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W. Winston Briggs: Atlanta Casualty had an expectation of an ongoing attorney-client relationship with Page, Scrantom.

Columbus firm loses \$400K conflict suit

ATLANTA CASUALTY said firm should not have taken case against insured

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THE GEORGIA COURT OF APPEALS may soon get a case asking whether a law firm that has represented an insurance company may then represent a plaintiff in suing someone insured by the same company.

A Columbus jury last month emphasized its answer—no—by ordering Page, Scrantom, Sprouse, Tucker & Ford to pay Atlanta Casualty Co. \$462,132 in damages and attorney's fees.

The winning lawyer, W. Winston Briggs of the Atlanta firm Decker, Hallman, Barber & Briggs said that the case was important because insurance defense firms in Georgia sometimes take cases against persons insured by insurance companies that they also represent.

“Prior to this case there has never been a case in Georgia that held that that was or was not

permissible,” said Briggs.

Page, Scrantom's outside lawyers said that the law firm will challenge the verdict, arguing that that the judge in the case should not have sent the case to jury but instead should have ruled as a matter of law in the firm's favor.

The firm's outside lawyers, Jerry Alan Buchanan of Buchanan & Land in Columbus and H. Lane Young II of Hawkins & Parnell in Atlanta, pointed to an opinion of the American Bar Association that gives their client cover.

The December 2004 opinion, ABA Formal Opinion 05-435, says that generally a lawyer who represents a liability insurer as a named party in one lawsuit may represent a plaintiff in a separate civil action against a defendant whose defense is being provided under an insurance policy by that liability

insurer, as long as the insurer is not also a named party in that case.

But both the expert who testified for the firm and the expert who testified for Atlanta Casualty, or ACC, agreed that no Georgia ethics opinion addressed the issue so clearly.

The company's expert, Mercer University legal ethics professor Patrick Longan, testified in his deposition that there is “no authority in Georgia to support the ‘automatic’ conclusion that there is an attorney client relationship between a firm hired to represent an insured and the insurance company that hired the attorney.”

“Typically,” continued Longan, according to the brief, “the ‘true client’ is the insured rather than the insurer.”

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Columbus firm loses \$400K suit on conflict of representation

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Conflicts check

ACC's case against Page, Scrantom started in May 2001, when Sara Johnson hired Page, Scrantom to pursue a personal injury action against Richard Allen. Johnson claimed Allen was at fault in a car accident that cost her \$1,100 in medical bills, according to an ACC brief.

ACC and the law firm have agreed that Page, Scrantom was representing another ACC insured when Johnson retained the firm and that Page, Scrantom previously had represented ACC directly at least once.

The parties also agreed that Page, Scrantom did not represent ACC directly in any particular matter when the law firm was retained by Johnson.

According to an ACC brief, the law firm ran a conflicts check when it opened a file in Johnson's case, which red-flagged ACC as a client of the firm.

ACC contended in its brief that, without asking ACC to waive any identified conflict, Page, Scrantom partner Virgil Ted Theus initialed the conflicts sheet to the effect that the conflict was "waived."

Buchanan said that when Theus signed off on the form, he was indicating that there was no conflict, not that there had been a conflict that had been waived. Page, Scrantom's conflicts check process form gives no space to indicate that a conflict does not exist, according to Buchanan.

Lawyers for Page, Scrantom also said that ACC waived any conflict by negotiating with Page, Scrantom on the Johnson case, sending the firm new cases to handle, and settling cases on behalf of their insureds in which Page, Scrantom represented other plaintiffs—even after becoming aware that the law firm represented Johnson.

Before filing the case on behalf of Johnson, the law firm sent ACC a \$15,000 time-limited settlement demand. Briggs, ACC's attorney, said that the demand "set up" ACC for a

potential bad faith claim by Allen, leaving the insurance company on the hook for the entire judgment in Johnson's favor.

According to an ACC brief, ACC litigation representative Shanda Barnes thought that Page, Scrantom's lawyer gave her an extension of time for ACC to respond to the complaint in the Johnson personal injury case while she attempted to verify some information.

Page, Scrantom denied giving ACC an extension on the answer, and ACC failed to answer Johnson's complaint, resulting in a \$354,200 default judgment against Allen.

