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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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DAVID GROCHOCINSKI,

Case No. 1:06-cv-5486

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Plaintiff,

Chicago, Illinois

September 26, 2007

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v.

Oral Argument

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MAYER BROWN ROWE & MAW, LLP,
et al.,

9

Defendants.

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TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE VIRGINIA M. KENDALL
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

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09:43:06 1 (Commenced at 10:07 a.m.)

10:07:36 2 THE CLERK: 06C5486, Grochocinski verse
10:07:41 3 Mayer Brown, oral argument.

10:07:44 4 MR. NOVACK: Good morning, your Honor. May
10:07:46 5 it please the Court, Steve Novack on behalf of
10:07:48 6 defendants.

10:07:49 7 THE COURT: Good morning.

10:07:50 8 MR. NOVACK: Good morning.

10:07:50 9 MR. CARROLL: I'm sorry. Rob Carroll on
10:07:52 10 behalf of plaintiff and Art Aufmann on behalf of the
10:07:55 11 plaintiff.

10:07:55 12 THE COURT: Good morning. Good morning,
10:07:57 13 everyone.

10:07:57 14 We're going to have oral argument today on
10:07:59 15 the motion to reconsider. And I guess my one point to
10:08:05 16 make to all of you before we begin is to remember the
10:08:08 17 procedure that we're at at this point, which is on a
10:08:11 18 motion to dismiss. And that, I think, is critical to
10:08:15 19 the analysis here. So whenever you're arguing, as much
10:08:18 20 as we want to get down to what the California judge did
10:08:22 21 with this judgment or what may or may not have happened
10:08:25 22 with the trustee's decision-making process, I want to
10:08:29 23 make sure that you are applying the proper standard
10:08:32 24 under the motion to dismiss standard. Okay?

10:08:35 25 MR. NOVACK: Yes, your Honor.

10:08:36 1 THE COURT: So let's move forward.

10:08:38 2 MR. CARROLL: Very good.

10:08:38 3 MR. NOVACK: Thank you, your Honor. May it
10:08:40 4 please the Court, and thank you for allowing us to
10:08:42 5 present argument today.

10:08:43 6 THE COURT: Thank you.

10:08:44 7 MR. NOVACK: I'll reserve a few minutes for
10:08:45 8 rebuttal.

10:08:46 9 Judge, you have a very important gatekeeping
10:08:49 10 function. It's a function that this Court exercises in
10:08:52 11 a variety of matters ranging from Daubert decisions on
10:08:56 12 expert witnesses, to motions in limine, to summary
10:08:59 13 judgments, to directed verdicts. Here, you should
10:09:03 14 exercise that function to prevent an unjust and absurd
10:09:07 15 result.

10:09:07 16 Now, why would I say it would be an absurd
10:09:11 17 result? Well, Judge, there are only two possibilities,
10:09:13 18 and either way the case should be -- should not go
10:09:17 19 forward.

10:09:17 20 One possibility is the trustee loses, Mayer
10:09:21 21 Brown wins. Well, the case shouldn't have gone forward
10:09:23 22 in the first place.

10:09:24 23 But the other possibility: Assume the
10:09:27 24 trustee's going to win. Still, your Honor, there never
10:09:30 25 should have been a case, and that's because if the

10:09:33 1 trustee does win, the result will be to line the pockets
10:09:36 2 of a party, Spehar, that asserted a claim that will have
10:09:41 3 to have been proven to be a losing claim for the trustee
10:09:46 4 to win that got an undeserved TRO that --

10:09:50 5 THE COURT: But stop right there. Why does
10:09:50 6 it have to be a losing claim?

10:09:51 7 MR. NOVACK: Yes.

10:09:51 8 THE COURT: How do I get to that point at
10:09:54 9 this stage? Even if I were to agree with your
10:09:56 10 conclusion that it's absurd, because -- certainly I have
10:09:59 11 never seen any posture like this in a case before the
10:10:03 12 Court.

10:10:03 13 MR. NOVACK: Right.

10:10:16 14 THE COURT: But how can I, at this stage,
10:10:16 15 knock it out of the box?

10:10:16 16 MR. NOVACK: Because, your Honor, the --
10:10:16 17 under the Illinois law -- and this is undisputed,
10:10:16 18 nobody's contested this point -- and we cited the Tri-G
10:10:16 19 case, Supreme Court 2006, the Governmental
10:10:20 20 Interinsurance Exchange case, 2006. In order for a
10:10:24 21 malpractice plaintiff to win a case that alleges that an
10:10:28 22 attorney failed to defend the case, it must prove that
10:10:33 23 the client would have won that case had the attorney
10:10:37 24 only defended it.

10:10:38 25 THE COURT: But they've alleged -- so if at

10:10:41 1 this stage with the allegations before proofs, I have to
10:10:45 2 take all of their allegations as true.

10:10:46 3 MR. NOVACK: I agree with that. And if I
10:10:49 4 may, I'm going to put up a blowup that I did of one of
10:10:53 5 those -- two of those allegations, but the one I'm going
10:10:56 6 to focus on now is paragraph 64.

10:10:59 7 The trustee knows that the only way he can
10:11:01 8 win this case is to prove that Spehar would have lost
10:11:06 9 the underlying case. It's a given; it's like night
10:11:10 10 following day; that's what the Illinois law is. And so
10:11:13 11 he alleges that such a losing claim was all that had to
10:11:18 12 happen to have proven the victory that Spehar got was
10:11:22 13 for Mayer Brown to have shown up. Because, he says, if
10:11:27 14 Given and Mayer Brown had -- and then he lists four
10:11:30 15 things, and then he uses an and/or, so it's really any
10:11:33 16 one of those four -- but they all reduce themselves to
10:11:36 17 the same thing. We should have shown up.

10:11:37 18 If we had shown up, there would not have
10:11:40 19 been an injunction and there would not have been
10:11:43 20 damages. So he is alleging that Spehar had a losing
10:11:47 21 claim, as he must under the law, and he must win that
10:11:51 22 allegation to win the case.

10:11:53 23 But if he wins that allegation and wins the
10:11:57 24 case, guess where the money goes? The money goes to the
10:12:00 25 very party that he will have proved had no claim in the

10:12:05 1 first place. And that's -- I tried to illustrate that
10:12:10 2 and put some concrete numbers on it on this board. Is
10:12:13 3 this going to be a problem that I'm away from the
10:12:19 4 microphone?

10:12:20 5 MS. REPORTER: No. Thank you.

10:12:22 6 MR. NOVACK: Now, let's just take, as an
10:12:24 7 example, Count 2, and the trustee proves his case on
10:12:27 8 liability and gets the exact amount he's claiming in the
10:12:30 9 complaint, \$17 million. What we know from that is,
10:12:33 10 based on the Spehar arrangement, the first 7 million
10:12:38 11 goes to the lawyer. Well, that's -- that's irrelevant
10:12:40 12 to the analysis. You can't create damages. You can't
10:12:43 13 create a positive result because a lawyer is going to
10:12:46 14 get a fee.

10:12:47 15 So that leaves \$10 million. What happens to
10:12:51 16 the 10 million? Well, the first 8- -- not the first,
10:12:56 17 it's a pro rata sharing -- 890,000 of it is set to go to
10:13:01 18 the estate. Now, when I get to the --

10:13:03 19 THE COURT: Would it -- what is this based
10:13:05 20 on, this breakdown?

10:13:07 21 MR. NOVACK: This is our Exhibit D to our
10:13:09 22 motion to dismiss, which is the order entered by Judge
10:13:14 23 Squires approving the agreement.

10:13:15 24 THE COURT: The arrangement.

10:13:16 25 MR. NOVACK: And the page on that is called

10:13:18 1 the calculation schedule. And I could hand up --

10:13:23 2 THE COURT: That's fine.

10:13:24 3 MR. NOVACK: -- to your Honor -- I'm going
10:13:26 4 to hand it up as a stand-alone page and also the full
10:13:29 5 order of Judge Squires and I've yellow highlighted the
10:13:34 6 relevant numbers.

10:13:41 7 THE COURT: And this was approved by the
10:13:44 8 bankruptcy judge, right, this arrangement was approved?

10:13:48 9 MR. NOVACK: It was; it was. But these
10:13:52 10 arguments weren't presented -- we weren't there -- but
10:13:58 11 they were approved.

10:13:58 12 THE COURT: Okay.

10:13:59 13 MR. NOVACK: They were approved and so --

10:14:01 14 THE COURT: And if you weren't out --

10:14:03 15 MR. NOVACK: Pardon?

10:14:03 16 THE COURT: And you weren't out in
10:14:05 17 California when the judgment was entered either.

10:14:06 18 MR. NOVACK: Well, there was no malpractice
10:14:08 19 claim against us at the time this thing was approved.
10:14:11 20 So we weren't called upon to comment one way or the
10:14:15 21 other.

10:14:15 22 THE COURT: Okay. Your client wasn't out
10:14:17 23 there?

10:14:17 24 MR. NOVACK: Pardon?

10:14:18 25 THE COURT: Your client wasn't out there?

10:14:19 1 MR. NOVACK: Yes. I'm sorry. I meant to
10:14:21 2 say that.

10:14:21 3 THE COURT: That's what I meant.

10:14:22 4 MR. NOVACK: I meant to say that.

10:14:23 5 But because it's been approved, and if
10:14:26 6 there's a recovery here, this is the way it's going to
10:14:29 7 be broken down.

10:14:29 8 THE COURT: Okay.

10:14:30 9 MR. NOVACK: 890,000 to the estate -- and
10:14:33 10 when I get to the damage argument, I'm going to show you
10:14:35 11 that that itself is a windfall and shouldn't happen
10:14:38 12 because no money's been paid on the judgment. So the
10:14:42 13 client would get a cash payment when it hasn't paid any
10:14:45 14 part of the judgment. But for this purpose of the
10:14:47 15 absurdity, we'll just assume that's where that's going.

10:14:50 16 But look what happens to what we call in our
10:14:53 17 brief the lion's share.

10:14:55 18 THE COURT: Right.

10:14:55 19 MR. NOVACK: Just to --

10:14:56 20 THE COURT: About sixteen times, by the way,
10:15:00 21 I have that expression in the papers.

