VOLUME 8, ISSUE 2

PROFESSIONAL LIABILITY DEFENSE QUARTERLY

SPRING 2016

INSIDE THIS ISSUE:

ENGAGEMENT LETTER SIGNIFICANCE 8

ANNUAL MEETING GOLD SPONSORS 10

MANAGING DIRECTOR'S MESSAGE 11

WEBSITE ANALYTICS 11

OUR 2016-2017 SPONSOR!

SPECIAL POINTS OF INTEREST:

- PLDF Annual Meeting, September 28-30, 2016 in Denver
- Bounce Reflected in Website Analytics
- Don't Forget: Board of Directors Election This September
- Member Retention Remains High

JUDGMENTAL IMMUNITY: THE FIRST PUNCH IN LEGAL MALPRACTICE DEFENSE, BY: DONALD PATRICK ECKLER, ESQ. AND JENNIFER BERARD, ESQ., C.P.C.U.

Judgmental immunity is one of the most powerful offensive tools use in defeating ever more creative claims made by plaintiffs suing their former attorneys. The defense takes different forms and extends to various degrees in jurisdictions across the country, but this defense is taking center stage in an ever increasing number of cases. The basics of this defense, its limit, and its use are the subjects of this article.

The Broad Interpretation of Judgmental Immunity

Courts across the country have held that an attorney may use the doctrine of judgmental immunity to defend a claim of malpractice and which provides that "an attorney will generally be immune from liability, as a matter of law, for acts or omissions during the conduct of litigation, which are the result of an honest exercise of professional judgment." *McIntire v. Lee*, 149 N.H. 160, 816 A.2d 993, 1000 (N.H. 2003) citing *Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980) and *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236, 239-40 (Idaho 1999). The Illinois Supreme Court has stated: "It is clear that an attorney is liable to his client only when he fails to exercise a reasonable degree of care and skill; he is not liable for mere errors of judgment." *Smiley v. Manchester Insurance & Indemnity Co.*, 71 Ill.2d 306, 313 (1978) (As one author has noted: "[T]he 'attorney judgment' defense [is] also commonly referred to as 'judgmental immunity' or the 'error of judgment' rule. Whatever the label, at its core, the rule dictates that attorneys do not breach their duty to clients, as a matter of law, when they make informed, good-faith tactical decisions." J. Mark Cooney, *Benching the Monday-Morning Quarterback: The "Attorney Judgment" Defense to Legal-Malpractice Claims*, 52 Wayne L. Rev. 1051, 1052 (2006).

It is well-settled law in Illinois that an attorney is not liable for conduct which is deemed to constitute a mere error of judgment even if the exercise of that judgment led to an unfavorable result for the client. *Goldstein v. Lustig*, 154 Ill. App. 3d 595, 600 (1st Dist. 1987); *see also, O'Brien and Associates, P.C. v. Tim Thompson, Inc.*, 274 Ill. App. 3d 472, 480 (2nd Dist. 1995) ("The law distinguishes between mistaken judgments and errors of negligence. A mere error of

Continued on page 2

CYBERSECURITY AND DATA BREACH LITIGATION UPDATE, BY: THOMAS D. JENSEN, ESQ.

> "There are only two types of companies left in the United States, according to data security experts: 'those that have been hacked and those that don't know they've been hacked.'"

Storm v. Paytime, Inc., 90 F. Supp. 3d 359, 360 (M.D. Pa. 2015).

We review here current developments in cybersecurity law arising out of data security breaches. Criminal data hackers attack systems electronically, seeking to monetize Personal Identifying Information ("PII") and Protected Health Information ("PHI") through unauthorized credit or debit transactions and otherwise. And street thieves steal or otherwise convert smart phones, tablets, laptops, desktop hard drives, backup tapes, CDs, and even servers seeking access to the same data. They go "phishing" to acquire PII through email communications that appear to be from a legitimate source, or they install "malware" or malicious software onto point-of-sale systems to acquire credit card numbers and expiration date data.

Continued on page 4

JUDGMENTAL IMMUNITY, CONT'D

judgment does not subject an attorney to liability even if that erroneous judgment leads to an unfavorable outcome for the client.").

