



Defeating “Settle and Sue” and “Lost Settlement Opportunity” Legal Malpractice Claims as a Matter of Law

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I. INTRODUCTION

A common claim in legal malpractice actions is the assertion that the underlying matter, if settled through the auspices of the attorney, should have been settled on better terms, or if litigated to a disappointing conclusion, that it should have been settled instead. By definition, these claims involve 20/20 hindsight and often rank speculation. One court has summarized the hindsight nature of these claims, noting that courts are “loathe to allow settling plaintiffs to later second-guess themselves by suing their attorneys.” (*Blecher & Collins, P.C. v. Northwest Airlines, Inc.* (C.D.Cal. 1994) 858 F.Supp. 1442, 1458 (*Blecher & Collins*)). Recent case law confirms the importance of understanding the rules of causation in this area, and the strategies defense counsel can use to defeat these claims as a matter of law. The purpose of this article is to explain the legal basis for these claims and how defense counsel can defeat these claims as a matter of law on summary judgment.

II. RELEVANT CASE LAW

A. “Settle and sue” claims

The first (and more common) type of “buyers’ remorse” claims discussed here arise when the underlying action was settled and the client then claims that the settlement would have been better absent the lawyer’s malpractice. The law in California for these claims is clear: the legal malpractice plaintiff should not be able to obtain a better result from the attorney in the

malpractice action than the plaintiff could have achieved in the underlying action.

The starting place is *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 (*Viner I*), in which the California Supreme Court held that a legal malpractice plaintiff must always prove “but for” causation, regardless of the type of claim asserted. In other words, liability exists only if the plaintiff shows that, but for the lawyer’s malpractice, a different and better outcome would have been achieved. The “but for” causation requirement “is to safeguard against speculative and conjectural claims.” (*Ibid.*) After the Supreme Court remanded the *Viner* case to the Court of Appeal to evaluate the facts in light of the clarified legal standard, the Court of Appeal held that the plaintiffs had failed to come forward with any evidence at trial proving that the other side would have agreed to a more favorable transaction than the one the parties eventually entered (a “better deal” scenario) or that the legal malpractice plaintiff would have been better off without entering into any transaction at all (a “no deal” scenario). (*Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1227-1229 (*Viner II*)).

The “better deal” scenario in *Viner II* is the proper analysis in any “settle and sue” claim. Legal malpractice plaintiffs must prove that “but for” the alleged malpractice leading up to settlement or malpractice in advising the client to agree to settlement, they could have obtained a “better deal” in the underlying action and that their attorney

should be liable for the difference between what was received and what should have been received, taking into account the expense of going forward with a trial.

The California case with the most thorough analysis of these issues is *Barnard v. Langer* (2003) 109 Cal.App.4th 1453 (*Barnard*). During the underlying action, there were numerous offers and counteroffers between the parties and eventually a settlement was reached at a settlement conference. During the settlement conference, the client asked the law firm to reduce its fees by \$100,000; the firm declined. The parties then negotiated and signed a settlement agreement. “Before the ink was dry,” the client wrote the firm contesting the firm’s fee due to its alleged negligence; the fee was placed in a trust account pending resolution of the dispute and the remaining sums were disbursed to the client. The client sued, claiming that the firm’s malpractice caused him to settle for “substantially less than [he was] legally entitled to.” (*Id.* at pp. 1457-1458.)

The trial court granted a nonsuit, which was affirmed. The court held that plaintiff had failed to come forward with evidence that “but for the [defendant’s] negligence,” the underlying action would have “had a better outcome, either by a higher settlement or at trial.” (*Barnard, supra*, 109 Cal.App.4th at p. 1461.)