10:15:02 22 MR. NOVACK: I know.

10:15:02 23 THE COURT: I understand.

10:15:03 24 MR. NOVACK: But I want to put some numbers
10:15:05 25 to it.

10:15:05 1 That means that of the 17 million, over
10:15:11 2 16 million's going to Spehar and the lawyers --

10:15:13 3 THE COURT: I understand.

10:15:14 4 MR. NOVACK: -- \$9 million --

10:15:16 5 THE COURT: I understand.

10:15:17 6 But the problem is the way that the
10:15:20 7 complaint is alleged is that the trustee's made a
10:15:23 8 decision here that the suit against Mayer Brown has
10:15:28 9 merit for it to go forward, right? I mean, the trustee
10:15:32 10 looks at the assets of the estate -- this being the sole
10:15:36 11 asset of the estate -- and has to make some independent
10:15:40 12 determination that it is worthwhile to move on. And
10:15:44 13 he's made that determination, right?

10:15:46 14 MR. NOVACK: Well, I'm not prepared to
10:15:48 15 assume that. He certainly made the decision to sue.
10:15:51 16 Whether -- he made a decision. Whether it was a good or
10:15:54 17 bad --

10:15:54 18 THE COURT: Well, let's talk about that. I
10:15:56 19 mean, the trustee in a bankrupt estate looks at the
10:16:01 20 assets and debts of the estate and stands in the shoes
10:16:04 21 of that estate and then says whether he is going to move
10:16:08 22 forward --

10:16:08 23 MR. NOVACK: Correct.

10:16:08 24 THE COURT: -- or not.

10:16:10 25 So he's moved forward because as much as

10:16:14 1 that goofy judgment -- and I'll -- it is goofy, it's
10:16:19 2 speculative and based on complete speculation about
10:16:25 3 whether the company could have gone forward, whether the
10:16:30 4 agreement actually existed and they deserved a
10:16:33 5 commission, whatever, whatever that judgment was based
10:16:36 6 on, he's made a judgment that it exists because the
10:16:44 7 Mayer Brown attorneys never appeared to challenge it.
10:16:49 8 And, therefore, there's some merit to his case to
10:16:53 9 challenge. And whether that brings this absurd result
10:16:57 10 is a different issue, before you get to the point of
10:17:00 11 whether the trustee's making the decision of moving on
10:17:03 12 the case.

10:17:04 13 MR. NOVACK: Well -- but, your Honor, with
10:17:06 14 all respect, he is not the Supreme Court. He is not the
10:17:09 15 Seventh Circuit.

10:17:09 16 THE COURT: I agree.

10:17:10 17 MR. NOVACK: He is not the Northern District
10:17:12 18 of Illinois.

10:17:12 19 The fact that he thinks it's meritorious and
10:17:14 20 that it's -- passes muster under 12(b)(6) is irrelevant.
10:17:19 21 And he has no more weight in saying that than I tell you
10:17:22 22 that it doesn't.

10:17:22 23 THE COURT: Okay. Fair enough. That he can
10:17:24 24 bring it and then I still need to rule on the 12(b)(6).
10:17:28 25 Understood. I understand that.

10:17:29 1 MR. NOVACK: Right.

10:17:29 2 THE COURT: But here's the point: The
10:17:33 3 trustee who's bringing this case is bringing it in good
10:17:36 4 faith -- are we assuming in good faith? Are you
10:17:39 5 alleging that he's conspiring with Spehar to --

10:17:42 6 MR. NOVACK: We made that in our motion and
10:17:45 7 you denied it, and we have not brought it on
10:17:47 8 reconsideration. We don't think it's in good faith. We
10:17:49 9 think it's a fraud on the Court. But you've rejected
10:17:52 10 that; I have not asked you to reconsider it. I'm going
10:17:55 11 to -- I'm keeping that argument in my pocket for the
10:17:58 12 merits of the case or any appeal. But, no, I don't
10:18:01 13 agree that it's in good faith. How could it possibly be
10:18:04 14 in good faith?

10:18:05 15 THE COURT: How could I possibly sit as a
10:18:08 16 District Court and look at a state court judgment and
10:18:15 17 say, Well, that sure is a goofy judgment. I should
10:18:17 18 throw it out because equitably it results in a lion's
10:18:20 19 share of recovery to Spehar. How can I do that?

10:18:23 20 MR. NOVACK: Judge, I am not asking you in
10:18:24 21 this motion and I didn't ask you in the other motion to
10:18:27 22 make a finding that that judgment was wrong.

10:18:30 23 We're not asking you to find that that
10:18:32 24 underlying judgment was bad. I'm saying that this
10:18:36 25 complaint is bad because it alleges that that underlying

10:18:39 1 judgment was bad. It has to, because of this zero sum
10:18:45 2 game, this case within a case. That's just what the
10:18:47 3 Illinois law is.

10:18:48 4 The Illinois law says you can make all the
10:18:51 5 mistakes in the world, lawyer, but you're not liable.
10:18:55 6 You're not liable unless the client would have prevailed
10:19:00 7 but for your mistake.

10:19:01 8 THE COURT: And the case within a case is
10:19:03 9 exactly why it should go to discovery as opposed to
10:19:08 10 being resolved at this point.

10:19:09 11 MR. NOVACK: But, Judge, when we get to the
10:19:11 12 end of the day, there's two possibilities, right? One
10:19:15 13 possibility is that it's proven that the underlying
10:19:18 14 judgment was bad and the trustee is going to arguably
10:19:25 15 win on that. Another possibility is that the -- is that
10:19:29 16 the underlying claims are going to be held as being
10:19:33 17 good. And I say that if it's proven that the underlying
10:19:37 18 claim is good, then there cannot be a malpractice case,
10:19:40 19 because they didn't lose because of negligence. They
10:19:43 20 lost because of the facts and the law.

10:19:44 21 THE COURT: I understand.

10:19:45 22 MR. NOVACK: But if they do prove the one
10:19:47 23 thing they have to prove in order to win, which is that
10:19:50 24 the underlying judgment was bad, then the person that
10:19:55 25 got the bad judgment -- so you'd have to make two

10:19:59 1 rulings. You'd have to say, I find that the underlying
10:20:02 2 judgment was bad, Spehar's claim was meritless, CMGT
10:20:10 3 would have won if only those lousy lawyers at Mayer
10:20:15 4 Brown would have shown up, it's a bad, bad judgment.
10:20:17 5 And then you'd have to say, So as a result of Spehar
10:20:20 6 filing a bad judgment, I'm going to give Spehar \$9
10:20:23 7 million.

10:20:24 8 THE COURT: Right. I understand.

10:20:25 9 MR. NOVACK: Well, Judge, with all respect,
10:20:27 10 the District Court shouldn't allow that to happen.
10:20:30 11 That's what the gatekeeper rule is. That turns the law
10:20:33 12 on its head. That's rewarding the party that caused the
10:20:37 13 problem in the first place with a \$9 million recovery.

10:20:41 14 The only way that Spehar can be a good guy
10:20:44 15 here is to prove that his judgment was good, but that
10:20:48 16 makes us win.

10:20:49 17 So I'm saying either way it goes -- that's
10:20:52 18 why you don't have to decide it now. You just have to
10:20:55 19 say, you know what? Either way it goes, either Mayer
10:20:59 20 Brown wins or wrongdoer gets the money, I'm not going to
10:21:02 21 let that case go forward. I don't like either result.
10:21:05 22 I don't like putting these parties through the burden of
10:21:07 23 this case when those are the only two possible results.

10:21:10 24 THE COURT: Then why -- then how, at this
10:21:13 25 stage, do I take the fact that the Mayer Brown attorneys

10:21:17 1 did not attack what could be a valid judgment? And why
10:21:22 2 isn't that just the reverse of your argument, that they
10:21:27 3 are now being rewarded for their lack of their
10:21:33 4 appropriate professional efforts to find in the case --

10:21:38 5 MR. NOVACK: I think it's even easier than
10:21:40 6 the last one. It's because the Illinois law, which
10:21:43 7 you're bound to follow here -- and this is Supreme Court
10:21:45 8 law, not you predicting it -- says that negligence alone
10:21:50 9 is not enough; negligence alone is not enough. Even
10:22:02 10 if -- now, it's -- the fact that Mayer Brown didn't show
10:22:04 11 up is not in itself sufficient to sustain the client's
10:22:07 12 cause of action.

10:22:10 13 Even if negligence is established -- they
10:22:14 14 were dealing with the damages issue. Unless there's
10:22:16 15 damage --

10:22:16 16 THE COURT: But how do I know at this stage
10:22:18 17 whether it's just negligence alone? How do I know,
10:22:21 18 before discovery, as to why they didn't show up? I have
10:22:25 19 no idea why the lawyers didn't show up. I have no idea
10:22:28 20 whether there were communications back and forth. I
10:22:31 21 have a complaint and the allegations are taken as
10:22:35 22 true --

10:22:35 23 MR. NOVACK: Well, the complaint alleges
10:22:36 24 negligence. This is a complaint for negligence.

10:22:38 25 THE COURT: Well, there's two complaints --

10:22:39 1 MR. NOVACK: I don't know what other
10:22:41 2 possibility there is. An intentional breach of duty?
10:22:45 3 Well, this is a malpractice -- I can only deal with what
10:22:48 4 the pleading is. The pleading says it's negligence.
10:22:51 5 The pleading says it's malpractice. And the Illinois
10:22:54 6 Supreme Court says it doesn't matter if the lawyer gets
10:22:56 7 a -- what you say is a windfall and gets rewarded for
10:23:00 8 his negligence. Well, he's not getting rewarded. He
10:23:03 9 just isn't paying for it.

