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RECOVERY OF "LOST PUNITIVE DAMAGES" AS "COMPENSATORY DAMAGES" IN LEGAL MALPRACTICE ACTIONS: TRANSFERENCE OF LIABILITY OR TRANSFORMATION OF CHARACTER?

CHARLES MARSHALL THATCHER†

INTRODUCTION

It has been almost a decade since the Supreme Court of South Dakota held in *Haberer v. Rice*[1] that a client in a legal malpractice action may be able to recover "lost punitive damages" as "compensatory damages." The plaintiff-client may thus recover compensatory damages consisting in part of any punitive damages the client would have collected from the defendant in the underlying action but for the failure of the lawyer to exercise ordinary professional skill in prosecuting that action on the client's behalf.[2] The court based its holding on "[t]he general rule that 'the measure of damages [in a legal malpractice action] is the value of the lost claim,'"[3] and the holding was consistent with a unanimous, though sparse, case law at the time.[4] Beginning in 1996,[5] a split of judicial authority has arisen regarding "whether plaintiffs in a legal malpractice action may recover as compensatory damages the punitive damages they allegedly lost due to the negligence of their attorneys in the underlying litigation (lost punitive damages)."[6]

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1. 511 N.W. 2d 279 (S.D. 1994).

2. *Id.* at 286.

3. Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP, 69 P.3d 965, 973, 135 Cal. Rptr. 2d 46, 56 (Cal. 2003).

4. Merenda v. Superior Court, 4 Cal Rptr. 2d 87 (3d Dist. 1992), *disapproved in Lieff, Cabraser, Heimann & Bernstein, LLP*, 69 P.3d at 973, 135 Cal. Rptr. 2d at 56; Elliott v. Videan, 791 P.2d 639 (Ariz. Ct. App. 1990); Patterson & Wallace v. Frazer, 93 S.W. 146 (Tex. Civ. App. 1906), *rev'd on other grounds*, 94 S.W. 324 (Tex. 1906). *Cf.* Scognamillo v. Olsen, 795 P.2d 1357 (Colo. Ct. App. 1990) (holding that client in legal malpractice action may be able to recover from lawyer punitive damages client had to pay as defendant in underlying action because of lawyer's negligence); Hunt v. Dresie, 740 P.2d 1046 (Kan. 1987) (same).

5. Cappetta v. Lippman, 913 F. Supp. 302 (S.D.N.Y. 1996).

6. *Ferguson*, 69 P.3d at 966, 135 Cal. Rptr. 2d at 48. *Compare* O'Connor Agency, Inc. v. Brodkin, 120 Cal. Rptr. 2d 336 (Cal. Ct. App. 2002) (holding that lost punitive damages are recoverable as compensatory damages in legal malpractice action), Jacobsen v. Oliver, 201 F. Supp. 2d 93 (D.D.C. 2002) (same), *and* Ingram v. Hall, Roach, Johnston, Fisher & Bollman, 1996 WL 54206 (N.D. Ill. 1996) (same), *with Ferguson*, 69 P.3d 965, 135 Cal. Rptr. 2d 46 (holding that lost punitive damages are not recoverable as compensatory damages in legal malpractice action), *affirming* Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP, 115 Cal. Rptr. 2d 342 (Cal. Ct. App. 2002), Piscitelli v. Friedenberg, 105 Cal. Rptr. 2d 88 (Cal. Ct. App. 2001) (same), Summerville v. Lipsig, 704 N.Y.S.2d 598 (2000) (same), and *Cappetta*, 913 F. Supp. 302 (S.D.N.Y. 1996) (same).

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The determinative inquiry in resolving that question appears to be whether *liability for punitive damages* should be *transferred* from the defendant-tortfeasor in the underlying action to the defendant-lawyer in the malpractice action,[7] or whether any punitive damages the client would have collected from the tortfeasor in the underlying action but for the attorney's negligence are instead *transformed* into a *component* of the *compensatory damages* the client may be entitled to recover in the lawyer malpractice action.[8] Courts that have refused to impose liability for lost punitive damages upon lawyers in legal malpractice actions have held on grounds of public policy that it is unfair to transfer a liability exposure for punitive damages from the original tortfeasor, whose conduct was reprehensible, onto the plaintiff's lawyer, whose conduct was merely negligent.[9] One of those courts concluded that it is "illogical"[10] to hold an attorney liable for punitive damages the client would have collected from the defendant in the underlying action. The most commonly accepted purposes of awarding punitive damages are to punish a wrongdoer for having engaged in some aggravated form of misconduct and to deter that wrongdoer and others from engaging in such misconduct in the future.[11] Imposing vicarious or surrogate liability for lost punitive damages upon a negligent lawyer will neither punish the defendant in the underlying action for its outrageous misconduct nor deter that defendant and others from engaging in similar misconduct.[12] It is therefore improper to re-label,[13] re-style,[14] or re-characterize[15] "lost punitive damages" as part of a plaintiff-client's "compensatory damages" in a legal malpractice action. By contrast, courts that have allowed recovery of lost

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7. *Ferguson*, 69 P.2d at 135, Cal. Rptr. at 52-53 (holding that it is unjust to impose liability on a negligent lawyer for punitive damages that would have been recovered in the underlying action from a defendant whose wrongful conduct was intentional and malicious); *Piscitelli*, 105 Cal. Rptr. at 108 ("[I]nconsistent with the goal of punishment to *transfer* the punishment to an actor innocent of the conduct necessary to justify an award of punitive damages.") (emphasis added); *Summerville*, 704 N.Y.S.2d at 598; *Cappetta*, 913 F. Supp. at 306.

8. *Jacobsen*, 201 F. Supp. 2d at 101; *Ingram*, 1996 WL 54206, at *2-*3; Haberer v. Rice, 511 N.W.2d 279, 286 (S.D.1994); *Merenda*, 4 Cal. Rptr. 2d at 93; *Elliot*, 791 P.2d at 645-646; *Patterson & Wallace*, 93 S.W. at 148.

9. *Ferguson*, 69 P.3d at 970, 135 Cal. Rptr. 2d at 53 ("[A]n award of lost punitive damages bears no relation to the gravity of the attorney's misconduct."); *Piscitelli*, 105 Cal. Rptr. 2d at 108 ("We cannot, as a matter of policy, justify imposing an award intended to punish a wrongful actor–relabeled as compensatory–upon a defendant who did not act oppressively, maliciously, or fraudulently.").

10. *Cappetta*, 913 F. Supp. at 306.

11. *See, e.g.*, S.D.C.L § 21-3-2 (2003) ("In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice . . . the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."); RESTATEMENT (SECOND) OF TORTS § 908(1) (1977) ("Punitive damages are damages . . . awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.").

12. *See, e.g.*, *Ferguson*, 69 P.3d at 970, 135 Cal. Rptr. 2d at 53 ("Imposing liability for lost punitive damages on negligent attorneys would . . . neither punish the culpable tortfeasor . . . nor deter that tortfeasor and others from committing similar wrongful acts in the future.").

13. *Piscitelli*, 105 Cal. Rptr. 2d at 108.

14. *Id.* at 94 ("[I]n legal malpractice actions, permitting a jury to impose punitive damages on a negligent defendant by restyling them as compensatory 'lost punitive damages' is unjust and contrary to public policy.").

15. Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP, 115 Cal. Rptr. 2d 342, 352; *Piscitelli*, 105 Cal. Rptr. 2d at 107.

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punitive damages as compensatory damages in legal malpractice actions have reasoned that recovery for such a loss may be required in order to make the client whole–to compensate the client fully for the loss of a benefit the client would have realized if the lawyer had exercised ordinary professional skill in prosecuting the underlying claim.[16] In the context of the legal malpractice action, "lost punitive damages" *become* a *part* of the client's "compensatory damages" and are no longer properly denominated "punitive damages."[17] "The measure of damages in a legal malpractice action involving an attorney's failure to bring a claim is 'the value of the claim lost.'"[18] Scholarly commentary supports the view that if the client would have collected punitive as well as compensatory damages from the defendant in the underlying action but for the negligence of the client's former lawyer, then what had been punitive damages becomes part of the "loss" the client suffered as a result of the lawyer's negligence and are recoverable as a portion of the client's compensatory (or "direct") damages in the legal malpractice action.[19]

Rough equality in the persuasiveness of the competing arguments on the

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16. Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in drafting the Restatements*, 26 HOFSTRA L. REV. 641, 653 (1998) ("[A]s a result of the lawyer's negligence, the punitive damages recoverable from the original tortfeasor become compensatory damages recoverable from the lawyer."); Jacobsen v. Oliver, 201 F. Supp. 2d 93, 101 (D.C. 2002); Ingram v. Hall, Roach, Johnston, Fisher & Bollman, 1996 WL 54206, at *2 (awarding lost punitive damages may be necessary "in order to return the plaintiff to the same position in which he would have been had the malpractice not occurred"); O'Connor Agency, Inc. v. Brodkin, 120 Cal. Rptr. 2d 336, 341 (Cal. Ct. App. 2002) (pointing out that lost punitive damages "are . . . an element of the compensatory award necessary to make the plaintiff whole").

17. *Cf.* Hunt v. Dresie, 740 P.2d 1046, 1057 (Kan. 1987) (reasoning that punitive damages awarded in the underlying action "are no longer properly called punitive damages" in the client's legal malpractice action).

18. *Piscitelli*, 105 Cal. Rptr. 2d. at 106.

19. *See, e.g.*, 2 DAN B. DOBBS, LAW OF REMEDIES § 6.11, at 243 (Practitioner Treatise Series, 2d ed. 1993) (suggesting that "if [punitive damages] were recoverable in the first action they would also be recoverable against the attorney" in the malpractice action); 2 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 17:8 n. 1 (2d ed. 2000) ("*Of course*, in a legal malpractice action, punitive damages are recoverable as an element of compensatory damages if, as a result of the attorney's negligence, the plaintiff . . . is prevented from recovering an award against a defendant in the underlying action.") (emphasis added); 3 RICHARD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 20.7, at 136-137 (5th ed. 2000) ("If the client should have recovered exemplary damages in the underlying action but for the attorney's wrongful conduct, then such a loss should be recoverable in the malpractice action as direct damages."); DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 4.2, at 58 (1980) ("[T]he attorney is liable to the point of placing the client in the position that the client would have been [in] but for the negligence of the attorney. Depending on the circumstances of the case, the attorney may have to make up the difference between what the client recovered as compared with what the client should have recovered."); 7 AM. JUR. 2D *Attorneys at Law* § 238 (1997) ("[C]lient may recover as compensatory damages in an action for legal malpractice the amount of punitive damages he or she can prove would have been obtained from the defendant in the underlying action."); Freedman, *supra* note 16, at 653 ("[T]he purpose of compensatory damages . . . is to give the client what she lost because of the lawyer's negligence . . . [including] the client's loss of punitive damages."). *But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. h (2000).

> A few decisions allow a plaintiff to recover from a lawyer punitive damages that would have been recovered from the defendant in an underlying action but for the lawyer's misconduct. However, such recovery is not required by the punitive and deterrent purposes of punitive damages. Collecting punitive damages from the lawyer will neither punish nor deter the original tortfeasor and calls for a speculative reconstruction of a hypothetical jury's reaction.

Id.

