Law Firm Risk Management Alert

PULLMAN & COMLEY

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A Critical Law Firm Risk Management Story: Confirming The Client's Plan To Perform Tasks On Its Own

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A recent decision by the New York State Appellate Court highlights why a law firm should precisely identify in its written engagement agreement what tasks the client should and *should not* expect the firm will perform. *Genesis Merchant Partners, L.P. v. Gilbride, Tusa, Last & Spellane, LLC,* 69 N.Y.S.3d 30, 2018 WL 358068 (N.Y. App. Div. 1st Dept. Jan. 11, 2018).

The defendant law firm was engaged to assist a client in a loan transaction. Specifically the client agreed to extend loans to buy life insurance policies. The loans were to be secured in part by the policies themselves. But the client's security interest in the policies was never perfected because the necessary security forms were never recorded.

After the borrower defaulted on the loan, the client was unable to collect. The client then turned on the law firm with a legal malpractice lawsuit claiming the firm's failure to perfect the security interest left it without any ability to recover $85 million it was owed.

In defense the law firm pointed to an understanding it had reached with the client: that the client, and *not* the law firm would handle the necessary recording of the security instruments. The firm did not, however, spell out this limitation in the "scope" section of its engagement letter. The trial court granted summary judgment against the firm.

A skeptical Appellate Court gave the law firm a second chance to try and prove that the client accepted the responsibility "for perfecting the security interests." But that court also noted the absence of an "engagement letter that defines the scope of [the firm's] engagement" by excluding such an obligation on the part of the firm.

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Cautionary Lesson: Even when a law firm believes it has reached an understanding with a client about the limits on the firm's engagement, a dissatisfied client may, as in the *Genesis Merchant Partners* case, have a very different understanding that the engagement was *not* so limited. Whether in a transactional or a litigation setting, the best way to minimize the firm's exposure: making the effort to include in the initial engagement letter not only a detailed description of the tasks within the scope of the engagement, but also the tasks *not* included. To the extent warranted, any such initial limitation also should be documented in a subsequent *written* communication confirming the client's understanding of the limitation.