When Negligence Is Not Enough: Proving Causation in a Litigation Malpractice Case

BY KELLI HINSON AND CAROLYN RAINES

The practice of law, by its very nature, involves adhering to deadlines and making judgment calls, sometimes very tough ones. Accordingly, it is a profession that provides many opportunities for making mistakes. But, as more and more courts are confirming, proving a mistake by a lawyer is not enough to prevail on a claim for legal malpractice, especially when the alleged negligence occurs during the prosecution or defense of another lawsuit.

The Trial-in-a-Trial

A claim for legal malpractice arises in tort and is treated like any other negligence claim. Therefore, the plaintiff must prove the traditional elements of a negligence claim: duty, breach, causation, and damages. When the alleged malpractice involves advice to the client, proving causation may not be difficult. The client, as the key decision maker, may be able to testify that she relied on the attorney’s advice with unfortunate consequences.

If a legal malpractice case arises during the course of litigation, however, in order to show that an attorney’s alleged negligence was the proximate cause of the plaintiff’s damages, the plaintiff must prove that, but for the attorney’s negligence, the plaintiff would have prevailed or obtained a better result in the underlying case. Some states also require proof that the judgment in the underlying case would have been collectible. The need to establish the likely result of the underlying litigation often is referred to as the “suit within a suit” or “case within a case” requirement. “It is this elemental requirement of proving the case within the case that makes a legal malpractice action unique.” In certain cases, it also makes proving causation extremely difficult.

In Rangel v. Lapin, for example, the alleged malpractice at issue was the personal injury attorney’s advice to the client that he should sell the car involved in the accident at issue. The client

Lost Punitive Damages in Legal Malpractice Cases—Where Have They Gone?

BY PAUL KONING AND BLAKE EDWARDS

Few legal malpractice controversies are as thorny as the issue of whether clients may sue for lost punitive damages. When a lawyer’s negligence results in the loss of a client’s tort cause of action, the client naturally seeks to recover all damages the client would have collected in the underlying case but for the legal malpractice—including punitive damages. The lawyer defendant, however, argues that treating lost punitive damages as actual damages ignores the noncompensatory nature of punitive damages and improperly punishes the lawyer for someone else’s sins. The tension between the two positions has resulted in a national split of authorities.
Welcome to the first issue of our committee's newsletter for the 2006–2007 bar year. I am honored to succeed Martha Gooding as cochair of the committee and look forward to working with you and returning cochair Steve Weiss in the year to come. Steve and I welcome Angelo Stio as the committee's newsletter editor, who will guide our newsletter into the second year of its attractive new format.

The articles in this issue focus on professional liability cases, an active commercial litigation area as courts increasingly scrutinize corporate governance and performance. The first three articles deal with the challenge of defining the “alternative world” that a plaintiff claims would have existed but for a professional's alleged wrongdoing.

In legal malpractice cases, one particularly challenging issue is the “trial-within-a-trial” that can result when the work of a trial lawyer is called into question—that is, what a plaintiff must show to establish how an earlier trial would have resulted but for the alleged misconduct of that lawyer. Carolyn Raines and Kelli Hinson describe recent trends in opinions about several facets of that problem. Paul Koning and Blake Edwards focus on claims that punitive damages were lost by an attorney’s negligence and analyze the complex policy issues raised by such claims. Finally, Jennifer Morris and Dena Stroh summarize the extensive case law about how courts should weigh the collectibility of a claim alleged to have been lost by malpractice. Collectively, these articles skillfully illustrate how tort theory interacts with intensely practical considerations in this area of law.

The other articles look at evolving standards for professional conduct in different areas. Dan Kaufmann reviews some very recent case law about the imputation defense in litigation against auditors. John McCahey examines the viability today of long-standing rules about immunity for expert witnesses. Lee Barrett concludes the issue with a thorough examination of the professional obligations imposed by the 2005 changes to the Bankruptcy Code. While professional liability cases derive from long-standing principles of basic tort law, both courts and Congress are actively developing and refining them.

Looking ahead to the new year, please put two big events on your calendar: first, the Section of Litigation Annual Meeting in San Antonio, April 11–14, 2007; and second, the ABA annual meeting in San Francisco, August 9–15, 2007. Our committee members always try to have a welcome dinner together at those events, in addition to a breakfast meeting and programs. If you’d like to get move involved right away, please look at Angelo Stio’s column for more information about submitting an article to upcoming newsletter issues, and bookmark our committee web page, www.abanet.org/litigationcommittees/commercial, for up-to-date committee news.

David Coale
Articles for the Winter 2007 issue, about settlement agreements, are due by October 13, 2006; articles for the Spring 2007 issue, about damages litigation in commercial cases, are due by January 5, 2007. A typical article is about 1,200 words, with all citations in endnotes and in MS Word format. An article may be submitted by emailing it to me at stioa@pepperlaw.com. Please send me a note if you have any questions or comments about the newsletter.

Angelo A. Stio III
Because a malpractice plaintiff must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence, a "trial-within-a-trial" is typically required to prove causation and the extent of harm. In a trial-within-a-trial, the legal malpractice plaintiff must show that she would have prevailed or obtained a better result in the underlying case but for her attorney's negligence.

For many states, one component of a trial-within-a-trial is to what extent the legal malpractice plaintiff would have been able to collect on a judgment as plaintiff in the underlying case. Some harm must be shown to have occurred to the grieving client. Courts generally recognize that "until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." Consequently, it would be inequitable for a malpractice plaintiff to receive a windfall by obtaining a judgment against the attorney that is greater than the judgment the plaintiff could have collected from the underlying defendant.

Collectibility—Whose Burden? The Majority Holds Plaintiff's Burden

The question, then, is who has the burden of proving or disproving collectibility? The majority of states that have considered this question, including California, Colorado, Connecticut, Georgia, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, North Carolina, South Dakota, Tennessee, Texas, Virginia, and Washington, place the burden on the malpractice plaintiff. The legal malpractice plaintiff must introduce evidence showing that the underlying judgment would have been collectible in part or in full.

The policy basis for this approach is to avoid awarding the plaintiff more than he would have recovered had the attorney not been negligent. Thus, a plaintiff's actual injury is measured by the amount of money that he would have actually collected but for his attorney's negligence, not the amount of the judgment that he would have been awarded. Hypothetical damages beyond what the plaintiff would have actually collected result in a windfall. Thus, the majority of jurisdictions consider collectibility a component of the plaintiff's prima facie proof in the simple application of the doctrine that "a party claiming damages must prove not only the wrong, but the amount of his damage as well."

The Supreme Court of New Hampshire, however, recognized that if the attorney's negligence made proof of collectibility impossible or at least more difficult, then an attorney defending a malpractice action "may not rely on the consequences of his own negligence to bar recovery against him."