Application of the above rule is particularly appropriate when an attorney is challenged on his choice of trial tactics. *See, Oda v. Highway Insurance Company*, 44 Ill. App. 2d 235, 252-53 (1st Dist. 1963). Citing to *Oda* with approval, one of the leading commentators on legal malpractice has summarized the rule as follows:

> The failure to obtain a favorable verdict for the client does not establish fault by a lawyer. Decisions of what witnesses to call, what testimony to obtain or when to cross-examine almost invariably are matters of judgment. That exercise of judgment includes the attorney's evaluation of the witnesses' credibility, the effect of the testimony on the trier of fact and the need for the testimony. Few attorneys proceed in the same manner. In hindsight, even the defendant-attorney probably would agree with the unhappy client that a different approach might have been more productive. Thus, the rule that an attorney is not liable for a mere error in judgment is extremely appropriate and necessary to protect the attorney engaged in the conduct of a trial, who must continuously select between alternatives, few of which are necessarily wrong or right.

R. Mallen and J. Smith, Legal Malpractice, § 30.40, p. 595 (2006). (citations omitted).

Still other jurisdictions that have considered the issue, have held that an attorney's tactical decisions at trial do not constitute grounds for a legal malpractice action as long as the attorney acts in good faith. *See, Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980); *Simko v. Blake*, 532 N.W.2d 842, 848 (Mich. 1995). "Otherwise, every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight." *Woodruff*, 616 F.2d at 930; *Simko*, 532 N.W.2d at 848. Notwithstanding the ability to use this defense as a matter of law, some courts have held the application of the attorney judgment rule is most often a question of fact and may make it difficult to obtain dismissal or summary judgment. *Gelsomino v. Gorov*, 149 Ill. App. 3d 809 (1st Dist. 1986).

Recently, in *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122, ¶¶ 24, 75, after a thorough discussion of judgmental immunity, the Illinois Appellate Court reversed dismissal of a legal malpractice case finding that it would be possible to state a claim where the defendant lawyers allegedly failed to bring an action against the plaintiff in the underlying matter and failed to assert certain meritorious defenses in a stock dispute. Citing *Biomet Inc. v. Finnegan Henderson LLP*, 2009 BL 57271, 967 A.2d 662 (D.C. 2009), the plaintiff successfully argued that "in order to avoid liability based on a litigation judgment, as claimed here by [defendant] and as found by the trial court, the attorney *must actually have exercised reasoned judgment in his decision making* and not every act of an attorney constitutes a professional judgment." *Nelson*, 2013 IL App (1st) 123122 at ¶ 37. At the stage of dismissal, the Court could not decide whether the defendant lawyers had exercised any judgment at all, or if they had merely overlooked the legal theories the plaintiff alleges they should have asserted. *Id*. at ¶ 56.

The Narrow Interpretation of Judgmental Immunity

In contrast to this broad view of judgmental immunity, that may apply to simply be a version of the standard of care, many jurisdictions have held that the immunity only applies in situations in which there is a good faith dispute over the applicable law and that a lawyer is not responsible for failing to accurately predict how a court will decide such an unsettled question of law. California, Florida, and, most recently, Virginia, have adopted this more narrow view.

> "[M]any jurisdictions have held that the immunity only applies [when] there is a good faith dispute over the applicable law … . "

In California, the judgmental immunity doctrine immunizes attorneys from liability "resulting from an honest error in judgment concerning a doubtful or debatable point of law." *Davis v. Danrell*, 174 Cal. Rptr. 257 (Cal. Ct. App. 1981). California courts adhere to a "two-pronged inquiry": (1) whether the state of the law was unsettled at the time the professional advice was rendered; and (2) whether that advice was based upon the exercise of informed judgment. *Village Nurseries, L.P. v. Greenbaum*, 123 Cal. Rptr. 2d 555, 562 (Cal. Ct. App. 2002). Thus, in determining whether to grant summary judgment based on the judgmental immunity doctrine, it is an "attorney who has conducted a 'thorough, contemporaneous research effort,' demonstrated 'detailed knowledge of legal developments and debate in the field,' and made a decision which represented a 'reasoned exercise of an informed judgment grounded upon a professional evaluation of applicable legal principles,' [who] may be entitled to judgment as a matter of law." *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1094 (Cal. App. 4 Dist. 2014).

