

TRENDS IN THE LAW

CIVIL PRACTICE

A Warning About Releases

A release to 'all other persons' will release all other persons

BY DENIS JAMES LAWLER

A mortgage company, AMC, acquired a mortgage in the secondary mortgage market. Unfortunately, the mortgagor was a fraud (the mortgagor pled guilty to one count of wire fraud, in violation of Title 18, United States Code, Section 1343 arising from his actions in fraudulently obtaining the loan).

According to AMC, so were the mortgage service company who originated the mortgage, the title abstract company who conducted the settlement at which the mortgage was executed, and the title insurer.

AMC claimed they had all conspired to contribute to its loss on its investment in the mortgage. Essentially all of the information AMC relied on in making the mortgage, such as the property appraisal, wage verifications and financial statements, was fictional.

When AMC learned about the extensive fraud which it believed had caused its loss, it brought an action against the mortgagor, the mortgage originator, the title abstract company, the title insurer, and various of their employees.

It ultimately settled that action, giving a release on May 25, 1995, which ran to the benefit of the parties thereto, their agents, and "all other persons" from all claims arising, directly or indirectly, out of that action, or which could have been asserted in that action.

Over a year earlier, AMC had filed a separate action against attorneys whom it had retained to foreclose on the mortgage. AMC's claims against its lawyers included a claim that its ability to prosecute the former action had been impaired by the lawyers' delay in the foreclosure action.

In the malpractice action, AMC claimed as losses against its attorneys:

- diminution of the value of the property which was security for the mortgage obligation;
- impairment of the opportunity to obtain monies in satisfaction of the Mortgage and Note other than from the secured property;
- impairment of AMC's ability to prosecute a fraud matter and obtain indemnification against a third party;
- incidental and consequential damages including real estate taxes and insurance premiums necessitated by defendants' alleged failure to promptly and efficiently move the action in mortgage foreclosure to judgment; and
- loss of use of the funds (including

interest thereon) representing AMC's investment in the real estate during the pendency of the mortgage foreclosure action.

The lawyer-defendants filed an answer denying any alleged unreasonable delay in pursuing the action. Because the value of the mortgage premises would have been a common question of fact in the malpractice action and the former action, the district court, to whom both actions had been assigned, determined that it would have allowed the malpractice claim to have been joined with the claims made in the former action.

Accordingly, the court held that AMC's claims against its attorneys in the malpractice action were barred by the express language of its release of "all other persons" in the former action. *Crestar Mortg. Corp. v. Shapira*, 937 F.Supp. 453 (E.D. Pa. 1996), appeal dismissed, No. 96-1912 (3d Cir., June 12, 1997).

When faced with its own release, and in light of clear, recent precedent from the Pennsylvania Supreme Court (in this diversity action subject to Pennsylvania law), AMC contended that, if the release did release its claims against its former lawyers, then a mistake had been made.

The lawyer-defendants, however, filed affidavits from two defense counsel in the former action which made clear that the release of "all other persons" was intentional on their part, and not a matter of mistake as to them.

In light of those affidavits, the district court held that AMC would clearly be unable to present evidence of a "mutual" mistake by all of the parties to the release; accordingly, AMC would be unable to make out its claim of mistake.

The district court granted summary judgment in favor of the lawyers on the basis that AMC's release of the defendants in the former action, and "all other persons," effected, whether intended by them or not, a release of AMC's malpractice claims against its own lawyers.

Caselaw in Pennsylvania had been consistent in giving force to language in a release that it will release "all other persons," including persons who had no relationship to the document and who paid no consideration for the release.

Most recently, on November 28, 1995, the state Supreme Court held that

Republic Insurance Company, as subrogee of an insured under one of its homeowner's policies, was itself foreclosed from bringing any action against a roofer, alleged to have caused damage to the homeowner's residence, by reason of language in its own release. *Republic Ins. Co. v. Paul Davis Sys. of Pittsburgh South, Inc.*, 670 A.2d 614 (Pa. 1995).

The Republic Insurance case presented the perfect scenario under which, if the Supreme Court were to carve out an exception, one might have expected it to do so.

In *Republic Insurance*, the insurance company paid a claim under a homeowner's insurance policy and took a release from its insured. It then filed a subrogation action against the roofer who had commenced making repairs to the roof, but had failed to take precautions to protect the remaining structure from rain.

When a rainstorm occurred, the structure was damaged. Republic's claim was barred by the form release which it had insured sign, and which released Republic and "all other persons."

CLAIMS AGAINST LAWYERS COULD

HAVE BEEN ASSERTED IN FORMER ACTION

In order to obtain the benefit of AMC's release, the lawyer-defendants had to show that:

- AMC's claim against them arose directly or indirectly out of claims which AMC made in the former action; or
- was a claim which AMC could have made in the former action.

The determination of claims which were released by AMC was essentially the same as the determination of whether the malpractice claim could have been made in the former action.

Federal Rule of Civil Procedure 20(a) allows joinder of claims against defendants "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."

AMC's claims in the former action and its claims against its lawyers were held to

arise out of a series of transactions or occurrences as required by Fed. R. Civ. P. 20(a).

Although AMC asserted that its claim against the lawyer-defendants could not have been asserted in the former action, AMC had joined a wide variety of claims in its former action. AMC joined:

- its claims against the company which had originated the mortgage based on two contracts (Counts I and II);
- with its claim against the president of the mortgage originator for his participation on its behalf and on behalf of the title abstract company (Count III);
- with its claim against another employee for his participation in the mortgagor's fraud (Count IV);
- with its claims for negligence in loan processing and underwriting against the mortgagor's corporation and the mortgage originator (Count V);
- with its misrepresentation claims against those same companies (Count VI);
- with its core fraud claim against the mortgagor (Count VII);
- with ten additional counts against the title insurer and the abstract company for their participation in misrepresentations (Count VIII); misrepresentations at settlement (Count IX); negligence in providing title insurance (Count X); negligence at closing (Count XI); respondent superior (Count XIII); breach of fiduciary duty at closing (Count XIV); breach of the title insurance policy (Counts XV and XVI); bad faith (Count XVII) and conspiracy (Count XVIII);
- and its claim against the title clerk for her participation in the fraud at settlement (Count XII).

