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Leadership Notes

Notes from the Editor

by Daniel S. Strick

On behalf of the Committee, we welcome our new Chair Frances O'Meara who has big shoes to fill after the accomplishments and efforts of outgoing Chair Dan Meyer.

As 2013 winds down we look to the many opportunities to write and get published in 2014. In addition to the many and varied articles and practice tips pieces published in our Quarterly Newsletter Riding the E&O Line. If you are interested in writing and getting published, there is no better time or place. Please email me, if you are interested in taking advantage of the many writing opportunities our committee has to offer.

We would like to thank this Quarter's authors, Laura Caldera Taylor, NelsVulin and Tom Hutchinson of Bullivant Houser Bailey, P.C., (Portland, OE), Will Jordan of Sowell Gray (Columbia, SC) and Stephanie Solomon of Burns White (Pittsburgh, PA) for their contributions. Our Spotlighted member is Dan Meyerof Meyer Law Group LLC (Chicago, IL).

Thank you.

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The views and opinions expressed by the authors herein are solely those of the authors and are not those of the authors' law firms, employers or clients.

Featured Articles

Pointing the Finger: Bernie Madoff and the Potentially Changing Landscape of Trustee Claims

by Laura Caldera Taylor and Nels Vulin with contribution from Thomas Hutchinson

Over a period of three decades, Bernard Madoff masterminded what is alleged to

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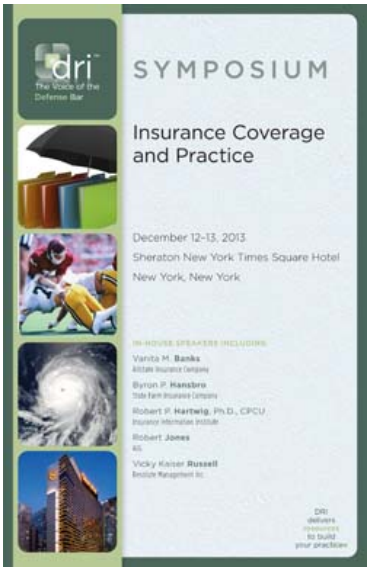

be the world's largest Ponzi scheme. *See* Petition for Writ of Certiorari, *Trustee v. JPMorgan Chase & Co., et al.*, (*In re Bernard L. Madoff Investment Securities LLC*) (October 9, 2013)(page 1). When it collapsed, nearly $20 billion invested in Madoff's Ponzi scheme had disappeared. *Id.* This is not new information. After Madoff's arrest in December 2008, it was frequently front-page news, and became the topic of many CLEs in the years that followed. Some five years later, does the Madoff debacle offer anything new or interesting for lawyers representing professionals and financial institutions? The short answer is yes. On October 9, 2013, the trustee in the SIPA liquidation bankruptcy of Madoff's firm, Bernard L. Madoff Investment Securities LLC ("BLMIS") filed a Petition for Writ of Certiorari that raises interesting issues regarding a trustee's standing to bring third-party claims, and preemption for conversion claims.

On December 3, 2010, in the United States Bankruptcy Court, Southern District of New York, BLMIS's Trustee, Irving Picard, filed one of the adversary actions against financial institutions alleged to have aided Madoff's Ponzi scheme. That action was brought against various entities under the JPMorgan umbrella ("JPMorgan" or "JPMorgan Defendants"). After the district court removed the reference from the bankruptcy court, an Amended Complaint was filed that alleged twenty-eight claims for relief including, among others: preferential or fraudulent transfer claims; tort claims ranging from aiding and abetting fraud and breach of fiduciary duty to fraud on the regulator; and contribution. *Picard v. JPMorgan Chase & Co., et al.* (*In re Bernard L. Madoff Investment Securities LLC*) Case No. 1:11-cv-0093, Adv. No. 08-01789, (SDNY 06/24/2011) (Docket No. 50). The Amended Complaint alleged that beginning in 1986, all of the money Madoff stole from his customers passed through the "703 Account" at JPMorgan where it was comingled and ultimately washed. *Id.* at ¶ 3. The Amended Complaint goes on to allege that virtually none of the money was used to buy securities—something Picard alleges JPMorgan knew or should have known. *Id.* JPMorgan did nothing to stop the fraud, the Amended Complaint alleges, allowing it to make at least half a billion dollars in revenue on Madoff's Ponzi scheme. *Id.* at ¶ 12. JPMorgan responded to these allegations by moving to dismiss a number of the claims.

