GOLDBERG SEGALLA

Professional Liability Monthly

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IN THIS MONTH'S EDITION

PROFESSIONAL LIABILITY MATTERS

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Professional Liability Monthly provides a timely summary of decisions from across the country concerning professional liability matters. Cases are organized by topic, and where available, hyperlinks are included providing recipients with direct access to the full decision. In addition, we provide the latest information regarding news in the professional liability industry. We appreciate your interest in our publication and welcome your feedback. We also encourage you to share the publication with your colleagues. If others in your organization are interested in receiving the publication, if you wish to receive it by regular mail, or if you would like to be removed from the distribution list, please contact Brian R. Biggie.

FEATURED ARTICLE

Trends in Equitable Subrogation: The Court's Not-So-Equitable Application to Attorneys

It is relatively rare to see a legal malpractice claim against defense counsel retained by an insurance carrier to defend an insured. In the majority of states, direct claims of legal malpractice by a primary or excess insurer are disfavored, and for the most part not permitted.

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ACCOUNTING MALPRACITCE

Plaintiff's Accounting Malpractice Claim Dismissed

BANK OF AMERICA, N.A. V. JAMES A KNIGHT, et al.
(7th Cir., August 8, 2013)

When three related companies (Knight Industries, Knight Quartz Flooring, and Knight-Celotex) went bankrupt, a plaintiff sustained in excess of $34 million in losses. The plaintiff alleged that the companies' directors and managers essentially looted the companies and commenced an accounting malpractice lawsuit against the companies' accountants based upon their alleged negligence in failing to detect this defalcation of assets. In the complaint, the plaintiff alleged that the defendants knew the Knight entities would furnish financial statements to their lenders, including the plaintiff.

The defendants moved to dismiss the complaint pursuant to Rule 12(b)(6), invoking the protection of 225 ILCS 450/30.1 which provides that an accountant is only liable to his clients unless the accountant actually commits fraud. The district court, applying Illinois law, granted the motion. On appeal, the plaintiff alleged that the district court erred inasmuch as the defendants knew that the "primary intent" of the preparation of financial statements by the accountants was to influence the plaintiff in its lending decision-making. The Seventh Circuit affirmed the dismissal of the complaint, noting that under Illinois law, an auditor's knowledge of an existing loan does not establish that the client's primary purpose in engaging the services of an accountant to provide audited financial service was for the benefit of the lender.

Impact: This case illustrates once again that a party attempting to assert a professional liability claim based upon a third-party beneficiary theory has a high burden. Indeed, the court observed that had the bank obtained an assignment from the estate in bankruptcy, perhaps the action could have been maintained.

EMPLOYERS' LIABILITY

NJ Supreme Court Retaliation Decision "Mixed Bag" For Employers

BATTAGLIA V. UNITED PARCEL SERVICE, INC.
(N.J., July 17, 2013)

In the May 2013 edition of *Professional Liability Monthly*, we discussed a case before the New Jersey Supreme Court involving Michael Battaglia, a United Parcel Service (UPS) employee who alleged UPS demoted him in retaliation for engaging in certain protected activities in violation of New Jersey's Conscientious Employee Protection Act (CEPA) —– also known as New Jersey's "Whistleblower Act" — and the Law Against Discrimination (LAD). On July 17, 2013, the New Jersey Supreme Court issued its unanimous decision in *Battaglia v. United Parcel Service, Inc.*, No. A-86/87-11 (N.J. July 17, 2013).

Much of the "buzz" among employment lawyers leading up to the court's decision was centered on Battaglia's fraud-based CEPA claim — namely, that Battaglia was demoted because of an alleged conversation between he and his supervisor in 2004, during which Battaglia claimed that several unidentified supervisors told him that employees were "abusing" the corporate credit card and taking "liquid lunches." The focus in a fraud-based CEPA claim is whether the employee making the complaint reasonably believed that the activity was occurring and that it constituted fraud.

In a welcome surprise to employer advocates, the New Jersey Supreme Court struck down Battaglia's CEPA claim because the evidence did not show that Battaglia actually believed the behavior he was complaining of constituted fraud, and because complaints about minor violations of internal company policies (such as employees drinking at lunch and misusing the company credit card) do not rise to the level of protected activity under CEPA and do not turn an employee into a protected "whistleblower."

Unfortunately for employers, the court also examined Battaglia's LAD retaliation claim and, as the old saying goes, "one hand giveth, and the other taketh away." Specifically, Battaglia claimed that he was also demoted in retaliation for complaining about offensive comments Battaglia's supervisor made to him about women, and for complaining that his supervisor was having an affair with a female manager. The Appellate Division had previously reversed the trial court's LAD verdict in favor of Battaglia because there was no evidence that the gender-based comments were heard by women. Noting that the LAD's primary goal is the "eradication of discrimination" and that the law "prohibits retaliation against those who oppose the behavior it forbids," the New Jersey Supreme Court rejected a "narrow interpretation" of the LAD that requires evidence of actual discrimination to find a retaliatory demotion.

Although there was no evidence any women heard the offensive language, the court found that the LAD's purposes should not be limited by a requirement that a plaintiff prove the existence of an identifiable victim of actual discrimination and held that as long "as an employee alleging retaliation as a consequence of voicing complaints believes in good faith that the complained-of conduct violates the LAD, a cause of action may be pursued." The court therefore reinstated the jury's liability and economic damages verdict on Battaglia's LAD count.

