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2019 SURVEY OF LAW

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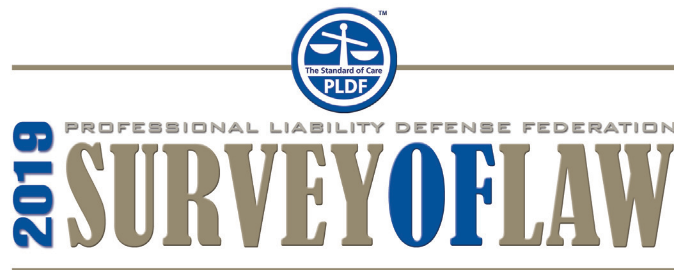

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Editor's Message

Thank you to the committee chairs, editors, and authors who worked hard on our first attempt at a publication of this kind. For our first attempt at this publication, it is a good effort, but we are working to build it into much more.

The law develops in waves and what starts as a single ripple often becomes a tsunami. The goal of the publication is to be able to look back over a year of case law in a particular area can give practitioners and insurance professionals alike the perspective needed to identify, understand, and prepare for trends in the law. We are working to include cases from across the country and across the areas in which our members practice; from legal malpractice and medical malpractice defense to the defense of design professionals and employment litigation and counseling. We are going to publish some of the summaries that did not get significant submission in the *PLD Quarterly*, and look forward to everyone's participation next year.

Be on the lookout through the rest of the year for significant decisions in the state and federal courts in which you practice and in the areas of your practice. We look forward to all of our members contributing to next year's publication.

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ARIZONA

Fiduciary Duties Now Apply to Members of LLCs in Arizona

G. Patrick HagEstad | *HagEstad Law Group, PLLC*

In *In re Sky Harbor Hotel Properties, LLC*, the Supreme Court of Arizona answered three certified questions from the United States Bankruptcy Court for the State of Arizona related to the fiduciary status of LLC members and managers. The issues presented were:

1. Whether a manager of an Arizona limited liability company ("LLC") owe common law fiduciary duties to the company;
2. Whether a member of an Arizona LLC owe common law fiduciary duties to the company; and
3. Whether an Arizona LLC's operating agreement can lawfully limit or eliminate those fiduciary duties;

The Court's analysis began by addressing whether "members", or owners, were agents of the LLC. The Court defined agency as the "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Further, the Court applied traditional agency principals, taking into consideration that agents have the power to alter the legal relation between the principal and third persons and between the principal and themselves. Based on those traditional principals, the Court held that members are agents of an LLC "for the purpose of carrying on its business in the usual way" LLC Act. The Court recognized that the Statute expressly provides a guide for determining who owes a fiduciary duty to the LLC, where the LLC Act provides for the management of the affairs of a manager, rather than the members. In such circumstances, it is the manager, not the members, who owe fiduciary duties to the LLC.

Finally, the Court addressed whether the common law fiduciary implied in the LLC Act could be limited through an Operating Agreement. The Court reasoned that the LLC Act provides for an operating agreement to govern relationships between members and managers and between managers, members, and the LLC itself. In doing so, the Court recognized that an Operating Agreement may contain any provision "not contrary to law and that relates to ... the rights, duties or powers of its members, managers, officers, employees or agents." The Court also recognized that the LLC Act, nor any other applicable law, broadly prohibits an operating agreement from altering or limiting fiduciary duties that otherwise would be owed to the LLC. Based on the silence in the law, the Court held that all common law duties, except for the covenant of good faith and fair dealing, could be limited by an Operating Agreement. In doing so, the Arizona Supreme Court re-affirmed the strong public policy arguments behind the Covenant of Good Faith and Fair Dealing.

In re Sky Harbor Hotel Properties, LLC, 443 P.3d 21 (2019).

CALIFORNIA

Actual Injury in an Accountant Malpractice Action Occurs When a Taxpayer Reaches a Settlement with the Taxing Authority

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In California the statute of limitations for accounting malpractice is viewed different from other professions. In *Moss vs. Duncan* the California appellate court specifically distinguished the "bright-line" rule in accounting malpractice from the analyses utilized by the courts in legal malpractice, as well as financial advisor malpractice cases.

Plaintiff, Glenn Moss, sued his accountant in August of 2015 for negligence and unfair business practices. Duncan had been a long-time accountant for Moss and his car dealerships. In 2005-2006 Duncan advised Moss in negotiations of four new dealerships. When Moss obtained a loan to complete the purchases through his newly created corporation, Duncan advised Moss to account for the loan as an individual and designated the loan payments made by the corporation as management fees instead of loan repayments on their tax returns. In May of 2010 the Franchise Tax Board ("FTB") notified Moss that it was auditing the 2006 tax returns in connection with the loan. Duncan's posi-

tion was rejected and the FTB advised Moss that it considered the transaction to be a taxable distribution from the corporation to the individual and as such Moss owed more than $1.0 million in taxes. After several years of dispute, Moss settled the FTB's claim on May 19, 2015 with the assistance of new accountants.

Moss then filed a complaint against Duncan on August 28, 2015 for negligence and unfair business practices. On a dispositive motion brought by Duncan, the trial court determined that the action was barred because it was based on the negligent tax advice given in 2006, the error was discovered in 2010 or 2011 at the latest, and the action was therefore not brought within the two-year statute of limitations. Moss appealed this decision, contending that the statute did not commence until 2015 when he settled the claim with the FTB and incurred damages.

The Court of Appeal first addressed the fact that each of the causes of action against Duncan, considered separately, carried different statutes of limitations. However, because both were based on Duncan's alleged negligence, in his professional capacity, the two-year statute applied to both causes of action. Next, the Court drew from the 1995 California Supreme Court decision in *International Engine Parts, Inc. vs. Fedderson & Co.* (1995) 9 Cal.4th 606, which held that in a negligence action brought against an accountant, actual injury does not occur until there is a deficiency assessment because it serves as finalization of the audit process and therefore only at that time caused harm to the taxpayer. The Court highlighted the discussion in *Fedderson* about the term "actual injury": "[A]ctual injury' represents a legal term of art which recognizes that an inchoate or potential injury cannot give rise to a professional malpractice action until there has been an actual determination that the accountant›s alleged negligence is related to the deficiency assessment. Once the audit process is finalized, however, the harm caused by the accountant›s negligence is no longer contingent and the taxpayer's cause of action in tort for alleged malpractice against the accountant accrues…" *Feddersen*, at pp. 619–620, 888 P.2d 1279. Based on this analysis, under the facts presented, even though the advice rendered occurred ten (10) years before the complaint was filed, it was deemed timely as there were no actual damages until the FTB and taxpayer reached a settlement.

Moss vs. Duncan (2019) 36 Cal.App.5th 569; 248 Cal.Rptr.3d 689.

ILLINOIS

Engagement Letter Limits Scope to Not Include Unintended Beneficiaries of an Accountants' Work

Donald Patrick Eckler | *Pretzel & Stouffer, Chartered*

The Illinois Appellate Court, First District in *Atlas v. Mayer Hoffman McCann, P.C.* issued an opinion dealing with the scope of the duty owed by accountants under Section 450/30.1 of the Illinois Public Accounting Act. The accountants were engaged by Salta to perform an audit. The plaintiffs, which did not include Salta, as it was in bankruptcy, were comprised of the owners of related companies and the owners personally. The plaintiffs alleged that the accountants failed to detect embezzlement by the co-defendant, Berger, causing the plaintiffs injury.

The defendant accountants moved to dismiss the plaintiffs' complaint based upon Section 450/30.1, the privity section of the Illinois Public Accounting Act. The Court held that accountants and their accounting firms did not owe a duty where they did not have an expectation that their work would be relied upon by the plaintiffs who had not engaged them. The accountants' engagement letter limited their duties to the entity for whom the work was being done, Salta, and since Salta was not among those that sued them the case was properly dismissed. This case illustrates the importance of engagement letters that specify to whom duties are owed.

Atlas v. Mayer Hoffman McCann, P.C., 2019 IL App (1st) 180939.

Relation Back Doctrine Saves Estate's Claims Against Accountants

Donald Patrick Eckler | *Pretzel & Stouffer, Chartered*

Plaintiffs often attempt to use the relation back doctrine to overcome the statute of limitations. In Illinois the relation back doctrine is governed by 735 ILCS 5/2-616. In *Shannon v. Desmond & Ahern*, the Illinois Appellate Court, First District, in an unpublished decision, reversed the grant of summary judgment in favor of the defendant accountants based upon breach of the statute of limitations and held that an estate's claims

— Continued on next page

were timely filed against the accountants within two years of the alleged negligence because the beneficiaries of the estate had filed substantially similar claims within the required period.

At the behest of the independent executor of the estate, in 2009 the defendant accountants prepared the 2008 estate tax returns and despite comments from counsel for the beneficiaries with 29 alleged deficiencies in the returns, the executor filed the returns unmodified. In 2011, the beneficiaries filed a lawsuit against the defendant accountants, and in 2012, the estate was joined as a plaintiff. After a voluntary dismissal of the claims against the accountants in 2013, the estate timely refiled its lawsuit against the accountants in 2014. The Court found that the 2011 claims filed by the beneficiaries were sufficiently related to the claims in the pending 2014 lawsuit filed by the estate and thus related back to the timely filed claims.

Shannon v. Desmond & Ahern, 2019 IL App (1st) 181593-U.

MASSACHUSETTS

In Pari Delicto Doctrine Repealed by Statute for Accountants Who Negligently Fail to Detect Fraud

Erin K. Higgins | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *Chelsea Housing Authority v. McLaughlin*, The Chelsea Housing Authority ("CHA") sued its former executive director as well as its former accountants over a fraud perpetrated by the executive director, which had increased the director's salary above regulatory limits. The accountants moved for summary judgment based on the holding of *Merrimack College v. KPMG LLP*, 108 N.E.3d 430 (Mass. 2018), asserting that the doctrine of *in pari delicto* applied to bar CHA from recovering because the fraud was perpetrated by CHA's senior management.

In pari delicto is an equitable, common law doctrine that bars a plaintiff who has participated in wrongdoing from recovering for losses caused by the wrongdoing. In *Merrimack College*, the Supreme Judicial Court held that, in applying the doctrine, only misconduct by senior management may be imputed to an entity to bar it from recovering. The court explained that the rules of imputation are generally intended for the allocation of risk, rather than blame. As such, the court held that a principal acting through an agent could only be barred from recovery under the *in pari delicto* doctrine where the principal was "morally blameworthy."

Heeding the *Merrimack College* decision, the Superior Court granted summary judgment for the accountants in *McLaughlin*. The Supreme Judicial Court vacated and remanded on direct appellate review, however, holding that the doctrine of *in pari delicto* was superseded by statute with regard to accountants.