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“It is not enough for [plaintiff] to simply claim, as he did at the trial of this malpractice action, that it was possible to obtain a better settlement or a better result at trial. The mere probability that a certain event would have happened will not furnish the foundation for malpractice damages. ‘Damages to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.’ ” (*Ibid.*)

The plaintiff’s evidence in *Barnard* showed nothing more than “speculative harm” because it did not demonstrate that but for the attorney’s negligence, the underlying action would have “settled for more or gone to trial and resulted in a larger recovery.” (*Barnard, supra*, 109 Cal. App.4th at p. 1461.) The plaintiff failed to introduce evidence that the defendant in the underlying action would have paid more than the settlement amount, leaving the alleged harm as “only a subject of surmise, given the myriad of variables” that affect trials. (*Ibid.*) “ “[T]he mere probability that a certain event would have

happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages.” ” (*Ibid.*) Plaintiff’s offer of proof at trial was “little more than a wish list of damages, unsupported by evidence that the [defendant] would have settled for more, or by expert testimony to show that [plaintiff’s] amounts could have been recovered had the case been tried.” (*Id.* at p. 1463, emphasis added.) Accordingly, under *Barnard*, a legal malpractice plaintiff must prove either evidence that the case could have settled for more than it did or must submit expert testimony that the outcome would have been better had the matter gone to trial.

Barnard further noted the “hindsight vulnerability of lawyers is particularly acute when the challenge is to the attorney’s competence in settling the underlying case.” (*Barnard, supra*, 109 Cal. App. 4th at p. 1462, fn. 13.) The court stated that “the speculative nature of hindsight challenges

to recommended settlements often are protected as judgment calls.” (*Ibid.*)

“*The standard should be whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less.* No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one.” (*Ibid.*, emphasis added.)

Barnard provides the correct analysis and shows that these claims can be resolved by motion short of trial. “ “The law favors settlements.” ’ ” (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 930.) Every client who settles a claim could sue their attorney for malpractice, asserting that the matter should have settled on better terms, even \$1 better. If the possibility of an additional dollar could create a triable issue of material fact, requiring a trial, then the legal malpractice

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plaintiff would always be able to survive summary judgment. That is why the issue is not whether the settlement could have been higher or lower, but instead, whether the settlement was within the range of reasonableness. (*Barnard, supra*, 109 Cal. App.4th at p. 1462, fn. 13.)

Barnard was followed in *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518 (*Slovensky*). *Slovensky* involved a “settle and sue” claim brought by the underlying plaintiff. The client consulted the defendant attorneys after the statute of limitations had run on the client’s claim. Nonetheless, the defendant attorneys filed suit on the client’s behalf and settled the case for \$340,000. (*Id.* at pp. 1521-1525.) The trial court granted defendant’s a motion for summary judgment on the grounds that the plaintiff’s underlying claim was barred by the statute of limitations. The Court of Appeal affirmed, following *Barnard* and reiterating that a plaintiff must prove damages “to a legal certainty, not to a mere probability.” (*Id.* at

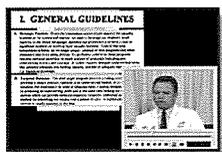
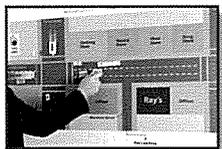
p. 1528.) The court noted that “settle and sue” claims are “likely to be speculative” and followed *Barnard* in holding that attorneys are only subject to the “standard of whether the settlement was within the realm of reasonableness.” (*Ibid.*) Undisputed facts showed that the plaintiff’s underlying claim was time barred, and “to recover damages at trial, she would have had to defeat the statute of limitations defense. The undisputed facts reveal she could not have done so.” (*Ibid.*) That is, the attorney defendants were entitled to summary judgment because they disproved the value of the plaintiff’s underlying case.

Another case demonstrating these principles is *Jalali v. Root* (2003) 109 Cal. App.4th 1768. In this case, the gravamen of the plaintiff’s claim was that the defendant negligently offered advice regarding the tax consequences of her settlement of the underlying action. (Because of the Alternative Minimum Tax, plaintiff was not able to deduct the defendant attorney’s contingent fee for the underlying case.)

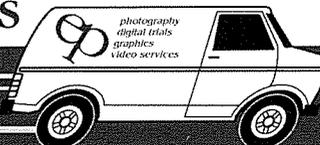
Plaintiff did not claim that she would have received a better result at trial than she did in the settlement. Instead, she argued that had the negligent tax advice not been given, she would not have settled the case and would have insisted on going to trial even if it meant a lesser result. (*Id.* at p. 1774.) The Court of Appeal reversed a jury verdict rendered in plaintiff’s favor. The court rejected plaintiff’s contention that her claim was for the right to put the underlying defendant through a trial. The court held that implicit in that theory was that the underlying defendant would have paid some amount more in order to spare the exposure of a trial and that amount was, by definition, more than the settlement figure. (*Id.* at p. 1778.) However, because plaintiff “never put on evidence that a recovery larger than \$2.75 million was even possible, her proof of damages fails.” (*Ibid.*)