10:23:04 10 The Illinois Supreme Court says, That's
10:23:06 11 okay, that's okay, because negligence alone is not
10:23:08 12 enough. These are equal elements of the cause of action
10:23:14 13 and in Sterling Radio where the Illinois Appellate Court
10:23:19 14 very recently, 2002, dealt with a similar issue, there
10:23:24 15 somebody else paid the judgment and the plaintiff said,
10:23:27 16 so what? If you let that lawyer off the hook -- he
10:23:31 17 admitted negligence -- then you're going to give him a
10:23:33 18 windfall. And the Court said, No, that isn't the way it
10:23:36 19 works. We look at the plaintiff to see if the plaintiff
10:23:38 20 is going to get a windfall, because they -- and that
10:23:41 21 court refused to apply the collateral source rule, which
10:23:43 22 is applicable in personal injury cases, and said, We
10:23:47 23 don't care if the lawyer gets a break here.

10:23:50 24 What we don't want to have happen is for the
10:23:52 25 client to be in a better position, because of the

10:23:55 1 negligence, than he would have been if there hadn't been
10:23:57 2 any negligence. And so that's, exactly what you're
10:24:01 3 saying, happened. They let the lawyer off the hook. It
10:24:09 4 was a break for everybody. Somebody else paid that
10:24:12 5 judgment.

10:24:13 6 So you don't -- you don't have to resolve
10:24:17 7 any issue of fact here for this motion. This is within
10:24:20 8 the four corners. This is a motion to dismiss because
10:24:26 9 either -- whichever road this case goes down, it ends up
10:24:30 10 either with us winning -- and that's not a reason to
10:24:32 11 keep the case going if we're going to win -- or we lose
10:24:40 12 and the winner is the guy that caused the problem in the
10:24:40 13 first place. And in order to win, there has to be a
10:24:44 14 finding that his judgment was bad. So that's why it's
10:24:50 15 absurd, and that's the absurd result that is going to
10:24:53 16 happen.

10:24:56 17 Our second ground on this motion is
10:25:01 18 Count 2 -- before I leave Count 1, I want to follow up
10:25:03 19 with what your Honor said, that you observed that the
10:25:06 20 judgment appears to be goofy and seems to be
10:25:11 21 speculative.

10:25:11 22 One of the grounds we asserted in our
10:25:14 23 original motion to dismiss was that on Count 1, where
10:25:18 24 they're claiming the damages are the loss of value of
10:25:21 25 the company, we cited the Illinois law that says, In a

10:25:24 1 startup company situation, you can't do that. And your
10:25:29 2 Honor's opinion didn't address that argument.

10:25:31 3 But I think that it's consistent with what
10:25:34 4 you just said about the speculative nature of it. And
10:25:38 5 I'd ask your Honor to consider, not reconsider, because
10:25:42 6 there was nothing in your opinion on that -- on that
10:25:45 7 argument.

10:25:45 8 Count 2 on damages. Starting with the law,
10:25:50 9 again, negligence alone isn't enough. There must be
10:25:53 10 actual damages. The Illinois Supreme Court says that
10:25:56 11 must be monetary loss. Sterling Radio is the holding we
10:26:02 12 think is closest to our case, which says that if the
10:26:04 13 client is never going to pay that judgment, then there's
10:26:07 14 no liability for the lawyer.

10:26:09 15 THE COURT: Are you making an assumption
10:26:10 16 there? The client's never going to pay the judgment?

10:26:14 17 MR. NOVACK: Well, your Honor, no money was
10:26:15 18 paid on it at the time of the filing, and as you just
10:26:19 19 confirmed, the trustee's stands in the shoes of the
10:26:23 20 bankrupt at the time -- the millisecond prior to the
10:26:28 21 filing.

10:26:28 22 What is being asked in the response brief is
10:26:31 23 that, well, maybe we'll win on Count 1. We'll take the
10:26:34 24 money that we win on Count 1 and pay the judgment and
10:26:37 25 then there's loss. The problem with that, Judge, is

10:26:44 1 that those damages are completely and totally
10:26:48 2 speculative because nobody knows right now, how could
10:26:52 3 they, whether they're going to win on Count 1. So there
10:26:55 4 are no concrete or finite damages as of the filing of
10:26:59 5 the complaint, and that's the test.

10:27:01 6 It's not, Well, I might suffer damages
10:27:04 7 later. Just be patient with me your Honor and maybe if
10:27:07 8 the case goes slow, damages will accrue, or maybe we'll
10:27:11 9 win this other count and then we'll have damages.

10:27:13 10 The test under 12(b)(6) and applying
10:27:17 11 Illinois law, which requires actual, not speculative,
10:27:21 12 damages. And, again, I rely on the NIEP case that you
10:27:25 13 cited, the Illinois Supreme Court 2005 case for that.
10:27:28 14 You cannot, quote, making that demonstration of actual
10:27:34 15 damages requires more than supposition or conjecture
10:27:38 16 where the mere possibility of harm exists, or damages
10:27:41 17 are otherwise speculative, actual damages are absent and
10:27:45 18 no cause of action yet exists.

10:27:48 19 Well, if they were right that Count 1 could
10:27:51 20 somehow spill over to Count 2, which I don't concede but
10:27:54 21 just arguendo for now, that's for a later day. If those
10:27:58 22 damages are suffered, then the case -- you know, the
10:28:02 23 trustee would file that case. We'll deal with it at the
10:28:05 24 time. But today it's completely, totally speculative.

10:28:09 25 It's really no different. Think of it this

10:28:11 1 way: What if a plaintiff had a lawyer in a case and the
10:28:15 2 lawyer made a mistake in the middle of the case, a huge
10:28:19 3 mistake? He ignored the client's instructions to take
10:28:24 4 an evidence deposition of an elderly sick witness and
10:28:26 5 the witness died. Oh, my God, the case is dead. He
10:28:31 6 fires that lawyer and hires a new lawyer to finish out
10:28:33 7 the case.

10:28:34 8 If that plaintiff filed the suit right then
10:28:39 9 against the lawyer for malpractice, that suit would be
10:28:42 10 dismissed. Why? There's no damage. He might win that
10:28:45 11 case. Maybe some other witness will fill the gap.

10:28:49 12 THE COURT: But there's a judgment of a
10:28:51 13 court sitting there, a \$17 million judgment sitting
10:28:56 14 there which, you know, you allege will never be
10:28:58 15 collected and you allege is not good, but it is a
10:29:01 16 judgment of a Court.

10:29:03 17 MR. NOVACK: But the fact -- but just the
10:29:05 18 fact -- that's what's called the judgment rule, and
10:29:08 19 Illinois does not follow the judgment rule. Sterling
10:29:11 20 Radio is the proof that Illinois does not follow the
10:29:13 21 judgment rule. The judgment rule says if the judgment
10:29:16 22 is entered, that's it. Don't ask any more questions.
10:29:19 23 That's the damages.

10:29:20 24 The payment rule, which is Illinois's rule,
10:29:22 25 says, No, you have to actually pay that judgment or be

10:29:26 1 damaged in some other way by it. And here there has
10:29:31 2 never been a payment, and the only time there could be
10:29:34 3 one, even giving their theory credibility, is in the
10:29:38 4 future with a big if, a big if. They've got to win that
10:29:42 5 case. And in my other hypothetical, if the plaintiff
10:29:45 6 said, Well, Judge, don't dismiss my case because I think
10:29:49 7 I'm going to lose that case, just wait, be patient, and
10:29:52 8 when I lose it, then I'll really have damages. The
10:29:54 9 Court's going to say, No, you don't have your damages
10:29:58 10 now, it's conjecture, and you don't know what's going to
10:30:00 11 happen. And we don't know what's going to happen on
10:30:03 12 Count 1.

10:30:04 13 So I think Sterling Radio is the Illinois
10:30:09 14 answer. I recognize the Illinois Supreme Court has not
10:30:11 15 dealt with it on all fours. However, the Illinois
10:30:14 16 Supreme Court has over and over and over again said you
10:30:17 17 have to have monetary loss and it cannot be speculative.
10:30:24 18 You put those two together, I think they come out the
10:30:26 19 way Sterling Radio did.

10:30:27 20 Now, your Honor's opinion said the Supreme
10:30:30 21 Court limited Sterling Radio to cases of collateral
10:30:34 22 source rule. Really what this -- what the Supreme Court
10:30:39 23 was doing was reciting what the Illinois Appellate Court
10:30:44 24 case that it was reviewing said -- and there's actually
10:30:49 25 a clause that didn't appear in your Honor's quote, that

10:30:51 1 said, In the case before us here, the Appellate Court
10:30:56 2 found Sterling Radio to be inapposite, because under --
10:30:59 3 unlike Gruse, and then it went on with the quote.

10:31:03 4 And --

10:31:03 5 THE COURT: It doesn't distinguish the
10:31:05 6 reasoning in any way. It doesn't -- my quote is a quote
10:31:10 7 from the case which talks about the appellate reasoning.
10:31:16 8 And if you read the full case, it is essentially
10:31:21 9 adopting not distinguishing that reasoning in any way.

10:31:24 10 MR. NOVACK: Judge, I respectfully disagree
10:31:26 11 with you on that, and here is why. It didn't reach the
10:31:31 12 issue of whether a judgment that hasn't been paid could
10:31:35 13 be damages. As a matter of fact, it said -- and I have
10:31:41 14 two quotes to prove that point. As soon as -- assuming
10:31:47 15 I can find them. Just bear with me one second, please,
10:32:07 16 because they're very important.

10:32:08 17 The first one said the flaw in the Appellate
10:32:16 18 Court's judgment is not related to shifting burdens of
10:32:19 19 Gruse, and then it goes on to say, Nor does it turn on
10:32:21 20 whether the existence of an unsatisfied judgment is
10:32:25 21 sufficient in and of itself to withstand the challenge
10:32:28 22 to the damages itself of the legal malpractice claim.

10:32:34 23 So what the Court was saying is that issue
10:32:34 24 is not going to be addressed. And then to confirm
10:32:38 25 that -- and that's at page 310 of the 216 Ill.2d volume.