Under Massachusetts General Laws chapter 112, section 87A 3/4, accountants are liable for negligence in proportion to their fault in cases where the loss is partially the result of another party's fraud. The statute was enacted in 2001, but was not raised by the parties in *Merrimack College*, possibly because most or all of the conduct in that case occurred before the statute's enactment. In *McLaughlin*, the Supreme Judicial Court held that by passing section 87A 3/4, the legislature had repealed the *in pari delicto* doctrine for cases where accountants negligently fail to detect fraudulent conduct, even though the legislature made no specific mention of the doctrine and perhaps had been unaware of it.

Chelsea Hous. Auth. v. McLaughlin, 125 N.E.3d 711 (Mass. 2019).

MONTANA

Montana Courts Recognize a Mortgagee's Contractual Rights Under a Deed of Trust to Pay Delinquent Property Taxes Owed on Mortgaged Property to Protect Their Rights in the Property

G. Patrick HagEstad | *HagEstad Law Group, PLLC*

In *Graham-Rogers v. Wells Fargo Bank, N.A.*¸ Graham-Rogers jointly owned Lot 3 with several family members who failed to pay their 2009 and 2010 property taxes. These lots were subject to mortgages, including a mortgage owned by Wells Fargo Bank.

At some point, Graham-Rogers received a real estate tax bill from Gallatin County which stated, "WARNING! This property

is the subject of a TAX LIEN SALE per MCA 15-17-212. Please pay TOTAL DELINQUENT TAXES DUE immediately."

In February 2011, Wells Fargo became aware of the tax delinquency and pending tax lien sale. This prompted Wells Fargo to advance $3,387.76 to pay the delinquent taxes. Wells Fargo paid the delinquent taxes directly, rather than out of the escrow account, because there were insufficient funds in Graham-Rogers› escrow account to pay the full amount of taxes due. Wells Fargo notified Graham-Rogers of its full tax payment, the resulting escrow shortage, and the resulting change in her monthly mortgage payment to make up the shortage in her escrow account. Graham-Rogers objected to Wells Fargo's tax payment, and refused to pay the increase in her mortgage.

Thereafter, Graham-Rogers brought suit in Montana District Court against Wells Fargo for Breach of the Deed of Trust, Negligence, Negligent Misrepresentation, violations of the Montana Consumer Protection Act, and Punitive Damages.

The District Court granted summary judgment in favor of Wells Fargo on all of Graham-Rogers› contract and tort claims, on the grounds that the Deed of Trust contained unambiguous language that permitted Wells Fargo to pay Lot 3›s taxes in full, that paying the taxes was necessary to protect Wells Fargo's interest in Graham-Rogers› property, and thus, no breach of contract occurred. The District Court further granted summary judgment on Graham-Rogers' tort claims on the premise that the claims stemmed from the breach of contract claim. In granting summary judgment, the District Court found that since no breach of the Deed of Trust had occurred, the tort claims had no basis in law.

The Montana Supreme Court held that the District Court correctly granted Summary Judgment in favor of Wells Fargo on Graham-Rogers' Contract claims based on the fact that the Deed of Trust contained a provision which entitled Wells Fargo to do *and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes*.

The Court also affirmed the District Court's granting of Wells Fargo's summary judgment as Graham-Rogers' Negligence, Negligent Misrepresentation, and violations of the Montana Consumer Protection Act on the grounds that, because Wells Fargo had not breached the Deed of Trust, Wells Fargo had not breached any duty to Graham-Rogers under the Deed of Trust.

Graham-Rogers v. Wells Fargo Bank, N.A., 449 P.3d 798.

SUPREME COURT OF THE UNITED STATES

Primary Liability after *Lorenzo*: Can Passing-On the Statements of Another Expose you to Liability for Violations of the Federal Securities Laws?

Gary S. Kessler | *Kessler Collins PC*
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On March 27, 2019, the U.S. Supreme Court issued a 6-2 decision in *Lorenzo v. SEC*, holding that a person who did not "make" a false statement may nonetheless be held primarily liable under Section 10(b) of the Securities Exchange Act of 1934 (and Rule 10b-5 promulgated thereunder) for knowingly passing-on misstatement(s) made by someone else. While issued from an SEC enforcement action, the *Lorenzo* opinion has the potential to change the landscape of private securities litigation. Indeed, it may even permit private litigants to assert claims for "primary" violations of Rule 10b-5 that would have otherwise been viewed as impermissible attempts to impose "secondary" liability—a practice prohibited by the U.S. Supreme Court in *Central Bank of Denver, N. A. v. First Interstate Bank of Denver*.

The three sub-parts of SEC Rule 10b-5 prohibit a party from employing fraudulent schemes, statements, or practices in connection with the purchase or sale of a security. More specifically, Rule 10b-5: (a) prohibits the use of "any device, scheme, or artifice to defraud"; (b) prohibits a party from "making" an untrue statement of material fact; and (c) prohibits the use of "any act, practice, or course of business" that "operates . . . as a fraud or deceit." *See* 17 C.F.R. § 240.10b-5.

The U.S. Supreme Court established the scope of primary lability under Rule 10b-5(b) in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). There, the Court limited liability for a misrepresentation to its "Maker"—the "person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." While this holding provided invaluable guidance to litigants seeking to apply Rule 10b-5(b), it left lingering questions regarding the proper application of Rules 10b-5(a) and (c). For example, could a party be held *primarily* liable for passing-on a misleading email that was written by his supervisor?

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In *Lorenzo v. SEC*, 587 US ____ (2019), the U.S. Supreme Court answered this question with a resounding "yes." There, Mr. Lorenzo—a vice president at an investment banking firm—did not "make" misleading statements as contemplated by the Court in *Janus*. Instead, he knowingly circulated emails that contained misleading information written by his supervisor. Thus, Mr. Lorenzo could not be held primarily liable for violations of Rule 10b-5(b).

In the 6-2 opinion authored by Justice Breyer, however, the U.S. Supreme Court held that Mr. Lorenzo could be held primarily liable for employing a scheme or practice intended to defraud potential investors. In so holding, the Court noted that the use of broad terms in Rules 10b-5(a) and (c) was indicative the drafters' intent that the Rules "capture a wide range of conduct." Thus, "[t]hose who disseminate false statements with intent to defraud are primarily liable under Rules 10b–5(a) and (c)[,] *even if they are [only] secondarily liable under Rule10b–5(b)*."

While issued from an SEC enforcement action, the ramifications of the *Lorenzo* opinion may be greater-felt in private securities litigation. Indeed, the Supreme Court's edict that Rules 10b–5(a) and (c) be broadly applied—even against non-"makers"—may provide opportunistic litigants an avenue to assert claims against ancillary actors that would have otherwise been relegated to a "secondary" role under *Janus*. The importance of this distinction is magnified in civil litigation by the U.S. Supreme Court's opinion in *Central Bank of Denver, N. A.*, 511 U.S. 164 (1994)—which noted that there is no private right of action for secondary liability under Rule 10b-5.

About the Authors

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ALABAMA and 11th CIRCUIT

Lawyers Professional Liability; First Amendment

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A jury convicted the Plaintiff of kidnapping and rape in Savannah Georgia in 1986. Plaintiff was sentenced to 15 years in prison and served 7 years until a DNA test revealed that his semen did not match the DNA recovered. The Defendant Lawton was the district attorney for Chatham County who ordered the state lab to conduct additional testing. When lawmakers introduced a bill to compensate the former prisoner $1.6 million, the district attorney sent a letter opposing such compensation. Those lawmakers then blocked the bill specifically due to the district attorney's correspondence.

The former prisoner sued the district attorney for First Amendment retaliation for prisoner's seeking legislative compensation for his wrongful convictions and stated a claim for retaliation for exercise of First Amendment rights. As the Court explained, "[i]f a district attorney defamed a former prisoner for seeking legislative compensation for his wrongful convictions and derailed that legislative effort, a person of ordinary firmness would likely be deterred from speaking again on that matter lest the prosecutor continue to tarnish his reputation or, worse, initiate a wrongful prosecution. So Echols's complaint states a claim of retaliation under the First Amendment." However, because that right was not clearly established at the time of the conduct, district attorney enjoyed qualified immunity for any claims for damages because "our sister circuits are divided over whether an official's defamatory speech is actionable as retaliation under the First Amendment[,]" and there was no case on point within the Circuit.

Echols v. Lawton, 913 F. 3d 1313 (11th Cir. 2019).

Lawyers Professional Liability; Advice of Counsel; Privilege

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Insureds, who were former insurance agents, brought action against errors-and-omissions insurer, who was within the same family of insurance companies for which insureds had been agents, for breach of contract, bad faith, abuse of process, tort of outrage, and conspiracy regarding insurer's refusal to provide a defense and/or indemnity coverage regarding counterclaims that family of insurance companies had asserted against them in their arbitration proceedings for post-separation benefits and damages. The agents were accused of selling competing products in contravention of their agency agreements, but they believed these actions had been approved by the insurance company. Both agents were then forced to resign from their positions.

Because Alfa had not interposed advice of counsel as a defense to former agents' bad-faith claim and had not injected advice of counsel in the case in any form, communications between Alfa and its counsel regarding coverage for former agents under E&O policies at issue were privileged and not discoverable. Although the communications between attorney and client are privileged, materials provided to the attorney which are otherwise discoverable are not privileged simply because they are provided to the attorney. Thus, the trial court exceeded its discretion when it disregarded the attorney-client privilege and entered a May 2018 order denying Alfa's motion for a protective order and compelling Alfa to produce the materials sought for in camera inspection or for discovery.

Ex parte Alfa Insurance Corporation, 284 So. 3d 891 (Ala. 2019).

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Lawyers Professional Liability; Discovery; Insurance

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Employee was injured while working at a facility owned by the Defendant. The employer at the time of the accident had a contract with Defendant to install a vacuum system at the facility. The Plaintiff filed a personal injury action against the Defendant and several others. The Defendant demanded that other defendants provide them with a defense and indemnity for the personal injury action.

In a declaratory judgment action, other the other defendants issued deposition notices seeking to depose representative of the Defendant and their insurers. The Defendant and their insurers objected asserting that the subpoenas called for production of information protected by the attorney-client privilege and the work-product doctrine.

In action by Dow against Alabama Electric for reimbursement of defense and indemnity costs relating to an underlying lawsuit, Dow did not waive attorney-client privilege regarding case evaluations concerning the underlying case. That determination of whether Dow acted reasonably and in good faith in settling underlying action (necessary for the indemnity claim) is objective in nature, and thus trial court erred in ordering production of case evaluation materials.

Ex parte Dow Corning Alabama, Inc., No. 1171118 (Ala. 2019).

Lawyers Professional Liability; Attorneys' Fees; Liens

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Three siblings contested the validity of their uncle's will and hired two lawyers from the Montgomery, Alabama based law firm, Capell & Howard P.C. The case eventually settled and the siblings received $170,000 from their uncle's estate. Then, the two lawyers who provided services to the siblings filed a "Motion to Schedule a Hearing to Determine a Reasonable Attorney Fee and to Divide the Settlement Funds." The siblings could not divide the proceeds among themselves and disputed the fee alleged by the lawyers of $54,158. The issue revolved around whether the trial court had jurisdiction to hear this motion.

