Alert
October 20, 2014

Global Insurance Alert
News Concerning Professional Liability Issues

COZEN O'CONNOR

"Uncollectibility" Is an Affirmative Defense to Legal Malpractice Claims in Washington

The Washington Supreme Court addressed two issues of first impression regarding legal malpractice claims in *Schmidt v. Coogan*, No. 88460-9, (October 9, 2014) and held: (1) that "uncollectibility" is an affirmative defense to a claim of legal malpractice, and (2) emotional distress damages are not available in a legal malpractice claim based upon a lawyer's failure to timely file a lawsuit.

Case History

Plaintiff Teresa Schmidt retained attorney Timothy Coogan to represent her in a slip and fall action against a Tacoma grocery store. Coogan failed to file the action before the statute of limitations expired and Schmidt sued him for legal malpractice. A jury trial resulted in a verdict in favor of Schmidt for $32,000 in economic damages and $180,000 in noneconomic damages, later reduced to $3,733.16 in economic damages and $80,000 in noneconomic damages for her slip and fall injuries. The Washington Court of Appeals reversed the judgment, holding that the plaintiff failed to prove collectibility (i.e., that she could have collected the judgment from the grocery store), and that collectibility was an essential element of a legal malpractice claim.[1]

On October 9, 2014, the Washington Supreme Court reversed the Court of Appeals, and affirmed the trial court's verdict for $83,733.16.

Collectibility Is Not an Element of Legal Malpractice

Over the concurrence's objection, the court considered attorney Coogan's collectibility argument. The court stated that the elements of legal malpractice are: (1) the existence of an attorney-client relationship, giving rise to the attorney's duty of care to the client, (2) the attorney's breach of the duty of care, (3) damage to the client, and (4) that the damage was proximately caused by the attorney's breach. The court determined that whether the client would be able to collect on the underlying judgment relates to the damage and proximate cause elements of legal malpractice because if the judgment is uncollectible, the client would not have suffered damage from the attorney's breach. However, instead of finding that collectibility is the plaintiff's burden, the court held that it is the attorney's burden to establish uncollectibility as an affirmative defense.

The court noted that while the majority of states traditionally put the burden of proving collectibility on the client, the recent trend is to put the burden on the defendant attorney instead. The court relied upon several public policy bases for its holding. First, the court observed that putting the burden on the client unfairly presumes that the underlying judgment was not collectible, requiring the client to prove that the judgment would be collectible, even if there is no dispute about collectibility. Second, the defendant attorney is in as good a position, if not better, than the client to prove uncollectibility because the attorney has investigated the claim and collectibility of judgment closer to the time of the accident, as compared to the client who has no reason to conduct such an investigation until the legal malpractice action commences. Third, placing the burden of showing uncollectibility on the defendant is more consistent with evidence rules that disfavor the introduction of evidence of liability insurance, because requiring the client to affirmatively prove collectibility would require evidence of liability insurance in every case. Fourth, the delay between when the underlying claim is brought and when collectibility becomes an issue in the legal malpractice case will hinder the client's ability to gather evidence regarding collectibility. Fifth, making the client prove collectibility during the legal malpractice action is unfair because some judgments (which are valid for 10 years and can be renewed thereafter) might not be collectible at the time of the legal malpractice action, but could become collectible years later. Finally, the court observed that putting the burden on the defendant attorney acknowledges the fiduciary relationship

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between client and attorney by balancing the burden of proof more evenly.

Emotional Distress Damages Are Not Available

On appeal, the plaintiff argued that she should have been allowed to seek emotional distress damages from the lawyer caused by his failure to timely commence her slip and fall claim. The court held that emotional distress damages in legal malpractice cases may be allowed "when significant emotional distress is foreseeable from the sensitive or personal nature of representation or when the attorney's conduct is particularly egregious." However, emotional distress damages were not available in this case, because the nature of the action was that Schmidt suffered only pecuniary loss and Coogan's conduct of failing to timely file a lawsuit constituted simple negligence.

No Recovery of Attorney Fees

The court also reaffirmed the American rule regarding attorney fees to hold that a successful plaintiff cannot recover attorney fees incurred in bringing a legal malpractice claim. However, the opinion did not consider the availability of consequential legal fees the client might have incurred as a result of the attorney's breach.

Conclusion

While collectibility always has the potential to be an issue in legal malpractice claims, this opinion clarifies the burden of proof and places it on the defendant. We anticipate that lawyer-defendants will still be able to successfully assert collectibility as a defense, though the court's ruling has made that task a little harder. In light of the court's holding regarding emotional distress damages, we may begin to see more allegations of emotional distress in legal malpractice claims.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Shauna Martin Ehlert at 206.224.1251 or sehlert@cozen.com.

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[1] We previously issued an Alert addressing the Court of Appeals opinion *Schmidt v. Coogan*, No. 41279-9-II, 2012 WL 5331567 (October 30, 2012).