

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III**

LESLIE NEWMAN, Commissioner of the)
Tennessee Department of Commerce and)
Insurance, (Marie Murphy, Special Deputy)
Commissioner of Commerce and Insurance)
for the State of Tennessee))

Petitioner,)

VS.)

SMART DATA SOLUTIONS, LLC, a)
Tennessee limited liability company, et al.,)

Respondents.)

NO. 10-507-III

Damages Petitioner Against
Evans/Petree PC and
William L. Hendricks, Jr.

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MEMORANDUM AND ORDER

This matter is before the Court on the Petitioner's motion to alter or amend a December 13, 2011 memorandum and order dismissing the entire case for failure to state a claim. After considering the papers in support and in opposition, and the argument of counsel, the Court denies the motion based on the following reasoning and authorities.

This lawsuit was filed by the State of Tennessee in March of 2010 to liquidate companies, including Smart Data Solutions, LLC, conducting insurance business without a license to do so. The petition for liquidation was granted by this Court in May of 2010. The status of the case is that the Liquidator is presently marshaling assets of the companies to pay claimants of the insurance business. Part of that process is the assertion by the Liquidator

of claims on behalf of the liquidated entities pursuant to Tennessee Code Annotated section 56-9-313(b)(1).

One such claim is a Petition to recover damages on behalf of one of the liquidated entities, Smart Data Solutions, LLC (“SDS”), from Evans/Petree PC, a Memphis law firm, and William L. Hendricks, an attorney of the firm, (collectively referred to herein as the “Attorneys”), for alleged acts of legal malpractice the Attorneys are claimed to have committed in their representation of SDS beginning in February of 2008.

Significant to the ruling herein is that the legal claim asserted is that the attorneys committed legal malpractice, i.e. breached their duties as attorneys, to SDS, the liquidated entity for whose estate the Liquidator seeks recovery. The claim is not one that the Attorneys are liable as co-conspirators or as participants in the alleged misdeeds of SDS’ owner, Bart Posey.

Mindful that the claim herein is legal malpractice allegedly committed by the Attorneys in their representation of SDS, the Court maintains its previous dismissal of the complaint. In particular, and in addition to its previous rulings, the Court concludes that dismissal is appropriate as a matter of law, for failure to state a claim, on these bases.

(1) As stated previously by the Court, the Petitioner has cited no authority for its claim that an attorney can be liable for an LLC’s unlawful distributions. Tennessee Code Annotated section 48-249-307 limits its list of those who are liable for unlawful distributions

to: member, manager or director under specific circumstances. Attorneys are not listed. As a matter of law, then, the Petitioner has failed to state a legal malpractice claim for unlawful distributions.


(2) As to the Petitioner's claim of legal malpractice with respect to SDS' purchase of sham insurance and failure to heed state regulatory agency notices and decisions, in its amended pleading, the Petitioner now uses the label "general counsel" when referring to the Attorneys as well as allegations of specific matters on which SDS requested the Attorneys to provide legal services such as: responding to several state agency investigations and lawsuits; future contemplated work including a possible restructuring and a lawsuit against one of the insurers; handling customer complaints and drafting indemnity language; communicating with one of the insurers regarding its coverage in response to various state investigations. *See* paragraphs 38-39, 41, 42, 69, 83-84. Nevertheless, the Amended Petition still fails to contain allegations that state a claim of duty in terms of SDS requesting the Attorneys to advise SDS on how to comply with applicable regulations, investigate potential insurers or advise SDS on whether to make any particular insurance premium payment. Absent these, dismissal is required.

As to whether the Attorneys had a duty to prevent SDS from continuing to pay premiums once the North Carolina Department of Insurance entered its August 15, 2008 administrative order stating that a particular insurer was "bogus," the Court concludes that

this fact does not establish a duty on the part of the Attorneys because, as SDS and its owner were named parties in the North Carolina investigation and orders, they already had knowledge and had been put on notice that North Carolina considered the insurance product a sham and posed a risk of nonpayment for member claims.

(3) Additionally, at paragraph 76 of the Amended Petition it states that SDS knew, no later than February 2009, that the Bema/SAA insurance product was a sham. Thus, any associated malpractice claim was time-barred (a one-year statute of limitations) before the receivership liquidation was filed in March 2010. According to *Woods & Woods v. Lewis*, 902 S.W.2d 914, 917-18 (Tenn. Ct. App. 1994), a client has one year from discovery of the negligence to sue the attorney. Combined with that is Tennessee Code Annotated section 56-9-304 and 313(c)(1) which indicates that rehabilitation and liquidation orders do not revive claims on which the limitations period has already expired by the time the rehabilitation and/or liquidation petition was filed.

Based upon the foregoing reasoning and authorities, the Court denies the Petitioner's Motion to Alter or Amend. It is so ORDERED.



ELLEN HOBBS LYLE
CHANCELLOR

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Attorneys for the Petitioner

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Attorneys for Evans, Petree, PC, William Hendricks, Jr., Russell
Hensley and Theodore Kitai