The firm filed a motion to set the fee styled under Rule 60(b)(6), arguing that the settlement agreement gave the trial court continuing jurisdiction to effectuate the agreement. The trial court granted the motion and set a fee of just over $54,000 on a $170,000 settlement. The contestants appealed. The Alabama Court of Appeals affirmed, holding: (1) the motion was not cognizable under Rule 60(b)(6) because the attorney was a non-party (among other reasons); (2) attorney's lien arose under Ala. Code § 34-3-62, the firm properly filed a motion in the circuit court to enforce that lien, which procedure conferred jurisdiction on the trial court—"[b]ased on the language used in § 34-4-62, an attorney holding money from which his or her attorney fee may be deducted may file a motion in the circuit court of the county of his or her residence seeking to settle a dispute over the amount of compensation to which the attorney is entitled"; (3) attorney was not required to intervene or file a lien, because the lien arose by operation of law; and (4) amount of fees was reasonable.

Harris v. Capell & Howard, P.C., 280 So. 3d 419 (Ala. Civ. App. 2019).

Lawyers Professional Liability; Attorney's Lien; Interest

Eris Bryan Paul | *Clark, May, Price, Lawley, Duncan & Paul, LLC*
Justin Nolen | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

Initially a worker's compensation and tort claim were filed by two attorneys working for a certain firm. However, when those two attorneys ended their employment, the Plaintiff terminated their previous firm and allowed the two attorneys to continue to represent him. The firm then intervened in the action, asserting an attorney-fee lien and claiming attorney fees

and expenses. The Plaintiff then obtained a settlement leaving only the attorney-fee lien pending. However, the trial court found that the firm was not entitled to any fees or reimbursement of expenses. Then the Court of Civil Appeals affirmed the trial court's judgment. The firm the filed a petition for writ of certiorari. The Plaintiff then filed a motion in the trial court seeking disbursement of funds and a motion to seek determination of postjudgment interest. However, the firm argued that the money at issue was for a lien and would not be considered a "money judgment."

The Alabama Supreme Court held that money held by the court regarding an attorney's lien is not a "money judgment" subject to the collection of post-judgment interest, and thus no post-judgment interest is due under Ala. Code § 8-8-10. Therefore, the settlement sum interpleaded into the court from the underlying cases "was not money that [the firm] owed to [the Plaintiff] pursuant to any note, mortgage, judgement, or other indebtedness, nor was it awarded as the result of any legal claims again [the firm]." *Bank Independent v. Coats*, 621 So. 2d 951, 952 (Ala. 1993). Thus, the firm was not required to pay the postjudgment interest to the Plaintiff.

Pope, McGlamry, Kilpatrick, Morrison & Norwood, P.C. v. DuBois, 2019 WL 2482323 (Ala. 2019).

Lawyers Professional Liability; Attorneys' Fees: Liens

Eris Bryan Paul | *Clark, May, Price, Lawley, Duncan & Paul, LLC*
Justin Nolen | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

A property owner brought negligence and trespass action against oil company and Underground and Aboveground Storage Tank Trust Fund, seeking damages resulting from gasoline contamination that spread to owner's property. The parties reached a settlement and the trial court awarded a fee of $43,363.83 and costs of $3,411.50 to property owner's former attorneys who had a contingency-fee agreement with property owner and who filed an attorney's lien when they were discharged as counsel.

Upon appellate review, the court held that attorney's lien based on 45 percent contingent fee contract was enforceable because fee as reasonable, supported by testimony that attorneys' fees would have been more than 45 percent contractual rate if billed hourly. The court found that based on the number of hours the attorneys worked and their respective hourly billing rates, which testimony from an attorney not involved in this case indicated was reasonable, the attorney fee based on the fee agreement was approximately $20,000 less than if the fee were calculated at an hourly rate for the work performed.

Rose v. Penn & Seaborn, LLC, 2019 WL 2401281 (Ala. Civ. App. 2019).

CALIFORNIA

The Pendency of Remedial Measures Does Not Toll the Statute of Limitations

Jennifer K. Saunders | *Haight Brown & Bonesteel LLP*

California's tolling provisions set forth in the statute of limitations for a legal-malpractice action continued to be refined in the 2019 appellate court decision of *Elise Sharon vs. Peter J. Porter*. The attorney defendant represented plaintiff in a lawsuit and obtained a default judgment in her favor in 2008. Porter had ceased representing plaintiff by 2013. Seven years after the judgment was obtained, plaintiff retained new counsel to enforce the judgment under a contingency fee agreement. Her new counsel received a letter from judgment debtor's counsel claiming the judgment was void but continued to pursue collection efforts. The judgment debtor filed a motion to vacate the default judgment at which point plaintiff modified her attorney's retainer agreement to one that called for payment on an hourly basis. The Superior Court granted the judgment debtor's motion to vacate in October of 2016. Plaintiff then filed a malpractice action against Porter within a year of the court's ruling, in 2017.

The attorney defendant challenged the malpractice action arguing that the action was barred by the statute of limitations. The matter proceeded to trial on the limited issue of when plaintiff had sustained actual injury such that the tolling provision of the statute of limitations no longer applied. Plaintiff argued that the statute of limitations did not commence until she incurred actual injury, which she argued did not occur until

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she incurred attorney's fees to oppose the judgment debtor's motion in 2016. Porter argued that plaintiff incurred damage when the judgment was entered in 2008 and no later than 2015 when her new attorney was advised by the judgment debtor that the judgment was void.

The court discussed the public policy interests behind the limitations statute requiring diligent prosecution of known claims so they can be resolved while evidence remains reasonably available and fresh. While the statute of limitations analysis will vary based on the facts of each case, the appellate court here disagreed with plaintiff, finding that the availability and exhaustion of remedial measures does not extend the tolling provision based on lack of "actual injury" and entered judgment in favor of the attorney defendant. To hold that injury did not occur until plaintiff incurred legal fees through new counsel would effectively have given the plaintiff unilateral control over when the limitations period commenced.

Elise Sharon vs. Peter Porter (2019) 41 Cal.App.5th 1; 253 Cal. Rptr.3d 840.

ILLINOIS

Summary Judgment Affirmed in Favor of Lawyers in "Case Within a Case"

James J. Sipchen | *Preztel & Stouffer, Chartered*
Donald Patrick Eckler | *Preztel & Stouffer, Chartered*

In *Elam v. O'Connor & Nakos*, the Illinois Appellate Court, First District, affirmed the grant of summary judgment in favor of the defendant lawyers for failing to advance a premises liability and voluntary undertaking theory against a concert venue. The underlying case arose from a car collision caused by an intoxicated concertgoer. The accident occurred a mile away from the venue. The plaintiffs claimed that the defendant lawyers should have alleged that the concert venue should have provided security and other measures to prevent intoxicated drivers from leaving the venue. Plaintiffs speculated that advancing those theories could have yielded a larger recovery in the underlying matter, but failing to do so forced them to accept a minimal settlement. The trial court granted summary judgment, holding that any alleged negligence did not proximately cause any damages because plaintiffs could not have succeeded on those theories in the underlying case.

In affirming the grant of summary judgment in favor of the defendant lawyers, the court held that the concert venue would have had no liability based on a premises liability theory to protect the deceased from the allegedly foreseeable collision because the collision occurred so far away from the venue. As to the voluntary undertaking theory, the court held that there was no evidence that the venue undertook to 1) prevent concertgoers from riding home from the concert with intoxicated drivers or 2) prevent attendees from becoming intoxicated and driving under the influence of alcohol.

Elam v. O'Connor & Nakos, __ N.E. 3d __, 2019 IL App (1st) 181123.

Illinois Court Rules in Adverse Domination Case

James J. Sipchen | *Preztel & Stouffer, Chartered*
Donald Patrick Eckler | *Preztel & Stouffer, Chartered*

In *Schrock v. Ungaretti & Harris, Ltd.*, the Illinois Appellate Court, First District held that the adverse domination doctrine did not apply to extend the statute of limitations brought by a company against the lawyers who represented its former executive. In that case, a limited liability company and a member sued the defendant attorneys for legal-malpractice, alleging that they aided and abetted the company's manager in avoiding the terms of an injunction imposed in underlying litigation.

The underlying litigation arose from a dispute between the plaintiff-member of the LLC, and the managing member. The plaintiff sued the manager alleging breach of fiduciary duty and ultimately prevailed at trial. The defendant attorneys represented the manager in the underlying trial. The jury awarded plaintiff $10 million in punitive damages. But before the court entered judgment, the manager declared bankruptcy and allegedly violated an injunction barring him from making payments to himself from the company. When the bankruptcy stay lifted, the circuit court entered a judgment against the manager. Plaintiffs filed a lawsuit against the manager in bankruptcy court. The manager answered the complaint and admitted the allegations that he had taken $16.3 million from the company.

The plaintiffs sued the defendant lawyers more than two years after the manager answered the complaint filed by in the bankruptcy case. The trial court granted a motion to dismiss finding that plaintiffs had actual knowledge that the manager violated the injunction on the date the manager answered the bankruptcy complaint admitting to it. On review, the court upheld dismissal of the plaintiff-member's individual claims against the defendant lawyers. But the company argued that, as to it, the doctrine of adverse domination tolled the statute of limitations.

Adverse domination is "an equitable doctrine that tolls the statute of limitations for claims by a corporation against its officers and directors during the time the corporation is controlled by those wrongdoing officers or directors." *Resolution Trust Corp. v. Chapman*¸ 895 F. Supp. 1072, 1077-78 (C.D. Ill. 1995), the court stated that the doctrine creates "a 'rebuttable presumption' that the corporation does not 'know' of the injury as long as it is controlled by the wrongdoing officers and directors." The doctrine applies not only to claims against the wrongdoing officers and directors, but also those that aided and abetted the wrongdoers. *Independent Trust Corp. v. Stewart Information Services Corp.*, 665 F.3d 930, 936-37 (7th Cir. 2012). The presumption may be rebutted by "evidence that someone other than the wrongdoing directors had the 'knowledge of the cause of action and the ability and motivation to bring the suit.'" *In re Emerald Casino, Inc.*, 867 F.3d 743, 760-61 (7th Cir. 2017).

Applying these principles to this case, the court held that the defendants successfully rebutted the presumption. The plaintiff member was someone with the knowledge of the cause of action against the defendant lawyers and motivation to sue. Indeed, he had already filed two suits seeking to recover the damages sought in the legal-malpractice action.

Schrock v. Ungaretti & Harris, Ltd., 2019 IL App (1st) 181698.