10:32:44 1 Then two pages later at 312 to 313, In making the point
10:32:49 2 that the plaintiff's argument was internally
10:32:50 3 inconsistent, it said, quote, if -- and this is the
10:32:55 4 keyword -- if, as NIEP contends, the existence of the
10:32:59 5 indemnity judgment standing alone is sufficient to
10:33:03 6 constitute legally cognizable damage, even though the
10:33:05 7 judgment has never been enforced against NIEP. Then it
10:33:10 8 went on to say that argument that was the plaintiff's
10:33:12 9 argument was inconsistent with another argument. But it
10:33:16 10 didn't say, you know, the rule is and that's
10:33:20 11 inconsistent. It said if. So we've got a word whether
10:33:25 12 the issue -- and it says we're not reaching that, and
10:33:28 13 then, secondly, it says if. So it doesn't reach the
10:33:32 14 question because it found that proximate cause was not
10:33:35 15 present, and that's all it had to do. So it did not
10:33:39 16 address it. It just left open that other question. So
10:33:45 17 it had no occasion to bless or criticize the Appellate
10:33:48 18 Court on that particular point.

10:33:51 19 And the Appellate Court was wrong about that
10:33:54 20 because Sterling did not turn only on the collateral
10:33:58 21 source rule. As a matter of fact, the first ruling that
10:34:04 22 Sterling Radio made was -- and this is at page 63 of 328
10:34:13 23 Ill.App.3d 3rd, before you get to the collateral --

10:34:17 24 THE COURT: Say where it is again.

10:34:18 25 MR. NOVACK: 328, Ill.App.3rd at 63.

10:34:23 1 THE COURT: Okay.

10:34:24 2 MR. NOVACK: It say, Thus, Seeth (phonetic),
10:34:26 3 that was the client, suffered only a diminution of the
10:34:30 4 value of his shares and not a loss of his personal
10:34:33 5 funds. Accordingly, we reject Seeth's argument. His
10:34:36 6 argument was just the entry of the judgment alone.

10:34:38 7 Then it goes on and in the very next
10:34:40 8 paragraph, very next sentence, Alternatively Seeth urges
10:34:46 9 us to apply the collateral source rule, and then it goes
10:34:49 10 on to do that. But this case dealt with both. It dealt
10:34:53 11 with the judgment versus payment rule on damages, and
10:34:57 12 then dealt with the collateral source.

10:34:58 13 And when it got to collateral source, your
10:35:01 14 Honor, it held that it did not apply because in
10:35:04 15 malpractice, which is what we have here, the purpose of
10:35:07 16 a malpractice action is the place -- I'm quoting now on
10:35:11 17 page 64 -- To place the plaintiff in the same position
10:35:14 18 he or she would have occupied but for the attorney's
10:35:18 19 negligence. The plaintiff can be in no better position
10:35:22 20 by bringing suit against the attorney than if the
10:35:25 21 underlying action had been successfully prosecuted or
10:35:29 22 defended.

10:35:29 23 Well, on the judgment issue now, default
10:35:32 24 judgment, to get money -- if the estate got money now,
10:35:36 25 it would be in a better position than if the judgment

10:35:39 1 had never been entered into. It would be getting
10:35:42 2 \$890,000 because a judgment was entered against it.
10:35:45 3 That makes it in a better position than if there had
10:35:48 4 never been the suit. That's our -- that's our case.
10:35:52 5 It's on all fours, all fours, your Honor.

10:35:55 6 So I would say for both of those reasons,
10:35:57 7 the absurd result and your Honor exercising your
10:36:00 8 gatekeeping function and for the lack of damages, we
10:36:05 9 respectfully ask your Honor to reverse your prior
10:36:07 10 decision and dismiss the complaint. We alternatively
10:36:12 11 argue certification. I think the briefs adequately
10:36:16 12 address that point.

10:36:16 13 THE COURT: I don't need you to address
10:36:18 14 that.

10:36:18 15 MR. NOVACK: I would like to make one point
10:36:20 16 about it, because I didn't say this in the brief, but
10:36:22 17 I'm going cite -- I'm going to quote from case that was
10:36:25 18 cited in the brief.

10:36:26 19 Seventh Circuit in Ahrenholz, a 2000 case
10:36:31 20 written by Judge Posner, said that, Where the statutory
10:36:35 21 criteria are met, the District Court no longer has the
10:36:39 22 discretion, but has the duty to certify. Here's what he
10:36:42 23 says: It is equally important, however, to emphasize
10:36:46 24 the duty of the District Court -- and of our court as
10:36:49 25 well -- to allow an immediate appeal to be taken when

10:36:51 1 the statutory criteria are met.

10:36:54 2 I submit that the statutory criteria are met
10:36:57 3 for the reasons set forth in the brief, and, therefore,
10:37:00 4 I ask in the alternative -- hopefully we won't get
10:37:03 5 there -- but in the alternative, to certify the question
10:37:06 6 for appeal.

10:37:07 7 THE COURT: Okay. Thank you.

10:37:18 8 Good morning.

10:37:19 9 MR. CARROLL: All right. Good morning.

10:37:19 10 Again, my name is Rob Carroll. I'm here for the
10:37:22 11 plaintiff.

10:37:22 12 I want to start where the defendants left
10:37:25 13 off, which is with their damages argument. And I'm
10:37:28 14 going to get to the points raised by defendant.
10:37:30 15 Specifically, I'm going to get to the point that
10:37:32 16 Illinois has adopted the judgment rule, not the payment
10:37:35 17 rule, and that's very clear, and that Sterling does not
10:37:38 18 say that Illinois' adopted the payment rule.

10:37:41 19 But before I discuss Sterling or the Gruse
10:37:43 20 case, which this Court relied on in finding that the
10:37:45 21 judgment rule applies, I want to talk about the Stanley
10:37:49 22 case from the Fifth Circuit, which I provided to the
10:37:51 23 Court and to counsel as soon as -- as soon as I became
10:37:55 24 aware of it. It came out September 13th of this year.

10:37:58 25 Now, the Stanley case is a case that is --

10:38:03 1 is very similar to this case factually. In that case
10:38:09 2 there was a lawyer who had been sued. He was a criminal
10:38:15 3 prosecutor, and he had been sued by somebody who had
10:38:18 4 been wrongfully convicted of a crime because he had --
10:38:21 5 because the prosecutor had allegedly withheld
10:38:25 6 exculpatory evidence. And in the lawsuit in which the
10:38:30 7 victim was suing the prosecutor, the victim obtained a
10:38:34 8 multimillion dollar judgment.

10:38:36 9 After the victim obtained that judgment, the
10:38:39 10 victim forced the lawyer into involuntary Chapter 7
10:38:44 11 bankruptcy, just as in this case the judgment creditor
10:38:48 12 for CMGT was forced into a bankruptcy proceeding.

10:38:54 13 Now, in Stanley after the bankruptcy
10:38:57 14 proceeding was commenced, the trustee for the criminal
10:39:00 15 prosecutor filed a legal malpractice case against the
10:39:04 16 prosecutor's lawyers for negligence arising out of the
10:39:08 17 underlying case. And the lawyers argued in that -- the
10:39:16 18 lawyer's defense in the legal malpractice argued that
10:39:19 19 the case should be dismissed on summary judgment because
10:39:21 20 there was no damages.

10:39:23 21 And part of the reason that they argued that
10:39:25 22 there was no damages is because the judgment debtor, the
10:39:28 23 criminal prosecutor in the underlying case, had been
10:39:33 24 absolved of any personal liability through Chapter 7
10:39:37 25 bankruptcy discharge.

10:39:38 1 And the Court takes the Fifth Circuit --
10:39:43 2 took that on review, and they looked at it in two steps.
10:39:47 3 Okay? The first step they said is that under the
10:39:49 4 bankruptcy -- federal bankruptcy rules, specifically
10:39:52 5 section 541(a), you have to look at the debtor -- the
10:39:57 6 judgment debtor in a snapshot of time to figure out
10:40:01 7 whether there's a cause of action that accrued to the
10:40:04 8 bankruptcy estate. And, specifically, you're supposed
10:40:08 9 to look at the judgment debtor as of the moment the
10:40:11 10 bankruptcy is commenced.

10:40:12 11 THE COURT: But isn't the Stanley case
10:40:14 12 distinguished on the basis of his argument about the
10:40:17 13 value of that judgment? You know, his argument is is
10:40:22 14 that the judgment is worthless because there was no
10:40:25 15 entity that was ongoing. It was a startup that failed.
10:40:29 16 And this judge out in California comes up with this
10:40:33 17 \$17 million judgment out of thin air on a lot of
10:40:36 18 speculation and it's a meritless judgment, according to
10:40:40 19 your allegations. And there's a difference between that
10:40:43 20 and what happened to the prosecutor here with the
10:40:46 21 judgment against him and the way that that went into
10:40:49 22 bankruptcy. Don't you agree?

10:40:51 23 MR. CARROLL: Well, one thing that I don't
10:40:52 24 agree with is that we've alleged that -- I want to be
10:40:55 25 careful here -- we have not alleged that the claim that

10:40:58 1 Spehar Capital had, the substance of it was meritless.
10:41:02 2 We have alleged that there were procedural defenses that
10:41:05 3 would have prevented that judgment from being entered,
10:41:09 4 and I think there's a difference. And so --

10:41:11 5 THE COURT: Okay. Well, it says in your
10:41:13 6 allegations that -- and he has highlighted the critical
10:41:15 7 paragraphs -- that it would not have obtained injunctive
10:41:18 8 relief or damages.

10:41:20 9 MR. CARROLL: Right.

10:41:20 10 THE COURT: So you would not have obtained
10:41:22 11 it --

10:41:22 12 MR. CARROLL: -- and I'll get to the fraud
10:41:25 13 arguments in a minute, after I address the damages
10:41:28 14 arguments. I don't want to get too offtrack. But we
10:41:31 15 have not alleged -- you will not see anywhere in our
10:41:34 16 complaint us alleging the substance of the dispute was
10:41:37 17 meritless. We've alleged that California was the
10:41:40 18 improper jurisdiction. It should have been brought in
10:41:42 19 Illinois.

10:41:42 20 We've alleged that if -- if Mayer Brown had
10:41:47 21 appeared, if the defendants had appeared and defended
10:41:49 22 that case, then they -- they defended the request for
10:41:57 23 injunctive relief, because there was monetary damages
10:41:59 24 that could have been rewarded because that relief wasn't
10:42:03 25 appropriate.

10:42:03 1 THE COURT: That it was inappropriate, did
10:42:05 2 you say?

