SECY: [handwritten initials]
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY CIVIL DIVISION

CASE NO.: 502004CA006138XXXXMBAO

STEWART TILGHMAN FOX & BIANCHI, P.A., a professional association; WILLIAM C. HEARON, P.A., a professional association; and TODD S. STEWART, P.A., a professional association,

Plaintiff(s),

vs.

KANE & KANE, LAURA M. WATSON, P.A. d/b/a WATSON & LENTNER, a professional corporation; and CHARLES J. KANE, HARLEY N. KANE, LAURA M. WATSON and DARIN J. LENTNER, individually,

Defendant(s).
______________________________________/

FINAL JUDGMENT

The above case came before the Court upon non-jury trial on the Plaintiffs' claims for fraudulent inducement, quantum meruit/unjust enrichment and constructive trust as set forth in the Third Amended Complaint and upon the Defendants, LAURA M. WATSON, P.A., LAURA M. WATSON and DARIN J. LENTNER's Counterclaims for Declaratory Relief. The Court has carefully considered all the pertinent pleadings, the exhibits submitted into evidence, has considered and weighed the testimony of the numerous witnesses, and has also resolved the conflicts in the testimony and evidence. The Court has also thoroughly considered the submittals of the parties both during trial and post-trial, the arguments of counsel, and has reviewed the numerous authorities cited both for and in opposition to the Plaintiffs' claims. Based upon the foregoing, the Court makes the following factual findings and legal rulings.

The facts and circumstances of the current litigation could be a case study for a course on professional conduct involving multi-party joint representation agreements and the ethical pitfalls surrounding such agreements when the interests of some of the attorneys and/or their clients come into conflict. While there are serious and strong concerns as to the conduct by some of the Defendant attorneys involved in this litigation, those issues need be resolved in a separate forum. While a number of reasonable compromises could be constructed to address these concerns and the equities between the respective parties, this Court does not have jurisdiction to construct such a compromise. That is not the function of the judicial system and such a resolution would have to be left to the parties. This Court's obligation and duty is limited to applying the law to the facts as this Court has found from the evidence in this case, regardless of the conduct of some of the attorneys. As a result, this Court has struggled with this case in an attempt to apply the law to the straightforward facts, while also attempting to do equity between the parties. Unfortunately, this decision will be unsatisfactory to some, if not all, the parties.

This case has its genesis in a methodology employed by various Progressive Insurance Companies for reducing or eliminating bills of a large number of healthcare providers under the PIP provisions of Progressive motor vehicle policies. The Defendant law firms represented approximately 441 healthcare providers throughout Florida who had some 2,500 PIP claims for unpaid bills and associated attorney's fees against Progressive. To obtain those clients, the law firms had pooled their resources, developed a joint business plan, established joint offices in Fort Lauderdale, Boca Raton, Orlando, Tampa and Jacksonville, conducted joint marketing programs and seminars promoting themselves as a group, prepared and used joint client intake forms, entered into joint special co-counsel contingency contracts in which all three firms agreed to jointly represent the clients and assume joint responsibility for their claims. As a result, thousands of PIP claims were brought against Progressive on behalf of numerous healthcare providers. Each of the Defendant law firms maintained and handled their own clients and files. A decision was made by the Defendants in order to increase pressure on Progressive to settle those claims, Civil Remedy Notices were filed with the Florida Department of Insurance claiming that Progressive was guilty of bad faith handling of the healthcare claims. After initially being unable to settle on a global basis all of the PIP claims against Progressive, the Defendant law firms began exploring a possible bad faith claim against Progressive.

Ultimately, after a series of meetings with the law firm of Slawson, Cunningham, Whalen and Stewart, P.A., that law firm undertook the handling of a bad faith claim against Progressive. The attorney responsible for that lawsuit (hereafter referred to as the *Goldcoast* case) was Todd Stewart. Shortly after the lawsuit was initiated, however, changes were made in the Slawson firm which necessitated finding additional counsel.

Thereafter, Larry Stewart was contacted by his son, Todd Stewart, about handling this lawsuit and in February 2002 Larry Stewart met with former Defendants Marks, Fleischer and with Defendants LENTNER and WATSON to discuss the *Goldcoast* bad faith lawsuit. At that time, a series of representations were made including; (1) the Defendants working together had amassed a client base of hundreds of doctors with thousands of PIP claims against Progressive; (2) Progressive utilized a bogus scheme and phony excuses not to pay the doctors; (3) when push came to shove Progressive paid the full amount that was due; (4) the healthcare providers were upset and wanted to pursue bad faith claims against Progressive to put a stop to their practices; (5) the Defendant lawyers wanted to go forward with these cases independent of the physicians; (6) that the healthcare providers wanted the claims pursued and were not merely seeking to put pressure on Progressive to settle the PIP claims. The Defendants deny making most of these representations but the Court finds to the contrary.