No Personal Jurisdiction in Illinois for Remote Provision of Legal Services

James J. Sipchen | *Preztel & Stouffer, Chartered*
Donald Patrick Eckler | *Preztel & Stouffer, Chartered*

In *Sheikholeslam v. Favreau*, the Illinois Appellate Court, First District held that there was no personal jurisdiction over a defendant lawyer in Illinois because the lawyer provided services remotely from Canada. The plaintiff engaged the defendant lawyer to provide immigration services, which she alleged were negligently performed and provided by a non-lawyer. The defendant resided in Montreal, Canada, but was licensed to practice law in Illinois. The defendant hadn't been in Illinois since taking the bar exam prior. The plaintiff signed the engagement letter in Iran and the defendant signed it in Canada. And the lawyer provided all of the services outside of Illinois. The trial court dismissed the case for lack of personal jurisdiction finding that the defendant was not "at home" in Illinois and that having an Illinois law license wasn't enough for the court to exercise personal jurisdiction over the defendant.

In affirming the trial court's dismissal, the appellate court affirmed that having an Illinois law license was an insufficient basis on which to confer personal jurisdiction over the defendant. The court held that having a law license allowed the defendant lawyer to practice in the state, but it was not necessary for him to provide the services at issue in this case. The lawyer did not have an office or other presence in Illionis, either. As to specific jurisdiction, the non-resident plaintiff and the non-resident defendant conducted none of the transaction in Illinois, nor did any alleged breaches occur in Illinois. Finally, the court held that Illinois had no particular interest in resolving a dispute between a resident of Iran and a resident of Canada when the courts in Quebec, where the defendant resides, were available.

Sheikholeslam v. Favreau, 2019 IL App (1st) 181703.

Illinois Court Holds Union Attorney Immune from Suit

James J. Sipchen | *Preztel & Stouffer, Chartered*
Donald Patrick Eckler | *Preztel & Stouffer, Chartered*

In a case of first impression, the Illinois Appellate Court, First District in *Zander v. Carlson* ruled in favor of a labor union and a union attorney in a legal-malpractice lawsuit arising out of an arbitration hearing in which plaintiff challenged his termination as a police officer. The plaintiff alleged legal malpractice against the attorney and negligence against the union. The court affirmed the dismissal of the plaintiff's com-

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plaint against the attorney on the ground that the attorney was immune from suit. The court also held that the Illinois Labor Relations Board had exclusive jurisdiction over the plaintiff's claims against the union.

The plaintiff was a police officer who was put on administrative leave for alleged misconduct and then terminated. The plaintiff sought assistance from a union lawyer during the grievance process but did not separately engage the lawyer. After a two-day arbitration hearing, the arbitrator upheld plaintiff's termination. The plaintiff filed a complaint for legal malpractice against the lawyer and against the union for assigning an inexperienced lawyer to represent him. The defendants moved to dismiss the action replying on *Atkinson v. Sinclair Refining*, 370 U.S. 238 (1962), in which the Supreme Court held that a union's agents may not be held individually liable for actions taken on the union's behalf. The Illinois Appellate Court extended this immunity to the defendant lawyer, finding there was no reason to distinguish union attorneys from other union agents.

The court also drew a distinction between union attorneys who are separately engaged by a union member to represent the member in a grievance and the situation that occurred here, where the attorney, in the regular course of his work for the union, represented the plaintiff as a union member in the grievance. In this case, the court held that plaintiff failed to sufficiently allege an attorney-client relationship between himself and the attorney defendant.

Zander v. Carlson, 2019 IL App (1st) 181868.

INDIANA

Reversal of Jury Verdict in Indiana in Favor of Lawyer for Lack of Causation

Donald Patrick Eckler | *Preztel & Stouffer, Chartered*

In *Drendall Law Office v. Mundia*, the Indiana Court of Appeals reversed a jury verdict against a lawyer in a case in which the lawyer did not timely provide notice of claims against public entities who failed to prosecute the plaintiff's husband for violating a protective order. After being released from custody the husband killed the plaintiff's child and severely injured the plaintiff. The defendant lawyer did not deny that he failed to file a notice of claim against the allegedly responsible public entities within the 180 days required by the Indiana Tort Claim Act. The plaintiff alleged that this failure cost her the opportunity to settle with the public entities.

Originally, the trial court granted summary judgment in favor of the defendant lawyer on the basis that there was no causation or damages. It held that there was immunity for the public entities for the underlying claims and that as a result there could be no damages. The Appellate Court reversed and ordered the matter to proceed to trial. The trial resulted in a verdict of $312,000.

On the appeal following the jury verdict, the defendant lawyer again argued that the public entities had immunity under Indiana law from the type of discretionary claim alleged. And evidence at trial showed that the public entities would not have settled out of sympathy despite the fact they had publicly admitted error. The defendant lawyer presented the testimony of an expert, who represented the public entities in actions similar to those advanced in the underlying matter. The expert testified that in a situation where the immunity applied there would be no discussion of settlement. The court held that in the absence of evidence that there was any possibility of settlement (the plaintiff did not call an expert to rebut the defendant's expert), and given that the public entities were immune, the verdict could not stand.

Drendall Law Office, P.C. v. Mundia, 136 N.E.3d 293 (Ind. Ct. App. 2019).

IOWA

$3.25 Million Verdict for Emotional Distress Damages Reversed in Favor of Attorney

Jacqueline M. DeLuca | *Fraser Stryker*
Mark Laughlin | *Fraser Stryker*
Katherine Matejka | *Fraser Stryker*

After an attorney represented a couple in an unsuccessful adoption, the couple sought emotional distress damages. At trial, a jury returned a verdict in favor of the couple for $3,250,000 in emotional distress damages. However, because the Court of Appeals determined that the attorney had not engaged in ille-

gitimate conduct, as is required to recover emotional distress damages in a legal-malpractice claim, it reversed and remanded for entry of judgment in favor of the attorney.

The adoption had initially been agreed-upon privately; the couple knew the baby's grandmother, who had informed the couple that the baby's mother was 16 years old and the father was likely also a minor. After the baby's birth, the mother and grandmother signed an authorization to discharge the baby to the attorney, who then placed the baby in the couple's care. The attorney also emailed a colleague regarding serving as a guardian ad litem (GAL) for the baby's mother in the proceeding regarding termination of parental rights. However, before the baby's mother signed a release of custody for the baby, she backed out of the adoption. The baby was returned to the birth mother, and the attorney moved to dismiss the petition to terminate parental rights without prejudice.

Based on Iowa precedent in *Miranda v. Said*, 836 N.W.2d 8, 14-33 (Iowa 2013), the Iowa Court of Appeals reasoned that emotional distress damages are only available in a legal malpractice action of the attorney's negligent acts were "illegitimate" and "especially likely to produce serious emotional harm." In making this determination, the existence of a highly emotional relationship cannot support emotional distress damages alone. The Court of Appeals reasoned that no evidence on the record indicated the attorney advised the couple to pursue an illegitimate strategy or otherwise acted contrary to Iowa law in pursuing releases of custody, and that the attorney's handling of the petition for termination of parental rights could not support emotional distress damages because any loss resulted from unsuccessful attempts to obtain releases of custody, not from conduct related to the petition. Accordingly, the Court of Appeals reasoned that the couple had not shown the attorney engaged in illegitimate conduct that was especially likely to produce serious emotional harm.

McFarland v. Rieper, 929 N.W.2d 273 (Iowa Ct. App. 2019).

Affirming Summary Judgment for Attorney on Plaintiff's Time-Barred Claim

Jacqueline M. DeLuca | *Fraser Stryker*
Mark Laughlin | *Fraser Stryker*
Katherine Matejka | *Fraser Stryker*

Plaintiffs filed a legal malpractice action against their attorney in June, 2017, regarding real estate installment contracts executed in June, 2008. Plaintiffs' attorney failed to record the contracts and deeds, and Plaintiffs' interest in properties ultimately became junior to First Midwest Bank. Plaintiffs argued that they did not suffer an actual injury (thus starting the statute of limitations clock) until August, 2012, when the buyer stopped making payments under the real estate contract. The district court had rejected this argument, reasoning that Plaintiffs' June, 2009 letter to their attorney airing their grievances and demanding $60,000 in compensation constituted the point where Plaintiffs' injuries were actual and nonspeculative. The Iowa Court of Appeals agreed with the district court. Because the record showed Plaintiffs suffered an actual and nonspeculative injury more than five years before they filed their legal malpractice action, summary judgment was properly granted in the attorney's favor.

P&C Sierra, L.L.C v. Carroll, 927 N.W.2d 211 (Iowa Ct. App. 2019).

Summary Judgment for Attorney Affirmed When Plaintiff's Claims Found Time-Barred

Jacqueline M. DeLuca | *Fraser Stryker*
Mark Laughlin | *Fraser Stryker*
Katherine Matejka | *Fraser Stryker*

Prior to the completion of proceedings dissolving the Plaintiff's marriage in July, 2009, the Plaintiff's ex-husband sustained injuries during surgery which led to his partial paralysis. Counsel for the ex-husband informed Plaintiff's counsel that he was contemplating a medical malpractice action and would reimburse Plaintiff for insurance premiums paid during the dissolution, but would not agree to Plaintiff receiving any

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settlement proceeds. Plaintiff and her ex-husband submitted a stipulated dissolution decree that was approved by the court on July 8, 2009. At the time, Plaintiff knew of her ex-husband's potential medical-malpractice claim, although he had told her he was not intending to bring a claim. The dissolution decree did not preserve any claim Plaintiff might assert to her ex-husband's potential malpractice action, preserve Plaintiff's own potential loss-of-consortium claim, or preserve a right to reimbursement for the insurance premiums. Plaintiff's ex-husband filed his medical malpractice claim in March, 2012, and settled it in November, 2013. Plaintiff brought her legal malpractice claim in January, 2017, claiming that her attorney failed to preserve Plaintiff's rights to a party of her ex-husband's recovery.

The Iowa Court of Appeals reasoned that the discovery rule exception did not apply to toll the statute of limitations on Plaintiff's professional negligence claim. Under Iowa law, a plaintiff's cause of action accrues when the plaintiff has imputed knowledge of the claim, meaning that the plaintiff knew or should have known sufficient facts to recognize the problem existed. Plaintiff argued that because her ex-husband told her he was not going to pursue his medical practice action, she did not know of her legal malpractice claim until she became aware in 2013 that her ex-husband had pursued his medical malpractice claim. The Court of Appeals rejected this, finding that it was undisputed Plaintiff was aware her ex had suffered a personal injury during their marriage, that Plaintiff knew of the possibility of his medical-malpractice action, and that she consented to a dissolution of marriage decree that did not preserve any claim with respect to her injury. Thus, the Court of Appeals found that Plaintiff was on inquiry notice from the time the decree was filed, more than five years before Plaintiff filed her legal malpractice claim. Similarly, Plaintiff's damages for loss of consortium ceased upon entry of the dissolution decree, and Plaintiff had five years from the time of her ex-husband's injury to bring a loss-of-consortium claim for those damages she incurred during the remainder of their marriage, which she failed to do. Accordingly, judgment for Plaintiff's attorney in the dissolution action was affirmed.

Schwab v. Zahradnik, No. 18-1118, 2019 Iowa App. LEXIS 664 (Ct. App. July 24, 2019).