JPMorgan was successful on its standing argument before the District Court. It argued that the Second Circuit's holding in *Shearson Lehman Hutton, Inc. v. Wagoner,* 944, F.2d 114 (2d. Cir. 1981)—that a claim against a third party for defrauding a failed corporation with the cooperation of management "accrues to the creditors not the guilty corporation"—is consistent with the Supreme Court's holding in *Caplin v. Marine Mindland Grace Trust Co. of N.Y.*, 406 U.S. 416 (1972), that a bankruptcy trustee "has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself." *See* Picard v. JPMorgan Chase &Co., 460 B.R.84 (S.D.N.Y. 2011). As JPMorgan explained, the *Wagoner* rule is based on the doctrine of *in pari delicto* and "because a trustee stands in the shoes of the corporation, the *Wagoner* rule bars a trustee from suing to recover for a wrong that he himself essentially took part in." *See Picard v. JPMorgan Chase & Co., et al.* (*In re Madoff*), Case No. 1:11-cv-0093, Adv. No. 08-01789, JP Morgan Defendant's Memo ISO Motion to Dismiss at p. 11, *citing to and quoting Kirschner v. KPMG LLP*, 15 N.Y. 3d 446, 457 (2010).

The Trustee, on the other hand, unsuccessfully focused on numerous cases holding that a SIPA trustee has standing to sue third parties as a bailee of customer property. *See Picard v. JPMorgan Chase & Co., et al.* (*In re Bernard L. Madoff Investment Securities LLC*) Case No. 1:11-cv-0093, Adv. No. 08-01789, Memorandum of Law of the Securities Investors Protection Corporation in Opposition to Motion to Dismiss at p. 8 (Docket No. 61) (Trustee's Memo in Opposition to Motion to Dismiss). The trustee's most persuasive authority before the District Court was *Redington v. Touche Ross & Co.*, 442 U.S. 560 (1979) where the Supreme Court upheld the Second Circuit's

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finding that a SIPA trustee had standing to bring third-party claims as a subrogee or baliee of customer property. The Trustee also addressed *Wagoner*, arguing that *in pari delicto* does not apply to a bailee, and even if it did the issue is not appropriately resolved at the pleading stage. *Id.* at pp. 24 – 29.

The District Court dismissed most of the Trustee's claims, finding that the common law causes of action belonged to the creditors and not the Trustee. *See Picard v. JPMorgan Chase & Co., et al.* (*In re Bernard L. Madoff Investment Securities LLC*) Case No. 1:11-cv-0093, Adv. No. 08-01789, Decision and Order Granting Defendants' Motion to Dismiss Certain Common Law Claims (Doc. No. 70) ("Order"). The District Court also found that the Trustee's claims were barred by *in pari delicto*. *Id.* Finally, as to the issue of contribution, the District Court found that the Trustee lacked standing on any other basis, and had no right to contribution under New York law when the source of his obligation to creditors arose under SIPA. *Id.* at 8.

On December 1, 2011, the Trustee appealed to the Second Circuit, which affirmed the district court's decision on the basis that (1) the doctrine of *in pari delicto* bars the Trustee's claims; (2) SIPA provides no right of contribution; and (3) the customer claims are not common or general, even if aggregated and thus cannot be brought by the Trustee. *In re Bernard L. Madoff Investment Securities LLC*, Nos. 11-5044, 11-5051, 11-5175 and 11-5207, 2013 WL 3064848 (2d Cir. June 20, 2013). (The appeal to the Second Circuit was combined with two other third-party adversaries in the Madoff Investment Securities bankruptcy.)

On October 9, 2013, the Trustee filed a Petition for Writ of Certiorari to the United States Supreme Court. *See* Petition for Writ of Certiorari, *Trustee v. JPMorgan Chase & Co., et al.*, (*In re Bernard L. Madoff Investment Securities LLC*) (October 9, 2013). The Trustee's Petition argues that Section 544(a) of the Bankruptcy Code provides that a trustee has all of the "rights and powers" of a hypothetical creditor with a judicial lien on all property of the pre-bankruptcy estate. *Id.* at p. 32. For that reason, the Petition argues, a trustee may bring claims against third-parties that are "general" to all creditors.

