

## WELCOME TO THE HARMONIE GROUP

### **ISSUE: Attorney Liability for Negligent Settlement Advice**

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### **RISK MANAGEMENT NOTE:**

**Claims against attorneys for negligent settlement advice are permitted in most states. Whether representing a plaintiff or a defendant, an attorney must take care to assure that his or her advice is based on a thorough investigation and understanding of the facts, adequate knowledge of the law and a reasonable and reasoned assessment of the likely outcome of the case absent settlement, all of which should be explained to the client. Documentation of the analysis and explanation is desirable.**

### **ARTICLE:**

Recent years have seen an expansion of the types of claims brought against attorneys, including an increasing number of cases arising from matters that historically have been considered as falling within an attorney's judgment. A particular example of such a claim is one in which an attorney is alleged to have negligently advised his or her client with respect to the settlement of litigation. Most commonly, disgruntled plaintiffs have asserted that their settlements were inadequate. Claims alleging settlement-related errors, however, are not only of concern to the plaintiff's bar. Claims arising from settlements have been asserted against defense attorneys, as well. See, e.g., *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707 (9th Cir. 1992); *Scognamillo v. Olsen*, 795 P.2d 1357 (Colo. App. 1990); *Home Ins. Co. v. Liebman, Adolfe & Charne*, 257 A.D.2d 424, 683 N.Y.S.2d 519 (1999). A recent decision even permitted a client's former defense counsel, who was sued for malpractice, to bring a third party claim against the client's successor counsel alleging that the second counsel negligently recommended an excessive settlement. See *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 576 A.2d 526 (2000).

In some cases, the former client has alleged that he or she was forced to settle because of the attorney's mishandling of the case. In other words, the attorney's alleged negligence in some aspect of the prosecution of the case so weakened the client's claim that the client was left with no choice but to settle it on unfavorable terms. Courts, understandably, have had little difficulty in accepting such claims. See, e.g., *Keramati v. Schackow*, 553 So. 2d 741 (Fla. App. 1989) (missed statute of limitations); *Huntington v. Fishman*, 212 Ga. App. 27, 441 S.E.2d 444 (1994) (failure to timely serve tortfeasor).

A more interesting and challenging type of claim is that the lawyer's settlement advice was, in and of itself, negligent either because the attorney failed to conduct adequate investigation and discovery to gather the facts necessary to evaluate the claim properly or because his or her judgment simply was poor.

Attorneys faced with such claims have raised a number of defenses in an effort to preclude them. First, defendants have argued that malpractice claims arising from settlements are collateral attacks on the reasonableness of settlements to which the clients agreed and, therefore, are barred by collateral estoppel. The courts have concluded, however, that the malpractice suit is not an attack on the settlement itself but, instead, raises the very distinct issue of the attorney's negligence. Accordingly, this argument has been unsuccessful. See, e.g., *Ziegelheim v. Appollo*, 128 N.J. 250, 607 A.2d 1298 (1992); *Baldrige v. Lacks*, 883 S.W.2d 947 (Mo. App. 1994).

Attempts also have been made to preclude legal malpractice claims arising from settlement advice based upon public policy concerns. Public policy without question favors settlement of civil disputes. Potential malpractice exposure for recommending settlement in a close and difficult case could, at least in theory, discourage lawyers from recommending settlements. At the very least, attorneys might be more hesitant to positively and unequivocally provide their own assessments and evaluations of cases for settlement purposes. Whether a case should or can be settled, and for what amount, are matters of great uncertainty. No matter how many settlements a lawyer has negotiated, each new case brings its own dynamic, with different and uncertain hopes and expectations of the parties, different degrees of willingness on the parties to litigate rather than compromise, different negotiating styles, techniques and personalities of opposing counsel and a variety of other factors. The legal malpractice claim arising from a settlement necessarily involves probing the attorney's judgment with the benefit of hindsight. Additionally, it has been argued that the inherent uncertainties of what constitutes a reasonable settlement make the determination of damages improperly speculative.

Although courts have considered these public policy concerns, they generally have found them to be of insufficient weight preclude malpractice claims arising from settlements. The Supreme Court of Pennsylvania appears to be the only court to have barred such claims for reasons of public policy. In *Muhammed v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 526 Pa. 541, 587 A.2d 1346, cert. denied, 502 U.S. 867 (1991), the plaintiffs, upon their attorneys' recommendation, settled a medical malpractice case following the completion of discovery. They later became dissatisfied with their settlement and sued their attorney for legal malpractice. The trial court dismissed the legal malpractice action as being barred by collateral estoppel, but the intermediate Pennsylvania appellate court reversed. The Pennsylvania Supreme Court agreed that the action was not precluded by collateral estoppel, but it barred the claim based upon the "strong and historical public policy of encouraging settlements." The court held that a lawyer could not be found liable for mere negligence in recommending a settlement. 587 A.2d at 1349. The court stated:

The primary reason we decide today to disallow negligence or breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients is that to allow them will create chaos in our civil litigation system. Lawyers would be reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that "could have been done, but was not." We refuse to endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases. A long-standing principle of our courts has been to encourage settlements; we will not now act so as to discourage them.

