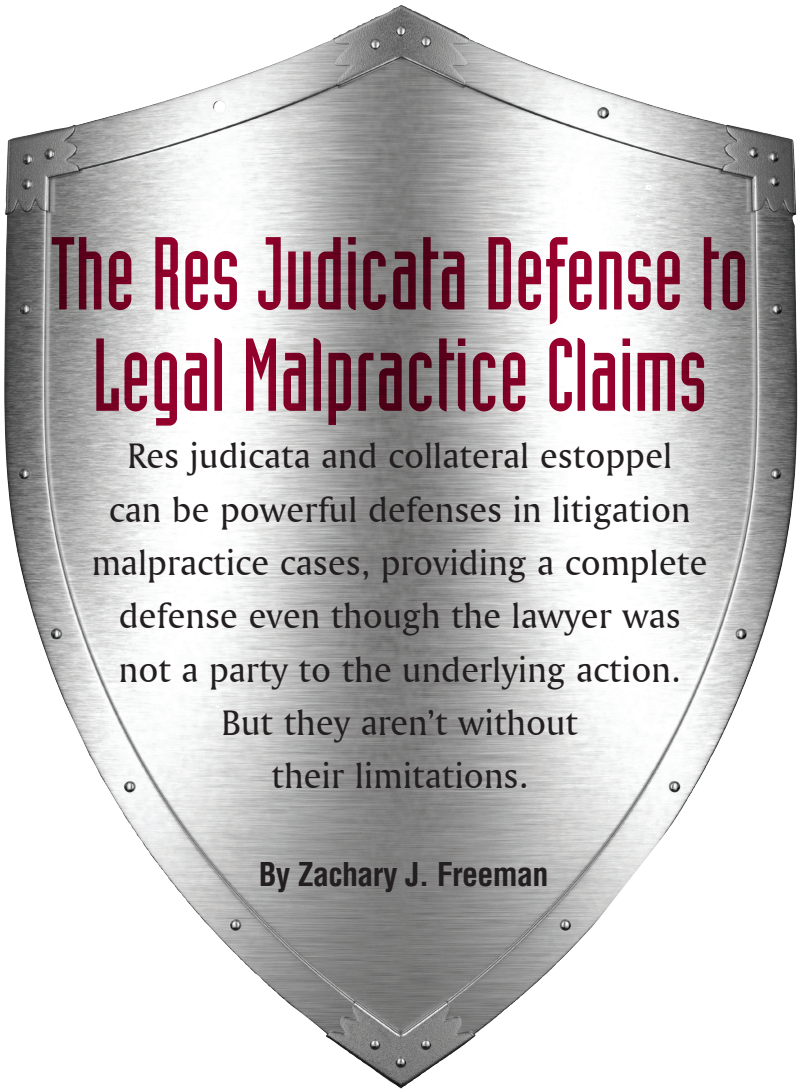

The Res Judicata Defense to Legal Malpractice Claims

Res judicata and collateral estoppel can be powerful defenses in litigation malpractice cases, providing a complete defense even though the lawyer was not a party to the underlying action. But they aren't without their limitations.

By Zachary J. Freeman

Legal malpractice lawsuits, like most of civil litigation, can become very expensive to defend absent a clear-cut basis to obtain an early resolution. Claim or issue preclusion, also referred to as res judicata or collateral estoppel, are dispositive defenses that can have a surprisingly broad application in litigation malpractice actions.

These defenses have such a broad application because, often, the court in the underlying action has already ruled – either expressly or implicitly – on the quality of the legal services provided. These types of final orders are routinely entered by courts in a wide range of cases: bankruptcy proceedings, class actions, family law cases, criminal cases, and litigation involving fee-shifting statutes.

This article discusses the principal Illinois cases applying res judicata and collateral estoppel to litigation malpractice claims, the underlying theory justifying the broad application of these defenses, important limits to when they apply, and steps lawyers can take to minimize their exposure to expensive malpractice claims.

The basics of res judicata

The doctrine of res judicata holds that a final judgment on the merits, entered by a court of competent jurisdiction, bars subsequent lawsuits between the parties or their privies that arise out of the same group of operative facts.[1] The related doctrine of collateral estoppel or

1. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998).

