



## The Voice

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### This Week's Feature

#### Pennsylvania Supreme Court Reviewing Limitation on Damages for Legal Malpractice Breach of Contract Claim

by Daniel S. Strick, Lucas and Cavalier, LLC, Philadelphia, PA

In most jurisdictions the distinction between a legal malpractice action founded in tort differs little from those brought in contract. The main difference between the two is the applicable statute of limitations. In Pennsylvania, all eyes are now focused on the Commonwealth's Supreme Court to see whether a damages limitation applicable only in contract based claims will continue.

On June 13, 2013, the Pennsylvania Supreme Court granted defendants Duane Morris, LLP and Kathleen M. Shay's petition for allowance of appeal to determine: "Does the limitations on damages in a legal malpractice action sounding only in contract set forth in *Bailey v. Tucker*, 533 Pa. 237, 252, 621 A.2d 108, 115 (1993)—which limited such damages to 'the amount actually paid for the services plus statutory interest' in a case involving an underlying criminal representation—apply where the underlying representation is a civil one?" *Coleman v. Duane Morris, LLP*, 58 A.3d 833 (Pa. 2013).

Pennsylvania's limitation of recoverable damages in legal malpractice claims sounding in contract to the amount of fees paid differs from most other jurisdictions. Other jurisdictions follow traditional contract remedies allowing a successful plaintiff to recover damages proximately caused by the breach of contract—usually the breach of the retention agreement which provides the lawyer will represent the client faithfully and with due diligence. See e.g. *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275 (Colo. App. 2010); *Timothy Whelan Law Assocs. v. Kruppe*, 409 Ill. App. 3d 359 (Ill. App. 2d Dist. 2011).

#### **Bailey v. Tucker and Its Progeny**

In *Bailey v. Tucker*, Pennsylvania Supreme Court found recoverable damages in a legal malpractice case sounding in contract was the amount paid for the services plus statutory interest. The court disallowed the recovery of consequential damages. See *id.* at 252. This was a departure from other jurisdictions.

Bailey was convicted first degree murder and was sentenced to life in prison. In post-trial proceedings, the court found Bailey's counsel had been ineffective for failing to investigate and pursue an intoxication defense. On retrial, Bailey was found guilty of



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voluntary manslaughter. At the time, Bailey had served nine years of his life sentence. The maximum sentence for voluntary manslaughter was 10 years. Bailey was sentenced to time served and was released.

Bailey sued his attorneys for negligence and breach of contract for failing to pursue the intoxication defense. The negligence claim was dismissed, as it was time barred. The *Bailey* court began its analysis by reviewing factors and considerations for adopting an absolute immunity from legal malpractice claims for criminal defense attorneys. There is English common law precedent for criminal attorney immunity. See *Tower v. Glover*, 467 U.S. 914, 921, 104 S.Ct. 2820, 2825 (1984). The reasons for the immunity included 1) the threat of a malpractice action for representation of a criminal defendant will have a “chilling effect” on counsel’s ability to defend his client fearlessly and independently; 2) as a consequence the system will have difficulty attracting and maintaining attorneys to represent persons charged with crime, and the retention of an attorney will become prohibitively expensive; 3) aggrieved defendants already have sufficient systemic remedies for attorney ineffectiveness such as appeals and post-conviction proceedings; 4) to permit such a cause of action will result in a flood of litigation; and 5) the existence of such a cause of action leads to the possibility of a guilty “in fact” party actually profiting from his crime where the attorney’s negligence was directed to a non-factual aspect of the criminal defense.

The *Bailey* court was most concerned with the first four factors and stated the system as a whole would be ill-served if criminal defense attorneys’ judgment was in anyway hindered by the fear of a threat of a malpractice action. To satisfy the concerns, the *Bailey* court limited recoverable damages to the amount actually paid for the services plus statutory interest.

Following the 1993 decision in *Bailey*, the holding was expanded to include alleged legal malpractice in handling a civil case. See, e.g. *D’Ambro v. Stradley, Ronon, Stevens & Young*, 29 D.&C. 88 (1996); *Masullo v. Hamburg, Rubin, Mullen, Maxwell & Lupin*, 1999 U.S. Dist. LEXIS 7177 (E.D. Pa. 1999). Courts were either limiting the recoverable damages to the amounts paid or dismissing claims entirely when the client failed to pay its legal bills.

### ***Coleman v. Duane Morris, LLP***

The underlying facts of the Colemans’ breach of contract action against Duane Morris are complex and of little importance. In simple terms, the Colemans retained Duane Morris for advice regarding whether the sale of company stock would terminate personal liability for unpaid taxes. Duane Morris’ fees were paid for by the company and not by the Colemans.

Duane Morris filed a motion for judgment on the pleadings based on *Bailey*, arguing since the Colemans did not pay for the legal services, they had not suffered any recoverable damages. Citing *Bailey*, the trial court agreed, finding in a breach of contract legal malpractice case, damages were limited to the amount actually paid for the services, plus statutory interest.

On appeal, the Pennsylvania Superior Court found the limitation on damages imposed by *Bailey* applied only to a breach of contract claim based on a claim of attorney malpractice in a criminal case, but that limitation does not apply where the underlying action was a civil action. Instead, recoverable damages under a breach of contract theory for legal malpractice in an

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underlying civil case are the damages which would naturally and ordinarily result from the breach. The damages must be reasonably foreseeable and within the contemplation of the parties at the time they made the contract and capable of being proved with reasonable certainty. This is consistent with the recoverable damages in a traditional breach of contract case.

Now, the Pennsylvania Supreme Court will analyze whether the limitation in recoverable damages in legal malpractice actions sounding only in contract to the amount actually paid extends to actions involving underlying civil actions. This is an important issue because the ruling could have a major impact on lawsuits initiated by law firms against non-paying clients. These types of claims often result in a counterclaim for legal malpractice. As a result, law firms typically wait until the tort statute of limitation expires before filing the collection suit to reduce potential exposure on the legal malpractice counterclaim because exposure was limited to the amount actually paid by the client. If the Pennsylvania Superior Court's decision is affirmed and traditional contract damages are recoverable, law firms may have to give a second thought to commencing a collection case when the client has not paid any of the fees because exposure on the counterclaim could exceed the potential recovery in the collection case.

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