

Closing Pandora's Box for Workers' Comp Lawyers

By Karen J. Dilibert, Vice President and Director of Loss Prevention, ISBA Mutual

For ere this the tribes of men lived on earth remote and free from ills and hard toil and heavy sickness which bring the Fates upon men...But the woman took off the great lid of the jar with her hands and scattered all these and...caused sorrow and mischief to men. Only Hope remained there in an unbreakable home under the rim of the great jar, and did not fly out at the door...

– Hesiod, *Works and Days*



In Greek mythology, Pandora's curiosity caused her to open a box crammed full of the world's evils. All sorts of plagues came flying out, and she managed to slam down the lid just in time to keep Hope inside.

The Illinois Appellate Court's recent decision of *Keef v Widuch*, 747 NE2d 992 (1st D 2001), was described by a dissenting justice as a "Pandora's Box of malpractice litigation" against workers compensation attorneys. In *Keef*, the court held that workers' compensation lawyers had a duty to advise their client of other potential remedies and the attendant statutes of limitation – even though their engagement letter expressly limited the scope of their engagement to the workers' compensation claim.

An expansive reading of *Keef* could indeed plague workers' compensation lawyers – indeed, **any** lawyers – who attempt to limit the scope of their representation. Yet the plagues released by *Keef* may not be as bad as they appear – and they may not be new, either. At a minimum, this new decision highlights the importance of implementing sound loss prevention procedures. For lawyers who do, however, there may be hope in the *Keef* box.

The recently issued Keef decision seems to open a Pandora's Box of malpractice plagues for workers' comp attorneys. Or does it?

The plagues hit the fan

Melvin Keef was injured at work twice by a malfunctioning lathe—first in 1991 and again in 1993. After the first injury, Keef retained attorneys to handle his workers' compensation claim. They entered into a written agreement in which the attorneys agreed "to prosecute and/or settle all disputed claims for benefits under the Illinois Worker's Compensation Act or Occupational Disease Act against [Keef's employer] on account of injuries arising out of and in the course of employment of [Keef] on or about January 15, 1991." Id, 747 NE2d at 995 (emphasis in original).

Keef subsequently filed a malpractice claim against his attorneys, alleging that they failed to file a products liability complaint against the lathe manufacturer and failed to advise Keef of the date upon which the applicable statute of

limitations would expire. Counts I and III related to his 1991 injury, and Counts II and IV to his 1993 injury. Id, 747 NE2d at 995-96. The lower court granted the defendant attorneys' section 2-619 motion with respect to all counts.

The Illinois Appellate Court reversed the dismissal of the counts related to the 1991 injury. (It upheld the dismissal of Counts II and IV, noting that Keef pled no facts to establish

that the attorneys were ever informed of the 1993 injury.) The court rejected the attorneys' argument that their duties were limited to those set forth in the written agreement. Some duties, observed the court, arise independently of the written attorney-client agreement, including the duty to advise clients about legal remedies. The court agreed that representation can be limited to a particular cause of action, but noted that the client "must be made to understand that [it] is not the sole potential remedy." Id, 747 NE2d at 998.

Accordingly, the court held that workers' compensation attorneys have a duty either to advise the client about possible third-party actions, or, if they do not want to represent the client in third-party actions, to advise the client to consult other counsel about such claims. The court reasoned that the typical injured worker would not be aware of the possibility of a third-party action and would rely on his workers' compensation attorney to advise him of "all the potential legal remedies." Id. The burden on the workers' compensation attorney, opined the court, would be "slight." Id.

The key fact for the *Keef* court appears to be the injured workers' knowl-

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edge – or lack thereof – of potential third-party actions. The court distinguished two cases cited by the defendant attorneys on the grounds that in both cases, the client was aware of the possibility of another cause of action (an employment discrimination claim and a products liability claim, respectively) when they met with the workers' comp attorney. *Id.*, 747 NE2d at 999-1000.

