

In most jurisdictions, in legal malpractice cases involving an allegation that the plaintiff-client lost a cause of action and a right to a judgment against a third party, damages are not presumed. Instead, the plaintiff-client has the burden of proving that he or she suffered actual damages. One issue that frequently arises is the issue of the collectability of the individual or entity who would have played the role of the defendant in the underlying lawsuit if the plaintiff-client's cause of action and right to a judgment had not been lost. Without a defendant to sue who could actually pay the amount of an award reflected in a judgment, the plaintiff-client's right to a judgment against such a defendant had little value in the first place, and it follows from that fact that the defendant-lawyer has caused no loss for which the law should make the lawyer account. In legal malpractice litigation where collectability becomes an issue, numerous related issues must be resolved by practitioners and the courts.

THE BURDENS OF PRODUCTION AND PERSUASION

A threshold issue that arises in cases where collectability is an issue is whether the plaintiff-client or the defendant-lawyer has the burden of coming forward with some evidence of the underlying defendant's collectability and the burden of persuading the trier of fact that, if successful, the plaintiff-client would really have collected money from the underlying defendant. Virtually all jurisdictions that have addressed the issue of collectability have concluded that a plaintiff-client's right of recovery against the defendant-lawyer should depend upon the extent to which the underlying defendant was collectable. If the law allowed the plaintiff to recover from a lawyer more than the plaintiff could have collected from the defendant in the underlying lawsuit, the plaintiff would unfairly receive a windfall as a result of the legal malpractice. Since the law's purpose in awarding damages in legal malpractice cases is to restore the plaintiff to the same condition that the plaintiff would have enjoyed if the plaintiff had not suffered any injury, the law tends to avoid results that confer windfalls.

But while there is unanimity that an underlying defendant's collectability or non-collectability should determine the extent to which the plaintiff may recover from the plaintiff's former lawyer, the authorities are split on the manner in which the judicial system should take account of the underlying defendant's collectability or non-collectability.

HARMLESS ERRORS



COLLECTABILITY ISSUES IN LEGAL MALPRACTICE LITIGATION

Michael R. Vescio SmithAmundsen LLC

The majority rule among jurisdictions holds that the plaintiff-client has the burden of coming forward with at least some evidence, and of ultimately persuading the trier of fact to believe, that—absent the lawyer's negligence—the plaintiff would have successfully recovered money. Decisions adhering to the majority rule place the burdens of production and per-

suation on the client on the theory that the client must prove all of the elements of the legal malpractice claim, including the element of damages. A plaintiff who cannot prove that the underlying defendant was collectable has not proven that the plaintiff suffered anything more than a harmless loss of a technical legal right. A judgment that cannot be collected has little value.

The minority rule among the jurisdictions that have resolved this question holds that the defendant-lawyer has the burden of production and persuasion on the non-collectability of the underlying defendant. One justification given for this alternative allocation of the burdens is that oftentimes legal malpractice cases involving an allegation of a lost cause of action and a lost right to a judgment are cases in which the lawyer delayed commencement of the client's lawsuit for so long that the statute of limitations ran on the client's claims. The resulting lapse of time makes proving any aspect of the case more difficult—memories fade, and records are lost. Under the minority rule, the lawyer who caused such a delay is the party who must contend with the evidentiary problems created by the delay. In addition, a lawyer who claims that the underlying defendant was non-collectable is claiming that the lawyer originally took up a client's cause against the underlying defendant even though any judgment the lawyer obtained would ultimately prove worthless. Since this sort of assertion seems the sort of extraordinary claim that requires extraordinary proof, the minority rule requires the lawyer to supply the requisite proof.

PLEADING ISSUES

Since the majority rule allocates the burdens on collectability issues to the plaintiff-client, in most collectability cases the plaintiff has the obligation to plead the collectability issue in accord with the jurisdiction's rules of pleading and practice. However, in cases where the minority rule governs the allocation of the parties' burdens, the defendant-lawyer should make sure that the non-collectability of the underlying defendant is asserted as an affirmative defense. Jurisdictions applying the minority rule treat non-collectability as an affirmative assertion, a means of defeating an otherwise valid legal malpractice claim, instead of a negative assertion about a deficiency in an element of the client's legal malpractice claim. Since non-collectability qualifies as an affirmative defense in jurisdictions adhering to the minority rule, a defendant's failure to timely plead non-collectability as an affirmative defense risks a waiver of the right to present the defense.

DISCOVERY ISSUES

Another issue that might arise in a collectability case is how to obtain information about the underlying defendant's capacity to pay the allegedly lost judgment. In some sense, this discovery issue is not limited to collectability cases. In legal malpractice cases more generally, a plaintiff must successfully prevail in a "trial within a trial"—litigating all of the issues that would have been litigated in the original action against the underlying defendant. As a result, information in the possession of the underlying defendant is often critical to the existing parties in legal malpractice lawsuits. However, since the legal malpractice case exists because the right to litigate against the underlying defendant has been lost, the underlying defendant is usually a stranger to the legal malpractice litigation. Fortunately for the litigants in the legal malpractice lawsuit, the civil justice system adheres to the general maxim that everyone has a right to every person's evidence, and the litigants can ordinarily compel the underlying defendant to provide the relevant testimony and documentary evidence that the underlying defendant possesses.

