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ARTICLE

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Abstract. The collectibility requirement as part of the legal malpractice plaintiff's affirmative case is well-established and regarded by most courts as a critical part of the plaintiff's proof of proximate causation. Conversely, where the legal malpractice plaintiff was the defendant in the underlying lawsuit, to be successful in the malpractice suit, the plaintiff must prove that it had a meritorious defense that would have made a difference to the outcome of the case had the lawyer properly asserted and pursued the defense.

Prompted by the conflicting opinions of two federal courts on this issue, courts have begun to discuss whether the judgment debtor turned legal malpractice plaintiff should also have to prove the ability to pay all or part of the judgment entered against it to recover the amount of the judgment as damages in a legal malpractice action. This Article joins that conversation and discusses the competing views on adopting a payability requirement for legal malpractice claims.

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I. INTRODUCTION

The collectibility requirement as part of the legal malpractice plaintiff's affirmative case is well-established and regarded by most courts as a critical part of the plaintiff's proof of proximate causation.[1] On the other hand, to be successful in the subsequent malpractice suit where the legal malpractice plaintiff was the defendant in the underlying lawsuit, the plaintiff must prove that he or she had a meritorious defense that would have made a difference to the outcome of the case had the lawyer properly asserted and pursued the defense.[2] In adopting these requirements, courts have made a strategic effort to avoid a windfall opportunity for a legal malpractice plaintiff who did not suffer any actual damages as a result of the lawyer's negligence.[3] Nevertheless, is that enough?

Prompted by the conflicting opinions of two federal courts on this issue,[4] courts have begun to discuss whether the judgment debtor turned legal malpractice plaintiff should also have to prove the ability to pay all or part of the judgment entered against him or her in order to recover the amount of the judgment as damages in a legal malpractice action.[5] This Article joins that conversation and discusses the competing views on adopting a payability requirement for legal malpractice claims.

This Article begins with a review of the collectibility requirement, including the policy behind the requirement and the majority versus the minority rule on collectibility. Second, this Article looks at the meritorious defense requirement for the legal malpractice plaintiff who suffered a judgment in the underlying lawsuit. Next, the Article focuses on

1. *See* Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (explaining the elements of a cause of action for legal malpractice); Blanks v. Shaw, 89 Cal. Rptr. 3d 710, 725 (Ct. App. 2009) (listing the elements for professional negligence in a civil malpractice case); Lindenman v. Kreitzer, 775 N.Y.S.2d 4, 8 (App. Div. 2004) (commenting on the plaintiff's burden of proof when suing for legal malpractice).

2. *See* Md. Cas. Co. v. Price, 231 F. 397, 403 (4th Cir. 1916) (requiring the plaintiff to show that he could have avoided the judgment entered against him were it not for the malpractice of his lawyer).

3. *See* McKenna v. Forsyth & Forsyth, 720 N.Y.S.2d 654, 658 (App. Div. 2001) (declaring the injuries the plaintiff suffered from the accident were separate from whatever loss the defendant incurred as a result of the defendants' failure to file a suit after the accident, and only the former were recoverable for legal malpractice).

4. *See* McClarty v. Gudenau, 176 B.R. 788, 793 (Bankr. E.D. Mich. 1995) (holding that a debtor cannot recover damages for a judgment that has been discharged); Stanley v. Trinchard, 500 F.3d 411, 430–31 (5th Cir. 2007) (ruling that a trustee was not barred from pursuing damages despite the existence of a bankruptcy discharge).

5. Smith v. Haden, 868 F. Supp. 1, 2–3 (D.D.C. 1994) (determining that the plaintiff did not have to prove that the underlying judgment was collectible in order to recover).

two federal court opinions, *McClarty v. Gudeanu*[6] from the Eastern District of Michigan and *Stanley v. Trinchard*[7] from the Fifth Circuit Court of Appeals, wherein the courts expressed opposite views on whether a legal malpractice plaintiff—who will never have to pay the judgment entered against it in the underlying lawsuit—should be able to collect the amount of the judgment as damages for legal malpractice. This study will include a look back at the debate over the judgment rule versus the payment rule and the various compromises courts have made in adopting one rule or the other. Finally, the Article concludes with a discussion about why a payability requirement makes sense as a corollary to the collectibility requirement in legal malpractice cases.

II. BASIC ELEMENTS OF PROOF FOR A LEGAL MALPRACTICE CLAIM

The elements of legal malpractice are well-established and shared among the various states.[8] According to the court in *Cosgrove v. Grimes*,[9] to establish a claim for legal malpractice, "[t]he plaintiff must prove that there is a duty owed to him by the defendant, a breach of that duty, that the breach proximately caused the plaintiff injury and that damages occurred."[10] Proximate cause consists of two elements: (1) cause-in-fact and (2) foreseeability.[11] According to *Doe v. Boys Club of Greater Dallas, Inc.*,[12] cause-in-fact, also referred to as the "but for" test, is "whether the negligent 'act or omission was a substantial factor in bringing about injury,' without which the harm would have not occurred."[13]

The essential question for a legal malpractice claim is whether a reasonable and prudent strategy and course of action by the lawyer would have led to a different result in the underlying litigation. A simple error in judgment will generally not constitute malpractice.[14] Moreover, the

6. McClarty v. Gudenau, 176 B.R. 788 (Bankr. E.D. Mich. 1995).

7. Stanley v. Trinchard, 500 F.3d 411 (5th Cir. 2007).

8. Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) ("The plaintiff must prove that there is a duty owed to him by the defendant, a breach of that duty, that the breach proximately caused the plaintiff injury and that damages occurred."); Blanks v. Shaw, 89 Cal. Rptr. 3d 710, 725 (Ct. App. 2009) (listing the same four elements for civil malpractice cases that are listed in *Cosgrove*); Lindenman v. Kreitzer, 775 N.Y.S.2d 4, 6–9 (App. Div. 2004) (examining the elements of a malpractice claim).

9. Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989).

10. *Id.* at 665.

11. Doe v. Boys Club of Greater Dallas, Inc., 907 S.W.2d 472, 477 (Tex. 1995).

12. Doe v. Boys Club of Greater Dallas, Inc., 907 S.W.2d 472 (Tex. 1995).

13. *Id.* at 477 (quoting Prudential Ins. Co. v. Jefferson Assocs., Ltd, 896 S.W.2d 156, 161 (Tex. 1995)).

14. *See* Blanks v. Shaw, 89 Cal. Rptr. 3d 710, 725 (Ct. App. 2009) (stating that the plaintiff

attorney's mere selection of one option among a number of reasonable and prudent options is not malpractice. The court in *Cosgrove v. Grimes* held that "[i]f an attorney makes a decision which a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable."[15] *Cosgrove* further stated, "[t]he standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith."[16] Attorneys cannot be held strictly liable for imperfect decisions or for unfulfilled client expectations.[17] The fact finder must evaluate the attorney's conduct based upon the information available to the attorney at the time they made their decision.[18] Thus, legal malpractice cannot be based on Monday morning quarterbacking.

In addition to the standard elements for any negligence claim, the legal malpractice plaintiff who loses a cause of action because of their attorney's negligence faces a higher burden. Known as the suit-within-a-suit, case-within-a-case, or trial-within-a-trial requirement, this doctrine serves as a procedural and evidentiary tool for addressing the proximate causation element of a plaintiff's legal malpractice claim, and requires the plaintiff to prove that but for the lawyer's misconduct, he or she would have been successful in the underlying action.[19] This burden is a distinctive feature unique to legal malpractice claims that adds an extra layer to proving proximate causation.[20]

has the burden to show he or she would have achieved a more favorable outcome in the underlying cause of action had the defendant lawyer not breached his or her duty owed to the plaintiff); *see also Cosgrove*, 774 S.W.2d at 664 (declaring that errors in judgment may not be malpractice if the error was made in good faith).

15. *Cosgrove*, 774 S.W.2d at 665.

16. *Id.* (holding that legal malpractice liability is based on an objective standard); *see also* Ambriz v. Kelegian, 53 Cal. Rptr. 3d 700, 708 (Ct. App. 2007) (detailing the fundamental burdens of proof for a plaintiff in a legal malpractice case); Crestwood Cove Apartments Bus. Trust v. Turner, 164 P.3d 1247, 1253–54 (Utah 2007) (comparing various standards in determining whether an attorney acted negligently).

17. *See Cosgrove*, 774 S.W.2d at 664 (contending that attorneys should not be liable for every mistake or lost case).

18. *See id.* (noting the basis of the attorney evaluation in a legal malpractice claim).

19. *See Blanks*, 89 Cal. Rptr. 3d at 725 (describing the dynamics of the "trial-within-a-trial method"); *see also* Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389, 395 (Ill. 2006) (noting that the idea of a legal malpractice action is to redress an actual harm); Lindenman v. Kreitzer, 775 N.Y.S.2d 4, 8 (App. Div. 2004) (finding that a malpractice action must be based on actual harm); Ballesteros v. Jones, 985 S.W.2d 485, 489 (Tex. App.—San Antonio 1998, pet. denied) ("Because the plaintiff must establish that the underlying suit would have been won 'but for' the attorney's breach of duty, this 'suit within a suit' requirement is necessarily a component of the plaintiff's burden on cause in fact.").

20. *See Lindenman*, 775 N.Y.S.2d at 8 ("It is only after the plaintiff has proved the case within

The suit-within-a-suit burden is, without question, significant for legal malpractice plaintiffs.[21] In essence, the plaintiff must win two trials: the underlying litigation and the subsequent malpractice suit.[22] Without it, however, the legal malpractice plaintiff could prevail based on "malpractice in a vacuum."[23] As the California Supreme Court stated, "The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims."[24] The suit-within-a-suit requirement requires the plaintiff to prove by factual evidence, rather than by supposition of what might have happened in the underlying lawsuit absent the attorney's negligence.[25] It ensures that the legal malpractice plaintiff recovers only his or her actual damages caused by the malpractice.[26] After all, that is the essence of awarding compensatory damages to a tort victim.

III. THE COLLECTIBILITY REQUIREMENT

A. *The Policy Behind Requiring Proof of Collectibility*

In the majority of states, in order to meet the suit-within-a-suit requirement, the plaintiff must prove what is known as "collectibility."[27]

the case, including the value of the lost judgment, that the issue of collectibility may arise.").

21. *See id.* (considering the heavy burden of the suit-within-a-suit requirement).

