

# Legal Malpractice Coverage Update

February 17, 2025

## Legal Malpractice - California

### *Go v McClaugherty*

No. D083772, 2025 WL 367745 (Cal. Ct. App. Jan. 31, 2025)

The California Court of Appeals for the Fourth District, Division I, in a reversal of the trial court's ruling, held that an insured can pursue a legal malpractice claim against the attorney assigned by an insurance company to defend the insured.

In January 2018, plaintiff Juanito Apao Go (Go) was involved in an accident with a pedestrian who died. The pedestrian's next of kin, Olga Silva (Silva), sued Go for motor vehicle negligence and wrongful death. Go's insurer retained attorney Jay McClaugherty (McClaugherty) to defend Go. In November 2018, the county's district attorney's office filed a criminal misdemeanor vehicular manslaughter complaint against Go arising from the January 2018 accident.

In early 2019, McClaugherty agreed to settle Silva's suit on Go's behalf and executed a release that would dismiss the action "with each party bearing their own costs and attorneys' fees." McClaugherty failed to advise Go that he could be subject to further monetary exposure by way of criminal restitution. Also, McClaugherty did not consult with Go's criminal attorney with respect to the impact of the civil release on Go's potential criminal liability. In November 2020, the judge presiding over the criminal case ordered Go to pay Silva over \$491,000 as restitution for Silva's attorney's contingency fees incurred in pursuing the civil suit.

Go then filed suit against McClaugherty for legal malpractice and breach of contract. McClaugherty demurred Go's complaint and first amended complaint. The trial court granted Go leave to amend his complaints upon the condition that he mitigate his damages by having the restitution award amended or deemed satisfied by the settlement.

Go filed a second amended complaint, which repeated his prior allegations that McClaugherty owed him a duty to advise of the foreseeable consequences of settling the civil case, failed to protect him through a settlement that released potential criminal restitution, and breached his professional duties by failing to advise Go of the potential for criminal restitution.

In response, the defendants demurred the complaints on the bases that: 1) Go failed to demonstrate how the alleged breach caused him damages in the criminal matter as McClaugherty was not involved in that action; 2) Go lacked legal causation because he did not seek to mitigate his damages as

LEGAL MALPRACTICE COVERAGE UPDATE Cont.

ordered by the court; and 3) Insurance Code section 533.5 barred his complaint. The trial court sustained the demurrer stating that Go failed to cure his pleadings on the causation and damages issue and failed to allege any facts about efforts to have the restitution order deemed satisfied in criminal court. Go appealed the dismissal.

The appellate court held that Go's allegations regarding legal malpractice were viable because the criminal restitution issue was reasonably apparent, even if it fell outside the scope of the civil retention. Go pled that McClaugherty failed to competently draft the settlement and release in the civil suit. The appellate court reasoned that, because the criminal charges were pending at the time of settlement, McClaugherty's duties extended to preserving Go's ability to offset some or all the insurance payment against a potential criminal restitution award.

Next, the appellate court rejected McClaugherty's argument that Go's claims were barred by California's Insurance Code section 533.5 which states: "No policy of insurance shall provide, or be construed to provide, any coverage or indemnity for the payment of any fine, penalty, or restitution in any criminal action or proceeding ... ." The appellate court found that McClaugherty incorrectly interpreted the statute to mean that the insurance policy covered restitution. Instead, the insurance payment on behalf of Go to Silva entitled him to offset his restitution obligation for the attorney fee she incurred, which fee was for recovery of her medical costs or other economic damages.