10:42:05 3 MR. CARROLL: That equitable relief was
10:42:07 4 inappropriate. Not that Spehar Capital didn't have a
10:42:10 5 valid claim, but that they were going about it the wrong
10:42:13 6 way, that they could have sued for money damages instead
10:42:16 7 of equitable relief. And because there's that --
10:42:19 8 because there was money damages that could have been
10:42:21 9 obtained, equitable relief was inappropriate.

10:42:25 10 They also could have argued that even if
10:42:26 11 equitable relief was appropriate, Spehar should have
10:42:30 12 been forced to post a TRO bond. And that bond would
10:42:33 13 have been millions of dollars, and we don't think Spehar
10:42:36 14 would have been able to afford it. And they would have
10:42:38 15 been able to post it and the injunctive relief never
10:42:41 16 would have been entered.

10:42:42 17 Now, that doesn't mean they had a valid
10:42:44 18 breach of contract claim against CMGT. Maybe it did.
10:42:48 19 But it doesn't get to the merit of the substance of the
10:42:51 20 dispute.

10:42:51 21 Our allegations go to, you know, if -- as
10:42:56 22 Given and MBRM had abandoned their duty, CMGT filed
10:43:00 23 suit. It would have filed them -- had to file a special
10:43:03 24 and limited appearance to contest California's
10:43:06 25 jurisdiction. That's the type of defenses that we're

10:43:07 1 asserting should have been presented by defendants, had
10:43:10 2 they actually appeared in California.

10:43:13 3 THE COURT: You know, it's the oddest
10:43:19 4 procedural history that I have ever seen. And to see
10:43:24 5 your client seek to stop a company from the startup as
10:43:32 6 opposed to, for example, seek commissions subsequent to
10:43:35 7 the startup, and then to have the company go bankrupt
10:43:38 8 and then get a judgment against the company, and then
10:43:40 9 have your clients pay the trustee for the attack on the
10:43:48 10 judgment is, as counsel has claimed, he's calling it a
10:43:53 11 fraud on the Court and wants me to reach in and stop
10:43:58 12 this inequitable position.

10:44:02 13 And you seem to just want to focus on the
10:44:05 14 fact that it may or may not have been a valid judgment
10:44:10 15 in California. But what about the just unclean hands
10:44:14 16 aspect of moving forward in the fashion that your
10:44:18 17 clients have moved?

10:44:18 18 MR. CARROLL: Well, we have to keep one
10:44:20 19 thing very clear. Our client is the trustee, not
10:44:23 20 Spehar. And Spehar is not a party --

10:44:25 21 THE COURT: I know. And the problem is that
10:44:28 22 Spehar, of course, is now funding the trustee's actions,
10:44:31 23 right?

10:44:31 24 MR. CARROLL: Well, Spehar has reached an
10:44:34 25 agreement with the estate to pay the costs of the

10:44:36 1 litigation.

10:44:36 2 THE COURT: And how common is that?

10:44:38 3 MR. CARROLL: I would think it's very common
10:44:40 4 that --

10:44:41 5 THE COURT: Would you think it is or it is
10:44:42 6 not?

10:44:42 7 MR. CARROLL: I think it is. I can't cite
10:44:44 8 you a specific example, but it's really not that crazy
10:44:48 9 of a result.

10:44:49 10 I mean, you have a Chapter 7 bankruptcy
10:44:52 11 estate with very few liquid assets. One of the assets
10:44:56 12 that it has is a legal malpractice claim. It doesn't
10:44:59 13 cost very much to Spehar to fund the estate to pursue
10:45:04 14 that claim. Whether he thinks it has any merit or not,
10:45:07 15 it doesn't cost him that much. And if the estate wins,
10:45:10 16 then his judgment gets paid. And so it's not that --
10:45:13 17 it's not that absurd to think that a judgment creditor
10:45:17 18 of an estate, that doesn't have that much in assets,
10:45:21 19 would help fund litigation, when litigation is one of
10:45:25 20 the assets of the estate to eventually get paid.

10:45:27 21 THE COURT: Has your client analyzed the
10:45:30 22 validity of the claim and espoused the validity of the
10:45:32 23 claims to say that they believe it is an asset of the
10:45:36 24 estate? Is that -- in essence he had to do that, right?

10:45:41 25 MR. CARROLL: Yeah -- yes, yes.

10:45:43 1 THE COURT: In spite of the fact that he
10:45:44 2 knows what the law is on damages for startup companies;
10:45:48 3 in spite of the fact that he knows about the very
10:45:50 4 beginning of the lawsuit where just from the allegations
10:45:55 5 it appears that the potential commission agreement may
10:46:00 6 have expired; in spite of all that, he believes that
10:46:03 7 there is validity to pursue the Mayer Brown lawyers for
10:46:07 8 this judgment?

10:46:09 9 MR. CARROLL: Absolutely. The Mayer Brown
10:46:10 10 lawyers were representing CMGT, and they should have
10:46:15 11 gone out to California. They have should have --

10:46:18 12 THE COURT: Okay. So they didn't and they
10:46:21 13 were negligent. How do you respond to his argument of
10:46:23 14 complete negligence? They blew it. They should have
10:46:25 15 been there, but they weren't. So why doesn't the case
10:46:28 16 get dismissed on just negligence? I mean, it's not an
10:46:31 17 overt act of malintent.

10:46:34 18 MR. CARROLL: It doesn't have to be
10:46:35 19 malintent. It's a negligence case. And the elements of
10:46:39 20 a legal malpractice case, which is what we have pled, is
10:46:42 21 that there was a duty between the attorney and the
10:46:45 22 client, which there was, that there was a breach of that
10:46:50 23 duty by the lawyer, which there was, and that there was
10:46:54 24 proximate cause -- there was a -- that breach
10:46:57 25 proximately cause the damages.

10:46:59 1 THE COURT: Okay. And your two problems are
10:47:02 2 proximate cause and damages. And damages, the
10:47:03 3 speculative nature of what the California judge did?

10:47:07 4 MR. CARROLL: Well, that's a valid judgment
10:47:10 5 that was entered -- you know what? If defendants had
10:47:13 6 appeared at that prove-up hearing --

10:47:16 7 THE COURT: Okay.

10:47:17 8 MR. CARROLL: -- they could have challenged
10:47:18 9 it and said it's speculative. That's what they should
10:47:20 10 have done, and they didn't do that. That's why we're
10:47:23 11 here today.

10:47:24 12 Our client is the estate. We're saying you
10:47:27 13 should have come, you should have challenged
10:47:29 14 jurisdiction and equitable relief. And when it came up
10:47:33 15 to a prove-up for default, you should have come. You
10:47:36 16 should have vacated the default. You should have
10:47:38 17 challenged the basis of the damages, that they're
10:47:41 18 speculative, and they didn't do any of that. And
10:47:44 19 because of that CMGT is bankrupt. CMGT is bankrupt
10:47:47 20 because defendants did not defend it in the litigation
10:47:53 21 in California.

10:47:54 22 CMGT was forced into an involuntary
10:47:58 23 bankruptcy because of the default judgment that has been
10:47:59 24 entered. The default judgment was entered because of
10:48:03 25 the defendant's malpractice. And so, you know, CMGT

10:48:06 1 has -- or the estate of CMGT has a valid claim against
10:48:09 2 their lawyers for being in the position that they're in
10:48:11 3 today.

10:48:14 4 But I want to get back to -- unless you have
10:48:17 5 more questions on --

10:48:18 6 THE COURT: No. Go ahead.

10:48:19 7 MR. CARROLL: -- on this issue, I want to
10:48:20 8 get back to damages.

10:48:21 9 I really don't think that there's that much
10:48:23 10 of a distinction between the Stanley case and this case.
10:48:25 11 I agree that there are some factual differences, but I
10:48:28 12 don't think that they merit a different result, because
10:48:31 13 under federal -- first of all, what you're being asked
10:48:35 14 to reconsider are two things.

10:48:37 15 You're being asked to reconsider your
10:48:40 16 decision about -- they're saying you're not being asked
10:48:42 17 to reconsider your decision about whether this case is a
10:48:45 18 fraud -- and I'll get to that. But with respect to
10:48:47 19 Count 2, specifically you're being asked to reconsider
10:48:50 20 your finding on damages.

10:48:51 21 THE COURT: Right.

10:48:51 22 MR. CARROLL: And when it comes down to that
10:48:53 23 finding -- and that's -- they're not challenging your
10:48:55 24 finding that there was a duty and that there was a
10:48:57 25 breach of that duty or even causation. They're just

10:49:00 1 simply challenging damages. And on damages the Stanley
10:49:05 2 case says that step 1 is to look at state law to
10:49:10 3 determine whether a cause of action accrued as of the
10:49:12 4 commencement of the bankruptcy.

10:49:14 5 And in this case you have already -- and in
10:49:18 6 doing that they say you then have to look at whether
10:49:20 7 this estate -- this state applies the judgment rule or
10:49:24 8 the -- other rule -- and that was briefed for the motion
10:49:28 9 to dismiss. And you found that based on the cases cited
10:49:30 10 to you, Illinois applies the judgment rule. In the case
10:49:34 11 that we cited and that you relied on in your opinion was
10:49:37 12 Gruse v. Belline, which says that an unpaid judgment,
10:49:42 13 even if it's unpaid at the time of trial, constitutes
10:49:46 14 actual damages absent evidence to the contrary. Okay?
10:49:49 15 And I'll get to that phrase, absent evidence to the
10:49:52 16 contrary, in a second.

10:49:53 17 Now, the second step that the Stanley Court
10:49:57 18 looked at arose out of an argument made by the defendant
10:50:01 19 in that case that there were no damages because the
10:50:06 20 judgment debtor had been absolved of personal liability
10:50:09 21 because of the bankruptcy relief, because it had been
10:50:12 22 discharged in bankruptcy.

10:50:13 23 And the Court said that under federal
10:50:15 24 bankruptcy law, you cannot look past the commencement of
10:50:19 25 the bankruptcy to determine whether the judgment debtor

10:50:22 1 was injured. And the Court said, We cannot and will not
10:50:26 2 take into consideration the subsequent discharge because
10:50:30 3 that's looking beyond the snapshot in time, that's
10:50:34 4 violative of the bankruptcy rules that says that you
10:50:37 5 look simply whether a cause of action has accrued as of
10:50:41 6 the commencement of the bankruptcy.