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issue preclusion applies the same theory to specific factual findings and precludes re-litigation of certain factual determinations in subsequent lawsuits.[2]

The purpose of res judicata and collateral estoppel is to ensure that all claims relating to a specific incident are litigated together and to protect parties from a multiplicity of lawsuits. They promote "fairness and judicial economy" by preventing the re-litigation of issues and claims.[3]

Res judicata applies to claims that were previously brought and, most importantly for present purposes, to many claims that could have been brought, through the exercise of due diligence, in the prior litigation.[4] The barred claims can include many counterclaims that could have been brought by the defendant even though counterclaims are generally permissive, not mandatory, in Illinois. Permissive counterclaims are barred by res judicata if the litigation of the counterclaim would either "nullify the earlier judgment or impair the rights established in the earlier action."[5]

Even if all of the elements of res judicata exist, courts are not required to apply it because it is an equitable doctrine. As stated by the supreme court, a party is permitted to bring a subsequent lawsuit that arises out of the same group of operative facts if it would be inequitable to apply res judicata.[6]

Some of the circumstances that can give rise to inequity are:

> (1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court in the first action expressly reserved the plaintiff's right to maintain the second action; (3) the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason.[7]

Thus, a party seeking to establish that a case is barred by earlier litigation must prove that res judicata is applicable and, in most circumstances, that the application of the doctrine would be equitable.

Bankruptcy jurisprudence

Litigation malpractice cases often arise out of bankruptcy filings. Debtors and creditors unhappy with the ultimate result frequently try to place blame on the attorneys in an after-the-fact effort to achieve a different result. Given the bankruptcy court's close supervision of appointed counsel, the res judicata defense should bar most litigation against appointed counsel. While Illinois courts have not expressly discussed the application of res judicata in the bankruptcy court context, the law in other jurisdictions is well developed.

As explained by the U.S. Court of Appeals, D.C. Circuit, in *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, "fee litigation in the bankruptcy proceeding preclude[s] later malpractice claims against the bankruptcy professionals to whom the fees had been awarded."[8] "[A] bankruptcy court makes an implied finding of the quality and value of the professional services rendered" because section 330(a)(3)(A) of the Bankruptcy Code requires the court to consider the nature, extent, and value of the attorney's legal services when ruling on a fee petition.[9] Thus, as long as a party had the opportunity to object to the attorney's final fee award, any subsequently filed legal malpractice action would likely be barred by res judicata as a result of the order granting the fee petition.

Other types of orders entered by the bankruptcy court could also provide a basis to assert a res judicata defense. For example, in *Sarno v. Akkeron*, the defendant attorney alleged that a prior bankruptcy court order finding that the plaintiffs had filed an involuntary bankruptcy petition in bad faith barred the plaintiffs' subsequent malpractice action against him for advising them to file the involuntary bankruptcy petition.[10]

Even though the Illinois court found that all of the elements of res judicata were present, it concluded that application of the doctrine would be inequitable because the plaintiffs could not be expected to allege that their attorney had been negligent during the bad faith proceeding. Not only was that attorney allegedly representing them in the proceeding, but he admitted that the plaintiffs had filed the involuntary petition pursuant to his advice, which in most circumstances would preclude a finding that the plaintiffs had acted in bad faith. *Sarno* highlights the fact that the party advancing the res judicata defense must explain that the defense not only can but should be applied.

Family law cases

Fee petitions are also closely scrutinized by family courts. As with bankruptcy courts, this scrutiny can give rise to an argument that malpractice claims arising out of the underlying proceedings are barred by res judicata. Illinois courts, however, have issued conflicting decisions on whether a final fee order in a marriage dissolution action bars a subsequent legal malpractice case. As with *Sarno*, the issue is not simply whether res judicata can be applied but whether it is equitable to do so.

Res judicata and collateral estoppel are potentially powerful defenses because they protect not only the parties to the underlying litigation but, often, their lawyers as well.

