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Insurance Defense Lawyers Feeling Sting of Carrier's Legal Malpractice Suit

By Henry Gottlieb

An insurance defense bar beset by pressure to handle more cases at lower rates has a new reason to fear carriers as clients.

In a rare case of defense lawyer malpractice, a jury in Camden County awarded $362,000 Thursday to an insurance company that didn't like the performance of its outside counsel at a personal injury trial.

The jury voted, 6-1, that a New Jersey partner in Philadelphia's 165-lawyer Post & Schell caused Safestep Reinsurance Inc. a loss in the 1997 defense of a worker's claim that he fell from a defective ladder.

Carriers rarely sue. In fact, it was the first time

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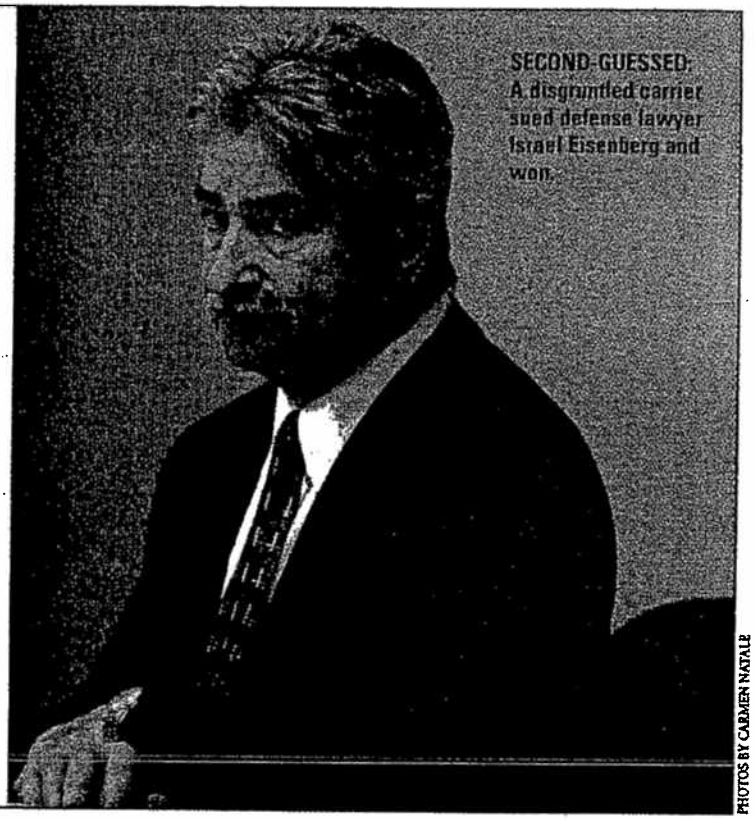

SECOND-GUESSED: A disgruntled carrier sued defense lawyer Israel Eisenberg and won.

PHOTOS BY CARMEN NATALE

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Safestep did in 2,500 cases over its 29-year history, says claims executive Paul Junius.

The case also is unusual because there aren't many malpractice cases stemming from a jury verdict in the underlying case. The typical malpractice verdict arising from litigation is against a plaintiff's lawyer whose negligence — such as by blowing a statute of limitations or failing to get an affidavit of merit — leads to dismissal of a winnable case.

The Camden verdict, along with an American Bar Association study, suggest such cases are becoming less rare. The ABA's Standing Committee on Lawyers' Professional Liability last year compared malpractice claims from 1995-1999 and 2000-2003 and found that claims against personal injury defense lawyers nearly doubled to 2,953 from 1,512.

ABA committee chair Ben Hill of Tampa, Fla., told the *ABA Journal* in October that while insurance companies have traditionally stood by their lawyers, "Today, loyalty doesn't exist like it did."

Post & Schell presented evidence at a three-week trial before Superior Court Judge F.J. Fernandez-Vina that its work met professional standards. In evidence that will resonate with defense lawyers, the firm also told the jury that claims manager Junius, who is a lawyer, was responsible for the loss and sued only because he didn't like the outcome.

Junius "had egg on his face" so he made Post & Schell the scapegoat, the firm's lawyer, Gerald Dugan of Philadelphia's Dugan, Brinkmann, Maginnis and Pace, said in his closing.