10:50:43 7 Now, the defendants here are arguing that
10:50:49 8 Gruse says that an unpaid judgment is evidence of
10:50:55 9 damages, absent evidence to the contrary. And they're
10:50:57 10 saying, Well, we have evidence to the contrary here.
10:51:00 11 The judgment rule, as it's stated in Gruse, shouldn't be
10:51:03 12 applied here because we have evidence that CMGT has not
10:51:07 13 and never will pay the default judgment.

10:51:11 14 And the only evidence that they have ever
10:51:13 15 presented to this Court is the bankruptcy relief that
10:51:16 16 was obtained after the bankruptcy was commenced. And if
10:51:19 17 you read Stanley, Stanley says that under federal
10:51:23 18 bankruptcy rules, you're not -- Courts are not supposed
10:51:27 19 to look at the subsequent bankruptcy relief in
10:51:30 20 determining whether the judgment debtor was injured as
10:51:33 21 of the commencement of the bankruptcy.

10:51:35 22 So it would be improper, under federal
10:51:39 23 bankruptcy rules, to accept their argument. And that --
10:51:42 24 and it should really stop there. I mean, the inquiry
10:51:45 25 into whether CMGT was damaged stops there, because there

10:51:49 1 has not been any evidence presented by the defendants,
10:51:52 2 other than the bankruptcy relief that was obtained after
10:51:55 3 the bankruptcy was commenced.

10:51:57 4 Now, during defendants' oral argument here
10:52:02 5 today they said that Sterling supports the rule that you
10:52:07 6 have to -- the payment rule rather than the judgment
10:52:09 7 rule. But Sterling -- it doesn't -- there's no
10:52:14 8 statement in Sterling that the payment rule applies
10:52:17 9 instead of the judgment rule. And as the Appellate
10:52:21 10 Court in the Northern Illinois Emergency Physician's
10:52:25 11 case correctly noted, Sterling never addresses the
10:52:28 12 question of whether Illinois applies a judgment rule or
10:52:30 13 a payment rule. Sterling dealt with a question of under
10:52:34 14 the facts of that particular case, which were -- would
10:52:37 15 the Court apply the collateral source rule.

10:52:40 16 Now, the facts of that case are important
10:52:42 17 because they're very unique and they are very unlike the
10:52:46 18 facts here. In Sterling, you had a situation where the
10:52:49 19 legal malpractice plaintiff was an individual who in the
10:52:55 20 underlying litigation was a shareholder of a company.
10:52:59 21 And in that underlying litigation he and the company
10:53:02 22 were sued. And the company alone paid a roughly
10:53:06 23 \$700,000 settlement, and that resolved. The individual
10:53:12 24 in that case paid nothing, and the individual lawyer
10:53:17 25 then sued both him and the lawyers who represented the

10:53:21 1 company for malpractice.

10:53:22 2 And the Court said, Under these facts, we're
10:53:25 3 not going to apply the collateral source doctrine
10:53:28 4 because that would allow somebody who never paid
10:53:30 5 anything in the underlying matter and was not going to
10:53:34 6 have to pay anything -- if he wins this malpractice
10:53:36 7 case -- to anybody to pocket \$700,000, which is an
10:53:39 8 unjust windfall.

10:53:41 9 In this case, on the other hand, if the
10:53:45 10 trustee wins, let's say, either of the counts, Counts 1
10:53:48 11 or Count 2, that money doesn't just go into his pocket.
10:53:52 12 It has to be distributed to all of the creditors, Spehar
10:53:56 13 included because he is a judgment creditor, but also to
10:53:59 14 other creditors of the estate.

10:54:00 15 THE COURT: Are there other creditors?

10:54:02 16 MR. CARROLL: There are other creditors of
10:54:04 17 the estate. Spehar is not the only creditor.

10:54:07 18 Okay. And -- and a lot's being made out of
10:54:10 19 this agreement that was reached between Spehar and the
10:54:14 20 trustee. But that agreement was approved by the
10:54:17 21 bankruptcy Court. And ultimately it's CMGT -- or the
10:54:19 22 trustee -- I'm sorry -- wins this malpractice case, the
10:54:22 23 bankruptcy Court is going to have to approve the
10:54:25 24 distributions that are made. And if that Court thinks
10:54:27 25 that it's overly weighted in favor of Spehar, it can

10:54:31 1 refuse the distribution that the trustee has proposed.

10:54:34 2 THE COURT: But the bankruptcy Court isn't
10:54:36 3 going to look at that \$17 million judgment and make a
10:54:39 4 determination as to whether or not it was frivolous or
10:54:43 5 speculative or -- it's assuming it's a valid judgment
10:54:47 6 and it's going to distribute according to that valid
10:54:50 7 judgment. It will look at it, for example, according to
10:54:53 8 the bankruptcy priorities, correct?

10:54:55 9 MR. CARROLL: Correct. But until that
10:54:59 10 \$17 million judgment is proven by somebody in a court of
10:55:02 11 law to be a fraud or to be somehow not proper, I mean,
10:55:07 12 then it is a valid judgment. It's a valid judgment
10:55:12 13 against CMGT. And until somebody proves otherwise,
10:55:17 14 Spehar is a valid judgment creditor.

10:55:21 15 Not -- I want to get to this fraud argument
10:55:26 16 that was made. If you look at the defendant's motion to
10:55:33 17 dismiss, at page 7, defendants make a one-page --

10:55:41 18 THE COURT: I don't think I have that with
10:55:42 19 me. I have all the new motions.

10:55:44 20 MR. CARROLL: You don't need it. I'll read
10:55:45 21 it and I'll make my point clear.

10:55:49 22 Page 7 under -- it's Roman numeral one. The
10:55:53 23 heading is, The complaint should be dismissed as a fraud
10:55:56 24 on the judicial system.

10:55:58 25 It is within this section, this one-page

10:56:01 1 argument -- and it's the only place in their motion to
10:56:03 2 dismiss that the argument is made that because -- that
10:56:09 3 Spehar allegedly orchestrated the filing of this case,
10:56:12 4 and that he's behind this entire case and that he's the
10:56:15 5 real party in interest. That argument is found only on
10:56:18 6 page 7 under the heading, The complaint should be
10:56:20 7 dismissed as a fraud on the judicial system.

10:56:23 8 And the case cited in support of that
10:56:25 9 argument is a case in which as a sanction -- in which a
10:56:30 10 Court says that as a sanction, a case can be dismissed
10:56:33 11 with prejudice where it has been proved by clear and
10:56:37 12 convincing evidence that a party committed a fraud on
10:56:39 13 the Court. That is the only argument you're going to
10:56:41 14 find in defendant's motion to dismiss with respect to
10:56:43 15 this argument that Spehar is a bad guy and that he's
10:56:47 16 orchestrating all of this, and that he believes his
10:56:50 17 claim doesn't have any merit. All these arguments being
10:56:53 18 made fall within this one page.

10:56:54 19 THE COURT: But, more importantly, don't I
10:56:57 20 have the problem with if it's a fraud on the Court, it
10:57:00 21 has to be a fraud, including the trustee?

10:57:02 22 MR. CARROLL: Absolutely.

10:57:03 23 And they're now saying today and they said
10:57:06 24 in -- defendants said in their reply, Wait a minute.
10:57:10 25 We're not complaining about your ruling about the fraud.

10:57:12 1 But what else could they be complaining about? Because
10:57:15 2 if they're complaining about something else, it's
10:57:17 3 improper on a motion to reconsider because the only
10:57:19 4 place you're going to find this argument that they're
10:57:22 5 making about Spehar being the, quote, real party in
10:57:24 6 interest, is under the fraud argument. There's no
10:57:26 7 section in their motion to dismiss where they're saying
10:57:29 8 this, you know, element 1 or element 2, or whatever
10:57:35 9 element is missing --

10:57:35 10 THE COURT: Well, I think they've made it in
10:57:36 11 their damages argument as well that the lion's share of
10:57:39 12 the recovery for damages would go to Spehar. And so
10:57:43 13 it's certainly -- it's certainly in that allegation as
10:57:49 14 well.

10:57:49 15 MR. CARROLL: But until --

10:57:50 16 THE COURT: That the real party to gain in
10:57:52 17 the end is a party that shouldn't be gaining because of
10:57:55 18 the operations of the way they -- the way this is in
10:58:00 19 bankruptcy court in the first place. And I'm sure you
10:58:04 20 will fill in the gaps when you are up on your rebuttal.
10:58:09 21 But I assume that's their position from their papers so
10:58:12 22 far.

10:58:12 23 MR. CARROLL: Well, that argument ignores
10:58:14 24 that -- that CMGT is in bankruptcy because its lawyers
10:58:19 25 didn't defend it. I mean, they keep calling Spehar the

10:58:22 1 wrongful person. And so far -- and you made a very good
10:58:26 2 point at the beginning of this oral argument, is that we
10:58:29 3 have to keep in mind where we are in the stage of this
10:58:31 4 case.

10:58:31 5 We are at the pleading stage. We are at the
10:58:34 6 motion to dismiss stage. Okay. And there's no evidence
10:58:37 7 anywhere that Spehar is a bad guy and did something
10:58:40 8 wrong and that he thinks his claim has no merit and that
10:58:44 9 he doesn't deserve to be -- you know, deserve to be paid
10:58:48 10 as a valid judgment creditor.

10:58:50 11 Our client is the trustee, not Spehar. And
10:58:54 12 there has been nothing proven about Spehar doing
10:58:57 13 anything wrong, committing any fraud, lying to the
10:58:59 14 California court. He went out to California and he got
10:59:02 15 a judgment. He presented testimony that was accepted by
10:59:06 16 the California court as to what his damages were. Now,
10:59:09 17 maybe that would not have been accepted had Mayer Brown
10:59:12 18 about been out there defending CMGT, but --

10:59:14 19 THE COURT: When your client came onboard,
10:59:19 20 couldn't your client have -- since they then stand in
10:59:22 21 the shoes, of course, of the entity, couldn't he have
10:59:27 22 moved to vacate the default judgment?