22. *See, e.g.*, McKenna v. Forsyth & Forsyth, 720 N.Y.S.2d 654, 656 (App. Div. 2001) (noting that legal malpractice plaintiffs have to prosecute two lawsuits and essentially recreate the underlying action to prevail); *see also* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 493 (2008) ("[C]ausation requires the malpractice plaintiff to win two trials: the original litigation and the later malpractice suit.").

23. *See* Schneider v. Richardson, 411 A.2d 656, 658 (Me. 1979) (contending that the suit-within-a-suit requirement arose from the policy that "mere negligence on the part of an attorney is not sufficient to impose liability," unless the client suffered actual damages as a result of the malpractice).

24. Viner v. Sweet, 70 P.3d 1046, 1052 (Cal. 2003) (citing Mattco Forge, Inc. v. Arthur Young & Co., 60 Cal. Rptr. 2d 780 (1997)).

25. *See* Law Offices of Lawrence J. Stockler, PC v. Rose, 436 N.W.2d 70, 77 (Mich. 1989) (providing that the suit-within-a-suit requirement should "satisfy the requirement that the client prove damages based on factual evidence").

26. In *Viner*, the court noted that without the suit-within-a-suit requirement, it would be entirely too easy for the legal malpractice plaintiff to make the lawyer a scapegoat for the deal or lawsuit that did not go as planned. *See Viner*, 70 P.3d at 1052. To avoid this, courts must pay close attention to the cause-in-fact element and deny recovery where the unfavorable result likely would have occurred regardless of the malpractice, or where the result was caused by the client's own lapse in judgment. *Id.* at 1051–52.

27. *See McKenna*, 720 N.Y.S.2d at 657 (reasoning that the plaintiff must show the defendant's negligence caused actual damages that the court can remedy in legal malpractice litigation); *see also* Cosgrove v. Grimes, 774 S.W.2d 662, 666 (Tex. 1989) ("The two issues should have inquired as to the amount of damages recoverable and collectible from Stephens *if the suit had been properly*

This means proof that but for the attorney's negligence, the plaintiff would have prevailed in the underlying lawsuit and would have been able to collect on the judgment.[28] In Texas, for example, the legal malpractice plaintiff must prove that he or she would have recovered a judgment for a specific amount had the attorney handled the underlying case properly.[29]

In enforcing the collectibility requirement, the court in *McKenna v. Forsyth & Forsyth*[30] reasoned that "[l]imiting damages in a legal malpractice action to the amount of collectible judgment" in the underlying lawsuit "is consistent with the purpose of compensatory damages, i.e., 'to make the injured client whole.'"[31] To hold otherwise would give former clients a windfall opportunity to be in a better position because of the legal malpractice action than they would have been in following the underlying lawsuit.[32] As a matter of fairness, it would be inequitable for the malpractice plaintiff to recover a judgment against the attorney for an amount greater than what the plaintiff would have recovered and collected in the underlying lawsuit.[33] The damages in a legal malpractice case for a lost cause of action are what the legal malpractice plaintiff would have recovered and been able to pocket had the underlying suit been properly prosecuted.[34] The collectibility requirement achieves this damage result for the former client.

Courts require strict proof of collectibility.[35] Proof of collectibility may include the fair market value of the defendant's net assets that would have been subject to payment of the judgment, evidence of the judgment debtor's financial status sufficient to pay the judgment, or the amount that

prosecuted.").

28. *E.g.*, *Cosgrove*, 774 S.W.2d at 666 (finding evidence that the plaintiff had been adversely affected by the negligent actions of his lawyer).

29. *See* Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 109 (Tex. 2009) (holding that there was insufficient evidence to calculate damages).

30. McKenna v. Forsyth & Forsyth, 720 N.Y.S.2d 654 (App. Div. 2001).

31. *Id.* at 657 (quoting Campagnola v. Mulholland, Minion & Roe, 555 N.E.2d 611, 613 (N.Y. 1990)) (discussing the fairness and consistency of limiting damages of legal malpractice to collectible judgments).

32. *See id.* (stressing the inequity of allowing a recovery that would exceed the collectible damages of the underlying action in a malpractice suit).

33. *See* Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S., 50 P.3d 306, 309 (Wash. App. 2002) ("In the legal malpractice context, proximate cause boils down to whether the client would have fared better but for the attorney's negligence." (citing Daugert v. Pappas, 704 P.2d 600, 603 (Wash. 1985) (en banc))).

34. *See* Hartford Cas. Ins. Co. v. Farrish-LeDuc, 882 A.2d 44, 50 (Conn. 2005) (justifying the court's reward of damages by concluding that they are equal to the damages that would have been recovered had the malpractice not been committed).

35. *See, e.g.*, *id.* at 53 (limiting the damages recovered by the plaintiff in her malpractice suit to the exact dollar amount she would have recovered in her personal injury claim).

would have been paid on the judgment by another, such as by a guarantor or insurer.[36] Proof that a defendant in the underlying lawsuit could have satisfied a judgment prior to when it was signed is not probative of collectibility for the subsequent malpractice action unless the plaintiff also proves that the underlying defendant could have satisfied the judgment at the time of entry.[37]

For example, in *Akin, Gump, Strauss, Hauer & Feld, LLP v. National Development & Research Corp.*,[38] the Texas Supreme Court held that evidence showing the defendant in the underlying lawsuit "owned numerous subsidiaries with hundreds of millions of dollars" in assets was not sufficient to show that the defendant itself had sufficient assets to pay the lost judgment.[39] In addition, several pieces of the evidence brought forward to prove collectibility dated back to before the judgment was signed; therefore, they did not constitute evidence of collectibility as of the date the judgment was entered.[40] Absent sufficient proof of collectibility, Akin Gump's former client could not recover damages for its legal malpractice claim in the amount of the judgment it lost as a result of the lawyer's negligence.[41]

On the other hand, in *DiPalma v. Seldman*,[42] the California Court of Appeals held that evidence that the judgment debtors in the underlying action had a $700,000 mortgage from the sale of a piece of property, $237,000 in refinancing proceeds, an equity interest in thirty to forty properties, twelve to eighteen construction projects currently in progress, and $30,000 from the auctioning of a restaurant in bankruptcy, was sufficient to prove collectibility of a judgment with a balance of less than

36. *See* Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 109 (Tex. 2009) (comparing the difference between the collectible funds and the damages that would have paid from the underlying defendant's net assets, and holding that the difference was grounds for reversal); *see also* Fernandes v. Barrs, 641 So. 2d 1371, 1376 (Fla. Dist. Ct. App. 1994) (listing possible ways a plaintiff may prove that the original tortfeasor would have had the funds to award the original damages).

37. *See Akin*, 299 S.W.3d at 113–14 (concluding that evidence of wealth before a final judgment is irrelevant and therefore not probative, except in cases where the defendant continued to have sufficient funds).

38. Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp., 299 S.W.3d 106 (Tex. 2009).

39. *See id.* at 112–15 (pointing out that pre-judgment evidence of solvency should be sufficient in most instances to prove collectibility).

40. *See id.* at 116–18 (summarizing that none of the evidence cited by the respondent was "legally sufficient to prove collectibility of damages it would have been awarded").

41. *Id.* at 111.

42. DiPalma v. Seldman, 33 Cal. Rptr. 2d 219 (Ct. App. 1994).

$200,000.[43] Specifically, the court held that as a result of the evidence set forth above, "a complexion of some solvency [was] suggested" to establish collectibility of the judgment.[44] Regardless of the jurisdiction, proof of collectibility is a steep burden.[45]

B. *Majority Versus Minority Rule*

The majority rule is that the legal malpractice plaintiff has the burden of proof to establish collectibility.[46] Proof of collectibility as part of the legal malpractice plaintiff's burden to prove proximate causation is the rule in several states, including Texas, California, Florida, and New York.[47]

For example, in *McKenna v. Forsyth & Forsyth*, McKenna filed a legal

43. *See id.* at 224–25 (declaring that ownership of a mortgage, property interests, and other funds were sufficient to evidence collectibility of a judgment).

44. *Id.* at 225 (quoting Walker v. Porter, 118 Cal. Rptr. 468, 470 (Ct. App. 1974)).

45. *See* Klump v. Duffus, 71 F.3d 1368, 1374 (7th Cir. 1995) (describing the difficult burden of proof required of the plaintiff).

46. *See id.* (taking the majority position in holding that the plaintiff has the burden to show collectibility); *DiPalma*, 33 Cal. Rptr. 2d at 220–21 ("A plaintiff who establishes legal malpractice *in prosecuting a claim* must also prove careful management would have resulted in a favorable judgment and collection of same." (citations omitted)); Fernandes v. Barrs, 641 So. 2d 1371, 1375 (Fla. Dist. Ct. App. 1994) (citing the general rule that the legal malpractice plaintiff must prove both that he would have achieved a favorable result but for the attorney's negligence, and also that the judgment to which he was entitled would have been collectible); Allen Decorating v. Oxendine, 483 S.E.2d 298, 301 (Ga. Ct. App. 1997) (affirming that a former client in a legal malpractice claim against his attorney has the burden of proof to show that his prior claim was valid, and that the court would have rendered a favorable, collectible judgment, in order for the court to award him damages); Kohler v. Woollen, Brown & Hawkins, 304 N.E.2d 677, 679 (Ill. App. Ct. 1973) (requiring the plaintiff to show the legitimacy of the lost claim that could have been realized if not for the attorney's negligence); Poly v. Moylan, 667 N.E.2d 250, 255 (Mass. 1996) (determining that a legal malpractice plaintiff is limited to recovering damages from "what he could have collected from the defendant in the underlying [action] but for the attorney's negligence"); McKenna v. Forsyth & Forsyth, 720 N.Y.S.2d 654, 657 (App. Div. 2001) ("It has long been the rule in New York that damages recoverable in [a] legal malpractice action are limited to the amount that 'could or would have been collected' in the underlying action." (quoting Schimitt v. McMillan, 162 N.Y.S. 437, 439 (App. Div. 1916))); Little v. Matthewson, 442 S.E.2d 567, 571 (N.C. Ct. App. 1994) (stating that a legal malpractice plaintiff must prove that the underlying claim was valid, that it would have resulted in a judgment in the plaintiff's favor, and that the judgment would have been collectible), *aff'd*, 455 S.E.2d 160 (N.C. 1995); Tilly v. Doe, 746 P.2d 323, 326 (Wash. Ct. App. 1987) (holding "the trial court did not err in requiring proof of collectibility" from the plaintiff because the legal malpractice plaintiff has the burden of proof).