Obviously, AMC understood that it could join numerous parties on various theories, all of whom it believed had contributed to its loss on the loan.

AMC filed an amended complaint in the former action on March 3, 1994. The district court decided that AMC could have included in that amended complaint its claim against the lawyer-defendants, because that claim was "in respect of" and "arises out of" a series of transactions or occurrences, and shares common questions of fact, i.e., the value of the mortgage premises and the amount of AMC's losses on the loan.

Accordingly, joinder would have been permissible under Fed. R. Civ. P. 20.

'MISTAKE' CLAIM REJECTED

"A mistake is a belief that is not in accord with the facts." Restatement (Second) of Contracts § 151 (1981). "An erroneous belief as to the contents or effect of a writing that expresses the agreement" can be a mistake.

The Restatement does not distinguish

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between mistakes of fact and law, but "treat[s] the law in existence at the time of the making of the contract as part of the total state of facts at that time."

In 1993, the Pennsylvania Bar Institute sponsored a seminar entitled "Settling Once & For All." The course materials included an update on this issue:

"Litigation surrounding general releases tends to occur when plaintiff's counsel has not studied the terms of a release, or simply does not realize its potential effects, and instructs his or her client to sign it when other claims remain unresolved.

"For a brief period of time, the appellate courts began to liberalize the law surrounding general releases This trend came to an abrupt halt with the Supreme Court's decision in *Buttermore v. Aliquippa Hospital*, 561 A.2d 733 (Pa. 1989).

BUTTERMORE

"In *Buttermore*, the Supreme Court was both reaffirming the 'bright line' rule concerning the effect of a general release, and emphasizing that a release is essentially a contract, under which parties may 'include or exclude terms, conditions and parties as they can agree. In doing so, they may yield, insist or reserve such right as they choose.' 561 A.2d at 735. Having struck their bargain, however, the parties are then bound by it.

"*Buttermore* suggests that the courts

will treat releases literally, and therefore it is dangerous to make any assumptions as to the scope of a general release." Gerald A. McHugh, Jr., "Joint Tortfeasor Releases: Negotiating the Maze," *Pennsylvania Bar Quarterly*, Vol. LXII, No. 4, October, 1991.

THERE IS NO RELIEF FOR A UNILATERAL MISTAKE

A unilateral mistake is not grounds for relief. *Smith v. Thomas Jefferson Univ. Hosp.*, 621 A.2d 1030, 1032 (Pa. Super. 1993), *allocatur denied*, 535 Pa. 638, 631 A.2d 1009 (1993).

Accordingly, the affidavits filed by AMC were inadequate to make out a case of mistake. They said little more than the executive vice president, who signed the release on its behalf,

and its counsel in the former action, claimed that they did not understand the legal import of the language utilized in the release, or, as the district court stated, "that some of the parties were mistaken."

Like the plaintiffs in *Hanselman v. Consolidated Rail Corp.*, 632 A.2d 607, 608 (Pa. Commw. 1993), the AMC affidavits essentially said "that although they read, reviewed with counsel [or were counsel] and signed the releases, they thought the releases only pertained to the

people specifically mentioned."

The lower court determined that in order to establish a mutual mistake, AMC would have to show a mistake common to it and "all parties to the release," not merely it and one defendant.

POSTSCRIPT

Because AMC had signed a release which ran to the benefit of parties to the former action and "all other persons," AMC's separate action against its former lawyers was barred. Its problems, however, were not over.

AMC, of course, had retained counsel to sue its former attorneys. That counsel, representing AMC as a plaintiff in a professional negligence case, undertook the representation on a contingency basis.

When the release came to light and, in particular, when the release was determined to have exterminated all of AMC's rights against its former attorneys, its counsel in the malpractice case asserted a claim against it for quantum meruit.

AMC's counsel in the malpractice case asserted that it had breached its obligations to him by releasing, intentionally or otherwise, the rights which it had against its foreclosure counsel, thus ren-

dering all of his efforts moot.

Ironically, in the context of the claim by AMC's malpractice counsel against it for inadvertent release of the malpractice cause of action, AMC's strongest defenses were all of the defenses asserted by its foreclosure counsel in defense of the malpractice case against them.

CONCLUSION

We are all familiar with the experience of relief at the time of settlement of an action on which, in many instances, counsel have been heavily involved for months, and sometimes years.

Agreements with respect to settlement are often made under stressful circumstances, while counsel is simultaneously preparing for imminent trial.

Unfortunately, as this case and its predecessors show, all too often, parties are insufficiently attentive to the language utilized in the agreement of release terminating the dispute.

A plaintiff executing a release which runs to the benefit of the parties paying for the release and "all other persons" must realize that an array of other parties, none of whom have paid anything for the release, will benefit from it.

In those circumstances in which a transaction or series of transactions have spun off more than one piece of litigation, the risk of such inadvertent releases is, of course, greatest.

Plaintiffs should execute releases containing such omnibus language only after careful consideration as to whether any other outstanding claims, or any claims intended to be asserted, would be covered by the scope of the release. ■

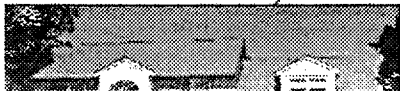
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