The Trustee cites *Koch Ref. V. Farmers Union Cent. Exch*, 831 F.2d 1339, 1341 (7th Cir. 1987) for the proposition that a trustee may bring general claims where "the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors."*Id.* at 33 – 34. In *Koch*, a group of oil companies sued the debtor – an energy cooperative – for declaratory relief seeking, among other things, to pierce the corporate veil and hold the member-owners responsible for any amounts the bankruptcy trustee recovered from the oil companies as preferences because the owner-members of the debtor allegedly breached their fiduciary duties to the corporation. *Koch*, 831 F.2d at 1349. The Seventh Circuit held that the oil company's claims were general to all creditors, and could therefore be brought by the bankruptcy trustee, but the oil companies/creditors had no standing to bring them. *Id*. The Petition notes that the First Circuit also adopted this distinction in *City Sanitation, LLC v. Allied Waste Servs. Of Mass., LLC (In re Am. Cartage, Inc.)*, 656 F.3d 82, 90 (1st Cir. 2011). In his Petition to the Supreme Court, Picard argues that the claims of the Madoff estate are general, and therefore, are properly brought by the Trustee. *See* Petition for Writ of Certiorari, *Trustee v. JPMorgan Chase & Co., et al.*, (*In re Bernard L. Madoff Investment Securities LLC*) (October 9, 2013) (page 36).

As to contribution, the Trustee argues that New York law allows the Trustee to sue joint torfeasors for payments made under SIPA whether they are liable under the same or different theories, and that New York law allows such claims to be brought even against intentional tortfeasors. The Trustee asserts that the Second Circuit dismissed the contribution claims without considering whether they conflict with federal law. Picard argues that New York law should control unless Congress specifically intended that federal law preempt the state law. *See* Petition for Writ of Certiorari, *Trustee v. JPMorgan Chase & Co., et al.*, (*In re*

Bernard L. Madoff Investment Securities LLC) (October 9, 2013) (page 26). This claim is important for the Trustee as it has the potential to increase the amount of damages it could pursue up to the amount of the prayer: $19 billion.

If the Supreme Court grants certiorari in this case it could have substantial implications for financial institutions, accountants, lawyers, and other professionals who have involvement in entities that end up in bankruptcy with allegations of fraud or other substantial wrongdoing on the part of the entities' principals. Presently, as highlighted by the Petition, there is a split of authority on whether a bankruptcy trustee has standing under these circumstances to bring certain third-party claims.

As to the standing issue, in addition to the split of authority regarding whether a Trustee has the ability to bring claims on behalf of all creditors, there is a split of authority regarding whether the standing issues and *in pari delicto* issues are, or should be, addressed together. In *In re Senior Cottages of America, LLC*, 482 F.3d 997 (8th Cir., 2007), the Eighth Circuit joined the First, Third, Fifth, and Eleventh Circuits in holding that the *in pari delicto* defense does not deprive the corporation, and by extension the trustee, of standing to sue third parties. In so concluding, the Eighth Circuit cited approvingly to this language from the Third Circuit, "An analysis of standing does not include an analysis of equitable defenses, such as *in pari delicto*. Whether a party has standing to bring claims and whether a party's claims are barred by an equitable defense are two separate questions, to be addressed on their own terms." *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 346 (3dCir.2001).

Even where the issue of standing and the defense of *in pari delicto* are treated separately, there is a split of authority on the application of that doctrine with several circuits finding that itbars "claims of a bankruptcy trustee, standing in the shoes of the debtor, against third-parties, without regard to the trustee's status as an innocent successor." *See Successor Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340 (3d Cir. 2001) (invoking *in pari delicto* as a bar to debtors' claims against third parties, even though trustee was "innocent"); *In re Dublin Sec., Inc*., 133 F.3d 377(6th Cir. 1997) (*in pari delicto* barred trustee's malpractice action against law firms and attorneys who allegedly represented debtors-securities companies in connection with fraudulent public stock offerings); *In re Hedged-Investments Associates, Inc*., 84 F.3d 1281 (10th Cir. 1996) (doctrine barred third-party claims by trustee of limited partnership used in Ponzi scheme).