47. *See DiPalma*, 33 Cal. Rptr. 2d at 220–21 (affirming the collectibility requirement in a legal malpractice claim); *Fernandes*, 641 So. 2d at 1375 (mandating the plaintiff show both "that a favorable result would have been achieved in the underlying litigation" and that any judgment rendered would have been collectible); *McKenna*, 720 N.Y.S.2d at 655 (noting the majority rule, which places the burden of proof of collectibility on the plaintiff). *See generally* Ballesteros v. Jones, 985 S.W.2d 485 (Tex. App.—San Antonio 1998, pet. denied) (explaining the necessity of the collectibility requirement in a legal malpractice action).

malpractice action against his lawyers after they failed to file a personal injury lawsuit within the statute of limitations.[48] The trial court ordered a bifurcated trial so the jury could hear the issue of liability and damages in the first case, and the issue of potential collectible damages in the second.[49] At the end of the first phase, the jury found that McKenna had sustained damages in excess of $500,000 as a result of the car accident.[50] During the second phase of the trial, the lawyer-defendants presented evidence that the limit of the underlying defendant's liability coverage was $50,000 and ultimately the defendant would have had to file bankruptcy to pay the $500,000 verdict against him.[51] Accordingly, the jury found that the amount that would have been collectible by McKenna in the underlying lawsuit was $50,000, and the trial court entered judgment against the lawyer-defendants in that amount.[52] In reviewing the trial court's judgment, the New York Appellate Court held that the loss sustained by McKenna related to the car accident was separate and distinct from the loss resulting from the lawyers' malpractice in failing to timely file the lawsuit.[53] Thus, it was proper for the trial court to limit the judgment against the defendants to the amount that would have been collectible by McKenna in the underlying personal injury case.[54] In addition, the trial court properly placed the burden to prove collectibility on McKenna.[55] The appellate court held that doing so was neither unfair nor illogical, because proof of collectibility is part of the plaintiff's case for legal malpractice.[56]

In contrast, a minority of courts have held that collectibility is an affirmative defense that must be pled and proven by the lawyer-

48. *See McKenna*, 720 N.Y.S.2d at 655–56 (affirming the $50,000 judgment against McKenna's lawyers as the collectible amount in the underlying lawsuit).

49. *See id.* at 656 (defining the procedures of each phase of the legal malpractice lawsuit).

50. *Id.*

51. *See id.* ("Defendants presented evidence that the limit of Schoenhardt's liability coverage at the time of the accident was $50,000 . . . that Schoenhardt would not be able to pay a judgment of $500,000 and that he would have declared bankruptcy if a judgment in that amount were entered against him.").

52. *Id.*

53. *Id.* at 657.

54. *Id.*

55. *Id.*

56. *See* McKenna v. Forsyth & Forsyth, 720 N.Y.S.2d 655, 658 (App. Div. 2001) (affirming the majority opinion of the courts concerning the plaintiff's burden of proof of collectibility); *see also* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 492 (2008) ("The majority of courts add a second caveat as well: the plaintiff must prove that she would have won the underlying judgment and collected it.").

defendant.[57] Courts adopting the minority rule have done so with a sympathetic attitude towards the twice-wronged legal malpractice plaintiff who faces a steep burden to recover any damages.[58] The minority-view courts have criticized proof of collectibility as part of the plaintiff's burden of proof on several grounds: (1) it "ignores the possibility of a settlement [between the underlying parties], either before or after judgment[;]" (2) over time, the judgment debtor's financial situation may improve, making it possible to pay the judgment, and judgments may typically be executed over number of years; (3) having a fact finder render a judgment on the merits in a party's favor is itself an indication that the party's claim has value regardless of collectibility of the underlying judgment; and (4) placing the burden to prove collectibility on the plaintiff would be unduly burdensome.[59] Despite this minority view, most courts today continue to view collectibility as part of the legal malpractice plaintiff's affirmative case.[60]

IV. PROOF OF PROXIMATE CAUSE ON THE DEFENSE SIDE: THE MERITORIOUS DEFENSE REQUIREMENT

Plaintiffs who were on the other side of the docket in the underlying

57. *See* Smith v. Haden, 868 F. Supp. 1, 2–3 (D.D.C. 1994) (holding that it is not necessary for the plaintiff to prove collectibility of the underlying judgment to which he or she was entitled); Power Constructors, Inc. v. Taylor & Hintze, 960 P.2d 20, 31–32 (Alaska 1998) (noting that policy favors requiring the defendant attorney to bear the inherent risks and uncertainties of proving uncollectibility, because the need to determine collectibility arises only after malpractice has already been proven against the attorney); Jourdain v. Dineen, 572 A.2d 1304, 1306 (Me. 1987) (declining to adopt a collectibility rule as part of the plaintiff's affirmative case, holding that "[b]ecause uncollectibility of a judgment should be treated as a matter constituting an avoidance or mitigation of the consequences of one's negligent act, it must be pleaded and proved by the defendant"); Teodorescu v. Bushnell, Gage, Reizen & Byington, 506 N.W.2d 275, 278–79 (Mich. Ct. App. 1993) (adopting the minority view "that collectibility is an affirmative defense" to a legal malpractice claim that an attorney must plead and prove); Albee Assocs. v. Orloff, Lowenbach, Stifelman & Siegel, 721 A.2d 750, 757 (N.J. Super. Ct. App. Div. 1999) (rejecting the "contention that the issue of collectibility cannot be determined prior to entry of a judgment for a specific amount of damages" and holding that the plaintiff may prove legal malpractice where the damages in the underlying suit are "ascertainable enough"); Kituskie v. Corbman, 682 A.2d 378, 382 (Pa. Super. Ct. 1996) (adopting the collectibility requirement as an affirmative defense to be proven by the defendant-attorney based on the reasoning that the twice-wronged legal malpractice "plaintiff should not have the added burden of proving collectibility").

58. *See Power Constructors*, 960 P.2d at 31 ("[P]olicy would seem to militate in favor of requiring the malpractice attorney to bear the inherent risks and uncertainties of proving uncollectibility.").

59. *Smith*, 868 F. Supp. at 2.

60. *E.g.*, *McKenna*, 720 N.Y.S.2d at 658 (asserting that despite recognized alternative views, the majority of courts continue to place the burden of proving collectibility on the plaintiff in legal malpractice cases).

case share a similar proof requirement. Legal malpractice plaintiffs who were defendants in the underlying lawsuit must also establish a meritorious defense in order to show proximate causation.[61] Specifically, courts have required the plaintiff establish that he or she had a meritorious defense in the underlying suit, and that but for the attorney's negligence, there would have been no judgment, or the judgment would have been for a lesser amount.[62] "A meritorious defense is one that, if proven, would cause a different result upon retrial of the case."[63] Courts have reasoned that no malpractice exists unless the lawyer's negligence resulted in the loss of a meritorious defense that would have made a difference in the underlying litigation.[64] The majority of states place the burden of proving a meritorious defense in the underlying lawsuit on the legal malpractice

61. *See* Md. Cas. Co. v. Price, 231 F. 397, 402 (4th Cir. 1916) (explaining the plaintiff's burden of proof); Zarin v. Reid & Priest, 585 N.Y.S.2d 379, 381 (App. Div. 1992) (indicating the plaintiff must prove that he or she would have had a meritorious defense in the underlying lawsuit); Heath v. Herron, 732 S.W.2d 748, 753 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (asserting that the former client needed to prove a meritorious defense that "would [have] cause[d] a different result upon retrial of the case" (citations omitted)).

62. *See Md. Cas. Co.*, 231 F. at 402 (concluding that the plaintiff's complaint did not allege facts sufficient to establish liability against the lawyer-defendant because it did not show that the plaintiff could have avoided the judgment entered against him or her but for the alleged malpractice); United Cmty. Church v. Garcin, 282 Cal. Rptr. 368, 373 (Ct. App. 1991) (holding that for the attorney-defendant to be ultimately liable for professional negligence, the malpractice plaintiff must prove that but for the attorney's negligence, the plaintiff would not have had an adverse judgment rendered against him or her because he or she had a valid defense); Sonnenschine v. Giacomo, 744 N.Y.S.2d 396, 397–98 (App. Div. 2002) (dismissing the plaintiffs' legal malpractice complaint for failure to state a cause of action where the plaintiffs made numerous allegations describing the defendant attorneys' negligence in causing their answer to be stricken, but failed to present any argument or proof of the merits of plaintiffs' defense in the underlying action); *Zarin*, 585 N.Y.S.2d at 381 (applying the but for test, which examines "whether a proper defense would have altered the result" of the underlying lawsuit, where the malpractice plaintiff was the defendant in the underlying lawsuit (quoting Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987))) (citations omitted); *Heath*, 732 S.W.2d at 753 ("In order to support a malpractice recovery against an attorney, it is necessary that the client establish that he had a meritorious defense to the [underlying] suit . . . ."); Sherry v. Diercks, 628 P.2d 1336, 1339 (Wash. Ct. App. 1981) (stating that proximate cause for a legal malpractice action requires proof that but for the attorney's negligence, the client would have been successful in defending the underlying action or would have suffered a lesser judgment).

63. *Heath*, 732 S.W.2d at 753 (citing Martin v. Allman, 668 S.W.2d 795, 797 (Tex. App.—Dallas 1984, no writ)).

64. *See Md. Cas. Co.*, 231 F. at 402 (concluding that the declaration did not allege facts sufficient to establish proximate causation because it did not show that proper prosecution of the case would have resulted in no judgment or a judgment for a lesser amount); *United Cmty. Church*, 282 Cal. Rptr. at 373 (analyzing the lawyer's actions using the but for test); Timothy Whelan Law Assocs., Ltd. v. Kruppe, 947 N.E.2d 366, 373 (Ill. App. Ct. 2011) ("As defendant failed to adequately plead proximate cause, we find that the trial court's decision to dismiss his claim for legal malpractice was not error.").

plaintiff.[65]

For example, in *Timothy Whelan Law Associates, Ltd. v. Kruppe,*[66] a legal malpractice plaintiff failed to plead that he would have successfully opposed the temporary restraining order (TRO) entered against him if his lawyers had properly filed an answer.[67] The Illinois Court of Appeals held that the plaintiff failed to adequately plead and prove proximate cause.[68] Because the plaintiff failed to present evidence of how he would have successfully defended against the issuance of the temporary restraining order, he failed to show the TRO's issuance was a result of the lawyer's negligence.[69]

The issue of proof of a meritorious defense often arises in the context of a default judgment that was entered against the malpractice plaintiff in the underlying lawsuit.[70] Addressing this situation, the Fourth Circuit held that if an attorney fails to appear in a lawsuit on behalf of a client, causing a default judgment to be entered the client, it does not automatically follow that the client suffered damages.[71] The judgment may have been warranted, and may ultimately have been entered, notwithstanding any efforts by the attorney to prevent it.[72] To prevail on a claim for legal malpractice, the plaintiff must go a step further and prove that had the lawyer executed a proper defense in the underlying lawsuit, the plaintiff would have been successful.[73]

65. *See Md. Cas. Co.*, 231 F. at 403 (stating that the burden to prove the damages that were suffered based on a meritorious defense in the underlying lawsuit is on the plaintiff); *see also* George S. Mahaffey, Jr., *Cause-In-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 407 (2004) ("The reason that the burden of proof is generally placed on the plaintiff is because the plaintiff is asking the court to grant him or her relief." (footnotes omitted)).