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question is revealed by the split of authority which the Supreme Court of California recently resolved[20] between districts[21] and between the first and third divisions within the fourth district of the California Court of Appeal.[22] In *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP*,[23] the California Supreme Court recently held that lost punitive damages are not recoverable as compensatory damages in legal malpractice actions on grounds of public policy.[24]

The California Supreme Court in *Ferguson* could have restricted the scope of its holding to apply only when plaintiffs in legal malpractice actions seek to recover punitive damages they allegedly lost as a result of their former lawyers' agreement to dismiss punitive damages claims against a defendant in order to settle an underlying *class action*.[25] A majority of the court was determined to announce a broader rule, however, under which lost punitive damages are not recoverable as compensatory damages in a legal malpractice action based upon a defendant-lawyer's mere negligence in prosecuting *any kind of an underlying action* against a former defendant on behalf of the plaintiff-client.[26] Most of the arguments for and against permitting recovery of lost punitive damages as compensatory damages in legal malpractice actions have been articulated in the case law during the past twelve years. In particular, the majority opinion of Justice Brown in *Ferguson* states the public policy considerations which militate against allowing recovery of lost punitive damages, whereas the concurring and dissenting opinion of Justice Kennard in *Ferguson* states the competing considerations. Deciding which result seems more appropriate requires analysis of the competing arguments articulated by the authors of those two opinions.

Before undertaking that analysis, however, several preliminary matters must be addressed. In South Dakota[27] as generally elsewhere,[28] the plaintiff

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20. Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP, 69 P.3d 965, 974, 135 Cal. Rptr. 2d 46, 56 (Cal. 2003) (disapproving Merenda v. Superior Court and its progeny in the court of appeals).

21. *Compare* Ferguson v. Lieff, Cabraser, Heimann & Bernstein, 115 Cal. Rptr. 2d 342 (Cal. Ct. App. 2002) (holding that lost punitive damages are not recoverable in legal malpractice actions), *petition for rehearing granted*, 119 Cal. Rptr. 2d 854 (Cal. Ct. App. 2002), *with* Merenda v. Superior Court, 4 Cal Rptr. 2d 87 (Cal. Ct. App. 1992) (holding that lost punitive damages are recoverable in legal malpractice actions).

22. *Compare* O'Connor Agency, Inc. v. Brodkin, 120 Cal. Rptr. 2d 336 (Cal. Ct. App. 2002) (holding that lost punitive damages are recoverable in legal malpractice action), *with Piscitelli*, 105 Cal. Rptr. 2d. 88.

23. 69 P.2d 965, 135 Cal. Rptr. 2d 46 (2003).

24. *Id.* at 970, 35 Cal. Rptr. at 52.

25. *Ferguson*, 69 P.3d at 972, 135 Cal. Rptr. 2d at 55. *See id.* at 975, 135 Cal. Rptr. 2d at 58 (Kennard, J., concurring and dissenting).

26. The court distinguished cases in which "the attorneys, *themselves*, are guilty of 'oppression, fraud, or malice' . . . but [in which] the measure of punitive damages would depend on the gravity of the attorneys' misconduct and their wealth." *Id.* at 974 n.3, 135 Cal. Rptr. 2d at 57 n.3.

27. Haberer v. Rice, 511 N.W.2d 279, 284 (S.D. 1994).

28. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 (2000) ("[A] lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care . . . if the lawyer fails to exercise care . . . and if that failure is a legal cause of injury."); 5 MALLEN & SMITH, *supra* note 19, § 33.6 ("In stating a cause of action for negligence, the plaintiff must plead facts showing: 1. the duty of the professional to exercise ordinary skill and knowledge; 2. a breach of that duty; 3. the causal connection between the negligent conduct and the resulting injury; and 4. actual

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bringing a tort action for legal malpractice must prove:

> 1. the existence of an attorney-client relationship giving rise to a duty; 2. that the attorney, either by an act or a failure to act, violated or breached that duty; 3. that the attorney's breach of duty proximately caused injury to the client; and 4. that the client sustained actual injury, loss or damage.[29]

In attempting to prove that an attorney's breach of duty was the proximate or "legal" cause of injury to a client,[30]

> a client must show that but for his attorney's negligence he would have been successful in the original litigation. "Accordingly, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding." The manner in which the plaintiff can establish what should have transpired in the underlying action is to recreate, i.e. litigate, an action which was never tried. This procedure of recreating the underlying action is known as a suit within a suit, a trial within a trial, an action within an action, [or] a case within a case . . . . Thus, the plaintiff in a legal malpractice case has not only to prove the four elements basic to negligence cases, but may be asked to prove [four] additional [things]: 1) that the underlying claim was valid, 2) that it would have resulted in a favorable judgment had it not been for the attorney's error, . . . 3) the amount of the judgment[, and 4)] that the judgment was collectible.[31]

The narrow question addressed in this article arises only after the plaintiff-client has established that the defendant attorney breached the duty "to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated . . . ,"[32] and is attempting to establish that the breach of duty was the legal cause of injury to the client.

> [T]he plaintiff can recover against the defendant-attorney only when it can be shown that the injury would not have occurred "but for" the negligence of the lawyer. Thus, the plaintiff must establish that the total or partial loss would not have occurred had it not been for some act or omission on the part of the attorney. In other words, the plaintiff must show that "but

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loss or damage."); MEISELMAN, *supra* note 19, § 3:1 ("In a legal malpractice case, the plaintiff must prove: 1. the existence of an attorney-client relationship giving rise to a duty; 2. that the attorney either by an act or a failure to act violated or breached that duty; 3. that the attorney's breach of duty proximately caused injury to the client; and 4. that the plaintiff sustained actual injury, loss or damage."); 7 AM. JUR. 2D *Attorneys at Law* § 212 ("An attorney who fails in his or her duty, causing actual loss to the client, is liable for the damages sustained.").

29. *Haberer*, 511 N.W.2d at 284 (quoting MEISELMAN, *supra* note 28).

30. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 (noting that a lawyer is liable for professional negligence "only if the lawyer's breach of a duty of care . . . was a legal cause of injury, as determined under generally applicable principles of causation and damages"); RESTATEMENT (SECOND) OF TORTS § 430 ("In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm.").

31. *Haberer*, 511 N.W.2d at 285 (quoting Basic Food Industries, Inc. v. Grant, 310 N.W.2d 26 (Mich. App. 1981) (citing W.E. Shipley, Annotation, *Attorney's Liability for Negligence in Preparing or Conducting Litigation*, 45 A.L.R.2D 5, § 2 (1956)); MEISELMAN, *supra* note 19, § 3.5; MALLEN & SMITH, *supra* note 19, §§ 27.1 and 27.7).

32. James L. Rigelhaupt, Jr., Annotation, *Legal Malpractice by Permitting Statutory Time Limitation to Run Against Client's Claim*, 90 A.L.R.3D 293, § 2[a], at 297 (1979).

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for" the negligence of the lawyer, the client's [underlying] cause of action . . . would have been successful.[33]

Suppose, for example, that a client retains a lawyer to prosecute a claim the client has against a defendant whose misconduct was so outrageous that the total anticipated value of the claim consists of both a compensatory and a punitive damages component. Suppose further that the claim is lost because the lawyer negligently failed to file it before the statutory period of limitations had expired. The client subsequently brings a legal malpractice action against the client's former lawyer. The client carries the considerable burden of establishing that but for the lawyer's negligent failure to prosecute the earlier action in a timely fashion, the client would have been awarded and would have collected from the defendant in that underlying action $100,000 in compensatory damages and $400,000 in punitive damages. Should the lawyer's liability for compensatory damages in the legal malpractice action be restricted to $100,000–the compensatory damages the plaintiff would have recovered from the defendant in the underlying action had the lawyer prosecuted that claim with ordinary professional skill–or should the client in the malpractice action be entitled to recover compensatory damages in the legal malpractice action totaling $500,000–$100,000 in compensatory damages and $400,000 in punitive damages the plaintiff would have recovered from the defendant in the underlying action had the lawyer not been negligent in prosecuting that claim?

The recent split of judicial authority on the question of whether lost punitive damages are recoverable as compensatory damages in legal malpractice actions is based upon conflicting opinions regarding whether the lawyer's breach of duty ought to be regarded by the court as the "legal" or "proximate" cause of injury to the client.[34] The answer to that question in turn depends primarily upon whether any such award is consistent with the purposes of awarding punitive and compensatory damages, as well as whether recovery of lost punitive damages is necessary in order to compensate the client fully for the harm, injury, loss, or detriment the client suffered as a consequence of the lawyer's failure to prosecute the underlying action with reasonable professional skill.[35]

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33. MEISELMAN, *supra* note 19, § 3:1, at 40; *Haberer*, 511 N.W.2d at 284.

34. *Compare* Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP, 69 P.3d 965, 970, 135 Cal. Rptr. 2d 46, 52 (attorney's negligence not the proximate cause of lost punitive damages claim), *and* Piscitelli v. Friedenberg, 105 Cal. Rptr. 88, 108 (same), with O'Connor Agency, Inc. v. Brodking, 120 Cal. Rptr. 2d 336, 343 (Cal. Ct. App. 2002) (detriment proximately caused "includes punitive damages that would have been awarded in the underlying case absent the attorney's negligence"), and Jacobsen v. Oliver, 201 F. Supp. 2d 93, 102 (D.C. 2002) ("permitting recovery of punitive damages as compensatory damages in a legal malpractice action is consistent with this jurisdiction's law regarding damages for negligence–'[t]he normal measure of tort damages is the amount which compensates the plaintiff for all of the damages proximately caused by the defendant's negligence'").

35. *Compare Ferguson*, 69 P.3d at 970, 135 Cal. Rptr. 2d at 56 (awarding lost punitive damages not required in order fully to compensate client in legal malpractice actions), and *Piscitelli*, 105 Cal. Rptr. 2d at 108 (Cal. Ct. App. 2001) ("Punitive damages are not a part of a plaintiff's remedies for harm suffered . . . Unlike compensatory damages, punitive damages provide a windfall to a plaintiff."), with *O'Connor Agency, Inc.*, 120 Cal. Rptr. 2d at 340 ("Although punitive damages are not compensatory in the underlying case, they are compensatory in the context of a legal malpractice case–they are part of the recovery the client would have received were it not for the attorney's negligence."), and *Jacobsen*, 201 F. Supp. 2d at 101 ("[P]unitive damages recoverable from the original tortfeasor become compensatory

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A. JUDICIAL REFUSAL TO RECOGNIZE BREACH OF LAWYER'S DUTY AS A "PROXIMATE" OR "LEGAL" CAUSE OF LOST PUNITIVE DAMAGES ON GROUNDS OF PUBLIC POLICY

In refusing to allow a plaintiff-client to recover lost punitive damages from a defendant-lawyer in legal malpractice actions, a majority of the Supreme Court of California held on grounds of public policy that the lawyer's negligence should not be regarded as a "proximate" or "legal" cause of the client's loss of the punitive damages award in the underlying action.[36] Even if the plaintiff could convince the trier of fact that the lawyer's negligence was a *cause in fact* of the client's failure to collect punitive damages from the defendant in the underlying action,[37] the majority opinion identified various public policy considerations in support of the holding that the lawyer's negligence was not a *proximate* or *legal* cause of the lost punitive damages claim.[38]

> [T]he law has imposed additional "limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy. [P]roximate cause 'is ordinarily concerned . . . with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.'"[39]

Although it might be more appropriate for the legislature rather than the judiciary to afford dispensation to a tortfeasor by imposing such a limitation of liability,[40] courts undeniably have the power in developing the common law to impose such limitations on grounds of public policy. The question is whether a court *should* create an *exception* to a common law or statutory rule under which actors are held liable for provable and foreseeable losses they actually cause others to suffer as a result of the actor's tortious conduct. The majority opinion in *Ferguson* states five public policy considerations supporting the conclusion that a lawyer's failure to exercise ordinary professional skill in prosecuting a client's claim is not fairly regarded as a proximate or legal cause of the loss of punitive damages the client would have collected from the defendant in the underlying action but for the lawyer's lapse of care.[41]

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damages recoverable from the lawyer.") (quoting *In Re* Related Asbestos Cases, 566 F. Supp. 818, 822 (N.D. Cal. 1983)).