All of the Plaintiffs testified in detail as to the various meetings and representations that were made. In addition to the Plaintiffs' testimony, DARIN J. LENTNER and Amir Fleischer, while refusing to acknowledge that specific representations were made, admitted that many of these subjects were discussed with the Plaintiffs. Importantly, the actions of the Defendants subsequent to these meetings is circumstantial evidence that these representations were, in fact, made. For example, when Plaintiffs sought additional bad faith clients, all the Defendants readily complied. Likewise, when the Defendants settled PIP claims they preserved the clients' bad faith claims. When it came time for settlement discussions with Progressive, Defendants supplied the information concerning the entire universe of bad faith claims, including a complete list of their clients and bad faith claims and data on the status of the claims and also approved the strategy that the combined client list would govern any settlement. Further, both the Defendants WATSON and LENTNER informed Progressive that any bad faith discussion would have to be with the Plaintiff. During settlement negotiations, the Defendants gave full authority to and raised no objection to the Plaintiffs negotiating a global settlement of all the bad faith claims of all clients, not just those named Plaintiffs in the *Goldcoast* cases. These representations were made numerous times by various parties over the course of the underlying litigation until shortly before the settlement with Progressive by the Defendant law firms.

The testimony in regard to the KANE Defendants' specific representations was, however, somewhat vague and unclear. What was clear, however, was that both HARLEY and CHARLES KANE were present at numerous meetings and/or were privy to numerous e-mails which clearly indicated their consent, ratification and joinder in this course of action. While the KANES deny any authority to pursue bad faith claims, they operated as though they had authority to pursue such claims. They filed civil remedy notices on behalf of their clients, claiming that Progressive acted in bad faith; they joined together with the other Defendants to seek class action/bad faith counsel. In addition, as they settled individual PIP claims they preserved the associated bad faith claims and refused to give general releases; and in the end settled all of their clients' bad faith claims and represented to Progressive that they were so authorized.

After beginning work, the Stewart firm asked William C. Hearon to assist in the prosecution of the bad faith claims. On April 16, 2002, Hearon also met with former Defendants Amir Fleischer and Gary Marks to assess the claims himself. At that meeting, Messrs. Fleischer and Marks made the same representation they had to Larry Stewart.

In a second meeting, on April 24, 2002, Plaintiffs reached agreement with the Defendant law firms concerning how the work would be handled. Attorneys' fees were to be split between Plaintiffs and Defendant law firms with 60% of any bad faith attorneys' fees going to the Plaintiffs. Defendants were to handle all client communications, continue to perfect and send the bad faith claims to Plaintiffs, and assist with any bad faith discovery directed to their PIP clients. The Plaintiffs were to prosecute the bad faith claims and assist the Defendants as needed. Plaintiffs and Defendants also prepared a fee contract to use in connection with the bad faith claims that provided for a 40% contingency fee, reflected the above fee division, and, because it was believed there would ultimately be global settlement, provided that the proceeds of such a settlement would be divided among the clients based on the clients' actual losses. It is clear from reading this contract that it was contemplated that additional bad faith claims would be added as they were perfected by the Defendant law firms, and that the named Plaintiffs in the *Goldcoast* cases would be expanded.

At the outset the Stewart team prepared an extensive background memorandum about Progressive's practices, investigated the various Progressive companies that were involved in the scheme and developed a litigation strategy. Based on that work, the allegations in the *Goldcoast* case were changed and additional plaintiffs and defendants were added, with the former executing the form contingent fee contract as they were joined. In addition, Plaintiffs launched discovery by filing extensive Requests to Produce.

The Plaintiffs worked on the bad faith case and claims for approximately two years, during which time there was extensive discovery, thousands of pages of documents were produced, and there were multiple objections, motions to compel and hearings. The issues were sufficiently complex that, with the consent of both parties, a Special Master was appointed and Plaintiffs obtained two critical rulings: (1) that Progressive had waived any attorney-client objection to a large amount of its internal documents concerning its bill discounting activities and (2) that Progressive's payment of the underlying PIP claims was *res judicata* as to the reasonableness of the healthcare providers' bills. Throughout this period Defendants and their law firms continued to preserve and perfect their clients' bad faith claims as they occurred and continued to assist and cooperate with the Plaintiffs.

In April, 2003 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (3003), was decided. Plaintiffs claim, that while they were initially concerned about the implications of *Campbell*, they ultimately concluded it would not have a significant impact on the claims. Defendants claim that as a result of this decision and for other reasons the Plaintiffs wanted to quit and had to be talked into continuing to handle the *Goldcoast* case. Either way, Plaintiffs continued to aggressively pursue the *Goldcoast* case and the settlement of all bad faith claims.

