

# The Professional Liability Law Blog

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INSURANCE PROFESSIONALS, ACCOUNTANTS AND STOCK BROKERS



## [Gutierrez v. Girardi: Not All Legal Malpractice Claims Involve “Case Within a Case”](#)

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It is standard thinking that evaluation and trial of a legal malpractice claim requires assessment and proof of the case within a case. The plaintiff must, in effect, try the underlying case and demonstrate that but for the attorney’s error or omission, the client would have obtained a better result. That is precisely the strategy the defendant’s attorneys pursued in *Gutierrez v. Thomas Girardi*, 2011 Cal. App. Lexis 492. The decision can be found [here](#). The plaintiffs in Gutierrez alleged that the defendant attorneys misappropriated part of the settlement proceeds obtained in partial settlement of claims against Lockheed and other defendants.

The attorneys argued that the underlying claims would have been time-barred and, therefore, the plaintiffs could not prove that but for the attorneys’ alleged wrongdoing the plaintiffs would have obtained a better result; the underlying defendants would have pursued and prevailed on the time-bar defense. The trial court was persuaded by this argument and granted the attorneys’ motion for summary judgment.

The Court of Appeal reversed. The court pointed out that the statute of limitations defense was irrelevant because the underlying case had already been settled. The underlying defendants were no longer in a position to assert any defenses; they had settled and paid their money. The claims against the lawyers were not that the settlement was inadequate and the clients should have obtained a better outcome. Rather, the claims arose after the settlement funds had been received. Thus, there was no need to litigate what might have happened had the underlying case gone forward. The only issue was whether, once that case was over and the settlement funds received, the attorneys had act improperly in connection with those funds.

In short, depending on when the alleged wrongdoing occurred, the concept of case within a case may not apply in a legal malpractice claim.