36. *Ferguson*, 69 P.3d at 969, 135 Cal. Rptr. 2d at 52.

37. *Id.*, 135 Cal. Rptr. 2d at 51.

38. *Id.*, 135 Cal. Rptr. 2d at 52.

39. *Id.* (citations omitted). *But cf.* RESTATEMENT (SECOND) OF TORTS §§ 431 ("[A]ctor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.") and 435 cmt. b ("If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor's negligence.").

40. *O'Connor Agency, Inc.*, 120 Cal. Rptr. 2d at 339 ("[A]ny exception to [statutes prescribing measure of damages due an injured plaintiff] should be established by the legislature, not the courts."). *Cf.* RESTATEMENT (SECOND) OF TORTS § 433 cmt. f (suggesting that common law liability may be limited *by statute*).

41. *Ferguson*, 69 P.3d at 970-74, 135 Cal. Rptr. 2d at 52-55.

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1. Holding a Negligent Lawyer Liable for "Lost Punitive Damages" is Inconsistent with the Purposes of Awarding Punitive Damages

Writing for a majority of the California Supreme Court, Justice Brown reasoned that imposing liability upon a negligent lawyer for lost punitive damages would be inconsistent with the purposes of awarding punitive damages.[42] Those purposes are "to punish [a person] for his outrageous conduct and to deter him and others like him from similar conduct in the future."[43] Even assuming the plaintiff-client in the malpractice action can establish that but for the defendant-attorney's failure to exercise ordinary professional skill, the client would have collected punitive damages in a provable amount from the defendant in the underlying action, it is unfair to transfer that liability onto the defendant-lawyer, whose conduct was merely negligent.[44]

The proposition that holding a negligent lawyer liable for lost punitive damages would not further the punitive and deterrent purposes of awarding punitive damages seems almost self-evident. It cannot be gainsaid that a client's recovery of lost punitive damages from the lawyer in a malpractice action will not punish or exact retribution from the defendant in the underlying action, whose outrageous conduct would have resulted in an award of punitive damages if the plaintiff's lawyer had exercised professional skill in prosecuting that action.[45] It is at least arguable, however, that the client's recovery of lost punitive damages from the lawyer in the malpractice action can be expected to discourage both the defendant in the underlying action and others from engaging in similar egregious misconduct. Natural curiosity can be expected to impel a defendant that is fortunate enough to have avoided liability for punitive damages because of the negligence of plaintiff's counsel to learn about any award of those lost punitive damages in a subsequent malpractice action brought against that counsel by the original defendant's former adversary. True, any deterrent effect that imposing liability upon a lawyer for "lost punitive damages" would have on the original defendant will be "minimal," to say the least, in comparison with the deterrent effect that imposition of liability for punitive damages on that defendant would have had. Nevertheless, an award of lost punitive damages in

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42. *Id.* at 970, 135 Cal. Rptr. 2d at 53 ("[A]llowing recovery of lost punitive damages would defeat the very purpose behind such damages."); Ferguson v. Lieff, Cabraser, Heimann & Bernstein, 115 Cal. Rptr. 342, 352 (Cal. Ct. App. 2002) ("To relabel as compensatory an award intended to punish a wrongdoer guilty of oppression, malice or fraud causes an innocent defendant to suffer that wrongdoer's punishment."); Piscitelli v. Friedenberg, 105 Cal. Rptr. 88, 108 (Cal. Ct. App. 2001) ("We cannot . . . justify imposing an award intended to punish a wrongful actor . . . upon a defendant who did not act oppressively, maliciously, or fraudulently."); Summerville v. Lipsig, 704 N.Y.S.2d 598, 598 (N.Y. 2000) ("Recognition of plaintiff's claim would not further the purpose of punitive damages to punish and deter."); Cappetta v. Lippman, 913 F. Supp. 302, 306 (S.D.N.Y. 1996).

43. RESTATEMENT (SECOND) OF TORTS § 908(1) (1977).

44. *Ferguson*, 69 P.3d at 970, 135 Cal. Rptr. 2d at 53 ("Making a negligent attorney liable for lost punitive damages would not serve a societal interest, because the attorney did not commit and had no control over the intentional misconduct justifying the punitive damages award.").

45. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. h (2000) (suggesting that plaintiff's recovery from a lawyer of "punitive damages that would have been recovered from the defendant in an underlying action but for the lawyer's misconduct . . . is not required by the punitive . . . [purpose] of punitive damages").

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the malpractice action can be expected to admonish the defendant in the underlying action that any repetition of the misconduct will subject the wrongdoer to a liability exposure for punitive damages which that wrongdoer should not expect to be able to evade a second time on account of the negligence of a plaintiff's counsel. This residual deterrent impact is analogous to the deterrent effect that an adverse declaratory judgment or a judgment awarding an opponent nominal damages can be expected to have upon a litigant. Moreover, an award of lost punitive damages in a legal malpractice action is likely to deter others from engaging in similar misconduct as much as would an award of punitive damages against the defendant in the underlying action.

Although the "definitive" purposes of awarding punitive damages are to punish the wrongdoer for its reprehensible misconduct and to deter the wrongdoer and others from similar misconduct in the future,[46] an award of punitive damages may have other effects as well.

> [One] non-punitive effect of [such] an extracompensatory award is that it will help finance the litigation. Under the general American rule, the prevailing plaintiff will not ordinarily recover attorney fees or most other litigation expense. A recovery of punitive damages may serve as a reservoir from which the plaintiff can pay attorney fees and litigation costs and in this sense may be compensatory.[47]

Courts that have refused to award lost punitive damages in lawyer malpractice actions insist that punitive damages awards serve no compensatory purpose. Yet a plaintiff-client who recovers lost punitive damages acquires a fund from which the client can pay lawyer fees and other expenses incurred in litigating the legal malpractice action and can thereby obtain full (or at least more) compensation for the harm caused by the defendant-attorney's negligence. As Professor Dobbs acknowledges in his treatise on remedies, to the extent that "punitive damages are intended to provide for attorney fees of the plaintiff, . . . [an] . . . award [of lost punitive damages in a legal malpractice action] might be justified in principle."[48] Dobbs indicates that an award of punitive damages may have another non-punitive effect:

> [T]he hope of punitive damages may induce a contingent fee lawyer to take the case . . . and to devote adequate time to it. This might be especially important in cases involving only small compensatory damages, the recovery of which would provide an insufficient percentage fee and also in cases which might bring a large damage recovery but which would entail legal work worth even more.[49]

Just as the prospect that a client might be able to recover punitive damages from the defendant in the underlying action might have helped induce the lawyer to take the case, so the prospect that a client might be able to recover lost

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46. RESTATEMENT (SECOND) OF TORTS § 908(1) (1977).

47. 1 DOBBS, *supra* note 19, § 3.11(3), at 482.

48. 2 DOBBS, *supra* note 19, § 6.11, at 243 n. 31 (adding, however, that "it would still be strange to measure the award against the attorney by the malice of the [defendant in the underlying action] who is not in the malpractice action at all").

49. 1 DOBBS, *supra* note 19, § 3.11(3), at 482.

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punitive damages from the defendant in a legal malpractice action might help induce another lawyer to take that case. "Moreover, the possibility of an award of [punitive damages] may . . . induce the *victim*, [who] is otherwise unwilling to proceed because of the attendant trouble and expense, to take action against the wrongdoer."[50] Considering the difficulty,[51] expense, and considerable risk of failure in prosecuting a claim for legal malpractice, both the client and the lawyer who contemplate prosecuting that claim may need the incentive provided by the prospect of recovering lost punitive damages.

A majority of the California Supreme Court in *Ferguson* relied upon *PPG Industries, Inc. v. Transamerica Ins. Co.*[52] in holding that it is unfair to impose liability for punitive damages upon a defendant whose conduct was merely negligent or was at least less culpable than was the conduct of the original wrongdoer.[53] In that case, the California Supreme Court held that an insurer was not liable for punitive damages assessed against its insured even though the insured would not have been held liable for those damages had it not been for the insurer's negligent failure or bad faith refusal to settle the underlying claim against the insured.[54] The court based its conclusion upon

> three policy considerations [which] strongly militate against allowing the insured, the morally culpable wrongdoer in the [underlying] lawsuit [a third party had brought against the insured], to shift to its insurance company the obligation to pay punitive damages resulting form the insured's egregious misconduct . . . . First, allowing the insured to shift to its insurer [the insured's] "responsibility to pay the punitive damages in the third party action would violate the public policy against reducing or offsetting liability for intentional wrongdoing by the negligence of another." Second, allowing the insurer to assume liability for punitive damages premised on the egregious conduct of its insured would defeat the public policies underlying these damages. Finally, requiring the insurer to pay punitive damages incurred by its insured would violate "the public policy against indemnification for punitive damages."[55]

The first and third of these policy considerations are not relevant when a client seeks to recover lost punitive damages from a negligent lawyer in a legal malpractice action. The plaintiff-client was not a wrongdoer and was not held liable for punitive damages in the underlying action; the client is not attempting to shift any responsibility the client has to pay punitive damages onto the lawyer. Nor is the plaintiff-client seeking indemnification for punitive damages the client was obliged to pay. The California Supreme Court concluded in *Ferguson*,

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50. Walker v. Sheldon, 223 N.Y.S.2d 488, 490, 179 N.E.2d 497, 498 (N.Y. 1961) (emphasis added).

51. Haberer v. Rice, 511 N.W.2d 279, 284-285 ("A client's burden of proving injury as a result of his attorney's negligence is especially difficult to meet when the attorney's conduct prevented the client from bringing his original cause of action. . . .").

52. 975 P.2d 652, 84 Cal. Rptr. 2d 455 (Cal. 1999).

53. Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP, 69 P.3d 965, 969-70, 135 Cal. Rptr. 2d 46, 52 (2003).

54. *PPG Industries, Inc.*, 975 P.2d at 658, 84 Cal. Rptr. 2d at 461.

55. *Ferguson*, 69 P.3d at 656, 135 Cal. Rptr. 2d at 52 (citations omitted); *see also PPG Industries, Inc.*, 975 P.2d at 656-58, 84 Cal. Rptr. 2d at 459-61.

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however, that the second of the policy considerations identified in *PPG Industries* also supported a refusal to allow a client to recover lost punitive damages as compensatory damages in a legal malpractice action. Any such recovery

> would defeat the very purpose behind [punitive] damages. "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." . . . Making a negligent attorney liable for lost punitive damages would not serve a societal interest, because the attorney did not commit and had no control over the intentional misconduct justifying the punitive damages award. Imposing liability for lost punitive damages on negligent attorneys would therefore neither punish the culpable tortfeasor . . . nor deter that tortfeasor and others from committing similar wrongful acts in the future.[56]

Just as an insurer that negligently fails to settle a claim against its insured should not be held liable for punitive damages awarded in an earlier third party action against the insured for the insured's egregious misconduct,[57] so a negligent lawyer should not be held liable for punitive damages a former client would have recovered in the underlying action from a defendant that engaged in egregious misconduct.[58]

The California Supreme Court's reliance upon PPG Industries appears misplaced. The situation the court confronted in PPG is materially distinguishable from cases in which a plaintiff-client seeks to recover lost punitive damages from a defendant-lawyer in a legal malpractice action.[59]

> In *PPG Industries*, the ultimate issue was whether the actual wrongdoer or its insurance company should pay an award of punitive damages. Here, the actual wrongdoer [the defendant in the underlying action] cannot be held liable for punitive damages, because of an attorney's negligence. The situations are therefore very different, and the same public policy arguments available when the actual wrongdoer can be held liable, as in *PPG Industries*, do not apply here.[60]

The plaintiff-insured in *PPG Industries* engaged in outrageous misconduct but would have avoided being held liable for punitive damages if its insurer had not failed to settle the third party claim against the insured in good faith. The plaintiff-client who seeks to recover lost punitive damages in a legal malpractice action did not engage in any misconduct whatsoever, and the client has been deprived of a sum of money the client would have collected had it not been for the lawyer's negligence.

