

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20th JUDICIAL DISTRICT, PART III**

JULIE MIX McPEAK, Commissioner of the Tennessee Department of Commerce and Insurance (Marie Murphy, Special Deputy Commissioner),)	
)	
Petitioner,)	No. 10-507-III
)	
v.)	“Damages Petition Against
)	Evans Petree PC and
SMART DATA SOLUTIONS, LLC, and others,)	William L. Hendricks, Jr.”
)	
Respondents.)	

**REPLY IN SUPPORT OF MOTION TO DISMISS THE
AMENDED PETITION WITH PREJUDICE FOR FAILURE TO STATE A CLAIM**

Petitioner’s response confirms that the Court should dismiss this malpractice action with prejudice. Petitioner has failed to identify any legal authority to support its unprecedented claims and, in desperation, is now making assertions that are not even in the amended petition.

The “Unlawful Distributions” Theory

Petitioner’s response goes far beyond the actual allegations in the amended petition in trying to salvage the theory that Evans Petree and Mr. Hendricks are liable for not “preventing” SDS from making \$1.2 million of allegedly “unlawful” distributions to SDS’s owner.

- Petitioner’s response states that Evans Petree and Mr. Hendricks “facilitated” the allegedly unlawful distributions and were “so far involve[d] themselves” that they should be held liable (Response pp. 5-6). By contrast, with the sole exception of \$144,400 that Mr. Posey intended to use to buy a home, the amended petition (like its predecessor) does not allege that Evans Petree and Mr. Hendricks *even knew about* any transfer of funds from SDS to Mr. Posey (see Lead Memo. p. 3 n. 2).

- Petitioner’s response suggests Evans Petree and Mr. Hendricks opined on “the advisability of the fraudulent transfers” (Response p. 6). The amended petition *contains no such allegation*.
- Petitioner’s response states that Evans Petree and Mr. Hendricks should have known that the transfers to Mr. Posey were “unlawful” because of their “involvement in SDS’s day-to-day business operations” (*id.*). The amended petition, however, does *not* allege that the lawyers were involved in SDS’s day-to-day business operations.
- Petitioner’s response suggests Evans Petree and Mr. Hendricks should have known SDS was insolvent because “their fees were not getting paid” (*id.*). But Exhibit 5 to the amended petition, which is the purported source of the allegation that SDS “could not pay Evans Petree’s bill,” actually states only that SDS’s bill “is now approaching \$50,000,” *not* that SDS could not pay (Amd. Pet. Ex. 5 at p. 1). (A client’s slow-paying their lawyer’s bills is not, in any event, a reliable litmus test for insolvency.)

The many discrepancies between petitioner’s response to the pending motion and the actual content of the amended pleading are not the petitioner’s only problem, however. The petitioner still has not cited *any* authority for the proposition, that *despite the plain language of Tennessee Code Annotated Section 48-249-307*, an LLC’s lawyers can be liable for the LLC’s “unlawful distributions” to its owner (see Lead Memo. p. 3). Petitioner’s theory simply is not viable as a matter of law.

The “Insurance Premiums” Theory

Petitioner similarly has not salvaged the theory that SDS’s former law firm is liable for premiums SDS paid to obtain insurance. Petitioner persists in using the “general counsel” label. But petitioner has never cited *any* authority for the proposition that using that label allows a

client to sue their former lawyers for any loss the client incurs, regardless of the scope of the work the lawyers were actually asked to do, or actually did. On the contrary, this unsupported proposition is nothing more than an effort to end-run the very law the Court relied on in dismissing the original petition, that is, the law that the scope of a lawyer's duty is defined by the matters on which the client seeks the lawyer's services (9/1/11 Order pp. 5-6, 8-10).¹

Petitioner's response to the statute of limitations defense is no better. This is the relevant chronology concerning Beema/SAA *as presented by the amended petition itself*:

