

# Establishing actual damages in legal malpractice cases

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Legal malpractice is something all practitioners rightfully dread, and, hopefully, it is something that most of us will never face. When it does occur, however, not all legal malpractice claims are created equal, especially when it comes to the required element that the plaintiff—a former client—establish that he suffered actual damages as a result of the malpractice.

Most practitioners are familiar with the idiom-like phrase in a legal malpractice setting of requiring a plaintiff to prove “a case within a case,” meaning that “[t]he plaintiff must prove the underlying action and the

damages owed by the third party absent the legal malpractice.”<sup>1</sup>

Where a client has retained an attorney to *prosecute* an action and, due to malpractice, the attorney fails to do so successfully, such as where the attorney misses a statute of limitations deadline, it is conceptually easy to determine whether the client suffered actual damages: the defendant either had the funds to pay the damage award or he did not. If the defendant had the money to pay the damage award and, if the client would have succeeded in his suit against the defendant but for the attorney’s malpractice, the client suffered

actual damages—that is, real loss—as a result of the attorney’s neglect.

But, what happens when the attorney has been retained to *defend* a lawsuit and, due to malpractice, misses a defense that results in a judgment being entered against the client? Assuming the client does not have the funds to pay the judgment, has the client suffered actual damages as a result of the attorney’s malpractice? This is the scenario recently faced by the Illinois appellate court in *Fox v. Seiden, et al.*,<sup>2</sup> which answered the question in the affirmative: the existence of the judgment alone is sufficient to constitute actual

damages.<sup>3</sup>

## The Underlying Litigation

The underlying case in *Seiden* involved a bitter family dispute between two brothers, Nachson Draiman (“Nachson”) and Yehuda Draiman (“Yehuda”), and their related corporate entities.<sup>4</sup> Nachson brought suit on behalf of Multiut Corporation (“Multiut”), for whom Nachson served as president, against Yehuda, a number of corporate entities with which Yehuda was affiliated, and his wife, Miriam Draiman (“Miriam”).<sup>5</sup> Among other things, Multiut alleged that

Yehuda and his corporate affiliates engaged in deceptive trade practices and that Miriam conspired with these defendants to commit wrongdoing.<sup>6</sup> After a multi-week bench trial, the court found in favor of Multiut and against the various defendants.<sup>7</sup>

In reaching its decision, the trial court noted that “having found that Yehuda Draiman has purposefully engaged in deceptive trade practices, it is this court’s determination that attorneys’ fees and costs in connection with the prosecution of this cause to be awarded to [Multiut] and against the Defendants.”<sup>8</sup> Yehuda, Miriam and their related corporations thus retained new counsel—Glenn Seiden and Associates, P.C., and individual attorneys in the firm (collectively, the “Seiden firm”)<sup>9</sup>—to represent them in post-trial proceedings, such as the attorney fee issue.<sup>10</sup>

Multiut filed its petition for fees, and the Seiden firm filed papers in opposition.<sup>11</sup> Not mentioned in any written or oral argument, which took place during an August 26, 2003 hearing (the “Hearing”), was any argument that Miriam should and could not be held liable for any award of attorneys’ fees because she was *not* named as a defendant in the only count that had the potential to award such fees: the violation of the Uniform Deceptive Trade Practices Act.<sup>12</sup> At the Hearing, the trial court awarded \$1,002,046 to Multiut as compensation for attorney fees pursuant to the Uniform Deceptive Trade Practices Act, and Multiut’s counsel undertook to draft an appropriate order. The order, however, contained imprecise language, stating that “[j]udgment is entered on behalf of plaintiff and *against defendants* in the amount of \$1,002,046,” without specifying which defendants were—or, like Miriam, were not—supposed to be subject to the attorney fee judgment.<sup>13</sup> The Seiden firm did not object to the language of the order, and Multiut sought enforcement of it against Miriam.<sup>14</sup>

Subsequently, the Seiden firm moved to

clarify the August 26, 2003 Order, but failed to argue that Miriam was not liable for the attorneys’ fees; rather, the point for clarification merely concerned the allocation of such fee award among the various defendants, including Miriam.<sup>15</sup> It was all for naught, however, because the next business day after filing the motion for clarification, the Seiden firm filed a notice of appeal in the case, thereby divesting the trial court of jurisdiction to adjudicate the motion for clarification.<sup>16, 17</sup>

