Settlement as a Bar to a Malpractice Action

Due to an increase in legal specialization, among other factors, attorneys today are increasingly vulnerable to suit for malpractice. One important defense to such an action is settlement of the basic action on which the malpractice suit is based. Although other defenses can be considered, this comment will only deal with the defense of settlement.

Settlement

One early response to settlement as a defense to a malpractice action was given in a turn-of-the-century Massachusetts case, Drury v. Butler.

An attorney had been retained to protect plaintiff’s interests regarding the town’s taking a strip of plaintiff’s land for the construction of a sewer. Although the attorney brought an action of trespass against the city for installing the sewer without any formal taking, he failed to file a petition for an assessment of damages within the two-year statutory period. Subsequently, plaintiff conveyed the land to the town for a valuable consideration and settled his trespass claim, stipulating that his rights against defendants (the administrators of the attorney’s estate) should not be affected by the settlement or the deed of release. Holding the release did not bar plaintiff’s malpractice action, the court reasoned that defendants’ failure to seasonably bring suit cost plaintiff a valuable right: his ability to maintain an action for the value of the land taken. The loss of this right would, prima facie, harm plaintiff.

2. Zilly, Recent Developments in Legal Malpractice Litigation, 6 LITIGATION 8 (Fall 1979); Comment, Attorney Malpractice—A “Greenian” Analysis, 57 NEB. L. REV. 1003 (1978).
3. Among such bars are the attorney’s death, contributory negligence, laches, the statute of limitations, res judicata, and lack of privity.
4. 171 Mass. 171, 50 N.E. 527 (1898).
5. Although the court notes the stipulation, the opinion accords no importance to it.
6. Id. at 175, 50 N.E. at 529.
The court summarily rejected defendants' argument that plaintiff had suffered no damage because the town might have allowed him to file his petition anyway, even though the statutory period had expired. The court simply stated that such an assumption cannot be made. The existence of damage, therefore, appeared to be the key to the court's conclusion that plaintiff's action should not be barred despite his settlement or compromise with the town. The latter should be viewed only as an attempt to mitigate his loss. Thus, settlement is not relevant in determining whether plaintiff's action should be precluded but rather is relevant only in relation to the jury's assessment of damages.

Although the court did not speak in terms of prima facie harm to plaintiff, Hiss v. Friedberg was similarly concerned with the element of damage as a justification for allowing the legal malpractice action to proceed. Hiss involved a violation of an escrow agreement with the clients. The attorneys in Hiss had been retained by the purchasers in a real estate transaction to search title, obtain title insurance, and conclude the purchase. In order to protect themselves against any claims under an outstanding unrecorded written lease, the client-purchasers entered into an escrow agreement with the attorneys. The attorneys were to hold their clients' cash and purchase-money notes in escrow until they received an insurance policy issued by an accredited title insurance company, guaranteeing a fee simple title free and clear of any liens or encumbrances. The attorneys breached this agreement by paying the purchase money and delivering the notes to the sellers before the title policy was issued. When it was subsequently issued, the title policy did not meet the terms of the escrow agreement, there being an outstanding leasehold interest. The holders of this leasehold interest took possession of the property, and all efforts by the sellers to remove the interest were unsuccessful. The purchasers filed suit against the sellers for breach of warranty and covenants due to the outstanding leasehold interest. Several months later, before the suit came to trial, the purchasers settled their claim against the sellers. As consideration for reducing the principal amount of the

7. Id.
8. The speculative and unrealistic nature of such an argument was similarly noted by the court in King v. Jones, 258 Or. 468, 483 P.2d 815 (1971).
9. 171 Mass. at 175, 50 N.E. at 529.
purchase money notes by $40,000, the purchasers executed a written release of their claims whereunder they expressly reserved the right to proceed against their attorneys.\textsuperscript{11}

When defendants-attorneys argued that plaintiffs-purchasers were fully compensated by their settlement with the sellers and thus were not entitled to additional monetary damages from them, the court stated that “[t]he mere fact that the [plaintiffs] were willing and able to settle their claims against the [sellers] for [$40,000] does not necessarily establish that as the measure of their loss.”\textsuperscript{12} Only a judicial determination of their loss would fix its limits.\textsuperscript{13} Although the court did not directly address the issue of whether the malpractice action should be barred,\textsuperscript{14} one may deduce from its statements concerning the measure of plaintiffs’ loss that a factor precluding a bar of the malpractice action is the possibility that plaintiffs have not been totally compensated for the damages they suffered. Until there is a judicial determination of the measure of plaintiffs’ damages, then, plaintiffs cannot be barred from proceeding against their attorneys.