Collectibility—The Minority Holds That the Defendant Has the Burden

By contrast, an increasing minority in Alaska, Indiana, Maine, Michigan, New Hampshire, New Jersey, New York, Pennsylvania, and the D.C. Circuit place the burden on the defendant attorney to assert the affirmative defense of collectibility. Indeed, in New York—a jurisdiction widely acknowledged as placing the burden of collectibility upon the malpractice plaintiff—the Supreme Court, Appellate Division overruled a prior holding that it was plaintiff's burden and held that noncollectibility is an affirmative defense. These courts reject the majority's view and hold that the legal malpractice defendant attorney must prove that the plaintiff could not have recovered the full value of the underlying judgment.

Paramount to these minority courts is that fairness requires that the attorney defendants bear the burden of proof with respect to collectibility. The malpractice plaintiff has already been allegedly wronged by two parties (the underlying defendant and the attorney defendant). The minority courts reason that this is particularly appropriate because legal malpractice claims are likely to be brought years after the underlying events. Furthermore, the majority's view (according to the minority courts) wholly ignores the possibility of a settlement, which might be encouraged by active litigation of a claim. Finally, having a fact finder render a judgment on the merits in favor of the plaintiff is itself a vindication of the legitimacy of the claim and has value regardless of whether it is collectible. Thus, noncollectibility is an affirmative defense because "the erring attorney should bear the inherent risks and uncertainties of proving it."

This minority approach has been criticized by at least one court for departing too far from the general principles of negligence.

To Bifurcate or Not to Bifurcate: That Is Yet Another Question

It is generally held that a litigant's financial condition has no relevance to damages (with the exception of punitive damages), but merely serves to prejudice the
such courts even address this question.20 A few courts in a bifurcated trial, the trial court first tries the questions of malpractice and the judgment that would have been recoverable.

In a bifurcated trial, the trial court first tries the questions of malpractice and the judgment that would have been recoverable. For these issues, proof of the financial resources of the underlying defendant is not admissible. If the jury renders a verdict against the attorney defendant, the defendant may move for a trial as to the collectibility of the judgment. This second proceeding determines how much of the judgment rendered by the jury would have been collectible, considering the financial ability of the underlying defendant to satisfy such judgment.17

Depending on the circumstances, a plaintiff or defendant may want to consider requesting that the court bifurcate the question of collectibility from the main legal malpractice proceeding. For instance, a defendant attorney may want to bifurcate when the plaintiff had a claim against “Mega-Corporation,” but the defendant attorney failed to file a lawsuit within the statute of limitations. In a subsequent legal malpractice claim, the plaintiff (in a jurisdiction in which it is the plaintiff’s burden to prove collectibility of a judgment) could present evidence that Mega-Corporation has a net worth of billions, which could prejudice the jury to award a higher amount of damages than would have been awarded in an underlying trial in which evidence of the financial condition of Mega-Corporation is inadmissible. Similarly, a malpractice plaintiff may want to request bifurcation if the likelihood of recovery of an underlying judgment is slight.

One note of caution: at least one court has rejected a party’s request to bifurcate the question of collectibility, citing state procedural law.19

The Date for Proving Collectibility
Proof of collectibility raises interesting evidentiary issues. For example, given that judgments may be collected over long periods of time, during what time period must a party prove or disprove collectibility? Most courts, primarily those that place the burden on the plaintiff to prove collectibility, seem to use the date of the trial of the malpractice action, to the extent that such courts even address this question.20 A few courts have answered this question by limiting the defendant attorney’s burden of proving noncollectibility to the period between the date of the legal malpractice and a “reasonable period of time after the date of trial, short of the initial . . . viability period of a judgment.”21

Indeed, one New York court held that an initial finding of noncollectibility is without prejudice to the plaintiff (in a jurisdiction in which the defendant bears the burden of showing noncollectibility) to present evidence that “subsequently becomes available concerning collectibility of the judgment before the expiration of its full life span.”22 Such a rule leaves a great deal of uncertainty to parties who likely seek finality.

Nonparty Discovery Battles
Whether the plaintiff or defendant in a legal malpractice case bears the burden of proving collectibility, an interesting discovery situation is created: information concerning the underlying defendants’ personal finances becomes relevant. The party with the burden of proving collectibility must present evidence of the underlying defendant’s income, investments, assets, ownership in real and personal property, expenses, debts, and/or insurance coverage in order to show that the underlying defendant had positive net income, net worth, or other means of satisfying a judgment.23

In In re Hecht, Solberg, Robinson, Goldberg & Bagley,24 a California court of appeals considered whether the trial court abused its discretion by ordering a nonparty law firm (which was the defendant in the underlying action) to produce financial records, liability insurance policies, and security filings with the secretary of state. After considering the relevancy of these records to the issue of collectibility and the nonparty’s arguments about its privacy rights, the appellate court concluded that the detailed financial information was relevant because collectibility is a fact-intensive inquiry that must be tried based on evidence, not hypothetical injury. The court also found that the nonparty law firm’s privacy rights did not outweigh the malpractice plaintiff’s right to financial discovery, especially with a protective order in place.

Where this information was not the subject of discovery in the underlying case, or even if it was but is inadmissible hearsay in the malpractice case, this issue involving a now
nonparty can become an expensive and contentious battle over privacy rights.\textsuperscript{35}

The trend on the question of who bears the burden of proving collectibility seems to be shifting to the minority view that noncollectibility is an affirmative defense. The analysis of the issues centers on fairness. The current majority finds greater unfairness in a windfall recovery for a malpractice plaintiff that is greater than the plaintiff’s actual loss. The current minority takes into consideration the unfairness of a windfall recovery by making noncollectibility an affirmative defense, but finds that the unfairness to a plaintiff that has been allegedly wronged twice (once by the underlying defendant and once by the malpractice attorney defendant) is paramount. \textsuperscript{1}

Jennifer Evans Morris and Dena DeNooyer Stroh are senior associates at Carrington, Coleman & Blumenthal, LLP, in Dallas, Texas, both experienced in defense of legal malpractice claims.

1. In analyzing collectibility, cases distinguish whether the legal malpractice plaintiff was the plaintiff or defendant in the underlying action. See, e.g., In re Hecht, Solberg, Robinson, Goldberg & Bagley, 40 Cal. Rptr. 3d 446, 453–54 (Cal. Ct. App. 2006); Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524, 525–26 (Iowa 1983).


4. Pickens, 328 N.W.2d at 526; Garretson, 121 Cal. Rptr. 2d at 323.

5. Lavigne, 50 P.3d at 310; see Vanasek v. Underkofler, 50 S.W.3d 1, 8 (Tex. App. 1999), aff’d in part and rev’d in part on other grounds, 53 S.W.3d 343 (Tex. 2001) (“The principle behind this rule is akin to the requirement that a breach of duty must be the cause in fact of damages to justify recovery.”); Garretson, 121 Cal. Rptr. 2d at 323 (“This is consistent with the fundamental principle of tort law that a plaintiff claiming negligence must prove causation.”).