The jury didn't buy it. After hearing from plaintiff's lawyer Glenn Bergenfield that a lawyer bears ultimate responsibility, the five women and two men on the panel found there was negligence by Post & Schell partner Israel Eisenberg, who tried the case out of the firm's Voorhees office.

The panel awarded one-third of what Bergenfield requested, but he is expected to ask the judge for interest and legal fees that would make the total judgment about $850,000 in the case, *Carbis Sales, Inc. v. Eisenberg*, CAM-L-2350-01.

Chain of Evidence Suspect

Post & Schell earned $1.7 million in fees in its 10 years of work as regional counsel to Safestep, whose sole insureds are members of the ladder manufacturing, sales and service industry.

Safestep turned to Post & Schell in 1994 when a construction worker named Dennis Carr added ladder manufacturer and service company Carbis Sales Inc. of Florence, S.C., to a claim that he suffered orthopedic injuries in a fall from a ladder in 1990 while installing insulation at a home building site in Mount Holly.

Partner Beth Wright, the partner who handled Safestep work at Post & Schell, spent 250 hours preparing. But in May 1997 she announced her resignation from the firm and gave the Carr file and six other Safestep matters to Eisenberg.

By the firm's reckoning, Eisenberg was the best lawyer for the job, having handled a broad range of product liability cases since joining the firm in 1980 after working as a public defender. "He was a very diligent lawyer, someone who had a love of being in the courtroom and was very good at it," Post & Schell's compliance partner, William Sutton, testified at the malpractice trial.

For Eisenberg, the strategy at the ladder trial before Burlington County Judge Ronald Bookbinder, in September 1997, was to create doubt with the jury about the chief piece of physical evidence. The damaged and patently dangerous ladder that Carr presented as evidence had been subjected to a dubious chain of custody after the accident and couldn't have been the ladder Carr fell from.

When the trial ended, though, the jury awarded Carr $600,000 and gave his ex-wife $100,000 for a per-quod claim. Carr won the appeal and the final judgment with interest came to nearly $900,000. Defense fees made it about $1 million, half paid by Safestep and half by Lexington Insurance Co., an AIG subsidiary.

While Safestep stuck with Post & Schell for the appeal, its anger about the outcome had been palpable after the verdict. Partner Sutton testified that Junius, in a profanity-laced phone conversation, blamed Eisenberg for the defeat. "This was an angry man," Sutton recalled. "I knew I had an unhappy client."

Junius and Post & Schell lawyers had a discussion about recompense from the firm, but none was forthcoming. Safestep moved its files to Lary Zucker, now of Cherry Hill's Marshall Dennehey Warner Coleman & Goggin. And when the appeal failed, the carrier sued.

It did so alone. Excess carrier Lexington Insurance Co., which continued to have a relationship with Post & Schell, had no interest in suing the firm, and it assigned away to Safestep any rights to a recovery from the firm. That meant Safestep could keep any amount it won against the firm, even if the sum exceeded the carrier's share of the judgment.

At the suggestion of its new defense counsel, Zucker, the insurer hired Hilton Stein of Totowa, the dean of New Jersey's plaintiffs' malpractice bar, but replaced him with Bergenfield when Stein went bankrupt and dropped out of the practice of law.

Carrier Stuck to No-Pay Policy

At the trial that ended Thursday, the jury heard two themes.

First Bergenfield's: Eisenberg spent woefully few hours preparing, failed to call critical witnesses and muffed chances to attack the plaintiff's credibility.

Dugan countered by stressing the realities of insurance defense work. Short preparation time is a fact of life for all lawyers, defense expert Warren Faulk of Westmont's Brown & Connery testified.

Dugan also elicited testimony that Eisenberg made a sound choice in not getting too tough at the ladder trial because it was clear that Carr had been hurt and that to question him too harshly would have backfired with the jury.

Dugan introduced evidence to suggest that the carrier bore responsibility through claims manager Junius, who sat through the ladder trial. If he didn't like what Eisenberg was doing, he could have taken action, the defense argued.

Instead, Junius stuck to the carrier's no-pay position, despite trial judge Bookbinder's suggestion a $500,000 settlement might be appropriate, Dugan said. "I know a winner when I see one," the defense quoted Junius as saying when Bookbinder warned a settlement might be a good idea for the defense.

If blaming a hands-on carrier for a defense lawyer's defeat and demonizing the claims manager is a tempting strategy in such cases, it didn't work in this one.