During 2003 not only WATSON and LENTNER but also the Plaintiffs attempted to initiate settlement discussions with Progressive on a global basis but were unsuccessful. Progressive's attitude toward settlement, however, radically changed in December 2003 when the Fourth District Court of Appeal denied its petition for a writ of certiorari seeking to prohibit the production of certain internal operational documents, thereby affirming the Special Master determination that there had been a waiver of all privileges. Progressive was, therefore, faced with having to produce these documents, and as a result agreed to discuss settling the universe of bad faith claims (not only those claims of the *Goldcoast* Plaintiffs but all perfected, unperfected and potential bad faith claims of all the healthcare providers). To assist in negotiations, Plaintiffs again requested information from Defendants about the universe of claims and, in early January, Plaintiffs and Defendants met to develop and agree on a settlement strategy. At the meeting Defendants reaffirmed their earlier representations regarding their own and the healthcare providers' intentions concerning the bad faith claims and the parties agreed, subject to the clients' ultimate approval, to demand $20 million to settle the entire universe of bad faith claims. Following that meeting, Defendant law firms provided Plaintiffs with detailed information concerning their clients and their claims, as well as clients lists that were merged into a single list of 441 clients. This list was to be the basis of any settlement agreement. After an exploratory meeting with Progressive, Plaintiffs met with Progressive on January 21, 2004, presented the client and claims information, made a demand for $20 million to settle all the perfected and potential bad faith claims, and reported this to the Defendants.

After several months of settlement negotiations Progressive indicated that it might want to resolve not only the bad faith claims but also the pending PIP claims. The Defendant law firms authorized Plaintiffs to negotiate the settlement of the PIP claims and also agreed to increase the attorneys' fees to the Plaintiffs from the bad faith portion of any recovery.

On April 19, 2004 Larry Stewart attended a mediation at which Progressive offered $3.5 million to settle all of the pending, perfected and potential bad faith claims. According to the mediator, Progressive had $6 million to $7 million to offer for the bad faith claims, but no agreement was reached at the time. Nevertheless, the Plaintiffs continued to put pressure on Progressive by demanding production of the privileged documents from Progressive. This resulted in efforts by Progressive to avoid production, an order compelling production, a sanction order and a hearing to determine the amount of those sanctions.

While the Plaintiffs were pressing for production of the attorney-client and/or privileged documents and Defendants were urging them to keep up their efforts, the Defendant law firms, without the knowledge or consent of the Plaintiffs, settled all of their clients' PIP and bad faith claims, whether the latter were filed, perfected or just potential, by accepting Progressive's offer of $14.5 million. The settlement was reached on Friday, May 14, 2004. On Sunday, May 16, 2004, all of the Defendants met with Progressive's attorneys and assisted in drafting a Memorandum of Understanding ("MOU"). The MOU made it clear that all PIP and all bad faith claims, whether filed, perfected or just potential, were being settled for an undifferentiated sum, and in the MOU the Defendants represented that they had the full authority to settle all of the claims and agreed that, if necessary, they would defend and hold Progressive harmless against the claims of their own clients.

The Defendants claim that the MOU was only an agreement to agree, or just a letter of intent. Such a claim, however, is contrary to the specific terms of the MOU and inconsistent with the way the Defendants acted upon it. The Court finds that the MOU was a binding contract. The only thing required to trigger payment was the delivery of the requisite number of releases. The Defendants' actions also belie their contentions. Defendants treated the settlement as completed even before the MOU was drafted, told Plaintiffs the case was settled before seeking any client approval, informed the court and opposing counsel that the case was settled before seeking client approval, and not only treated it as a completed settlement but also called it a settlement.

The initial MOU allocated the $14.5 million as follows: Marks & Fleischer - $5,000,000.00; LAURA M. WATSON, P.A. d/b/a WATSON & LENTNER - $4,000,000.00; KANE & KANE - $5,500,000.00. This MOU did not allocate any of the proceeds to the "bad faith" claims (whether part of the *Goldcoast* cases or not). The Court finds that this procedure was utilized by the Defendant law firms in order to allocate almost 90% of the initial settlement proceeds to attorney's fees. Although aware there were serious flaws in this settlement procedure, the Defendants nevertheless moved forward with the settlement. To trigger payment under the MOU, the Defendant law firms had to deliver complete releases from all the *Goldcoast* Plaintiffs and 90% of the other clients. To obtain those releases which not only included the PIP claims but also any filed, perfected or potential bad faith claims, the Defendant law firms jointly drafted a letter to the *Goldcoast* Plaintiffs that failed to disclose that although nothing was being allocated to the bad faith claims, the settlement included compensation for these claims. This letter also failed to disclose the amount of the settlement, the amount of the attorney's fees being taken or the value of the bad faith claims being released. The methodology used by the Defendant law firms in creating this settlement violated a number of rules, including Rules 4-1.5(f)(1) and (5), 4-1.7(a), (b) and (c) , 4-1.8 and 4-1.8(g) and 4-1.4 of the Rules of Professional Conduct.

