

Is the Dragonetti Act Unconstitutional as Applied to Attorneys?

The statutory tort of wrongful use of civil proceedings, 42 Pa. C.S.A. §§ 8351-8354, was enacted in the 1970s to replace the common-law tort of malicious prosecution. [Although the name “Dragonetti” appears nowhere in it, the act is almost universally referenced as the “Dragonetti Act,” including in case law, because it refers to the name of a Philadelphia reporter involved in a high-profile case that prompted passage of this legislation.]

One consequence of this law was abolishment of the common-law requirement that there must be a showing of the arrest or seizure of the person or property of the victim. Liability is premised upon a showing, under Section 8351 of the act, that a person 1) “takes part in the procurement, initiation or continuation of civil proceedings”; 2) has “act[ed] in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based” and 3) “the proceedings have terminated in favor of the person against whom they are brought.” Section 8352 defines what constitutes “probable cause,” and a developing body of case law defines what constitutes “favorable termination.” Expanding upon damages recoverable under common law, Section 8353 delineates the recoverable damages, which include but are not limited to damages to reputation, emotional distress and even punitive damages “according to law in appropriate cases.” The act further provides for a cause of action against both the offending party and his or her counsel in the underlying action.

Here is the rub, however, as this act applies to attorneys: Article V, § 10(c), of the Pennsylvania Constitution provides that “The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts. . . . All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.”

Over the years the Supreme Court has held that this provision gives it the exclusive authority to regulate the practice of law in the state courts of Pennsylvania. For example, in *Wajert v. State Ethics Comm’n*, 420 A.2d 439, 442 (Pa. 1980), the court struck down a statute that effectively prohibited retired judges from representing clients before their former bench on the basis that the statute “was an

unconstitutional encroachment on the exclusive power of the [Supreme] Court.” By way of further example, in *Snyder v. Unemployment Comp. Bd. of Review*, 502 A.2d 1232, 1233-34 (Pa. 1985), the court, based upon the same reasoning, struck down a statute “permitting court employees to participate in partisan political activity . . . as applied to any person affected by the Court’s directive forbidding partisan political activity.” In *Beyers v. Richmond*, 937 A.2d 1082, 1089 (Pa. 2007), a plurality decision, with three of the five justices voting in favor of reversal, found that the Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. § 201-1 *et seq.*, was, for the same reason, unconstitutional as it applied to lawyers.

In contrast, other courts have applied the UTPCPL to attorneys, distinguishing *Beyers* on the basis that the issue there concerned “the sufficiency of [the attorney’s] legal representation” and not his “debt-collection practices.” See, e.g., *Yelin v. Swartz*, 790 F.Supp.2d 331 (E.D. Pa. 2011). Whether the Pennsylvania Supreme Court embraces that distinction remains to be seen. In *Yelin* the constitutional argument was not made against the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.*, presumably because the Pennsylvania Constitution does not govern federal law.

So, in view of the foregoing analysis, is the Dragonetti Act subject to constitutional attack as it applies to attorneys for their conduct that constitutes the practice of law? In a recent decision a trial court considered that question.

In *Villani v. Seibert* and *Seibert v. Villani*, consolidated cases reported at 63 Ches. Co. Rep. 326 (2015), the defendant attorney raised, by preliminary objection, a state constitutional challenge to the Dragonetti Act as applied to attorneys. In the underlying action — an action in ejectment — the attorney had represented the plaintiffs, now the co-defendants in the current action, against whom the trial court in the underlying action had entered summary judgment, which the Superior Court upheld and for which the Supreme Court denied the petition for allowance of appeal.

In an extended footnote to the order sustaining the preliminary objection, the court, per Chester County Judge Edward Griffith, concluded, “[t]he Dragonetti Act is a legislative attempt to intrude upon the Supreme Court’s exclusive authority to regulate the conduct of attorneys in the practice of law. It is for the judiciary to sanction lawyers from bringing actions that are baseless or otherwise engaging in inappropriate conduct. The Dragonetti Act, as it pertains to lawyers, is unconstitutional and unenforceable.”

To reach this conclusion, the court closely examined provisions in the Dragonetti Act, a product of the Legislature, and compared them to provisions in the Pennsylvania Rules of Professional Conduct (Pa.R.P.C.), which

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the Supreme Court has promulgated. The court’s analysis illustrated that the act states inconsistent and conflicting standards from those in the rules and therefore the act constitutes an intrusion upon the Supreme Court’s regulation of this conduct by way of its rules.

For example, Section 8352(1) of the Dragonetti Act states that “an attorney has probable cause, if [the attorney] ‘reasonably believes’ that under the facts upon which the underlying claim was based, the claim may be valid under ‘existing or developing law.’ ” Yet Pa.R.P.C. 3.1 (Meritorious Claims and Contentions), which regulates the same behavior, provides attorneys broader protection because it allows an attorney “to advocate for the ‘extension, modification or reversal of existing law.’ ” [Emphasis added.]

Moreover, Section 8352(3) of the act “attempts to regulate attorney conduct by permitting ‘an attorney of record’ to prosecute an action ‘believ[ed] . . . in good faith . . . not [to be] intended to merely harass or maliciously injure the opposing party.’ ” In contrast, Pa.R.P.C. 3.1, which regulates the claims that an attorney can bring, does not address an attorney’s beliefs in any way. Instead, as the court notes with respect to motivation, the rule applies an objective analysis.

Further, the *Villani* court noted that the act provides far greater remedies, including monetary damages, than those provided under the rules. Accordingly, it concluded that “[t]he concept of a lawsuit against an attorney for money damages based on how a civil case is conducted is repugnant to the system of discipline established by the Supreme Court pursuant to Art. V, §10(c), of the Pennsylvania Constitution.”

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Assuming that the holding in *Villani* stands the test of time, it could arguably have unintended consequences. For example, the Dragonetti Act is not the only instance in which the legislative branch has enacted legislation to govern the conduct of attorneys engaged in the practice of law. For example, pursuant to 42 P.C.S. § 2503(6), a state trial court may award taxable costs against an attorney for “dilatatory, obdurate or vexatious conduct” while engaged in the practice of law. If the Dragonetti Act is unconstitutional as applied to attorneys as an impermissible intrusion upon the Supreme Court’s domain, should not Section 2503(6) suffer the same consequences?

Then there is the matter of asserting a Dragonetti claim against an attorney for

the wrongful prosecution of a civil action in federal court, where the state rules have been adopted but pursuant to the authority of the federal court. The Pennsylvania Supreme Court does not govern attorney conduct in federal court. Although case law does recognize a Dragonetti cause of action for such conduct, would not the Dragonetti Act pose an intrusion upon the federal court’s exclusive authority to govern the conduct of lawyers in federal court?

Judge Griffith has granted plaintiffs’ motion for certification for interlocutory appeal, which increases the possibility that the Superior Court may allow an appeal on this issue before this case proceeds any further at the trial-court level.