

**LAWYERS RISK MANAGEMENT**
CAUTIONARY TALES

The Dual Representation Maze

This federal litigation initially arose out of legal services provided by the insured for Jackson Smith in connection with a \$200,000 loan made by the claimant in April 2011 to Capital Ventures, Inc. (Capital Ventures), which at the time of the litigation was owned by Ryan and Sarah Baker and had been placed into receivership. The claimant asserted that Capital Ventures failed to make any payments owed to her pursuant to a promissory note, wherein Capital Ventures agreed to make two interest payments 10 months apart, and to repay the principal owed with the second interest payment. Further, Smith alleged that the principal objective of Capital Ventures was to monetize certain patents owned by Harry Townsend and to use those funds to repay investors and to finance several civil lawsuits instituted by Townsend that asserted violations of those patents.

The Smith complaint named Sunny Biddle, a partner at the insured law firm who represented Townsend in the civil litigation, and asserted causes of action for fraud and conspiracy. Smith contended that at the time of her investment into Capital Ventures, Biddle falsely assured her that the investment would be used to pay the insured's past-due fees and to allow the insured to pursue any patent violations. Additionally, Smith asserted that the loan was recorded in the corporate financial books of Capital Ventures as an "investment" to "hide" the loan from Smith, which Biddle approved of so that Biddle could receive payment. Ultimately, the claimant's lawsuit was dismissed after a favorable ruling on the insured's motion for summary judgment. Townsend and the receiver for Capital Ventures later commenced separate lawsuits against the insured firm and Biddle. Townsend alleged that the insured simultaneously represented Capital Ventures and himself, which is a conflict of interest resulting in the loss of his intellectual property and damages in excess of \$100 million. As for Capital Ventures, the company alleges that the insured failed to maintain patents and patent applications belonging to Capital Ventures in good standing with the United States Patent and Trademark Office (USPTO) and failed to recognize the conflict of interest in representing Capital Ventures and Townsend and for using Capital Venture's funds for Townsend's legal bills.

The insured's simultaneous representation of Townsend and Capital Ventures in the same transaction was a basis for potentially significant liability as to Townsend, since it was undisputed that the insured represented Townsend and Capital Ventures in the transaction that resulted in Capital Ventures gaining ownership of Townsend's patents. As to Capital Ventures, it received the intellectual property and there seemed to be little merit to the assertion that the insured was required to maintain the patents with the USPTO, as Capital Ventures could not produce any agreement requiring the insured to do so. Additionally, Capital Ventures did not appear to timely bring its lawsuit, and as such a pre-answer motion to dismiss was filed. The court determined, however, that it could not reasonably conclude that any cause of action should be dismissed without undergoing the discovery process.

RESULTS

Ultimately, Smith's lawsuit was dismissed after a favorable ruling on the insured's motion for summary judgment. As to Townsend, he ultimately sought bankruptcy protection, and in his petition to the court, indicated that the value of his claim against the insured was only \$50,000. He likely specified this figure with the hope that the appointed trustee would sell the claim back to him for a limited amount. The trustee did not do so and a settlement was ultimately reached with Townsend and the trustee for \$75,000.

TAKEAWAY

In the instant claim, the insured should not have undertaken the dual representation of Townsend and Capital Ventures without first thoroughly explaining the conflict of interest issues, advising each party to consult with independent counsel and obtaining written waivers from both sides. Although, even if all of those measures had been taken, the insured likely should not have undertaken the representation of all parties in this transaction in light of the significant conflict of interest and the substantial amount of money at stake.