After objections were raised by Plaintiffs to this settlement, and after consultation with their attorney, on June 16, 2004, the Defendant law firms modified the original settlement by unilaterally and arbitrarily allocating $1.75 million to the *Goldcoast* bad faith claims and reducing their share of the settlement proceeds to fund this reallocation. Under the amended MOU (and exclusive of the *Goldcoast* allocation), Marks & Fleischer received $4,380,000.00, LAURA M. WATSON, P.A. d/b/a WATSON & LENTNER $3,075,000 and KANE & KANE $5,250,000.00. This reallocation of the settlement proceeds required contributions to fund the *Goldcoast* amount as follows: Marks & Fleischer $575,000.00, KANE & KANE $250,000.00 and LAURA M. WATSON, P.A. d/b/a WATSON & LENTNER $925,000.00.[1] Although the Kane & Kane law firm had no actual clients in the *Goldcoast* case they nevertheless contributed out of their clients' allocated settlement $250,000.00 toward the *Goldcoast* litigation. Under the amended MOU, the remaining approximate 400 clients who were not actual parties to the *Goldcoast* litigation, were to still receive nothing for their unfiled, perfected and potential bad faith

1 The Court notes that the testimony indicated that although Marks & Fleischer paid $575,000.00 out of their original settlement allocation toward the *Goldcoast* case, the math does not equal the amounts they received in final settlement, $4,380,000.00. However, given this Court's decision, it would make no difference in the ultimate outcome.

claims, <u>although they were required to release those claims</u>. Again, the clients were not notified of the specifics of the settlement, were not advised of the total settlement, the amount of the attorney's fees, or who was to receive exactly what in the settlement. The largest portions of the settlement proceeds of the *Goldcoast* case was paid to Goldcoast Orthopedics (and as a result, LAURA M. WATSON, P.A. d/b/a WATSON & LENTNER allocated more to this settlement than the other law firms). This was the result of a "side deal" that had been entered into between *Goldcoast* and the WATSON law firm without the knowledge of the Plaintiffs that they would receive a certain guaranteed amount from the *Goldcoast* case. From the reallocated proceeds, the Defendant law firms ended up taking over $10,960,000.00 in PIP fees, their portion of the *Goldcoast* attorney's fees and over $760,000.00 in costs. The Defendants gave conflicting reasons for this reallocation, but the Court finds that the real reason was to maximize attorney's fees recovery and to limit the amounts the Plaintiffs could claim in fees while attempting to cure, after the fact and on the surface only, serious ethical flaws in the settlement procedure. In this Court's view, the amendment to the MOU did not cure the violations of the Rule of Professional Conduct noted above.

Once the Defendant law firms received the settlement proceeds on June 22, 2004, they discharged the Plaintiffs. At the same time, Defendant law firms filed Notice of Appearance in the *Goldcoast* case, cancelled the sanctions hearing scheduled for the next morning and dismissed the case with prejudice.

The amounts taken by the Defendant law firms as attorneys' fees for the PIP cases exceeded the fees they had earned in those cases. The PIP cases were county court actions that were repetitive in nature. Most of the work was done by clerical staff and/or paralegals, and there were standardized forms for everything from pleadings, motions and correspondence to checklists. The amount of attorney time required for the claims was not substantial and none of the PIP claims against Progressive were ever tried.

Nevertheless, in an effort to justify their fees, the Defendants presented "estimates" of the time spent on their Progressive PIP cases. The Court finds those estimates neither competent nor credible for a number of reasons. The Defendants claimed to have time records for all or at least some of their files but offered no explanation for their failure to produce complete records. The time records that were introduced had time entries that were grossly inflated and staff time billed as attorney's time and at attorney's rates. There is no reason to believe that Defendants' "estimates" are not equally inflated and unreliable. Although the Defendants listed expert witnesses to testify as to the reasonableness of their fees and the WATSON Defendants had one to testify on unjust enrichment, they elected not to offer any expert testimony. *See, e.g., Crittenden Orange Blossom Fruit v. Stone*, 514 So.2d 351, 343 (Fla. 1987); *Fitzgerald v. State*, 756 So.2d 110, 112 (Fla. 2nd DCA 1999); *Cooper v. Cooper*, 406 So.2d 1223, 1224 (Fla. 4th DCA 1981).

The credibility of the KANE & KANE's trial "estimates" are seriously questioned by the testimony that in 2005 KANE & KANE created Progressive case time records for purposes of this litigation. They were created by associates who worked under the threat of their compensation being withheld. The resulting records inflated the time expended, "billed" clerical and staff work at attorney's rates. In addition, after the time records were created, HARLEY KANE modified them. At trial, HARLEY KANE conceded that those records were "excessive" and claimed that, instead of relying on those records, he made a "conservative" estimate.