66. Timothy Whelan Law Assocs., Ltd. v. Kruppe, 947 N.E.2d 366 (Ill. App. Ct. 2011).

67. *See id.* at 372 ("What is missing is any explanation of how plaintiff would have successfully opposed the issuance of the TRO.").

68. *Id.* at 373.

69. *Id.* at 372.

70. *See Md. Cas. Co.*, 231 F. at 402 ("The averment is merely that the default judgment would not have been rendered if defendants had not failed to appear . . . ."); Sherry v. Diercks, 628 P.2d 1336, 1339 (Wash. Ct. App. 1981) (stating that the principles of proximate cause require the plaintiff to show that if the suit against him had been properly defended, the plaintiff would have prevailed or at least achieved a more favorable outcome).

71. *See Md. Cas. Co.*, 231 F. at 402 (reasoning that the court may have rendered the same judgment against the client even if the attorney had appeared).

72. *See id.* at 403 ("[T]here is a difference between the case of an attorney who fails to do anything for his client, and one who makes an inexcusable mistake in attempting to comply with instructions . . . .").

73. *See id.* at 402–03 (explaining the plaintiff's burden of proving a meritorious defense to the

V. THE "PAYABILITY" REQUIREMENT AND THE COMPETING VIEWS

The question arises as to whether damages for legal malpractice as a result of an adverse judgment against the malpractice plaintiff should include the amount of an adverse judgment that the plaintiff will never have to pay. Discussion of a "payability" requirement to establish proximate causation relates back to the competing views on the judgment rule versus the payment rule.

A. *Judgment Rule Versus Payment Rule*

The debate regarding the judgment rule versus the payment rule typically comes up in the context of the liability of an insurer for entry of a judgment in excess of policy limits as a result of bad faith settlement practices.[74] In that context, under the majority judgment rule, the entry of an adverse judgment is by itself sufficient to bring an action for breach of duty, regardless of whether any money has been paid or the judgment is ultimately collectible.[75]

The majority-view courts have expressed several reasons for adopting the judgment rule. First, the judgment rule discourages "bad-faith [settlement] practices in the insurance industry by eliminating the insurer's ability to hide behind the financial status of its insured."[76] If the rule required payment of the judgment or proof of the ability to make payment, "an insurer may be encouraged to refuse to settle a claim merely because the insured is insolvent[,]" discouraging the poor from using insurance.[77] "[T]he judgment rule prevents an insurer from benefitting

underlying lawsuit); *see also* George S. Mahaffey, Jr., *Cause-In-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 406–07 (2004) (discussing the burdens of proof on a plaintiff with regard to cause-in-fact damages in a transactional legal malpractice action).

74. *See* Stanley v. Trinchard, 500 F.3d 411, 423–24 (5th Cir. 2007) (comparing views of other jurisdictions with regard to the judgment rule in a legal malpractice case); Shipman v. Kruck, 593 S.E.2d 319, 326 (Va. 2004) (identifying issues concerning adoption of the payment rule versus the judgment rule).

75. *See Stanley*, 500 F.3d at 424–25 ("[T]he viability of a legal malpractice claim should not depend on the ability of the victim to satisfy all or part of a judgment against him."); Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128, 1131 (D.C. Cir. 1989) (acknowledging "a split of authority among the states as to the extent of an insurance company's liability to the assignee of its insured for a claim above the policy limit," but adhering to the majority judgment rule). *But see Shipman*, 593 S.E.2d at 325–27 (discussing the problematic nature in applying the payment rule of legal malpractice actions).

76. Pistalo v. Progressive Cas. Ins. Co., 983 N.E.2d 152, 157 (Ind. Ct. App. 2012) (quoting Econ. Fire & Cas. Co. v. Collins, 643 N.E.2d 382, 385 (Ind. Ct. App. 1994)).

77. *Id.* (quoting *Econ. Fire*, 643 N.E.2d at 385).

from poverty of an insured who has a meritorious claim but cannot first pay the judgment imposed upon [him or her]."[78] In addition, it would be wrong for an insurer to ignore its responsibility to operate in good faith with respect to its insured client merely because the client is insolvent.[79] Finally, the payment rule, which adopts the opposite view, unfairly assumes that the insolvent—or its estate, which may be insolvent at the time the judgment is entered—will remain insolvent for the life of the judgment.[80] Despite these policy reasons to protect insured individuals, courts have recognized that a bankrupt or insolvent insured "presents the most difficult challenge to the integrity of the judgment rule."[81]

The minority view favors the payment rule—also called the prepayment rule—which provides that damages are limited to the amount of the judgment paid or payable by the judgment debtor.[82] For example, at one time Virginia followed the payment rule.[83] In *Allied Productions v. Duesterdick*,[84] based on the well-established principle that an attorney is liable only for the injury actually suffered by the client, the Supreme Court of Virginia held that "when a client has suffered a judgment for money damages as the proximate result of his lawyer's negligence such judgment constitutes actual damages recoverable in a suit for legal malpractice only to the extent such judgment has been paid."[85] In 2004, the Virginia Supreme Court overruled *Allied Productions*, citing three perceived problems with the payment rule.[86] First, under the payment rule the aggrieved client could intentionally delay the running of the statute of limitations for its malpractice claim simply by deferring payment of the

78. *Id.* (quoting *Econ. Fire*, 643 N.E.2d at 385) (identifying further benefits of the judgment rule).

79. *See* Carter v. Pioneer Mut. Cas. Co., 423 N.E.2d 188, 192 (Ohio 1981) (finding that the judgment rule better serves the interest of justice).

80. *See id.* (comparing the effects of applying the payment rule with the effects of applying the judgment rule).

81. Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128, 1131 (D.C. Cir. 1989).

82. *See* Levantino v. Ins. Co. of N. Am., 422 N.Y.S.2d 995, 999 (Sup. Ct. 1979) (characterizing the payment rule as the "earlier and now generally discredited view of damages in bad faith cases").

83. *See* Allied Prods. v. Duesterdick, 232 S.E.2d 774, 776 (Va. 1977) ("[W]e hold that . . . such judgment constitutes actual damages recoverable in a suit for legal malpractice only to the extent such judgment has been paid."), *overruled by* Shipman v. Kruck, 593 S.E.2d 319 (Va. 2004).

84. Allied Prods. v. Duesterdick, 232 S.E.2d 774 (Va. 1977), *overruled by* Shipman v. Kruck, 593 S.E.2d 319 (Va. 2004).

85. *Id.* at 776.

86. *See* Shipman v. Kruck, 593 S.E.2d 319, 326 (Va. 2004) (reversing the appellate court due to the attested problems with the holding that the payment rule applies).

judgment.[87] Second, the court found that "in a statute of limitations context, [the payment rule] would work an injustice on attorneys who may be forced to defend allegations of malpractice brought many years after the alleged breach occurred, dependent entirely upon the ability or whim of the complaining client to pay the resulting damages."[88] In addition, the payment rule may lead to a situation where "the greater the injury wrongfully inflicted, the less the liability of the wrongdoer."[89]

Today, it is not clear whether any state strictly follows the payment rule. However, several states have adopted a modified form of the payment rule. In *Frankenmuth Mutual Insurance Company v. Keeley*,[90] the Michigan Supreme Court, in affirming the trial court's decision that the insurer's bad faith did not cause the excess judgment entered against its insured, decided to resolve the excess-judgment issue that had been presented in the case.[91] Although the Michigan Supreme Court had endorsed the judgment rule in its earlier opinion, it subsequently adopted a compromise between the judgment rule and the payment rule as set forth by Justice Levin in his dissent in the prior opinion.[92] Specifically, Justice Levin in his dissenting opinion proposed the following compromise:

> [T]hat this Court accept the essence of the judgment rule by eliminating the need to show partial payment [as a prerequisite to a lawsuit for bad-faith settlement practices], but provide protection for insurers along the lines of the prepayment rule by precluding collection on the judgment from the insurer beyond what is or would be actually collectable from the insured.[93]

Justice Levin also advocated for a recovery to the extent that the insured could show economic loss in the form of damaged credit or financial consequences.[94] Following a remand to the trial court, the Michigan Supreme Court adopted this modified payment rule as the better measure

87. *See id.* ("[A]dherence to a payment rule would vest the aggrieved client with the power to forestall the running of the statute of limitations by the deferral of payment . . . .").

88. *Id.*

89. *Id.* (quoting Allied Prods. v. Duesterdick, 232 S.E.2d 774, 777 (Va. 1977) (Poff, J., dissenting)).

90. Frankenmuth Mut. Ins. Co. v. Keeley, 461 N.W.2d 666 (Mich. 1990).

91. *See id.* at 667 (affirming the trial court's decision denying that any bad faith by the insurer caused harm to the insured).

92. *See id.* (holding that Justice Levin's dissent was the best approach to determine the issue of whether insurers are liable in cases of excess judgment).

93. Frankenmuth Mut. Ins. Co. v. Keeley, 447 N.W.2d 691, 709 (Mich. 1989) (Levin, J., dissenting), *withdrawn,* 461 N.W.2d 666 (Mich. 1990).

