

# Settle and sue: Settlements as preludes to malpractice claims

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MAY 2017

Finality is a powerful incentive for parties to settle civil cases. Settlements end the drain of valuable time and resources that routinely occurs in litigation — a process that often has uncertain outcomes and, potentially, open-ended expenses.

Some settlements are the last act in the judicial battle between the litigants, but become Act I in a new lawsuit — a lawsuit by a settling party against his or her lawyer.

Such “settle and sue” cases — settler’s remorse, if you will — typically plead that counsel concealed from, or failed to explain to, the client one or more material terms of the underlying settlement agreement, or made an error earlier in the case that made an unpalatable settlement the only option.

In some cases clients also allege their counsel exerted undue influence or outright coercion in “forcing” the client to sign the agreement.

Settle and sue lawsuits raise thorny legal and ethical issues:

- How should courts balance the competing public policy favoring full disclosure of material information by attorneys to their clients with the reality that at least 90 percent of civil cases settle? If attorneys were discouraged from settling lawsuits for fear of becoming the next target, a system crash of the judicial branch would likely result. What threshold showing should clients be compelled to make before proceeding to trial in a settler’s remorse case?
- Since every attorney-client relationship carries with it a fiduciary duty to act in the client’s best interests, can every remorseful settler claim undue influence? What can attorneys do to minimize this risk?

These cases turn on nuances within various state legal ethics laws. Below, we summarize some of the leading cases throughout the United States, and recommend a fact-specific analysis to evaluate how courts may likely rule.

## THE SETTLEMENT AGREEMENT, AND THE LEGAL STANDARD

Most settlement agreements recite that they are integrated — that is, they supersede all prior negotiations and communications. That clause is usually adequate to foreclose disagreements between the settling parties about the nature of what was promised.

There is no similar clause between attorneys and clients. An attorney may not ethically require a client to release a malpractice claim in the same agreement that settles the

case. See, for example, Rule 3-300 of the California Rules of Professional Conduct, Cal. R. Prof. Conduct 3-300, and California State Bar Formal Opinion No. 2009-178.

The parties to a settlement may, and often do, release each other’s “employees, agents, counsel,” etc., but not their own counsel.

After signing the release, a client — perhaps prodded by others — may come to believe that he or she accepted too little or paid too much in settlement because counsel failed to explain what the case was really worth.

It’s easy to say, but hard to prove, because the case’s true value would have been determined by a jury or arbitrator, and that kind of determination is no longer going to happen.

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How high should the plaintiff’s burden of proof be? The California Court of Appeal in *Filbin v. Fitzgerald*, 211 Cal. App. 4th 154 (Cal. Ct. App., 1st Dist. 2012), set the bar quite high, at proof “to a legal certainty” that if the case had not settled the plaintiff would have recovered damages much greater than the settlement.

Taken literally, under a legal certainty standard the settle-and-sue plaintiff would need to prove he or she would have prevailed in the first case, the amount that would have been awarded, and the collectability of that amount from the original defendant(s).

Would a court in a malpractice case be wrong, as a matter of law, if it denied summary adjudication to the plaintiff on any of these three issues? That is as close to a “legal certainty” as this author can define.

It is the attorney-defendant who typically resorts to summary adjudication, and based on California appellate cases decided after *Filbin*, the attorney-defendant often wins.

In *Namikas v. Miller*, 225 Cal. App. 4th 1574 (Cal. Ct. App., 2d Dist. 2014), the appellate court upheld summary judgment for the attorney on the basis that the plaintiff had not offered evidence of what a fair settlement “would have been.”

The court’s choice of “would” rather than “might” is telling, because it emphasizes the plaintiff’s burden to prove a better outcome with certainty.



## HOW OTHER STATES TREAT SETTLE-AND-SUE CASES

No single legal standard has been adopted by all states in this type of case. In general, reported decisions disfavor settle-and-sue actions, but the rationale applied by courts across the country varies.

### New York

Three New York appellate decisions have rejected settler's remorse cases on different grounds, based on the facts of each case.

### Plaintiff's admissions

New York generally holds parties to the terms they stated in writing. In *Boone v. Bender*, 74 A.D.3d 1111 (N.Y. App. Div., 2d Dep't 2010), the New York Supreme Court, Appellate Division, dismissed a former client's malpractice claim against her divorce lawyers because the client had expressed satisfaction with her counsel's work before remorse set in, had discussed the terms of the divorce settlement with counsel and recited in the settlement that she entered the agreement voluntarily and of her own free will.