Dismissing Legal Malpractice Claims for Lack of Expert Testimony

Jacqueline M. DeLuca | *Fraser Stryker*

Plaintiff, an experienced self-employed businessman, brought several claims against multiple defendants relating to a series of loan transactions. Among these claims was a legal malpractice claim against his attorney, who had provided Plaintiff legal services in personal and business matters, and for whom Plaintiff had signed a consent and waiver concerning conflicts of interest arising in relation to the attorney entering into business transactions with Plaintiff. Defendants moved for summary judgment on all claims, arguing that Plaintiff's claims required expert testimony concerning the standard of care and Plaintiff had failed to timely designate any expert witnesses.

The district court denied Plaintiff's motion for an extension of time to designate experts and granted summary judgment in favor of defendants on Plaintiff's legal malpractice claims. The Iowa Court of Appeals reasoned that a layperson could not be expected to understand the standard of care of an attorney "in this complicated set of facts" because determining whether the attorney's performance fell below the standard of care required "an understanding of both the technicalities of, and ordinary practices involved with—to name a few—loan agreements, promissory notes, secured transactions, personal guarantees, and complex business dealings" in addition to "a lawyer's duty of care as to conflicts of interest, not to mention the ability to navigate the additional wrinkle of [Plaintiff's] consent and waiver to some conflicts of interest." Accordingly, the Court of Appeals reasoned that the district court did not abuse its discretion in denying Plaintiff's request for additional time to designate expert witnesses, and since his legal malpractice claims could not proceed without expert testimony, summary judgment was affirmed for the attorney on these claims.

Wild v. Willey, 928 N.W.2d 159 (Iowa Ct. App. 2019).

MASSACHUSETTS

Where Causation Question Turned on How Judge Would Have Ruled, Expert Testimony Impermissible

Erin K. Higgins | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *Greenspun v. Boghossian*, a client sued his former attorney for failing to draft a prenuptial agreement that adequately implemented the client's desired division of real estate purchased in cash by a single spouse during the marriage. Prior to marrying, the plaintiff and his now-former wife had "collaboratively" drafted a document to serve as the basis for a prenuptial agreement. Among other terms, the document provided that, if either spouse used her or his own savings to buy real estate without a mortgage during the marriage, the other spouse would "accrue a 2.5 percent ownership interest in the real estate every year after the purchase, assuming the marriage is intact, up to a maximum ownership interest of 50 percent." After several drafts, the couple's respective attorneys developed a prenuptial agreement based on the document and the couple married.

When the couple divorced three years later, the Probate Court found the prenuptial agreement to be valid, but applied a different provision of the agreement, which was triggered by the couple having had a child. That provision resulted in the couple taking equal interests in the marital home, which the husband had purchased in cash two days after the wedding. The husband sued his former attorney alleging legal malpractice and other claims. The defendant attorney motioned for summary judgment and the Superior Court allowed the motion because the plaintiff had failed to furnish expert testimony on the issue of causation.

The Appeals Court vacated the lower court's judgment, holding that, although expert testimony is often needed in legal malpractice cases, it is not permitted on issues of law. The court noted that the determination of causation would turn on the question of whether a judge would have enforced the prenuptial agreement had it been drafted as the client instructed. The Appeals Court held that the motion judge erred by dismissing the case, because expert testimony on how a judge would have ruled would have been impermissible.

Greenspun v. Boghossian, 126 N.E.3d 99 (Mass. App. Ct. 2019).

Expert Testimony on Settlement Value Not Required inTrial Within a Trial to Prove Settlement's Inadequacy

Erin K. Higgins | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *Marston v. Orlando*, the conservator of a brain-injured offshore worker sued the attorneys who had secured a $7,500 settlement for the worker under the Massachusetts Workers' Compensation Act and thereafter secured a $200,000 settlement under the federal Jones Act. The conservator alleged that the settlement amount was so inadequate that the settlement constituted malpractice. The trial judge dismissed the case before trial, holding, *inter alia*, that the conservator had failed to produce expert testimony that the settlement was unreasonable. The Appeals Court reversed, holding that where a plaintiff elects to demonstrate a settlement's unreasonableness using the trial-within-a-trial method, expert testimony is admissible, but not required.

Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986), allows proof that a settlement was unreasonable by holding a trial within a trial to determine if an attorney's client would probably have received more money at trial than the client received through the settlement at issue. Alternatively, *Fishman* allows a plaintiff to show that the settlement was inadequate because it was less than what a competent counsel would have negotiated; however, this second method of evaluating a settlement *does* require expert testimony on the reasonable settlement value of the case. The Appeals Court held that plaintiffs choosing to use *Fishman*'s trial-within-a-trial method are not required to provide expert testimony on settlement value.

The court also held that the plaintiff could maintain his negligence action because his former attorneys had failed to alert him that settling a state workers' compensation claim might preclude him from proceeding with his federal Jones Act claim.

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Although the law is unsettled as to whether the federal claim would have been precluded, the court held that the attorneys had a duty to disclose such potential consequences before recommending to the conservator that he accept the state workers' compensation settlement. Therefore, although the Jones Act claim was ultimately settled, "[t]he attorneys' failure to alert [the plaintiff] to the uncertainty deprived him of the opportunity to assess the risk and was an actionable basis of negligence."

Marston v. Orlando, 127 N.E.3d 296 (Mass. App. Ct. 2019), *review denied*, 132 N.E.3d 953 (Mass. 2019).

Consent-to-Settle Clause Permissible in Professional Liability Insurance Contract

Erin K. Higgins | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

Rawan v. Continental Casualty Co. considered the Rawan family's claims against Continental, the liability insurer for Kanayo Lala, an engineer who designed structural elements of the Rawans' home. The Rawans sued Lala for professional malpractice when it became evident that his designs were structurally deficient. Continental's insurance contract with Lala contained a consent-to-settle clause but no "hammer clause" (a clause that limits an insurer's liability to the amount of a proposed settlement if the insured refuses consent to settle at that amount). Continental strongly encouraged Lala to settle, but he refused to do so.

During protracted settlement negotiations, the Rawans amended their complaint to name Continental as a defendant, alleging violations of Massachusetts General Laws chapters 93A (barring unfair business practices) and 176D (requiring, *inter alia*, insurers to promptly settle claims once liability becomes clear). The case against Lala eventually went to trial, where a jury awarded over $400,000 in damages, which Continental and Lala paid.

After the trial of the claims against Lala, Continental moved for and received summary judgment on all remaining counts. The Supreme Judicial Court of Massachusetts affirmed the Superior Court's judgment, holding that chapter 176D does not render consent-to-settle clauses impermissible in professional liability contracts because, although such clauses may hamper an insurer's ability to effectuate a prompt settlement, that tension is not great enough to imply a legislative intent to ban such clauses. The court also noted that professionals have reputational and other reasons to desire control over settlements.

The court further held that, even where an insured's refusal of consent under a consent-to-settle clause is unreasonable, that refusal cannot be imputed to the insurer for purposes of 93A claims made by a third-party claimant. The Court cautioned, though, that insurers still have a duty to conduct settlement negotiations in good faith and to encourage recalcitrant insureds to settle.

Rawan v. Cont'l Cas. Co., 136 N.E.3d 327 (Mass. 2019).

MICHIGAN

Witness-Immunity Doctrine Not an Absolute Defense to Professional-Malpractice Claims Against Expert Witnesses

James J. Hunter | *Collins Einhorn Farrell PC*

In *Estate of Voutsaras v Bender*, the Michigan Court of Appeals grappled with the issue of whether a client can sue their own expert witness for malpractice. The estate hired the defendants to provide litigation support and expert testimony in a foreclosure lawsuit. Following an adverse outcome in the underlying litigation, the estate sued its experts alleging that they gave unfavorable testimony at trial and failed to provide competent expert opinions.

The ability to sue one's own expert witnesses was an issue of first impression for the court. The trial court held that the witness-immunity doctrine shields a party's own experts from malpractice claims, regardless of any duty they may owe their client. According to the trial court, the witness-immunity doctrine barred the estate's entire malpractice claim. In a narrow holding the Court of Appeals disagreed, holding that the witness-immunity doctrine didn't absolutely immunize the defendants from professional-malpractice claims merely because part of their retention included providing expert testimony.

Under Michigan law, witnesses enjoy total immunity for testimony provided during judicial proceedings. There is a strong public policy consideration buttressing the witness-immunity doctrine: a witness must be able to give damaging testimony without fear of reprisal. And Michigan's Supreme Court has previously held that a witness owes a duty of candor to the court, so a breach of that duty doesn't give rise to a cause of action by an *adverse* party. But what about non-adverse parties? The Court of Appeals answered that question in *Voutsaras*, holding that the witness-immunity doctrine protects *any* witness called by *any* party based on the substance of the witness's testimony or evidence. Consequently, the Court of Appeals upheld summary disposition of the estate's claim that its experts gave unfavorable testimony.

But the witness-immunity doctrine applies only to actual testimony or other evidence prepared for the benefit of the court. Yet the estate alleged that the defendants 1) provided *incompetent* (not just unfavorable) testimony and 2) negligently provided expert opinions for the benefit of the estate separate from the intended expert testimony for the court. Noting prior cases didn't address whether witness immunity protects witnesses from providing *professionally incompetent* testimony, the Court of Appeals held that expert witness aren't absolutely immunized from professional-malpractice claims solely because part of their retention included the provision of expert testimony. The Court of Appeals held that "licensed professionals owe the same duty to the party for whom they testify as they would to any client." Consequently, the trial court erred in granting summary disposition as to the balance of the estate's professional-malpractice claims.

Estate of Voutsaras v Bender, 929 N.W.2d 809 (Mich. Ct. App. 2019).

MINNESOTA

Emotional Distress Damages Available Where Attorneys Found Liable Under Consumer Fraud Act

Corinne G. Ivanca | *Geraghty, O'Loughlin & Kenney, P.A.*

This unpublished decision of the court of appeals arose out of malpractice, consumer fraud, and breach of contract claims brought by three clients based on attorneys' representations in individual immigration matters.

At trial, the jury found the attorneys liable to the clients for malpractice, breach of contract, and violation of Minnesota's Consumer Fraud Act, and that the clients were entitled to damages, including emotional distress damages. Attorneys moved for judgment as a matter of law or a new trial on multiple issues. The motion was denied. Attorneys appealed the district court's denial of their motion.

The jury had found that attorneys had represented to the clients that the clients would be eligible for an I-601A provisional waiver by virtue of each client having a child who was a United States citizen. The clients therefore believed when they retained and paid attorneys that attorneys could secure their residency through this provisional waiver. Children, however, are not qualifying relatives that support a provisional waiver. Because the clients had no other qualifying relatives, they were not eligible for the waiver.