LAURA WATSON claimed that she spent 7,200 hours on the Progressive PIP cases, which would be over 34 hours per week for over four years. But the WATSON law firm Scheduling Calendar shows that for most of the time less than 50% of her scheduled items involved the Progressive claims. In addition, the case data that LAURA WATSON produced during the underlying *Goldcoast* case showed the WATSON law firm averaged less than now claimed in attorney fees per claim on its Progressive cases.

Based upon the foregoing facts, the Plaintiffs have sought recovery against the Defendants on three separate but interrelated legal theories: fraudulent inducement, quantum meruit and/or unjust enrichment. Plaintiffs also a seek constructive trust as set forth in the Third Amended Complaint.

Initially, the Plaintiffs contend that Defendants fraudulently induced them into entering into the agreement to represent the *Goldcoast* Plaintiffs. In essence, the Plaintiffs argue that the Defendants set in motion a scheme from the start which was intended to merely induce the Plaintiffs to pursue the bad faith claims with the intention of always sacrificing those bad faith claims and any potential bad faith claims for the benefit of the PIP claims and more specifically to aggrandize their fees. The facts and actions of the Defendants over a two year period from the date of initial representation until the settlement, however, do not support that conclusion. The actions of the Defendants throughout the progress of the bad faith litigation indicated that they were acting in accordance with their representations from the start. The Defendants assisted whenever requested, settled cases without dismissing bad faith claims, turned over information to assist in the bad faith litigation, and on occasion ordered transcripts to assist in prosecution of that case. Most importantly, all the Defendants gave the Plaintiffs complete authority to settle not only the PIP claims but also the bad faith claims at mediation, conduct which simply cannot be reconciled with an ongoing fraudulent plan or scheme. Moreover, the Defendant Lentner's actions in attempting to get Holy Cross to join in the *Goldcoast* cases is also inconsistent with such a fraudulent plan. It was only after April 2004 that the Defendant law firms decided to settle directly with Progressive and attempt to exclude and/or to severely limit the Plaintiffs from participation in the settlement and began to formulate a plan to maximize their attorney's fees. Progressive contacted former Defendant Amir Fleischer to discuss a settlement of his clients' claims and he agreed to serve as an intermediary between Progressive and the Defendant law firms. Ultimately settlements of the KANE & KANE cases as well as the WATSON law firm cases were finalized with Progressive to the complete exclusion of the Plaintiffs.

Plaintiffs also seek recovery from the Defendants based upon theories of quantum meruit and/or unjust enrichment. There has been confusion in the courts as to these legal theories and, in fact, courts have on occasion treated unjust enrichment and quantum meruit synonymously. *See e.g., Maloney v. Therm Alum Industries Corp.*, 636 So.2d 767, 769 (Fla. 4th DCA, *rev. denied*, 645 So.2d 456 (Fla. 1994). Quantum meruit can reference two separate causes of action, one based upon a contract implied in law, and one based upon a contract implied in fact. *See, Commerce Partnership 8098 Limited Partnership v. Equity Contracting Co., Inc.*, 695 So.2d 383 (Fla. 4th DCA 1997). However, there has been a blurring of the distinction between contracts implied in fact and quasi contracts by reason that both theories often apply in the same case. Generally a contract implied in fact is when one party has performed services at the request of another without discussion of compensation. Under such circumstances, the law implies a contract in fact. *Id.* However, in circumstances where there is no enforceable express or implied in fact contract, but a defendant has received something of value or has otherwise benefited from the services, recovery under a quasi contract theory may be appropriate. *Id.*

Under quantum meruit, the totality of the circumstances surrounding each situation should be considered in determining the reasonable value of the services. *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So.2d 366, 369 (Fla. 1995). While 4-1.5(b) of the Rules of Professional Conduct may provide guidance in determining such a reasonable fee, the facts necessarily vary from case to case. *Id.* The ultimate determination, however, must rest with the sound discretion of the trial court. *Id.*

It was the Defendants who requested Plaintiffs perform the legal services and implied in that request is an obligation to pay. Those services were accepted by and benefited the Defendant law firms, who had the most to gain given their claims for attorney's fees. Moreover, the Defendants admitted at trial that Plaintiffs are entitled to be paid for their work. *See, Rash, Katzen & Kay, P.A. v. Horton*, 476 So.2d 724, 725 (Fla. 3d DCA 1985)(trial counsel who hired appellate counsel liable on quantum meruit basis).