An additional reason for not barring the malpractice action was squarely addressed by the court. Since plaintiffs had two separate causes of action, one against the sellers for breaches of warranty and covenants, and the other against the attorneys for breaches of their contract of employment and escrow agreement, two separate breaches of obligation were necessarily involved.\textsuperscript{15} Consequently, the sellers and attorney-defendants were not joint contractors; therefore, the settlement of plaintiffs’ claim against the sellers “did not constitute a settlement and release of their separate cause of action against [the attorneys].”\textsuperscript{16}

Further, plaintiffs were forced to “resort to litigation”\textsuperscript{17} with the sellers to obtain what they had purchased. Because litigation

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\item \textsuperscript{11} Here, too, the opinion treats this reservation as irrelevant in that it only mentions its existence without further comment.
\item \textsuperscript{12} 201 Va. at –__, 112 S.E.2d at 875.
\item \textsuperscript{13} “Nor has the measure of such loss been judicially determined in this or any other suit.” Id.
\item \textsuperscript{14} Defendants-attorneys did not contend that the action itself should be barred. Instead, they argued that plaintiffs were not entitled to recover actual or compensatory damages from them.
\item \textsuperscript{15} 201 Va. at –__, 112 S.E.2d at 875.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\end{itemize}
costs are an element of recoverable damages in the malpractice action, such costs can be another reason for not precluding the action against the attorneys. Obviously, if plaintiffs are entitled to damages which are not recoverable in the underlying action, these damages should be recoverable in a subsequent action. If the malpractice action were barred, these losses could never be recouped.

Katzenberger v. Bryan involved similar facts but, strangely enough, Hiss was not cited in the opinion. Defendant-attorney, retained to certify the title to property that plaintiffs had contracted to purchase negligently failed to discover that the vendors did not own the portion which provided ingress and egress. Plaintiffs brought an action for breach of warranty against the vendors and accepted $1500 in settlement before the case went to trial. Defendant argued that this settlement constituted an accord and satisfaction of the claim against him, and thus that plaintiffs' action was barred. In rejecting defendant's contention, the court focused on the fact that plaintiffs had two separate and distinct causes of action for two separate wrongs. The contract claim against the vendors for breach of warranty was totally independent of the tort claim against defendant for breach of his duty to use due care in examining and certifying the title to property. Thus, settlement of the contract claim should not represent an accord and satisfaction of the tort claim against defendant since the acts which gave rise to the two claims were separate and distinct, i.e., the vendors and defendants were not joint tortfeasors but rather were strangers to the wrong committed by the other. Although settlement does not bar the tort action, settlement will affect the amount of plaintiffs' recovery. The court states that, on remand, evidence of plaintiffs' settlement with the vendors should be submitted to the jury which must decide if plaintiffs already received in settlement

18. "In their suit against the [sellers] the [plaintiffs] could not recover as an element of their damages the amount of counsel fees which they paid or were obligated to pay in that case." Id.
20. The defense of accord and satisfaction was also rejected in Heasly v. Whitten, 580 S.W.2d 104, 106 (Tex. Civ. App. 1979): "the acceptance by plaintiffs of part of the proceeds of the sale of the property was an accord and satisfaction with Musgrove in the partition suit, and not with Whitten in this tort action."
21. 206 Va. at __, 141 S.E.2d at 675-76.
22. Id. at __, 141 S.E.2d at 676.
23. Id.
any of the same items of damage they are claiming against defendant.24 Plaintiffs' recovery must be reduced according to the extent of duplication.25

Both Drury and Katzenberger were cited by the Supreme Court of Oregon in King v. Jones.26 The King court firmly rejected defendant-attorney's contention that plaintiff's release of the tortfeasors in a personal injury action constituted an accord and satisfaction of her malpractice claim and barred the action against them.27 Defendants, retained by plaintiff to bring suit against a car dealership and an individual who had shown her a car, negligently failed to obtain service on the individual within the prescribed time. As a result, plaintiff's cause of action was barred by the statute of limitations. After the expiration of the limitations period, plaintiff settled the action during the trial for $3500 and executed a release in favor of both the dealership and the individual. In her malpractice complaint plaintiff alleged that defendants' negligence precluded her from recovering a judgment against the individual and that she suffered damages in the amount of $27,873.97.28 She further alleged that she was "not fully compensated for her injuries by receipt of the $3500 in settlement."29 Significantly, the court said defendants failed to cite any rule of law supporting their claim that release of an original tortfeasor after the statute of limitations has expired operates as a bar to a malpractice action.30 Defendants claimed that the release of one joint tortfeasor (the individual defendant in the personal injury action) releases all of them (the attorneys-defendants in the action at bar). As in Katzenberger, the court here squarely rejected the claim that the individual defendant in the personal injury action and defendants in the malpractice action were joint tortfeasors. Defendant in the first action negligently allowed the car door to strike plaintiff, but the attorneys negligently failed to serve defendant before the statute of limita-

