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The Suit-Within-a-Suit Paradigm Is Still Necessary

Ronald Israel and Marie Mathews, New Jersey Law Journal

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In the Jan. 14 article entitled, "Time to Say Good-bye to the 'Suit Within a Suit,'" the author posits, from the plaintiff's perspective, that the courts should dispense with a suit-within-a-suit method of proving the proximate cause element of a legal malpractice action because "it has become a procedural and evidentiary morass during discovery and trial that frequently leads to bizarre and unjust results." The author further advocates for the relaxing of burdens of proof and evidentiary rules that have been the fixture of civil litigation for decades:

And so, when discussing settlement, let's not insist that an expert report adhere to the rigidities of the rules of evidence that govern the trial, or that, as a precondition of meaningful settlement efforts, the expert opinion first be tested so that it strictly complies with the increasingly demanding requirements of the net opinion rule. The net opinion rule is appropriate for trial and governs, as it should, admissibility of evidence at trial—but it throttles settlement.

Although it is understandable that, from a plaintiff's perspective, "the rigidities of the rules of evidence" might be frustrating, such rules undeniably serve an important role in ensuring a just result, including those reached through a negotiated settlement. Relaxing the net opinion rule, for example, for legal malpractice cases and otherwise dispensing with the suit-within-a-suit framework for proving proximate causation, even if only in the pretrial context, will only serve to encourage the filing of frivolous and unsubstantiated claims against attorneys in the hopes of securing a quick settlement.

The only way for litigants to logically evaluate the settlement value of a case includes a thorough and realistic examination of the likelihood of prevailing at trial. That analysis requires consideration of the strength and admissibility of the competing expert opinions, as well as any other evidence that the parties intend to introduce in support or defense of the allegation that absent the attorney's negligence, the client would have received some benefit. Far too often, an independent expert retained by plaintiff's counsel merely sets forth a hindsight opinion without any basis in fact or law as to how the defendant attorney should have prosecuted a matter—often not even supported by the plaintiff's sworn testimony—in an attempt to survive summary judgment. It thus makes little sense to consider settlement as a matter completely divorced from any realistic expectation of recovery at trial.

The elements of a professional negligence cause of action are: (1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney; (2) the breach of that duty by the defendant; and (3) the defendant's breach was a proximate cause of the plaintiff's injury.

Conklin v. Hannoch Weisman, 145 N.J. 395, 416 (1996). To establish the causal connection between the defendant's breach and the plaintiff's injury, the plaintiff must present evidence that the defendant's conduct was a "substantial factor" in bringing about the injury. Id. at 419. In a malpractice suit arising out of a litigation, the plaintiff may establish the requisite proximate cause through a "suit within a suit"—i.e., by submitting the evidence that would have been submitted at trial if no malpractice had occurred. The suit-within-a-suit method requires proof that the claim underlying the malpractice action would have been successful but for the attorney's negligence. This is because if the plaintiff could not have won the underlying case, the plaintiff could not have been damaged by an attorney's negligence, for example by missing a statute of limitations.

In a transactional context where the plaintiff claims that his attorney failed to protect his interest in a transaction, the plaintiff must establish that absent the attorney's negligence, the other parties to the transaction would have recognized the plaintiff's interest and the plaintiff would have derived a benefit from it. See Froom v. Perel, 872 A.2d 1067 (2005). In other words, if the plaintiff's claim is that his transactional counsel failed to incorporate a certain provision in the contract being negotiated, the plaintiff would have to show that the other party to the contract would have agreed to that provision, and the transaction would have closed.

The same is true in a "botched settlement" case, which is typically nothing more than a plaintiff, having second thoughts about having settled with an adversary, blaming the plaintiff's former attorney for allegedly providing bad advice to settle even if the adversary would not have settled for a penny more. Whether referred to as "suit within a suit" or something else, the burden placed on the plaintiff in both the litigation and transactional contexts are the same: to demonstrate that an otherwise meritorious position was undermined by the negligence of the attorney. The plaintiff must show that he would have been better off in the underlying transaction or litigation if the attorney had not been negligent.

Absent the imposition of that burden, the legal advisor to a transaction or settlement may too easily become the scapegoat for a client that has second thoughts about the deal. Before the loss can be shifted to the attorney, the client has to clear the hurdle of showing that the loss was in fact caused by the attorney's alleged malpractice. Recovery must be denied (or settlement throttled) where the purportedly unfavorable deal was likely to occur anyway or the purportedly optimal deal was never going to happen. Despite the recent onslaught of legal malpractice cases, attorneys are not guarantors of their clients' ultimate satisfaction with a litigation or transaction, and we should not provide an incentive for plaintiffs to sue lawyers by removing the proximate causation element of the cause of action for legal malpractice. Although the author posits that the suit-within-a-suit paradigm is a relic from the age "before it became fashionable to sue lawyers," dispensing with the requirement of proximate causation would create a setting in which it would indeed become even more fashionable to sue lawyers.