But, other circuits find that it could be inequitable to apply *in pari delicto* "where prior management was at fault but the claim was asserted on behalf of creditors or shareholders." *Baena v. KPMG LLP*, 453 F.3d 1, 10 (1st Cir. 2006), (citing *FDIC v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir.1995); *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir.)).

Of particular note are decisions out of the California district courts where equity considerations are given considerable weight. There, district courts have noted that where a receiver, or trustee, "was not a party to the original inequitable conduct . . . application of the *in pari delicto* defense would place losses on innocent creditors rather than the allegedly culpable defendant." *Mosier v. Stonefield Josephson, Inc.*, 2011 WL 5075551 (C.D. Cal. Oct. 25, 2011). California courts, it seems, are beginning to challenge the notion that a debtor's fault should automatically be imputed to a receiver or trustee. *See also F.D.I.C. v. O'Melveny & Myers, 61 F.3d 17, 19 (9th Cir. 1995)* (unpublished) ("[D]efenses based on a party's unclean hands or inequitable conduct do not generally apply against that party's receiver. While a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on a trustee, receiver or similar innocent entity that steps into the party's shoes pursuant to court order or operation of law.").

In considering Picard's Petition, the Supreme Court has the opportunity to resolve the split of authority in the circuit courts regarding how to address the issue of a trustee's standing and whether to merge the issues of standing and

the defense of *in pari delicto* into a single analysis, or to separately consider them on their own merits. The Court will also have the opportunity to address the equity issues the California district courts have been grappling with regarding the defense of *in pari delicto*. And finally, the Court will be called upon to answer what could be a $19 billion question regarding the viability of the Trustee's conversion claim. Because of its potential impact, the Madoff Trustee's Petition for Writ of Certiorari should be on the must watch list for lawyers representing financial institutions, and professionals such as financial and legal advisors.

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The Case within the Case: Practical Tips for Using the Full Arsenal in Defending Legal Malpractice Claims

by William H. Jordan

There's a scene in the movie *Ocean's Eleven* where Danny Ocean, played by George Clooney, gathers the all-star team of accomplices who will help him rob three Las Vegas casinos and explains the task at hand:

> Okay. Bad news first. This place houses a security system which rivals most nuclear missile silos. First: we have to get within the casino cages . . . which anyone knows takes more than a smile. Next: through these doors, each of which requires a different six-digit code changed every twelve hours. Past those lies the elevator, and this is where it gets tricky: the elevator won't move without authorized fingerprint identifications . . . and vocal confirmations from both the security center within the Bellagio and the vault below . . . Furthermore, the elevator shaft is rigged with motion detectors . . . Once we've gotten down the shaft, though, then it's a walk in the park: just three more guards with Uzis and predilections toward not being robbed, and the most elaborate vault door conceived by man. Any questions?

A plaintiff asserting a legal malpractice claim against his former lawyer faces a similar—albeit less dangerous and less dramatic—task. This is because of the unique burden that the plaintiff in a legal malpractice case must carry: proving the case within the case. The plaintiff's unique burden is the defense attorney's best friend, and a lawyer defending a legal malpractice claim must ensure that he or she is using the case within the case standard—and all its implications—to the fullest extent available under the law. Courts differ in the language they use to describe the

standard and in the strictness with which they require the plaintiff to meet his or her burden. Additionally, the application of the standard can change based on the nature of the underlying case and the type of negligent act alleged. For these reasons, it is important to carefully consider the applicable law in the relevant jurisdiction. This article focuses, however, on identifying the basic weapons in the legal malpractice defense attorney's arsenal.