7. McDow, 226 S.E.2d at 147; Lavigne, 50 P.3d at 310.

8. Jernigan, 500 N.E.2d at 807 (finding no evidence to warrant the conclusion that the attorney’s negligence made proof of collectibility impossible or more difficult). But see Beeck, 350 N.W.2d at 161 (rejecting the plaintiffs’ argument of the impossibility of proving collectibility based on modern discovery and the policy consideration that the plaintiff should not receive a windfall).


11. Lindenman, 7 A.D.2d at 35–36.

12. Carbone, 864 A.2d at 318; Kinuskie, 714 A.2d at 1031; Hoppe, 385 A.2d at 919.


14. Smith, 868 F. Supp. at 2. This is a variation on the theme that every plaintiff is entitled to his day in court.


17. See McDow v. Dixon, 226 S.E.2d 145, 148 (Ga. Ct. App. 1976) (“Generally, evidence of the parties’ worldly circumstances would be inadmissible, because of prejudice and lack of relevancy, in determining the issue of liability, i.e., whether or not the plaintiff had a valid claim for damages against the original alleged tortfeasor, and so, its value in money.”).


19. In re Hecht, Solberg, Robinson, Goldberg & Bagley, 40 Cal. Rptr. 3d 446, 458 (Cal. Ct. App. 2006) (finding that the court cannot create the right to bifurcate by judicial decision).


22. Lindenman, 7 A.D.2d at 36.

23. Garretson v. Miller, 121 Cal. Rptr. 2d 317, 324 (Cal. Ct. App. 2002); see Hecht, 40 Cal. Rptr. 3d at 454; Beeck v. Aquaside ‘N’ Dive Corp., 350 N.W.2d 149, 161 (Iowa 1984).

24. Hecht, 40 Cal. Rptr. 3d 446, at 455–61.

25. Id. at 459–61.
The Imputation Doctrine: An Ever-Changing Defense for Auditors

BY DANIEL KAUFMANN

In the wake of accounting scandals at high-profile institutions such as WorldCom, Enron, and HealthSouth, outside auditing firms have become targets in lawsuits brought by corporations or their shareholders. In these cases, the financial fraud is often perpetrated by a handful of corrupt insiders at the corporation. Given this scenario, accounting firms assert the in pari delicto defense to state law tort claims. The defense, which literally means “in equal fault,” is commonly applied to “prevent a deliberate wrongdoer from recovering from a co-conspirator or accomplice.” In determining whether the corporation is at equal fault with its auditors, courts often struggle with whether the corrupt acts of the inside officers should be imputed to the corporation.

Under the doctrine of imputation, notice acquired by an agent while transacting business for the corporation operates as notice to the corporation. There is a well-established exception to the imputation doctrine, however. Under this exception, if the corporation's agent acted adversely to the interests of the corporation, the agent's acts are not imputed to the corporation. This exception is appropriately known as the “adverse interest” exception.

Recent Decisions—Baena

Three recent decisions highlight the struggles courts face in determining whether to apply the imputation doctrine and the adverse interest exception. For instance, the First Circuit refused to apply the adverse interest exception in Baena v. KPMG LLP. In Baena, the trustee of a bankrupt publicly traded corporation's litigation trust brought an unfair trade practices action against the corporation's former auditor, KPMG. KPMG argued that the complaint was due to be dismissed because the claim was barred by the in pari delicto doctrine. In response, the trustee argued that the wrongdoing of the corporate officers should not be imputed to the corporation because it provided short-term profits of corporate “looting.” Furthermore, the court noted that the overstatement of earnings was not “adverse” to the interests of the corporation because it provided short-term profits for the corporation. Moreover, the First Circuit opined that nothing in Massachusetts's jurisprudence indicated that its courts “might take a narrow view of imputation in the context of in pari delicto.” Refusing to narrowly apply the imputation doctrine, the First Circuit held that the adverse interest exception was not applicable.

NCP Litigation Trust

In stark contrast to the First Circuit’s opinion in Baena, the New Jersey Supreme Court has recently narrowed the scope of the imputation doctrine in lawsuits brought by corporations or their shareholders against the corporation's auditors for alleged negligence in failing to detect fraud by the directors and officers of the corporation. The underlying facts in NCP Litigation Trust are consistent with the recent accounting fraud scandals highlighted in the news. Physician Computer Network (PCN), a publicly traded corporation, orchestrated a series of fraudulent transactions to inflate PCN's reported revenues and reduce reported expenses. KPMG, PCN's outside auditor, allegedly failed to detect the fraudulent transactions and issued unqualified audit opinions to PCN's board and stockholders. KPMG later detected the fraudulent transactions and withdrew its audit reports for the previous years. The revelation of the fraud forced PCN into bankruptcy. The NCP Litigation Trust (Trust) was established pursuant to the bankruptcy plan. The Trust ultimately sued KPMG, alleging that the audits committed negligence.

KPMG moved to dismiss, contending that the fraud of the officers of PCN, as agents of PCN, should be imputed to the Trust, as PCN's successor-in-interest, thereby barring the Trust's action against KPMG. The trial court granted the motion. The intermediate appellate court reversed and KPMG appealed. The issue framed by the New Jersey Supreme Court was “whether the imputation doctrine bars the Trust, representing shareholders of PCN, from bringing suit against the corporation's auditor for its alleged negligence in failing to detect the fraud of PCN's directors and officers.” KPMG argued that the imputation doctrine bars all claims against a corporate auditor unless the plaintiff alleges that the auditor was an active and knowing participant in the fraud.
The court rejected this “active and knowing participant” standard. Instead, it recognized the imputation doctrine “exists to protect innocent third parties from being sued by corporations whose agents have engaged in malfeasant behavior against those third parties.” The court opined that the matter before it did not present the typical circumstance for which the imputation was designed because PCN’s agents did not directly defraud an innocent third party. Since the officers of PCN defrauded the corporation and its creditors, the court found that KPMG was not a victim of the fraud in need of protection. Furthermore, the court acknowledged that KPMG “had an independent contractual obligation, at a level defined by its agreement with PCN, to detect the fraud, which it allegedly failed to do.” The court stated that allowing KPMG to escape liability for its allegedly negligent conduct would not promote the purpose of the imputation doctrine—to protect the innocent. Thus, the court held that “a claim for negligence may be brought on behalf of a corporation against the corporation’s allegedly negligent third-party auditors for damages proximately caused by that negligence.”

“"A claim for negligence may be brought on behalf of a corporation against the corporation’s allegedly negligent third-party auditors for damages proximately caused by that negligence.""