In his computer-graphic-assisted presentation, Bergenfield identified 21 alleged errors by Eisenberg — errors that no reasonably competent lawyer would make, Bergenfield told the jury.

Bergenfield's evidence showed that Eisenberg spent 20.5 hours preparing for the ladder trial, failed to elicit expert testimony that could have refuted the plaintiff's experts, failed to take advantage of expert testimony for defendants that got out on summary judgment and failed to exploit evidence that would have shown Carr to be a lying fraud.

Bergenfield faulted Eisenberg for neither confronting Carr with evidence about his work experience and other accidents nor using a surveillance video to try to entrap Carr.

Bergenfield attacked Eisenberg for not getting tough against a per quod claim by Carr's divorced wife by highlighting Carr's relationship with another woman.

Eisenberg also erred by not attacking Carr's credibility by using the same evidence that U.S. Home and the ladder's manufacturer used to win summary judgment. U.S. Home proved to the judge's satisfaction that Carr couldn't prove he was actually working where he said he was on the day of the accident.

Finally, Bergenfield called a witness who Eisenberg hadn't found for the first trial, Carr's co-worker. He testified that if he had been called for the first trial he would have said Carr's story about the chain of custody of the ladder was a lie and that Carr had access to beat-up old ladders to present to the first jury. Carr died two years ago.

"Dennis Carr got $769,697 and 10 cents for a big fat lie," Bergenfield said in his closing. "Trial work isn't about just showing up and that's what he did," he said of Eisenberg. He urged the jury to consider that the justice system doesn't work if both sides in the process don't do their best.

By finding the firm negligent, the jury did not have to reach the final question on the jury interrogatory: does Safestep still owe the firm $29,000 in unpaid bills?

Defense lawyer Dugan, the firm, and Eisenberg, who is now retired, declined to comment, but a request for a judgment notwithstanding the verdict is expected.

Divining the Minds of Jurors

On a disputed legal issue during the trial, Fernandez-Vina rejected Dugan's argument that an opinion by plaintiff's expert Bennett Wasserman of Newark's Stryker, Tams & Dill — or any expert opinion in such a case — is an inadmissible net opinion because no one could opine what was in the minds of the jurors in the underlying case.

If that was true, Fernandez-Vina asked Dugan rhetorically in ruling against him, "could there ever be a legitimate case against an attorney when there is a trial?"

By Bergenfield's reckoning, the standard of care isn't determined by what's in the jurors' minds. Whether a lawyer uses reasonable knowledge and skill ordinarily possessed by members of the profession is what counts, and that's what experts are qualified to discuss, he argued.

Members of the malpractice bar said last week the case would attract much interest among defense lawyers.

"My belief is, it is something that will probably continue to occur on an infrequent basis as companies are pressured to increase their bottom line," says Robert Hille of Secaucus' Waters, McPherson, McNeill. "The insurance industry is not immune from that pressure that other sectors experience. I fully expect the trend to continue and to grow."

William Voorhees Jr., who has a firm in Morristown, says suits like this would reflect a change in the relationship between insurers and lawyers.

Mergers of insurance companies create pressure on claims departments to increase their short-term bottom line, he says. "It is not at all unusual these days for the claims department to be almost as hostile to their defense attorneys as they are to plaintiffs' attorneys, particularly when it comes to billing," he says.

Leon Piechta of O'Donnell & Piechta in West Orange says suits can drive up malpractice rates. "The only benefit we get as defense counsel now is that we can put on our applications that we are very rarely sued by anybody," he says.

Thomas Hight of Bloomfield's O'Meara & Hight and chairman of the New Jersey Defense Association's professional liability committee, says of the Camden trial, "it's a story we're all going to read."

"The remedy a carrier has against its counsel is to not send them any more work," he says. "They pull the files and you don't get any more work."

Losing business is a major stress for defense counsel, he says. "They have every right; it's their work," he says. "You have a change in regime, you do something the new guy doesn't like, the work is gone."

That's a danger to all lawyers, he concedes. But if a commercial client pulls its work, it's often just one or two cases.

"With defense attorneys, our bread and butter comes from the volume," he says.

Hight had more to say about the subject during a telephone conversation on Thursday. But he had to interrupt to get another line. He had an adjustor on hold. ■