> In a client's action against an attorney for lost punitive damages, unlike the situation in *PPG*, only one of the parties–the attorney–is blameworthy.

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56. *Ferguson*, 69 P.3d at 970, 135 Cal. Rptr. 2d at 52-53 (quoting City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-267 (1981)).

57. *PPG Industries, Inc.*, 975 P.2d at 656-57, 84 Cal. Rptr. 2d at 459-60.

58. *Ferguson*, 69 P.3d at 970, 135 Cal. Rptr. 2d at 52.

59. O'Connor Agency, Inc. v. Brodkin, 120 Cal. Rptr. 2d 336, 342 (Cal. Ct. App. 2002).

60. *Id.*

> The client is a victim twice over–a victim first of the third party's intentional tort and second of the attorney's malpractice. Such an action, unlike the lawsuit in *PPG*, does not involve a more culpable party's attempt to shift to a less culpable party a liability resulting from [the more culpable party's] own intentional wrongdoing; instead, it involves a nonculpable party's attempt to obtain full compensation from a culpable party for [a] . . . financial loss caused by the culpable party's negligence. No public policy forbids such compensation.[61]

In none of the other cases where the California courts have refused to award punitive damages against persons other than the original tortfeasor "did the defendant from whom punitive damages were sought do anything . . . to cause the plaintiff to lose a claim for punitive damages against a third party wrongdoer."[62] For example, neither a decedent's estate nor the executor of that estate are liable for punitive damages that would have been awarded against the decedent tortfeasor,[63] a rule which arguably supports the proposition that it is inappropriate to impose liability for punitive damages upon any person that did not engage in the outrageous conduct necessary to justify an award of punitive damages in the first place.[64] But, unlike the lawyer in a malpractice action, neither the estate nor its executor did anything which prevented the tort victim from recovering punitive damages from a tortfeasor. Imposing liability for lost punitive damages upon the negligent lawyer does not punish an "innocent actor;"[65] it instead makes an actor responsible for a foreseeable loss that actor negligently caused.

In addition to its conclusion that "allowing recovery of lost punitive damages would defeat the very purpose behind such damages,"[66] a majority of the California Supreme Court reasoned that

> [a]llowing recovery of lost punitive damages as compensatory damages in legal malpractice actions would also violate public policy because the amount of the award bears no relation to the gravity of the attorney's misconduct or his or her wealth. A plaintiff seeking to recover lost punitive damages from his negligent attorney is "deliberately seeking an

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61. *Ferguson*, 69 P.3d at 977, 135 Cal. Rptr. 2d at 61 (Kennard, J., concurring and dissenting).

62. Merenda v. Superior Court, 4 Cal. Rptr. 2d 87, 94-95 (Cal. Ct. App. 1992) (citing City of Salinas v. Souza & McCue Construction Co., 57 Cal. Rptr. 837, 424 P.2d 92 (Cal. Ct. App. 1992)) (governmental agency not liable for punitive damages). *See also* Evans v. Gibson, 31 P.2d 389 (Cal. 1934) (neither estate nor executors liable for punitive damages that might have been awarded against decedent tortfeasor); California State Auto. Ass'n Inter-Ins. Bureau v. Carter, 210 Cal. Rptr. 140 (Cal. Ct. App. 1985) (insurer not liable under uninsured motorist provisions of auto insurance policy for punitive damages that might have been awarded against uninsured motorist); City Products Corp. v. Globe Indemnity Co., 151 Cal. Rptr. 494 (Cal. Ct. App. 1979) (insurer not liable for punitive damages awarded against insured based on insured's conduct); Merlo v. Standard Life & Acc. Ins. Co., 130 Cal. Rptr. 416 (Cal. Ct. App. 1976) (employer liable for punitive damages based on employee's conduct only if employer authorizes or ratifies that conduct, employee is a manager, or employer recklessly employs an unfit employee); Ebaugh v. Rabkin, 99 Cal. Rptr. 706 (Cal. Ct. App. 1972) (same).

63. *See, e.g., Gibson*, 31 P.2d at 395.

64. Piscitelli v. Friedenberg, 105 Cal. Rptr. 2d 88, 108 (Cal. Ct. App. 2001).

65. *But see id.* ("[I]mposing an award intended to punish a wrongful actor . . . upon a defendant who did not act oppressively, maliciously, or fraudulently . . . simply punishes an innocent actor for another's oppressive, malicious, or fraudulent wrongdoing.").

66. *Ferguson*, 69 P.3d at 970, 135 Cal. Rptr. 2d at 52.

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> award disproportionate (or at least unrelated) to the [attorney's] ability to pay. That result . . . is contrary to the public purpose of punitive damages."[67]

The same reasoning might apply, however, in any malpractice case where the plaintiff-client seeks to recover from the defendant-lawyer high compensatory damages that do not include a punitive damages component. For example, a lawyer's negligent drafting of a contract might have caused a client to suffer a huge foreseeable loss which is also disproportionate and unrelated to the gravity of the lawyer's misconduct and the lawyer's ability to pay. That loss is nevertheless prima facie compensable in a subsequent legal malpractice action.

The California Supreme Court rejected the suggestion that awarding lost punitive damages would "indirectly further the deterrent purpose of punitive damages by encouraging attorneys 'to exercise reasonable care in investigating or defending punitive damages claims.'"[68] Exposure to liability for lost punitive damages would undoubtedly provide added incentive for the attorney to exercise professional skill in prosecuting punitive damages claims; the better the attorney's performance in prosecuting such claims, the more likely punitive damages will be awarded against the defendant in the underlying action and the more likely the deterrent purpose of punitive damages will be served. Yet because the negligent attorney is not guilty of the egregious misconduct which would have justified an award of punitive damages against the defendant in the underlying action, imposing liability upon the attorney for the client's loss of those punitive damages "necessarily frustrates the purpose of such damages." This reasoning ignores the primary justification for awarding lost punitive damages as compensatory damages in legal malpractice actions.

> While it is true that the purpose of punitive damages is not to compensate victims, but rather is to punish bad actors and deter future wrongdoing, . . . "[t]he issue is not the purpose of punitive damages, but the purpose of compensatory damages, which is to give the client what she lost because of the lawyer's negligence . . . . Essentially, as a result of the lawyer's negligence, the punitive damages recoverable from the original tortfeasor become compensatory damages recoverable from the lawyer."[69]

The purported purpose in holding the negligent lawyer liable for lost punitive damages is not to punish and deter either the lawyer or the defendant in the underlying action, but to make the plaintiff-client whole for a provable portion of the loss the lawyer's negligence caused the client to suffer.

The California Supreme Court offered a final reason why an award of lost punitive damages "conflicts with the public purpose behind punitive damages."[70]

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67. *Id.* at 1047, 135 Cal. Rptr. 2d at 53 (quoting Adams v. Murakami, 813 P.2d 1348, 1359, 284 Cal. Rptr. 318, 329 (Cal. 1991). *Cf.* 2 DOBBS, *supra* note 19, § 6.11, at 243 n.31 (acknowledging that it would be strange to measure a lost punitive damages award against an attorney in a legal malpractice action with reference to the outrageous conduct of the defendant in the underlying action).

68. *Ferguson*, 69 P.3d at 970-71, 135 Cal. Rptr. 2d at 53 (quoting Jacobsen v. Oliver, 201 F. Supp. 2d 93, 102 (D.C. 2002)).

69. *Jacobsen*, 201 F. Supp. 2d at 101 (quoting Freedman, *supra* note 16, at 653).

70. *Ferguson*, 69 P.3d at 971, 135 Cal. Rptr. 2d at 53.

A punitive damages award must be high enough that the wrongdoer cannot comfortably bear that liability without being so high as to destroy the wrongdoer financially.[71]

> [A]n award of lost punitive damages can only further the goal of deterrence if it deters "without being excessive" . . . . Because an award of lost punitive damages bears no relation to the gravity of the attorney's misconduct or his or her wealth, it cannot further the deterrent purpose behind such damages. Indeed, where . . . the intentional wrongdoer is a wealthy corporation whose alleged misconduct was especially reprehensible, any award of lost punitive damages is likely to be "disproportionate to the [attorney's] ability to pay" . . . and may financially destroy the attorney. Such a result would undoubtedly contravene the purpose of punitive damages, which "is to deter, not destroy."[72]

It is true that the amount of the punitive damages a client-plaintiff would have collected from the defendant in the underlying action ordinarily bears no relation either to the gravity of the attorney's misconduct or to the attorney's wealth. It is also true that holding the negligent attorney liable for such lost punitive damages might destroy the attorney financially in cases where the defendant in the underlying action was a wealthy corporation that engaged in especially reprehensible misconduct. Again, however, the same point can be made when a lawyer is held liable for the loss of a huge compensatory damages award the client would have collected from the defendant in the underlying action but for the lawyer's negligence. The amount of compensatory damages a client would have recovered but for the lawyer's negligence might be greatly disproportionate to the gravity of the lawyer's offense and is unrelated to the lawyer's wealth. Moreover, an award of compensatory damages alone serves a deterrent purpose–it deters the defendant from committing another breach of duty which is a legal cause of injury.[73] Awarding a client "lost compensatory damages" in a legal malpractice action may deter the lawyer from committing malpractice in the future, but it is not awarded in order to deter the lawyer from engaging in the conduct which would have entitled the client to the award of compensatory damages against the defendant in the underlying action. Similarly, an award of "lost punitive damages" as a component of a client's compensatory damages in a legal malpractice action may deter the lawyer from committing malpractice in the future, but it is not awarded for the purpose of deterring the lawyer from engaging in the egregious misconduct which would have justified an award of punitive damages against the defendant in the underlying action.

The argument that a client should not be permitted to recover what were

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71. *Id.* (quoting Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 526 (Cal. Ct. App. 2001)).

72. *Id.* at 971, 135 Cal. Rptr. at 53-54 (quoting *Adams*, 813 P.2d at 1351 and 1352, 284 Cal. Rptr. at 321 and 322.).

73. 1 DOBBS, *supra* note 19, § 3.1, at 282 ("Even if the defendant is not subject to punitive damages, an ordinary 'compensatory' damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior.").

