Morrison Mahoney LLP

LEGAL Dimensions

By Michael Keller, Associate, Hartford Office

Comparative Negligence in Legal Malpractice Cases

At the outset of any case it is essential to recognize potential defenses, understand mitigating arguments and appreciate how they may impact liability and bottom line damages. Some of the best advice I've received as an attorney is to "work the case backwards." In other words, jump to the time of trial and envision your closing arguments. Spending the time necessary early on to think about the defenses you will put forth helps identify the evidence you will need to establish in discovery. One of the most common special defenses identified when "working backwards" is comparative negligence. However, the interplay of Connecticut's murky world of special defenses, comparative negligence and the complex apportionment system is easily misunderstood and often misapplied, especially in the legal malpractice context. Given this hazy backdrop, opposing counsel often attempt to obscure the application of the comparative negligence doctrine in legal malpractice actions involving purely commercial losses.[1]

The Connecticut Appellate Court decided the broader issue of the general application of comparative negligence to legal malpractice claims in **Somma v. Gracey**, 15 Conn. App. 371 (1988). In **Somma**, the plaintiffs sought the defendants' legal counsel in the sale of a business and, subsequently, brought an action for legal malpractice against the defendants. The allegation was that the attorney failed to conduct an adequate investigation of the buyer's financial condition and failed to inform the plaintiffs that they should not proceed with the transaction because there was insufficient security for the consideration offered. The defendant attorney was permitted to raise a comparative negligence defense that it was the plaintiffs' responsibility to investigate the buyer's financial condition.

The plaintiffs appealed, arguing the court "[e]rred in instructing the jury on the defense of comparative negligence." The Appellate Court disagreed, explaining that in situations where the claim of malpractice sounds in negligence, the defense of comparative negligence should be available. The Court observed that other jurisdictions permit the same defense in medical malpractice actions. Noting that the comparative negligence statute, Conn. Gen. Stat. § 52-572h(b), provides that any economic or noneconomic damages based on negligence are to be diminished in proportion to the plaintiff's percentage of negligence, the Court saw no basis for distinguishing between actions for legal malpractice and other claims sounding in negligence.

Despite the seemingly clear language of **Somma**, in legal malpractice cases where only commercial loss damages are sought, plaintiff's counsel will sometimes argue that comparative negligence does not apply. They argue that "damages," as set forth in § 52-572h(b), do not include purely commercial losses unaccompanied by personal injury or damages to, or loss of use of, some tangible property. The argument relies on a strict construction of the statute, advocating that because the legislature omitted commercial losses from the language, it was the legislature's intent to exclude commercial losses from the application of comparative negligence. Thus, the claim is that comparative negligence does not apply to purely commercial losses in legal malpractice cases because the statute cited by **Somma** does not specifically provide for that application.

In **Williams v. Ford**, 232 Conn. 559 (1995), a case which dealt with general, as opposed to professional, negligence, the Connecticut Supreme Court recognized this argument and found that the statute only provides for comparative negligence for

continued on page 22

[1] A few caveats are necessary. First, the defense of comparative negligence in the legal malpractice context is typically only available when the defense relates to the responsibilities of the attorney and client during the course of their relationship. Generally, an attorney cannot rely on a client's purported negligent conduct arising in the underlying lawsuit as a basis for a comparative negligence claim. In addition, it is important to distinguish the situation in which a former client is suing an attorney, versus when an attorney is brought in as an apportionment defendant. In the latter situation, the analysis is completely different than the scope of this article.

Comparative Negligence in Legal Malpractice Cases

continued from page 12

"damages resulting from personal injury, wrongful death or damage to property." The **Williams** decision stands for the proposition that, as a matter of statutory law, comparative negligence is inapplicable in commercial loss situations. Nonetheless, the ultimate holding of **Williams** supports the argument that comparative negligence applies to commercial loss damages.

