Avoiding Liability

By Jeffrey P. Lewis

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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 motions. 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.