94. *See id.* at 706 ("If Keeley could demonstrate that his credit had been damaged or he had suffered financial ruin, then he should no doubt recover for such economic loss caused by breach of contract.").

of an insurer's liability for an excess judgment resulting from bad faith settlement practices.[95]

New York has also adopted a modified version of the two competing rules, depending on the circumstances in which the judgment rule or payment rule may be applied.[96] The New York county court in *Levantino v. Insurance Company of North America*[97] articulated the rule as follows:

> 1) [W]here the assured pays part of the judgment or is solvent enough to do so at the time of the excess judgment, the judgment rule applies and he is entitled to the full amount of the excess as his damages; 2) where he was insolvent before the judgment and obtained a bankruptcy discharge after it, he is not damaged and may not recover for it; and 3) where he was insolvent or nearly insolvent prior to the judgment the jury must consider his past, his prospects, and other economic factors and assess his damages.[98]

In adopting this modified rule, the New York court recognized that a judgment debtor who was insolvent before the excess judgment was entered, and subsequently obtained a discharge in bankruptcy for the amount of the judgment, has not been harmed in the amount of the excess judgment by the bad faith practices of the insurer.[99]

Courts have focused on several distinguishing factors in adopting the judgment rule for bad faith insurance cases. First, bad faith actions against an insurance company arise out of a contract where there is an attempt to put the injured party back in its original position before the breach.[100] In addition, bad faith insurance cases involve a third party, the judgment creditor, who was harmed by the acts or omissions of the insured.[101] In enforcing the judgment rule, there is an underlying assumption that the "holder of the former judgment" will be a party to the subsequent bad faith suit against the insurer or will otherwise seek to "protect his interests prior to payment of the second judgment" such that the insured will not receive a windfall.[102] Finally, in the insurance context, there is a concern

95. *See Keeley*, 461 N.W.2d at 667 (adopting Justice Levin's proposition of a hybrid of the payment and judgment rules).

96. *See* Levantino v. Ins. Co. of N. Am., 422 N.Y.S.2d 995, 999–1002 (Sup. Ct. 1979) (discussing the circumstances giving rise to different applications of the judgment rule).

97. Levantino v. Ins. Co. of N. Am., 422 N.Y.S.2d 995 (Sup. Ct. 1979).

98. *Id.* at 1002.

99. *See id.* at 1001 (declaring that being insolvent before judgment is rendered nullifies any injury from the judgment).

100. *See* Carter v. Pioneer Mut. Cas. Co., 423 N.E.2d 188, 192 (Ohio 1981) (hesitating to relieve an insurer from his or her contractual duty of good faith).

101. *E.g.*, *Levantino*, 422 N.Y.S.2d at 997 (noting that the action against the insurer was brought by the insured's creditor).

102. *See* Hernandez v. Great Am. Ins. Co. of N.Y., 464 S.W.2d 91, 94 (Tex. 1971) (assuming

that adoption of the payment rule will encourage bad faith settlement practices by insurance carriers.[103]

B. *McClarty v. Gudenau*

In 1995, the United States District Court for the Eastern District of Michigan decided a case that sparked discussion and controversy around the country regarding whether courts should adopt a requirement similar to the payment rule for legal malpractice cases involving an adverse judgment against the former client.[104] In *McClarty v. Gudenau*, a Chapter Seven bankruptcy trustee brought a legal malpractice action "on behalf of the Debtor and her bankruptcy estate" alleging malpractice in connection with the lawyer's representation of the debtor in a negligence case.[105] As a result of the underlying lawsuit, the debtor had a $1 million judgment entered against her, which, after payment by the insurance company, left her with $750,000 of personal liability.[106] This "personal exposure" caused the judgment debtor to file for bankruptcy, in which she later received a discharge of the debt.[107] The lawyer "[d]efendants moved for summary judgment[,]" arguing that the debtor's bankruptcy discharge nullified her damage claim for $750,000 as part of the unsatisfied judgment.[108]

The Michigan District Court recognized that the issue before it was one of first impression and focused, for purposes of its analysis, on the proximate cause element of a legal malpractice claim, which requires proof of actual damages suffered by the wronged litigant.[109] The court agreed with the lawyer-defendants, holding that as a result of the discharge in bankruptcy, "the [d]ebtor no longer suffer[ed] from the excess

the likelihood of a holder of a former judgment bringing an action to protect his assets.).

103. *See, e.g.*, Pistalo v. Progressive Cas. Ins. Co., 983 N.E.2d 152, 157 (Ind. Ct. App. 2012) ("The rationale behind allowing full recovery to an insured who has not paid the excess judgment is to prevent bad-faith practices in the insurance industry by eliminating the insurer's ability to hide behind the financial status of its insured." (quoting Econ. Fire & Cas. Co. v. Collins, 643 N.E.2d 382 (Ind. Ct. App. 1994))).

104. McClarty v. Gudenau, 176 B.R. 788 at 789–90 (Bankr. E.D. Mich. 1995).

105. *Id.* at 789.

106. *See id.* (discussing the liability imposed on the plaintiff in the automobile negligence suit).

107. *See id.* (describing the "exposure which prompted [the debtor's] filing of bankruptcy" and the later discharge of the debt).

108. *See id.* at 789–90 (noting the defendant's previously denied motion for summary judgment and the defendant's position).

109. *See id.* at 790 (acknowledging the "novelty of this issue" and later the need to prove "actual damages suffered by the tort victim").

judgment."[110] Accordingly, the court held that the bankruptcy trustee, standing in the shoes of the debtor, could not prove damages in the amount of the excess judgment, because the debtor no longer owed anything as a result of the bankruptcy discharge.[111]

The court supported its conclusion with an analysis on "the law the Court and the parties have been able to find on the effect of a discharge on legal malpractice damages available to a bankruptcy trustee . . . ."[112] First, in *In re R.H.N. Realty Corporation*,[113] the Southern District of New York held that where "a Chapter seven trustee brought suit against a partnership seeking indemnification for a judgment owed by the debtor[,]" the trustee did not have a valid indemnification claim because the debtor had not paid, nor would he ever have to pay, the judgment in a no-asset case.[114] The court noted that the trustee was "simply attempting to collect the deficiency claim" for the benefit of the judgment debtor, which did not come within the trustee's duties under the bankruptcy code.[115] Second, the *McClarty* court cited *Frankenmuth Mutual Insurance Company v. Keeley*, wherein the court adopted the modified judgment rule articulated by the dissent in its earlier opinion, and held that "recovery against an insurer for bad faith" settlement practices is "limited to the amount of the judgment actually collectible against the insured[.]"[116]

Finally, the court analyzed a New York case wherein the court took a similar position.[117] In *Murphy v. Stein*,[118] the plaintiff alleged that the defendant attorney committed "malpractice by failing to detect [a] discrepancy between the court's memorandum decision and the judgment submitted[,]" with regard to the income gained from the sale of his marital property as part of his divorce.[119] The judgment incorrectly ordered

110. *Id.* (citing 11 U.S.C. § 524(a) (2012)).

111. *See id.* (noting that "the [d]ebtor no longer suffered from the excess judgment" as a result of the bankruptcy discharge).

112. *Id.*

113. *In re* R.H.N. Realty Corp., 84 B.R. 356 (Bankr. S.D.N.Y. 1988).

114. *See McClarty*, 176 B.R. at 790–91 (citing *R.H.N. Realty Corp*., 84 B.R. at 360–61) (analyzing the holding in *In re R.H.N Realty Corp.*, where a trustee did not have a valid claim for indemnification of a judgment).

115. *See id.* at 791 (quoting *R.H.N. Realty Corp.*, 84 B.R. at 361) (indicating that the collection of a deficiency claim does not fall within a trustee's duties under the bankruptcy code).

116. *McClarty*, 176 B.R. at 791 (citing Frankenmuth Mut. Ins. Co. v. Keeley, 461 N.W.2d 666, 667 (Mich. 1990)).

117. *See id.* (citing Murphy v. Stein, 549 N.Y.S.2d 53, 54 (App. Div. 1989)) (discussing other forms of support for the proposition that a deficiency claim collection is not a function of a trustee).

118. Murphy v. Stein, 549 N.Y.S.2d 53 (App. Div. 1989).

119. *Id.* at 54.

expenses to be incurred by the plaintiff's income from the sale.[120] Relying on the flawed divorce judgment, the plaintiff sold his equity interest in the house for $1,500.[121] The plaintiff then filed for bankruptcy from which he later received a discharge.[122] In the subsequent malpractice action against his divorce attorney, the plaintiff sought damages claiming he sold his equity interest in the house for far less than it was worth based upon the attorney's error.[123] The court held that as a result of the bankruptcy discharge, the plaintiff had "not suffered the requisite 'actual damages'" to prove proximate causation.[124] The court stated just the opposite—the plaintiff suffered no damages as a result of the alleged malpractice because, "by virtue of the sale of his equity interest"—in the amount of $1,500—and the bankruptcy discharge—of approximately $21,000 in debts—the plaintiff actually received a benefit in excess of "his alleged interest in the marital premises."[125] The *McClarty* court held that these three cases supported its holding that a "[d]ebtor's discharge from bankruptcy mitigated" the debtor's damages for any malpractice by the lawyers.[126]

In reaching its decision, the *McClarty* court recognized there were a couple of cases that could support the bankruptcy trustee's position and thus quickly distinguished those cases.[127] First, in *Camp v. St. Paul Fire & Marine Insurance Company*,[128] St. Paul contended that its liability for an excess judgment, as the result of bad faith settlement practices, was extinguished by virtue of the insured's discharge in bankruptcy from the $3 million medical malpractice judgment entered against their doctor.[129] The court rejected St. Paul's argument on the grounds that "St. Paul's duty [of good faith] extended to the bankruptcy estate and the estate was damaged by St. Paul's failure to settle within the policy limits . . . ."[130] In particular, the court focused on language in the doctor's insurance policy, which stated St. Paul would still be obligated under the policy if the insured went bankrupt, to support its finding that St. Paul "assumed a

120. *See id.* (acknowledging that the defendant attorney failed to correct the error made in his requested judgment that the court followed).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 55.

125. *See id.* (affirming summary judgment in favor of the defendant attorney).

126. *See* McClarty v. Gudenau, 176 B.R. 788, 791–92 (Bankr. E.D. Mich. 1995) (supporting the notion that a bankruptcy discharge would mitigate a debtor's damages for legal malpractice).

127. *See id.* at 792 (distinguishing cases that were arguably supportive of the trustee's position).

128. Camp v. St. Paul Fire & Marine Ins. Co., 616 So. 2d 12 (Fla. 1993).

129. *Id.* at 14.