It should also be noted that in addition to making his complaints directly to

UPS management, Battaglia vaguely referenced certain "ethical" issues, including "langu[age] you wouldn't use in your wors[t] nightmare," in an anonymous letter to UPS corporate headquarters. The court found "particularly relevant" what it deemed to be the company's inadequate investigation of the allegations referenced in the anonymous letter. Specifically, the court described the company's investigator as "conduct[ing] only a limited investigation and rel[ying] on her pre-existing beliefs to discount the complaints."

Impact: The Battaglia decision is a true "mixed bag" for employers, but an important one, as plaintiffs in employment discrimination cases often bring "retaliation" cases under both CEPA and LAD. On the one hand, Battaglia reinforces the notion that CEPA does not turn "trivial or benign employee complaints" into protected whistleblower activity. On the other hand, Battaglia is likely to increase LAD retaliation claims and make it even more difficult for employers to dispose of such claims early on in the litigation process (e.g., on a summary judgment motion), despite the court's reassurances that the LAD is not intended to be a "civility code for the workplace where only language fit for polite society will be tolerated." Finally, Battaglia is yet another in a long line of cases that stresses the importance of adequately investigating all complaints of harassment and discrimination, even anonymous ones where all of the facts might not be at your fingertips.

District Court Addresses Facebook Posts Under Stored Communications Act

EHLING V. MONMOUTH-OCEAN HOSPITAL SERVICE CORP.
(D.N.J., August 20, 2013)

The plaintiff in this case, Deborah Ehling, was a registered nurse and paramedic for Monmouth-Ocean Hospital Service Corp. (MONOC). She had a personal Facebook page which was accessible only to her Facebook "friends." One of those friends was a co-worker paramedic named Tim Ronco, who, without her knowledge, had begun (of his own free will) sending screenshots of her Facebook page to MONOC management. On June 8, 2009, the plaintiff posted the following message on her Facebook wall:

> "An 88 yr old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards....go to target practice."

After Ronco alerted MONOC management to the post, the plaintiff was suspended with pay and received a memo from management expressing concern over what it considered to be the message's "deliberate disregard for patient safety." The plaintiff was later terminated for violations of the company's attendance policy and leave procedures. She sued MONOC, its president, and its executive director of administration, asserting a variety of claims, including violation of the Federal Stored Communications Act (SCA), 18 U.S.C. §§ 2701-11.

More specifically, the plaintiff argued that the defendants violated the SCA by improperly accessing her Facebook wall post about the museum shooting. Conceding that very few courts have addressed this issue, the district court found that the SCA protected the plaintiff's Facebook wall posts because she selected privacy settings limiting access to her Facebook friends. The SCA covers (1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage (Facebook stores electronic communications for backup purposes), and (4) that are not public (the private nature of the communications is the "touchstone" of the SCA). The district court noted that "privacy protection provided by the SCA does not depend on the number of Facebook friends that a user has," and held that when Facebook wall posts are configured to be "private," those posts meet all four criteria for coverage under the SCA.

The district court next examined whether the SCA's "authorized user" exception applied. Per this statutory exception, the SCA does not apply to conduct "authorized by a user of that service with respect to a communication of or intended for that user." 18 U.S.C. §2701(c). The authorized user exception applies only where (1) access to the communication was "authorized," (2) "by a user of that service," (3) "with respect to a communication … intended for that user." 18 U.S.C. § 2701(c)(2). Access is not authorized if the purported authorization was coerced or provided under pressure.

In this case, the district court found all three elements of the authorized user exception to be present. First, access to the plaintiff's Facebook wall posts was "authorized." The evidence showed that Ronco voluntarily sent MONOC management the screenshots of the plaintiff's Facebook page and that such behavior was at all times completely unsolicited. Further, MONOC management never had password access to the Facebook account of Ronco, the plaintiff, or any other employee. Second, MONCO management's access to Facebook was authorized by Ronco, who has his own Facebook account and is therefore a "user" under the SCA. Finally, the plaintiff's Facebook wall was "intended for that user," as Ronco was friends with the plaintiff on Facebook and, per the terms of the plaintiff's Facebook privacy settings, had access to her Facebook wall posts. Accordingly, despite the SCA applying to the plaintiff's Facebook wall posts, the authorized user exception also applied, and the district court granted summary judgment on the plaintiff's SCA claim.

(**Note** — The district court also dismissed the plaintiff's invasion of privacy claim, noting that the defendants were merely the "passive recipients of information that they did not seek out or ask for. The plaintiff voluntarily gave information to her Facebook friend, and her Facebook friend voluntarily gave that information to someone else. This may have been a violation of trust, but it was not a violation of privacy.")

Impact: While the applicability of the SCA to Facebook wall posts may have been a novel issue for the district court in this case, the dilemma faced by employers who discover inappropriate employee social media content is all too common in the modern workplace. This case is also unique for the fact that MONOC management was a completely passive recipient of the plaintiff's Facebook wall posts. Many employers choose to take a more aggressive approach and either request or require access to employee social media content (an issue which in itself could the subject of its own article). Employers should view this case with cautious optimism and understand that at the end of the day, the facts of each case will either lose or carry the day.

