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Attorney Can Be Sued for Negligence That Forced Client to Settle Litigation

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Three years after the New Jersey Supreme Court ruled that litigants unhappy about settlements to which they agree cannot sue their lawyers for malpractice, appeals courts are finding exceptions to the bar.

On July 30, the state Appellate Division held a suit could go forward where the alleged legal malpractice was a relevant factor behind the client's decision to settle the earlier litigation.

The client alleged the lawyer had not done enough to protect his interest in a small, closely held business, thereby forcing him to compromise his suit against the other principals. "Here, plaintiff claims that he was compelled to settle his Chancery action because the negligence of defendant deprived him of the proofs he needed to prevail," the judges said in *Hernandez v. Baugh*, A-5752-06.

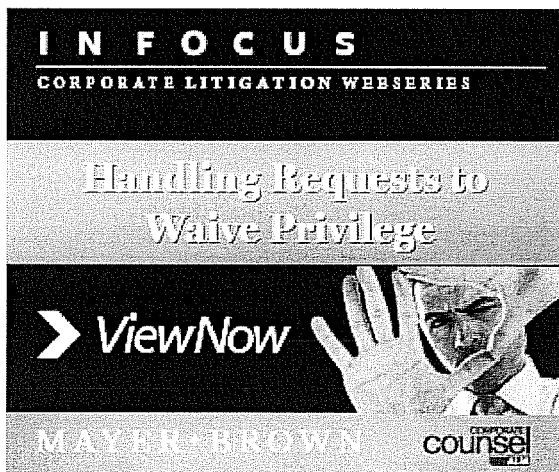
The panel found the situation distinguishable from that in *Puder v. Buechel*, 183 N.J. 428 (2005), which prohibits a client who believes a claim was settled for less than its worth from suing his or her lawyer for the difference.

Puder arose in the context of a divorce settlement, and the July 30 ruling, which overturns a grant of summary judgment to a lawyer, is one of number of recent decisions that are chipping away at the doctrine in a non-matrimonial cases.

On July 21, in *Schulman v. Wolff & Samson*, A-4674-06, an appeals panel said *Puder* did not apply in a malpractice case charging two law firms with breach of fiduciary duty in a suit over the break-up of an East Brunswick, N.J., company. The owners settled their underlying dispute but some of them alleged the firms did not properly represent their interests.

In April, in *Prospect Rehabilitation Services Inc. v. Squitieri*, A-2991-05, an appeals panel held *Puder* held *Puder* did not apply if the client claims the underlying settlement terms were neither fair nor satisfactory.

A federal judge applying New Jersey law likewise refused to dismiss a malpractice claim in *Keltic Financial Partners*



v. Krovatin, 2007 WL 1038496 (D.N.J. 2007), saying *Puder* did not apply because there was no contention that malpractice caused the plaintiff to settle too low and the alleged malpractice did not even arise out of legal services.

In the July 30 case, plaintiff Felipe Hernandez claimed in the underlying suit to have been hoodwinked by his uncle and aunt, with whom he had joint-ventured in a car-wash and lube-shop business.

Hernandez hired Belleville, N.J., solo Carmen Baugh to create two corporations: Hernandez & Martinez Inc. to own the property and F & H Inc. to own the business. The corporate records listed Hernandez as a stockholder in Hernandez & Martinez but not in F & H. There was no written agreement setting forth the nature of Hernandez's interest in F&H, even though Hernandez contributed \$70,000 toward the purchase price of the real estate and business and the seller took back a mortgage for \$600,000, secured in part by Hernandez's personal guarantee.

Allegedly, Hernandez and his uncle had an understanding that Hernandez would run the day-to-day operations for a salary plus expenses. But seven months after the closing, his uncle fired him and denied him access to the business.

Hernandez sued in Essex County and settled the suit for a lump-sum payment of \$325,000. The settlement agreement stated, "The parties deem this settlement to be fair and reasonable and have arrived at this settlement in arm's length negotiations taking into account all relevant factors, present or potential."

Hernandez then sued Baugh for malpractice, alleging that her negligence made it unlikely he would have received a larger settlement, since he had no way of proving an ownership interest in F & H.

Superior Court Judge Theodore Winard granted summary judgment to Baugh, finding *Puder* applied because the agreement Hernandez signed said the settlement was "fair and reasonable."

But Judges Dorothea Wefing, Lorraine Parker and Ellen Koblitz found the agreement had wiggle room. "We consider plaintiff's claim that defendant was negligent in representing plaintiff in connection with the transaction to be encompassed within the phrase, 'taking into account all factors past or potential,' which modifies the statement that the settlement was fair and reasonable," Wefing wrote for the panel.

Hernandez, in considering the settlement, had to take into account the difficulties he would face in proving any ownership interest he had in F & H Inc. Those difficulties, he said, were due to Baugh's negligence.

"Certainly at this stage of the proceedings, plaintiff was entitled to have the sentence interpreted to mean that he considered the settlement reasonable in light of the apparent weaknesses in his case, and not that he considered \$325,000 a fair and reasonable estimate of his interest in both companies," said Wefing.

Hernandez's attorney, Edward Lee, says the underlying suit would likely have resulted in a higher award to Hernandez had it not been for Baugh's negligence. "He was never issued shares in the one corporation and the agreement never took into account his sweat equity," says Lee, of Pitman, Mindas, Grossman, Lee, Bross and Moore in Springfield, N.J.

Baugh's attorney, Patrick Minter, says no decision has been made whether to appeal further. "We're disappointed that the Appellate Division did not agree with the trial court's determination that *Puder* applied," says Minter, of Morristown, N.J.'s Graham Curtin. "We will continue to defend this case on its merits."