24. Id. at __, 141 S.E.2d at 677.
25. Id. Here, such duplication might exist in payment received for the loss of ingress and egress, since this factor was central in any diminution in value of the residue of the property. The diminution in market value is the element of damages charged to the defendant.
27. Id. at __, 483 P.2d at 818.
28. Id. at __, 483 P.2d at 816.
29. Id. at __, 483 P.2d at 817.
30. Id.
tions expired—two separate and distinct acts, giving rise to two separate and distinct causes of action. 31 Defendants also argued that even if plaintiff had a good cause of action against this individual, 32 she lost it when she executed the release. The court obviously thought that this argument missed the point: plaintiff lost her cause of action because defendants allowed the statute of limitations to run before serving the individual. 33 Consequently, plaintiff’s release of this individual was irrelevant; in fact, it was an “empty gesture” because her cause of action against him had already been barred. 34 Unfortunately, the court failed to discuss the relevance of the release against the car dealership. Undoubtedly, this release was not an empty gesture as the statute of limitations had not run against the dealership.

Although the court refers to the similarity between Drury and the instant case, Drury appears relevant only with regard to the release of the individual. In Drury, when defendant allowed the statute of limitations to expire, plaintiff lost the right to recover damages for the value of the land taken. Likewise, in King, when defendants allowed the statute of limitations to run against the individual who demonstrated the car, plaintiff lost her right to recover damages from him. From the facts given, however, it certainly does not appear that plaintiff lost her right to recover damages from the dealership. Despite the court’s lack of clarity in dealing with the release of the dealership, the holding is clear regarding the release of the individual defendant. This release had absolutely no relationship to plaintiff’s cause of action against defendants—attorneys which arose when they allowed the statute of limitations to run on her claim against the individual. 35

Similarly, in Mitchell v. Transamerica Insurance Co., 36 an attorney negligently allowed the statute of limitations in Kentucky to run on plaintiffs’ personal injury claim, but thereafter plaintiffs engaged another attorney who brought an action in Indiana which

31. Id.
32. In an action for legal malpractice the plaintiff must demonstrate that he/she had a good cause of action against the defendant(s) in the original action. See McDow v. Dixon, 138 Ga. App. 388, 226 S.E.2d 145, 147 (1976); Titsworth v. Mondo, 95 Misc. 2d 233, 407 N.Y.S.2d 793, 796 (1978).
33. 258 Or. at 817, 483 P.2d at 817.
34. Id. at 818, 483 P.2d at 818.
35. Id.
36. 551 S.W.2d 586 (Ky. App. 1977).
had a longer statute of limitations. Plaintiffs settled before trial for $60,000. In the meantime, plaintiffs brought suit against their first attorney. Because they were able to bring suit in another jurisdiction with a longer statute of limitations, the court held plaintiff suffered no loss.

Therein lies the crucial distinction between Drury and Mitchell. In the Kentucky case plaintiffs did not lose the right to bring suit on their personal injury claim. Instead, they were able to bring suit on this cause of action in Indiana. Consequently, no presumption arose that plaintiffs were harmed. Indeed, the court, quoting a Delaware case, states: "It is the law that a malpractice action against an attorney cannot be established in the absence of a showing that his wrongful conduct has deprived his client of something to which he would otherwise have been entitled." As in Drury, the crucial element seems to be damage. In Drury damage existed and the malpractice action was allowed; in Mitchell no damage existed and the malpractice action was barred.