130. *Id.* at 15.

duty to the bankruptcy estate."[131] The *McClarty* court found specific language in the insurance policy to be the "crucial distinction" between *Camp* and the case before the court.[132] In contrast to *Camp*, the lawyer-defendants in *McClarty* had in no way assumed a duty to the debtor's bankruptcy estate.[133] Accordingly, while the excess judgment remained with the bankruptcy estate, the trustee could not recover the excess judgment as damages against the lawyer-defendants through an action brought solely on behalf of the bankruptcy estate.[134]

The *McClarty* court also analyzed *Green v. Welsh*.[135] In *Green*, the Second Circuit allowed a tort claimant to pursue her negligence claim against the discharged bankruptcy debtors, but the action was limited to recovering a judgment against the insurance carrier.[136] In making its decision, the circuit court relied on the language in 11 U.S.C. § 524(a): "A discharge in a case under this title—(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . ."[137] The purpose of the bankruptcy discharge is to give the debtor a fresh start, but not to afford anyone else a similar benefit.[138] The *McClarty* court distinguished *Green* on the grounds that the extent of the defendant-insurer's liability was based on an amount set by an insurance policy, as opposed to legal malpractice actions where the defendant-lawyer is liable for the claimant's actual damages proximately caused by the lawyer's negligence.[139]

The court in *McClarty* noted that its holding did not preclude the bankruptcy debtor from recovering "damage for [harm to] her credit and emotional injuries" as a result of filing for bankruptcy.[140] Those are the damages the debtor would be entitled to, in addition to the discharge, for a

131. *Id.*

132. *McClarty*, 176 B.R. at 792.

133. *See id.* (differentiating the instant case due to lack of an assumed duty or relationship between the parties).

134. *See id.* (holding that the defendant attorney owed no duty to the plaintiff trustee relating to any monetary judgment not in the plaintiff's possession).

135. Green v. Welsh, 956 F.2d 30 (2d Cir. 1992).

136. *See id.* at 32 ("Green could resume her suit against the Welshes as long as it was directed only at obtaining a judgment to be paid by the Welshes' liability insurer.").

137. *Id.* at 33 (quoting 11 U.S.C. § 524(a) (2012)) (emphasis omitted).

138. *See id.* (stating that a bankruptcy discharge is only intended to benefit debtors).

139. *See McClarty*, 176 B.R. at 792 ("*Green* is different from this case, however, because the extent of Defendants' malpractice liability to the trustee as an 'insurer' of the Debtor is . . . the Debtor's actual damages—not an amount set in an insurance policy or other indemnity agreement.").

140. *Id.* at 793.

make-whole-type remedy.[141] However, the court was simply unwilling to ignore the bankruptcy filing and its discharge to determine the debtor's recoverable damages for the alleged malpractice.[142] Thus, *McClarty* stands for the proposition that a plaintiff may not recover the amount of a judgment that has been discharged in bankruptcy and that the plaintiff will never have to pay as a result as damages for a legal malpractice claim.

Since the Michigan court's decision, *McClarty* has been distinguished as a case discussing limitations on liabilities for debts owed to third parties. For example, in *McHale v. Silicon Valley Law Group*,[143] a 1031[144] exchange company claimed damages of $18 million in cash inflows used to close 1031 exchange transactions of new clients, which resulted in insufficient cash flow to meet the commitments of subsequent 1031 exchangers.[145] The law firm relied on *McClarty* and other third-party liability cases to argue that those cash inflows did not result in any liability to the plaintiff and that such liability had been extinguished as a result of the entity's filing for bankruptcy.[146] The court found that the plaintiff did have a liability to repay those funds and distinguished *McClarty* as a case that discussed limitations on liabilities to third parties.[147] In the *McHale* case, the plaintiff owned the lost exchange funds and thus suffered a distinct injury when he was stripped of those assets and could no longer fulfill his obligations to the exchangers.[148] Therefore, the court held the

141. *Id.*

142. *See id.* (underlining the Court's unwillingness to ignore the bankruptcy discharge when evaluating damages).

143. McHale v. Silicon Valley Law Grp., No. 10-CV-04864-JCS, 2013 U.S. Dist. LEXIS 100798, 2013 WL 3784349 (N.D. Cal. July 18, 2013).

144. *Like-Kind Exchanges Under IRC Code Section 1031*, IRS (last updated Aug. 3, 2012), http://www.irs.gov/uac/Like-Kind-Exchanges-Under-IRC-Code-Section-1031 ("Whenever you sell business or investment property and you have a gain, you generally have to pay tax on the gain at the time of sale. IRC Section 1031 provides an exception and allows you to postpone paying tax on the gain if you reinvest the proceeds in similar property as part of a qualifying like-kind exchange.").

145. *See McHale*, 2013 U.S. Dist. LEXIS 100798,. at *4–5, 2013 WL 3784349, at *2 ("The parties have stipulated that 1031 Advance did not have sufficient assets remaining to meet the obligations of the subsequent 1031 Advance exchangers or the other 1031 Debtors and their clients, and that '1031 Advance had liabilities to repay those funds.'").

146. *See id.* at *9-10, 2013 WL 3784349, at *3 (explaining that the defendant lawyer's position that liability for inflows had been extinguished due to the entity filing for bankruptcy).

147. *See id.* at *10, 2013 WL 3784349, at *3–4 (emphasizing that the plaintiff had an obligation to pay debts to its own clients and that *McClarty* was distinguishable because that case discussed limitations on liabilities to third parties).

148. *See id.* at *8, 2013 WL 3784349, at *3 ("[T]he trustee [did] not seek to recover money owed to the other 1031 Debtors or their clients; at the time 1031 Advance filed for bankruptcy, it had a deficit of approximately $31.2 million in exchange funds that it needed to close exchanges for its *own clients*.").

plaintiff could offer evidence of the lost funds as damages for its legal malpractice claim.[149] Notably, the court in *McHale* did not determine whether the law firm's conduct was the proximate cause of the loss of the plaintiff's assets, but only whether the plaintiff could claim as damages the lost assets and put on evidence related thereto.[150]

C. *Stanley v. Trinchard*

In 2007, the Fifth Circuit Court of Appeals addressed a similar fact pattern and rejected the *McClarty* court's reasoning and decision in *Stanley v. Trinchard.*[151] *Stanley* has since become the seminal counterpart case to *McClarty* on the issue of whether legal malpractice plaintiffs (or a bankruptcy trustee standing in their shoes) may pursue a damage claim in the amount of a judgment that was discharged in bankruptcy.[152] In *Stanley*, Hale, a Louisiana detective working for a Sheriff's office, had a multi-million dollar judgment entered against him as a result of a § 1983 civil suit.[153] After a judgment creditor forced Hale into an involuntary bankruptcy, he received a discharge of the bankruptcy and brought suit against the lawyers who represented him in the § 1983 action.[154] The lawyer-defendants filed for summary judgment, arguing that as a result of Hale's discharge in bankruptcy, he could not prove damages for his legal malpractice claim.[155]

Hale sought damages in the amount of the multi-million dollar judgment entered against him, as well as general damages for "the physical and emotional stress of [being in] trial; the shock of having [the] judgment

149. *See id.* at *12–13, 2013 WL 3784349, at *4 (holding that in a legal malpractice claim, the plaintiff could present evidence to prove lost funds were proximately caused by the defendant's negligent acts).

150. *See id.* at *13, 2013 WL 3784349, at *4 (emphasizing that while the defendant had not offered evidence of causation, this was a question of fact for the fact finder).

151. *See* Stanley v. Trinchard, 500 F.3d 411, 421 (5th Cir. 2007) (addressing whether the trustee for Hale's estate could pursue a malpractice action against the attorneys who represented Hale in the prior case based on a judgment for which Hale had received a discharge in bankruptcy).

152. *See id.* at 425 ("[W]e hold that . . . [the debtor] had incurred a legal injury . . . sufficient to allow [the trustee] to assert a legal malpractice claim . . . *and* that [the debtor's] subsequent discharge from personal liability for that judgment had no effect on the right and duty of the trustee to pursue that claim.").

153. *See id.* at 415–17 (summarizing the prior civil suit filed by a convicted murderer alleging that exculpatory evidence had not been disclosed in his trial, which resulted in a $4,000,000 judgment against Hale).

154. *Id.* at 418.

155. *See id.* (explaining that the district court concluded "Hale's bankruptcy discharge made it impossible for Stanley to show that any damages resulted from the . . . defendants' alleged malpractice" and thus granted the defendants' motions for summary judgment).

rendered against him; and the humiliation" of having to file for bankruptcy.[156] Citing *McClarty*, the defendants argued that summary judgment was proper because there was no injury to support a malpractice claim as a result of the bankruptcy discharge.[157] In response, the bankruptcy trustee argued that the Fifth Circuit's decision in *In re Segerstrom*[158] rejected *McClarty*.[159]

In earlier proceedings, the district court declined to follow *McClarty* based on the Fifth Circuit's decisions in *In re Segerstrom* and *In re Edgeworth*,[160] in which the court held that a "bankruptcy [discharge] discharges only the debtor's personal liability for his discharged debts but does not extinguish the debt itself . . . ."[161] Relying on this precedent, the district court denied summary judgment on the grounds that Hale had suffered no damages as a result of the discharge.[162] Despite this ruling, the district court then granted summary judgment in accordance with Louisiana law because the reasons for the bankruptcy discharge were indistinguishable from *McClarty*.[163] In granting summary judgment under Louisiana law, the district court noted that Hale's bankruptcy discharge relieved him of personal liability for the judgment entered against him.[164] Additionally, Hale had produced no evidence of any lost assets or payments made as a result of the judgment entered against him.[165] Consequently, the district court held that Hale had not suffered any kind of economic loss as a result of his lawyer's alleged malpractice.[166]

156. Stanley v. Trinchard, No. 02-1235, 2005 U.S. Dist. LEXIS 17682, at *31, 2005 WL 2037543, at *9 (E.D. La. Aug. 1, 2005), *rev'd*, 500 F.3d 411 (5th Cir. 2007).

157. *See id.* at *10, 2005 WL 2037543, at *3 (citing McClarty v. Gudenau, 176 B.R. 788, 790 (Bankr. E.D. Mich. 1995)) (supporting the view that a bankruptcy discharge bars a debtor from recovering damages for a discharged judgment in a malpractice suit).

158. *In re* Segerstrom, 247 F.3d 218 (5th Cir. 2001).

159. *See Stanley*, 2005 U.S. Dist. LEXIS 17682, at *10–11, 2005 WL 2037543, at *3 (outlining the trustee's argument that the debtor's discharge did not limit the right to bring a malpractice suit and that the discharge does not eliminate the debt).

160. *In re* Edgeworth, 993 F.2d 51 (5th Cir. 1993).

161. *Stanley*, 2005 U.S. Dist. LEXIS 17682, at *13, 2005 WL 2037543, at *3–4.

162. *Id.*, 2005 WL 2037543, at *4.

163. *See id.* at *42–43, 2005 WL 2037543, at *13 (finding that the plaintiff failed to meet his burden of proving the last element of his legal malpractice claim such that summary judgment in favor of the defendants was proper).

164. *Id.* at *34–35, 2005 WL 2037543, at *11.

165. *Id.*, 2005 WL 2037543, at *11.