*Id.* The court limited malpractice actions arising from settlement to those based upon actual or constructive fraud, where "the lawyer knowingly commits malpractice but does not disclose the error and convinces the client to settle so as to avoid the discovery of such error." *Id.* at 1351.

Muhammed, however, has not been accepted elsewhere and, in fact, has been expressly rejected on the ground that its policy arguments are outweighed by clients' rights to competent and professional legal advice and representation. See, e.g., *Ziegelheim v. Appollo*, 128 N.J. 250, 607 A.2d 1298 (1992); *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 646 A.2d 195 (1994). Indeed, the Pennsylvania Supreme Court later held that analysis is "limited to the facts of that case". *McMahon v. Shea*, 547 Pa. 124, 131, 688 A.2d 1179, 1182 (1997). Thus, a policy argument most likely will gain some sympathy, but not success, for the defendant attorney.

Another defense that has been raised is that of judgmental immunity. A number of courts have found, in a variety of contexts, that an attorney may not be held liable for conduct that can be considered an honest and good faith exercise of professional judgment. As stated in one of the early, leading cases on the subject, the rule is as follows:

[T]here can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise, every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight.

Woodruff v. Tomlin, 616 F.2d 924, 930 (6th Cir. 1980). See also, e.g., Kirsch v. Duryea, 21 Cal. 3d 303, 146 Cal. Rptr. 218, 578 P.2d 935 (1978); Glenna v. Sullivan, 310 Minn. 162, 245 N.W.2d 869 (1976); Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985).

This defense was used successfully by the defendant attorney in Hudson v. Windholz, 202 Ga. App. 882, 416 S.E.2d 120 (1992), in defending a claim alleging negligent settlement advice. There, the court found that the evidence on the record “clearly indicates that defendant assessed the relative strengths and weaknesses of the plaintiffs’ claims . . . and exercised his best, informed judgment” prior to making his recommendation. 416 S.E.2d at 124. Although recognizing and accepting the judgmental immunity defense in light of the facts of the case before it, the court’s opinion plainly leaves open the possibility of liability in a case where the attorney cannot demonstrate clearly that he or she made a thorough and informed evaluation of the case. Indeed, it is commonly alleged that the attorney’s negligent advice was the product of inadequate investigation or discovery. See, e.g., Blackwell v. Eckman, 410 N.W.2d 390 (Minn. App. 1987) (failure to discover that the defendant had insurance); Hirsch v. Weisman, 189 A.D. 2d 643, 592 N.Y.S.2d 337 (1993) (incorrect understanding of defendant’s policy limit); Baldrige v. Lacks, 883 S.W.2d 947 (Mo. App. 1994) (failure to properly investigate marital assets); Collins v. Perrine, 108 N.M. 714, 778 P.2d 912 (N.M. App. 1989)(failure to conduct discovery); Hipwell v. Sharp, 858 P.2d 987 (Utah 1993)(failure to be aware of change in law).

In addition, settlement advice claims can be challenged as being based on impermissible speculation. Such a defense is most commonly successful when the malpractice suit is not an attack on a settlement that was obtained but, rather, is a claim that a settlement opportunity was lost or delayed. See, e.g., Thompson v. Halvonik, 36 Cal. App. 4th 657, 43 Cal. Rptr. 2d 142 (1995); Schlomer v. Perina, 169 Wis. 2d 247, 485 N.W.2d 399 (1992).

Defense successes in this area, however, have been limited. Courts throughout the country generally have found legal malpractice claims arising from settlement advice to be cognizable causes of action.

A decision of the Court of Appeals of Maryland, Thomas v. Bethea, 351 Md. 513, 718 A.2d 1187 (1998), illustrates the majority approach to the issue. The legal representation at issue began in 1981, nearly 17 years before the court’s decision. David Thomas, a Maryland attorney, was engaged to represent a child and her mother in a lead paint poisoning case. Thomas filed suit against the landlords of three properties in which the child had lived. The owners of the first two properties were served, but Thomas was unable to effect service on the owner of the third property. In late 1983, Thomas received an offer of settlement from the two served defendants in the amount of \$2,500, conditioned on the general release of all three defendants. Ms. Bethea accepted the settlement offer on Thomas’ recommendation. Nearly 12 years later, the child sued Thomas for legal malpractice. (Under Maryland law, the statute of limitations for a minor’s claim is tolled until the child reaches adulthood.)