1. Know the Basics

Legal malpractice is a negligence cause of action. As such, a plaintiff in a legal malpractice action generally must establish the following elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the plaintiff's damages by the breach. *See, e.g., Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 697 S.E.2d 551, 555 (S.C. 2010); **Haddy v. Caldwell**, 403 S.W.3d 544, 546 (Tex. Ct. App. 2013); *Leibel v. Johnson*, 728 S.E.2d 554, 555 (Ga. 2012); *Lee v. Harlow, Adams & Friedman, P.C.*, 975 A.2d 715, 721 (Conn. Ct. App. 2009). The case within the case standard comes into play in the plaintiff's proof of the third and fourth elements—that the attorney's breach proximately caused the plaintiff damage. This is because the plaintiff must establish he "most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." *Summer v. Carpenter*, 492 S.E.2d 33, 38 (S.C. 1977); *see also Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773, 775-76 (Mich. 1994); *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996); *Giron v. Koktavy*, 124 P.3d 821, 824 (Colo. Ct. App. 2005). Thus, a legal malpractice plaintiff "must prove the merits of the underlying case as part of the proof of the malpractice case." 7A C.J.S *Attorney & Client* § 331. The "case within a case" concept is "often employed to explain the causal relationship between the attorney's breach of duty and the harm suffered by the client." Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. Rev. 727, 731 (1994). The case within a case doctrine is relevant when "the theory of the malpractice case places the merits of the underlying litigation directly at issue." *Eastminster Presbytery v. Stark & Knoll*, No. 25623, 2012 WL 723331, at *2 (Ohio Ct. App., Mar. 7, 2012).

2. Take Two (or Three) Bites at the Apple

Lawyers love to complain that the opposing party is trying to take "two bites at the apple." Lawyers defending legal malpractice claims have the perfect response: "that's exactly what the law provides." A legal malpractice defendant can win the case either by showing the plaintiff cannot prove that the lawyer acted below the standard of care or by showing the plaintiff should not have been successful in the underlying case, even if the alleged negligence had not occurred. First, counsel must consider whether there was an attorney-client relationship and, assuming there was, whether the lawyer's conduct fell below the applicable standard of care. In most cases, arguing the attorney acted reasonably under the circumstances will be defense counsel's first bite at the apple. Defense counsel's second bite comes in the form of arguing the plaintiff should have lost the underlying case anyway and, therefore, the alleged negligence did not proximately cause the plaintiff any damage. The legal malpractice case usually is predicated on some bad act or mistake—a missed deadline or allegedly negligent advice about a settlement. Plaintiff's counsel will want to make the whole case about the one bad act. Do not let that happen. The plaintiff has a lot to prove to win his case. Hold him to his burden.

3. Might I Suggest a Horn Book (or a Co-Counsel)?

The analysis of the merits of the underlying case requires the legal malpractice defense counsel do his or her homework and may—under some circumstances—merit the association of counsel with expertise in the practice area of the underlying claim. For example, the claim in the underlying case might have been a patent infringement claim or a preference claim asserted in bankruptcy court. Does defense counsel know anything about defending patent infringement claims or litigating preferences in

bankruptcy court? If not, he or she better learn or better hire someone who does. Consider this: if the opposing party in the underlying case had a strong argument for summary judgment, the legal malpractice defendant has a strong argument for summary judgment in the legal malpractice case. The underlying case might have been settled or dismissed prior to trial. It might never have been filed at all. In those circumstances, the legal theories at issue in the underlying case probably were not fully developed. Take the time to develop them, both legally and factually. Be prepared to argue not only that the defendant did not breach the standard of care, but also—and in many cases, more importantly—that the plaintiff should have lost the underlying case anyway.

4. Know Who Should Decide the Case within the Case

As with any lawsuit, the underlying case will involve questions of fact and questions of law. In all likelihood, the plaintiff's counsel will want all of the issues, factual and legal, in the underlying case to go to the jury. This is especially true when the plaintiff has alleged the defendant committed some egregiously negligent or even willful act. Defense counsel should consider, however, whether the judge or jury in the malpractice case should be deciding the merits of the underlying case and should avoid allowing plaintiff's counsel to lump all of the issues together for submission to the jury.

First, defense counsel should always insist the court decide issues of law from the underlying case. The jury would not have decided issues of law at the trial in the underlying case and therefore those issues should not be submitted to the jury in the malpractice case. *See, e.g., Doe v. Howe*, 626 S.E.2d 25, 30 (S.C. Ct. App. 2005); *Jaraysi v. Soloway*, 451 S.E.2d 521, 532 (Ga. Ct. App. 1994); *Martin v. Hall*, 20 Cal. App. 3d 414 (Cal. Ct. App. 1971); *Stafford v. Garrett*, 613 P.2d 99 (Or. 1980).