The leading case in Florida is *Crosby v. Jones*, 705 So.2d 1356 (1998). The *Crosby* case citing *Davis*, stated that "the rule of judgmental immunity is premised on the understanding that an attorney, who acts in good faith and makes diligent inquiry into an area of law, should not be held liable for providing advice or

JUDGMENTAL IMMUNITY, CONT'D

taking action in an unsettled area of law." *Crosby v. Jones*, 705 So.2d 1356, 1358 (1998). In *Crosby*, the plaintiff was injured in an automobile accident, and retained the defendant to represent her in a suit against a number of individuals, including the driver and the driver's employer. *Crosby*, 705 So.2d at 1357. The plaintiff settled with the defendant driver in the underlying matter and, based on the defendant attorney's advice, she released the defendant driver but specifically excepted the defendant driver's employer from the release. *Id*. The defendant driver was then dismissed with prejudice from the underlying matter. *Id*. The trial court in the underlying matter then entered summary judgment in favor of the employer. A legal malpractice action was brought against the lawyer for counseling dismissal of the defendant employee causing judgment in favor of the employer, but because at the time the advice was given by the defendant lawyer the point of law was unsettled, the Florida Supreme Court held that summary judgment was proper in favor of the defendant lawyer because not only was there conflicting law at the time advice but that the defendant lawyer had no duty to inform his client of the conflicting case law on the issue. *Id*. at 1358-1359.

In *Air Turbine Technology, Inc. v. Quarles & Brady, LLC*, 165 So.3d 816, 822-823 (Fla. 4th DCA 2015), the issue of whether the plaintiff was exposed to paying the other party's attorneys' fees was exhaustively researched by the defendant attorneys, and the Court held that an attorney need not perform research on every issue during the course of litigation, but rather can rely on his honest belief and experience. The court reasoned that most experienced Florida commercial lawyers could and would reasonably surmise that the terms "costs" and "expenses" do not include attorney's fees unless the contract expressly states otherwise. *Air Turbine*, 165 So.3d at 823. The Court also held that that the defendant attorney was not liable for failing to hire an expert of the fees sought in the underlying dispute because such a decision was tactical in nature and also protected by the attorney immunity. *Id*. at 823-824.

In *Shevlin Smith v. Bruce W. McLaughlin,* 769 S.E.2d 7, 11-12 (Va. 2015), which dealt with an initial criminal case, within an underlying criminal malpractice case, within a legal malpractice case, the Virginia Supreme Court did not adopt a *per se* judgmental immunity rule, but did look to the *Davis* case in holding that the rule of law in Virginia protects an attorney from failing to correctly predict the outcome of an unsettled issue. Like the *Crosby* case, the issue in *Shevlin* concerned the scope and application of a release. *Shevlin*, 769 S.E.2d at 14-15. The underlying criminal defendant was found not guilty of sexual abuse at a second trial after serving four years in prison following an initial conviction and brought a legal malpractice claim against his original attorneys who had unsuccessfully defended him. *Id*. at 3-4. A release agreement was entered into in that criminal malpractice claim that released some, but not all of the defendants in that case. *Id*. at 4. However, a subsequent ruling from the Virginia Supreme Court had the effect of releasing those parties not previously released. *Id*. An action was then brought against the lawyers who had counseled the plaintiff to enter into the release agreement. *Id*. The Court held that the attorney who counseled the plaintiff to enter into the release agreement did not breach his duty to the plaintiff because there was a reasonable basis to counsel his client as he did and there was no way to anticipate the ruling of the court. *Id*. at 15-16.

Conclusion

For the attorney who represents other attorneys, early evaluation of the availability of the judgmental immunity defense should be undertaken to determine if the defense applies and then to develop the evidence that could demonstrate that the alleged malpractice is protected. Irrespective of whether the jurisdiction applies the broad or narrow interpretation of the immunity, ascertaining whether the defendant lawyer exercised judgment in making the decision that is the subject of the claim can be at the very least used that the attorney was careful and that simply because the client did not prevail in the underlying dispute does not mean that the attorney committed malpractice.

Donald Patrick Eckler, Esq., is a partner at **Pretzel & Stouffer, Chartered**, who handles civil disputes across **Illinois** and **Indiana**. Pat manages complex litigation involving doctors, lawyers, architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and other professionals in professional negligence cases. He may be reached at deckler@pretzel-stouffer.com.

Jennifer Berard, Esq., CPCU, is a Director of Strategic Claims at **CNA** with 19 years of experience in the combined litigation and insurance industries, with an emphasis on large exposure, complex claims in multiple professional lines of business including lawyers, physicians, accountants, design professionals, directors/officers and brokers. Jennifer earned her CPCU designation and is a licensed attorney in Kansas and Missouri.

PLDF AND DIVERSITY

Professional Liability Defense Federation supports diversity in our member recruitment efforts, in our committee and association leadership positions, and in the choices of counsel, expert witnesses and mediators involved in professional liability claims.

"For the attorney who represents other attorneys, early evaluation of the availability of the judgmental immunity defense should be undertaken … ."