The most recent case is *Weisman v. Schiller, Ducanto & Fleck*. In that case, the client objected to her attorney's fee petition in the dissolution action by alleging that her attorney had been negligent. She subsequently sued that attorney for legal malpractice.[11]

The appellate court found that all of

2. *DuPage Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001).
3. *Id.*
4. *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 955 (1st Dist. 2008); *Hughey v. Industrial Comm'n*, 76 Ill. 2d 577, 582 (1979).
5. *Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 92 (2d Dist. 2001); *Kosydor v. American Express Centurion Services Corp.*, 2012 IL App (5th) 120110, ¶ 19.
6. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 341 (1996).
7. *Id.* (citing Restatement (Second) of Judgments § 26(1) (1980)).
8. *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 490 (D.C. Cir. 2009).
9. *Marbury Law Group, PLLC v. Carl*, 799 F. Supp. 2d 66, 77 n.8 (D.D.C. 2011).
10. *Sarno v. Akkeron*, 292 Ill. App. 3d 80, 85-87 (1st Dist. 1997).
11. *Weisman v. Schiller, Ducanto & Fleck*, 314 Ill. App. 3d 577, 578 (1st Dist. 2000).

the elements of res judicata were present but declined to apply the doctrine. The court reasoned that the divorce court lacked subject matter jurisdiction over a legal malpractice counterclaim and the statutory authority to provide the plaintiff with her constitutional right to a jury trial. (It should be noted that several Illinois courts, in other contexts, have stated that the divorce court has jurisdiction to hear all justiciable matters.)[12] Thus, the court concluded, it would be fundamentally unfair to apply res judicata to bar the plaintiff's legal malpractice action.

Weisman expressly contradicted (but did not purport to overrule) an earlier decision issued by the same court: *Bennett v. Gordon*.[13] In *Bennett*, the court held that a legal malpractice claim filed against a divorce attorney based on objections previously raised to a fee petition was barred by res judicata.

The plaintiffs in both *Weisman* and *Bennett* had objected to their attorneys' fees in the underlying divorce case. But if a client does not object to his attorney's fee petition in the divorce case and does not allege that his or her divorce attorney had acted negligently, a subsequent legal malpractice claim may not be barred by res judicata.

In *Wilson v. M.G. Gulo & Assocs., Inc.*, the court refused to find that a malpractice claim was barred by res judicata because the issue of the attorney's competence was not litigated in the underlying matter.[14] This reasoning is not persuasive because the only reason the attorney's competence was not litigated was because the plaintiff decided not to put it at issue. Moreover, the court did not mention the law summarized above, which holds that permissive counterclaims should be barred if they would nullify or impair the underlying judgment. The absence of any discussion of this aspect of res judicata jurisprudence is significant because the legal malpractice case would require a finding that the lawyer had been negligent, which would impair the underlying order that the attorney was entitled to be paid for his reasonably rendered legal services.

An additional res judicata case in the family law setting is *Lane v. Kalcheim*.[15] There, the plaintiff sued her divorce attorney for allegedly failing to prove up an oral settlement agreement and for negligent conduct in connection with an alleged antenuptial agreement. After the claims relating to the settlement agreement were dismissed with prejudice, the plaintiff voluntarily dismissed the remaining allegations.

Lawyers would be wise to try to ensure that, whenever possible, court orders reflect any findings the court made with respect to their services, conduct, or fees.

The plaintiff then refiled a complaint based solely on the antenuptial claims, and the defendant alleged that the new complaint was barred by the final order dismissing the settlement claims. The court agreed and dismissed the new complaint based on res judicata.[16] This case highlights the dangers of voluntarily dismissing a case once a court has dismissed certain counts with prejudice.

Class actions

The application of res judicata to claims against class action lawyers was recently addressed in *Langone v. Schad, Diamond and Shedden, P.C.*[17] Courts approving class action settlements (like bankruptcy and divorce courts) must scrutinize fee petitions.

In *Langone*, after the trial court made a final fee award to class counsel, one of the lawyers representing the class sued co-counsel for breach of contract alleging that he (the plaintiff) did not receive his *pro rata* share of the attorneys' fee award. This breach of contract action was dismissed on res judicata grounds. The court found that it was equitable to bar the breach of contract action because the issue of the plaintiff's entitlement to a *pro rata* share of the attorneys' fee award was raised in front of the trial court and rejected by that trial court.