Although the plaintiff presented expert testimony to the effect that the \$2,500 settlement was generally inadequate, she stipulated at trial that the alleged breach of the standard of care concerned only the release of the unserved defendant as part of the settlement. Thus, her contention was that Thomas should not have agreed to release that defendant as part of the settlement with the other two. At trial, both sides presented the testimony of well-respected Baltimore attorneys, who, unsurprisingly, expressed diametrically opposed views concerning the standard of care. The plaintiff’s expert testified that the settlement was “woefully inadequate” in view of the fact that the child had a strong case in the lead paint litigation. Accordingly, in his view, the case should not have been settled for \$2,500 but, instead, should have gone to trial. The defense expert, on the other hand, opined that, because success at trial would have been unlikely, the settlement was “a gift.”

In answering special verdict questions, the jury determined that the unserved landlord was negligent and that the presence of lead paint in the home that it owned and leased to Ms. Bethea was a substantial factor in causing injury to the child. The jury found that the plaintiff had sustained \$125,000 in damages as a result of her exposure to lead paint at the third residence. The jury also concluded that Thomas’ settlement recommendation was one that no reasonable attorney would have made. Finally, although there was no evidence on the subject, the jury decided that a reasonable attorney would have recommended a settlement of \$25,000. The trial court granted Thomas’ motion for judgment

notwithstanding the verdict on the ground that the proper measure of damages was the amount of a reasonable settlement and that there was no evidence of what a reasonable settlement would have been. On appeal the Court of Appeals, after holding that the plaintiff's claims were not barred by collateral estoppel, proceeded to determine the applicable standard of care. The court explicitly rejected the Pennsylvania Supreme Court's decision in Muhammed. Furthermore, it rejected the argument that a negligent settlement advice claim should be subject to any heightened standard of negligence. In a prior case, Maryland's intermediate appellate court, based on the sorts of policy issues addressed in Muhammed, had decided to adopt a standard of care by which liability could be found only if "no reasonable attorney" would have recommended the settlement at issue. See *Prande v. Bell*, 105 Md. App. 636, 660 A.2d 1055 (1995). The Court of Appeals, however, held that there is no sound reason to treat negligent settlement advice cases any differently than any other kind of professional malpractice case. The court stated, "There can be little doubt that clients routinely anticipate that their cases will be settled and that they rely heavily on their lawyer's recommendation regarding settlement, expecting that the lawyer has a sufficient understanding of the relevant facts, law, and prospects to make an intelligent recommendation." 718 A.2d at 1195.

Although recognizing that a lawyer's settlement recommendation must consider a variety of subjective factors and that settlement recommendations can provoke honest differences of opinion, the court found that lawyers frequently must make "judgment calls." Those calls, according to the court, properly should be examined in light of the traditional professional negligence standard of reasonable care. Thus, the court appears to have implicitly rejected the judgmental immunity defense. (The court's opinion does not reveal whether the plaintiff asserted that Thomas' alleged errors were any more than errors of judgment.)

In addressing the appropriate measure of damages, the court gave malpractice plaintiffs the benefit of choosing between two damage theories. If the client can prove (1) the settlement recommended by the lawyer was one that a reasonable lawyer would not have recommended under the circumstances, (2) had the settlement offer not been accepted, a higher settlement both would and could have been obtained, and (3) the higher amount would have been a reasonable settlement, then the proper measure of damages would be the difference between the settlement that reasonably could have been obtained and the one that was actually obtained. The court recognized, however, that evidence proving that a better settlement was available would be difficult to obtain in most cases. (The court appeared to reject the possibility of a plaintiff successfully using expert testimony to prove the likelihood of settlement as being improperly speculative without direct evidence of the defendant's willingness to settle.)

Assuming that a plaintiff could not establish the difference between what the case was settled for and could have been settled for, the plaintiff then has another option. Once the plaintiff establishes that the settlement was unreasonable, he may proceed on the theory that the lawyer, accordingly, should have recommended rejection of the settlement, and the case should have proceeded to trial. When the issue is put in this analytical context, the measure of damages necessarily becomes the difference between what was accepted in settlement and what the client likely would have received had the case been tried. This involves the classic "case within a case" approach. Applying this holding, the court upheld the jury's \$125,000 verdict.

*Thomas v. Bethea* and cases like it demonstrate the difficulty of defending negligent settlement advice cases. If the plaintiff can present any evidence that his attorney failed to consider some factor in evaluating the settlement value of his case, or even if he simply can find an expert to testify that the settlement amount was unreasonable, he is likely to have a viable claim of legal malpractice.

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