MEDICAL MALPRACTICE

Court Finds Board-Certified Family Medicine Physician Is Not a "Similar Health Care Provider"

MINER V. TARKINGTON, PA-C
(Conn. Super., July 9, 2013)

The plaintiff in this case brought suit against the defendant, a certified physician's assistant, claiming negligence in the defendant's care and treatment of the plaintiff's decedent. The defendant moved to dismiss the plaintiff's complaint, arguing that the plaintiff failed to attach an opinion letter from a "similar health care provider" as required by Conn. Gen. Stat. § 52-190a(a). The plaintiff did attach an opinion letter to the complaint, but it was authored by a board-certified family medicine practitioner, not a certified physician's assistant.

In order to qualify as a "similar health care provider," the author of an opinion letter directed to a non-specialist must be (1) licensed by the appropriate regulatory agency of Connecticut or another state requiring the same or greater qualification, and (2) trained and experienced in the same discipline or school of practice, and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period prior to the incident giving rise to the claim.

The defendant argued that under *Bennett & Wilkins v. Connecticut Childbirth & Women's Center*, 135 Conn. App. 679 (2012), the present medical malpractice claim must be supported by an opinion letter from another physician assistant who is trained and experienced in the same discipline or school of practice. The Appellate Court held in *Bennett & Wilkins* that a case against a nurse midwife could not be supported by an opinion letter authored by an obstetrician. The plaintiff attempted to distinguish *Bennett & Wilkins* by arguing that that case was decided under Conn. Gen. Stat.§ 52-184c(c), stating that an obstetrician and a nurse midwife are not of the same "specialty."

The court agreed with the defendant and dismissed the case. The court noted that an opinion letter author and a defendant cannot practice within the same "specialty" under § 52-184c(c) unless they first share the same "discipline or school of practice" as required by § 52-184c(b). When the statute is read as a whole, the scope of the term "specialty" incorporates the separate and distinct terms "discipline" and "school of practice" such that an opinion letter author may not qualify as a similar health care provider unless he or she shares the same schooling and degree of knowledge as the defendant. The court concluded that the author of the opinion letter in the present case is not a similar health care provider with respect to the defendant, as he did not have a degree from an accredited physician assistant program, nor was he certified by the National Commission on Certification of Physician Assistants.

Impact: This case is noteworthy because the decision relied upon by the court, *Bennett & Wilkins v. Connecticut Childbirth & Women's Center,* 135 Conn. App. 679 (2012), is up on certification to the Connecticut Supreme Court on the same issue as discussed herein. See 305 Conn. 921 (2012).

PA Supreme Court Rules MCARE Fund May Be Required to Make Multiple Payouts in Single Case

KINNEY-LINDSTROM V. MEDICAL AVAILABILITY & REDUCTION
(Pa., August 19, 2013)

The Pennsylvania Supreme Court has issued a much-anticipated opinion which breathes new life into a dispute over whether a state-managed malpractice insurance fund should provide coverage for two instances of medical malpractice after a trial court jury found a doctor negligent for failing to diagnose bacterial infections *in utero* in a set of twins. The Supreme Court further held that the Commonwealth Court should not have granted summary judgment in the case, as there were genuine issues as to whether the infection of each twin *in utero* constituted a single occurrence of medical malpractice, or two such instances.

In 2007, Lisa Kinney-Lindstrom filed suit against Pennsylvania's Medical Care Availability and Reduction of Error (MCARE) Fund. The MCARE Fund is a state-managed agency intended to provide excess insurance coverage to health care practitioners facing medical malpractice lawsuits. Kinney-Lindstrom sought to increase the fund's contributions to a $13 million verdict she was awarded

by a federal jury in a medical malpractice action against her doctor, alleging failure to diagnose the two chorioamnionitis infections in question. The Commonwealth Court granted summary judgment in May 2011, ruling in favor of MCARE that the failure to diagnose the infections constituted a "single occurrence." Under the MCARE Act, the fund is liable for contributions of $1 million per occurrence.

The Supreme Court justices concluded that the state legislature did not intend for the $1 million limit to apply for each claim brought against a practitioner, relying upon language in the act which placed the $1 million per occurrence "if the health care provider is found liable for a claim." The court found "it … clear that the legislature intended the term 'occurrence'" to mean something different from a 'claim.' Even as the court ultimately concluded that the limit applied to each occurrence of professional negligence, the Supreme Court justices also found there was sufficient doubt as to whether the doctor should have been able to diagnose the infections distinctly at different points in the pregnancy.

Impact: It is not unusual for the MCARE Fund to face multiple exposures in cases alleging, for example, failure to timely diagnose and treat a condition or disease, such as cancer. In such cases, multiple health care professionals allegedly had missed an opportunity to correctly diagnose and treat a condition which ultimately worsened in the absence of such care. The decision in Kinney-Lindstrom expands the fund's potential exposure beyond this setting, and into cases where a single practitioner may be held responsible for multiple acts of negligence.

Pennsylvania Court Dismisses Suit for Lack of Personal Jurisdiction

CERCIELLO V. CANALE
(E.D. Pa., July 31, 2013)

The plaintiff in this case is an orthopedic surgeon practicing in Pennsylvania who was suspended by the American Academy of Orthopedic surgeons and American Association of Orthopedic Surgeons (AAOS) for violating certain standards of professionalism pertaining to expert witness testimony. The defendant, also an orthopedic surgeon, resides and works in Tennessee as the editor-in-chief for an AAOS publication. The defendant published an article concerning the plaintiff's suspension. Subsequently, the plaintiff brought suit against the defendant for tortious interference with contractual relations, commercial disparagement, defamation, and false light invasion of privacy. The defendant filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for lack of personal jurisdiction, which was granted.