The Mitchell court's analysis would have been clearer if it had stopped at the point in its opinion where it cites Thompson. Unfortunately, however, in discussing plaintiffs' contention that they could have received more in damages if the case had been tried in Kentucky, the court confuses its analysis by adding dictum: "However, the evidence, . . . , on this is a matter of conjecture and speculation. It may have been a different case if the Mitchells had tried their case in Indiana and had come away with patently inadequate damages. The fact is that they settled their case for $60,000.00." Perhaps the court was trying to say that a patently inadequate settlement in Indiana might be tantamount to the loss of the right to bring suit on their claim. Although such a case could eventually arise, the court's speculation on a possibly different outcome seems unwise: the dictum raises doubts concerning the reason the malpractice action is barred. Is it indeed the loss of a right to bring suit on a particular cause of action that serves as the predicate for the malpractice suit? Or, rather, is it immaterial whether this right is totally lost, with the relevant factor being whether the settle-

37. Defendant's malpractice insurer was also a named defendant. The Court of Appeals affirmed the trial court's directed verdict for defendant's insurer. This issue is not relevant to the focus of the present discussion.

38. 551 S.W.2d at 588 (citing Thompson v. D'Angelo, 320 A.2d 729 (Del. Super. cf. 1974)).

39. 551 S.W.2d at 588.
ment is adequate? If the settlement is patently inadequate, is the court saying that the malpractice action should be allowed? At one point the court refers to the "substantial settlement" plaintiffs received. Such language suggests it is not simply a patently inadequate settlement which serves as a prerequisite for allowing the malpractice action but rather any settlement which is less than substantial might suffice to preclude the bar. In seemingly placing importance on the amount of the settlement, the court weakens the significance of the loss of the right to bring an action. Ironically, the court has fallen prey to its own admonition. In rejecting plaintiffs' contention that they could have received more damages in Kentucky than they did in Indiana, the court refers to the speculation and conjecture such a contention engenders. The court appropriately characterizes such an argument as "an exercise in the pyramiding of an inference upon an inference." Yet in dictum about a different result in the event damages were patently inadequate, the court engaged in the very speculation and conjecture it condemns. What would qualify as patently inadequate damages? $30,000? $10,000? $5,000? Would not such a determination at least partially depend on what an Indiana jury might have awarded? Would the determination likewise depend on what a Kentucky jury might have awarded or indeed on what a settlement in Kentucky might have brought? What should the measuring stick be for "patently inadequate" which supposedly might open the doors to a malpractice action? The Mitchell opinion unfortunately multiplies the confusion over the effect of the loss of the right to bring suit on a cause of action as opposed to the effect of a settlement. Its language relating to the amount of the settlement even further obfuscates the key issues.

Three New York cases are helpful in clarifying the issues in settlement cases. None involved a claim of malpractice based on defendant-attorney's allowing the statute of limitations to run on a plaintiff's claim. Rather, they involved some act of malpractice on the part of the attorney which allegedly left plaintiff no alternative but to settle. In N.A. Kerson Co. v. Shayne, plaintiffs

40. Id.
41. Id.
42. Id.
43. Note that all the principal cases discussed up to this point with the exception of Hiss and Katzenberger have involved such a claim.
44. 59 A.D.2d 551, 397 N.Y.S.2d 142 (1977), aff'd for reasons stated in con-
charged that defendant-attorney, improperly and without their consent, withdrew the second affirmative defense in a foreclosure action. During the trial of the foreclosure action, plaintiffs voluntarily entered into a stipulation of settlement. A few months later they moved to vacate the stipulation of settlement and restore the action to the trial calendar. The ground for their motion was that they were induced to settle because the mortgagee’s attorney had misrepresented facts to the trial judge during the settlement negotiations. Plaintiffs’ motion was denied and the denial of their motion was affirmed in *Hannibal Investors Corp. v. Kerson Co.*\(^46\) In its memorandum opinion in *Shayne* the Appellate Division, Second Department, held that plaintiffs’ malpractice action could not proceed for two reasons: (1) it was simply a collateral means of attacking a stipulation of settlement which had already withstood direct attack in the *Hannibal* action and (2) plaintiffs could not base a malpractice action upon the alleged mistakes of their counsel prior to settlement because plaintiffs’ agreement to the terms of the settlement terminated the litigation.\(^46\) The concurring memorandum, however, favored dismissing plaintiffs’ complaint on the merits of the malpractice action\(^47\) rather than barring the action as a matter of law for the above two reasons. With respect to the first reason, the concurring justice stated that plaintiffs’ unsuccessful motion to vacate should have no bearing on their malpractice claim since the allegations of malpractice in their complaint were not raised at all in their motion to vacate.\(^48\) In regard to the second reason given by the majority, he stated that there can be “no automatic waiver, as a matter of law, of plaintiffs’ right to sue defendants for legal malpractice in the handling of the prior foreclosure

\(^{curren opini on, 45 N.Y.2d 730, 380 N.E.2d 302, 408 N.Y.S.2d 475 (1978).}


47. [P]laintiffs utterly failed to establish even a prima facie case of malpractice against defendants.