Defendants nevertheless claim that Plaintiffs' recovery must be based solely on the fees they would have earned in the *Goldcoast* case since the named Plaintiffs there were the only clients with whom they had written fee agreements. While written fee agreements are required before an attorney can accept a contingent fee they need not be entered into before the work is done. *Rule 4-1.5 of Professional Conduct. See, e.g., Lugassy v. Independent Fire Ins. Co.*, 636 So.2d 1332 (Fla. 1994)(contingent fee contract modifiable before verdict); *Corvette Shop & Supplies, Inc. v. Coggins*, 779 So.2d 529 (Fla. 2nd DCA 2000)(fee agreement executed after trial – rule intended to protect the client). Here the plan was always that the Defendant law firms would obtain fee agreements from all the potential bad faith claimants if and when it appeared that their claims were to be settled. The only reason those agreements were never obtained is the manner in which

Defendant law firms settled the case. They are, therefore, trying to benefit by their own wrongdoing. Regardless, the absence of fee agreements would only mean that Plaintiffs would be entitled to a fee for their work based upon quantum meruit, as attorneys without a written contingent fee agreement. *See Chandris, S.A. v. Yanakakis*, 668 So.2d 180, 186 n.4 (Fla. 1995); *Lackey v. Bridgestone/Firestone, Inc.*, 855 So.2d 1186 (Fla. 3rd DCA 2003), or out of the common fund their efforts created. *Truman J. Costello, P.A. v. City of Cape Coral*, 693 So.2d 48 (Fla. 2nd DCA 1997).

It was clear from the evidence that any settlement would ultimately be a global settlement of all the bad faith claims, nor could it reasonably be argued that Progressive would have settled on any other basis. Therefore, to limit Plaintiffs' fees only to the *Goldcoast* cases ignores the obvious, is contrary to the understanding of the parties to the litigation and would result in a windfall to the Defendant law firms, a windfall they did not earn. Moreover, it would give credence to the methodology used to settle the case and ratify the unilateral allocation of funds to the bad faith case, which allocation was contrary to the evidence at trial.

Defendants also claim the Plaintiffs' recovery should be limited to the $420,000.00 (i.e., 60% of the 40% fee on the $1,750,000.00 *Goldcoast* allocation) because the Plaintiffs are "bound" by the settlements, i.e. the *Goldcoast* Plaintiffs' decision to accept $1.75 million and the remaining bad faith claimants' decision to accept no money for their claims. However, while clients have the right to settle their claims, when it is done without the attorney's knowledge in such a way to eliminate or reduce his fee, it amounts to fraud and the attorney is not bound by the settlement. *See e.g, United States v. Transocean Air Lines, Inc.*, 356 F.2d 702, 705 (5th Cir. 1966); *Brown v. Vermont Mut. Ins. Co.*, 614 So.2d 574, 580 (Fla. 1st DCA 1993). *See e.g., Ellis Rubin, P.A. v. Alarcon*, 892

So.2d 501 (Fla. 3d DCA 2004); *Ingalsbe v. Stewart Agency, Inc.*, 869 So.2d 30 (Fla. 4th DCA 2004); *Farish v. Bankers Multiple Line Ins. Co.*, 425 So.2d 12 (Fla. 4th DCA 1982), *aff'd in relevant part*, 464 So.2d 530 (Fla. 1985); *Yanakakis v. Chandris, S.A.*, 9 F.3rd 1509 (11th Cir. 1993). While it was not the client's conduct but that of the Defendant law firms which attempted to eliminate or reduce the fees of the Plaintiffs, there is no reason the same rule should not apply.

Defendants also contend that the Plaintiffs are also limited to $420,000.00 by operation of the "quantum meruit limited by contract" rule (i.e., that a discharged attorney seeking fees on a quantum meruit basis cannot recover more from the client than he would have under his contract). *Rosenberg v. Levin*, 409 So.2d 1016, 1021 (Fla. 1982); *Searcy*, 652 So.2d at 368. Such a rule, however, should have no application here. Plaintiffs are not seeking quantum meruit fees from the clients, and neither *Rosenberg* nor *Searcy* involved or concerned, whether Plaintiffs' rights are limited by Defendant law firms' settlement of the bad faith claims based upon their <u>unilateral</u>, <u>arbitrary</u> and <u>artificial allocation</u> of the proceeds so as to maximize their own fees.

Plaintiffs also claim damages based on the unjust enrichment of the Defendants [i.e., where there is no enforceable express or implied contract and the Defendant has received something of value, or has otherwise benefited from the service provided. *Commerce Partnership 8098 Limited Partnership, supra* at 387]. Defendants argue, however, that the PIP attorneys are entitled to approximately $11 million in fees while Plaintiffs are entitled to just $420,000. Based upon the facts of this case, such an award would constitute unjust enrichment and would allow the Defendant law firms to benefit by the work of the Plaintiffs and reward their improper conduct in the manner they settled the claim. Neither law nor equity can allow such a result. The attorneys' fees that were earned in the PIP litigation represented only a percentage of the combined value of the PIP and bad faith claims, and the value of the latter was a benefit conferred by the Plaintiffs' efforts. The bad faith claims were an important pressure point on Progressive, they represented the biggest damage threat, they were a driving force behind the settlement, and their release was one of the principal considerations for the settlement. Moreover, it was Plaintiffs' labor that made a global settlement of the PIP claims possible. In addition to being disproportionately rewarded, Defendant law firms' after the fact conduct and methodology in their settling the "bad faith" claim – also amount to circumstances that make it unjust for the Defendant law firms to retain the benefits Plaintiffs conferred. *Duncan v. Kasim, Inc.*, 810 So.2d 968, 971 (Fla. 5th DCA 2002). The Defendant law firms' unilateral, and after the fact, allocation of certain funds to the bad faith claims does not change the fact that the Plaintiffs are entitled to, nor should the Defendant law firms' conduct limit, the reasonable fees for the services performed.