ACC unsuccessfully moved to set aside the default, as in February 2002 Muscogee County State Court Judge Maureen C. Gottfried found that no extension on the answer had been given, according to Page, Scrantom's brief. The judge also rejected ACC's arguments that she should disqualify Page, Scrantom as having a conflict of interest.

ACC paid the judgment, even though the limit of its policy for Allen was only \$15,000. Briggs said that ACC paid the full judgment because arguably Allen had a bad faith claim against ACC because of ACC's failure to settle within policy limits on Johnson's \$15,000 demand.

'Most respected law firms'

In October 2002, ACC sued Page, Scrantom to recover what it had paid on the judgment. Briggs said that he argued that ACC still had an attorney-client relationship with Page, Scrantom when the firm took Johnson's case because ACC had an expectation of an on-going relationship.

As is customary in Columbus cases against local law firms, the case went before a visiting judge, Senior Judge L.A. McConnell Jr.

Page, Scrantom argued to no avail that McConnell should have granted the law firm summary judgment. The firm argued that there was no legal authority to support ACC's claim that Page, Scrantom had a conflict in representing Johnson and, even if there were, ACC had waived any conflict in failing to object to the firm's representation of Johnson promptly.

Young, one of the lawyers

representing the firm, said that Page, Scrantom is one of the "most respected law firms in Georgia."

"They feel strongly that taking a claim against an insured of a company that they do a small amount of business for over the years is not inappropriate," he added, "and that the ABA opinion on the issue indicates that they are correct, and the states that have looked at it with case law have indicated that they are correct."

The law firm also argued unsuccessfully that Gottfried's rulings on the extension and conflict should have disposed of the case against the firm.

Without a written opinion or oral explication of his reasoning against summary judgment for the firm, according to Buchanan, McConnell sent the case to the jury.

Page, Scrantom objected to the whole of McConnell's charge to the jury.

According to a transcript, at one point during the charge, McConnell said, "I'm talking in circles ... but I think you can get the idea there." When Buchanan objected that he "simply did not understand the charge," McConnell responded, "Well, I can't argue with what you said."

However, McConnell ultimately denied Page, Scrantom's motion for a mistrial, saying, "Well, I have no problem understanding it."

On February 17, after a week of testimony and more than four hours of deliberations, the jury awarded ACC \$335,000 in compensatory damages, \$127,131 in attorney fees and expenses and \$1 in punitive damages.

The jury foreperson, who asked that her full name not be used, said in an e-mail interview with the *Daily Report* that the issue of the extension to answer the complaint "was never an issue in deliberation."

"[O]ur deliberation was predicated on the improper assignment of 'Conflict Waived by the Client' by the Page Scrantom attorneys on the Client Contact sheet," the foreperson wrote.

Young, one of the firm's lawyers, said that jurors told him they found the jury instructions "extremely hard to follow and understand."

But the jury foreperson said simply that the judge provided the jurors "with in-depth instructions regarding our responsibilities related to the case" and answered three questions posed by the jury during deliberations "to our complete satisfaction and understanding."

The foreperson said that, except for the issue of whether to award punitive damages, the case was not a difficult one to decide and provoked little disagreement among jurors.

"[W]e unanimously believed that Page-Scrantom acted in bad faith by not securing their client's approval prior to taking the case and because both the principals for the firm and their expert witness admitted such on the stand, we were compelled to find in favor of [ACC]," said the foreperson.

Clark D. Cunningham, an ethics professor at Georgia State University College of Law, said that the conflict issue might have posed a factual question for a jury as to whether ACC reasonably thought that Page, Scrantom was its counsel.

"If someone reasonably thinks that a law firm is representing them, generally speaking we're going to let that control," said Cunningham. He added that the issue is complicated with insurance companies, however, since insurance defense law firm firms usually do not represent the insurance companies directly and insurance companies may have several different defense counsel.

Buchanan said that the problem with allowing the case to go to the jury is that it could create contradictory rules around the state on the conflict question. "The narrow question is can a law firm that defends insureds of Atlanta Casualty Company also sue insureds of Atlanta Casualty Company," said Buchanan. "There ought to be but one rule on what attorneys can do in the state."

One of Page, Scrantom's senior partners said that the firm, which houses more than two dozen attorneys, was very disappointed in the trial's outcome.

"We're a group of lawyers, we get along well, and our law firm is over a hundred years old, and we take great pride in it, so we do take it personally," said W. G. Scrantom Jr. ■