These principles were recently applied by the Court of Appeal in *Filbin v. Fitzgerald*

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(Nov. 20, 2012, A128544) ___ Cal.App.4th ___ [2012 WL 5857331]. In *Filbin*, the underlying action was an eminent domain proceeding where the plaintiff was represented by the defendant lawyer before hiring another lawyer. After the change of counsel, the plaintiff settled the underlying case. The plaintiff then brought a “settle and sue” malpractice claim against prior counsel. Following a bench trial, the trial court ruled that the defendant attorney’s alleged failure to properly prepare for trial caused the plaintiff to settle the underlying case for \$574,000 less than what the case was worth. The Court of Appeal reversed, holding that the plaintiff could not, as a matter of law, prove the causation necessary for a “settle and sue” claim. The court ruled that because the underlying settlement was reached without the assistance of the defendant attorney, the plaintiffs could not prove that anything the attorney did adversely affected them:

“Therefore, when replacement counsel took over the case on August 3, it was with no lingering impairment at Fitzgerald’s hands. When it came time for the Filbins to consider whether to settle the case some two and a half months later, in mid-October, they were free agents. No past decision by Fitzgerald hobbled them. Nothing prevented their new counsel from giving them impartial advice. No one would stop them from going to trial. Their decision to settle was theirs and theirs alone, made with the assistance of new counsel, with no input from Fitzgerald. The consequences of that decision are likewise theirs alone.” (*Id.* at *10.)

These and other cases show that, under California law, a defendant may be entitled to summary judgment in “settle and sue” cases. (See *Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1057-1058 [following *Marshak* and *Thompson*]; *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518-1519 (*Marshak*) [same]; *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661-663 (*Thompson*) [affirming the granting of summary judgment in “settle and sue” legal malpractice case]; *Blecher & Collins, supra*, 858 F.Supp. at pp. 1458-1459 [granting

summary judgment in “settle and sue” case].)

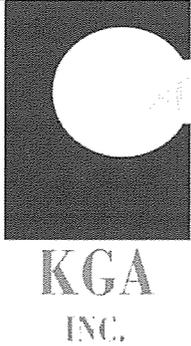
Another issue that arises in these cases is the admissibility of settlement offers and demands made during a mediation. In *Cassel v. Superior Court* (2011) 51 Cal.4th 113, the California Supreme Court emphasized the absolute nature of the mediation confidentiality statutes (Evid. Code, § 1119 et seq.) and held that evidence of communications made during a mediation are inadmissible, even if it means that a legal malpractice plaintiff is unable to prove his or her claim. (*Cassel*, at pp. 132-134.) Therefore, neither the legal malpractice plaintiff, nor the defendant attorney, can introduce settlement offers made during a mediation in order to support their respective positions. In contrast, the mediation confidentiality statutes do *not* apply to mandatory settlement conferences. (Evid. Code, § 1117, subd. (b)(2); Advisory Com. com., 23 pt. 1B West’s Ann. Codes, Rules (2012

supp.) foll. rule 3.1380, p. 43.) Thus, settlement offers and demands made during mandatory settlement conferences, unlike mediations, should be admissible in these cases.

B. “Lost settlement opportunity” claims.

In the other “buyers’ remorse” legal malpractice scenario, the client alleges that the attorney’s negligence caused the client to miss an opportunity to settle for a result better than the ultimate outcome. Ronald Mallen refers to this as a “lost settlement opportunity” scenario. (4 Mallen & Smith, *Legal Malpractice* (2012) *The Litigation Attorney – Legal Malpractice Claims*, § 33:37, p. 895.) There are not as many reported “lost settlement opportunity” cases under California law. The leading case is *Campbell v. Magana* (1960) 184 Cal.App.2d 751 (*Campbell*). This involved a claim brought by the plaintiff in the underlying action. *Campbell* is usually