By way of brief background, the jury in **Williams** returned verdicts in favor of the plaintiffs on a negligent misrepresentation claim and awarded damages accordingly, including a reduction of the plaintiffs' award by 10 percent, which represented the degree of the plaintiffs' negligence. On appeal, the defendant claimed that the jury's finding of contributory negligence operated as a complete bar to recovery for the negligent misrepresentation claim. The defendant conceded that § 52-572h(b) eliminated the rule of contributory negligence in favor of comparative negligence for "damages resulting from personal injury, wrongful death or damage to property," but argued that the statute did not apply to purely commercial losses and that plaintiff's negligence therefore acted as a complete bar. While the Supreme Court agreed with the defendant's interpretation of § 52-572h(b), it nonetheless concluded that, "as a matter of common law, the policy of the comparative negligence statute § 52-572h(b), applies to negligence actions where only commercial losses are sustained."

After acknowledging that commercial losses did not fall within the explicit purview of § 52-572h(b), the Court explained that in certain circumstances it is appropriate to apply a statute beyond its designated boundaries as a matter of common law. This is precisely what the Connecticut Supreme Court did, explaining that the courts should, where possible, "assure that the body of law — both common and statutory — remains coherent and consistent." The Court found that it would be consistent with the goal of "ameliorat[ing] the harshness of the complete bar to liability resulting from the common law defense of contributory negligence," to apply comparative negligence equally to damage to person, property or commercial loss.

In extending the policy and application of the comparative negligence statute beyond the designated parameters of § 52-572h to negligence actions involving commercial losses, the application of the comparative negligence statute was extended to legal malpractice actions involving claims of only commercial loss. This directly comports with the holding in **Somma**. That is, when the principle of **Williams**, i.e., that comparative negligence applies to negligence actions where only commercial losses are sustained, is read in conjunction with the principle of **Somma**, i.e., there is "no basis for distinguishing between actions for legal malpractice and other claims sounding in negligence," it is clear that attorney defendants in commercial loss legal malpractice cases are entitled to a reduction of any potential verdict by the proportionate share of the plaintiff's negligence, and to preclude all recovery if the negligence of the plaintiff exceeds the negligence of the defendant.

Whether you are a claims professional or an attorney, when evaluating a legal malpractice claim involving purely commercial losses, it is important to recognize the availability of comparative negligence. Whenever applicable, comparative negligence should be pled as a special defense from the outset and its mitigation of damages and liability should be considered when evaluating potential settlement, verdict ranges and setting reserves.Recognizing that opposing counsel will sometimes obfuscate the otherwise clear application of this doctrine, it is essential to have a clear understanding of the **Somma** and **Williams** cases. This knowledge allows defense counsel and claims professionals to be prepared for such challenges and have the legal arguments at their disposal to mitigate damages and reduce liability. ■

Commonwealth of Massachusetts
Division of Insurance

September 5, 2014

ALL SAVERS INSURANCE COMPANY
7440 Woodland Drive
Indianapolis, IN 46278

The above company has made application to the Division of Insurance to obtain a Foreign Company License to transact Life, Accident, and Health insurance in the Commonwealth.

Any person having any information regarding the company which relates to its suitability for the license or authority the applicant has requested is asked to notify the Division by personal letter to the Commissioner of Insurance, 1000 Washington Street, Suite 810, Boston, MA, 02118-6200, Attn: Financial Surveillance and Company Licensing within 14 days of the date of this notice.

Commonwealth of Massachusetts
Division of Insurance

September 5, 2014

UNITEDHEALTHCARE LIFE INSURANCE COMPANY
3100 AMS Blvd.
Green Bay, WI 54313

The above company has made application to the Division of Insurance to obtain a Foreign Company License to transact Life, Accident, and Health insurance in the Commonwealth.

Any person having any information regarding the company which relates to its suitability for the license or authority the applicant has requested is asked to notify the Division by personal letter to the Commissioner of Insurance, 1000 Washington Street, Suite 810, Boston, MA, 02118-6200, Attn: Financial Surveillance and Company Licensing within 14 days of the date of this notice.

Commonwealth of Massachusetts
Division of Insurance

August 22, 2014

ACCORDIA LIFE AND ANNUITY COMPANY
215 10th Street, Suite 1100
Des Moines, IA 50309

The above company has made application to the Division of Insurance to obtain a Foreign Company License to transact Life, Accident, and Health insurance in the Commonwealth.

Any person having any information regarding the company which relates to its suitability for the license or authority the applicant has requested is asked to notify the Division by personal letter to the Commissioner of Insurance, 1000 Washington Street, Suite 810, Boston, MA, 02118-6200, Attn: Financial Surveillance and Company Licensing within 14 days of the date of this notice.