In order to succeed in their malpractice action, plaintiffs were required to prove that the second affirmative defense in the foreclosure action was withdrawn by the defendants herein and that, except for the withdrawal of that defense, plaintiffs would have succeeded in the foreclosure action.

*Id.* at 553, 397 N.Y.S.2d at 144 (1977) (Suozzi, J., concurring).

48. *Id.* Plaintiffs’ contention in the malpractice action was that withdrawal of their second affirmative defense in the foreclosure action destroyed their position in the latter action.
action."\textsuperscript{49} The preclusion of automatic waiver would hold true despite voluntary agreement by plaintiffs to enter into the stipulation of settlement in the foreclosure action. The reasoning in the concurring memorandum provided the basis for the Court of Appeals’ affirmation of the Appellate Division’s dismissal of plaintiffs’ complaint in malpractice.\textsuperscript{50} Before the Court of Appeals decision in \textit{Shayne} was handed down, the Supreme Court, County of New York, Special Term, decided \textit{Becker v. Julien, Blitz & Schlesinger, P.C.}\textsuperscript{51} The events leading up to the \textit{Becker} action were defendants’ attorneys’ engagement to represent plaintiff in a contract action against a corporation and the settlement of the action during trial in which plaintiff agreed to accept $45,000.\textsuperscript{52} In \textit{Becker}, plaintiff contended that he was obliged to agree to the settlement due to the mishandling of the action by his attorneys\textsuperscript{53} and that he would have recovered $5,000,000 had it not been for defendants’ malpractice. Defendants used the collateral attack argument, \textit{i.e.}, that since plaintiffs voluntarily settled their contract action, they cannot make a collateral attempt to go behind the previous settlement by bringing a malpractice action.\textsuperscript{54} Defendants urged that the malpractice action is barred unless plaintiff challenges the settlement.\textsuperscript{55} The court stated that “[i]n making such contentions, defendants misconceive the nature of the [malpractice] action.”\textsuperscript{56} According to the court, plaintiff’s execution of the release and his retention of the proceeds of the settlement only constitute ratification of the settlement “as to the third-party.”\textsuperscript{57} Indeed, in his malpractice action plaintiff did not contend that his settlement with the third party was not final and binding but rather that the settlement was “improvidently made because of the attorneys’ malpractice.”\textsuperscript{58}

\textsuperscript{49} Id. at 553, 397 N.Y.S.2d at 144.
\textsuperscript{50} 380 N.E.2d at 302, 408 N.Y.S.2d at 476.
\textsuperscript{51} 95 Misc. 2d 64, 406 N.Y.S.2d 412 (1977), aff’d, 66 A.D.2d 674, 411 N.Y.S.2d 17 (1978). (The order was modified on other grounds.)
\textsuperscript{52} Additional sums plaintiff had previously received brought the total to $64,000.
\textsuperscript{53} Among the alleged wrongful acts were improper preparation for trial, failure to call in necessary witnesses, and dilatory tactics.
\textsuperscript{54} 95 Misc. 2d at 66, 406 N.Y.S.2d at 413.
\textsuperscript{55} Id. at 66, 406 N.Y.S.2d at 413.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
The *Becker* court repudiated the second reason given by the Supreme Court in *Shayne* as precluding a malpractice action from going forward: “[t]o the extent that the Appellate Division of another department has held that an action in malpractice cannot be based upon alleged mistakes of counsel prior to settlement, since agreement to the terms of the settlement terminated the litigation . . . this court must respectfully disagree.” The *Becker* court revealed the flaw in such reasoning by explaining that “[o]ften it is the very fact of termination of the action which gives rise to the claim for malpractice.” The court states that it “finds itself in agreement with the concurring opinion . . . in the *Shayne* case . . . that the cause of action for legal malpractice must stand or fall on its own merits, with no automatic waiver of a plaintiff’s right to sue for malpractice merely because plaintiff had voluntarily agreed to enter into a stipulation of settlement.”