Collectability issues in legal malpractice lawsuits further complicate discovery of information and documents in the possession and control of the underlying defendant. Information about the underlying defendant's collectability—that is, the underlying defendant's capacity to pay money over to a plaintiff holding a valid judgment against such person—has a special status. Most people regard information about their finances and wealth as confidential and sensitive information, and the law oftentimes gives special recognition to the reasonable expectation that people have to a zone of privacy with regard to such sensitive materials and information.

In light of the special confidentiality and sensitivity of information about the underlying defendant's finances and wealth, the litigants in a legal malpractice case where collectability is an issue should consider the use of special procedures to protect the underlying defendant's privacy concerns. For example, the parties may enter into confidentiality agreements with the underlying defendant, or offer to stipulate to the entry of a protective order for the underlying defendant's benefit, in order to gain the underlying defendant's cooperation in efforts to obtain the requisite evidence of collectability. And if the parties cannot secure the

cooperation of the underlying defendant, the parties should be cognizant that their general right to every person's evidence might not suffice by itself to grant them wide access to evidence of the wealth and finances of the underlying defendant.

EVIDENTIARY ISSUES

The evidentiary issues that may arise in cases where collectability is an issue are too numerous to attempt to list in any sort of exhaustive fashion. In terms of documentary evidence, the collectability of an underlying defendant might be revealed through the presentation of things like accounting reports, balance statements, and tax returns. Litigants might also present witnesses with personal knowledge about the underlying defendant's capacity to pay a judgment. For example, in cases involving an underlying defendant who is a corporation or other business entity, the company's accountant or chief financial officer could likely testify from personal knowledge about the entity's capacity to pay a judgment.

Another fairly obvious factor in any collectability case is whether insurance exists which might have provided coverage sufficient to indemnify the underlying defendant for the allegedly lost judgment. On the one hand, a plaintiff-client might prove that the underlying defendant's insured status made him or her collectable. On the other hand, the defendant-lawyer might raise as a defense against the plaintiff's claims about collectability any insurance coverage defenses that the underlying insurer might have raised. As a result, the possibility exists that the parties in the legal malpractice case could find themselves litigating a special sort of "trial within a trial," a "coverage trial within a trial."

Something else that might complicate the issues in a collectability case is the possibility that a settlement might have been reached in the underlying litigation if not for the alleged malpractice. A plaintiff might maintain either that the defendant in the underlying case made a settlement offer, or that the lawyer should have and could have obtained such an offer, and that, if informed of such an offer, the plaintiff would have accepted it. If the plaintiff can prove this, and if the defendant cannot prove that the underlying defendant lacked the capacity to make good on any settlement the parties might have reached, the plaintiff in the legal malpractice case could recover from the former lawyer the difference between

the value of the hypothetical settlement and the amount, if any, that the plaintiff actually recovered at the conclusion of the underlying litigation.

Finally, in an appropriate case, parties should consider using opinion testimony from expert witnesses to prove the collectability or non-collectability of the underlying defendant. For example, a forensic accounting expert might be used to impeach the computations or conclusions of an adverse party, or to reconstruct the underlying defendant's finances or capacity to pay a judgment after a lapse of time or a change in circumstances—like an intervening bankruptcy or other sort of insolvency—makes proof of collectability or non-collectability elusive. Such testimony would obviously need to satisfy the admissibility requirements applicable to expert testimony in that particular jurisdiction.

CONCLUSION

The potential relevancy of collectability issues in a legal malpractice lawsuit complicates the litigation at nearly every stage. Case law provides some guidance in resolving some of the most frequently recurring issues, but perhaps not to the same extent as in other areas of the law. In the past, in many jurisdictions, plaintiffs brought legal malpractice actions against their lawyers relatively infrequently. This began to change in the 1990s, when there was an increase in the frequency of malpractice claims against lawyers and other professionals. This trend continues today. Nationally, 5 percent to 6 percent of lawyers become the subject of a legal malpractice claim in an average year.¹ In the resulting legal environment, involving increasingly frequent legal malpractice claims and a relative paucity of legal guidance on how to resolve complicated issues, practitioners and courts will spend the next few years, at least, resolving the numerous unresolved issues—including collectability issues—that are unique to legal malpractice cases.



Michael Vescio is a partner in the Milwaukee, WI office of SmithAmundsen LLC. He concentrates his practice in insurance coverage litigation, professional liability and malpractice defense, insurance tort defense, complex civil and commercial litigation, and appellate law.

¹ See Harold Nedd, "Lawyers Insure Themselves In Case They Get Sued," *Pacific Business News* (Honolulu) (September 1, 2006) (citing *Insurance Journal: The Property Casualty Magazine*).