'Settle And Sue' Malpractice Cases Have New Clarity In Calif.

By **Steven Berenson**

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With its opinion in Masellis v. Law Office of Leslie F. Jensen,[1] filed on June 19, the California Court of Appeal for the Fifth Appellate District clarified an important issue of long-standing confusion with regard to the standard of proof a legal malpractice plaintiff must satisfy in order to prove the required elements of causation and damages in a "settle and sue" legal malpractice case.

A settle-and-sue legal malpractice case is one where the plaintiff in the malpractice case settled the underlying lawsuit, and then turned around and sued their lawyer from the underlying case, claiming that but for the lawyer's malpractice, the plaintiff would have either settled the underlying case for more money, or recovered more money at trial.

The court concluded that the "preponderance of the evidence" standard that applies in most civil cases applies to plaintiffs' burden of proving causation and damages in settle-and-sue legal malpractice cases, rather than the "legal certainty" standard the lawyer in Masellis argued in favor of. While the decision provides clarity for parties to malpractice cases going forward, it is unlikely to alter significantly the existing balance between attorneys and their former clients in malpractice litigation.

The facts of the underlying case in Masellis are discussed in an unpublished portion of the court's opinion, so they will not be recounted in great detail here. Krista Masellis sought a divorce from her husband of 12 years. During the marriage, the couple acquired a number of valuable business interests. Therefore, these were considered community property that would be subject to division between the divorcing spouses.

The expert retained jointly by the parties valued the community estate at something more than $3 million. The parties and their attorneys met for a mandatory settlement conference, or MSC, four days before the matter was scheduled for trial. During the malpractice trial, Masellis and her former attorney Jensen offered conflicting testimony regarding the settlement negotiations that took place at the MSC and over the weekend that intervened between then and the trial date in the divorce case.

Masellis testified that because she believed she and Jensen were not ready for trial, she felt like she had no choice but to accept her husband's settlement offer of an equalizing payment of $1.2 million, plus approximately $20,000 per month in child and spousal support.

The marital settlement agreement prepared by Jensen did not include a date certain by which the husband's equalizing payment needed to be made. As a result, the husband did not complete his obligations under the settlement agreement for nearly two years after it was entered into by the parties. Also, because the settlement was not entered as a judgment of the court, Masellis was not entitled to interest on the delayed payment.

As a result, at the malpractice trial, Masellis claimed damages in the amount of $586,000, $300,000 by which the equalizing payment fell below her "half" of the marital estate, $283,333 in lost interest on the delayed payment, and the balance to pay a different attorney to help her to collect the settlement amount from her former husband. Following

trial, the jury ruled in favor of Masellis, awarding her $300,000 in damages.

Like any negligence claim, a claim of malpractice against an attorney requires proof of four elements: (1) a duty by the lawyer "to use such skill, prudence, and diligence as other members of [the] profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the [lawyer's] negligence."[2]

On appeal, Jensen essentially conceded that she had breached her duty of care owed to Masellis. However, Jensen contended that Masellis had failed to meet the standard of "legal certainty" required to prove the third and fourth elements of the malpractice claim.

Jensen relied on the case of Filbin v. Fitzgerald[3] to support her argument that the standard of proof of causation and damages in settle-and-sue legal malpractice cases is "legal certainty."

In Filbin, another settle-and-sue malpractice case involving an eminent domain proceeding, the California Court of Appeal for the First Appellate District stated that: "Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty."[4] Numerous other California appellate cases have employed similar language in deciding settle-and-sue legal malpractice cases.[5]

However, the Masellis court concluded that none of the prior opinions that used the legal certainty language had gone through the analysis necessary to modify the preponderance of the evidence standard, which is compelled by Section 115 of the California Evidence Code to be applied in civil cases unless other law requires a different standard.

The court found that no constitutional provision, statute or judicial decision requires deviation from the preponderance standard in settle-and-sue malpractice cases. The court also concluded that none of the cases applying the legal certainty language explicitly states that the legal certainty standard is different from, or imposes a higher burden of proof than, the preponderance of the evidence standard.

In reaching its conclusion, the court relied heavily on the above-cited article by professor Vincent Johnson of Saint Mary's University School of Law in San Antonio, Texas, a nationally recognized expert on legal malpractice law. Like the court, Johnson engaged in an exhaustive analysis of the California cases employing the legal certainty language and similarly concluded that no opinion expressly applies that standard as an alternative to the preponderance of the evidence standard in a legal malpractice case.

Johnson pointed out that if California courts did apply the legal certainty standard as something higher than the preponderance of the evidence standard, California would be significantly out of step with legal malpractice law in the rest of the country, and would unfairly shift the balance between plaintiffs and defendants in legal malpractice cases and would similarly unfairly balance the interests of the legal profession and the public at large.

The Masellis court ultimately affirmed the $300,000 jury verdict in favor of Masellis. It is a rare California appellate opinion where a legal malpractice judgment against an attorney is affirmed.

The opinion definitely clarifies the standard of proof that applies to the causation and damages elements of a settle-and-sue legal malpractice cases. It remains to be seen whether other California state appellate courts will follow Masellis' ruling, or whether other

appellate districts will continue to follow some version of the "legal certainty" test, causing a split that might necessitate resolution in the California Supreme Court.

To the extent that courts follow the Masellis decision, it does seem that plaintiffs' likelihood of prevailing in settle-and-sue legal malpractice cases has increased modestly. On the other hand, it does not appear that the landscape surrounding settle-and-sue legal malpractice litigation has been altered dramatically.