166. *Id.* at *35, 2005 WL 2037543, at *11. In reaching its decision, the court cited *Costello v. Hardy* in support of its holding. *See id.* at *32–34, 2005 WL 2037543, at *10 (citing Costello v. Hardy, 864 So. 2d 129, 133 (La. 2004)) (explaining that in drafting a will for a son, the drafting attorney negligently failed to include a $25,000 annual stipend the son intended to leave for the mother). In *Costello v. Hardy*, through settlement of the suit to annul the will, which the attorney

Furthermore, the court found no causal connection between the alleged malpractice and Hale's alleged emotional distress and mental anguish claims.[167] The Louisiana court held that because Hale could not meet his burden of proof with respect to proximate cause and damages, summary judgment was warranted for the defendants.[168]

In reviewing this decision, the Fifth Circuit cited bankruptcy law stating that a bankruptcy trustee "may pursue any claims that are property of the bankruptcy estate."[169] The bankruptcy trustee then stands in the shoes of the debtor and "is subject to all defenses available against the debtor, and must prove all elements that the debtor would be required to prove."[170] Because Hale's legal malpractice claim accrued pre-petition, his malpractice claim became property of the bankruptcy estate, and could properly be pursued by the bankruptcy trustee on behalf of the estate.[171]

The Fifth Circuit recognized the Michigan Bankruptcy Court's holding in *McClarty*, but declined to follow it.[172] Instead, the court looked to its prior decision in *In re Segerstrom* as the proper authority on this issue.[173] In *In re Segerstrom*, the court entered a judgment of $8.5 million against a personal injury defendant involved in a car wreck.[174] After the judgment creditor filed an involuntary bankruptcy action against Segerstrom, the court granted the trustee's motion to hire special counsel to pursue a legal malpractice claim against Segerstrom's lawyers in a state court lawsuit.[175]

had allegedly negligently prepared, Mrs. Costello was entitled to a $25,000 annual stipend, which compromised and discharged her claim for the $25,000 annual stipend that was allegedly omitted from the will. Costello v. Hardy, 864 So. 2d 129, 138–39 (La. 2004). Because Mrs. Costello only claimed damages for the annual stipend in the legal malpractice action, the court of appeals granted summary judgment, which the Louisiana Supreme Court affirmed, in favor of the lawyer-defendants. *Id.* at 139.

167. *See Stanley*, 2005 U.S. Dist. LEXIS 17682, at *41, 2005 WL 2037543, at *13 (asserting that because the trustee could not provide evidence of Hale's emotional distress or mental anguish resulting from the multi-million dollar judgment, Hale had not satisfied all the elements of a legal malpractice claim).

168. *Id.* at *43, 2005 WL 2037543, at *13.

169. Stanley v. Trinchard, 500 F.3d 411, 418 (5th Cir. 2007) (citing 11 U.S.C. § 323 (2012)).

170. *Id.* (quoting *In re* Segerstrom, 247 F.3d, 218, 224 (5th Cir. 2001)).

171. *Id.* at 418–19.

172. *See id.* at 419–20 (holding that "a trustee of [a] bankruptcy estate of a discharged debtor" cannot recover the amount of the judgment for which the debtor received a discharge as damages for a legal malpractice claim. (citing McClarty v. Gudenau, 176 B.R. 788 (Bankr. E.D. Mich. 1995))).

173. *See id.* at 420 (noting how the facts in *In re* Segerstrom were parallel to the facts in the present case).

174. *See In re* Segerstrom, 247 F.3d 218, 221 (5th Cir. 2001) (providing the background of a car wreck case, which resulted in an excess judgment and an involuntary bankruptcy suit filed against the defendant).

175. *See id.* at 221–22 (discussing the bankruptcy estate's malpractice complaint "alleging

Eight months after the bankruptcy filing, Segerstrom received a discharge in the bankruptcy.[176] This led the district court to grant the defendant-lawyer's motion for summary judgment for lack of proximate cause and injury.[177]

The Fifth Circuit affirmed the summary judgment on lack of proximate causation and injury on grounds unrelated to Segerstrom's bankruptcy discharge.[178] Specifically, after declining to follow *McClarty*, the court looked to "whether the [bankruptcy] estate has offered sufficient evidence that *Segerstrom*, as opposed to her creditors, suffered injury in the [underlying] litigation."[179] The court found that the bankruptcy estate had failed to prove a meritorious defense that would have made a difference in the underlying lawsuit or any injury to Segerstrom, to meet its burden of proof on the third and fourth elements of its legal malpractice claim.[180] The Fifth Circuit discussed, as dicta, the law firm's argument that Segerstrom was not damaged in the amount of the judgment for which she had received a discharge in bankruptcy.[181] While not controlling, the *In re Segerstrom* court cited its prior decision in *In re Edgeworth*, holding that "a discharged debt continues to exist [thereafter] and judgment creditors may collect from any other [liable] source."[182] It also found the policy argument relevant in *Edgeworth*, that tortfeasors should not be able "to escape liability simply based on the financial

negligence, gross negligence, and breach of fiduciary duty").

176. *Id.* at 222.

177. *See id.* at 222–23 (explaining that the district court granted summary judgment in favor of the defendants, because any negligence by the defendants "did not cause Segerstrom injury because her personal liability on the state court judgment had been discharged").

178. *See id.* at 227 & n.6 (expounding on the bankruptcy court's failure to prove injury or causation without considering bankruptcy proceedings). In the underlying lawsuit, Segerstrom, a minor at the time of the car accident, made "the strategic decision to accept responsibility for the accident . . . ." *Id.* at 226. The court found that the bankruptcy estate failed to produce any evidence suggesting Segerstrom did not achieve the exact outcome she pursued in the litigation to prove she had suffered any injury as a result of the alleged malpractice. *Id.* In addition, the bankruptcy estate failed to prove that its alternative trial strategy would have been successful (the meritorious defense requirement) in the underlying litigation to establish causation. *Id.* at 226–27.

179. *See id.* at 226 (disagreeing with the court in *McClarty* and considering whether the individual's estate suffered any injury).

180. *See id.* at 226–27 (reinforcing the fact that the estate had failed to prove their case).

181. *See id.* at 225 n.4 (refusing to adopt the district court's holding that the bankruptcy trustee would not have been able to prove damages as a result of the discharge of the debt).

182. *See id.* (citing *In re* Edgeworth, 993 F.2d 51, 53 (5th Cir. 1993)) (explaining that the family of a deceased who had died under a doctor's care could pursue a malpractice claim even though the doctor had filed for bankruptcy and received a discharge); *see also* 11 U.S.C. § 524(e) (2012) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.").

misfortunes of the insured victims."[183]

In *Stanley*, the Fifth Circuit noted that while the court was not strictly required to follow its prior holding in *In re Segerstrom*, it made sense to do so.[184] In support of its decision, the court cited the following policy reasons: "(1) it would be improper to excuse the malpractice liability of a potentially negligent attorney because of the 'financial misfortunes'" of his former client, and (2) permitting a claim for legal malpractice to go forward despite a "bankruptcy discharge would not threaten 'the primary purpose behind the discharge,' i.e., avoiding financial harm to the debtor."[185] Of significance, the *Stanley* court made a distinction between the claim by Hale individually and the claim by the bankruptcy trustee on behalf of his bankruptcy estate, describing it as the very distinction underlying the court's opinion in *In re Segerstrom*.[186] Specifically, the court held, "The fact that Hale was later discharged from personal liability for his judgment debt had no legal effect on Stanley's right and duty to continue pursuing that claim on behalf of the bankruptcy estate."[187] Thus, Hale's discharge of the debt, after the filing of the bankruptcy and after the legal malpractice claim, had already transferred to the bankruptcy estate upon the filing of the bankruptcy, and thus did not affect "the right and duty of the [bankruptcy] trustee to pursue that claim."[188]

Today, these two opinions—*McClarty* and *Stanley*—represent a divided jurisprudence on this important issue for legal malpractice actions.

VI. AVOIDING MALPRACTICE IN A VACUUM: THE WISDOM OF ADOPTING THE PAYABILITY REQUIREMENT

Proof of actual damages as a result of the attorney's negligence is a key element of a legal malpractice claim.[189] Courts have stepped up the burden of proof by requiring legal malpractice plaintiffs to provide evidence of collectibility of the lost judgment in order to prevail.[190] On

183. *Segerstrom*, 247 F.3d at 225 n.4 (quoting *In re* Edgeworth, 993 F.2d 51, 54 (5th Cir. 1993)).

184. *See* Stanley v. Trinchard, 500 F.3d 411, 420 (5th Cir. 2007) (clarifying that while this court was not required to rule in the same manner as its earlier decision, there was no reason not to).

185. *Id.* at 420–21 (quoting *In re* Segerstrom, 247 F.3d 218 (5th Cir. 2001)).

186. *See id.* at 421 (separating the interests of the individual from those of the bankruptcy estate).

187. *Id.* at 422.

188. *Id.* at 425.

189. *See* Jackson v. Urban, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (requiring proof of a collectible award before the legal malpractice plaintiff could succeed).

190. Gibson v. Johnson, 414 S.W.2d 235, 238–39 (Tex. Civ. App.—Tyler 1967, writ ref'd

the defense side, the plaintiff must prove an available meritorious defense in the underlying lawsuit that would have precipitated a different result but for the lawyer's negligence.[191] However, in the latter situation, courts need to go a step further. As the corresponding burden of proof to collectibility, it seems only logical and fair that a legal malpractice plaintiff who was a defendant in the underlying action (and is consequently now a judgment debtor) should also have to prove payability of the adverse judgment to recover the amount of the judgment as damages for legal malpractice. In the legal malpractice arena, "mere negligence on the part of an attorney is not sufficient to impose liability" upon him.[192] Furthermore, such negligence constitutes "malpractice in a vacuum" when considered without the actual damages suffered by the plaintiff.[193] Rather, the policy behind the suit-within-a-suit doctrine is that a former client will prevail in a legal malpractice action only upon proof that "the attorney's negligence 'made a difference to the client.'"[194] This relates back to "the fundamental rules of damages," that a wronged litigant may not recover "damages in the absence of a showing with certainty that actual damages were, in fact, sustained."[195] The client-plaintiff in a legal malpractice action must show appreciable harm in order to recover.[196] Thus, proof of collectibility, or on the flip side, payability, is a critical component of establishing proximate causation for a legal malpractice claim.

In requiring proof of collectibility, courts have recognized that it would be inequitable for a malpractice plaintiff to obtain a judgment against the lawyer greater than what the plaintiff could have recovered and put in his or her pocket as a result of the underlying lawsuit.[197] In the same light, it

n.r.e.) (holding that a client who sued his former attorney for malpractice for mishandling a prior cause of action had the burden of proof to show he would have been successful in his prior suit and that any judgment rendered would have been collectible).

