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How Attys Can Guard Against Rising Settle-And-Sue Claims

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Two colliding trends make this year a risky one for attorneys settling their clients' cases.

First, frustrated litigants are increasingly opting to settle disputes as the COVID-19 pandemic creates bottlenecks in trial courts and extends the time needed to get to a jury verdict. Second, malpractice claims are on the rise as parties realize that their contracts do not offer the protection that they may have thought they did, and cash-strapped plaintiffs seek relief from the comparatively deep pockets of law firms and their insurers.

The confluence of these trends means that attorneys can expect more after-the-fact scrutiny of their settlements than ever before, along with a corresponding increase in so-called settle-and-sue malpractice claims.

Settle-and-sue claims are those where a litigant settles their case and then sues the attorney who represented them in the settlement for malpractice.[1] The facts needed to prevail on such a claim vary by jurisdiction, but typically the client must demonstrate that, but for the attorney's negligence, they would have received a higher settlement amount or a larger recovery at trial.[2]

The mere prospect of a settle-and-sue claim causes heartburn for many litigators. After all, how can you prove that a settlement you negotiated for your client was objectively reasonable, when settling a case is more art than science,[3] and there is no formula to account for the costs and risks associated with going to trial?[4]

While there is no surefire way to prevent a settle-and-sue claim from being asserted, recent authority aptly illustrates some pitfalls litigators can avoid to reduce the chances of that happening.

In Masellis v. Law Office of Leslie F. Jensen, the California Court of Appeal for the Fifth Appellate District considered a settlement agreement gone awry.[5] In the underlying divorce case, the client believed her soon-to-be ex-husband was concealing assets, but the attorney resisted investigating.

Tensions in the attorney-client relationship deteriorated further when, at a court-ordered mandatory settlement conference, the attorney refused to present the client's proposed settlement demand of $1.2 million, saying: "I'm not going in there with more than $800,000. What's your number?"

The client testified that the attorney's conduct during the settlement conference left her "speechless. … I didn't know how to grasp it, and I just felt trapped. I felt … really scared and didn't know what to do."

The attorney-client relationship went south from there, to the point that the attorney refused to meet the client without a third person present, and attorney-client communications largely took place via their consulting expert. On the morning of the trial, the client was told to go to the consulting expert's office, where she was presented with a settlement agreement for $1.2 million. The attorney was not present.

The client testified that, although she did not understand the settlement agreement and the consulting expert provided no guidance about it, she signed it because she "felt completely trapped" and thought her lawyer was unprepared for trial, which was set to begin in just 90 minutes.

Several months after signing the settlement agreement, the client filed a settle-and-sue claim against the attorney alleging, among other things, that the attorney breached the standard of care by failing to pursue relevant discovery and abandoning the client during settlement negotiations. A jury agreed and awarded $300,000, which the client's expert characterized as the "low end" of the difference between what the client received under the settlement agreement and what she should have recovered under the settlement agreement absent malpractice.

To be sure, the facts of Masellis are somewhat egregious, but the broader issues that bedeviled the attorney-client relationship — differing expectations between the attorney and client regarding the reasonable range of recovery, lack of alignment on legal strategy, and difficulty in client communications — and led to malpractice litigation are common. All practitioners can draw lessons from Masellis with an eye on reducing their own chances of confronting a settle-and-sue cases in the future.

1. Monitor your client relationship.

Settle-and-sue case law is replete with examples of attorneys who worked through difficult client relationships to obtain settlements for their clients, only to be hit with a malpractice suit. In Masellis, for instance, although the attorney-client relationship had drastically deteriorated, the attorney apparently worked through the weekend before the trial to broker a settlement that met the client's $1.2 million request.

Practitioners in the throes of a difficult client relationship might believe such heroics will rehabilitate the attorney-client relationship and leave all involved with feelings of happily ever after. But once the attorney-client relationship has been poisoned, it is equally likely that the client will remain disgruntled and begin contemplating malpractice litigation before the ink on the settlement agreement has dried.

Attorneys must be willing to admit when the attorney-client relationship is broken beyond repair and try to withdraw when that happens. Presettlement withdrawal will not only reduce the risk of a settle-and-sue claim from being brought in the first place, by providing the client a fresh start with new counsel, but will also provide an effective defense in the event a claim is brought.[6]

Lawyers should of course be mindful of ethical obligations in withdrawing, but the upshot of the settle-and-sue case law is that it is difficult to repair a broken relationship via a settlement, and being willing to end a relationship that is not working is likely safer in the long run.