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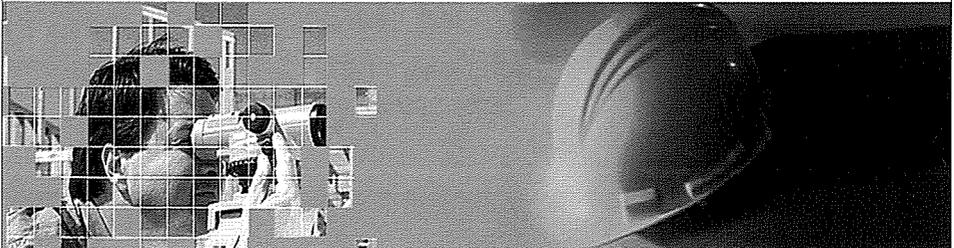


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cited for the proposition that a legal malpractice plaintiff who demonstrates malpractice leading to loss of a viable claim must also prove that, had a judgment in his or her favor been rendered, it would have been collectable. (*Id.* at p. 754.) The case also, however, stands for the proposition that a plaintiff may not rest a malpractice action on loss of a “nuisance value” claim regardless of the claim’s merits. (*Id.* at p. 753.) The court rejected plaintiff’s assertion:

This argument cannot prevail for at least two reasons; first, it advances speculative values as a measure of recovery; and second, it violates an established rule of this state (and most others) that one who establishes malpractice on the part of his attorney in prosecuting or defending a lawsuit must also prove that careful management of it would have resulted in recovery of a favorable judgment and collection of same or, in case of a defense, that proper handling would have resulted in a judgment for

the client; that there is no damage in the absence of these latter elements, and the burden of proof rests upon the plaintiff to prove recoverability and collectibility of a plaintiff’s claim or ability to establish a defense for a client who has been sued.

(*Id.* at p. 754, emphases added.) The court also rejected a “lost settlement opportunity” claim because the evidence showed that the best offer ever made to the plaintiff was \$350, while the plaintiff demanded that she would settle “for nothing less than \$100,000.” (*Id.* at p. 758.) It is in this context that the court expressly rejected the contention, frequently raised by plaintiffs, that every claim has “settlement or nuisance value which cannot be disregarded.” (*Id.* at p. 753.)

In *Charnay v. Cobert* (2006) 145 Cal. App.4th 170 (*Charnay*), the defendant in the underlying action brought a “lost settlement opportunity” claim, alleging that her attorneys should have advised

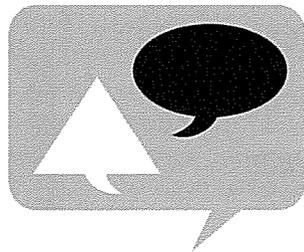
her to settle the underlying action for \$25,000, rather than trying the case. The underlying judgment against the client was \$600,000. (*Id.* at pp. 175-177.) The trial court sustained the attorney’s demurrer, holding that the plaintiff could not allege a more favorable outcome because such a claim was speculative under *Thompson* and *Marshak*. The Court of Appeal reversed. The court distinguished *Thompson* and *Marshak* because both of those cases were decided on summary judgment, rather than on the pleadings. Although the court was skeptical as to whether the plaintiff would be ultimately able to prove damages, the court held that the complaint sufficiently alleged causation to establish a cause of action for legal malpractice under *Viner I.* (*Id.* at pp. 179-182.)

III. CONCLUSION

Slovensky proves that by attacking the merits of the underlying case, the defendant attorney can prevail on summary judgment, and *Campbell* holds that a plaintiff cannot simply contend that every claim has some value. Even if the defendant attorney cannot prove that the plaintiff’s underlying case was completely devoid of merit, *Barnard* and *Slovensky* hold that the attorney need only show that the former client’s disappointing settlement is “within the range of reasonableness” in order to be entitled to summary judgment. By attacking the merits of the underlying action, attorney defendants can demonstrate that the settlement was “within the realm of reasonableness” and obtain summary judgment on legal malpractice claims. And, while *Charnay* cautions against trying to defeat such claims by demurrer, the question whether the settlement is within the “realm of reasonable conclusions” is an issue of law that can be decided on summary judgment. (*See Slovensky, supra*, 142 Cal.App.4th at p. 1533.)

Steven Fleischman is an appellate attorney with Horvitz & Levy LLP, and is Chair of ASCDC’s amicus committee. This article is based on a prior article that Mr. Fleischman wrote with Edith Matthai, Robie & Matthai, which was presented to an ABA Seminar.

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