The *Becker* court, however, appears to set up a stricter standard for the establishment of a cause of action in malpractice when the underlying litigation has been terminated by settlement: “Where the termination is by settlement rather than by a dismissal or adverse judgment, malpractice by the attorney is more difficult to establish, but a cause of action can be made out if it is shown that assent by the client to the settlement was compelled because prior misfeasance or nonfeasance by the attorneys left no other recourse.”

*Titsworth v. Mondo* also reaches the conclusion that settlement of the underlying action will not bar a malpractice action. Plaintiffs had originally retained defendant-attorney to represent them in a personal injury action and had later discharged him, hiring another attorney. Although defendant had been discharged, he still caused a Note of Issue and Statement of Readiness to be filed before turning over the case to the other attorney. The latter made a motion to increase the ad damnum from $100,000 to $500,000 but Special Term denied the motion. Possibly the denial was based on plaintiffs’ failure to show a change in circumstances which was required once a Note of Issue and Statement of Readiness had

59. *Id.*
60. The underlying litigation may have been terminated because of default, dismissal, expiration of the statute of limitations, etc. *Id.*
61. *Id.*, 406 N.Y.S.2d at 414.
62. *Id.*, 406 N.Y.S.2d at 413-414.
63. 95 Misc. 2d 233, 407 N.Y.S.2d 793 (1978).
been filed. Plaintiffs did not appeal the denial of their motion and subsequently settled their actions for $90,000 and executed a general release without limitation or reservation in favor of defendants in the personal injury actions. Plaintiffs then commenced their malpractice action making two allegations: (1) defendant had sued for an inadequate amount in the personal injury action since he failed to increase the amount sued for after receiving the neurosurgeon’s report and the attending physician’s report; (2) defendant had improperly filed the Note of Issue and Statement of Readiness after his discharge from the case, thereby preventing the ad damnum from being increased.

In deciding what effect settlement of the underlying action should have upon a legal malpractice action, the Titsworth court returned to the separate and independent wrong theory. Since defendant-attorney and the defendants in the personal injury action were not joint tortfeasors, the release plaintiff executed should not also release defendant-attorney:

Although the claim against the defendant for legal malpractice refers to the same injuries, physical and economic, suffered from the Corso and Condor accident, the wrong claimed is separate and independent. The damages result from the claimed negligence of a lawyer rather than from the negligence of an automobile operator, notwithstanding such damages stem from the same physical injuries and financial loss.

The Titsworth opinion sets up two possible arguments for requiring a client to take his underlying claim for damages to judgment as a prerequisite to maintaining a malpractice action. First, permitting a dissatisfied client who has already settled to sue his attorney for a theoretical difference in damages which the client claims he could have recovered but for his attorney’s malpractice seems to impose an unfair burden on the attorney. Strangely enough, the Titsworth court marshalls case law support for this argument rather than revealing its invalidity. One wonders if the court simply forgot to attack this argument. Its failure to explain the argument’s flaw causes confusion. One would think that the court would hold that settlement does bar a malpractice action.

64. Defendant had commenced two actions, one brought in the name of Virginia Titsworth as parent of Michele Hudson an infant, and the other brought in the name of Raymond and Virginia Titsworth.
65. Id. at 238-39, 407 N.Y.S.2d at 795.
The second argument is that if a client is not required to take his underlying claim for damages to judgment first, then in the malpractice action a lawyer might be obliged to divulge the information he originally obtained from his client through their confidential relationship. The court reveals the invalidity of this argument by pointing out that attorneys are obliged to use such information, and, indeed, are specifically permitted to use it in any malpractice action.66

Undoubtedly, the most compelling reason the Titsworth court gives for allowing the malpractice action to proceed despite settlement of the underlying action is the fact that the wrong committed by defendants in the personal injury action is totally separate and independent from the wrong committed by defendant-attorney. The court views the effect of a settlement in the same light as the cases already discussed: the settlement will not bar the malpractice action, but it will operate as a defense to the extent of reducing the potential damages recoverable in the later malpractice action.67

Rather than discussing the issue in terms of separate and independent wrongs, Gustavson v. O'Brien68 took a different approach. A corporation and its shareholders brought an action against their fire insurers and attorney. The latter had been retained to perform the legal services incident to the purchase of a restaurant and tavern business and to form a corporation for the operation of the business. Since the sellers of the business refused to convey title to the corporation, the shareholders, as individuals, entered into a land contract with the sellers. The shareholders instructed defendant-attorney to assign the contract from them to the corporation but the attorney failed to effect the transfer. Subsequently, the restaurant was badly damaged in a fire. Repairs were not made and the town ordered the demolition of the building. While the fire insurers denied coverage on the ground that the corporation lacked an insurable interest in the property, the shareholders brought an action against the six separate insurers and against defendant-attorney. The action against defendant was abated pending determination of the action against the insurers. Considerable negotiations prior to trial resulted in a settlement against the insurers for $33,000, with the shareholders reserving