The court further held that the Trust could pursue the negligence action against KPMG. The court rejected a conclusion that the imputation defense should prohibit all shareholder lawsuits against auditors who were allegedly negligent within the scope of their engagement. Turning to the application of the adverse interest exception, the court found that inflating a corporation’s revenues and enabling a corporation to continue past the point of insolvency cannot be considered a benefit to the corporation. Even if this type of activity could be construed as a “benefit” to the corporation, the court recognized that such a benefit would not be a complete bar to liability because New Jersey is a comparative negligence jurisdiction. In reaching this holding, the court noted that KPMG’s liability must be defined by the scope of the engagement it entered into with PCN. Thus, it concluded that a “limited imputation defense” will properly compensate the victims of corporate fraud without indemnifying wrongdoers “when an auditor is negligent within the scope of its engagement . . .”

**Parmalat**

Consistent with the New Jersey Supreme Court’s decision in *NCP Litigation Trust*, a federal district court in the Southern District of New York has recently held that the imputation doctrine did not bar state law tort claims against two outside auditing firms. In the *Parmalat* case, the trustee for the bankrupt corporation pursued tort claims against Parmalat’s former outside auditors, Grant Thornton and Deloitte & Touche. The trustee alleged in the complaint that Parmalat’s insiders orchestrated a series of massive frauds to siphon off billions of dollars from the company into their own pockets. The trustee further alleged that Parmalat’s auditors were aware of and assisted with the looting cover-up from the beginning.

The auditors moved to dismiss the complaint under the doctrine of *in pari delicto*. They contended that the trustee’s claims were barred because the allegations in the complaint admit that Parmalat itself participated in the fraud. More specifically, the auditors alleged that the corrupt insiders were acting within the scope of their agency and, thus, their acts and knowledge are imputed to Parmalat. In response, the trustee stated that the allegations in the complaint establish that the corrupt insiders, working with Grant Thornton and Deloitte’s help and argued that the corrupt insider’s knowledge should not be imputed to Parmalat because the insiders were acting adversely to Parmalat’s interests.

The district court agreed with the trustee’s reading of the complaint. It opined that the complaint consistently avoided characterizing Parmalat as a participant and alleged that the corrupt insiders acted adversely to Parmalat’s interests and for their own benefit. The trial court concluded that the tenor of the complaint was that the corrupt insiders, working with Grant Thornton and Deloitte, looted and harmed Parmalat. Since the corporate insiders were working against the corporate interests, the trial court held that the doctrine of *in pari delicto* did not bar the trustee’s state law tort claims.

**Current Trends**

Auditors find themselves under persistent attack in state and federal courts in the wake of fraudulent accounting schemes at numerous publicly traded companies. In this environment, they discover that one of their defenses,
the in pari delicto doctrine, continues to be inconsistently applied in these forums due to the struggles arising from application of the imputation doctrine. Jurisdictions such as Massachusetts refuse to narrowly apply the imputation doctrine absent some allegation or evidence of corporate “looting” by the corrupt insiders. In contrast, comparative negligence jurisdictions such as New Jersey narrowly apply the doctrine by allowing negligence claims against auditors consistent with the duties defined by the scope of the engagement.

Given this dichotomy, auditors in contributory negligence jurisdictions would be wise to develop facts during discovery that emphasize the benefits the corporation received through the fraudulent action (i.e., rise in stock price, successful acquisitions). By establishing benefit, courts in these jurisdictions will likely bypass the adverse interest exception and fully apply the imputation doctrine. Similarly, auditors in comparative negligence jurisdictions would be well-served if they took this approach. While benefit to the corporation will not be a complete bar to liability, it will be a factor considered for the apportionment of damages.

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5. Id. at *6, *8.
6. Id. at *10–11.
7. Id. at *13.
8. Id. at *15–16 (citing Allard v. Arthur Andersen & Co., 924 F. Supp. 488, 495 (S.D.N.Y. 1996) (finding that, “notwithstanding the adverse interest exception,” “imputation would not necessarily operate as a complete bar to [trustees'] negligence and malpractice claims” in jurisdictions that apply comparative negligence)).
9. Id. at *18.
11. Id. at *3.
12. Id. at *7.
Should Experts Receive Witness Immunity?

BY JOHN P. MCCAHEY

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plaintiff in all of these cases alleged claims of negligence or malpractice against an expert it retained in an earlier litigation. The emerging majority view is that the policy considerations underlying the witness immunity doctrine are not served by immunizing a friendly expert from liability for his or her negligence or malpractice.

The Washington Supreme Court was one of the first courts faced with the issue of witness immunity for friendly experts. In a 5-4 decision, the court adopted the now minority view that friendly experts are entitled to witness immunity. The plaintiff in that case had retained the expert to testify at trial as to the cost of property repairs that plaintiffs were claiming as damages. Plaintiffs were awarded the amount calculated by their expert, but the actual repair work when done cost twice that calculation. Plaintiffs' subsequent action against the expert for negligence was found to be barred by witness immunity.

The court's plurality opinion concluded that witness immunity for experts was essential to ensure their objective testimony. It was immaterial in their view that the expert had been retained and compensated by plaintiffs because the underlying rationale of witness immunity extended to all witnesses, including friendly and adverse experts. Imposing civil liability upon expert witnesses was deemed "too blunt an instrument" to achieve more reliability or professional diligence in expert testimony, and instead may motivate experts to take extreme positions favorable to their clients to avoid a later lawsuit. Moreover, the potential of personal liability and the need for liability insurance may deter all but the expert who is a professional witness from accepting an engagement as an expert witness. The court thus concluded that denying immunity to experts would only serve to deprive the courts of the benefit of candid and unbiased expert testimony.

All appellate courts (as well as all but one trial court) following the Washington Supreme court decision have rejected both its reasoning and conclusion as to friendly experts. While not disputing that adverse experts may be entitled to witness immunity, these courts draw a distinction between friendly and adverse experts. They typically focus on the commercial relationship between a friendly expert and the plaintiff (i.e., the friendly expert’s client) and the friendly expert’s role as a compensated advocate. Friendly experts voluntarily undertake to provide professional services to their clients for a fee, and it is therefore inappropriate to shield them from civil liability for their failure to provide those services with the “care, skill and proficiency” expected of professionals.

The courts taking this majority view also conclude that immunizing friendly experts from civil liability for their negligence or malpractice will not enhance the judicial process, and therefore cannot be justified as a matter of public policy. To the contrary, the absence of immunity for friendly experts is viewed as benefiting the judicial process by both encouraging experts to exercise more care in that role and ridding the courts of incompetent experts. At least one court has pointed out that permitting a client to bring a malpractice action against its expert is analogous to a client bringing a malpractice action against its attorney.