Regardless of whether couched in terms of quantum meruit, unjust enrichment, implied in fact or quasi contract, considering the totality of the circumstances and for the reasons set forth above, the Plaintiffs are clearly entitled to reasonable compensation for the services provided, and not limited by the Defendant law firms' unilateral, arbitrary and artificial allocation of the proceeds. While this Court has no difficulty in determining that the Plaintiffs are entitled to a reasonable fee, not limited to the percentage of the recovery in the *Goldcoast* case, the determination of the amount of such a reasonable fee is complicated.

Nevertheless, the evidence clearly demonstrates that the Plaintiffs brought their significant reputation and experience to the bad faith claims; the bad faith claims were complex and required considerable skill; the undertaking of them precluded other employment by the Plaintiffs; the bad faith claims imposed significant responsibilities on the Plaintiffs; their fee was contingent on the outcome; and they expended over 1,200 hours before being discharged without cause. The Plaintiffs work resulted in favorable rulings which opened the door to settlement when Defendants had been unable to make any progress in that regard on their own. In addition, the evidence establishes that Defendant law firms unfairly deprived Plaintiffs of a fee by ignoring multiple conflicts of interest, misrepresenting the terms of the settlement to the Plaintiffs, misrepresenting the terms of the settlement to the clients to obtain the releases to trigger payment, manipulating the allocation of the settlement to obtain most of it as attorneys' fees, and by discharging Plaintiffs for no reason. Based upon the evidence, the Court, therefore, finds that the Plaintiffs were 50% responsible for the result achieved. Nevertheless, an award of 50% is a maximum award and does not consider the services provided by the Defendant law firms in representation of the universe of PIP claimants. In this context, the Court accepts the testimony of Larry Stewart as to the reasonable value of the services performed by the WATSON firm and the KANE & KANE firm. Based upon that testimony, the Court finds that a reasonable fee earned by the WATSON firm for the PIP cases would be $1,541,000.00 (more than 50%) and a reasonable fee for KANE & KANE for the PIP cases is $1,912,500.00 (less than 50%). Marks & Fleischer, P.A. received $4,380,000.00 in the reallocated settlement of which $4,000,000.00 went to attorney's fees. Excluding the *Goldcoast* allocation in the Amended MOU, KANE & KANE settled their client's PIP claims for $5,250,000.00, from which they received $4,000,000.00 in attorney's fees and the WATSON firm received $3,075,000.00 in settlement of which $2,522,792.00 went to attorney's fees. Therefore, based upon the above and after considering all relevant circumstances, the totality of the circumstances, and the factors under Rule of

Professional Conduct 4-1.5(b), the Court finds a reasonable fee to the Plaintiffs on behalf of the WATSON clients is $981,792.00 ($2,522,792.00 less $1,541,000.00) and a reasonable fee on behalf of the KANE & KANE clients is $2,000,000.00 (50% of $4,000,000.00).

Nevertheless, the Plaintiffs seek "benefit of the bargain damages in its claims against the Defendant law firms. In essence, they contend they are entitled to what they would have received had they been allowed to continue to handle the bad faith litigation. In this context, they introduced expert testimony as to the "value" of the bad faith litigation. Even assuming that "benefit of the bargain damages" are allowable under the theories pled, such damages may only be considered when the evidence is reasonably certain. The evidence cannot be so vague as to cast virtually no light upon the issue. *See e.g., Meadows v. English, Machaughan & O'Brien, P.A.*, 909 So.2d 926 (Fla. 4th DCA 2005). In this case, the Court finds that the "expert's opinion" as to the alleged "settlement value" or "value" is totally speculative and not probative. The Court finds such testimony is predicated upon unknown and unquantifiable facts. *See., Fla. Stat. 90.702.*

The Plaintiffs also seek a constructive trust. The elements of constructive trust are: (1) a promise, express or implied; (2) a transfer of the property and reliance thereupon; (3) a confidential relation; and (4) unjust enrichment. *See e.g., Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022, 1024 (Fla. 4th DCA 1996); *Abele v. Sawyer*, 750 So.2d 70 (Fla. 4th DCA 1999). Not only has this Court previously ruled that a fiduciary relationship cannot be found in the instant case for reasons set forth in *Beck v. Wecht*, 28 Cal. 4th 289 (Cal. 2002), the Plaintiffs have failed to establish the requirements of a constructive trust under the facts of this case.