191. *See, e.g.*, Schneider v. Richardson, 411 A.2d 656, 658 (Me. 1979) (citing Sohn v. Bernstein, 279 A.2d 529, 532 (Me. 1971)) (stating that in order to prevail in a legal malpractice action, the plaintiff must prove a certain probability of success but for the attorney's negligent actions or lack thereof).

192. *Id.*

193. *See id.* (explaining why malpractice without damages or injuries is a fruitless cause of action).

194. Best v. Rome, 858 F. Supp. 271, 277 (D. Mass. 1994) (quoting Jernigan v. Giard, 500 N.E.2d 806, 807 (Mass. 1986)).

195. Coon v. Ginsberg, 509 P.2d 1293, 1295 (Colo. App. 1973).

196. Kituskie v. Corbman, 682 A.2d 378, 380 (Pa. Super. 1996).

197. *See id.* ("The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." (quoting Ammon v. McCloskey, 665 A.2d 549, 552 (Pa. Super. 1995))).

would be inequitable for a judgment debtor turned legal malpractice plaintiff to recover a judgment against his or her former attorney in an amount greater than the plaintiff could have paid on the judgment. Without requiring evidence of payability, the legal malpractice plaintiff has the opportunity to obtain a windfall in the form of damages for a judgment that he or she will never have to pay, as the result of a bankruptcy discharge, insolvency, or other circumstances.[198] With such a lapse in the law, clients may be encouraged to allow big judgments to be entered against them, with the comfort of knowing that they will never have to pay the judgment, only to turn around and sue their lawyer for the full amount.[199]

Requiring legal malpractice plaintiffs to prove payability is not at odds with the judgment rule adopted by the majority of jurisdictions.[200] The judgment rule merely permits the legal malpractice plaintiff to bring an action at the time of the entry of the adverse judgment, and allows the statute of limitations to begin to run at that time.[201] Although some courts have extended its application, the judgment rule, in its original form, does not provide that the amount of the judgment constitutes actual damages for a legal malpractice claim.[202]

Moreover, the payability requirement does not mandate payment of the underlying judgment as a condition precedent to bringing a legal malpractice suit.[203] This is what *Stanley* ultimately held.[204] Just like in the majority of judgment rule cases, the Fifth Circuit in *Stanley* did not hold that the amount of the judgment for which the debtor received a

198. *See* McKenna v. Forsyth & Forsyth, 720 N.Y.S.2d 654, 657 (App. Div. 2001) (opining that limiting legal malpractice damages to the collectible amount of the award is the best policy, otherwise plaintiffs would obtain a "windfall opportunity to fare better as a result of the lawyer's negligence than he would have fared if the lawyer had exercised reasonable care" (quoting David A. Barry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 MASS. L. REV. 74, 81–82 (1993))).

199. *See* Klump v. Duffus, 71 F.3d 1368, 1374 (7th Cir. 1995) (claiming that a windfall would occur in allowing the plaintiffs to sue their former attorneys for the full amount of damages assessed to them, rather than the amount payable).

200. *See id.* (opinion that the purpose of a malpractice action is to restore the plaintiff to the same position he or she was in prior to the attorney's negligent action).

201. *See id.* at 1370 (noting the failure of Klump's attorney to file his lawsuit within the statute of limitations, drawing a malpractice action from Klump).

202. *See* Montfort v. Jeter, 567 S.W.2d 498, 500 (Tex. 1978) ("The Court, after full consideration of the respective merits of the prepayment rule and the judgment rule, adopted the judgment rule insofar as a tort action is concerned." (citing Hernandez v. Great Am. Ins. Co., 646 S.W.2d 91, 94–95 (Tex. 1971))).

203. *See, e.g.*, Stanley v. Trinchard, 500 F.3d 411, 421 (5th Cir. 2007) (ruling that the trustee was not barred from bringing a malpractice claim despite Hale's bankruptcy discharge).

204. *Id.* at 431.

discharge in bankruptcy could be recovered as actual damages for the trustee's legal malpractice action.[205] Rather, the court held that the bankruptcy discharge did not preclude the trustee's ability to pursue the legal malpractice claim on behalf of the bankruptcy estate, and that the judgment was some evidence of damages.[206] Thus, under the payability rule, an insolvent or bankrupt legal malpractice plaintiff may still bring a legal malpractice claim to recover other damages, just not the amount of the judgment that he or she will never have to pay, or in the foreseeable future be able to pay.

In addition, several of the policy reasons for adopting the judgment rule in bad faith settlement practices cases do not apply in legal malpractice actions. Unlike insurance cases, where insurers may assume a duty of good faith to third parties, the general rule is that lawyers owe a duty only to their clients, and not to third parties with whom they have no attorney–client relationship.[207] Furthermore, the concern that the payment rule will encourage insurers to engage in bad faith settlement practices does not translate to the legal malpractice context.[208] Unlike insurance cases, where the insurer may be able to avoid payment under the insurance policy by engaging in bad faith settlement practices, lawyers have nothing to gain by committing malpractice. Even if the lawyer avoids a judgment against himself because the plaintiff failed to prove payability of the underlying judgment, a negligence finding against a lawyer can significantly impact his reputation and his ability to earn a living, and may even pose a threat to his bar license. Thus, regardless of whether courts enforce the payability requirement, lawyers are already incentivized not to commit malpractice.

The payability requirement does not make the viability of a legal

205. *See id.* at 420–21 (noting that the court did not hold the amount of the judgment in debtor's bankruptcy discharge could be collected as actual damages).

206. *Id.* at 421.

207. *See* Giacometti v. Aulla, 114 Cal. Rptr. 3d 724, 727 (Ct. App. 2010) (citing the traditional privity rule in California which states that a contract is a prerequisite to maintaining a professional negligence claim); *see also* AG Capital Funding v. State St. Bank, 842 N.E.2d 471, 478 (N.Y. 2005) (holding that absent privity, a plaintiff must show "'fraud, collusion, malicious acts, or [some] other special circumstances' in order to maintain a cause of action" for legal malpractice (quoting Estate of Spivey v. Pulley, 526 N.Y.S.2d 145, 147 (App. Div. 1989))); McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 792 (Tex. 1999) (stating that an attorney in Texas is not liable to non-client third parties for legal malpractice). *But see* Camp v. St. Paul Fire & Marine Ins. Co., 616 So. 2d 12, 15 (Fla. 1993) (finding an insurance carrier "assumed a duty to the bankruptcy estate" in the event of a bankruptcy under the terms of the insurance policy).

208. *See* Pistalo v. Progressive Cas. Ins. Co., 983 N.E.2d 152, 157 (Ind. Ct. App. 2012) ("The rationale behind allowing full recovery to an insured who has not paid the excess judgment is to prevent bad-faith practices in the insurance industry . . . ." (quoting Econ. Fire & Cas. Co. v. Collins, 643 N.E.2d 382, 385 (Ind. Ct. App. 1994))).

malpractice claim turn on the ability of the former client to satisfy all or part of the adverse judgment entered against them. Assuming the legal malpractice plaintiff has sustained actual damages because of the adverse judgment, the plaintiff will still be entitled to pursue a legal malpractice claim for those damages.[209] Courts adopting the judgment rule have reasoned that the mere entry of an adverse judgment may cause damages in the form of impaired credit, potential liens on property, and harm to the judgment creditor's reputation.[210] We agree with this reasoning because even with the payability requirement in place, the plaintiff may still recover actual damages resulting from an unpaid judgment in the form of negative effects on credit, liens on property, and non-exempt property being subject to execution and forced sale.[211] Thus, attorney tortfeasors will not be allowed to escape liability because of the payability rule—they will simply be held liable only for the actual damages sustained by the client.

Courts adopting the minority view with respect to collectibility have expressed concern that the collectibility requirement ignores the possibility that during the life of the judgment, the underlying defendant may come into resources to pay all or part of the judgment against him or her.[212] In adopting a modified version of the judgment rule, New York courts have held that where the legal malpractice plaintiff "was insolvent or nearly insolvent prior to the judgment[,]" the fact finder may "consider his past, his prospects, and other economic" considerations in assessing the plaintiff's actual damages related to the judgment.[213] In a payability case then, the fact finder could consider whether the circumstances are such that the legal malpractice plaintiff may, during the life of the judgment, be able to pay all or part of the judgment entered against him. Assuming the legal malpractice plaintiff could prove with some certainty that he would

209. *See* McClarty v. Gudenau, 176 B.R. 788, 793 (Bankr. E.D. Mich. 1995) (noting the district court's holding that the plaintiff will be allowed to introduce proof of any injuries suffered as a result of the alleged malpractice).

210. *See* Levantino v. Ins. Co. of N. Am., 422 N.Y.S.2d 995, 999–1000 (Sup. Ct. 1979) ("The mere entry of the excess judgment is viewed as causing legal damage since it impairs credit, subjects the insured's property to the lien, diminishes his reputation and future prospects . . . .").

211. *See McClarty*, 176 B.R. at 793 (allowing the plaintiff to present proof of injury to, among other things, her credit rating); Montfort v. Jeter, 567 S.W.2d 498, 500 (Tex. 1978) (remanding the case with instructions for the lower court to hear the plaintiff's argument for damages incurred); Frankenmuth Mut. Ins. Co. v. Keeley, 447 N.W.2d 691, 706 (Mich. 1989) (supporting the plaintiff's ability to recover actual damages by showing that he or she suffered negative effects on credit and other financial consequences).

212. *See* Smith v. Haden, 868 F. Supp. 1, 2 (D.D.C. 1994) (stating that the passage of time can be significant because during the life of a judgment the plaintiff may come into resources with which to pay the judgment against them).

213. *Levantino*, 422 N.Y.S.2d at 1002.

come into resources in the near future from which he could pay all or part of the judgment entered against him, the jury could consider that evidence in awarding actual damages.[214] Although this seems like an unlikely scenario, allowing the jury to consider all of the relevant circumstances for payment of the judgment at some future date gives the courts a way to deal with this possibility when the evidence supports it.

In conclusion, to avoid a potential windfall for former clients, courts must put legal malpractice plaintiffs to the test for proof of payability of the judgment they seek to recover as damages from the attorney.

214. *See id.* ("Where the assured has meager assets and is unable to pay the judgment, the Pattern Jury rule thus permits the jury to consider the age, economic status, economic prospects, skills, health, and any other matters presently existing which would be reasonably predictive of the insured's economic future.").