Notwithstanding that they conclude that friendly experts are not entitled to witness immunity for their negligence, some courts suggest that friendly experts may be entitled to immunity from other claims. The Pennsylvania Supreme Court has stressed that it is imperative that an expert witness not be subject to litigation because the party who retained the expert is dissatisfied with the substance of the expert’s opinion. The court cited with approval to an earlier lower-court decision that extended witness immunity to dismiss a negligence claim against a friendly expert who changed her opinion at trial because she realized it was unsupportable. Distinguishing claims based on the “substance” of an expert’s opinion from those based on the expert’s “negligence” in formulating that opinion, however, may prove difficult for courts in the future.

Conclusion
Granting witness immunity to adverse experts is not only consistent with the rationale underlying the doctrine, but recognizes that such suits are typically

The Pennsylvania Supreme Court has stressed that it is imperative that an expert witness not be subject to litigation because the party who retained the expert is dissatisfied with the substance of the expert’s opinion.
retaliatory and frivolous in nature. Conversely, the majority view that the doctrine cannot be invoked to protect friendly experts from their negligence or malpractice appears sound. What remains to be clarified in the future are the circumstances, if any, when a friendly expert may be entitled to witness immunity.

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2. See Murphy v. A.A. Matthews, 841 S.W.2d 671, 674 (Mo. 1992) (en banc).
3. See Briscoe, 460 U.S. at 334–35.
4. See Marrogi v. Howard, 805 So. 2d 1118, 1126 (La. 2002); Bruce v. Byrne-Stevens & Assoc. Eng’rs., Inc., 776 P.2d 666, 670–71 (Wash. 1989); but see Murphy, 841 S.W.2d at 675–76 (noting that Missouri and some other states have not extended immunity beyond defamation claims unless doctrine’s underlying policies require extension).
9. See Murphy v. A.A. Matthews, 841 S.W.2d 671, 675 n.11 (Mo. 1992) (en banc).
10. See Wilson, 625 S.E.2d at 712 (citation omitted).
13. See Bruce, 776 P.2d at 666.
14. See id. at 667–73.
15. See Murphy v. A.A. Matthews, 841 S.W.2d 671, 681 (Mo. 1992) (en banc).
17. See Pollock, 781 A.2d at 525–27.
20. See LLMD of Mich., Inc. v. Jackson-Cross Co., 740 A.2d 186, 191 (Pa. 1996); see also Murphy, 841 S.W.2d at 680 n.7 (limiting denial of immunity to pretrial activities and not reaching the issue of whether immunity would extend to friendly expert’s trial testimony).
22. See LLMD of Mich., 740 A.2d at 192 (dissenting opinion).
Professional Liability Under the New Bankruptcy Code

BY LEE BARRETT

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) appears to have raised the professional standard for attorneys with various levels of involvement with bankruptcy cases. One of the least-noticed amendments requires creditor committees to provide access to information to certain creditors. Currently, only a handful of bankruptcy courts have addressed the information disclosure requirements. As bankruptcy litigation increasingly trends toward professional liability as a source of recovery, faced with pending amendments to the Federal Rules of Civil Procedure regarding electronic records and given the potential for inherent conflict and adverse obligations faced by committee counsel, committee counsel should not underestimate the potential liability still lurking in section 1102(b)(3) of the Bankruptcy Code.

New Requirements

The vast majority of attention from media and bar organizations seems to have focused on the increased burdens for the consumer debtor's bar. Some of the more prominent amendments address certain required disclosures to an “assisted person” and restrictions on the advice and counsel that an attorney may provide for purposes of prebankruptcy planning.

Burdening creditor committees with the task of providing information to noncommittee members does not appear to have captured the attention of more than a handful of commentators. On its face, the statutory addition appears fairly innocuous, which may explain in part why the issue has largely remained in the background. Section 1102(b)(3) reads, in pertinent part,

(3) A committee appointed under subsection (a) shall—
   (A) provide access to information for creditors who—
      (i) hold claims of the kind represented by the committee; and
      (ii) are not appointed to the committee . . .
   (C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).
Notably, the Bankruptcy Code does not define the term “information,” nor does it provide any guidance as to the scope of the phrase “access to information.” Further, it does not appear that the legislative history provides any guidance as to the new boundaries of the relationship between committee counsel and constituency creditors.

In theory, the statutory obligation of the committee to provide access to information relevant to the reorganization should serve as an aid to committees in satisfying their respective fiduciary obligations to constituency creditors. Creditor committees are given fairly broad authority to engage in investigations of the debtor and the debtor’s officers and management. More importantly, creditor committees play a pivotal role in the formation and negotiation of plans of reorganization. Within the representative capacity of the committee, committee members have the ability to solicit either the acceptance or the rejection of a proposed plan of reorganization.

Requiring committees to provide access to information to meet those ends would seem a natural extension of a committee’s obligations to constituency creditors. In the course of a committee’s undertaking its obligations under section 1103, it is not uncommon for committees to obtain, or be supplied with, confidential information about the debtor or the debtor’s operations. Disclosure of such information, whether to a competitor of the debtor or the public at large, could represent a serious threat to the debtor’s reorganization. Of concern to creditor committees formed since the effective enactment of the information access provision of section 1102(b)(3) is whether or not that provision requires committees to provide confidential, proprietary, or other material nonpublic information to constituency creditors.

**Refco**
The Refco bankruptcy provided one of the earliest attempts by a creditor’s committee to define the scope of its obligations under section 1102(b)(3) by obtaining bankruptcy court approval of the first step of a two-step disclosure process. The Refco committee sought an interim order clarifying its threshold obligations to constituency creditors, without risking the disclosure of confidential or proprietary information. In doing so, the committee was careful to specify that it was not yet seeking court approval as to the implementation of procedures to fulfill the statutory obligation imposed by section 1102(b)(3). Rather, the committee’s motion envisioned, as a second step, the establishment of a protocol for providing the requisite access to information throughout the life of the reorganization.

The Refco committee raised several areas of concern that, in the absence of additional refinement, indicate that the information-sharing requirement could simultaneously impair many of the fundamental duties of a committee and imperil the debtor’s chances of successfully reorganizing. Prior to the disclosure obligation found in section 1102(b)(3), confidential or sensitive information was provided to committees under the protection of confidentiality agreements, committee by-laws, and other similar arrangements. The propriety of such arrangements is not addressed by section 1102(b)(3), and the Code does not provide any guidance as to any affirmative obligation that committees may have to constituent creditors.

Debtors may be hesitant to disclose sensitive financial or strategic information not otherwise available to the public where there may exist an obligation by the committee to do so. A committee may be dissuaded from the investigation of potential litigation claims, or from developing its own analysis of estate assets, as a result of the uncertainty of access to such information by competitors, claims traders, and litigation targets. By establishing some central collection point to provide for the access and dissemination of public information in the early stages of a bankruptcy, a creditor committee is afforded some level of comfort that the seemingly competing obligations imposed by sections 1102(b) and 1103 can both be satisfied.