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formerly punitive damages as compensatory damages in a legal malpractice action is less persuasive when the client was the defendant in the underlying action and had to pay punitive damages in that action as a result of the negligence of the client's lawyer.[74] The client's recovery in a legal malpractice action of such "imposed punitive damages" as compensatory damages is easier to justify than is the client's recovery of "lost punitive damages" as compensatory damages. A client that has had to pay punitive damages as a result of a lawyer's negligent representation in the underlying action suffers a net loss, and full recovery for that loss in a subsequent malpractice action the former defendant brings against the lawyer is indisputably necessary in order to make the client whole. Yet a client's recovery in legal malpractice actions of such "imposed punitive damages" as compensatory damages is if anything even more inconsistent with the punitive and deterrent purposes of punitive damages than is a client's recovery of "lost punitive damages" as compensatory damages. Holding a lawyer liable for punitive damages assessed against a client in the underlying action will neither punish nor deter outrageous conduct, because the client was not guilty of any such conduct in the first place, and it was the lawyer's negligence that caused the client to have to pay the punitive damages award. In cases involving the recovery of "imposed punitive damages" as compensatory damages in legal malpractice actions, there is no intentional misconduct to punish or deter. The amount of punitive damages the client was obliged to pay in the underlying action bears no relation to the gravity of the attorney's misconduct and may well be disproportionate to the attorney's ability to pay. The holding of the Supreme Court of California in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP* will undoubtedly be limited to cases in which a client seeks to recover from an attorney punitive damages the client would have collected from the defendant in the underlying action but for the attorney's negligence. That holding probably would not apply in cases where a client was obliged to pay punitive damages in the underlying action as a result of the attorney's negligence. If the California Supreme Court were confronted with a case involving a client that seeks to recover from a former attorney punitive damages the client had to pay in the underlying action because of the attorney's negligent defense, it might well decide that recovery of such imposed punitive damages is necessary in order to compensate the client for a loss the attorney's negligence caused the client to suffer. If such "imposed punitive damages" would be recoverable as compensatory damages in California even though "lost punitive damages" are not recoverable as compensatory damages under *Ferguson*, the different results seem to put too fine a point on the already tenuous distinction between losses a client incurs as a result of a lawyer's negligence and gains which the lawyer's negligence prevents a client from

74. *See, e.g.*, Hunt v. Dresie, 740 P.2d 1046 (Kan.1987); Scognamillo v. Olsen, 795 P.2d 1357 (Colo. Ct. App. 1990). *Cf.* Picadilly, Inc. v. Raikos, 555 N.E.2d 167 (Ind. Ct. App. 1990) (holding that plaintiff-client must prove it should not have been held liable for punitive damages in underlying action before lawyer can be held liable for those damages in lawyer malpractice action), *aff'd on other grounds*, 582 N.E.2d 338 (Ind. 1991).

realizing.

2. *"Lost Punitive Damages" Are Too Speculative to Be Awarded Against a Negligent Lawyer in a Legal Malpractice Action*

The second consideration which militates against allowing a client to recover lost punitive damages as compensatory damages in a legal malpractice action is the public policy against awarding damages which are speculative.[75] "Because an award of punitive damages constitutes a moral determination, lost punitive damages are too speculative" to be recoverable as compensatory damages in an action for attorney negligence.[76] When calculating compensatory damages in a legal malpractice action,

> "the jury's task is to determine what a reasonable judge or fact finder would have done" in the underlying action absent attorney negligence . . . . The standard is "an *objective* one." . . . Lost punitive damages, however, are not amenable to an objective determination. "Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' 'tried' by the jury". . . . Instead, a jury's "imposition of punitive damages is an expression of its moral condemnation" . . . . Thus, to award lost punitive damages, the trier of fact must determine what *moral* judgment would have been made by a reasonable jury. Because moral judgments are inherently subjective, a jury cannot objectively determine whether punitive damages should have been awarded or the proper amount of those damages with any legal certainty . . . Lost punitive damages are therefore too speculative to support a cause of action for legal malpractice.[77]

The argument that lost punitive damages are too speculative to be awarded as part of the injured client's compensatory damages in legal malpractice actions is not persuasive.

> [W]hether a jury trying the underlying claim would have awarded punitive damages, and how much it would have awarded but for the claim's forfeiture, are no more speculative than whether the client would have prevailed had the claim gone to trial and how much in compensatory damages the jury would have awarded.[78]

More specifically, it is no more speculative in the malpractice action for the trier of fact to determine whether punitive damages would have been awarded in the

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75. *Ferguson*, 69 P.3d at 971, 135 Cal. Rptr. 2d at 54 ("[P]ermitting recovery of lost punitive damages would violate the public policy against speculative damages."). *See* RESTATEMENT (SECOND) OF TORTS § 912 (1979) ("One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.").

76. *Ferguson*, 69 P.3d at 971, 135 Cal. Rptr. 2d at 54.

77. *Id.* (citations omitted). *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 (2000) cmt. h (recovering lost punitive damages "calls for a speculative reconstruction of a hypothetical jury's reaction"); O'Connor Agency, Inc. v. Brodkin, 120 Cal. Rptr. 2d 336, 347(Cal. Ct. App. 2002) (Bedsworth, J., dissenting) ("Punitive damages are several degrees of magnitude more speculative than either general or special damages.").

78. *Ferguson*, 69 P.3d at 976, 135 Cal. Rptr. 2d at 59 (Kennard, J., concurring and dissenting).

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underlying action and in what amount than it is for that trier of fact to determine whether compensatory damages for pain and suffering would have been awarded in the underlying action and in what amount. Damages which a client could have been awarded in the underlying action for pain and suffering are recoverable as a component of the client's compensatory damages in legal malpractice actions,[79] though the basis for awarding general damages to compensate for pain and suffering is just as subjective as the basis for awarding punitive damages.

> It is pointless to contend that a punitive damage award "calls for a speculative reconstruction of a hypothetical jury's reaction." The same is true in any lawyer malpractice case involving a lost claim in which it is necessary to reconstruct what a hypothetical jury would have found with regard to liability and compensatory damages in the underlying action.[80]

3. The Difficulty of Applying Complex Standards of Proof Governing Recovery of Lost Punitive Damages in Legal Malpractice Actions

The third public policy consideration which a majority of the California Supreme Court thought militated against recovery of lost punitive damages as compensatory damages in legal malpractice actions is the "pragmatic difficulty"[81] a trier of fact would have in applying "the complex standard of proof applicable to [such] claims."[82] By statute in California, "the standards of proof governing compensatory and punitive damages are different."[83] The burden of proof governing claims for compensatory damages is proof by a preponderance of the evidence,[84] whereas in order to recover punitive damages a plaintiff must prove that the defendant's conduct was oppressive, fraudulent, or malicious by clear and convincing evidence.[85] Thus,

> the standard of proof for lost punitive damages will be, in essence, a standard within a standard. To recover lost punitive damages, a plaintiff must prove *by a preponderance of the evidence* that but for attorney negligence the jury [in the underlying action] would have found *clear and convincing evidence* of oppression, fraud, or malice. In light of this complex standard, "[t]he mental gymnastics required to reach an intelligent verdict would be difficult to comprehend, must less execute."[86]

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79. Granquist v. Sandberg, 268 Cal. Rptr. 109, 113 (Cal. Ct. App. 1990).

80. Freedman, *supra* note 16, at 653, (*quoting* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. h (2000)).

81. *Ferguson*, 69 P.3d at 972, 135 Cal. Rptr. 2d at 55.

82. *Id.* at 972, 135 Cal. Rptr. 2d at 54-55.

83. *Id.* at 972, 135 Cal. Rptr. at 55.

84. CAL. EVID. CODE § 115 (West 1995).

85. CAL. CIV. CODE § 3294(a) (West 1997). *Compare* Schaeffer v. Edward D. Jones & Co., 1996 SD 94, 552 N.W.2d 801 (burden of proof governing recovery of punitive damages under S.D.C.L. § 21-3-2 is proof by a preponderance of the evidence), *with* S.D.C.L. § 21-1-4.1 ("In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and *before* any such claim may be submitted to the finder of fact, *the court* shall find, after a hearing and based upon *clear and convincing evidence*, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.") (emphasis added).

86. *Ferguson*, 69 P3d at 972, 135 Cal. Rptr. 2d at 55 (emphasis in original) (citation omitted)

The perceived pragmatic difficulty a California trier of fact can be expected to have in deciding whether to award lost punitive damages as compensatory damages in a legal malpractice action does not appear to be any greater than the pragmatic difficulty the trier of fact in the underlying action would have had in deciding on the one hand whether liability for compensatory damages had been established by a preponderance of the evidence and on the other hand whether the plaintiff had established by clear and convincing evidence that the defendant was guilty of oppression, fraud, or malice. A properly instructed jury ought to be able without undue difficulty to apply the different standards of proof to the different questions of fact it must resolve in the plaintiff-client's favor before it may award lost punitive damages.

4. Lost Punitive Damages Should Not Be Awarded in Legal Malpractice Actions When the Underlying Action Was a Class Action

The fourth public policy consideration the California Supreme Court took into account provided the most persuasive basis for not allowing the plaintiffs in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* to recover lost punitive damages as compensatory damages in the legal malpractice action they brought. The basis for the plaintiff-clients' allegation of negligence was that the defendant-attorneys had agreed to discharge all punitive damages claims which class members might have asserted against the original tortfeasor in order to settle the underlying class action.

> [A]llowing recovery of lost punitive damages in this case would hinder the ability of trial courts to manage and resolve mass tort actions by discouraging the use of mandatory non-opt-out punitive damages classes. "[C]ourts have encouraged the use of mandatory class actions to handle punitive damages claims in mass tort cases. Mandatory class actions avoid the unfairness that results when a few plaintiffs–those who win the race to the courthouse–bankrupt a defendant early in the litigation process. They also avoid the possible unfairness of punishing a defendant over and over again for the same tortious conduct."[87]

As Justice Kennard observed in the concurring portion of his concurring and dissenting opinion, the California Supreme Court could have based its decision affirming summary judgment for the defendant attorneys solely on the basis of the public policy favoring the settlement of class actions. The majority chose instead, however, to state a broader rule which prohibits recovery of lost punitive damages as compensatory damages in legal malpractice actions generally, without limiting the scope of the rule to the class action context.[88]

> If we permitted all dissident members of a class to pursue a malpractice action against class counsel for punitive damages relinquished by settlement, attorneys would have little incentive to bring class actions and

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(quoting Wiley v. County of San Diego, 966 P.2d 983, 990, 79 Cal. Rptr. 2d 672, 679 (Cal. 1998)).

87. *Ferguson*, 69 P.3d at 972, 135 Cal. Rptr. 2d at 55 (quoting *In re* Exxon Valdez, 229 F.3d 790, 795-796 (9th Cir. 2000)).

88. *Ferguson*, 69 P.3d at 974, 135 Cal. Rptr. 2d at 58 (Kennard, J., concurring and dissenting).

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> even less incentive to settle them... To permit plaintiffs to... collaterally attack what they perceive to be an insufficiently lucrative settlement in the underlying class action violates an overriding public policy favoring settlement of class actions.[89]

Justice Kennard noted, however, that most legal malpractice claims are not based on a defendant-lawyer's negligent settlement of an underlying class action.[90]

Of the eleven reported cases which have addressed claims for lost punitive damages in legal malpractice actions,[91] only two arose in the class action context,[92] and in each of those two cases a California court refused to allow recovery of punitive damages the plaintiff-client allegedly would have been able to collect from a defendant in an underlying class action but for the negligence of the defendant-lawyer.[93] Only two of the reported cases disallowing recovery of lost punitive damages arose outside the class action context; in one of those cases a federal district court in New York had to anticipate how the New York state courts would resolve this question of first impression,[94] and the other case was reported in a one-page opinion by a lower New York court which relied on the earlier federal district court opinion.[95] Adding the two cases in which courts have allowed clients in legal malpractice actions to recover punitive damages they had to pay in the underlying action as a result of their lawyers' negligence[96] produces a total of nine out of eleven courts that have sanctioned a plaintiff-client's recovery of punitive damages as compensatory damages in legal malpractice actions arising outside the class action context. Even after eliminating from the majority camp the two California Court of Appeal opinions which the California Supreme Court overruled in *Ferguson,*[97] this tally of the conflicting precedents supports Justice Kennard's opinion that recovery of lost

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89. *Id.* at 975, 135 Cal. Rptr. 2d at 58-59.