The recitation did not go so far as to release the law firm from liability, but it did signify that the client knew what she was doing.

### No guarantees of outcomes

A "wish I had settled" variant on the settle-and-sue fact pattern occurs when clients, with the benefit of 20/20 hindsight after an adverse finding, claim they would have accepted settlement offers that the defendants made before trial.

To reduce the risk of such claims, attorneys' engagement letters often state that lawyers cannot predict or guarantee the outcome of cases. In *Leder v. Spiegel*, 872 N.E.2d 1194 (N.Y. 2007), a lawyer sought a fee award after receiving an adverse ruling from the trial court. The lawyer's client counterclaimed that but for the attorney's negligent representation, the client would have accepted a \$108,000 settlement.

A lower court dismissed the counterclaim and the New York Court of Appeals upheld the dismissal, reasoning that the attorney's failure to anticipate the court's evidentiary rulings — even if accepted as true — did not establish negligence.

### Opportunity to cure alleged malpractice

Clients sometimes sue after settling, claiming they were forced to settle because of their attorneys' alleged malpractice. In such cases, proximate cause may be a potent defense.

In *Katz v. Herzfeld & Rubin PC*, 48 A.D.3d 640 (N.Y. App. Div., 2d Dep't 2008), the clients alleged that they settled their underlying personal injury action for an amount far below what they would have recovered had it not been for their law firm's negligence.

The law firm had allegedly refused to pursue a "highly questionable" claim for exaggerated lost earnings damages and delayed in retaining an economist to evaluate that claim.

The law firm successfully moved to dismiss on the basis that the clients had discharged the firm and hired new counsel five months before the settlement, and that subsequent counsel had a sufficient opportunity to protect the clients' rights by pursuing any appropriate remedies.

### Illinois

Illinois does not impose a "legal certainty" test in settle-and-sue cases, though it does not allow recovery against counsel based on speculation that a better outcome could have been obtained.

A former client must prove by admissible documentation that he settled for a lesser amount than he could reasonably expect without the alleged malpractice. *Webb v. Damisch*, 842 N.E.2d 140 (Ill. App. Ct., 1st Dist. 2005).

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The client-plaintiff must also show actual damage caused by the attorney's alleged errors. In *Brooks v. Brennan*, 625 N.E.2d 1188 (Ill. App. Ct. 1994), a client dismissed her attorney, who had filed a Federal Employers' Liability Act case on her behalf. A second attorney took over the case and obtained a settlement amount greater than the one the first attorney had negotiated.

The Illinois Appellate Court found that the client was in a better position because she had gotten additional compensation as a result of her subsequent settlement, and could not prevail against the first attorney.

The court also found that settlement of an underlying action does not preclude a malpractice action per se, and further said that summary judgment for an attorney is not appropriate where factual issues exist as to whether the attorney's conduct damaged the client's case. *McCarthy v. Pedersen & Houpt*, 621 N.E.2d 97 (Ill. App. Ct., 1st Dist. 1993).

### Texas

Like Illinois, Texas does not discourage settle-and-sue cases by imposing a high burden of proof. Texas courts require that malpractice actions be supported by expert testimony, including an explanation as to how the attorney's conduct affected the outcome.

In *Taylor v. Alonso*, 395 S.W.3d 178 (Tex. App. 2012), a client-defendant paid \$3 million in personal funds to settle a car accident lawsuit and then sued his attorneys for allegedly failing to assert a particular defense in the case.

The attorneys said the former client could not prove causation, and a lower court entered summary judgment in their favor.

The case went up to the Texas Court of Appeals, which found that the former client's expert failed to explain how omitting the defense changed the settlement value of the underlying case. The court upheld the summary judgment ruling.

### New Jersey

In *Guido v. Duane Morris LLP*, 995 A.2d 844 (N.J. 2010), a group of plaintiffs who settled a case sued their counsel for providing negligent advice about the merits of settling.

The *Guido* plaintiffs did not seek to vacate or otherwise repudiate the settlement, but alleged that they entered it based on negligent advice from their counsel.

The New Jersey Supreme Court noted that the plaintiffs had not unconditionally expressed on the record that they were satisfied with the settlement, and were not precluded from filing their malpractice case.