Information generated within the committee, or by committee professionals, also requires some level of protection from required disclosure to constituent creditors. Section 1102(b) is silent as to the disclosure of information that might be subject to attorney-client or work product privileges as between the committee and committee counsel.

Regarding those bankruptcies involving public companies, the Refco committee raised the specter of forced disclosure of “material nonpublic information” under the SEC’s Regulation Fair Disclosure (Regulation FD). Regulation FD prevents selective disclosure of such
information to certain persons without making the same information available to the public. Disclosures made under a confidentiality agreement can prevent the necessity of making a disclosure to the public at large. In the event a committee was required to selectively disclose such information, Regulation FD may require the committee to make such information readily available to the public despite any negative consequences to the administration of the estate.19

Creditor committees also must be wary of other interested parties seeking to shape the committee’s rights and obligations under section 1102(b)(3). The debtor in the Dana Corp. bankruptcy, shortly after initiating the reorganization proceedings, sought the court’s guidance regarding the flow of information to constituent creditors.20 The Dana committee sharply criticized the debtor for seeking overly broad relief that, if granted, would prohibit committee members from access to some information and would place draconian restrictions on discussions and deliberations on key matters with some of the members.21

Present Trends

For all of the relative similarity of the pleadings filed in search of clarity under section 1102(b)(3), relief afforded by bankruptcy courts seems to have varied greatly. The FLYi court provided that the committee was neither required nor authorized to disclose “confidential information,” and restricted the committee’s authority and duty to disclose “privileged information” as well.22 In terms of the scope and mechanism for complying with the requirements of section 1102(b)(3), the FLYi court also specifically referenced the committee’s “reasonable business judgment” in fulfillment of its additional statutory duty.

The Refco court provided a comprehensive structure manifested by the protocol (Information Order), which appears to have gone unchallenged since implemented in January 2006. The Information Order requires the committee to establish and maintain an Internet website including access to pleadings, dockets, upcoming events, monthly summaries of the case, general Chapter 11 information, and certain restricted access to certain information for legitimate constituent creditors.23 More importantly, the Information Order provides a mechanism for handling creditor requests for confidential information. Finally, the Information Order provides limited protection to the committee in regards to the preparation, dissemination, or implementation of the protocol as approved by the Information Order. The Information Order does not provide an escape from liability based on breach of fiduciary duty, gross negligence, willful misconduct, or the breach of any confidentiality agreement.24

The fledgling case law seems to have effectively placated practitioners’ concerns regarding committee obligations under section 1102(b)(3), at least in terms of access to confidential or substantive information by constituent creditors. Based on the wide-ranging approaches embodied in the few orders addressing access to information, committee counsel would be well-advised to obtain court guidance clarifying the steps necessary for compliance with section 1102(b). The experiences of the Dana committee indicate that the better practice for committee counsel is to seek such guidance sooner, rather than later, in order to avoid the encroachment of interested parties who may be adversely aligned against the committee or its individual members. To the extent that committees rely on the Internet and other digitally based technologies to comply with section 1102(b), committee counsel also must be aware of pending changes to the Federal Rules of Civil Procedure, especially as those amendments relate to ever-evolving views of discovery and privilege issues concerning digital records. Finally, committees also will have to remain cognizant that the protocol established in the Refco case may not be a “one-size-fits-all” solution, especially in regard to smaller reorganizations.

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2. To avoid confusion between those professionals or law firms that might be defined as “debt relief agency[ies]” pursuant to 11 U.S.C. § 101(12A) and those professionals referenced in this article who are less likely to fall under the moniker of “debt relief agency,” the terms “attorney,” “lawyer,” or “professional” shall be used interchangeably, and in place of, “debt relief agency.” See generally Hersch v. U.S., No. 3:05-CV-02330 (N.D. Tex. July 26, 2006) (finding that attorneys are debt relief agents under the plain meaning of BAPCPA).


6. As that term is defined by 11 U.S.C. § 101(3).


9. In addition, section 1102(b)(3)(B) requires the committee to solicit and receive comments from the creditors not serving on the committee. The Bankruptcy Code appears silent as to what affirmative duties or obligations a committee may have, if any, regarding what appropriate actions if comment is made.


13. See id. § 1103(c).

14. See 7 Collier on Bankruptcy ¶ 1103.05[1][d], at 1103–25 (King, 15th ed. Rev. 2006).

15. See 11 U.S.C. § 1103(c)(3); see also 7 Collier on Bankruptcy ¶ 1103.05[1][d][i], supra note 14, at 1103–26, citing In re Tex. Extrusion Corp, 844 F.2d 1142 (5th Cir. 1988), and Century Glove, Inc. v. First Am. Bank, 860 F.2d 94 (3d Cir. 1988).

16. See 7 Collier on Bankruptcy ¶ 1103.05[2][a], supra note 14, at 1103–30.


18. The motion is docket no. 133 on the Refco docket.


20. The motion is No. 331 on the Dana docket.

21. The Dana committee noted in its objection that committee counsel had been engaged in negotiations with the debtor’s counsel for the purpose of developing an information-sharing protocol to be implemented throughout the life of the reorganization. Certainly in larger and more complicated reorganizations, committee counsel should at least seek an interim order early in the case restricting access to confidential and privileged information.


23. The Refco committee maintains at least one website as a result of the Information Order. General case information is available at http://www.refcocommittee.com. The committee’s website contains links to several other websites that provide access to pleadings, hearing transcripts, and related matters.

24. Ironically, the committee’s website appears to make only limited references to the Information Order, or any obligations under section 1102(b)(3). Indeed, a link to a disclaimer notice appears at the bottom of each page of the website.
When Negligence Is Not Enough
(continued from page 1)

later decided to sue the automobile manufacturer, Honda, claiming that the car had a defective restraint system. But because the client no longer had the car at issue, he was unable to pursue that claim. Instead, the client sued his original lawyers for giving him bad advice. The client offered expert testimony from an attorney who had handled similar cases against Honda and who testified that there was “no doubt in his mind” that he could have recovered substantial damages on behalf of the client had the vehicle been preserved. Because the client could not prove the elements of the underlying products liability case (since he was no longer in possession of the car), the appellate court held that the trial court had correctly granted summary judgment in favor of the defendant attorney.7