The plaintiff resides in Pennsylvania. However, the defendant has not lived in Pennsylvania since completing his residency in Philadelphia in the early 1970s. The defendant has returned to the state for some speaking engagements and to attend an AAOS conference but has no real estate or other financial investments in that state.

The defendant argued this case should be dismissed because he is a Tennessee resident with no minimum contacts in Pennsylvania. A federal court will have personal jurisdiction over a non-resident of that state in which the court sits if authorized by law by the forum state. Pennsylvania's long arm statute allows for general or specific personal jurisdiction to be exercised over non-residents. There is no general jurisdiction here because the defendant did not have continuous and systematic contacts with Pennsylvania.

For purposes of this case, specific jurisdiction can be found over a non-resident if a plaintiff is caused harm or tortious injury in Pennsylvania from an act or omission outside of the state. Here, specific jurisdiction can be found if the plaintiff establishes that the exercise of jurisdiction conports with due process. Hence, the plaintiff has to establish that the defendant's activities were purposefully directed at Pennsylvania and the litigation arises out of or relates to at least one of those activities. The court found that the defendant did not specifically target Pennsylvania through his editorial review of the subject publication. Thus, the court granted the motion to dismiss for lack of personal jurisdiction.

Impact: This case exemplifies how suffering alleged harm from a publication is insufficient to establish personal jurisdiction if the defendant did not partake in any purposeful activities within that forum.

Appellate Court Finds Claim Sounds in Ordinary Negligence Rather Than Medical Malpractice

MULTARI V. YALE NEW HAVEN HOSP., INC.
(Conn. App., August 27, 2013)

We first profiled this case in our April 2012 edition of *Professional Liability Monthly.* Here, the plaintiff sued the defendant hospital after tripping and falling on the sidewalk outside the hospital while carrying her granddaughter, who had just undergone a surgical procedure at the hospital. The plaintiff alleged in her complaint that the defendant made her leave the hospital with her granddaughter because the child was being disruptive in the recovery room due to the anesthesia that the child had been given. The plaintiff had requested that she be permitted to remain until her son, the child's father, could return to assist them, but her request had been denied. She claimed in her complaint that her injuries were caused by the hospital's negligence in that it created a dangerous condition by

insisting that she and the child leave the hospital before the child was fully awake, before her son could return to help her, and without the assistance of a wheelchair.

The plaintiff further alleged that the hospital knew or should have known the danger in permitting her to carry the groggy child and their belongings to the parking area without assistance, and that it was unsafe to discharge the child who had not yet fully recovered from anesthesia.

The defendant moved to dismiss, arguing that the plaintiff failed to attach a certificate of good faith as required by Conn. Gen. Stat. § 52-190a. The trial court granted the motion to dismiss, and the plaintiff appealed. On appeal, the Appellate Court reversed the decision of the trial court. The Appellate Court found that the trial court incorrectly concluded that the plaintiff's complaint sounded in medical malpractice rather than ordinary negligence. The Appellate Court found that the plaintiff's complaint did not satisfy the three-part test for determining whether a claim sounds in medical malpractice. The three prongs are: (1) whether the defendants are sued in their capacities as medical professionals; (2) whether the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship; and (3) whether the alleged negligence is substantially related to medical diagnosis or treatment.

The Appellate Court determined that the plaintiff did not bring the action against the hospital in its capacity as a professional medical service provider, the negligence alleged was not medical in nature arising out of a medical professional-patient relationship, and the hospital's decision to require the plaintiff and the child to leave the hospital unassisted did not involve the exercise of medical judgment. The Appellate Court also noted that even though the complaint included language that is typically used to denote medical malpractice, reading those allegations in the context of the entire complaint revealed that the allegations were merely an "inartfully worded" description of the reasons for the plaintiff's ejection from the hospital's premises.

Impact: This case illustrates that even if the complaint contains allegations that appear to refer to medical negligence, courts will view the complaint as a whole to determine the true nature of the action.

Pennsylvania's Certificate of Merit Requirement in Federal Court

ROGAN V. COUNTY OF LAWRENCE
(W.D. Pa., August 1, 2013)

This medical malpractice claim arises from the plaintiff-deceased's suicide while being detained within the Lawrence County Correctional Facility. She had a history of previous suicide attempts, drug dependence, and mental impairment. However, she was cleared from a 24-hour suicide watch and was never seen by a healthcare professional. Several days after being admitted, she took her own life.

The plaintiff brought suit against the correctional facility and the warden. After filing an answer to the complaint, the defendants filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(b)(6) based upon the plaintiff's failure to timely file a certificate of merit (COM) pursuant to the Pennsylvania Rule of Civil Procedure 1042.3. This rule states a COM must be filed with or within 60 days of filing the complaint from a licensed healthcare professional declaring the defendant-healthcare provider and/or facility's conduct fell below the standard of care. Failure to comply with this rule may lead to a judgment of non pros against the plaintiff. The Third Circuit in *Liggon-Redding v. Estate of Sugurman,* 659 F.3d 259 (3d Cir. 2011) stated the COM requirement is substantive law that must be followed by federal courts in Pennsylvania.

The plaintiff conceded it did not timely file a COM but argued dismissal was inappropriate because the defendants failed to provide prior notice of their intent to seek dismissal pursuant to Pennsylvania Rule of Civil Procedure 1042.6. However, there is no federal case law which states the notice requirement is substantive law and is rather procedural, which need not be followed. Thus, dismissal may be appropriate unless the plaintiff establishes good cause for the failure to file a COM. However, the court denied the motion to dismiss without prejudice to enable the plaintiff time to provide an explanation for its delay in not filing a COM.