Second, in many jurisdictions, defense counsel should argue the judge should make the ultimate determination of the merits of the underlying case. This is because many states recognize application of the case within the case doctrine is objective, focusing on what the outcome of the underlying case *should have been*, not on what the outcome *would have been*. *Iacono v. Hicken*, 265 P.3d 116, 129 (Utah 2011); *Ambriz v. Kelegian*, 146 Cal. App. 4th 1519, 1531 (Cal. Ct. App. 2007); *Doe*, 626 S.E.2d at 31 n. 18; *Brown v. Silvern*, 45 P.3d 749, 751 (Colo. Ct. App. 2001); *Antiballistic Sec. & Protection, Inc. v. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*, 789 F. Supp. 2d 90, 94 (D.C. Cir. 2011); Mallen & Smith, 3 Legal Malpractice § 23:12 (2013 ed.) ("[T]he predicate of the case-within-a-case methodology is ascertaining what the result should have been."). Because the standard is objective, the judge should decide the overall success of the underlying case, although the judge might have to rely on a jury to develop a factual record upon which to make that determination. Other jurisdictions indicate the issue of whether a judge or jury decides the underlying case turns on "whether the issues are predominantly questions of fact or law." *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 970 (Cal. Ct. App. 2001); *Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773, 777 (Mich. 1994); *Brust v. Newton*, 852 P.2d 1092, 1094 (Wash. 1993); *Phillips v. Clancy,* 733 P.2d 300, 306-07 (Ariz. Ct. App. 1986); *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W.2d 118, 134 (Wis. 1985); *Chocktoot v. Smith*, 571 P.2d 1255, 1259 (Or. 1977). In those jurisdictions, defense counsel should still insist the judge decide all issues of law.

While jurisdictions differ, all defense counsel should, at a minimum, be on the lookout for issues of law that would favorably dispose of the underlying case. Point those issues out to the court in dispositive motions and, if necessary, motions for directed verdict, and make it clear those are issues of law that the court should decide. If the case goes to trial, be prepared to argue that it is the court's role to decide whether the case within the case had any merit.

5. Beware of Expert Testimony.

One of defense counsel's worst enemies in a legal malpractice case is the plaintiff's expert. Typically a law professor or ethics expert, the plaintiff's expert will happily march to the stand and tell the jury all about how the defendant acted in complete dereliction of his duties to his client, violated all of the Rules of Professional Conduct, and—through his negligence—lost a very valuable case for the plaintiff. But, be careful. Many jurisdictions have held that matters of law cannot be the subject of expert testimony. *McKesson Medication Mgmt, LLC v. Slavin*, 75 So. 3d 308, 312 n. 5 (Fl. Ct. App. 2011); *Heyward & Lee Const. Co. v. Sands, Anderson, Marks & Miller*, 453 S.E.2d 270, 272 (Va. 1995); *Hermitage Indus. v. Schwerman Trucking Co.,* 814 F. Supp. 484, 485 (D.S.C. 1993); *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992); *Floyd v. City of New York,* 861 F. Supp. 2d 274, 287 (S.D.N.Y. 2012); *Jones v. Pramstaller*, No. 1:09-cv-392, 2012 WL 2153622, *6 (W.D. Mich., May 4, 2012). As a result, the plaintiff's expert in a legal malpractice case should not be permitted to testify concerning what the outcome of the underlying case should have been. In fact, the plaintiff's legal malpractice expert arguably should not be able to offer any opinion concerning the value of the underlying case or the likely outcome of that case. There is usually no avoiding the plaintiff's expert's testimony about the ways in which the defendant breached his duties to the plaintiff. But try to stop the bleeding and get the plaintiff's expert off the stand before he tells the jury about how valuable the underlying case was.