- April 22, 2008: Bart Posey of SDS emails William Worthy of SAA: "To date I still do not have sufficient paper work and [/] or evidence that this plan through Beema which we have offered is even legal. With all this said we have still moved forward..." (Amd. Pet. ¶ 78 & Ex. 14).
- August 15, 2008: The North Carolina Department of Insurance ("NCDI") enters an administrative Order in an action naming SDS, ATA, and Mr. Posey, among others; the Order declares the Beema/SAA insurance "bogus" (*id.* ¶¶ 18, 34-36, 84 & Ex. 11 p. 6 at ¶ 19, pp. 21-22 at ¶ 68).
- February 20, 2009: The NCDI enters its final Order; the Order finds that SDS has marketed and sold "bogus health insurance coverage," including under the plan issued by Beema/SAA (*id.* ¶¶ 35, 74, 76 & Ex. 12 pp. 16-17 at ¶¶ 71-79, p. 27 at ¶ 132, p. 34 at ¶ 176, p. 35 at ¶¶ 180-81). (This Court has already found, at petitioner's urging, that, given this NCDI Order, SDS was on notice no later than February 2009 that the Beema/SAA product was "a sham" (*id.* ¶ 76 (quoting from Court's 4/14/10 Memo. & Order)).
- March 23, 2010: Petitioner begins receivership / liquidation by obtaining an *ex parte* Order of Seizure (*id.* ¶ 20).

¹ Petitioner's response states (without citation) that defendants "were engaged and/or assumed the duty of performing all legal services needed to develop the receivership entities' business and attempt to keep it alive and functioning" (Response p. 4). The amended petition actually refutes rather than supports that assertion (see Lead Memo. pp. 4-5 (among other things, citing exhibits to the amended petition that show that, when SDS wanted a lawyer's help on a given matter, it asked for it)). The fact is that the amended petition, like its predecessor, contains no allegation that SDS asked Evans Petree and Mr. Hendricks to investigate any potential insurer or to advise SDS on whether to make any particular premium payment. The absence of such allegations is dispositive given that an attorney's duty extends only to the services for which he or she was hired (9/1/11 Order p. 6).

June 14, 2011: Petitioner files original malpractice petition.

The one-year limitations period on a legal malpractice claim runs from the date the client discovers, or should have discovered, the lawyer's alleged negligence. Woods & Woods v. Lewis, 902 S.W.2d 914, 917-18 (Tenn. Ct. App. 1994). Petitioner's unsupported assertion to the contrary, a "plaintiff may *not*...delay filing suit until all the injurious effects and consequences of the alleged wrong are actually known to the plaintiff." Shadrick v. Coker, 963 S.W.2d 726, 733 (Tenn. 1998) (emphasis added). Given the petitioner's own allegations and the applicable law, any claim that Evans Petree and Mr. Hendricks are liable to SDS for premiums SDS paid for the "sham" Beema/SAA insurance was time-barred *no later than* February 2010.²


CONCLUSION

The original petition did not state a viable claim. The amended petition failed to cure the defects of the original. The situation has only deteriorated further with petitioner's response to the motion to dismiss. Evans Petree and Mr. Hendricks respectfully request a dismissal with prejudice.

² Petitioner asserts that Evans Petree and Mr. Hendricks are liable for premiums SDS paid three different entities: \$2,106,944 to Beema/SAA; \$582,967 to First Risk – Andone; and \$125,000 to Atlantic Surety (Amd. Pet. ¶¶ 88, 94, 97). The claim with respect to all three entities should be dismissed given that the amended petition does not allege that SDS ever asked Evans Petree or Mr. Hendricks to investigate any potential insurer or to advise SDS on whether to pay any particular insurance premium (see Lead Memo. pp. 5-6). But, even if that were not the case, the claim with respect to Beema/SAA would still have to be dismissed as time-barred on its face, and the claim with respect to First Risk – Andone would have to be dismissed because the amended petition (like its predecessor) does not allege that Evans Petree or Mr. Hendricks even knew about that payment, much less were ever asked to advise SDS on whether to make the payment (see *id.* p. 6 n. 6).

Respectfully submitted,

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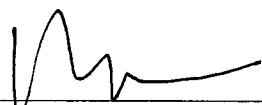
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Certificate of Service

On November 8, 2011, I caused this document to be sent by email and first-class mail to:

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