66. ABA Code of Professional Responsibility, Disciplinary Rule 4-101(c).
67. 95 Misc. 2d at 244, 407 N.Y.S.2d at 799.
68. 87 Wis. 2d 193, 274 N.W.2d 627 (1979).
their right to proceed against defendant. In the action against defendant, the jury awarded the shareholders and the corporation the $12,000 difference between the total amount of insurance coverage and the settlement figure.69

As in Titsworth, the Gustavson court discussed whether plaintiffs should have been required to litigate their claim to judgment as a prerequisite to maintaining a malpractice action against the attorney. The court here took a more forceful approach than the Titsworth court by presenting a rather strong policy argument against such a requirement. If, as a prerequisite to bringing a malpractice action, plaintiffs-clients were required to litigate all issues to judgment, defendant-attorney could contend that plaintiffs “unreasonably prolonged the litigation, thereby increasing their legal expenses, and unreasonably refused a fair settlement offer which would have mitigated their damages.”70 Such a contention would be especially likely if the judgment in the litigation were adverse to the client.71 The court viewed the settlement as a “bona fide attempt by respondents to mitigate their damages and bring the litigation to an end.”72 The guarantee of the genuineness of the settlement seems to reside in the fact that the “issue of insurable interest could well have been litigated to the extent of an appeal to this court.”73 The court states: “In such a case a reasonable settlement made in good faith and after commencing litigation and extended negotiations, cannot be construed as a waiver of the client’s rights against the negligent lawyer.”74 Although the court held that the settlement will not preclude the action against the attorney, the cautious and qualified nature of the holding is noteworthy. When can a settlement not be construed as a waiver of the right to bring an action against the attorney? Five qualifications appear to stand out: (1) when the issue in the underlying action could have been litigated all the way to the state supreme court; (2) when the settlement is reasonable; (3) when it is made in good faith; (4) when it is reached after litigation has begun; (5) when it is reached after extended negotiations. Arguably, the reasonableness of the

69. Plaintiffs were also awarded expenses for legal fees and for interest paid on the land contract pending settlement with the insurers.
70. 87 Wis. 2d at __, 274 N.W.2d at 631.
71. Id.
72. Id.
73. Id. at __, 274 N.W.2d at 632.
74. Id.
settlement is not an additional qualification so that any settlement which satisfies the other four criteria would be reasonable. Nevertheless, the court has carefully set forth a holding limited by at least four distinct qualifications. Such a holding invites speculation on the outcome of a factual situation in which one or more of the criteria might not be met.

Despite the qualified holding, the court summarized the real question as whether the attorney’s negligence forced plaintiffs to “engage in litigation they otherwise would not have had to engage in.”76 By focusing on this issue, the court diminished the effectiveness of the qualifications delineated in the holding. It would seem that plaintiffs might have had to engage in litigation against the insurers even if the latters’ position had not been a strong one. Indeed, plaintiffs’ position might have been so strong that the case would not go to the state supreme court and yet plaintiffs would still have had to engage in litigation due to the attorney’s negligence. Perhaps, however, the court’s attempt to summarize the question at issue should not be seen as lessening the importance of the qualifications since the summary of the issue was given to establish and emphasize that the outcome of the issue in the underlying action (here, the issue of insurable interest) was irrelevant.77 The court was attempting to make the point that the relevant factor is the debatability of the issue rather than its ultimate outcome. The five qualifications which will preclude the malpractice action from being barred would therefore overshadow the later attempt by the court to summarize the question.