6. Don't Forget Collectability.

Not satisfied with two bites at the apple? In some jurisdictions, legal malpractice defense counsel can take a third. Even if the plaintiff is able to prove the defendant was negligent and his or her negligence was the proximate cause of the plaintiff's inability to obtain a judgment in the underlying case, consider whether the law requires the plaintiff to establish that the judgment the plaintiff would have obtained in the underlying case would have been collectable. In North Carolina, for example, a plaintiff "must not only prove that the defendant was negligent, but must also show that it would have won its underlying case and *would have been able to collect damages*." *In re McGillewie*, 936 F. Supp. 327, 329 (W.D.N.C. 1995). Other jurisdictions also require a legal malpractice plaintiff to prove collectability. *Kelley & Witherspoon, LLP v. Hooper*, 401 S.W.3d 841, 854 (Tex. Ct. App. 2013); *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27, 30 (S.D. 1983); *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524, 526 (Iowa 1983); *Sheppard v. Krol*, 218 Ill. App. 3d 254, 259-60 (Ill. Ct. App. 1991). In at least one jurisdiction, while collectability of the underlying judgment is not an element of the legal malpractice case that the plaintiff must prove, the uncollectability of the underlying judgment is an affirmative defense. *Smith v. Haden*, 872 F. Supp. 1040, 1054 (D.D.C. 1994).

Remember the final scene in *Ocean's Eleven*? Having pulled off the impressive heist, Ocean's crew watches the fountain show at the Bellagio with great satisfaction. Despite the casinos' impressive array of defenses, the thieves walked away with $15 million. Don't suffer a similar fate. The case within the case standard gives legal malpractice defense attorneys an advantage not shared by lawyers defending other types of cases. Legal malpractice defense lawyers have two cases to litigate, and only have to win one of them. Think of the cases separately and look for the factual or legal issues that will help you win one or both of them. Hold the plaintiff to his or her burden and make him or her prove both cases. You have an impressive arsenal in defending legal malpractice cases. Use it for all it's worth.

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Bench Trials — A New Defense Tactic in Legal Malpractice Claims

by Stephanie Solomon

In a legal malpractice case, disputes of fact and determination of damages are generally left for a jury to decide. However, there are some instances where a bench trial may be not only appropriate, but advantageous. The advantages and disadvantages of jury trials versus bench trials are complicated. Do you want the judge to be both both the finder of fact and ruler on matters of law and procedure? In what jurisdiction is your case? Are you comfortable with the jury pool? What is the nature of the underlying malpractice action? Do you have a sympathetic Plaintiff? Which judge is assigned your case? The questions are endless. Choosing between a bench trial and jury trial should be determined by defense counsel on case-by-case basis in the event the option exists, as each carry significant legal and financial consequences.

If the matter in the underlying suit was not and legally could not have been decided by a jury, an argument exists that the plaintiff is not entitled to a jury trial in the current legal malpractice action. This subject is still relatively novel, but a few states have unquestionably determined where a jury trial was inappropriate in the original matter the related legal malpractice action similarly cannot be determined by a jury. This gives defense counsel the unique opportunity to file motions to strike or quash a Plaintiff's demand for a jury trial in the event that having a judge decide the underlying matter could create a tactical advantage. We will look to examples in New Jersey, Illinois and Michigan to understand how certain courts have ruled when faced with this issue.

The state of New Jersey has been careful to recognize the level of deference that the court should receive in determining how a legal malpractice case is tried. In a 1996 decision, the Supreme Court of New Jersey held, although the Plaintiff had the right to a jury trial under the state constitution, the legal malpractice claims were so interconnected to the equitable issues that the chancery court had properly resolved the dispute. The court was careful to recognize this did not infringe on the state's constitutional right to a jury trial because of the distinct roles of the chancery courts. The court stated, "in assessing whether jury trial rights are infringed, courts should 'consider the nature of the underlying controversy as well as the remedial relief sought.'" *Shaner v. Horizon* Bancorp, 116 N.J. 433, 450-51 (1989). In 2004, the Supreme Court of New Jersey once again recognized the deference should be given to the Court in determining the proper approach to resolving each case. "Courts are not to become involved in determining how a legal malpractice case is tried unless the parties disagree, in which case the final determination of the court is a discretionary judgment that is entitled to deference." *Garcia v. Kozlov, Seaton, Romanini, & Brooks, P.C.*, 179 N.J. 343, 346 (2004) (*citing Lieberman v. Employers Insurance*, 84 N.J. 325 (1980)).

