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Attorney's Fees: Contingency Fee Agreement Void Where City Terminated Attorney For Prior Undisclosed Ethics Violation; Quantum Meruit Applies

City of Alexandria v. Cleco Corp., No. 13-30364 (5th Cir. Mar. 5, 2014).

In 2004 Alexandria, Louisiana pursued claims against Cleco Corporation for electricity overcharges to the City. The City hired two attorneys – John Sharp and H. Craig Davidson – to handle the case. Even though these attorneys worked for separate firms, the contract referred to them collectively, awarded them a 20% contingency fee, and stated that both would "take the lead role and control all proceedings relating to the claims." The attorney's fee provision stated simply "Client further covenants and agrees to pay any and all attorney fees and costs Attorney incurs as a result of any lawsuit or action brought to recover any fees, costs, expenses, or reimbursement due Attorney under this Agreement or arising as a result of any breach of this Agreement."

Between 2005 and 2008 Sharp and Davidson worked on the Cleco case and eventually got a memorandum of understanding signed. In 2008, while final settlement negotiations about a power supply agreement were ongoing, Davidson discovered that the Louisiana Bar had recommended disbarring Sharp. Apparently Sharp had settled a case off-the-books and, having kept the proceeds of the settlement for himself, was caught by his partners. Davidson called the City Attorney to convey this information and the City immediately terminated Sharp – who never came forward about these issues himself. Another attorney was retained by the City to litigate the case in place of Sharp.

Ultimately the Cleco case settled in 2010 with an agreement worth approximately $50.7 million to the City. Learning this, Sharp claimed the City owed him his full contingency fee. The City responded with a declaratory judgment motion, claiming the entire Sharp/Davidson contract was

void and/or unenforceable, leaving Davidson and Sharp with recovery based only on quantum meruit. Davidson counterclaimed for his entire fee and Sharp filed a third-party complaint.

After a bench trial in which the contract itself was found to have been voided, the district court awarded Davidson $1.3 million and Sharp $700,000, based on quantum meruit. The court held that Sharp's own conduct and disbarment prevented his completing the case but, looking at "all the factors," including the fact that he got the case near a point of settlement, a figure of $700,000 reflected the value he added while recognizing his problematic behavior.

All the parties appealed, seeking to resume litigation of a Rule 54 motion that was pending in the district court. In a separate decision, the Fifth Circuit held that Davidson's only recovery was pursuant to quantum meruit, because the entire contract had been voided due to Sharp's inability to perform. Sharp persisted at district court, but lost his Rule 54 motion for two reasons. First, the court noted that his disbarment was the reason for his termination under the contract and, with a failure of the contract for lack of consideration, his only available remedy was in quantum meruit. Second, the severability clause did not save his claim; when terminated for cause, the entire contract was terminated.

HELD: The Fifth Circuit affirmed the district court, holding that since another panel of the Fifth Circuit had already ruled on the contingency fee issue, the panel hearing the current appeal was required to hold the same.

DISCUSSION: The Fifth Circuit panel hearing the Sharp appeal began with the its own rule of orderliness, namely that "only an intervening change in the law (such as by a Supreme Court case) permits a subsequent panel to decline to follow a prior Fifth Circuit precedent." It then went on to explain that while Sharp's case was pending in the district court based on the parties' joint motion to dismiss the appeal and argue the Rule 54 motion in the district court, Davidson's appeal went to a panel of the Fifth Circuit. In that appeal the panel held Davidson could not collect his contingency fee and could not recover his fees because Sharp's disbarment prevented Davidson from fulfilling the indivisible contract. It pointed out that in his current appeal, Sharp was trying to collect on the exact same contract. His loss in the district court on his Rule 54 motion was therefore affirmed.

https://www.ca5.uscourts.gov/opinions/unpub/13/13-30364.0.pdf (last accessed Mar. 19, 2014).

Due Process: Requiring Sex Offenders to Register For Deferred Adjudications Back to 1970 Is Constitutional

King v. McCraw, No. 13-20092 (5th Cir. Mar. 10, 2014).

Against due process and *ex post facto* challenges, the Fifth Circuit has upheld provisions of a Texas law amended in 2005 to require that sex offenders register for deferred adjudications of indecency with a child going back to 1970.

In 1990 Reginald King pleaded guilty to a charge of indecency with a child. As part of his plea he received a deferred adjudication and agreed to sex offender counseling; after ten years of