The "Element" of Collectibility

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Courts frequently speak of "collectibility" as a separate element in legal malpractice cases.[1] (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 499, 33 Cal.Rptr.2d 219; *Campbell v. Magana* (1960) 184 Cal.App.2d 751, 754, 8 Cal.Rptr. 32.) This is, in fact, a misnomer: collectibility is not doctrinally a separate or special element of a legal malpractice case, but simply a necessary part of the proof both of breach of duty and causation.

Collectibility affects the element of causation directly: A plaintiff who proves that the case was "worth" millions of dollars has lost nothing if the original tortfeasor could not have paid the judgment. The law is clear; there is no legal malpractice for failing to pursue, or obtain, an uncollectible paper judgment.

The courts have strictly enforced this element. For example, in *Garretson v. Miller* (2002) 99 Cal.App.4th 563, 121 Cal.Rptr.2d 317, plaintiff's counsel presented evidence that the underlying defendant was the owner of an established business with 25 employees; this was found to be insufficient to establish collectibility.

This is not necessarily a black or white question: An otherwise successful legal malpractice plaintiff who proves that a judgment would have been collectible to some degree is entitled to judgment to the extent that the judgment would have been collectible.

Collectibility is generally something that can be proven simply, i.e., by showing the limits of the original defendant's insurance coverage or that defendant's wealth. You must prepare to address this issue at trial.

In certain cases, the plaintiff may not be able to establish either the existence of insurance or the available limitations of coverage. This may be the case, for example, where the attorney negligently allowed the statute of limitations to lapse. Under such circumstances, collectibility may be shown by direct evidence of the defendant's wealth – although, as O.J. Simpson demonstrated for everybody, wealth itself does not guarantee collectibility – or by subpoenaing the insurance company (if known) or the original defendant. If these alternatives are not possible and plaintiff's ability to establish collectibility was *caused by* the defendant attorney's conduct, the burden of proof on this issue should be shifted to the negligent attorney. (*Thomas vs. Lusk* (1994) 27 Cal.App.4th 1709, 34 Cal.Rptr.2d 265.)

The courts have recognized the unique burden that proof of collectibility may impose on plaintiffs: legal malpractice parties are permitted the unique opportunity to subpoena financial records from, or presumably about, the former defendant; a non-party to the legal malpractice case. (*Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court* (2006) 137 Cal.App.4th 579, 593, 40 Cal.Rptr.3d 446.) Presumably, this authority would extend to subpoenas to the former defendant's insurance company; indeed, this would be far less invasive than attempting to reconstruct the original defendant's personal ability to pay a judgment.

In addition, you should remember that collectibility may also be relevant to the attorney's standard of care. For example, a plaintiff who claims a "million dollar injury" cannot expect the same level of activity when the tortfeasor is impecunious, uninsured or uncollectible. Every attorney recognizes that that "million dollar case" will be handled differently if the defendant is well insured or a solvent Fortune 500 company than if that defendant is patently insolvent.

This is, of course, why lawyers have long ordered asset checks: lawyers treat cases differently based on the anticipated ability of the defendant to pay a judgment; thus, collectibility can be a component of the variety of factors that determine the standard of care. ■

Editor's Note: This is one in a series of discussions about legal malpractice topics.

All litigators worry about the specter of a legal malpractice case. This fear is increased because, with the economic conditions and high premium rates for malpractice insurance, many small firms are "bare."

Most continuing education resources focus on malpractice avoidance – a critical subject for any practicing attorney – yet few of us really understand the substantive law of legal malpractice.

Many of the principles governing legal malpractice cases are unique and quite different from other types of negligence cases. Those differences, especially those which may be counter-intuitive to non-malpractice specialists, are the focus of this column.

This column presents a few – but certainly not all – legal doctrines which uniquely apply to legal malpractice cases. It is intended to give the uninitiated practitioner some inkling of this feared claim, to provide assurance to colleagues whose fears are ungrounded and finally, by educating those who might be asked to represent a party in such a case, a deeper understanding of the law.

[1] This element was explicitly stated in BAJI 6.37.5 but is only implicit in CACI 601.