10:59:30 23 MR. CARROLL: It's a fact issue. Maybe he
10:59:32 24 could have. I don't think that's an issue that's before
10:59:34 25 the Court today. I think the Court properly ruled that

10:59:37 1 that is a fact issue that we have to look at what
10:59:42 2 decision-making process he went into in deciding whether
10:59:45 3 or not to do that and what a court would have done had
10:59:47 4 he made that motion. You know, motions -- motions to
10:59:50 5 vacate a default judgment, for example, in Illinois --
10:59:55 6 and I don't -- as far as I know, California is not any
10:59:57 7 different -- after 30 days, it's very difficult to get a
11:00:01 8 motion for default vacated. You have to show compelling
11:00:03 9 reasons as to why it should be vacated, and malpractice
11:00:07 10 by your lawyers is not a compelling reason. At least in
11:00:09 11 Illinois the Courts say sue your lawyer.

11:00:13 12 And -- but ultimately that's an issue that
11:00:17 13 hasn't been raised in defendant's motion to reconsider.
11:00:19 14 And I think this Court correctly ruled as a fact issue
11:00:23 15 that should be decided in that after discovery has been
11:00:26 16 commenced in this case.

11:00:34 17 It's also not a defense to this case,
11:00:37 18 particularly Count 2 of this case, to prove that the
11:00:40 19 judgment -- the default judgment is based on speculative
11:00:44 20 damages. Such proof would not make the judgment
11:00:50 21 invalid. And even if it is -- no, I'll just stop there.
11:00:54 22 If I can just have one minute?

11:00:55 23 THE COURT: You may.

11:01:27 24 MR. CARROLL: That's all. Thanks, Judge.

11:01:28 25 THE COURT: Okay. Thank you.

11:01:29 1 Any reply?

11:01:31 2 MR. NOVACK: Yes, your Honor.

11:01:40 3 Judge, first of all, I neglected to ask you
11:01:42 4 if you wanted me to hand up eight and a half by 11s of
11:01:46 5 the boards.

11:01:46 6 THE COURT: That's fine. I have the
11:01:48 7 complaint and I have the exhibits, so -- and I actually
11:01:53 8 have pretty good eyesight, so I can see it well.

11:01:58 9 MR. NOVACK: Now you're just bragging.

11:02:01 10 Judge, let me try to address the points that
11:02:04 11 were made. I'll try to stick to the order and just --
11:02:09 12 we can keep going like this.

11:02:10 13 Counsel started with the Stanley case.
11:02:13 14 Stanley is distinguishable on numerous, numerous
11:02:17 15 grounds. That was Louisiana law, not Illinois law, and
11:02:20 16 that's significant because Louisiana did adopt the
11:02:26 17 judgment rule.

11:02:26 18 THE COURT: I think he's really focusing on
11:02:27 19 the Fifth Circuit, which is a sister circuit, and
11:02:32 20 applying federal bankruptcy law. And then it comes down
11:02:35 21 to -- I know they applied the Louisiana judgment rule,
11:02:38 22 but his argument was more about the controlling federal
11:02:45 23 bankruptcy law.

11:02:45 24 MR. NOVACK: Okay. Well, let me go to that
11:02:47 25 then right now.

11:02:48 1 THE COURT: Okay.

11:02:48 2 MR. NOVACK: The argument is -- and we
11:02:52 3 should accept this -- that the Court can't look at what
11:02:55 4 happens after the bankruptcy is filed, they said you've
11:02:58 5 got to put blinders on. Judge, take him at his word and
11:03:02 6 put blinders on as to the argument that the damages for
11:03:05 7 Count 2 are going to be the product of the -- winning
11:03:10 8 Count 1. That can only happen after the bankruptcy has
11:03:14 9 occurred.

11:03:15 10 And so you can't -- and so even if they won
11:03:19 11 Count 1, that doesn't create the damages for Count 2,
11:03:22 12 because under their argument you can't look at what
11:03:26 13 happens after the bankruptcy's been filed.

11:03:28 14 THE COURT: But I think their argument is it
11:03:30 15 doesn't matter. The judgment is before the bankruptcy's
11:03:33 16 filed and it's sitting there and it's a valid judgment.
11:03:36 17 It's a valid amount of money regardless of how you think
11:03:40 18 it's frivolous, regardless of how you and I may think
11:03:44 19 what did that judge base his decision on, it stands and
11:03:48 20 it's a judgment.

11:03:49 21 MR. NOVACK: But that goes back to the
11:03:55 22 question whether the judgment rule or the payment rule
11:03:55 23 applies.

11:03:55 24 THE COURT: I understand.

11:03:55 25 MR. NOVACK: Now, they're saying that even

11:03:55 1 if I'm right that it's the payment rule not the judgment
11:03:59 2 rule, they say there may be payment, there may be
11:04:04 3 payment with the proceeds of the judgment on Count 1.
11:04:08 4 But that cannot happen by definition. It hasn't
11:04:11 5 happened yet. It's speculative. And it'll never happen
11:04:14 6 until sometime in the future, which is by definition
11:04:17 7 after the bankruptcy is filed.

11:04:19 8 So all I'm saying is I'm not using that rule
11:04:22 9 to show that there's -- that the judgment rule applies
11:04:25 10 versus the payment rule or vice versa. But, rather, to
11:04:30 11 their argument -- and your Honor asked me a question
11:04:33 12 about this -- they might get proceeds from Count 1 and
11:04:37 13 doesn't that -- won't that cause the very damage under
11:04:41 14 Count 2, because they'll use some of that to pay off the
11:04:44 15 default judgment.

11:04:45 16 And now I'm saying even if that's true, even
11:04:48 17 if that does happen -- which is too speculative to think
11:04:51 18 about -- but even if you do, under the rule of the Fifth
11:04:56 19 Circuit that they're espousing and asking to you
11:04:58 20 enforce, you can't even look at that as being the thing
11:05:01 21 that creates the damages.

11:05:02 22 The other second bite at the apple that
11:05:05 23 they're asking you to do now -- this is not in the
11:05:07 24 brief, but he made the argument. He says, Don't worry
11:05:10 25 about how it gets paid. Now, of course, there's an

11:05:13 1 agreement that says it's going to get paid.

11:05:15 2 But he says the bankruptcy judge could
11:05:18 3 decide then that maybe, yeah, that judgment was
11:05:20 4 frivolous, that judgment was speculative, or --

11:05:23 5 THE COURT: I don't know.

11:05:24 6 MR. NOVACK: -- Spehar --

11:05:25 7 THE COURT: No, I don't think he said that.
11:05:27 8 I think what he was saying is that the bankruptcy judge,
11:05:31 9 once this -- if it were a part of the estate -- would
11:05:35 10 still need to assess whether Spehar would get a
11:05:39 11 particular percentage of the judgment, because other
11:05:42 12 creditors are also available for the money, or should be
11:05:46 13 able to get the money as well.

11:05:47 14 MR. NOVACK: Well, let me say two things
11:05:49 15 about that. One is that I don't see how they're going
11:05:52 16 to get out of that agreement. The bankruptcy judge
11:05:54 17 approved the agreement. They signed the agreement.
11:05:58 18 They promised Spehar that in exchange for the things
11:06:01 19 that he was going to do, which is financing the case,
11:06:03 20 that's what he'd get. I don't know that they get a
11:06:05 21 second bite at the apple. But if they did get the
11:06:09 22 second bite at the apple, we'll just think about that.

11:06:11 23 Here I am telling you what an absurd result
11:06:14 24 this is and, therefore, the case should stop now. And
11:06:16 25 they're telling you, No, let the case go forward and let

11:06:18 1 some other judge make that ruling, but we've already
11:06:21 2 spent the money defending the case, you know, et cetera,
11:06:25 3 et cetera.

11:06:26 4 And as far as whether there are other
11:06:28 5 creditors, Judge, don't be fooled by that. Spehar is --
11:06:31 6 I'll use that lion's share again -- beyond the lion's
11:06:35 7 share creditor. If you take away the creditors who
11:06:39 8 happen to also be shareholders -- and we all know
11:06:43 9 there's equitable subordination, there's almost
11:06:45 10 nobody -- I can't give you chapter and verse -- Spehar
11:06:49 11 would probably get more of that recovery if it went
11:06:53 12 simply as him as a creditor, as opposed to him as a
11:06:57 13 party to this agreement. So there's nobody else that's
11:06:59 14 going to be hurt by this.

11:07:02 15 Now, the one thing that counsel had the most
11:07:04 16 difficulty with -- and he was candid enough to say, I
11:07:08 17 have to be careful, and there's a reason why he has to
11:07:11 18 say that. And I respect Mr. Carroll. I think he made
11:07:13 19 an excellent argument.

11:07:13 20 But when you asked, Is this a meritless
11:07:17 21 claim or a meritorious claim, he said, I'd better be
11:07:20 22 careful how I answer it. And I think, Judge, he has
11:07:22 23 answered it in a way that you ought to dismiss the case
11:07:25 24 right now from the bench.

11:07:26 25 His partner said the same thing at the last

11:07:29 1 oral argument. I didn't say anything about it because
11:07:31 2 he was new to the case, he was covering for Mr. Carroll.
11:07:33 3 But they've now thought hard about this, and their
11:07:36 4 position is that Mr. Spehar had a valid claim. That's
11:07:40 5 what they're now telling you. That's inconsistent with
11:07:44 6 paragraph 64, and it defeats their claim because if
11:07:47 7 Spehar had a valid claim, then it wasn't the negligence,
11:07:51 8 alleged negligence, and I haven't stipulated to
11:07:55 9 negligence. Assuming arguendo it wasn't the alleged
11:07:58 10 negligence of Mayer Brown that caused that judgment, it
11:08:01 11 was the facts and the law of what now we're being told
11:08:04 12 is a valid claim. Well, under the case-within-a-case
11:08:07 13 rule, hold them to that, and I think you should just
11:08:09 14 dismiss the case right now.