While recognizing the apparent harshness of the ruling, the court found that applying res judicata was equitable because the plaintiff failed to properly present his fee petition to the trial court prior to the entry of the fee award.[18]

Courts outside of Illinois have also held that the entry of fee awards in class action litigation precludes subsequent legal malpractice actions against class counsel. Most recently in *Wyly v. Weiss*, the U.S. Court of Appeals for the Second Circuit explained that when "the parties had a full and fair opportunity to litigate the reasonableness of counsel's representation, a district court's award of 'fair and reasonable' attorneys' fees precludes a subsequent action for legal malpractice for counsel's advocating the settlement."[19]

The second circuit is not alone in reaching this conclusion. For example, the U.S. Court of Appeals for the Sixth Circuit in *Laskey v. International Union* dismissed a legal malpractice claim arising out of a class action lawsuit. The court asserted that the plaintiff's claim was collaterally estopped because "a finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable, which in turn was essential to approving the settlement."[20]

Judgments for attorneys' fees

The elements of res judicata can also result if an attorney is required to bring an action to recover fees from its client. This is exactly what happened in *Kasny v. Coonen & Roth, Ltd.*[21] After a client refused to pay, his attorney filed a claim in small claims court seeking less than $5,000 in fees. The client never appeared, and the court entered a default judgment for the attorney. The client subsequently sued his lawyer for legal malpractice.

The trial court dismissed plaintiff's complaint as barred by the earlier default judgment. The appellate court, however, reversed the dismissal even though it found that all of the elements of res judicata were present. The court con-

12. *See, e.g., In re Marriage of Olbrecht*, 232 Ill. App. 3d 358, 365 (1st Dist. 1992).
13. *Bennett v. Gordon*, 282 Ill. App. 3d 378, 385 (1st Dist. 1996).
14. *Wilson v. M.G. Gulo & Associates, Inc.*, 294 Ill. App. 3d 897, 902 (3d Dist. 1998).
15. *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 329-36 (1st Dist. 2009).
16. *Id.* (citing *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008)).
17. *Langone v. Schad, Diamond and Shedden, P.C.*, 406 Ill. App. 3d 820, 832 (1st Dist. 2010).
18. *Id.* at 835.
19. *Wyly v. Weiss*, 697 F.3d 131, 144 (2d Cir. 2012).
20. *Laskey v. International Union*, 638 F.2d 954, 957 (6th Cir. 1981).
21. *Kasny v. Coonen & Roth, Ltd.*, 395 Ill. App. 3d 870 (2d Dist. 2009).

cluded that the plaintiff had alleged in his complaint that he could not have discovered that he had a malpractice claim against his attorney prior to the entry of the default judgment. The court also questioned whether the doctrine should apply to small claims court judgments, since small claims are litigated expeditiously without the same procedural rights of other courts.

The *Kasny* case illustrates one of the key factual disputes that could preclude a dismissal of a legal malpractice claim on res judicata grounds. When the malpractice is not expressly raised, the attorney may have to show that the plaintiff knew or should have known of the potential claim at the time the relevant final order was entered.

Criminal cases

The res judicata defense is also available when criminal defense lawyers are sued by their clients. In this situation, the defense would not arise out of the judicial approval of a fee petition, but instead out of a claim of ineffective assistance of counsel.

While no Illinois cases directly address this issue, the denial of a criminal defendant's ineffective assistance of counsel claim should be a complete bar to a subsequent malpractice action when the standard of care for legal malpractice claims is equivalent to or lower than the standard of care for ineffective assistance of counsel claims.[22] In these situations, collateral estoppel would probably apply because a subsequent finding that the attorney had been negligent would likely impair or nullify the earlier finding that the attorney provided effective assistance of counsel.

The reverse, however, is not necessarily true. After a criminal defendant prevails on an ineffective assistance of counsel claim, collateral estoppel will not necessarily bar his attorney from disputing negligence in a subsequent legal malpractice claim.[23] Not only could the negligence standard of care be different than the standard of care for ineffective assistance of counsel, but courts have reasoned that the incentives to litigate civil and criminal matters are materially different.[24] As explained by the Supreme Court of Minnesota in *Noske v. Friedberg*, an ineffective assistance of counsel claim focuses on the fairness of the trial while a legal malpractice claim focuses on the conduct of the criminal defense lawyer.[25]

Thus, it is theoretically possible for a criminal defendant to have received ineffective assistance of counsel even though his lawyer did not violate the applicable standard of care. For all of these reasons, it has been much harder for criminal malpractice plaintiffs to preclude their attorneys from disputing negligence than it has been for criminal lawyers to preclude their former clients from re-litigating the same issue.