Impact: Plaintiffs who file medical malpractice claims in Pennsylvania federal court must comply with the certificate of merit requirements from Rule 1042.3. However, a defendant may not seek dismissal of a plaintiff's claim for failure to file a certificate of merit without complying with the notice requirement of this rule unless there is a reasonable basis for the delay in filing same.

LEGAL MALPRACTICE

Court Permits Plaintiff to Discontinue Underlying Medical Malpractice Action and Sue His Attorneys Instead

GRACE V. LAW, PHILLIPS LYTLE, LLP ET AL.
(N.Y. 4th Dept., July 19, 2013)

The plaintiff, represented by the defendant law firms, commenced a medical malpractice action in federal court against the Veteran's Administration under the Federal Tort Claims Act, alleging that the VA failed to monitor and/or treat his eye condition in a proper and timely manner, causing loss of vision in the right eye. During discovery, it was learned that the treating physician was actually an employee of the University of Rochester. The defendant government

commenced a third-party action against the treating physician and the university.

Five months later, the plaintiff's attorney filed an amended complaint, adding the university and treating physician as defendants. Those defendants made a motion for summary judgment dismissing the amended complaint against them as time-barred and the court dismissed the claims. The government defendant also moved for summary judgment, seeking relief from any claims of negligence since the treating physician was an independent contractor, not an employee of the VA. The motion was granted. The plaintiff's only surviving claim was that the VA was negligent in failing to reschedule the plaintiff's ophthalmology appointment. The plaintiff directed his attorney to discontinue the claim.

The plaintiff then commenced a legal malpractice action, claiming that his lawyers were negligent in failing to name the treating physician and the university in a timely fashion in the underlying medical malpractice action.

The defendants in this legal malpractice moved for summary judgment, claiming that since the plaintiff voluntarily discontinued his underlying medical malpractice action and did not appeal the court's granting of summary judgment to the defendants in that action, the plaintiff should not be permitted to pursue a legal malpractice claim.

The court denied summary judgment to the lawyers, holding that the plaintiff did not waive his right to sue his lawyers. The court held that a per se rulev requiring parties to exhaust the appellate process in the underlying action before commencing a legal malpractice action would force parties to prosecute potentially meritless appeals, discourage settlements, conflict with the plaintiff's duty to mitigate damages, and could also result in the expiration of the statute of limitations on the legal malpractice claim.

The court also found that the legal malpractice defendants failed to establish that the plaintiff was likely to succeed in an appeal in the underlying action, and therefore, their negligence was not a proximate cause of the plaintiff's damages.

One justice dissented, holding that an appeal by the plaintiff in the underlying medical malpractice action may have been successful. The dissenting judge also reasoned that allowing a plaintiff to discontinue the underlying case in order to pursue a legal malpractice action will result in increased litigation costs and overburdening of the court system, and force the parties to litigate the very issue that would have been decided on appeal in the underlying action if the plaintiff had only pursued it. The dissent noted that a plaintiff should not be allowed to forego an appeal in the underlying case against a physician in order to choose an "easier target"-defendant attorney. Finally, the dissent noted that if there is a risk that the legal malpractice statute of limitations may run, nothing prevents the plaintiff from commencing a legal malpractice action that is stayed until the appeal in the underlying action is completed and final resolution is had.

Impact: This is a case of first impression and changes the prior rule in the Fourth Department. This court had previously held that if a plaintiff voluntarily discontinues the underlying action, it cannot pursue a legal malpractice claim. Now, this court has opened the door permitting plaintiffs to order their counsel to discontinue the underlying action so that they can pursue a legal malpractice case against the attorneys instead. Since there is a dissent, if the parties do not resolve the case, there is a chance of appeal to the Court of Appeals in the future.

Plaintiffs Are Not Entitled to Collect Attorneys' Fees for Prosecuting Legal Malpractice Action

BARUNO v. SLANE
(Conn. Super., July 16, 2013)

The plaintiffs in this case prevailed in a legal malpractice action, and in a subsequent hearing the court was asked to determine the recoverability of their attorneys' fees for prosecuting the lawsuit. The plaintiffs' claim for fees was based on four theories: 1) attorneys' fees are consequential damages and are necessary to make the plaintiffs whole; 2) breach of the fiduciary relationship between attorney and client warrants them; 3) mutuality of remedy arising out of the retainer agreement requires them; and 4) the court has discretion to award them. The trial court rejected each of the theories.

First, the court stated that Connecticut adheres to the American rule regarding attorneys' fees, and under the rule, in the absence of statutory or contractual authority to the contrary, a successful party is not entitled to recover attorneys' fees or other ordinary expenses and burdens of litigation. The trial court did acknowledge that Connecticut courts recognize a bad faith exception to the rule and an assessment of punitive damages, as well as an exception based on equitable grounds.