11:08:13 15 There is irony to the fact that they've now
11:08:16 16 said that we should have vacated that default judgment.
11:08:20 17 And I know you ruled on this before, but he raised it.
11:08:23 18 He said we should have vacated it. The trustee should
11:08:26 19 have to. The trustee -- you heard the argument of,
11:08:29 20 Well, the time was up. No, no, no, we cited chapter and
11:08:33 21 versus from bankruptcy law that trumps --

11:08:36 22 THE COURT: But I just don't know how that
11:08:39 23 plays out at this stage right now. That's the problem.

11:08:42 24 MR. NOVACK: The California judge -- we
11:08:44 25 don't even have to worry about what the California judge

11:08:46 1 would have done. We cited it in our brief. He incited
11:08:49 2 a motion to vacate. He said, I know what's going to
11:08:52 3 happen. I'll go along with the 17 million, because I
11:08:55 4 know somebody's going to come in and vacate it. Well,
11:08:57 5 the trustee had the time to do it, but the time was
11:09:00 6 extended and he didn't do it.

11:09:02 7 We're now hearing for the first time, It's
11:09:04 8 not in the pleading. It's because, I think, some of
11:09:08 9 these arguments rang true to them. They're saying that
11:09:11 10 the default judgment caused the bankruptcy. That's not
11:09:14 11 alleged in the complaint.

11:09:16 12 In paragraph 65, it says it was the TRO that
11:09:19 13 did. That was months before the default judgment. The
11:09:22 14 default judgment was entered after that happened and
11:09:27 15 there's no allegation that it caused the bankruptcy.

11:09:28 16 The only damages that is alleged in this
11:09:31 17 complaint arising from the default judgment is the
11:09:34 18 \$17 million default judgment, which hasn't been paid --
11:09:39 19 and I suggest will never be paid -- and even if it might
11:09:43 20 be paid by Count 1, certainly it's too speculative. The
11:09:49 21 argument that, Well, maybe, the -- Spehar's substantive
11:09:55 22 claim is meritorious, but the way he went about it it is
11:09:58 23 meritless. Either way it doesn't matter.

11:10:00 24 The complaint is that the TRO was entered
11:10:01 25 and the default judgment was entered. That's -- either

11:10:05 1 was valid or invalid. And if it's invalid, it's because
11:10:09 2 Spehar chose to file an invalid TRO and got away with it
11:10:13 3 because nobody came out there, or filed an invalid
11:10:16 4 default judgment motion and got away with it because
11:10:18 5 nobody was there.

11:10:19 6 THE COURT: But don't we do that every
11:10:21 7 day -- getting away with, as you're using that
11:10:23 8 expression -- every day if people don't appear on cases,
11:10:26 9 if they don't respond to complaints, default judgments
11:10:30 10 are entered and proveups are entered.

11:10:32 11 MR. NOVACK: But if that complaint -- if
11:10:34 12 that claim was valid and we had gone out there and
11:10:37 13 procedurally, let's just say procedurally --

11:10:39 14 THE COURT: Okay.

11:10:39 15 MR. NOVACK: -- avoided it, if it's a valid
11:10:42 16 claim -- this is a guy, Spehar, who has come to Chicago
11:10:45 17 to put this company in bankruptcy. Surely he would have
11:10:49 18 come to Chicago to assert his valid claim. And if it
11:10:53 19 was a valid claim, we're going to lose, whether losing
11:10:57 20 in California on default or Illinois on the merits.
11:11:00 21 He's got to prove that they wouldn't have won that case.
11:11:04 22 And if that's true, he doesn't deserve the money.

11:11:08 23 Finally on damages, Judge, we're going back
11:11:13 24 and forth as to whether the \$17 million judgment was
11:11:16 25 speculative or whether the trustee's claim is

11:11:18 1 speculative. In reality, there's double speculation.

11:11:22 2 The \$17 million judgment, as the Court
11:11:25 3 has -- and I'm not saying you've made a holding about
11:11:28 4 it -- but you've recognized it looks kind of goofy,
11:11:32 5 looks kind of speculative, and everybody knows that that
11:11:34 6 one is speculative.

11:11:35 7 THE COURT: And my opinion is to me worth
11:11:39 8 little, if I am supposed to be looking at that judgment
11:11:43 9 and somewhat, what, collaterally attacking it in this
11:11:47 10 case? Am I supposed to -- I could tell you right now
11:11:50 11 when I looked at the judgment and I realized that it's
11:11:54 12 on a startup company and no one appeared and \$17 million
11:11:57 13 was proved up that it sounds extremely speculative.

11:12:02 14 But to suggest that I know better than the
11:12:05 15 District Judge -- or the state court judge that
11:12:08 16 addressed the judgment, made the judgment, made the
11:12:11 17 findings, I would be collaterally attacking that
11:12:13 18 judgment.

11:12:15 19 MR. NOVACK: But that's why I'm saying you
11:12:15 20 don't have to do that. Because, again, there's only two
11:12:18 21 possibilities, right? Either the \$17 million was solid
11:12:21 22 and valid, in which case we didn't cause it; the facts
11:12:24 23 of the law caused it.

11:12:25 24 Or it was invalid and speculative, in which
11:12:28 25 case that person shouldn't get the \$9 million. But

11:12:33 1 there's a second speculation here, which is even more
11:12:36 2 important.

11:12:36 3 The trustee's arguing that he gets the value
11:12:39 4 of CMGT. That's the damage in Count 1. CMGT not only
11:12:46 5 was in a startup company, but if the Trautner's
11:12:51 6 financing -- and I'm going to come back to the word
11:12:54 7 financing -- his allegation I'm on -- it was not getting
11:12:58 8 the Newco deal, that's Trautner that caused the problem.
11:13:04 9 If it had received that, it would have become a highly
11:13:08 10 profitable company.

11:13:09 11 Well, remember, Judge, this is in the
11:13:11 12 record: There was no financing from Newco. There
11:13:14 13 wasn't an infusion of funds. All that CMGT got out of
11:13:18 14 Newco was 20 percent of Newco. So CMGT, itself a
11:13:22 15 startup, would get 20 percent interest in Newco, another
11:13:26 16 startup. Illinois law says those aren't actual damages.
11:13:32 17 Those are speculative. We cited those cases in our
11:13:35 18 motion.

11:13:35 19 THE COURT: But how do I get to that point
11:13:37 20 unless we sit down and do some discovery to determine
11:13:41 21 the 20 percent influx of funding versus what the
11:13:46 22 agreement was? It does not appear to me that at a
11:13:49 23 motion to dismiss stage that can be so easily decided.

11:13:52 24 MR. NOVACK: Well, we cited exactly the
11:13:54 25 chapter and versus in the record, not outside the

11:13:57 1 record. I think it was on page 11 of our reply brief in
11:14:00 2 the underlying motion to dismiss. You didn't address
11:14:03 3 it, so I don't know what your reasoning was on that.

11:14:06 4 But there can't be, under Illinois law,
11:14:10 5 damages for the loss of a startup company. And there's
11:14:13 6 no dispute, no dispute that this was a startup company.

11:14:17 7 THE COURT: I'll give you a chance, okay,
11:14:18 8 for a surreply.

11:14:19 9 MR. CARROLL: I just wanted to say very
11:14:21 10 briefly, this is far beyond anything I said in my
11:14:23 11 response, and it's also beyond anything that's in the
11:14:25 12 motion to reconsider. There was no reconsideration in
11:14:28 13 the motion -- no argument in the motion to reconsider
11:14:30 14 that this Court made an error with respect to the
11:14:33 15 damages to Count 1. And right now I think that's what
11:14:36 16 we're getting into.

11:14:37 17 THE COURT: Okay. Well, fair enough.

11:14:39 18 MR. NOVACK: Well, counsel is right, but the
11:14:41 19 reason for that is you didn't give any reasoning on
11:14:44 20 that, and we couldn't make the three elements of
11:14:46 21 reconsideration to say that you decided incorrectly or
11:14:51 22 what have you. It's not in your opinion. That was an
11:14:53 23 issue --

11:14:53 24 THE COURT: It isn't in your motion to
11:14:55 25 reconsider, either, so his point is valid. All right.

11:15:00 1 MR. NOVACK: Well, Judge, I think I have
11:15:02 2 said all that I want to say, and I thank you once
11:15:04 3 again --

11:15:04 4 THE COURT: Okay.

11:15:05 5 MR. NOVACK: -- on behalf of both of us.
11:15:07 6 And I'm sure I speak for Mr. Carroll.

11:15:08 7 MR. CARROLL: Of course.

11:15:09 8 MR. NOVACK: Thank you for letting us do
11:15:10 9 that.

11:15:10 10 THE COURT: All right. You're welcome, and
11:15:20 11 I will take it under advisement.

11:15:20 12 I just have one thing to add, which is just
11:15:20 13 one of my, I suppose, judicial pet peeves. Throughout
11:15:21 14 the course of the oral argument, I do not know who the
11:15:25 15 counsel or gentleman is in the first row right here. I
11:15:28 16 don't know if he's an attorney with your firm. He
11:15:30 17 wasn't introduced to me.

11:15:32 18 Throughout the course of the oral argument,
11:15:35 19 you, sir, made a number of times shaking of your head,
11:15:37 20 rolling of your eyes with various questions that the
11:15:40 21 Court asked and responses. It's just not helpful to the
11:15:43 22 Court. It's not helpful to your side. I don't know how
11:15:46 23 you're affiliated with that side.

11:15:47 24 So in future -- for future reference, for
11:15:51 25 all of you, I never find that behavior to be

11:15:54 1 professional or helpful. And I think that just we're
 11:15:58 2 all trying to do the right thing here, to read the law
 11:16:02 3 accurately, to apply the law appropriately. That's what
 11:16:05 4 I'm doing, and that's why I've given you this
 11:16:07 5 opportunity. So extra facial expressions and gestures
 11:16:12 6 don't aid in that regard.

11:16:14 7 MR. NOVACK: I apologize for that.

11:16:15 8 THE COURT: Thank you.

9 (Concluded at 11:16 a.m.)

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16 C E R T I F I C A T E

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18 I certify that the foregoing is a correct transcript
 19 from the record of proceedings in the above-entitled
 20 matter.

21

22

23 _____
 April M. Metzler, RPR, CRR

_____ Date

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