Illinois has also directly addressed the issue. Illinois courts have consistently held the trial judge, rather than the jury, must be allowed to decide legal issues in legal malpractice actions. *Environmental Control Systems, Inc. v. Long*, 301 Ill.App.3d 612 (5th Dist. 1998). While a jury may be responsible for determining any disputed facts, the question of whether a breach of duty actually proximately caused any damages may be reserved for resolution by the trial judge. In a practical sense, Illinois has recognized the limits of a jury's ability to decide legal questions in a legal malpractice claim. When the case-within-a-case analysis demands a close inspection of court documents and procedures, judicial resolution of these questions is the only appropriate method. Therefore, where it is within the realm of the court to determine the law, it is improper for a jury to usurp that role. One such example can be seen in *A.O. Smith Corp. v. Lewis, Overbeck & Furman*, 777 F.Supp. 1405 (N.D.Ill. 1991). The plaintiff brought a legal malpractice action on the basis of improper jury instructions. In resolving the case, the trial court held "[j]urisdictions that have spoken on th[is] issue have uniformly declared that the trial judge in a malpractice case must reconsider legal issues raised in the underlying case

from the standpoint of the 'reasonable judge.'" *A.O. Smith Corp*. at 1408-9.

The Supreme Court of Michigan concisely summarized the state's approach to dealing with an underlying matter for which a jury trial was not appropriate in *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579 (1994). In this case, the court reasoned that, "[j]uries traditionally do not decide the law or the outcome of legal conflicts. … To maintain the traditional role of the jury, the jury must remain the factfinder; a *jury may determine what happened, how, and when, but it may not resolve the law itself*. The determination of questions of law by the court… is a vindication of the existence of the judiciary." *Charles Reinhart Co*. at 601 (emphasis in original).

While no Pennsylvania state court has expressly addressed this issue, it has been analyzed and firmly decided by Pennsylvania federal courts applying substantive state law. In *Scaramuzza v. Sciolla*, 2006 WL 557716 (E.D. Pa. March 3, 2006), a diversity legal malpractice action applying Pennsylvania law, the Court asserted it:

> must determine whether it may properly decide as a matter of law at the summary judgment stage whether Defendants' breach of duty was the "but for" cause of Scaramuzza's individual liability, or whether this disputed issue must be submitted to a jury. Although the U.S. Court of Appeals for the Third Circuit has not expressly ruled on this question, the Court finds persuasive authority sufficiently establishes that this Court may decide the issue itself.

Scaramuzza, 2006 WL 557716, at *7.

The Court found such authority in a "well-reasoned analysis of the Utah Supreme Court in *Harline v. Barker*, 912 P.2d 433 (Utah 1996), and quoted the *Harline* Court's "emphatic" conclusion:

> We see no reason why a malpractice plaintiff should be able to bootstrap his way into having a lay jury decide the merits of the underlying "suit within a suit" when, by statute or other rule of law, only an expert judge could have made the underlying decision. It is illogical, in effect, to make a change in the law's allocation of responsibility between judge and jury in the underlying action when that action is revisited in legal malpractice actions and thereby distort the "suit within a suit" analytic model.

Id. at *9 (quoting *Harline*, 912 P.2d at 440).

Ultimately, the Eastern District of Pennsylvania Court concluded in *Scaramuzza* that, where the relevant underlying proceeding was decided by a court sitting without a jury, the case-within-a-case analysis of the legal malpractice action should also be decided by a court rather than a jury. *Scaramuzza*, 2006 WL 557716, at *9.

Yet another Pennsylvania federal court decision applying substantive Pennsylvania state law is in agreement with this principle. The U.S. District Court for the Middle District of Pennsylvania concluded that a decision which the court in the underlying action would have made was appropriate for the court in the legal malpractice action. *Harsco Corp. v. Kerkam, Stowell, Kondracki & Clark, P.C.*, 965 F.Supp. 580, 584 (M.D. Pa. 1997).

When defending against a legal malpractice claim, it is important to be aware of whether the right to a jury trial existed in the underlying matter. If not, then the case-within-a-case analysis may introduce the question of whether or not a jury trial is appropriate for the legal malpractice action. For defense attorneys, cases with compelling facts and "likeable" plaintiffs are sometimes better candidates for bench trials, where liability is questionable. Choosing between a jury trial or bench trial

can make the difference as to whether or not your client is ultimately found liable.

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