The trial court rejected the plaintiffs' argument that attorneys' fees are consequential damages. The plaintiffs argued that while the damages may not have been direct, they were a reasonable foreseeable consequence of the attorneys' malpractice. The court acknowledged that in some jurisdictions attorneys' fees are considered incidental damages because they flow from the malpractice (See, *Foster v. Duggin*, 695 S.W.2d 526 (1985, Tenn.)), while other jurisdictions award them in order to make the party whole. See, *Rudolf v. Shayne, Dachs, Stanisci, Corker and Sauer*, 8 N.Y.3d 438 (N.Y. 2007); accord *Saffer v. Willoughby*, 143 N.J. 256 (N.J. 1996). The

plaintiffs argued that to fail to award their attorneys' fees is to fail to make them whole and violates public policy. Further, they argued that failing to award the fees fails to protect the client's interests by giving them a "pyrrhic victory," and that it will produce a chilling effect on valid malpractice claims. The trial court rejected this argument by stating that if the legislature wanted to award attorneys' fees, it knew how to do so.

The trial court further rejected the argument that attorneys' fees are recoverable because the relationship is a fiduciary one. Relying on the trial court's decision in a motion to strike the breach of fiduciary count, the trial court stated that professional negligence alone does not give rise to an automatic claim for breach of fiduciary duty. The plaintiffs further urged the court to apply the "equitable exception" to the American rule, citing to a Connecticut Appellate Court decision in which the award of attorneys' fees was allowed because the court found that there was a breach of a trustee's fiduciary duty by depletion of the trust funds. In reviewing the cases that have awarded attorneys' fees based on the equitable exception, the trial court distinguished this legal malpractice case by stating that those cases alleged equitable causes of action. The court stated that while the underlying action involved the exercise of equitable rights, here the fees to be awarded are not those in the underlying action but in the malpractice case itself, which is being brought to vindicate the loss or failure to exercise the equitable rights.

The third theory rejected by the trial court was the mutuality of remedy. The plaintiffs asked the court to adopt the holding in *Ween v. Dow*, 35 A.D.3d 58 (2006), wherein the New York Appellate Division declared that an attorneys' retainer agreement that was not reciprocal as to attorneys' fees was fundamentally unfair to the client and therefore unenforceable. The plaintiffs argued that "Connecticut cannot be less protective of clients than New York … Why favor the attorney over the client?" The trial court rejected this emotional appeal, stating that there is no position to carve out a special rule of reciprocity based on principles of mutuality, logic, and fairness.

The fourth and last argument advanced by the plaintiffs is that the court has discretion in fairness and equity to award attorneys' fees. The trial court recognized that commentators have criticized the American rule, but acknowledged and refused to repudiate it when the Connecticut legislature refuses to do.

Impact: This case is a stark reminder that a plaintiff's legal malpractice bar is fighting to change Connecticut law which, unlike other states, does not allow attorneys' fees to prosecute a legal malpractice action as damages in the legal malpractice action itself. Until the legislature creates a statute that allows for the recovery of attorneys' fees in legal malpractice cases, counsel will continue to argue for attorneys' fees to prosecute the action, hoping to force even the slightest change in the interpretation of the law.

FIDELITY/CRIME BOND INSURANCE

Sixth Circuit Addresses the Applicability of Exclusions

SEAWAY COMMUNITY BANK v. PROGRESSIVE CASUALTY INSURANCE COMPANY
(6th Cir., August 8, 2013)

Progressive Casualty Insurance Company refused to pay its insured, Seaway Community Bank, basing its decision on an exclusion in the bankers' bond which negated coverage where losses resulted from checks not "finally paid." However, the exclusion did not specifically exclude checks drawn upon Canadian banks.

The bond provided coverage for losses caused by forged checks and provided coverage for losses resulting "directly from the Insured … paid, transferred any Property in reliance on any Written, Original Negotiable Instrument which … is ... altered." The bond contained an exclusion of coverage for checks that are not "finally paid."

A Seaway customer deposited three checks totaling over $370,000 made payable to him through a Canadian bank. Seaway allowed the customer to withdraw the proceeds from these three checks from his account. Unbeknownst to Seaway, however, the checks had been fraudulently altered before the customer received them. The Canadian bank returned the checks to Seaway and the provisional credits were reversed.

Seaway made a claim under its bond, the claim was disclaimed based on the exclusion and the lawsuit ensued. The court found that under the UCC and Michigan law, the checks from the Canadian payor bank were "finally paid." Progressive argued the UCC did not apply to Canadian banks and the fraudulent checks could never have been "finally paid."

The court found that the "phrase 'finally paid' has a clear meaning within the banking industry: it means when the midnight-deadline rule applies under the Uniform Commercial Code." The Sixth Circuit construed the exclusion in favor of the insured because the exclusion did not specifically carve out checks drawn on foreign banks.

The dissent, however, was quick to point out that the UCC only applies to banks that are members or participants of the Federal Reserve System, and since Canadian banks are not, the UCC's midnight rule does not apply to them. In not applying the UCC, the checks were not finally paid, and coverage should have been excluded.

Impact: This case presents an excellent example of a court ignoring the very intent of the bond and the exclusionary language and finding in favor of a more liberal interpretation.

FEATURED ARTICLE

Trends in Equitable Subrogation: The Court's Not-So-Equitable Application to Attorneys

It is relatively rare to see a legal malpractice claim against defense counsel retained by an insurance carrier to defend an insured. In the majority of states, direct claims of legal malpractice by a primary or excess insurer are disfavored, and for the most part not permitted. The reasoning behind these decisions stems from the sanctity of the attorney-client relationship and a hesitation to interfere with defense counsel's duty to the insured. Few claims of this nature have been successful.

However, excess insurers have had limited success in bringing direct claims against defense counsel retained by primary insurers under the theory of equitable subrogation. This essentially means that the excess insurer stands in the shoes of the insured. When legal malpractice is committed by defense counsel resulting in overpayment on a claim triggering an excess policy, the excess insurer can collect for that overpayment in the same manner as the insured would be able to if they were personally required to pay out any money.