Attorneys argued on appeal that emotional distress damages were not available because there was no evidence of willful, wanton or malicious conduct, as required under *Lickteig v. Alderson*, 556 N.W.2d 557, 562 (Minn. 1996). The court noted the jury had found a violation of the Consumer Fraud Act, which was supported by evidence that attorneys took the clients' fee payments despite it being obvious that the clients would not qualify for the provisional waiver. The court held that this was sufficient to affirm the district court's conclusion that attorneys' conduct was "willful, wanton or malicious."

In addition, the court affirmed that medical evidence was not required to support the emotional distress damage claims, so long as the plaintiffs are able to prove that their emotional injury occurred under circumstances tending to guarantee its

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genuineness, citing *Navarre .v. South Washington Cty. Schools*, 652 N.W.2d 9, 30 (Minn. 2002).

Cedillo v. Igbanugo, 2019 WL 2168766 (Minn. Ct. App., May 20, 2019) (unpublished).

Purely Speculative Harm Does Not Satisfy the "Some Damage" Rule of Accrual

Corinne G. Ivanca | *Geraghty, O'Loughlin & Kenney, P.A.*

The beneficiaries of a decedent's estate brought an action against the estate administrator for breach of fiduciary duty related to administrator's handling of sale of real property to be used as a sports complex. Beneficiaries alleged that administrator breached its fiduciary duty by failing to 1) require purchaser to provide financial forecasts; 2) select an independent CPA to forecast sufficient operating income; 3) require purchaser to show a lease sufficient to maintain note payments; and 4) hold itself liable as personal representative of the estate, for its three previous failures.

The administrator moved to dismiss based on the six-year statute of limitations, alleging that beneficiaries had suffered "some damage" more than six years prior to commencement of the lawsuit. The district court granted the motion, the court of appeals affirmed, and the supreme court reversed, finding that the administrator failed to establish that beneficiaries had suffered some damage more than six years prior to the commencement of the case.

The court re-affirmed the "some damage" rule of accrual as articulated in *Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006). The occurrence of "some damage" is the occurrence of any compensable damage, whether specifically identified in the complaint or not. "Some damage" in the form of financial liability accrues when the resulting liability is immediate, concrete, compensable, noncontingent, and at least partly ascertainable.

The administrator alleged that the beneficiaries had sustained economic losses before the default of the purchaser on the note as a result of administrator's alleged failure to obtain financial forecasts, which would have projected revenues as insufficient to meet the obligations under the note. The administrator argued that had such forecasts been obtained, it could then have negotiated a better deal with the purchaser, or the estate could have declined to sell the property. But since there was nothing in the pleadings suggesting that there was another buyer who would have paid more than the beneficiaries ultimately were paid, or that the estate would have been better off holding on to the property, the administrator's argument rested on "purely speculative harm." The court held: "We cannot adopt a rule that would invite the kind of speculation inherent in the rejected occurrence rule of damage accrual."

Since the earliest nonspeculative harm to the beneficiaries was incurred when the estate stopped receiving payments on the note, which was less than six years prior to commencement of the case, the beneficiaries' claims were timely.

Hansen v. U.S. Bank National Association, 934 N.W.2d 319 (Minn. 2019).

Expert Affidavit Required for Conflict of Interest and Breach of Duty of Candor Claims

Corinne G. Ivanca | *Geraghty, O'Loughlin & Kenney, P.A.*

An investor and an LLC brought claims against attorney and law firm for breach of fiduciary duty, collusion and fraud. The case was removed to federal court. The district court granted summary judgment to the defendants, the plaintiffs appealed, and the Eighth Circuit Court of Appeals affirmed.

The court noted that the case arose out of an extremely complex factual background and multiple intersecting allegations of conflicts of interest and other breaches of fiduciary duty.

The court cited established Minnesota precedent holding that the Minn. Stat. § 544.42 expert affidavit requirement does not apply if the attorney's conduct can be evaluated adequately by a jury in the absence of expert testimony, but that such cases are "rare and exceptional," such as those where there is an obvious missed deadline or a clear case of theft of client funds. The court cited additional Minnesota precedent for the proposition that breach-of-fiduciary-duty claims against attorneys, because they are essentially malpractice claims in another form, also require compliance with Minn. Stat. § 544.42 unless the attorney's conduct can be adequately evaluated by the jury without an expert's opinion.

The first breach of fiduciary duty claim was based upon an allegation of conflict of interest. The court stated that claims related to conflicts of interest generally lie outside of the jury's common knowledge. Further, the claim was based on a factually complex relationship, primarily on allegations that the attorney engaged in dual representation. The court held such a claim required expert testimony.

The second breach of fiduciary claim was based on the attorney's alleged breach of his duty of candor under Minn. Stat. § 481.06. The clients alleged that the attorney failed to adequately investigate facts which led to the attorney submitting a misleading affidavit to the district court. The court found that this claim was also one which required expert testimony in order to proceed because of the complexity of the factual allegations.

Because the plaintiffs had not complied with Minn. Stat. § 544.42, the district court had properly granted summary judgment to the defendants on the breach of fiduciary duty claims.

Sandhu v. Kanzler, 932 F.3d 1107 (8th Cir. 2019).

NEBRASKA

Affirming Judgment for Attorney on Defense of Plaintiff's Contributory Negligence

Jacqueline M. DeLuca | *Fraser Stryker*
Mark Laughlin | *Fraser Stryker*
Katherine Matejka | *Fraser Stryker*

Plaintiff and her husband divorced in 2011. About a week after the divorce decree was entered, Plaintiff's ex-husband died. When Plaintiff made a claim for the death benefits under her ex-husband's life insurance policies, his children from his first marriage successfully challenged her right to the benefits, with the Nebraska Supreme court affirming the finding that Plaintiff had waived her beneficiary interest in the policies by the property settlement agreement entered with the divorce decree. Plaintiff sued her attorney from the divorce proceedings, alleging he did not advise her that the property settlement agreement waived her interest in her ex-husband's life insurance policies. Upon a bench trial, judgment was entered for the attorney.

On appeal, the Nebraska Supreme Court considered that the attorney had provided evidence and testimony that he had asked Plaintiff about life insurance when he first met with her, and that Plaintiff had not informed the attorney about life insurance so that he could properly include it in the decree. The district court also found the attorney's expert more persuasive; he had testified that the attorney's actions regarding the property settlement agreement were proper and that the "boilerplate" language Plaintiff complained of was "essential." The Supreme Court concluded that the district court did not err in its conclusion that the attorney did not breach any duty owed to Plaintiff and that Plaintiff could not show the attorney's actions were the proximate cause of her injury.

Rice v. Poppe, 924 N.W.2d 344 (2019).

NEW YORK

Getting Judiciary Law § 487 Past the Pleading Stages

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

Not often does a Judiciary Law § 487 Claim survive motion practice. In *Gerard Fox Law, P.C. v Vortex Group, LLC.*, Hon. Andrew Borrok, sitting in New York County, permitted a § 487 counterclaim to survive dismissal based on documentary evidence verifying certain material misrepresentations made to the court.

This action involved allegations of breach of fiduciary duty, fraud, negligent misrepresentation, and professional negligence brought by Gerard Fox Law against its former real estate broker, the Vortex Group. Vortex counterclaimed for fraud and violation of Judiciary Law § 487. Fox moved pursuant to CPLR §§ 3016 and 3211 (a) (7) to dismiss Vortex's counterclaims in their entirety. Ultimately, the court granted Fox's motion regarding the counterclaim for fraud, but not as to the § 487 counterclaim.

To successfully state a cause of action for violation of Judiciary Law § 487, allegations of deceit or an intent to deceive must be stated with particularity (CPLR § 3016 [b]; *Facebook v DLA Piper LLP* (US), 134 AD3d 610, 615 [1st Dept 2015]).

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Where a cause of action under Judiciary Law § 487 is based on allegations of false statements in pleadings, a party may prevail by establishing that "the lawsuit could not have gone forward in the absence of the material misrepresentation, [and] that party's legal expenses … may be treated as the proximate result of the misrepresentation" (*Amaltifano v Rosenberg*, 12 NY3d 8, 15 [2009]).

Vortex's § 487 counterclaim is based on statements Fox made in its complaint. Vortex asserts that Fox intended to deceive the Court by knowingly making several false statements concerning certain underlying events. For example, Paragraph 2 of the Complaint provides:

Specifically, in the Fall of 2015, [Gerard Fox] sought to lease space with room for five to six offices and a conference room, within its monthly budget of $28,000- $30,000. … Viewing [Fox] as an out-of-town "yokel" it could work for a fat commission, Vortex upsold [Fox] from the get-go. Vortex exclusively presented options far outside of [Fox's] price range, … To encourage [Fox] to rent office space beyond its budget, Vortex represented falsely that the rent was below-market and a great deal (emphasis added).

The Court found that Fox's statements were not only misleading, but also demonstrably false. Vortex's space report, which set forth the properties that Vortex presented to Fox, illustrated that 10 of the 12 properties were within Fox's stated budget. In light of this, the court held Fox premised its lawsuit on material misrepresentations of fact. And Vortex was compelled to defend the action and incur legal fees as a proximate result of Fox's misrepresentations. So, Vortex adequately pleaded its counterclaim for violation of § 487 to survive dismissal.

Gerard Fox Law, P.C. v *The Vortex Group, LLC*, 2019 NY Slip Op 32065(U) (NY Sup Ct 2019).

Undisputed Conclusory Facts are Still Conclusory

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

Although a court must accept the facts alleged in the complaint as true and afford a plaintiff the benefit of every possible favorable inference, the protection afforded under CPLR 3211 does not lower a plaintiff's burden to establish the prima facie elements of the cause of action to overcome a motion to dismiss.

In *Gilbo v. Horowitz*, the plaintiff filed a declaratory judgment action in order to void a retainer agreement previously entered into with the attorney defendant. Plaintiff was hospitalized after being severely injured in a car accident. Although plaintiff's mother sought defendant's representation, plaintiff personally signed the retainer while he still admitted in the hospital. Plaintiff sued to void the retainer, asserting that he lacked the required mental capacity to contract at the time he signed the agreement. The defendant filed a motion to dismiss pursuant to CPRL 3211. The court granted defendant's motion to dismiss.

Principles of contract law govern retainer agreements. "A party's competence to enter into a contract is presumed, and the party asserting incapacity bears the burden of proof (*Er-Loom Realty, LLC v. Prelosh Realty, LLC,* 77AD3d 546, 547 [1st Dept. 2010])." "A plaintiff must to show by clear and convincing evidence that his mind was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction (*Sears v First Pioneer Farm Credit, ACA,* 46 AD3d 1282, 1284-1285 [3d Dept 2007])." A plaintiff must further show "that such incompetency/incapacity existed when he executed the… documents…" *Sears,* 132 NY at 89. The *Gilbo* court found that plaintiff had not met his evidentiary burden to show he was incompetent when he signed the retainer.