The court also suggested that the defendant attorneys had a duty to advise Keef of the statute of limitations applicable to his third-party claim. This information, said the court, was "necessary to allow the layman client to consult with another attorney in a timely manner." *Id.*, 747 NE2d at 1000. Again, the court considered the attendant burden on the attorneys to be "slight": "A workers' compensation attorney has the ability to easily and quickly research the length of the products liability statute of limitations." *Id.*

Presiding Justice Hall's dissent warned that the majority opinion would open up a "Pandora's Box" of malpractice litigation." *Id.*, 747 NE2d at 1001. Justice Hall argued that the written agreement clearly stated that the lawyers' scope was limited to workers' compensation. He opined that the client had the burden of asking the attorneys about other potential remedies.

Same plagues, different day?

Despite Justice Hall's dire warning, it is possible that *Keef* has not released any *new* plagues on the workers' comp bar. Even before *Keef*, loss prevention authorities advised that if an attorney wanted to limit her scope of services to the workers' comp claim, it was advisable for her to tell her client that he might have other claims and that those claims might be time-barred if he delayed obtaining counsel to handle them.

To reinforce that message, savvy workers' comp lawyers included language like this in their engagement letters:

This Agreement is limited to proceedings before the Industrial Commission. If Client intends any appeal beyond the Industrial Commission Proceedings, a new agreement must be executed. It is further agreed and understood by and between the parties that this Agreement is **ONLY** for representation of the client by Lawyer in regard to the Client's workers' compensation claim. There may be additional

causes of action available to Client in connection with the accident/injury that may be time-barred if not pursued promptly. Client should therefore seek the advice of other counsel immediately if client intends to pursue additional claims.

Keef's lawyers didn't follow this loss prevention procedure. There was no evidence that they advised Keef of the possibility of other causes of action, and the fact that they would eventually be time-barred. Furthermore, their engagement letter, while it clearly limited the representation's scope, omitted any reminder about the existence of other possible causes of action or the need to consult with other counsel.

Accordingly, *Keef* may be a case of "bad facts make bad law." Some of its language will doubtless be cited by malpractice plaintiffs' counsel for the proposition that a workers' compensation lawyer must identify the entire universe of possible claims with specificity, and precisely calculate the date upon which the statute of limitations will run on each. The *Keef* court's suggestion that such a burden would be "slight" seems very unrealistic.

A less extreme reading of *Keef* is possible, however. Recall that the *Keef* court distinguished cases in which the client was aware of other causes of action at the time he consulted the workers' comp attorney. If lawyers make their clients aware of the possibility of other third-party actions and the need to act promptly to avoid any time bar – as many already do as a matter of course – they may yet come within a "safe harbor."

There's Hope in the box

Until the Illinois Supreme Court applies *Keef* to another case, it is impossible to predict with certainty what, if any, changes will be required in workers' compensation lawyers' current practices. At a minimum, *Keef* highlights the importance of employing procedures to ensure that clients are informed of other potential remedies and the need to seek other counsel to pursue them. Here are some basic steps that may help workers' comp lawyers avoid a *Keef*-type claim.

At your initial meeting, or at the first possible opportunity, advise the client that he may have other remedies in addition to the workers' compensation action. Obvious ones – like a products lia-

bility action in *Keef* – can be identified with specificity, with the warning that still others may exist. Remind the client that you are only handling his workers' compensation claim, and that he will need to seek other counsel to pursue any other remedy.

You will also need to advise the client that statutes of limitation will bar other claims unless he seeks other counsel immediately. Here you face a dilemma. While *Keef* suggests that it is easy to research the applicable statute of limitation and inform the client of the date on which it will run, this can be risky if you have not performed sufficient investigation, and/or if you are unfamiliar with the substantive area of law. It may be better practice to avoid identifying a particular date and advise the client to seek other counsel *immediately*, lest his claims be time-barred.

Finally, your written engagement letter should include language such as that cited above, to remind the client of the limited scope of your services, the potential existence of other remedies, and the need to consult with other counsel to avoid any time bar.

Keep Hope alive

The *Keef* decision, read broadly, appears to be a Pandora's Box of new and burdensome plagues. It is possible, however, that not much has changed. Until *Keef* is applied to other cases, there is hope for the attorney who employs sound loss prevention techniques. ■