In another Texas malpractice case, Alexander v. Turtur & Assocs., Inc., a client sued a law firm regarding its handling of a complex bankruptcy case. The client had hired the named partner Alexander personally, but Alexander had passed the case off to a new associate, who ultimately tried the case (to a bad result). The client claimed that causation was obvious, relying on evidence of numerous alleged mistakes made during the trial. The Texas Supreme Court disagreed, noting that “even when negligence is admitted, causation is not presumed.” Because the plaintiff had not offered any expert testimony on the probable outcome of the case in the absence of the alleged mistakes, the court found that the trial court correctly entered a take-nothing judgment.8 In a concurring opinion, Justice Hecht expressed doubt as to whether a jury could ever be fairly expected to determine what a judge would have decided in such hypothetical circumstances.9

In some circumstances, the result of the underlying case may be determined by essentially trying that case to a jury. In the North Carolina case of Kearns v. Horsley, for example, the plaintiff alleged that the defendant attorneys had negligently allowed the statute of limitations to run out on her personal injury claim. The trial court ordered a bifurcated proceeding, requiring that the plaintiff literally prove her case within a case by obtaining a jury finding that her original claim would have resulted in a judgment in her favor before she could proceed with her negligence case against the attorneys before a different jury. Because the first jury found no negligence on the part of the would-be defendant in the underlying case, the plaintiff was precluded from pursuing her claim against the attorney defendants.10

Courts and commentators have recognized the problems that can be created by requiring a malpractice plaintiff to try her underlying case.11 First, in a case like Alexander, it would be very difficult, if not impossible, to accurately re-create the original trial such that the effect of different trial strategies could be measured. Also, some have opined that it is unfair to require the client to litigate her case against her own lawyer, who has “superior knowledge about the strengths and weaknesses of the case, including knowledge obtained from the client’s own confidences.”12 In addition, it may be difficult to conduct adequate discovery into the merits of the underlying case, because the original defendant will not be a party to the malpractice action. Finally, it can be unfair to the defendant attorney that all of the optimistic statements and high damage estimates he made in the underlying lawsuit may now be used against him as admissions by a party-opponent.

Emerging Limits
Despite these concerns, many states do require legal malpractice plaintiffs to prove the merit of their case through the “suit-within-a-suit” procedure. But several courts have begun to place limits on the traditional requirements.

Many states do require legal malpractice plaintiffs to prove the merit of their case through the “suit within a suit” procedure. But several courts have begun to place limits on, or make exceptions to, the traditional requirements. Michigan courts, for example, limit the suit-within-a-suit requirement to cases in which (1) the attorney’s negligence resulted in an adverse judgment on an otherwise successful claim; (2) the attorney’s negligence prevents the client from bringing the action (i.e., where the statute of limitations has run); (3) the attorney’s failure to appear causes judgment to be entered against the client; or (4) the attorney’s negligence pre-
vents an appeal from being perfected. Michigan courts do not apply the suit-within-a-suit requirement when the client claims that, absent the attorney’s negligence, he would have suffered a smaller verdict than what was rendered. In limiting the applicability of the suit-within-a-suit requirement, Michigan courts reason that “requiring the plaintiff in all cases to show that he would have prevailed completely in the former action as a condition precedent to recovery in a subsequent malpractice action is a harsh requirement that would preclude otherwise meritorious claims.”

The New Jersey Supreme Court also has recognized the need for alternative approaches to proving causation and a “willingness to accept such alternatives when the situation demands.” Accordingly, New Jersey courts allow plaintiffs to prove causation through use of a “suit within a suit” or “any reasonable modification thereof,” or by presenting expert testimony regarding “what as a matter of reasonable probability would have transpired at the original trial” absent the malpractice. The proper approach for legal malpractice cases in New Jersey “will depend upon the facts, the legal theories, the impediments to one or more modes of trial, and, where two or more approaches are legitimate, to plaintiff’s preference.”

Ohio courts also recognize exceptions to the general rule that a plaintiff in a legal malpractice action must prove that, absent the attorney’s negligence, she would have been successful at trial. In a case where the plaintiffs’ claims stemmed from the failure of their attorneys to disclose legal consequences surrounding plea bargains and settlement agreements, the Ohio Supreme Court stated that “we cannot endorse a blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim.” Although the court made an exception because it found that plaintiffs had sustained damages despite their failure to show probable success in the original action, the court also noted that “the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case.”

As demonstrated by cases like the ones discussed above, the courts are continuing to struggle to find the fairest and most efficient way to establish causation in litigation malpractice cases. Given the complexity of the issues and the difficulties of proof involved, it is a debate that likely will continue for some time.
Lost Punitive Damages
(continued from page 1)

To date, appellate courts in at least five jurisdictions have grappled with the lost punitive damages issue. Additionally, several courts have addressed the closely related issue of liability for punitive damages imposed against the client due to lawyer negligence. This article surveys the fractured landscape.

The Case Against Lost Punitive Damages

The California Supreme Court eloquently articulated the case against lost punitive damages in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP.* The court began its discussion by noting that an attorney is liable only for the damages that are “proximately caused” by his or her negligence. Proximate cause differs from mere “cause in fact” or “but for” causation; it includes “additional limitations... related not only to the degree of connection between the conduct and the injury, but also with public policy.” The court enumerated five public policy considerations that weigh against allowing the recovery of lost punitive damages as compensation.

First, the *Ferguson* court observed that punitive damages are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional and malicious. Noting that the essential question in every punitive damages inquiry is whether the amount of punitive damages serves the societal interest, the court stated that “making a negligent attorney liable for lost punitive damages would not serve a societal interest, because the attorney did not commit and had no control over the intentional misconduct justifying the punitive damages award.” The court noted that imposing liability for lost punitive damages would neither punish the culpable tortfeasor nor deter the tortfeasor from committing the act in the future. Further, the amount of the award would bear no relation to the gravity of the attorney’s misconduct or his or her wealth.

Second, the *Ferguson* court reasoned that permitting recovery for lost punitive damages would violate the public policy against speculative damages, noting that “damages may not be based upon sheer speculation and surmise.” Whereas the measure of actual...
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damages involves a question of predictive fact, the measure of punitive damages does not involve a determination of fact at all, but only the jury’s “expression of its moral condemnation.” To award lost punitive damages, the jury in the malpractice case would have to decide what moral judgment a reasonable jury would have made in the underlying action. However, “because moral judgments are inherently subjective, a jury cannot objectively determine whether punitive damages should have been awarded or the proper amount of those damages with any legal certainty.”

Third, the Ferguson court reasoned that California’s different standards of proof for actual and punitive damages militate against the recovery of lost punitive damages as compensation. The court noted that if lost punitive damages were recoverable, a plaintiff would have to “prove by a preponderance of the evidence that but for the attorney negligence the jury would have found clear and convincing evidence of oppression, fraud or malice.” The “pragmatic difficulty” of understanding and complying with this standard provides additional support for barring recovery of lost punitive damages.