About eight months later, on May 23, 2005, Miriam filed for bankruptcy in the Northern District of Illinois.<sup>18</sup> On July 25, 2005, the bankruptcy court granted Multiut’s motion to lift or modify the automatic stay, making the attorney fee judgment fully subject to collection despite the bankruptcy proceedings, and Multiut was able to obtain the turnover of Miriam’s beneficial interest in her home and certain stock certificates in the defendant corporations, and imposed a wage garnishment on her.<sup>19</sup>

## The Malpractice Action

On March 27, 2006, Horace Fox (“Fox”), as trustee for Miriam in bankruptcy, filed an amended complaint alleging legal malpractice claim against the Seiden firm and its successor firm, Azulay, Horn and Seiden, LLC.<sup>20</sup> The amended complaint alleged Miriam and the Seiden firm entered into an attorney-client relationship, the Seiden firm had certain duties arising out of the attorney-client relationship, and the Seiden firm breached its duties by: (1) by failing to argue to the trial court that it lacked authority to award attorney fees against Miriam under the Illinois Uniform Deceptive Practices Act because she was not a named defendant in that claim; (2) by failing to catch the imprecise language used in the August 26, 2003 order that the judgment of \$1,002,046 was entered against the “defendants” generally rather than the “defendants” named in the sole count for violations of the Illinois Uniform Deceptive Practices Act; and (3) by failing to preserve the liability for attorney fees issue for appeal.<sup>21</sup>

The amended complaint further alleged that Miriam was damaged by the entry of the \$1,002,046 attorney fee judgment, and the accrual of interest thereon, despite the fact that Miriam had not satisfied the judgment.<sup>22</sup> The amended complaint also alleged that Miriam was damaged by Multiut’s efforts to collect the wrongfully imposed judgment, including the turnover of beneficial interest of Miriam’s interest in a land trust and garnishment of wages.<sup>23</sup>

The defendants moved to dismiss the amended complaint for failure to state a claim pursuant to Illinois Code of Civil Procedure Section 2-615.<sup>24</sup> Defendants argued that Fox failed to plead actual damages and proximate cause, and the trial court granted the motion to dismiss.<sup>25</sup> The appellate court reversed, finding that the amended complaint had adequately alleged both actual damages and proximate cause. As noted above, this article concerns itself only with the actual damages issue.<sup>26</sup>

## The Appellate Court’s Opinion

On appeal, Fox argued that the trial court had incorrectly granted the Seiden firm’s motion to dismiss because the imposition of the attorney fee judgment against Miriam, standing alone, was a sufficient injury to constitute actual damages.<sup>27</sup> In so arguing, Fox cited *Gruse v. Belline* as direct authority for that proposition.<sup>28</sup> In *Gruse*, evidence of the entry of two judgments against a legal malpractice plaintiff, with no evidence that any payment in satisfaction of the judgment was made, was sufficient to establish proof of actual damages at trial.<sup>29</sup> Fox also cited to *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, in which the Illinois Supreme Court cited with approval the holding of the *Gruse* case, stating that “[o]ur appellate court has held that where an attorney has been engaged to defend an action and the action is lost through the attorney’s negligence, the amount of the judgment suffered by the client is, generally, a proper element of recovery in a malpractice proceeding against the attorney.”<sup>30, 31</sup>

In opposition, the Seiden firm argued that the damages claimed by Fox were speculative, and would remain so until Miriam paid some amount of the attorney fee judgment—the mere entry of the judgment against Miriam was insufficient to constitute actual damages.<sup>32</sup> In espousing this position, the Seiden firm relied primarily on *Eastman v. Messner*<sup>33</sup> for the proposition that a legal malpractice plaintiff may only recover the amount of damages net of what he had already recovered from worker’s compensation insurance, arguing that Miriam’s “loss,” if at all, would be the net amount that she actually paid towards the attorney fee judgment.<sup>34</sup> Because *Gruse*’s holding was contrary to this position, the Seiden firm simply argued that *Eastman* had overruled *Gruse*, *subsilently*.<sup>35</sup>