90. *Id.*

91. Jacobsen v. Oliver, 201 F. Supp. 2d 93 (D.D.C. 2002) (lost punitive damages recoverable); Ingram v. Hall, Roach, Johnston, Fisher & Bollman, 1996 WL 54206 (N.D. Ill. 1996) (lost punitive damages recoverable); Cappetta v. Lippman, 913 F. Supp. 302 (S.D.N.Y. 1996) (lost punitive damages not recoverable); *Ferguson,* 69 P.3d at 965, 135 Cal. Rptr. 2d at 46 (lost punitive damages not recoverable); Haberer v. Rice, 511 N.W.2d 279 (S.D. 1994) (lost punitive damages recoverable); Elliott v. Videan, 791 P.2d 639 (Ariz. Ct. App. 1990) (lost punitive damages recoverable); O'Connor Agency, Inc. v. Brodkin, 120 Cal. Rptr. 2d 336 (Cal. Ct. App. 2002) (lost punitive damages recoverable); Piscitelli v. Friedenberg, 105 Cal. Rptr. 2d 88 (Cal. Ct. App. 2001) (lost punitive damages not recoverable); Merenda v. Superior Court, 4 Cal. Rptr. 2d 87 (Cal. Ct. App. 1992) (lost punitive damages recoverable); Summerville v. Lipsig, 704 N.Y.S.2d 598 (N.Y. App. Div. 2000) (lost punitive damages not recoverable); Patterson & Wallace v. Frazer, 93 S.W. 146 (Tex. Civ. App. 1906) (lost punitive damages recoverable).

92. *Ferguson*, 69 P.3d at 965, 135 Cal. Rptr. 2d at 46 (lost punitive damages not recoverable for attorneys' alleged negligence in stipulating to dismissal of punitive damages claims against defendant pursuant to settlement of underlying class action); *Piscitelli*, 105 Cal. Rptr. 2d at 88 (lost punitive damages not recoverable for attorney's alleged negligence in failing to opt client out of class, causing client to lose punitive damages claim against defendant in class action).

93. *Ferguson*, 69 P.3d at 965, 135 Cal. Rptr. 2d at 46; *Piscitelli*, 105 Cal. Rptr. 2d at 88.

94. *Cappetta*, 913 F. Supp. at 302.

95. *Summerville*, 704 N.Y.S.2d at 598.

96. Hunt v. Dresie, 740 P.2d 1046 (Kan. 1987); Scognamillo v. Olsen, 795 P.2d 1357 (Colo. Ct. App. 1990).

97. *Ferguson,* 69 P.3d at 974, 135 Cal. Rptr. 2d at 57, (expressly disapproving *Merenda*, 4 Cal. Rptr. 2d at 87, and impliedly disapproving *O'Connor Agency, Inc.*, 120 Cal. Rptr. 2d at 336).

punitive damages as compensatory damages in legal malpractice actions ought to be allowed when the underlying action was not a class action.

In addition to the argument that "allowing recovery of lost punitive damages . . . would hinder the ability of trial courts to manage and resolve mass tort actions by discouraging the use of mandatory, non-opt-out punitive damages classes,"[98] the majority opinion in *Ferguson* made the related suggestion that

> allowing lost punitive damages may adversely impact the overall ability of courts to manage their caseloads by making settlement more difficult in cases involving punitive damages claims. Because dissatisfied clients may seek such damages based solely on an allegation of negligent undervaluation of the punitive damages claims, the settlement of such claims exposes plaintiffs' attorneys to potentially devastating liability. Faced with this risk, plaintiffs' attorneys will likely be more hesitant to settle and more intransigent in their settlement demands.[99]

This point could be made with equal force, however, in any case where substantial compensatory damages might have been recovered from the defendant in the underlying action but for the negligence of the plaintiff's lawyer. Dissatisfied clients can also be expected to seek recovery of such "lost compensatory damages" based solely on an allegation that their lawyers' negligently undervalued the compensatory damages claims, and the settlement of any possible claims for high compensatory damages may expose the attorneys to potentially devastating liability. The higher the possible value of the claim asserted, the more hesitant plaintiffs' attorneys will be to settle and the more intransigent they are likely to be in their settlement demands, whether the value of the claim is attributable to high compensatory damages, high punitive damages, or both.

5. Recovery of Lost Punitive Damages Would Have an Adverse Impact upon the Cost and Availability of Professional Liability Insurance for Lawyers

One of the last public policy considerations which the California Supreme Court took into account in refusing to allow recovery of lost punitive damages was the prospect that

> exposing attorneys to such liability would likely increase the cost of malpractice insurance, cause insurers to exclude coverage for these damages, or further discourage insurers from providing professional liability insurance in California . . . . The resulting financial burden on attorneys would probably make it more difficult for consumers to obtain legal services or obtain recovery for legal malpractice. At a minimum, the specter of [liability exposure for] lost punitive damages would encourage the practice of "defensive law."[100]

Although Justice Brown conceded that the court had not been provided with

98. *Ferguson*, 69 P.3d at 972, 135 Cal. Rptr. 2d at 55.
99. *Id.*
100. *Id.* (citations omitted) (quoting Wiley v. County of San Diego, 966 P.2d 983, 991, 79 Cal. Rptr. 2d 672, 680 (Cal. 1998)).

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any "concrete evidence that this parade of horribles will occur,"[101] he thought it unwise to risk these possible consequences absent any persuasive reason for doing so.[102]

In the dissenting portion of his concurring and dissenting opinion, Justice Kennard disputed the supposition that allowing recovery of lost punitive damages would make it harder or more expensive for lawyers to obtain professional liability insurance coverage. In the first place Justice Kennard felt the question should be resolved by the legislature rather than by the courts.[103]

> Moreover, the majority's observation assumes that until now, both in this state and in the majority of other jurisdictions that have addressed the question, legal malpractice actions have not permitted recovery of lost punitive damages as an item of compensatory damages. Not so. So far, only one [other] state excludes [a]ttorneys recovery of lost punitive damages.[104] Thus, the general rule is this: "Attorneys can be liable for exemplary or punitive damages lost or imposed because of their negligence." . . . . The majority does not explain why a malpractice insurance crisis will result from leaving in place a rule that has prevailed until now in many jurisdictions, including California.[105]

Considering how infrequently the question of attorney liability for lost or imposed punitive damages has arisen in the past hundred years, the majority's concern about the adverse impact that sanctioning such liability might have on the cost, coverage, and availability of professional liability insurance appears to be unwarranted. The specter that a lawyer might be held liable in a malpractice action for lost punitive damages is no more likely to encourage the practice of defensive law than is the specter that a malpracticing lawyer might be held liable for lost compensatory damages which are substantial in amount. Moreover, the lawyer's liability exposure can be reduced in other ways. Liability in the malpractice action is limited to the amount of damages the client would have actually collected from the defendant in the underlying action.[106] The

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101. *Ferguson,* 69 P.3d at 973, 135 Cal. Rptr. 2d at 56.

102. *Id.* at 972, 135 Cal. Rptr. 2d at 55.

103. *Id.* at 976, 135 Cal. Rptr. 2d at 56 (Kennard, J., concurring and dissenting).

104. Justice Kennard must have been referring to New York, although the New York cases refusing to permit recovery of lost punitive damages in legal malpractice actions were not decided by the New York Court of Appeals. Cappetta v. Lippman, 913 F.Supp. 302 (S.D.N.Y. 1996); Summerville v. Lipsig, 704 N.Y.S.2d 598 (N.Y. App. Div. 2000).

105. *Ferguson,* 69 P.3d at 976, 135 Cal. Rptr. 2d at 60 (Kennard, J., concurring and dissenting) (quoting MALLEN & SMITH, *supra* note 19, § 20.7, at 136).

106. There is a split of judicial authority on the question of whether the plaintiff-client in a legal malpractice action has the burden of establishing, as part of the prima facie case, that punitive damages would have been collected from the defendant in the underlying action but for the defendant-lawyer's negligence, or whether the defendant-lawyer has the burden of establishing as an affirmative defense that punitive damages would not have been collected from the defendant in the underlying action. *Compare* McKenna v. Forsyth & Forsyth, 720 N.Y.S.2d 654, 658 (N.Y. App. Div. 2001) (adopting the majority rule that the plaintiff-client in a legal malpractice action has the burden of establishing that damages would have been collectible from the defendant in the underlying action); DiPalma v. Seldman, 33 Cal. Rptr. 2d 219 (Cal. Ct. App. 1994) (same); Whiteaker v. Iowa, 382 N.W.2d 112, 115 (Iowa 1986) (same); Jernigan v. Giard, 500 N.E.2d 806, 807 (Mass. 1986) (same); Rorrer v. Cooke, 329 S.E.2d 355, 369 (N.C. 1985) (same); Larson v. Crucet, 481 N.Y.S.2d 368, 368 (N.Y. App. Div. 1984) (same); Palmieri v. Winnick, 482 A.2d 1229, 1229 (Conn. Super. Ct. 1984) (same); McDow v. Dixon, 226 S.E.2d 145, 147 (Ga. Ct. App. 1976) (same); Sitton v. Clements, 257 F. Supp. 63, 66-67 (E.D. Tenn. 1966), *aff'd,* 385

defendant-lawyer should be able to deduct as an offset from an award of lost punitive damages any portion of the lawyer's fee which the client would have had to pay if the lawyer had not been negligent and the client had collected a punitive damages award from the defendant in the underlying action.[107] A lost punitive damages claim cannot exceed any statutorily imposed cap on punitive damages. Prejudgment interest may not be recoverable on a claim for punitive damages.[108] Finally, and most importantly from a practical standpoint, the possibility of recovering lost punitive damages as compensatory damages in legal malpractice actions is reduced by the difficulty a plaintiff-client can be expected to have in proving that punitive damages of a certain amount would have been awarded but for the defendant-lawyer's negligence.

6. An Award of Lost Punitive Damages Is Not Necessary in Order Fully to Compensate the Plaintiff-Client in a Legal Malpractice Action

Along with the argument that holding a negligent lawyer liable for lost punitive damages would not serve the purpose of punishing the defendant in the underlying action, whose misconduct was more culpable than was that of the lawyer, the other most frequently stated reason for refusing to allow a client to recover lost punitive damages as compensatory damages in a legal malpractice action is that recovery of lost punitive damages is not necessary in order fully to compensate the client for the loss, injury, harm, or detriment the client suffered as a result of the conduct of the defendant in the underlying action.[109] Punitive damages are not awarded for the purpose of compensating the victim of egregious misconduct.[110] A plaintiff is considered to have been made whole by

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F.2d 869, 870-71 (6th Cir. 1967) (same); Hammons v. Schrunk, 305 P.2d 405, 409 (Or. 1956) (same); Lawson v. Sigfrid, 262 P. 1018, 1018-19 (Colo. 1927) (same); *with* Kituskie v. Corbman, 714 A.2d 1027, 1032 (Pa. 1998) (adopting the minority rule that "defendant/lawyer in a legal malpractice action should plead and prove the affirmative defense that the underlying case was not collectible by a preponderance of the evidence"); Smith v. Haden, 868 F. Supp. 1, 2 (D.D.C. 1994) (same), *aff'd*, 69 F.3d 606, 607 (D.C. Cir. 1995); Teodorescu v. Bushnell, Gage, Reisen & Byington, 506 N.W.2d 275, 278 (Mich. Ct. App. 1993) (same), *appeal denied*, 521 N.W.2d 607 (Mich. 1994) (unpublished table decision); Jourdain v. Dineen, 527 A.2d 1304, 1306 (Me. 1987) (same); Hoppe v. Ranzini, 385 A.2d 913, 920 (N.J. Super. Ct. App. Div. 1978) (same). The South Dakota Supreme Court has adopted the majority rule which casts upon the plaintiff-client the burden of proving the collectibility of lost damages. Haberer v. Rice, 511 N.W.2d at 285 ("plaintiff in a legal malpractice case has . . . to prove . . . that the judgment was collectible") (citation omitted).