Agreed dismissal orders

Another related issue that arises frequently is the filing of a second suit against a defendant who settled an earlier action. This issue is slightly beyond the scope of this article because it applies to all subsequent litigation and not just to legal malpractice actions. Counsel should be aware that Illinois courts, as the court observed in *Jackson v. Callan Publishing, Inc.*, are split on whether an agreed dismissal order with prejudice can operate as a bar to a subsequent lawsuit.[26]

On the one hand, some courts have refused to apply res judicata in this situation, concluding that it is inappropriate to do so because the dismissal order is only a "recordation of the agreement between the parties" and is not a "judicial determination of the parties' rights."[27] On the other hand, other courts have held that dismissal orders entered pursuant to settlement agreements are "deemed to be as conclusive of rights of parties as if the matter had proceeded to trial and been resolved by final judgment."[28]

In light of the conflicting case law on this issue, lawyers should explain to their clients that the agreed dismissal order might not preclude a subsequent lawsuit. If a client wants to eliminate the risk of a successive suit, it should require a full release in connection with the agreed dismissal order. A specific release is particularly beneficial because "courts have been willing to bar additional claims failing within the scope of the [specific] release that do not explicitly appear in the release."[29]

For example, in *Goodman v. Hanson*, the court held that it did not have to determine whether the plaintiff had contemplated the claims when it executed the specific release because that release unambiguously and specifically released claims relating to the relevant subject-matter.[30] Additionally, the lawyer should include, when appropriate and accurate, a statement in the dismissal order that the court has either reviewed the terms of the settlement agreement or that the dismissal order is deemed to be a final judicial determination of the parties' rights. Such language could provide a basis for a subsequent court to find that the case is barred by the earlier agreed dismissal order.

Conclusion: document judicial findings

Litigation malpractice cases do not operate on a clean slate. The pleadings, motions, discovery, and orders from the underlying matter must be reviewed closely to determine not only the merits of the negligence claim but also whether any affirmative defenses apply. Despite their limitations, res judicata and collateral estoppel are potentially powerful defenses because they protect not only the parties to the underlying litigation but, in the right circumstances, the lawyers representing those parties. As this article demonstrates, when a court expressly or implicitly finds that the lawyers' services were adequate, that finding could bar any subsequent legal malpractice claims.

In light of the preclusive effect that these findings and orders can have on future disputes, lawyers would be wise to ensure that, whenever possible, court orders reflect any findings the court made with respect to their services, conduct, or fees. By properly documenting these judicial findings, attorneys will be positioned to obtain their benefit if they find themselves in the unfortunate position of having to defend against a legal malpractice claim. ■

22. *Hinton v. Rudasill*, 624 F. Supp. 2d 48, 52 (D.D.C. 2009).
23. *Charlotten v. Heid*, Case No. 1:09-cv-0891 (LEK/RFT), 2011 WL 3423826, at *14 (N.D.N.Y. Aug. 4, 2011).
24. *Id.*; *People v. Trakhtenberg*, 826 N.W.2d 136, 141-42 (Sup. Ct. Mich. 2012).
25. *Noske v. Friedberg*, 670 N.W.2d 740, 746 (Sup. Ct. Minn. 2003).
26. *Jackson v. Callan Publishing, Inc.*, 356 Ill. App. 3d 326, 340 (1st Dist. 2005).
27. *See Goodman v. Hanson*, 408 Ill. App. 3d 285, 300 (1st Dist. 2011) (quoting *Kandalepas v. Economou*, 269 Ill. App. 3d 245, 252 (1st Dist. 1994)).
28. *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 896 (4th Dist. 1999); *accord Fox v. Will County*, No. 04 C 7309, 2012 WL 2129393, at *3 (N.D. Ill. June 8, 2012).
29. *Goodman*, 408 Ill. App. 3d at 293.
30. *Id.* at 298.