

Malpractice for Failure to Sue the Deep Pocket

An attorney representing a company sues an entity for breach of contract and is successful in attaining a judgment that, unfortunately, proves uncollectible. Does that company have a viable legal malpractice claim because there is another entity the attorney could have sued that would have resulted in a collectible judgment? The Superior Court of Pennsylvania addressed this issue in a recent decision.

In *Heldring v. Lundy Beldecos & Milby PC*, 2016 PA Super 263, both the company's president and the company itself asserted a legal malpractice claim against the attorney who had represented the company, which was a subcontractor in a suit against a general contractor and a partner of the owner. The claim in the underlying matter was for breach of contract. The company contended that the contractor allegedly failed to pay it for the structural steel fabrication and installation of rails, stairs and lintels in a construction project converting a building into condominiums. The company also contended that the president of a principal of the owner had breached its promise to pay the company and the other subcontractors for their work performed on the owner's premises.

The company retained an attorney to prosecute this action; the existence of this representation was confirmed by a retention letter addressed to the company, attention to its president. The retention letter said the attorney "would engage in proceedings to collect moneys owed to the [company]."

The attorney commenced an action on behalf of the company against the general contractor and the president of the principal of the entity that owned the premises but not against any of the other entities of which he was also president. The court granted summary judgment in favor of the contractor. Following a bench trial, the court rendered a verdict in favor of the company and against the president, but only in his capacity as president of that company.

Unfortunately, judgment against the entities and the president of the company were uncollectible. Those defendants against which judgment was entered later appealed, but that appeal was dismissed because they had failed to file post-trial motions. Thereafter, the attorney requested the trial court "to re-examine the evidence and further reconsider the judgment entered" in an effort to attain a judgment against the non-parties who should have been sued

and who were not judgment-proof. That motion was denied as beyond the authority of the trial court to consider.

The company and its president then commenced the current action against the attorney. In the amended complaint for legal malpractice and unjust enrichment, they contended that the attorney and his law firm "were negligent and careless in their pre-litigation investigation and due diligence because they did not name the correct . . . entity or any of the various legal entities owned or controlled by [the entities' president] . . ." i.e. those entities with deep pockets. They further contended that the attorney had sued a trade name or names instead of the deep-pocket entities and, if the attorney had sued the deep-pocket entities, a collectible judgment would have resulted.

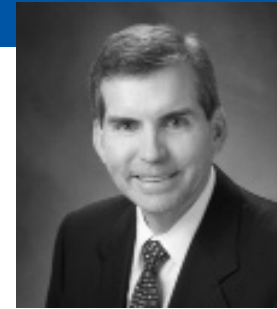
The now-defendant attorney and his law firm filed preliminary objections in the nature of a demurrer, contending that "it has already been judicially establish[ed] that defendants sued the correct party in the underlying matter, and defendants cannot be deemed to have breached a duty of care owed to the company." They sought dismissal of the unjust enrichment claim "because the parties' relationship arises from an actual contractual agreement." Defendants also argued that the company's president could not assert a claim because he was not a party to the contract between the law firm and the company for the retention of the law firm's legal services. The defendant's attorney and his law firm opposed the unjust enrichment claim on the basis that there was a "written and express contract with the attorney and his firm" and, accordingly, there could be no basis for an unjust enrichment claim.

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In opposition to those preliminary objections, the company and its president argued that "the fact that attorneys sued an entity against which a recoverable judgment could not be obtained cannot be a valid defense against the attorney's failure to sue a different liable party that is able to pay a judgment." The company argued that the attorney owed a duty to "investigate and to identify a proper solvent party to sue so that any judgment obtained would then be collectible."

The trial court sustained the preliminary objections and dismissed the amended complaint. It accepted the reasoning of the defendant lawyer and his law firm that neither party to the previous action had questioned the finding of liability against the defendants in that action by way of motions for reconsideration or by way of post-trial mo-

Avoiding Liability



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tions. Not until eight months after the bench-trial verdict did the company file a motion for clarification, which that court denied. Therefore, the trial court in the current action in effect found that the company was stuck with the result in the underlying action and that the defendant in that action was the entity liable to the company. The trial court dismissed the claim brought by the company's president, accepting the argument that the defendants represented the company only and not its president, thus depriving the president of privity with defendants, a necessary basis for asserting a professional liability claim. Stated differently, addressing the president in the engagement letter expressly in his role as the company's president and not agreeing to represent him individually did not create a professional relationship between him and the defendant lawyers and law firm. The company and its president appealed to the Superior Court.

A three-judge panel of the Superior Court affirmed the trial court's finding that the company's president could not assert a claim but reversed the finding that the company could not assert a claim against the defendant lawyer and law firm for failure to sue a viable deep pocket. Citing favorable case law from a foreign jurisdiction, the court recognized "that, upon proper proof, failure to sue the correct party may be a viable basis for a legal malpractice cause of action and that the company should have been permitted to proceed on that theory."

The lesson taught by this case is clear — it is not sufficient for the lawyer to sue and recover a judgment. The lawyer must consider whether his or her target is a deep pocket, and failure to take that issue into account can constitute a claim for actionable legal malpractice.