Fourth, the court observed that allowing recovery of lost punitive damages would hinder the ability of trial courts to manage and resolve mass tort actions by discouraging the use of mandatory, non-opt-out punitive damages classes. Exposing class counsel to liability for lost punitive damages would discourage counsel from using these mandatory classes because counsel would otherwise face “the specter of multiple legal malpractice lawsuits from disgruntled class members.” The court also predicted that allowing lost punitive damages would adversely impact the ability of courts to manage their caseloads by making it harder to settle cases involving punitive damages. The court theorized that attorneys, facing “potentially devastating liability” for negligently undervaluing punitive damages claims in settlement, would become more hesitant to settle and more intransigent in their settlement demands.

Finally, the court reasoned that allowing for the recovery of lost punitive damages would come at a significant social cost. The court speculated that allowing such damages would lead to the increase of malpractice insurance, cause insurers to exclude coverage for these damages, further discourage insurers from providing professional liability insurance in California, and increase the financial burden on practicing attorneys. At a minimum, the court noted, allowing lost punitive damages would cause attorneys to practice “defensive law.”

In addition to California, New York courts have steadfastly prohibited the recovery of lost punitive damages in legal malpractice cases. A 1900 case from the Supreme Court of Rhode Island appears to take the same position. The most recent convert to the Ferguson approach is Illinois, which, as discussed below, barred lost punitive damages in June 2006. The Ferguson court’s approach is also consistent with comment (h) to section 53 of the Restatement (Third) of the Law Governing Lawyers.

The Case in Favor of Lost Punitive Damages

Courts in other jurisdictions have disagreed with the conclusion in Ferguson. A prime example is the decision of the U.S. District Court for the District of Columbia in Jacobsen v. Oliver. In deciding to allow recovery for lost punitive damages, the Jacobsen court began its discussion by focusing on the purpose of compensatory damages, which is “to give the client what she lost because of the lawyer’s negligence.” The court speculated that if attorneys appreciate the risk of liability for lost punitive damages, they will be motivated to exercise reasonable care in investigating punitive damages claims.

The Jacobsen court speculated that if attorneys appreciate the risk of liability for lost punitive damages, they will be motivated to exercise reasonable care in investigating punitive damages claims.
In addition to the District of Columbia, Arizona has expressly allowed for recovery of lost punitive damages. Additionally, a 1904 Texas case allowed recovery of lost punitive damages, albeit without policy analysis.

Recent Development—Illinois Switches Sides

Until recently, Illinois was one of the leading jurisdictions allowing lost punitive damages recovery. The decision of the Illinois Court of Appeals in Tri-G, Inc. v. Burke, Bosselman & Weaver contained a thorough analysis of the competing policy issues, and ultimately rejected the California approach in favor of the paramount goal of compensation. In June 2006, however, a divided Illinois Supreme Court rejected the court of appeals’ conclusion. After a detailed review of the various lost punitive damages decisions, the Illinois Supreme Court noted that the issue is one “on which reasonable minds can certainly disagree” and that “sound arguments can be made for both sides of the issue.” Nevertheless, finding that the “approach taken by the courts of California and New York . . . represents the sounder view,” the court held that “[l]ost punitive damages are not recoverable in a subsequent action for legal malpractice.”

Practical Ramifications

There does not yet appear to be a definitive trend in the treatment of lost or imposed punitive damages. (The recent decision of the Illinois Supreme Court in Tri-G, Inc. v. Burke, Bosselman, & Weaver, however, may indicate that the California/New York approach is gaining steam.) As more states weigh in, the split of authorities may result in a checkerboard of “pro” and “con” states. The split may affect the decision of where to bring some legal malpractice suits, at least when multiple forums are available. Indeed, we may even see a claim brought against a legal malpractice plaintiff’s counsel for filing a legal malpractice suit in a jurisdiction that does not allow recovery for lost punitive damages, when suit could have been filed in a jurisdiction that does. When that happens, the combination of causation, conflict of laws, and public policy issues will make for some interesting briefing.


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1. 69 P.3d 965 (Cal. 2003).
2. Cappetta v. Lippman, 913 F. Supp. 302 (S.D.N.Y. 1996) (holding that no “derivative punitive damages” should be awarded in a legal malpractice case); Summerville v. Lipsig, 704 N.Y.S.2d 598 (App. Div. 2000) (holding that it would be “illogical to hold the law firm liable for causing the loss of a claim for punitive damages which are meant to punish the wrongdoer and deter future similar conduct”).
3. Forrow v. Arnold, 47 A.693 (R.I. 1900) (holding that “such an allowance [of the underlying punitive damages] was clearly erroneous”).
5. Comment (h) reads, in relevant part: “Collecting punitive damages from the lawyer will neither punish nor deter the original tortfeasor and calls for a speculative reconstruction of a hypothetical jury’s reaction.”
7. Elliott v. Videan, 791 P.2d 639 (Ariz. Ct. App. 1989) (holding that “if an attorney's negligence is the cause of dismissal of the underlying claim, the proper measure of damages is all compensatory and punitive damages awarded by the jury in the trial of the case within a case”).

8. Patterson & Wallace v. Frazer, 79 S.W.1077 (Tex. Civ. App. San Antonio 1904, no writ) (noting that “the fact that part of [a] judgment which might reasonably have been expected to be recovered and collected might have been for exemplary damages would make no difference”).


12. An analogous issue is the majority rule requiring clients convicted of criminal conduct to establish exonerations or innocence before bringing a malpractice case against defense counsel. Even though the client may prove a “but for” relationship between the lawyer's negligence and the conviction, public policy prohibits a convicted criminal from profiting from his own wrongdoing. See, e.g., Belk v. Cheshire, 583 S.E.2d 700 (N.C. Ct. App. 2003).

13. Compare Haberer v. Rice, 511 N.W.2d 279 (S.D. 1994) (holding that “the punitive damages . . . awarded in the underlying claim are part and parcel of the damages [plaintiff] suffered as a result of [the attorney's] negligence”); Scognamillo v. Olsen, 795 P.2d 1357 (Colo. Ct. App. 1990) (holding that “the punitive damages assessed in the underlying case are part and parcel of the damages plaintiffs suffered as a result of defendants' alleged negligence”); Hunt v. Dresie, 740 P.2d 1046 (Kan. 1987) (holding that “a jury . . . should be free to consider the entire judgment as being [plaintiff's] damages”); with Paul v. Smith, Gambrell & Russell, 599 S.E.2d 206 (Ga. Ct. App. 2004) (holding that “to allow the plaintiffs to shift their tort liability for punitive damages that the plaintiffs were specifically found to have caused intentionally would be contrary to the public policy of Georgia”); Picadilly, Inc. v. Raikos, 555 N.E.2d 167 (Ind. Ct. App. 1990) (holding that “the causal connection between [the attorneys'] conduct and the amount of punitive damages is even more tenuous”), aff'd on other grounds, 582 N.E.2d 338 (Ind. 1991).

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