107. *See, e.g.*, Moore v. Greenberg, 834 F.2d 1105, 1110 (1st Cir. 1987) (stating that deduction from client's recovery in malpractice action of the contingent fee the client would have paid the lawyer is necessary in order to put client in financial position he would have been in if lawyer had not been negligent); 2 DOBBS, *supra* note 19, § 6.11, at 244-45 (acknowledging the split of judicial authority on the question of whether the lawyer's liability should be reduced by the fee that the client would have had to pay had the lawyer not been guilty of malpractice).

108. *See, e.g.*, S.D.C.L. § 21-1-13.1 (Supp. 2002) (providing that prejudgment interest is not recoverable on punitive damages award).

109. Cappetta v. Lippman, 913 F. Supp. 302, 306 (S.D.N.Y. 1996) ("purpose [of punitive damages] is not to compensate plaintiffs"); *Ferguson*, 69 P.3d at 973, 135 Cal. Rptr. 2d at 56 ("[b]y definition [punitive damages] are not intended to make the plaintiff whole by compensating for a loss suffered"); O'Connor Agency, Inc. v. Brodkin, 120 Cal. Rptr. 2d 336, 344 (Bedsworth, J., dissenting); Piscitelli v. Friedenberg, 105 Cal. Rptr. 2d 88, 107 (Cal. Ct. App. 2001) ("punitive damages are not compensation for injury").

110. RESTATEMENT (SECOND) OF TORTS § 908(1) ("Punitive damages are damages . . . other than

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an award of compensatory damages from a tortfeasor whose conduct would also support an award of punitive damages.[111] A plaintiff is entitled to recover provable compensatory damages but is not *entitled* to recover punitive damages.[112] Similarly, "[a] plaintiff in a legal malpractice action 'is entitled only to be made whole,'"[113] and should be presumed to have been made whole by an award of the compensatory damages which the plaintiff would have been entitled to recover from the defendant in the underlying action.[114] "Because legal malpractice plaintiffs are made whole for their injuries by an award of lost compensatory damages, allowing these plaintiffs to recover lost punitive damages would give them an undeserved windfall."[115] "Where the stated goal is to make an injured plaintiff 'whole,' a windfall award should not be included in the damage equation."[116]

The argument that a plaintiff would receive an undeserved windfall or "boon"[117] by an award of lost punitive damages in a legal malpractice action is not persuasive. Although an award of punitive damages is not considered necessary in order to compensate the plaintiff for the loss caused by the defendant in the underlying action,[118] an award of punitive damages a plaintiff-client would have collected from the defendant in the underlying action but for the negligence of the plaintiff's lawyer is necessary to put the plaintiff in the same financial position the plaintiff would have been in if the lawyer's failure to exercise ordinary professional skill had not caused the plaintiff to lose the punitive damages award.

> If, but for the attorney's negligence, the client would have received an award of punitive damages, the attorney's negligence actually caused the client to suffer a loss . . . . Although punitive damages are not compensatory in the underlying case, they are compensatory in the context of a legal malpractice case–they are part of the recovery the client would have received, were it not for the attorney's negligence. Characterizing lost punitive damages as a "windfall" is simply inaccurate; lost punitive damages are properly considered compensatory in the legal malpractice setting.[119]

The plaintiff-client in a legal malpractice action can only be made whole by recovering the *full* value of the claim lost,[120] and if the plaintiff would have

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compensatory . . . damages.").

111. *Ferguson*, 69 P.3d at 973, 135 Cal. Rptr. 2d at 56. ("[b]y definition [punitive damages] are not intended to make the plaintiff whole by compensating for a loss suffered") (quoting Lakin v. Watkins Associated Industries, 863 P.2d 179, 192 (Cal. 1993)).

112. *Ferguson*, 69 P.3d at 973, 135 Cal. Rptr. 2d at 56.

113. *Id.* (quoting Smith v. Lewis, 530 P.2d 589, 597 (Cal. 1975).

114. *Ferguson*, 69 P.3d at 973, 135 Cal. Rptr. 2d at 56.

115. *Id.*

116. *Piscitelli*, 105 Cal. Rptr. 2d at 108.

117. Adams v. Murakami, 813 P.2d at 1348, 1357 (Cal. 1991).

118. Piscitelli v. Friedenberg, 105 Cal. Rptr. 2d 88, 107 (Cal. Ct. App. 2001) ("[*I*]*n the underlying action*, an award of punitive damages has nothing to [do] with the detriment . . . suffered by a legal malpractice plaintiff.") (emphasis added).

119. O'Connor Agency, Inc v. Brodkin, 120 Cal. Rptr. 2d 336, 340 (Cal. Ct. App. 2002) (quoting *Piscitelli*, 105 Cal. Rptr. 2d at 108).

120. Merenda v. Superior Court, 4 Cal. Rptr. 2d 87, 93 (Cal. Ct. App. 1992) ("The general rule is

collected punitive damages from the defendant in the underlying action but for the negligence of the plaintiff's lawyer, those lost punitive damages are a portion of the value of the claim lost. Although a punitive damages award might have been considered a "windfall" or a "boon" to the plaintiff in the underlying action, it becomes a portion of the plaintiff's entitlement in the legal malpractice action if plaintiff would have collected punitive damages from the defendant in the underlying action but for the negligence of plaintiff's lawyer. "Essentially, as a result of the lawyer's negligence, the punitive damages recoverable from the original tortfeasor become compensatory damages recoverable from the lawyer."[121] A client that would have collected punitive damages from the defendant in the underlying action but for the negligence of the client's lawyer can hardly be expected to appreciate why compensation for that provable loss is not required in order to make the client whole. Courts that have disallowed recovery of lost punitive damages have refused to acknowledge that the plaintiff-client suffers a legally cognizable *loss* when a defendant-lawyer's negligence causes the plaintiff to *lose* a sum of money the client would have collected as punitive damages from the defendant in the underlying action.

B. RECOVERABILITY OF LOST PUNITIVE DAMAGES IN ACTIONS FOR BREACH OF THE LAWYER-CLIENT CONTRACT

The competing arguments regarding whether a client should be able to recover lost punitive damages as compensatory damages in a malpractice action apply with equal force when the client sues the lawyer for breach of contract or brings alternative causes of action against the lawyer for breach of contract and for the tort of professional negligence based upon the same misconduct by the lawyer. In South Dakota,[122] as elsewhere,[123] a lawyer that breaches the duty to exercise ordinary professional skill may be exposed to liability for breach of contract as well as for the tort of negligence. The lawyer makes "an implied promise . . . to exercise due care while representing the client."[124] If the lawyer's breach of that implied promise causes a client to lose a punitive damages award which the client would have collected from an adversarial party in the absence of such a breach, the client should be able to recover the lost punitive damages as a component of the client's expectation damages in a breach of contract action against the lawyer. Although punitive damages are generally not recoverable for breach of contract when, as here, the conduct constituting the breach–the lawyer's negligence–is not also a tort for which punitive damages are

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that a plaintiff is entitled only to be made whole: i.e., when the attorney's negligence lies in his failure to press a meritorious claim, the measure of damages is the value of the claim lost.").

121. Jacobsen v. Oliver, 201 F. Supp. 2d 93, 101 (D.C. Cir. 2002) (quoting Freedman, *supra* note 16, at 653).

122. Haberer v. Rice, 511 N.W.2d 279, 286 (S.D. 1994) ("A legal malpractice suit may have two causes of action, one which is for breach of contract and another in negligence.").

123. Roy Ryden Anderson and Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 235 (1994).

124. *Id.* at 244.

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recoverable,[125] an award of expectation damages should include any punitive damages the client would have collected from the defendant in the underlying action if the lawyer had not breached the implied promise to exercise due care in prosecuting that action on the client's behalf. Just as lost punitive damages may become a part of a client's compensatory damages in a malpractice action based on the lawyer's negligence, lost punitive damages may become a part of the client's expectation damages in a malpractice action based on the lawyer's breach of contract. An award which includes the lost punitive damages component seems necessary in order to give the client the benefit of the lawyer-client bargain–to put the client "in as good a position as he would have been in had the contract been performed."[126] When the lawyer and the client make a contract under which the lawyer promises to prosecute a claim that both parties hope will produce a punitive damages award for the client, the lawyer has reason to foresee that the client will probably suffer a loss of that award if the lawyer breaches the duty to exercise due care,[127] because that loss may be expected to follow from such a breach "in the ordinary course of events."[128] The client relies on the lawyer's implied promise to exercise due care when the client retains the lawyer and gives up the opportunity to retain some other lawyer to prosecute the claim. If the loss of a collectible punitive damages award results from the lawyer's breach of the implied promise to exercise due care, recovery of the lost punitive damages as a portion of the client's expectation damages in a breach of contract action also protects the client's passive reliance in having given up the opportunity to retain competent counsel.[129]

Nevertheless, just as a court in a tort action may limit liability for negligent conduct by holding on grounds of public policy that the conduct is not the legal or proximate cause of a loss,[130] so "[a] court [in a breach of contract action] may limit damages for foreseeable loss . . . if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation,"[131] or if the court concludes that imposing liability for lost punitive damages upon the lawyer was not in the contemplation of the parties when the lawyer-client contract was made.[132] Thus, whether the basis for the malpractice action is negligence, breach of contract, or both, the court can refuse to allow recovery of lost punitive damages as compensatory damages on grounds that it is unfair, unjust, or

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125. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages.").

126. *Id.* § 344(a) (defining promisee's "expectation interest").

127. *See generally id.* § 351(1).

128. *Id.* § 351(2)(a).

129. L. L. Fuller and William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 61 (1936) ("In a hypothetical society in which all values were available on the market and where all markets were 'perfect' in the economic sense . . . there would be no difference between the reliance interest and the expectation interest. The plaintiff's loss in foregoing to enter another contract would be identical with the expectation value of the contract he did make.").

130. *See, e.g.*, Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP, 69 P.3d 965, 969, 135 Cal. Rptr. 2d 46, 52 (Cal. 2003); Piscitelli v. Friedenberg, 105 Cal. Rptr. 2d 88, 109 (Cal. Ct. App. 2001).

131. RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981).

132. Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (Ex. 1854).

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otherwise against public policy to hold the lawyer liable for that loss. Again, the question is whether the court *ought* to *exercise* that power.

C. INCENTIVE AND RISK ALLOCATION RATIONALES FOR RECOVERY OF LOST PUNITIVE DAMAGES

Having stated several public policy considerations which affirmatively support a refusal to award lost punitive damages as compensatory damages in legal malpractice actions, Justice Brown concluded his majority opinion in *Ferguson* by rejecting the suggestion that shielding lawyers from liability exposure for lost punitive damages will not adequately discourage lapses of professional care.

