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The Newsletter from

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2004 Vol. 2

PROFESSIONAL UPDATE

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Damages In Malpractice:

“where relevant, the issue of noncollectibility should be treated as a matter constituting an avoidance or mitigation of the consequences of the attorney's malpractice... and the erring attorney should bear the inherent risks and uncertainties of proving it.”

RECENT DECISIONS:

MALPRACTICE DAMAGES

PROOF OF THE COLLECTIBILITY OF AN UNDERLYING JUDGMENT IS NOT AN ESSENTIAL ELEMENT IN A CAUSE OF ACTION FOR LEGAL MALPRACTICE

Overruling its prior decision in Larson v. Crucet, 105 A.D.2d 651, 481 N.Y.S.2d 368 (1st Dept. 1984), and abrogating McKenna v. Forsyth & Forsyth, 280 A.D.2d 79, 720 N.Y.S.2d 654 (4th Dept. 2001), the Appellate Division, First Department has recently held that proof of the collectibility of an underlying judgment is not an essential element of a plaintiff's cause of action for legal malpractice. See Linderman v Kreitzer, 2004 WL 728237 (N.Y.A.D. 1 Dept.)

The Court has held that “where relevant, the issue of noncollectibility should be treated as a matter constituting an avoidance or mitigation of the consequences of the attorney's malpractice...and the erring attorney should bear the inherent risks and uncertainties of proving it.” (internal citations omitted.)

The Court noted how the “burden of proof in a legal malpractice case is a heavy one” as the plaintiff “must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation,” i.e., proving a case within a case. While an “essential element of the plaintiff's case in any legal malpractice action is actual damages, i.e., the injuries he suffered and their value” the Court held that “where the injury suffered is the loss of a cause of action, the measure of damages is generally the value of the claim lost.” Thus, in a malpractice action arising from an attorney's alleged negligence in preparing or conducting litigation, the plaintiff must prove the value of the lost judgment.

The Court, in Linderman, found that “[i]t is only after the plaintiff has proved the case within the case, including the value of the lost judgment, that the issue of collectibility may arise.” Nevertheless, the Court held that “a fact finder's judgment in the plaintiff's favor, i.e., the finding that the plaintiff was wronged by the defendant in the underlying action and wronged by the attorney who represented him in that action, is itself a vindication of the legitimacy of the plaintiff's underlying claim and has value regardless of whether it is wholly collectible.”