The Plaintiffs also suggest that DARIN LENTNER and LAURA WATSON should be individually responsible for the quantum meruit/unjust enrichment fees. First, there was no evidence presented as to the value, if any, individually conferred upon either. It was undisputed that LENTNER was an employee of the WATSON law firm and that WATSON was the shareholder/president of LAURA M. WATSON, P.A. and LAURA M. WATSON, P.A. was the party to all the contracts. There was no evidence that DARIN LENTNER or LAURA WATSON was ever a party to any such agreements. It is also undisputed that any and all payments related to the settlement were made to the law firm of LAURA M. WATSON, P.A. d/b/a WATSON & LENTNER and all the attorney's fees were paid to the law firm. Generally, when a corporation is allegedly unjustly enriched, an action against individual directors, officers or shareholders will not lie simply because the assets can ultimately be traced from the corporation to the individual as long as the corporation retains its legal existence. *See e.g., United States v. Dean Van Lines*, 531 F.2d 289, 292-93 (5th Cir. 1976).

Former Defendants Marks & Fleischer settled the Plaintiffs' claims by a voluntary payment to the Plaintiffs and are no longer a party to this litigation.

Based upon the foregoing, it is

CONSIDERED, ORDERED AND ADJUDGED as follows:

1. In order to state a cause for fraud in the inducement, Plaintiffs were required to prove: (1) a false statement of a material fact; (2) knowledge of the falsity; (3) Defendants' intent that representation induced Plaintiffs to rely upon and act upon it and (4) injury to Plaintiffs and justify reliance upon the representation. *Samuels v. King Motor Company of Ft. Lauderdale*, 782 So.2d 489 (Fla. 4th DCA 2001). Based upon the findings of facts aforesaid, the Court finds for the Defendants against the Plaintiffs on the claims for

fraud in the inducement and the Defendants shall go hence without day in regard to said claims. Since the fraud in the inducement claim is the only claim which would support a claim for punitive damages, the Plaintiffs' claim for punitive damages also must fail.

2. Final Judgment be and the same is hereby entered in favor of the Plaintiffs, STEWART TILGHMAN FOX & BIANCHI, P.A., WILLIAM C. HEARON, P.A. and TODD S. STEWART, P.A., and against LAURA M. WATSON, P.A., d/b/a WATSON & LENTNER, in the amount of $981,792.00, for which let execution issue.

3. Final Judgment be and the same is hereby entered in favor of the Plaintiffs, STEWART TILGHMAN FOX & BIANCHI, P.A., WILLIAM C. HEARON, P.A. and TODD S. STEWART, P.A., and against the Defendants, KANE & KANE, HARLEY N. KANE and CHARLES J. KANE, jointly and severally, in the amount of $2,000,000.00, for which let execution issue.

4. Plaintiffs are also entitled to pre-judgment interest on their award. Since the Florida Supreme Court's decision in *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212, 215 (Fla. 1985), whenever a verdict or judgment has the effect of fixing an otherwise unliquidated pecuniary loss as of a prior date, the plaintiff is entitled to an award of prejudgment interest. *See e.g., Mercedes-Benz of North America, Inc. v. Florescue & Andrews Investments, Inc.*, 653 So.2d 1067 (Fla. 4th DCA 1995)("an award of prejudgment interest is nondiscretionary once the amount of loss is ascertained") And that includes for unjust enrichment, *e.g., Burr v. Norris*, 667 So.2d 424, 426 (Fla. 2d DCA 1996); and for quantum meruit. *E.g., Rohrback v. Dauer*, 528 So.2d 1362, 1364 (Fla. 3d DCA 1988). The Court's award bears interest at the statutory rate of 7% from June 22, 2004, the date the settlement proceeds were received by the Defendants, through the end of 2005, 9% during the year 2006, and 11% thereafter.

5. Based upon the above findings of fact, the Plaintiffs' claim for Constructive Trust is hereby denied.

6. All other claims not otherwise set forth above are hereby denied.

7. A copy of this opinion is being forwarded to The Florida Bar for action, if any, in regard to this Court's finding of violations of Rules of Professional Conduct 4-1.5(f)(1) and (5)4-1.7(a)(b) and (c), 4-1.8 and 4-1.8(g) and 4-1.4.

DONE AND ORDERED this ____ day of April, 2008 at West Palm Beach, Palm Beach County, Florida.

SIGNED AND DATED

APR 24 2008

DAVID F. CROW
CIRCUIT COURT JUDGE

JUDGE DAVID F. CROW

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