Plaintiff attempted to satisfy his burden by asking the court to take judicial notice of his mental state at the time of execution. Plaintiff argued that defendant did not dispute plaintiff's factual claim that he was in a coma during the time period that the retainer was signed, therefore proving he was incapacitated. The court rejected plaintiff's contention stating that although "a court must accept the facts alleged in the complaint as true, [and] accord plaintiff the benefit of every possible favorable inference…", the court "need not accept 'conclusory allegations of fact or law not supported by allegations of specific fact' or those that are contradicted by documentary evidence. (Wilson v. Tully, 43 AD2d 229, 234 [1st Dept. 1998])."

Plaintiff failed to provide anything further to prove he was absolutely incompetent at the time the retainer was executed. The court found that Plaintiff did not establish his prima facie

burden and that the mere undisputed nature of a fact contained in the complaint does not extend the legal significance of the fact as alleged.

Gilbo v. Horowitz, 2019 NY Slip Op 30320(U) (Sup Ct 2019).

Saving Prior Counsel

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

In his decision in *Gross v Aronson, Mayefsky & Sloan, LLP*, Hon. Anthony Cannataro illustrated the compelling deference given to prior counsel when successor counsel substitutes in and must remedy a problem that arose under the prior counsel's watch. Generally three factual settings exist in this situation: 1) the problem cannot be solved (i.e. no attorney malpractice by either); 2) the problem could have been solved, but the second attorney failed to solve it (possible malpractice against the second attorney); or 3) the second attorney solved the problem facing the prior counsel (no malpractice against the prior counsel). In any factual setting, the prior counsel may be off the hook.

In *Gross*, the plaintiff alleged that the attorney defendant failed to seek an order compelling the plaintiff's ex-husband to pay certain expenses in the underlying litigation. But the defendant attorney introduced documentary evidence showing that successor counsel in the underlying litigation secured a judgment against the ex-husband for the outstanding expenses.

The court held where documentary evidence establishes that successor counsel had sufficient time and opportunity to adequately protect plaintiff's rights, prior counsel's alleged negligence cannot be considered a proximate cause of plaintiff's alleged damages (*Maksimiak v Schwartzapfel Novick Truhowsky Marcus, P.C.,* 82 AD3d 652, 652 [1st Dept 2011]). Because successor counsel obtained a judgment covering the exact expenses that defendant allegedly failed to recover, defendant's failure to seek such expenses cannot be a proximate cause of damages in a malpractice lawsuit against the prior counsel.

Gross v *Aronson, Mayefsky & Sloan, LLP,* 2019 NY Slip Op 32972 (U) (NY Sup Ct 2019).

The Burden of Proof: the Fundamental Element of All Successful Motions

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

Understanding the standard of proof and meeting the required burden are the fundamentals of any successful motion. Yet attorneys get it wrong all the time. In *Mazzurco v. Gordon*, the court highlighted this conundrum in its decision to uphold a Suffolk County, Supreme Court order in a legal-malpractice action that denied an attorney defendants' motion for summary judgment for failing to meet the requisite burden of proof.

To succeed in a motion for summary judgment to dismiss a complaint alleging legal malpractice, a defendant must present prima facie evidence that the attorney "did not breach the duty to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, or that the plaintiff did not sustain actual and ascertainable damages as a result of such deviation." See *Panos v. Eisen*, 160 AD3d 759, 759-760 [2018]; *Lever v. Roesch*, 101 AD3d 954, 955 [2012]. In *Mazzurco*, The attorney defendants' motion for summary judgment relied exclusively on a court order that precluded plaintiff from calling certain fact witnesses at trial. The defendant attorneys argued that the plaintiff would be unable to meet his prima facie burden in the action given the court's preclusion of the fact witnesses.

The court found that defendants failed to meet the requisite burden of proof to sustain their summary motion. Defendants' reliance on the Supreme Court preclusion order alone was insufficient. The defendant attorneys failed to demonstrate that they did not breach their duties to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, or that the plaintiff did not sustain actual and ascertainable damages as a result of such deviation.

Mazzurco v. Gordon, 173 AD3d 1003 (2nd Dept 2019).

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Is this Document Documentary?

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

In a CPLR 3211(a)(1) motion, defendants may offer documentary evidence to refute the claims in a lawsuit. These motions are particularly effective (and widely used) to defend legal-malpractice claims. But all paper is not "documentary" as explained in *First Choice Plumbing Corp. v Miller Law Offs., PLLC*.

Under CPLR 3211(a)(1), a motion to dismiss a complaint on the ground that the action is barred by documentary evidence, "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). "In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable" (Granada Condominium III Assn. v Palomino, 78 AD3d 996, 996-997 [2010]; see Fontanetta v John Doe 1, 73 AD3d 78, 86 [2010]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (Fontanetta v John Doe 1, 73 AD3d at 84-85 [internal quotation marks omitted]). "Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence" (25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co., 127 AD3d 850, 851 [2015]; see Phillips v Taco Bell Corp., 152 AD3d 806, 807 [2017]; Prott v Lewin & Baglio, LLP, 150 AD3d 908, 909 [2017]; Gawrych v Astoria Fed. Sav. & Loan, 148 AD3d 681, 682 [2017]).

In *First Choice Plumbing*, the defendant attached emails and letters in support of its motion. The court held that these items were not documentary evidence within the meaning of CPLR 3211(a)(1). To the extent that the other evidence submitted was documentary, that evidence did not conclusively establish the absence of an attorney-client relationship between the plaintiffs and the defendant with respect to the liens and their extensions. Thus, the Second Department held that the Supreme Court should not have dismissed the complaint based on this ground.

First Choice Plumbing Corp. v *Miller Law Offs., PLLC,* 2018 NY Slip Op 05825 (2nd Dept 2018).

Plaintiff's Pesky Privity Requirement

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

An attorney-client relationship is an essential element to almost all legal-malpractice causes of action. In *Hinnant v. Carrington Mtge. Servs., LLC,* the court discussed the very limited exception to the privity rule. In that case, the court dismissed plaintiffs' malpractice claim against a defendant attorney based on the lack of privity with the attorney defendant and plaintiff's failure to meet the limited-exception standard.

In an action to recover damages for fraud and professional malpractice, the defendant attorney appealed an order from the Kings County Supreme Court, which denied his motion to dismiss the complaint pursuant to CPLR 3211(a). This matter arose out of the attorney defendant's representation of the co-defendant in the execution of a consolidated note between plaintiffs and co-defendant. The plaintiffs alleged that the consolidated note contained inconsistencies regarding monthly mortgage payments and that the attorney defendant failed to point out these inconsistencies to the plaintiffs.

Given that the attorney defendant represented co-defendant, not plaintiffs, there was a lack of privity between plaintiffs and the attorney defendant. Privity is generally required to bring a professional-malpractice claim: "Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity, or near-privity, for harm caused by professional negligence (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co*., 5 NY3d 582, 595 [2005])." To determine if the limited exception applies, courts look to the complaint for allegations that set forth evidentiary facts demonstrating a defendant's participation in a common scheme or plan to defraud plaintiffs, or otherwise aid and abet an alleged co-participant in the commission of fraud. *See Fredriksen v. Fredriksen*, 30 AD3d at 372; *Goldfarb v. Schwartz*, 26 AD3d at 463-464.

Here, the court looked at the complaint as a whole and found that even accepting the facts asserted in the complaint as true as required by CPLR 3211(a)(7), plaintiffs failed to allege the required privity to bring a professional-malpractice claim against the attorney defendant. Plaintiffs further failed to plead specific allegations of evidentiary facts demonstrating that the defendant was a participant in a common scheme or plan to

defraud plaintiffs. Similarly, the court found that there was no indication that the attorney defendant aided and abetted the co-defendant in committing fraud.

Hinnant v. Carrington Mtge. Servs., LLC, 172 AD3d 827 (2nd Dept 2019).

SOUTH CAROLINA

Court of Appeals Clarifies the Legal Malpractice Statute of Limitations

Douglas W. MacKelcan | *Copeland, Stair, Kingma & Lovell, LLP*
Michael C. Masciale | *Copeland, Stair, Kingma & Lovell, LLP*

In *Personal Care, Inc. v. Theos*, the South Carolina Court of Appeals considered South Carolina's statute of limitations and the discovery rule as they relate to legal malpractice cases. The plaintiff ,a medical transport company, had retained the defendants' law firms to investigate a former employee's alleged misappropriation of proprietary corporate information in the formation of a competing business. On September 14, 2009, one of the defendants sent a letter to the former employee demanding the former employee cease soliciting the plaintiff's clients and defrauding insurers. The defendant also sent the letter to a third-party medical services provider.

On March 9, 2010, in an underlying action between the plaintiff and former employee, the former employee counterclaimed for defamation, arising directly from the publication of the September 14, 2009 letter. On March 19, 2010, one of the defendants sent an email to the plaintiff, informing it that the defendants had "received an Answer and Counterclaim… in this action." Additionally, the defendant's paralegal sent a copy of the pleadings to the plaintiff by email. Thereafter, the defendant sent multiple emails referencing the counterclaim to the plaintiff, provided copies of discovery requests regarding the counterclaim, and presented an invoice for fees earned in defending the counterclaim, which was paid.

On March 8, 2013, the plaintiff filed a legal malpractice action against the defendants relating to, among other things, the publication of the 2009 letter and a claimed failure by the defendants to timely notify itof the counterclaim. An August 28, 2013, the parties struck the legal malpractice action from the docket, tolling the statute of limitations if the case was restored within one year. On September 22, 2014, after having settled the underlying action, the plaintiff moved to restore the legal malpractice action to the docket. The plaintiff relied on a recent Supreme Court of South Carolina opinion in *Stokes-Craven Holding Corp. v. Robinson*, 787 S.E.2d 485 (2016), which held the statute of limitations begins to run on a legal malpractice claim upon the resolution of the underlying suit against the client on appeal. In its final order, the trial court dismissed the action, finding the statute of limitations had expired.

On appeal, the appellate court distinguished this case from *Stokes-Craven*, finding that the plaintiff's claim depended on the publication of the 2009 letter, not the resolution of the underlying action against the former employee. The court held the defendants' correspondence with the plaintiff in 2010, in addition to the plaintiff's payment of their invoice, was sufficient to put an ordinary person, in the exercise of reasonable diligence, on notice of the existence of a potential claim. Thus, the court held that, where a client's claim against his or her attorney is not dependent upon an unfavorable resolution of the underlying lawsuit against the client, South Carolina's three-year legal malpractice statute of limitations begins to run when the client reasonably should discover that he or she has a claim against the attorney.

Personal Care, Inc. v. Theos, 825 S.E.2d 281 (S.C. Ct. App. 2019).

Insurer May Pursue Legal Malpractice Claim Against Counsel Hired to Defend Insured

Douglas W. MacKelcan | *Copeland, Stair, Kingma & Lovell, LLP*
Michael C. Masciale | *Copeland, Stair, Kingma & Lovell, LLP*

The Supreme Court of South Carolina recently addressed whether an insurance company can pursue a legal malpractice claim directly against the counsel it hired to defend the insured. In *Sentry Select Insurance Co*., the insured brought a lawsuit in federal district court against defense counsel, alleging that

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counsel's negligence in failing to timely respond to requests to admit caused the case to settle for an amount significantly more than it would otherwise have settled.