After considering the arguments of both sides, the Appellate Court reversed the trial court’s decision, ruling that plaintiff had ad-

equately pled the existence of actual damages based solely on the entry of a judgment against Miriam, even though the judgment was unpaid.<sup>36</sup> The Appellate Court cited favorably to and quoted from *Northern Illinois Emergency*, and rejected the Seiden firm's arguments that *Eastman* had overruled *Gruse*, *sub silentio*, stating that it disagreed with the Seiden firm's contention that "our supreme court works in mysterious ways."<sup>37</sup> The court pointed out that *Eastman* does not discuss the sufficiency of pleadings for a legal malpractice case, and more specifically did not deal with the pleading requirements for actual damages, in the context of malpractice based on the failure to defend a lawsuit.<sup>38</sup>

Instead, the appellate court stated that the contrast between *Eastman* and *Northern Illinois Emergency Physicians* merely serves to make clear the distinction between damages in a legal malpractice case involving negligence in the prosecution of a claim, and those in a case involving negligence in the defense of a claim.<sup>39</sup> It is not enough, when alleging legal malpractice on the part of an attorney prosecuting an action, to show that the attorney negligently merely "lost" the case; instead, the plaintiff must also allege that he would have recovered had the underlying case been prosecuted successfully, in order to adequately plead actual damages.<sup>40</sup> In contrast, where there has been negligence in defending a claim, the entry of a judgment in and of itself is sufficient to show the existence of actual damages.<sup>41</sup>

The appellate court's decision in *Seiden* is in line with the position of other state courts around the country with respect to actual damages in a legal malpractice case for the negligent defense of an action. In a decision relied upon by the *Gruse* court, the Texas Supreme Court discussed the differences between the "prepayment rule," as advocated by the Seiden firm, that would require prepayment of a judgment before maintaining a claim, and the "judgment rule," where the mere existence of the judgment is enough:

The basic question presented is whether we should apply the "prepayment rule" or the "judgment rule" in determining whether or not Montfort sustained any actual damages by the judgment rendered against him. Admittedly, Montfort has not paid any part of the judgment, as required under the pre-payment rule. Nor has execution been attempted on any of his property. Nevertheless, the uncontradicted evidence at the trial is that the

unpaid judgment was still "hanging over his head."

This question was considered by us in *Hernandez v. Great American Ins. Co.* The court, after full consideration of the respective merits of the prepayment rule and the judgment rule, adopted the judgment rule insofar as a tort action is concerned. The Court observed: "*The judgment injures Hernandez while it remains unpaid. His credit is affected. A lien attaches to his land. His non-exempt property is constantly subject to sudden execution and forced sale. He is entitled to relief from harm if it is the fault of the tortfeasor.*"<sup>42</sup>

Similarly, in *Roebuck v. Steuart*, the Maryland court engaged in the following discussion after first citing Texas law in support of the "judgment rule":

Virginia has taken a contrary position [to the "judgment rule"]. In *Allied Prods., Inc. v. Duesterdick*, 232 S.E.2d 774 (1977), the Court held that when a client has suffered a judgment for money damages as the proximate result of his lawyer's negligence, such judgment constitutes actual damages . . . only to the extent has judgment has been paid. . . . In a well-reasoned dissent, however, Justice Poff observed:

If the client has no cause of action until he has paid the judgment against him, then the larger the judgment, the greater the client's burden and the lawyer's impunity; the greater the injury wrongfully inflicted, the less the liability of the wrongdoer. The rule would seem to penalize a lawyer for his negligence when it costs his client a modest judgment but grant him immunity when his negligence results in a judgment too large for the client to pay.

Furthermore, when the judgment forces the client into a state of insolvency, the rule may prejudice not only the client but his general creditors as well.

Finally, the rule the majority adopt will force the client to choose whether to postpone suit against his negligent lawyer until he has paid his judgment creditor in full or to institute a

separate suit against his lawyer for each partial payment he makes. How the latter course might be affected by the doctrine of *res judicata* one can only wonder.

*Id.* 232 S.E.2d at 777.