While these claims have enjoyed more success than the direct legal malpractice claims, the success still has been quite limited. Again, courts are not quick to permit such claims for fear that the attorney-client relationship would be damaged between the insured and the counsel selected to defend the insured. Only a handful of courts have permitted such claims.

But this trend might just be changing. Two new decisions issued addressing the issue suggest that perhaps the law is moving in a different direction — perhaps a more favorable direction for excess carriers. While this development might be fruitful for excess carriers, it rightfully has given cause for concern to both defense counsel and professional liability carriers.

History of Use of Equitable Subrogation

Excess insurers use of equitable subrogation is not new. In the early 1990s, excess carriers attempted to use equitable subrogation to assert claims against defense counsel selected by the primary insurer and were sometimes quite successful in doing so. For example, in a 1992 case, *American Continental Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480 (Tex. 1992), a Texas court permitted an excess insurance carrier to use equitable subrogation. Other courts have also permitted its use in this context. See *Atlanta Int.l Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991); *Allstate Ins. Co. v. American Transit Ins. Co.*, 977 F. Supp. 197 (E.D.N.Y.); *National Union Ins. Co. v. Dowd & Dowd*, P.C., 2 F. Supp. 2d 1013 (N.D. Ill. 1998).

But this success was widely limited to a few states. From the 1990s on, numerous courts in various states reached an opposite result, suggesting a general trend against an excess insurer's ability to collect against defense counsel. These courts concluded that an excess carrier has no right to bring an equitable subrogation claim against the attorney hired by the primary insurer to defend the underlying action. See *Continental Casualty v. Pullman Comley, Bradley & Reeves*, 929 F.2d 103 (2d Cir. 1991); *American Continental Ins. Co. v. Weber & Rose*, P.S.C., 997 S.W.2d 12 (Ky. Ct. App. 1998); *Essex Ins. Co. v. Tyler*, 309 F.Supp. 2d. 1270 (D. Colo. 2004); *Querrey & Harrow, Ltd., v. Transcontinental Ins. Co.,* 885 N.E.2d 1235 (Ind. 2008).

The primary reasoning behind these decisions was the attorney's duty of loyalty to his or her client. The decisions emphasized that the attorney was retained for the benefit of the insured and owed a duty of complete loyalty to the insured. The courts feared that allowing for liability of the attorney to the excess carrier put that relationship in jeopardy. The overall underlying concern was that permitting liability on claims of equitable subrogation forces the attorney to be concerned about the excess carrier's view of his or her case, handling which has the potential to undermine the attorney's relationship and undivided loyalty to the insured.

Other courts have gone as far as to equate this type of action to one of an assignment of a legal malpractice claim, which has been frequently rejected by most courts for the same reasoning — that it undermines the attorney-client relationship. Still other courts point to more practical reasons for disallowing these types of claims relying on the fact that excess carriers typically have the right to appoint their own counsel to protect their interests and monitor the action.

Notwithstanding the different reasoning of the courts, for the most part, excess insurers have enjoyed limited success on equitable subrogation claims, with history demonstrating that until very recently most courts took an unfriendly view toward equitable subrogation applied in this context.

Recent Success of Excess Subrogation Claims

Two cases issued in the last year indicate that courts might just be warming up to equitable subrogation claims by excess carriers. The two decisions — *Great American E & S Ins. Co. v. Quitairos, Prieto, Wood & Boyer,* P.A., 100 So. 3d. (Miss. 2012) and *ACE American Ins. Co.*

v. Sandberg, Phoenix & Von Gontard, P.C, (S.D. Ill. 2012) — issued by the Mississippi Supreme Court and Federal District Court for the Southern District of Illinois have seemingly reset the compass on this issue and suggest that perhaps equitable subrogation might be a viable avenue for direct claims by carriers against defense counsel.

The facts of the two cases are fairly similar in nature. In *Quitairos*, a law firm that had been hired by a primary insurer failed to timely designate expert witnesses on behalf of the policyholder. The failure resulted in a substantially increased settlement of the case causing the primary insurer to tender its policy. The excess carrier now stuck with the remaining damages exceeding the primary insurance sued the law firm for legal malpractice and also under a theory of equitable subrogation.

On appeal, the Mississippi Supreme Court affirming the Appellate Court in part concluded that while the excess carrier could not bring a direct legal malpractice action against defense counsel, the excess carrier could pursue a claim against the firm under the theory of equitable subrogation. Citing to the previous 1992 Texas decision discussed above, the court adopted the Appellate Court's reasoning finding that where an attorney's negligence results in a judgment in excess of the primary policy limits, the excess carrier would be the only party with any incentive to pursue any sort of claim against the attorneys for their negligence.

In *Sandberg*, the Southern District Court of Illinois reached the same conclusion. There, the policyholder was sued in a product liability action which again resulted in a substantial settlement. This settlement was reached after the trial judge severely sanctioned the defendant policyholder for discovery abuses by defense counsel retained by the primary carrier and struck all of the pleadings. The excess insurer brought suit against the policyholder's counsel, arguing that its misconduct exponentially increased the costs of settling the litigation. The court allowed both the direct legal malpractice and equitable subrogation claims to proceed. With respect to the equitable subrogation claims, the court predicted that the Illinois Supreme Court would allow an excess carrier to enforce duties owed by the attorney to the insured. The court distinguished this case from those cases in which courts have forbidden the assignment of a legal malpractice claim, reasoning that an assignee is typically a stranger to the attorney-client relationship who has suffered no injury from the lawyer's actions, whereas an excess insurer may suffer a direct injury as a result.

