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COMMENTARY

'Settle and sue' defense strategies

By JESSE L. ROTH

Buyer's remorse is not a cause of action. Yet that is what many plaintiffs appear to plead when they sue their former attorneys for malpractice after agreeing to settle the underlying case. There are factual distinctions in these so-called "settle and sue" legal malpractice cases, however, that make the difference between whether a plaintiff can establish a claim or not. A recent Pennsylvania appellate decision provides one of the more common analytical frameworks for addressing this issue.

Kilmer v Sposito, 146 A3d 1275 (Pa App 2016), was a legal malpractice action arising out of the defendant's representation of the plaintiff in connection with settling the plaintiff's husband's estate. The defendant allegedly gave bad advice that caused the plaintiff's share of her husband's estate to be substantially reduced. The plaintiff thereafter replaced the defendant with a new attorney, who reached a settlement with the husband's estate. The court in the malpractice case was asked to decide whether the plaintiff's underlying settlement barred her claim against her former attorney. The court distinguished a situation where a dissatisfied plaintiff challenges an attorney's judgment with respect to the amount of money to be accepted in a settlement, which malpractice claim would be barred. In this case, however, where the plaintiff's settlement amount was diminished because of alleged malpractice already committed by the defendant, the settlement did not bar the malpractice claim.

In Michigan, the law is more defendant-friendly. The leading case, *Espinoza v Thomas*, 189 Mich App 110 (1991), was a legal malpractice claim brought by a General Motors employee whose car had been attacked by striking co-workers, as a result of which he suffered a severe aggravation of a pre-existing mental condition. The attorney defendants had let the statute of limitations expire on the plaintiff's assault and battery claim, and consequently the plaintiff was only able to pursue a claim for intentional infliction of emotional distress. The underlying case ultimately settled at mediation for \$16,000, including just \$500 each from the only defendants who actively participated in the attack. The nominal award reflected the panel's belief that the plaintiff's only viable cause of action was the time-barred assault and battery claim.

The plaintiff argued that the attorney defendants' prior negligence caused him to lose his only viable cause of action, which left him with no choice but to accept the reduced settlement amount or proceed to trial without a viable claim. The court held that a settlement of the underlying litigation does not always preclude a subsequent legal malpractice action. Rather, the court found an exception exists "if it is shown that assent by the client to the settlement was compelled because prior misfeasance or nonfeasance by the attorneys left no other recourse." The court distinguished



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a situation where a plaintiff's claims remain viable and he nevertheless elects to settle. In such a case, the court found, the plaintiff would be precluded from establishing a claim against his attorney.

Maddin Hauser recently represented attorneys in a complex malpractice action that ultimately turned out to be a "settle and sue" case. The plaintiff had sued his one-time business partner in civil litigation. After that case had resolved, the plaintiff approached our clients about instituting new litigation arising out of harassment by the business partner. Our clients initially declined to represent the plaintiff, then reconsidered and agreed to investigate the claims, and eventually declined to pursue them.

During the two months our clients represented the plaintiff, the statute of limitations expired on one of the harassment claims against the business partner, and the plaintiff sued for legal malpractice. We argued that the plaintiff had other claims against the business partner that remained timely, the prosecution of which could fully satisfy his damages. The court agreed, and held the case against our clients in abeyance while the plaintiff prosecuted his claims against the business partner. Ultimately, the plaintiff settled his claims against the business partner, at which time we moved to dismiss the malpractice claims against our clients on the basis of the underlying settlement. The trial court granted our motion and dismissed the case, finding that the plaintiff could not establish that any negligence of our clients caused him damages where he freely agreed to settle his viable underlying claims against the business partner.

There will always be plaintiffs who have buyer's remorse after agreeing to settle a case. One way to defend these so-called "settle and sue" cases in Michigan is to frame the plaintiff's underlying claims as still-viable at the time of the settlement, and the plaintiff's agreement to settle as knowing and freely given. If the facts support this, the plaintiff will be hard-pressed to establish a legal malpractice case.

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