2. Communication is key.

Settle-and-sue case law is shot through with cases evidencing breakdowns in attorney-client communications. These breakdowns can later allow a plaintiff to claim they were kept in the dark about the value of their case or the reasonableness of the settlement agreement. This evidence can be devastating.

For example, in Masellis, the client testified that when presented with the settlement agreement minutes before trial with the attorney unavailable to answer questions, she felt she had no choice but to sign:

> I was freaking out. I was thinking, "If I don't sign this, we go to trial. We're not prepared." I felt completely trapped.

In the current environment, attorneys need to be more cognizant than ever to ensure lines of communication with clients are wide open, important case developments are timely relayed in writing, and that an affirmative paper or email trail is created that will not allow a client to claim they were abandoned — or, on the flip side, impermissibly strong armed[7] — by their attorney during settlement discussions.

3. Be willing to rethink assumptions.

After developing their initial theory of the case, litigators have been known to develop tunnel vision and, consciously or otherwise, overlook or minimize information that challenges that theory.

In Masellis, for instance, the attorney rebuffed the client's efforts to further investigate possible asset-concealing by the husband and refused to demand more than $800,000 at the mandatory settlement conference, despite the client's insistence that the case was worth at least $1.2 million. The jury's verdict demonstrates the client was right.

Of course, clients who believe their case is worth more than their attorney are not exactly few and far between. As many verdicts in successful settle-and-sue cases demonstrate, however, any given client may well be correct in that belief. Attorneys should remember that no one likely knows the facts of the case better than the client and strive to keep an open mind about the client's suggestions regarding evidence or damages, even if that means tweaking, or entirely reworking, their initial theory of the case.

4. Early settlements pose risks.

As the expense of discovery increases, early settlements — i.e. those occurring before a complaint is filed, before discovery begins or after only a small amount of discovery has taken place — are growing increasingly popular. While these can be a major win for clients in appropriate circumstances, they can also pose a significant settle-and-sue risk for attorneys because they allow the client stronger grounds to argue the attorney failed to adequately investigate a case before recommending settlement.[8]

Almost by definition, an attorney will not have exhaustively researched all aspects of a client's case in an early settlement scenario; indeed, the prospect of settlement without incurring the high fees and costs of discovery and motion practice is one of its selling points.

While there is no perfect solution to this Catch-22, attorneys can protect themselves by documenting in

writing that they informed the client of (1) the benefits and risks of early settlement, (2) what legal and factual investigation they did, and did not, do before recommending settlement, and (3) the impact — positive and negative — that further investigation could have on the client's settlement and trial prospects.

In addition, the attorney should be sure to document that the client understood and agreed to those points at the time of settlement.

5. Backstop your settlement recommendation.

Far and away the most problematic — and, from an attorney's perspective, frustrating — aspect of a settle-and-sue case is demonstrating the objective reasonableness of the settlement amount they recommended a client.

In Masellis, the attorney's use of a mutual damages expert who was employed by both sides, coupled with other egregious conduct, likely made it easy for the jury to conclude that the attorney had recommended settlement for an unreasonably low amount. But even an engaged and responsive attorney can be vulnerable to a settle-and-sue claim if the client later alleges they recommended an unreasonably low settlement.[9]

Particularly in cases where a client seems to grudgingly or reluctantly accept a settlement recommendation, attorneys should consider backstopping their recommendation in any number of ways: (1) by providing the client with copies of jury verdicts in similar cases as a frame of reference; (2) by engaging an independent expert to provide a second opinion regarding the settlement recommendation; and (3) by emphasizing in detail both the risks and delays associated with going to trial generally, as well as the weaknesses in the client's case that could cause the jury to award little or no damages.[10]

Backstopping your reasoning as to why you have recommended a particular settlement amount — and doing it in writing — will serve two purposes.

First, it will socialize your client with the idea that a given settlement is in their best interest and that you have done your due diligence on their behalf, thereby discouraging them from bringing a settle-and-sue claim in the first place. And second, in the event the client does bring such a claim, it will provide you with important documentary proof showing that you did not breach the standard of care to your client.