Indeed, in all of the cases the attorney relied on in Masellis in support of her argument that the "legal certainty" should apply, it seems highly likely that the courts would have reached the same result in favor of the defendant attorney even in the absence of the "legal certainty" language.

In some of these cases, the plaintiff offered no evidence at all that the outcome of the matter would have been altered in any way in the absence of the attorneys' breach of their duty of care.[6] In the other cases, whatever evidence was presented on the issues of causation and damages clearly fell below the preponderance of the evidence standard adopted in Masellis.[7]

Of course, going forward, defense counsel in settle-and-sue legal malpractice cases would be well-advised to avoid the "legal certainty" language rejected by the Masellis court. On the other hand, defense counsel still have a number of strong arguments to resort to in defending such claims.

First, plaintiffs generally need to provide expert testimony to prove that the attorney's representation in reaching the settlement fell below the appropriate standard of care.[8] Failure to do so will likely be fatal to the plaintiffs' claims.

Second, the standard of proof of causation in legal malpractice cases remains the "but for" standard of causation.[9] This is a relatively stringent standard of causation in tort law. Indeed some commentators have called for a lessening of this standard of causation in order to achieve greater balance between plaintiffs and defendants in legal malpractice cases.[10] The "but for" standard of causation also compels the "case within a case" requirement,[11] which places a heavy burden on plaintiffs to prove likely success in the underlying legal matter.

Third, even though damages need not be proven to a legal certainty, damages that are merely speculative will not be sufficient, and the fact that damage has occurred must be clear, even if the amount of damage is not.[12]

Attorneys for plaintiffs, on the other hand, should acknowledge that proof of a settle-and-sue remains a formidable challenge, even after Masellis. A good pointer that emerges from the Masellis decision is that counsel for plaintiffs would be well-advised to present expert opinion with regard to the elements of causation and damages, as well as the more common practice of presenting expert testimony with regard to the issue of the appropriate standard of care.

Masellis presented expert testimony that she would have received more than the amount she settled for had the case gone to trial. In an unpublished part of the opinion, the appellate court upheld the admissibility of this testimony.

Counsel for plaintiffs should also focus on proving the fact of damage, rather than trying to prove a particular amount of damages. Once the fact of damage has been proven beyond a

preponderance of the evidence, the amount of damage is a question to be resolved by the jury, which is of course where plaintiffs' legal malpractice attorneys and their clients would like to see it resolved.

The court in Masellis offers clarity in the legal standard that must be satisfied in order to prove causation and damages in settle-and-sue legal malpractice cases. Although the Masellis decision is not likely to alter that outcome of many legal malpractice cases dramatically, it does provide a road map for both plaintiffs and defense attorneys to present their cases more effectively.

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[1] 2020 Cal. App. LEXIS 564.

[2] Osornio v. Weingarten (2004) 124 Cal.App.4th 304, 319 (citations omitted).

[3] (2012) 211 Cal.App.4th 154, 166.

[4] Id. at 165 (citations omitted).

[5] See Vincent R. Johnson, Causation and "Legal Certainty" in Legal Malpractice Law, 8 St. Mary's J. Legal Mal. & Ethics 374, 377 n.2 (2018) (citing cases).

[6] See Filbin, 211 Cal.App.4th at 168 (no evidence of causation or damages); Slovensky v. Friedman (2006) 142 Cal.App.4th 1518, 1528 (no damage when underlying claim was time barred); Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 Cal.App.4th 1052, 1057 (plaintiff "produced no evidence showing his ex-wife would have settled for less than she did, or that following a trial, he would have obtained a judgment more favorable than the settlement"); Marshak v. Ballesteros (1999) 72 Cal.App.4th 1514, 1519 (same).

[7] See Shophoff & Cavallo LLP v. Hyon (2008) 167 Cal.App.4th 1489, 1509 (plaintiff's allegations of proximately caused damages "were either inadequate, uncertain, or speculative"); Barnard v. Langer (2003) 109 Cal.App.4th 1453, 1461 ("the mere probability that a certain event would have happened will not furnish the foundation for malpractice damages") (citations omitted); Thompson v. Halvonik (1995) 36 Cal.App.4th 657, 663 (none of plaintiff's evidence "offers more than speculative harm").

[8] See Lipscombe v. Krause (1978) 87 Cal.App.3d 970, 976; 1 Witkin Cal. Procedure (5th ed. 2008) Attorneys § 291, p. 397.

[9] See, e.g. Shophoff, 167 Cal.App.4th at 1509; Slovinsky, 142 Cal.App.4th at 1528; Barnard, 109tt Cal.App.4th at 1462; Orrick, 107 Cal.App.4th at 1057; Thompson, 36 Cal.App.4th at 663. The Masellis court found that the but for causation standard was subsumed within the "substantial factor" causation instruction given to the jury in that case, rejecting the attorney's argument that the jury instruction was erroneous.

[10] See generally Susan S. Fortney, A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims, Fordham L. Rev. 2033 (2017); Lawrence W. Kessler, The Unchanging Face of Legal Malpractice: How the "Captured" Regulators of the Bar Protect Attorneys, 86 Marq. L. Rev. 457 (2002).

[11] Orrick, 107 Cal.App.4th at 1054.

[12] See Shophoff, 167 Cal.App.4th at 1510; Thompson, 36 Cal.App.4th at 663.