The District Court certified two questions of law to the Supreme Court: 1) whether an insurance company may directly pursue a legal malpractice claim against counsel it hired to defend its policyholder, and 2) whether a legal malpractice claim may be assigned to a third party. The South Carolina Supreme Court answered the first question in the affirmative and declined to answer the second question.

In its opinion, the Court explicitly laid out multiple constraints on the insurer. First, if the interests of the insured client are even the slightest bit inconsistent with the insurer's interests, then there can be no liability of the attorney to the insurer. Rather, the insurer may recover only for the attorney's breach of duty to the client when the insurer proves the breach is the proximate cause of damages to the insurer, and proves its case by clear and convincing evidence. The Court also emphasized that it was not recognizing any separate duty owed by the insured's attorney to the insurer, nor recognizing a "dual attorney-client relationship." Further, the Court held there may be no double recovery, noting it made a deliberate decision not to specifically identify any theories of recovery for the insured in order to preserve the attorney's fiduciary allegiance to his client with no interference from the insurer. Finally, the insurer may not intrude upon the privilege between the attorney it hires to defend its insured and the attorney's client.

The dissent highlighted some significant implications of the Court's ruling, including that by limiting the insurer's recovery to the extent hired counsel breached its duty to the insured and by prohibiting double recovery, any cause of action against the defense counsel would be more akin to equitable subrogation or an assignment of an insured's legal malpractice claim.

Sentry Select Insurance Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270 (2019).

SUPREME COURT OF THE UNITED STATES

SCOTUS Declines to Adopt the "Discovery Rule" for the FDCPA's 1-Year Statute of Limitations; Reaffirms Plain Text Approach to Statutory Interpretation

Matthew E. Selmasska | *Kaufman Dolowich & Voluck, LLP*

In *Rotkiske v. Klemm*, the U.S. Supreme Court took up the question of whether the one-year statute of limitations under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(d), is subject to the discovery rule, meaning that the clock would begin to run upon the discovery of the purported violation. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 358 (2019). The FDCPA is the primary federal statute that creates civil liability for debt collection practices and has critical import for attorneys engaged in collections work. In *Rotkiske*, relying on the plain text of the FDCPA, the Supreme Court declined to adopt the discovery rule approach and held that the clock for the one-year statute of limitations begins to run from the date on which the alleged violation occurs. *See Rotkiske*, 140 S. Ct. at 360.

Here, Kevin Rotkiske incurred $1,200 in credit card debt and his credit card company referred the outstanding debt to Klemm & Associates. Klemm sued Rotkiske in a collections action and attempted service at an address where the appellant no longer lived. A person whose description did not match Rotkiske's accepted service. While Klemm later withdrew the lawsuit, it initiated the action again in January 2009. Again, Klemm served the complaint at an improper address and someone other than Rotkiske accepted service. Klemm obtained a default judgment that Rotkiske only learned of in September 2014 when he was denied for a mortgage.

Rotkiske sued Klemm under the FDCPA six years after the default judgment. Rotkiske specifically alleged that the underlying collections action violated the FDCPA because it was brought beyond the six-year statute of limitations on the underlying debt, meaning that Klemm did not have the lawful ability to collect. Rotkiske argued that the one-year FDCPA statute of limitations should be equitably tolled because Klemm

served process in a manner to ensure he would not receive service. The District Court granted Klemm's motion to dismiss and held that Rotkiske's FDCPA claim was time barred. The court also declined to follow Ninth Circuit precedent adopting the discovery rule. The U.S. Court of Appeals for the Third Circuit unanimously affirmed the dismissal and declined to follow the Ninth Circuit.

The Supreme Court, relying on the plain text of the statute, held that actions under the FDCPA must be brought, "within one year from the date on which the violation occurs." *See Rotkiske*, 140 S. Ct. at 360 (quoting 15 U.S.C. § 1692k(d)). The Court declined to accept Rotkiske's invitation to apply a general "discovery rule" for FDCPA actions, labeling this approach "a bad wine of recent vintage." The Court reiterated that it should not second guess Congress's decisions in statutory construction.

Rotkiske v. Klemm, 140 S. Ct. 355, 358 (2019).

TEXAS

Statute of Limitations Bars Claim Against Lawyer in Underlying

John G. Browning | *Spencer Fane LLP*

In *Erikson v. Renda*, the Texas Supreme Court issued an opinion in in which it answered the question of whether the *Hughes* rule (which tolls the limitations period on legal malpractice claims arising out of litigation until all appeals have run) extended to legal malpractice claims that occur in connection with the prosecution of a claim or defense. On the alleged advice of counsel, a business owner transferred various assets to the business' creditors when the business owed a $12 million debt to the U.S. government—which resulted in the government filing a priority claim against the business owner.

Eleven years after the advice, and six years after the business owner discovered the injury (but one year after resolution of the federal government suit), the business owner filed a malpractice claim against his attorney. The trial court granted summary judgment for defendant on limitations grounds, but the Amarillo Court of Appeals reversed. The Supreme Court reversed, pointing out that Renda's malpractice claim accrued more than five years before he sued Erickson, and that because the legal advice about the settlement of the business' debts was only tangentially related to the prosecution or defense of a claim, no *Hughes* tolling result applied. The Court rendered a take nothing judgment on the legal malpractice claim.

Erikson v. Renda, 590 S.W.3d 557 (2019).

WISCONSIN

Non-Client Beneficiary Has Standing to Sue for Negligent Estate Administration

Corinne G. Ivanca | *Geraghty, O'Loughlin & Kenney, P.A.*

This legal malpractice case arose out of an attorney's alleged negligent administration of an estate, which the beneficiaries alleged had caused them harm. The specific allegation was that the attorney should have interpreted the decedent husband's will as creating a trust in favor of his widow, instead of as devising his property directly to her. The alleged negligence resulted in estate taxes being imposed upon the wife's passing, as opposed to when the husband died. The children, unhappy with the large tax bill when their mother passed, claimed that the attorney should have interpreted the husband's will as creating a trust, which would have avoided the ultimate estate tax.

The district court granted summary judgment to the defendant on the basis that the husband's will did not create a trust, nor did he intend to create a trust. The court of appeals affirmed in an unpublished opinion. The supreme court accepted review and affirmed.

The supreme court held, in a matter of first impression, that a non-client who is a named beneficiary of a will has standing to sue an attorney for malpractice if the beneficiary can demonstrate that the attorney's negligent administration of the estate thwarted the testator's clear intent. In *Auric v. Continental Cas. Co.*, 331 N.W.2d 325) (Wis. 1983), the court had created a narrow exception to the privity rule in holding that the beneficiary of a will could maintain an action against an attorney who negligently drafted or supervised the execution of the will, where the negligence thwarted the decedent's intent.

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The beneficiary plaintiffs urged the court to abandon the *Auric* rule and adopt the Restatement (Third) of the Law Governing Lawyers § 51 (2000), which contains a more expansive statement of an attorney's duty to non-clients. The court declined to adopt the Restatement but held that the *Auric* exception to the rule of nonliability of an attorney to a non-client applies to the administration of an estate in addition to will drafting and execution.

Finally, the court agreed with the district court and the court of appeals that the testator's intent had not been thwarted by the alleged negligence of the attorney, because the testator had not intended to create a trust. Thus, the court affirmed the grant of summary judgment to the defendant attorney.

MacLeisch v. Bardman & Clark, LLP, 924 N.W.2d 799 (Wis. 2019).

Individual Condo Owners Do Not Have Standing to Sue Condo Association Attorneys

Corinne G. Ivanca | *Geraghty, O'Loughlin & Kenney, P.A.*

Plaintiffs were condominium owners who rented their condominium units to Wisconsin Dells vacationers. They filed a proposed class action against the condominium association claiming that the association was improperly offering club memberships to the public thereby permitting the public to rent units at a discount to the benefit of the association but the detriment of the individual plaintiffs. Plaintiffs also asserted claims for legal malpractice against the attorneys for the association, purportedly on behalf of the association.

Defendant attorneys moved to dismiss the legal malpractice claims, arguing that while the association would be able to sue on behalf of all unit owners under § 703.15(3)(a)3, the individual owners do not have the inverse right to sue on behalf of the association. In response, the plaintiffs argued that "for all practical purposes," the attorneys represented the unit owners. But the court found that no factual support was offered to support that conclusion. The plaintiffs further argued that the attorneys could be liable to them as third parties because fraud was present. The court declined to address the assertion that the plaintiffs had personal claims against the attorneys because the complaint had not asserted such claims, and rather had only stated claims "on behalf of the association." Accordingly, the defendant attorneys' motion for judgment on the pleadings was granted as to the legal-malpractice claims.

Additionally, in ruling on the association's motion for judgment on the pleadings on the basis of the statute of limitations, the court refused to consider a document the defendant attached to its answer because the document was not referred to in the plaintiff's complaint, nor was it subject to judicial notice. The proper procedure to rely on the document was therefore a motion for summary judgment rather than a motion for judgment on the pleadings.

Sartin v. Chula Vista, Inc., LLP, 2019 WL 2746210 (E.D. Wis., July 1, 2019).

Court Declines to Create Exception to Actual Innocence Rule

Corinne G. Ivanca | *Geraghty, O'Loughlin & Kenney, P.A.*

This unpublished court of appeals case arose out of the plaintiff's legal-malpractice claim against his criminal defense attorney. The attorney had represented him in defending a charge of theft by contractor, a misdemeanor. The attorney failed to recognize that the three-year statute of limitations in § 939.74(1) applied to bar prosecution of the case. The plaintiff entered a guilty plea and was sentenced to eight months in jail.

The plaintiff moved for post-conviction relief, and the appointed post-conviction attorney realized that the statute of limitations applied. He moved to vacate the conviction on that basis. The court granted the motion and plaintiff was released from jail. He had spent four months in jail as a result of the conviction.

The plaintiff sued the attorney for legal malpractice, and the defendant attorney moved for summary judgment, arguing that under *Hicks v. Nunnery*, 643 N.W.2d 809 (Wis. Ct. App. 2002), the plaintiff was required to demonstrate his actual innocence of the criminal charge, which he could not do because he did not dispute that he committed the theft. The district court granted the motion for summary judgment, and the plaintiff appealed. He argued that an exception to the actual innocence rule should be recognized in the case where an attorney fails to recognize the statute of limitations as a bar to the charge. The court de-

clined to create an exception to the actual innocence rule and affirmed the district court's grant of the defendant's motion for summary judgment.

The Wisconsin Supreme Court has accepted review. *Skindzelewski v. Smith*, 935 N.W.2d 682 (Wis. 2019).

Skindzelewski v. Smith, 388 Wis.2d 144 (Wis. Ct. App., May 29, 2019) (unpublished).

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