Under those circumstances, a legal malpractice plaintiff need not first seek to vacate the settlement, but may proceed directly against the lawyers who provided the allegedly negligent advice that culminated in the settlement, the court said.

According to the high court, clients who become disillusioned with transactions negotiated by counsel have the same burden of proof as those alleging unfavorable settlements: they must establish "particular facts in support of their claims of attorney incompetence." *Ziegelheim v. Apollo*, 607 A.2d 1298 (N.J. 1992).

In *Puder v. Buechel*, 874 A.2d 534 (N.J. 2005), the New Jersey Supreme Court held that a client who testified that her divorce settlement was a fair and voluntary compromise could not subsequently sue her attorney for monies she did not receive in that settlement.

In contrast, the holding in *Puder* did not apply in *Gere v. Louis*, 38 A.3d 591 (N.J. 2012), where a post-judgment settlement between the aggrieved spouse and her former husband that was negotiated by her second law firm, expressly included a reservation of rights to sue her prior attorneys for malpractice.

The plaintiff claimed that her prior counsel failed to engage in meaningful discovery, hampering the ability of her successor attorney to establish her case against her former spouse.

### Pennsylvania

The Keystone State's courts have traditionally been protective of attorneys whose clients succumb to settler's remorse.

In *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991), the clients had brought an underlying medical malpractice suit and agreed on a settlement, but they later became dissatisfied with the amount.

The Pennsylvania Supreme Court ultimately barred the plaintiffs' legal malpractice claim based on Pennsylvania's public policy favoring the finality of settlements.

*Muhammad* was distinguished in a later Pennsylvania high court case, *McMahon v. Shea*, 688 A.2d 1179 (Pa. 1997). In that case, the client alleged that his attorneys failed to advise him on well-established principles of law and their impact on a written agreement.

The state Supreme Court said it would be absurd to permit attorneys to shield themselves from liability for legal errors under the guise of exercising professional judgment.

### Maryland

Maryland's highest court, the Court of Appeals, established its pleading and proof standards for settle-and-sue cases in *Thomas v. Bethea*, 718 A.2d 1187 (Md. 1998).

First, a client must specifically allege that "the attorney's recommendation in regard to [the] settlement was one that no reasonable attorney, having undertaken a reasonable investigation into the facts and the law as would be appropriate under the circumstances and with knowledge of the same facts, would have made," the court said

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Second, the court approved the "trial within a trial" approach to litigate the outcome of the underlying case within the legal malpractice case. In doing so, a plaintiff must show he would have achieved a better outcome with a different lawyer.

The *Thomas* court said that having a trial within a trial was a better option than relying solely on experts' opinions since "evidence from other persons, either as to settlement value or as to the actual prospect of a better settlement, has been regarded as speculative" by other courts.

A later Maryland case, *Vogel v. Touhey*, 828 A.2d 268 (Md. Ct. Spec. App. 2003), applied an estoppel rule against a client who sued her former counsel following a divorce settlement.

Because the client had stated at the divorce hearing that she was fully aware of the issues and that the settlement was fair and equitable, she was judicially estopped from bringing the malpractice suit against the attorney.

### CONCLUDING THOUGHTS

Attorneys who become targets of settle-and-sue cases should assess the specific context in which the alleged malpractice occurred with their defense counsel. If it was in allegedly mishandling the underlying case, thus making the challenged settlement the effect of the alleged malpractice

rather than its cause, it may be more difficult in some states to obtain an early disposition of the case.

As in other aspects of malpractice avoidance, an ounce of prevention may be better than a pound of litigation. When a client is recalcitrant about settling, even before a mediation or settlement conference has been scheduled, a few steps may be considered to lessen the chances that a post-settlement malpractice claim will occur.

This is a time to communicate in detail with the client, perhaps by providing copies of jury verdicts in similar cases, or suggesting an independent second opinion about the settlement value or simply confirming in writing the facts and rationale that support counsel's settlement recommendation.

Communications during the settlement process may be inadmissible under a given state's law, but written attorney-client communications are admissible, once malpractice is alleged.

Legal scholar Yogi Berra commented, "It ain't over til it's over." Careful documentation of settlement recommendations may help attorneys find finality in settlements for themselves, as well as for their clients.

*This analysis first appeared in the May 2017, edition of Westlaw Journal Professional Liability.*

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