

# Professional Judgment and Speculative Damages in Transactional Malpractice

In negotiating commercial business transactions, each counsel attempts to insert terms and conditions designed to protect his or her client in the event that the other party later defaults. Depending on the nature of the deal, there are innumerable approaches to create such protections. In a real estate transaction, for example, this can involve the insertion of a provision for a mortgage or judgment lien to secure the seller's position where seller financing is involved. To the extent that there are no legal restrictions to any proposed protective provision, there is always one limiting factor in inserting such a provision: the other party must agree to it. But what are the consequences when the other party defaults and there was no or an insufficient measure to protect the client under those circumstances? Will the client want to second guess his or her own lawyer for failure to have negotiated adequate protection? It's an easy question to answer when the lawyer asks for the insertion of the protection, the other party refuses and the client, being fully advised of this refusal and its potential consequences, still agrees to risk a subsequent default without benefit of the protection. But what if the attorney had not thought to suggest such a protection and, in the malpractice action brought by his client as a consequence, the client's expert opines that it was negligence for the attorney to fail to suggest one. Isn't it pure speculation to say that if the lawyer had asked for the insertion of such a protective measure into the agreement, the other party to the deal would have agreed? What if the lawyer considered asking for a certain protection but, upon the exercise of his or her judgment, decided not to? Can the attorney be liable under any of these circumstances? A recent case addresses these issues.

*Mosera v. Davis*, — S.E.2d —, 2010 WL 3749199 (Ga.App.) (decided Sept. 28, 2010), presents a legal malpractice claim against a lawyer who had represented an individual lender to a land use developer in the settlement of a lawsuit over the default of that loan. The terms of the

settlement included monthly payments by the developer and a consent judgment, which the lender-client could file upon default by the developer. The client contended, however, that his lawyer had not insisted on adequate protections for him in the event of a default by the developer. In Georgia, a mortgage is called a deed to secure debt, and such an instrument is "filed," not "recorded." As one of the terms of the settlement, the developer had given the client a deed to secure debt to secure the monthly payments, to stand in second position behind a filed-first deed to secure debt that secured a bank loan. But the client could only file his deed if the developer defaulted on his monthly payments. The client complained that his counsel should not have let him agree to this term, characterizing it as one instance of "tactical error and incompetence." Because client could not file the deed to secure debt until after a default, this allowed another deed to be filed first, which defeated client's intended second-priority position.

Not surprisingly, the client and the lawyer had conflicting memories of the advice that had been given concerning the strength of client's security before he entered into the agreement. The client contends that he was advised that he was "100 percent secured" in second position behind the bank. In contrast, the lawyer testified that the client "understood that there was some risk involved; that he understood that this was the best deal that [the lawyer] could obtain for him; and that [the client] was anxious to get paid. ..." Weakening his position, however, "client had read the terms of the bank's deed to secure debt and acknowledged that the filing of another deed to secure debt on the property would have resulted in a default under the terms of that document." Therefore, he understood the developer's legal position and why it could not agree to allow the client to file his deed immediately. Moreover, he had previously been burned under similar terms in the original loan agreement, which breach thereof led to the settlement in question.

This dispute in recollections between the client and his lawyers did not have to be resolved for the court to decide this case by granting summary judgment in the lawyers' favor. In the court's view, the client was engaged in impermissible second guessing of the lawyers' "good faith exercise of their judgment in handling or in recommending settlement of the underlying litigation." Although this concept is recognized nationwide, in Georgia it is called the "judgmental immunity rule." The trial court noted that the client "had read and understood the terms of the settlement agreement." Moreover, the trial



## Avoiding Liability



By Jeffrey P. Lewis

*Jeffrey P. Lewis is a member in the West Chester office of the Pittsburgh-based law firm of Eckert Seamans Cherin & Mellott L.L.C. He serves on the PBA Professional Liability Committee and is a member of the PBA House of Delegates.*

court held that the client could not prove proximate cause because there was no evidence "to show that a better settlement agreement was obtainable or that a better outcome would have been achieved had the underlying litigation proceeded to trial."

The Court of Appeals of Georgia affirmed, agreeing with the trial court's reasoning. In its view, to allow a lesser standard for establishing proximate cause "would invite speculation and conjecture." Although it did not reference contributory negligence, the court clearly found fault in the client because he signed the settlement agreement and quoted from another case that "[t]here are few rules of law more fundamental than

that which requires a party to read what he signs and to be bound thereby. This rule has particular force when the party is well educated and laboring under no disabilities. To hold otherwise is to create the potential for malpractice litigation in every contract dispute." The court was also impressed with the fact that the lawyers had sent a letter to client before the settlement, which client's expert even conceded was an accurate description of the potential consequences if a deed of debt is not filed.

*Mosera* illustrates many of the landmines that a client must traverse to establish a viable legal malpractice claim arising out of a business transaction. It also underscores the need for the lawyer to document advice in business transactions, especially where risk is assumed by the client.