> Given the potential size of punitive damage awards and the typical contingent fee arrangements, attorneys already have a strong incentive to properly pursue these claims without subjecting them to liability for lost punitive damages. Moreover, in most cases, potential liability for lost compensatory damages–which are often substantial–provides an adequate deterrent to attorney misconduct. Finally, the specter of disciplinary action, increases in malpractice premiums, and losses in future business gives attorneys more than enough incentive to handle their cases properly.[133]

In any event, the "risk of encouraging attorney negligence"[134] was greatly outweighed in the majority's estimation by "the overwhelming public policy considerations militating against recovery of lost punitive damages."[135]

Conceding that lawyers already have ample incentives to exercise professional skill in representing clients who seek to recover punitive as well as compensatory damages, holding the negligent attorney liable for lost punitive damages is consistent with a fair allocation of risks that lawyers bear in agreeing to prosecute such claims on their clients' behalf. In "the typical contingent fee [arrangement],"[136] the lawyer agrees to take the case in the hope that it will result in a substantial damages award, often consisting of both compensatory and punitive damages, from which award the lawyer will take an agreed upon percentage. The lawyer is keenly aware of the risk that the claim may prove worthless or worth too little to compensate the lawyer fully for the exercise of ordinary professional skill. The lawyer who exercises that skill in prosecuting a claim on a contingency basis appreciates both the prospect of being generously compensated if his or her efforts are crowned with success and the risk of being uncompensated or under-compensated if they are not. The lawyer should also bear the risk that if the claim is lost as a result of the lawyer's negligence, the client will be entitled to recover the full value of the lost claim in a subsequent malpractice action, including the value of any punitive damages award the client would have collected but for the lawyer's negligence, less any fee the lawyer

133. *Ferguson*, 69 P.3d at 973, 135 Cal. Rptr. 2d at 56.
134. *Id.*
135. *Id.*
136. *Id.*

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would have been entitled to receive from the client if the lawyer had successfully prosecuted the claim. Because the lawyer is entitled to a share of any punitive damages the client might recover when the lawyer provides competent representation, it seems only fair that the lawyer should be exposed to liability for the client's share of any punitive damages award lost to the client as a result of the lawyer's failure to provide competent representation.

CONCLUSION

Only two state supreme courts have authoritatively resolved the question of whether lost punitive damages are recoverable as compensatory damages in legal malpractice actions. The Supreme Court of South Dakota answered the question in the affirmative, based upon its application of the general rule that a plaintiff-client who prevails in a legal malpractice action is entitled to recover as damages the value of the lost claim.[137] Since 1994, five courts have refused to allow recovery of lost punitive damages as compensatory damages in legal malpractice actions,[138] and two courts have allowed such a recovery.[139] In 2003, the Supreme Court of California refused to allow recovery of lost punitive damages on grounds of public policy.[140] Given the split of judicial authority that has arisen over the question, it may be appropriate to ask whether the South Dakota Supreme Court should reconsider its decision if it is again confronted with the question in the future.

A majority of the Supreme Court of California based its holding that a defendant-lawyer's negligence is not a proximate cause of a plaintiff-client's loss of a punitive damages claim on at least five public policy considerations. First, awarding lost punitive damages as compensatory damages to the plaintiff-client for the defendant-lawyer's merely negligent misconduct would not serve the purposes of punitive damages, which are to punish a wrongdoer whose tortious misconduct was especially reprehensible and to deter that wrongdoer and others from engaging in similar misconduct in the future.[141] Second, lost punitive damages are too speculative to be fairly awarded in legal malpractice actions.[142] Third, refusing to award lost punitive damages spares the trier of fact in the legal malpractice action the pragmatic difficulty of having to apply differing standards of proof governing the award of compensatory and punitive damages.[143] Fourth,

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137. Haberer v. Rice, 511 N.W.2d 279, 287 (S.D. 1994). *See Ferguson*, 69 P.3d at 974, 135 Cal. Rptr. 2d at 57 (citing *Haberer* as one of the cases which "permit recovery of lost punitive damages solely based on the general rule that the measure of damages in a legal malpractice action is the value of the lost claim").

138. *See Ferguson*, 69 P.3d at 968, 135 Cal. Rptr. 2d at 51, *affirming* 115 Cal. Rptr. 2d at 352; Piscitelli v. Friedenberg,, 105 Cal. Rptr. 2d 88, 106 (Cal. Ct. App. 2001); Summerville v.Lipsig, 704 N.Y.S.2d 598, 598 (N.Y. App. Div. 2000); Cappetta v. Lippman, 913 F. Supp. 302, 307 (S.D.N.Y. 1996).

139. O'Connor Agency, Inc .v. Brodkin, 120 Cal. Rptr. 2d 336, 339 (Cal. Ct. App. 2002); Jacobsen v. Oliver, 201 F. Supp. 2d 93, 101 (D.C. 2002).

140. *Ferguson*, 69 P.3d at 970, 135 Cal. Rptr. 2d at 57.

141. *Id.* at 970, 135 Cal. Rptr. 2d at 52-54.

142. *Id. at* 971, 135 Cal. Rptr. 2d at 52-54.

143. *Id.* at 972, 135 Cal. Rptr. 2d at 54-55.

allowing recovery of lost punitive damages in legal malpractice actions would make it harder to settle any underlying class action against the original tortfeasor.[144] Fifth, the various risks which exposing lawyers to liability for lost punitive damages would create are not worth taking, because punitive damages are a windfall which the aggrieved client does not need to recover in order to be made whole,[145] and because exposing lawyers to liability for lost punitive damages is not necessary in order to encourage lawyers to exercise professional skill in prosecuting client claims.[146]

As indicated in Justice Kennard's concurring and dissenting opinion, however, the California Supreme Court could have refused to hold the defendant-lawyers in *Ferguson* liable for lost punitive damages solely on the basis of the fourth public policy consideration identified in the majority opinion.[147] If clients were allowed to recover punitive damages lost as a result of their lawyers' settlement of an underlying class action against the original tortfeasor, it would inhibit settlement of class actions.[148] Outside the class action context, however, the other public policy considerations do not seem to justify creating an exception to the general rule that the measure of damages in a legal malpractice action is the full value of the claim lost.

First, a client's recovery of lost punitive damages is necessary in order to satisfy the purpose of awarding compensatory damages in the legal malpractice action, not in order to satisfy the punitive and deterrent purposes of awarding punitive damages against the tortfeasor in the underlying action. If it is established in the malpractice action that the client would have collected punitive damages from the original tortfeasor had it not been for the negligence of the client's lawyer, then the client has suffered a loss by being deprived of a sum of money the client would have obtained if the lawyer had exercised professional skill. Recovery for that loss is necessary in order to put the client in the same financial position the client would have been in if the lawyer had not been negligent in prosecuting the underlying claim. The value of the lost claim includes both the compensatory damages and the punitive damages that the plaintiff-client should have collected from the defendant in the underlying action. Because of the lawyer's negligence, the client cannot recover punitive damages from the defendant in the underlying action. But the client does not seek to recover punitive damages from the lawyer in the malpractice action. The client in the malpractice action instead seeks to recover both the compensatory damages and the punitive damages components of the award the client would have collected from the original tortfeasor if the lawyer had not been negligent. The punitive damages the client should have collected from the defendant in the underlying action are justly transformed into a portion of the client's compensatory damages in the legal malpractice action.

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144. *Id.*
145. *Id.* at 973, 135 Cal. Rptr. 2d at 55-56.
146. *Id.*
147. *Id.* at 975, 135 Cal. Rptr. 2d at 58 (Kennard, J., concurring and dissenting).
148. *Id.*

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Second, lost punitive damages are not too speculative to be awarded as compensatory damages in legal malpractice actions. Consistent with the trial-within-a-trial format employed in legal malpractice litigation, the trier of fact can determine with an adequate degree of certainty whether the conduct of the defendant in the underlying action would have justified an award of punitive damages. The trier of fact in the malpractice litigation can then determine the size of the punitive damages award that the client should have collected by taking into account the wealth of the original tortfeasor and the gravity of its misconduct. A trier of fact's determination in a legal malpractice action whether punitive damages should have been awarded in the underlying action and in what amount requires no more speculation than the determination in a legal malpractice action whether damages compensating the plaintiff for pain and suffering should have been awarded in the underlying action and in what amount.

Nor do any different evidentiary standards governing the degree of proof required to establish negligence and the degree of proof required to support an award of punitive damages seem to present an insurmountable pragmatic difficulty for the trier of fact in the malpractice litigation. In the trial-within-a-trial phase of the malpractice litigation, the trier of fact can determine without undue difficulty whether the evidence that the plaintiff-client should have recovered a punitive damages award from the defendant in the underlying action is clear and convincing. In the negligence phase of the malpractice litigation, the same trier of fact can determine whether the plaintiff-client has proven by a preponderance of the evidence that the defendant-lawyer's failure to exercise ordinary professional skill caused the client to lose the punitive damages award.

Finally, despite the split of judicial authority that has arisen over the question in the past several years, exposing lawyers to liability for lost punitive damages under the still prevailing majority rule has not caused or contributed to a liability insurance crisis for lawyers. And although any recovery of punitive damages in the underlying action might originally have been a "windfall" or a "boon" for the plaintiff, that windfall would have become a part of the plaintiff's *entitlement* if a judgment including the punitive damages award had been entered in the plaintiff's favor against the defendant in the underlying action. If a lawyer causes the client to lose an entitlement to both the compensatory and punitive damages portions of a judgment the client would have obtained had the lawyer not been negligent, recovery of both portions of the lost judgment is necessary in order fully to compensate the client for that foreseeable loss.

Perhaps what is most disconcerting about allowing a client to recover lost punitive damages from a lawyer in a legal malpractice action is the sheer size of the award. If the client's compensatory damages in the malpractice action consist of both the compensatory and the punitive damages the client would have collected from the defendant in the underlying action but for the lawyer's negligence, the lawyer's liability exposure may well exceed the lawyer's liability insurance coverage and the lawyer will suffer financial ruin. Yet that is a risk that the lawyer should be expected to take into account in agreeing to prosecute

the client's claim against the defendant in the underlying action. Prosecution of civil claims is not a task for the faint-hearted. A lawyer whose failure to exercise professional skill causes a client to lose a claim for substantial *compensatory* damages against the defendant in the underlying suit will be held liable for the full value of that lost claim, even though the value of that claim seems disproportionate to the lawyer's fault in causing its loss. If a client can prove in a malpractice action that punitive damages would also have been recovered and collected from the defendant in the underlying action but for the lawyer's negligent prosecution of the claim, the lost punitive damages augment the value of the lost claim. A lawyer who is unwilling to undertake the risk of liability exposure for the full value of a claim lost on account of the lawyer's negligence should decline to represent the client in the first place. The prospect that substantial punitive damages might be awarded if a claim against the defendant in an underlying action is prosecuted with professional skill often provides the lawyer with the incentive to take the case. Such an incentive should be balanced against the disincentive created by the specter that the lawyer might be held liable in a legal malpractice action for compensatory damages measured by the full value of the underlying claim, including any punitive damages component of that value, if the lawyer's negligent representation causes the client to lose that claim.

Even if the competing arguments are considered to be about equally persuasive, it does not seem appropriate outside the class action context to adopt an exception to the general rule entitling plaintiff-clients in legal malpractice actions to recover the full value of their lost claim, including any punitive damages they would have collected but for the defendant-lawyer's negligence. The majority rule does permit the client to recover from the lawyer a sum of money the client should have recovered as punitive damages from the original tortfeasor, whose conduct was far more culpable than was that of the negligent lawyer. Nevertheless, the majority rule does not countenance the *transfer* of liability for punitive damages from a more culpable to a less culpable tortfeasor. Instead, the punitive damages portion of the award the client should have collected from the original tortfeasor is legitimately *transformed* into a portion of the compensatory damages the client must be able to recover from the negligent lawyer in order to make the client whole and vindicate the client's expectation interest.

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