Buyer's remorse is hardly limited to the world of litigation, and as long as clients are susceptible to this human impulse, settle-and-sue lawsuits are likely to persist. By taking these precautions, however, an attorney can dissuade a client from asserting such a claim, and create a solid evidentiary record to defend themselves in the event it occurs.

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[1] Namikas v. Miller, 225 Cal. App. 4th 1574, 1577 n.1 (2014).

[2] See, e.g., Thomas v. Bethea, 351 Md. 513, 533 (Md. Ct. App. 1998) (collecting cases and explaining the majority view of the measure of damages in settle-and-sue cases is that "the difference between what was accepted in settlement and what likely would have been received from the adjudication").

[3] See, e.g., First Specialty Ins. Corp. v. Novapro Risk Sols. LP, 468 F. Supp. 2d 1321, 1333 (D. Kan. 2007) ("[A]s appreciated by any lawyer or judge who has handled more than a few trials, valuing a case for settlement purposes is more akin to a judgment-based 'art' than anything remotely resembling an empirical 'science.'"); Sw. Nurseries LLC v. Florists Mut. Ins. Inc., 266 F. Supp. 2d 1253, 1258 (D. Colo. 2003) ("[S]ettlement strategies are more the product of art than science, and fraught with the potential for mis-perception by all parties.").

[4] Fraley v. Facebook Inc., No. 3:11-CV-01726-RS, 2012 WL 5835366, at *3 (N.D. Cal. Aug. 17, 2012) ("To arrive at a fair settlement amount in compensation for past damages, the plaintiffs' potential recovery at trial must be estimated, and then appropriate discounts applied for the uncertainties, risks, and costs of litigation.").

[5] Slip Opinion, Case Nos. F075772& F076362 (Cal. Ct. App. 5th Dist., June 19, 2020).

[6] See Filbin v. Fitzgerald, 211 Cal. App. 4th 154, 171 (2012) (rejecting settle-and-sue claim against former attorney where plaintiff was represented by different counsel at the time of settlement because "[t]heir decision to settle was theirs and theirs alone, made with the assistance of new counsel, with no input from" the prior attorney); Builders Square Inc. v. Saraco, 868 F. Supp. 748, 750 (E.D. Pa. 1994) (rejecting malpractice liability in a settle-and-sue case where defendant in this case did not represent plaintiff at trial or when plaintiff agreed to the mid-trial settlement).

[7] For instance, in Shriner v. Friedman Law Offices, the client testified that the defendant attorney advised her at mediation to settle her personal injury case for $45,000. 23 Neb. App. 869, 895 (2016). When the client, who was indigent, declined, the attorney informed her he would no longer advance litigation costs for her case, including $12,000 to $20,000 that would be needed for expert depositions. Id. The client alleged she then "relented under the pressure and duress" and signed the settlement agreement. Id. The Court of Appeals of Nebraska reversed the grant of summary judgment in favor of the attorney, holding a jury could conclude, among other things, that the attorney committed malpractice by coercing her into signing the settlement agreement.

[8] See, e.g., Collins v. Perrine, 108 N.M. 714, 721 (Ct. App. 1989) (affirming $2.9 million damages in settle-and-sue case where attorney conducted little pretrial discovery or legal research); Bruning v. Law Offices of Ronald J. Palagi PC, 250 Neb 677, 690 (1996) (reversing summary judgment in favor of attorneys who allegedly did not fully investigate client's case before recommending settlement). Although the Masellis case did not involve early settlement, the attorney's apparent unwillingness to investigate possible concealing of assets by the husband, and apparent lack of explanation for that decision, seems to have played a major role in the jury's decision.

[9] See, e.g., Malfabon v. Garcia, 111 Nev. 793, 798-99 (1995) (reversing summary judgment in favor of an attorney where the jury could reasonably have concluded the attorney negligently advised the client to accept a settlement offer); see generally Jones v. Lattimer, 29 F. Supp. 3d 5, 11 (D.D.C. 2014) (courts permit legal malpractice claims based on negligent settlement recommendations).

[10] See, e.g., Slovensky v. Friedman, 142 Cal. App. 4th 1518, 1536-37 (2006) (affirming summary judgment in favor of attorney on the grounds that the $340,000 settlement was a windfall where the client's underlying claim was barred by the statute of limitations).