In *Titsworth* the court also considered the relative strength of plaintiffs’ position in the underlying action. But in contrast to the situation in *Gustavson* where the court recognized that the defendant-insurer’s position was quite strong, the *Titsworth* court noted that defendants’ liability in the personal injury action was almost a given. “There is much force to defendant’s argument that the plaintiff, having accepted a settlement substantially less than the amount sued for where there was virtually no issue of liability, may not now require a court to speculate as to what a jury would have awarded.”77 (emphasis added) Since plaintiff’s position was

75. Id.
76. Here, whether plaintiffs would eventually have been able to establish coverage would be irrelevant.
77. 95 Misc. 2d at 237, 407 N.Y.S.2d at 795.
strong, the Titsworth court obviously worried about the factors outlined in Gustavson: the litigiousness of the issues and the reasonableness and good faith of the settlement. Although the Titsworth court recognizes that a strong argument can be made that an attorney should not be compelled to defend against a claim for damages which his former client has chosen to settle, the court is not nearly so cautious in its holding. Indeed, given that plaintiff's position was so strong, the factual situation in Titsworth might not have satisfied the criteria set out in Gustavson. Given the fact pattern, it would have been easier for the Titsworth court to hold that the action against the attorney was barred, but it did not do so. Nor did it purport to limit its holding: "[T]he release by the plaintiff in the underlying action and the failure to proceed to judgment . . . do not bar the plaintiff from maintaining this action." 

Conclusion

If the client settles the underlying action, will he then be able to maintain a malpractice action against the attorney? Case law indicates that he will. Undoubtedly, the most compelling argument for a malpractice action is the fact that the client has two separate causes of action for two separate wrongs. The defendants in the underlying action and the attorneys in the malpractice action are not, as sometimes claimed by attorneys, joint contractors or joint tortfeasors. Because of the existence of two independent wrongs, the defense of accord and satisfaction is ill-fitted to the situation. Since the doctrine of accord and satisfaction only operates to bar further recovery on the particular claim in the underlying action, settlement of this action cannot possibly represent an accord and satisfaction of the client’s claim against the attorney. This defense, then, is of little avail to attorneys-defendants.

Equally unsuccessful has been the argument by attorneys that a malpractice action cannot be based on alleged mistakes of counsel prior to settlement, i.e., that settlement purportedly cuts off any rights the client might have had against the attorney. Such an argument is based on a non-sequitur because a claim for malpractice does not even arise until the underlying litigation is somehow terminated. There is no good reason that such termination, which triggers the clients’ rights, cannot be by way of settlement. The

78. Id. at 240, 407 N.Y.S.2d at 796.
79. Id. at 242, 407 N.Y.S.2d at 797-98.
judicial response, then, to the argument that a malpractice action cannot be based on mistakes of counsel prior to settlement may well be that there can be no automatic waiver of the right to sue for legal malpractice despite settlement.

What issues is a court likely to focus on in determining if a legal malpractice action will be allowed to proceed? First, the element of damage or harm seems essential. The courts have focused on the element of harm by asking if plaintiffs were forced to engage in litigation they otherwise would not have had to engage in. If so, plaintiffs have unquestionably been harmed. The courts might further justify not barring the malpractice action by stating that settlement is not sufficient to definitively establish a measure of loss, that a judicial determination is necessary. This rationale may well counter the argument that it is unfair to allow the client to sue his attorney for a theoretical difference in damages which he alleges would have been recovered had it not been for the attorney’s malpractice. Another reason for allowing the malpractice action is that only in this action can plaintiff recover the costs of litigation in the underlying action. If the malpractice action were barred, therefore, plaintiff could never be fully compensated.

In the typical case in which the attorney’s malpractice has caused plaintiff to lose a valuable right, to what factors should the attorney direct the court’s attention? One case suggests that a key question may be whether the settlement was a bona fide attempt by plaintiffs to mitigate their damages and bring the litigation to an end. Such an inquiry unquestionably will involve not only procedural but substantive aspects of the settlement. Leaving aside the question of whether this kind of inquiry is advisable, it certainly is more promising for the attorney. The more factors he can convince the court are essential to the definition of a “bona fide” attempt, the better his chances for getting the malpractice action barred. A “bona fide” effort by plaintiffs to mitigate their damages might involve requirements that the issue or issues be capable of being litigated all the way to the state supreme court, that the litigation have already begun, that negotiations have been extensive, and that the settlement be reasonable.

If we accept the predominant opinion that settlement will not bar a legal malpractice action, what role does settlement play? First, it will unquestionably affect the amount of damages recoverable in the malpractice action. The prevailing opinion is that there should be no duplication in items of damage that are recovered in
the underlying action and the malpractice action. Second, settlement may well affect the requirements for establishing a cause of action in malpractice. Plaintiff may be obliged to show that he had no other recourse but settlement due to the attorney's malpractice. Finally, then, although settlement will probably not bar the malpractice action, settlement may well make it more difficult for plaintiff to prove his case.

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