

PROFESSIONAL LIABILITY UPDATE

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TRANSACTIONAL MALPRACTICE

California Law

By William L. Jacobson

California Supreme Court holds that plaintiffs in transactional malpractice actions must prove that but for the malpractice, there would have been a more favorable result.

Viner v. Sweet (June 23, 2003, No. S101964)
<<http://www.courtinfo.ca.gov/courts/supreme>>

In a unanimous opinion, the California Supreme Court held today that when a client claims malpractice occurred in transactional work (advising or preparing documents for business transactions), the client must prove the alleged error caused damage under the same “but for” test applied in litigation malpractice. That is, the client must prove the loss or harm would not have occurred without the attorney’s malpractice.

The defendant attorney negotiated a buy-out of plaintiffs’ interests in the audio book company they founded. The deal consisted of two agreements: a stock purchase agreement under which the buyer paid plaintiffs more than \$3 million and an employment termination agreement that was to pay plaintiffs \$1.5 million over 5 years. The attorney led plaintiffs to believe the employment termination agreement contained several favorable provisions that the contracts actually did not provide.

After the plaintiffs unsuccessfully arbitrated their disputes with the buyer,

they sued the attorney who represented them in the transactions. They alleged that the attorney misadvised them on some contract clauses and negligently failed to secure more favorable terms on various other contract provisions.

At trial, plaintiffs did not attempt to prove that the buyer would have given them a better deal on the terms in issue if their attorney had not been negligent. The trial court refused the attorney’s requested instruction that plaintiffs had to prove they would have obtained a more favorable result absent the alleged negligence. The jury awarded plaintiffs \$13,291,532.

The court of appeal affirmed after reducing the judgment to \$8,085,732. The court held that unlike malpractice claims arising out of litigation, a plaintiff claiming attorney error in transactional work does not have to meet the “but for” test of causation. The court said that the two forms of malpractice must be treated differently because (1) in litigation one side’s gain is the other’s loss, but in transactions both sides can gain; (2)

litigation malpractice involves only events in the past while transactional malpractice involves what parties would accept for the future; and (3) the universe of variables is much larger in transactions than in litigation.

The Supreme Court reversed the court of appeal. The court rejected plaintiffs' argument that California has abandoned the "but for" test of causation in adopting the "substantial factor" test for cause-in-fact determinations. The court stated that when a claim, such as theirs, does not involve concurrent independent causes, the case is governed by the "but for" test stated in subsection (1) of Restatement Second of Torts, section 432. The "substantial factor" test applies when there are multiple forces operating at the same time and each would have been sufficient by itself to bring about the harm.

In addressing the court of appeal's reasoning, the Supreme Court observed that litigation can present as much complexity in malpractice cases as transactional matters. The court stated, "We see nothing distinctive about transactional malpractice that would justify a relaxation of, or departure from, the well-established requirement in negligence cases that the plaintiff establish causation by showing either: (1) *but for* the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm." The opinion stressed that "[c]ourts are properly cautious about making attorneys guarantors of their clients' faulty business judgment."

The court also rejected the argument that transactional matters have too many

variables for a "but for" test. The court said that causation issues always require evaluation of hypothetical situations, but "in both litigation and transactional malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent."

The court did not accept the argument that evidence for a "but for" test would be too difficult to obtain. After noting that plaintiffs can meet their burden with circumstantial evidence, the court stated, "In any event, difficulties of proof cannot justify imposing liability for injuries that the attorney could not have prevented by performing according to the required standard of care."

Consequently, the court concluded, "[J]ust as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result."

COMMENT: The Supreme Court's reinvigoration of the "but for" test in the cause-in-fact element of tort causation analysis also led the court to disapprove the opinion in *California State Auto. Assn. Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey* (2000) 84 Cal.App.4th 702 [see Professional Liability Update *Issue No. 99*.] There too the court of appeal applied different proof standards for causation in litigation and transactional malpractice claims.

The full text of the Supreme Court's opinion is available on-line at: <http://www.courtinfo.ca.gov/opinions/documents/S101964.DOC>