Not mentioned by Justice Poff, but an equally vexatious problem if the "prepayment rule" were adopted, is the question of when the statute of limitations would begin to run. . . . As to the cases from other jurisdictions, we find more persuasive those supporting the "judgment rule." We hold, therefore, that the trial court erred in applying the "prepayment rule" to the judgment in this case.<sup>43</sup>

Only a few years later, the Virginia Supreme Court expressly overruled its prior decision in *Duesterdick* and, instead, adopted the "judgment rule" as advocated by Justice Poff in his dissent.<sup>44</sup>

## Conclusion

The *Seiden* decision firmly roots Illinois jurisprudence with the law of all other states that have examined the issue—including Colorado, North Dakota, New Jersey, South Dakota, California, and Utah—requiring only that a malpractice plaintiff establish the issuance of a judgment against him in order to maintain a claim against his lawyer for negligently defending a lawsuit. Thus, the *Seiden* court affirmed that the ill effects of a wrongfully imposed judgment, even when that judgment has not been satisfied, can constitute actual damages for the purpose of a legal malpractice action based on the negligent defense of a claim. While the requirement for actual damages is a feature of all legal malpractice cases, *Seiden* teaches that one must look below the surface and examine the nature of the legal malpractice action to determine if this requirement has been met. ■

1. *Willey v. Paulsen*, 894 N.E.2d 862, 870 (1st Dist. 2008).

2. *Fox v. Seiden, et al.* 382 Ill.App.3d 288, 887 N.E.2d 736 (1st Dist. 2008).

3. The *Seiden* decision also address the issue of proximate cause in a legal malpractice case, discussion of which will have to await a future publication. For now, the scope of this article is limited to the actual damages issue.

4. *Seiden*, 382 Ill. App.3d 289.

5. *Id.*

6. *Id.*

7. *Id.* at 290.

8. *Id.*

9. The Seiden firm had previously appeared on behalf of both Yehuda and Miriam, but were not counsel of record at the time of the bench trial, and after filing their appearance for post-trial issues, merged into the firm of Azulay, Horn and Seiden, LLC.

10. *Seiden*, 382 Ill.App.3d 290.

11. *Id.*

12. *Id.* at 292.

13. *Id.* at 290 (emphasis added).

14. Miriam had also been found liable for civil conspiracy and judgment had previously been entered against her in the amount of \$250,000, which was unrelated to the attorney fee judgment.

15. *Seiden*, 382 Ill.App.3d at 299.

16. *Id.* at 290.

17. The eventual proceedings on appeal, while having some relevance to the issue of proximate cause discussed in *Seiden*, have little bearing on the actual damages determination, and are therefore beyond the scope of this article.

18. *Seiden*, 382 Ill.App.3d at 292.

19. *Id.* at 293.

20. *Id.* at 292.

21. *Id.*

22. *Id.* at 293.

23. *Id.*

24. *Id.* at 289.

25. *Id.*

26. *Id.*

27. *Id.* at 294-295.

28. *Grusev. Belline*, 138 Ill.App.3d 689, 486 N.E.2d 398 (1st Dist. 1985)

29. *Gruse*, 138 Ill.App.3d at 698.

30. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 307, 837 N.E.2d 99 (2005).

31. Fox also cited to *Seyfarth, Shaw, Fairweather & Geraldson v. Wintz*, 1999 WL 1129609 at \*7 (N.D. Ill. 1999), in which the Northern District of Illinois cited approvingly to *Gruse*, stating: "Illinois has recognized that an unpaid judgment assessed against a party is sufficient to sustain an allegation of damages in a legal malpractice action."

32. *Seiden*, 382 Ill.App.3d 296.

33. *Eastman v. Messner*, 188 Ill.2d 404, 721 N.E.2d 1154 (1999).

34. *Seiden*, 382 Ill.App.3d at 297.

35. *Id.*

36. *Id.* at 299.

37. *Id.* at 297.

38. *Id.*

39. *Id.*

40. *Id.* at 297-298.

41. *Id.* at 298.

42. *Montfort v. Jeter*, 567 S.W.2d 498, 499-500 (Tex. 1978) (citations omitted; emphasis added).

43. *Roebuck v. Stewart*, 544 A.2d 808, 813-814 (Md. Ct. Appeals 1988),

44. See *Shipman v. Kruck*, 593 S.E.2d 319, 326-27 (Va. 2004).

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