A Growing Trend?

The two decisions issuing within short temporal proximity of each other do suggest that perhaps the courts are softening their stance a bit on the availability of equitable subrogation to excess carriers. At this point, we should be careful in calling it a current trend or complete shift in favor of the use of equitable subrogation. In fact, Illinois has long been in the minority with respect to actions against defense counsel by carriers and this is not the first time that courts in this state have permitted equitable subrogation claims to lie against defense counsel. Nevertheless, this was an issue of first impression for Mississippi. At the very least, the two decisions provided additional support to what was has long been considered a minority view, giving it a bit more strength than it had before.

While it may be a bit too early to describe the two decisions as the beginning of a trend toward increased court approval of equitable subrogation, they should not be ignored. Given the publicity that these cases have received, it is likely that we will see an increase in the frequency of these types of suits whether the claims are ultimately successful or not. Defense counsel must recognize the potential exposure to these types of suits against them and should be aware of the potential parties who might bring claims against them. And primary insurers should also recognize their own exposure to claims of vicarious liability when selecting defense counsel, and professional liability insurers should be aware of the growing potential for the possibility of these types of claims.

PROFESSIONAL LIABILITY MATTERS

(Click on the headlines below to read the full blog post from Professional Liability Matters*)*

A First of its Kind: FDIC v. Independent Auditor

A recent decision in a closely watched accounting malpractice matter — the first of its kind initiated by the FDIC — may suggest cause for concern for accountants. As receiver for a failed bank, the FDIC may sue professionals who played a role in the failure of the institution. In the wake of recent bank failures, the FDIC has targeted officers and directors, attorneys, and brokers.

Boston's Big Dig Spawns Big Malpractice

Boston's "Big Dig" continues to spark lawsuits 15 years after construction was completed. The most expensive US highway project — in excess of $24 billion —– the Big Dig rerouted a major highway in Boston into a 3.5 mile tunnel. The project was plagued by delay, leaks, design flaws, and substandard materials. Ten years after completion of the project, in 2006, 26 tons of ceiling tiles and concrete became dislodged, fell and killed one motorist, injuring others.

Status Update: Facebook "Likes" Receive Constitutional Protection

Social media issues arising out of the workplace are ever-changing. Your friends at *Professional Liability Matters* recently discussed the potential consequences to employees for posting objectionable personal information on Facebook. However, a novel decision from the Fourth Circuit Court of Appeals on Wednesday may turn the tables on employers who take retaliatory action against employees based upon their Facebook activity. Spoiler alert… Facebook "likes" are protected free speech under the First Amendment.

Lack of Leg Waxing License Puts Coverage at Risk

The majority of professional liability lawsuits target attorneys, accountants, and physicians. But there are a series of so-called "miscellaneous professionals" who also face malpractice exposure: marketing consultants, recruiters, travel agents … and even leg waxing professionals. Many professionals are licensed by the state to practice in their chosen field and the failure to obtain such a license may void any professional malpractice coverage.

Good At-Will Hunting: At-Will Employment Put to the Test

While most countries allow employers to dismiss employees only for cause, employment relationships are presumed to be "at-will" in all U.S. states except Montana. As a result, most employers are well aware that employment relationships in the States may be terminated at any time, for any legal reason. But the at-will presumption is a default rule that can me modified by contract whereby the employee may hold a reasonable expectation of continued employment. The modification of employment terms by way of contract was recently put to the test in New York, resulting in a victory for the employer.

Law Firm Denied Coverage Due to "Fraud Exclusion"

Most professionals are governed by this universal rule: always act in the best interests of the client. But there is an unspoken footnote to that rule: unless the client engages in unethical, illegal, or otherwise improper conduct. Make no mistake, when a professional cooperates in the client's foul play, she is also exposed to liability and perhaps a denial of coverage due to a fraud exclusion existing in many professional malpractice policies. This limitation became a reality for a Colorado law firm accused of assisting its clients in the commission of fraud.

Cleveland Indians Sue Insurance Broker Following Wrongful Death Claim

It is generally understood that an insurance broker may be held liable for failing to obtain requisite insurance for the insured. But, there is plenty of room for debate when the broker fails to obtain coverage for a third-party; i.e. an additional insured. This issue was put to the test by the Cleveland Indians following the death of one of its patrons attending pre-game activities. According to the Sixth Circuit, the team stated a valid claim.

Dealing with the Problem Client

We've all been there. Inevitably, every professional encounters a client whose demeanor or attitude make the representation difficult. As a result, the professional may be tempted to ignore the situation and limit contact with these clients. But, that would be a mistake. Pursuant to a recent ethics ruling in *Matter of Azar,* DRB 13-041, the New Jersey Disciplinary Review Board determined that providing the cold shoulder to problem clients warranted disciplinary action.

Pleading the Fifth in the Civil Context

Dropping the nickel, also known as pleading the Fifth Amendment is most often referenced on TV dramas in a criminal setting. Most civil practitioners do not encounter the Fifth and therefore may be unfamiliar with its role in civil litigation. However, since the line between civil and criminal liability is not entirely clear in some scenarios impacting professionals, there may be situations when the Fifth is appropriate, albeit risky.

Fantasy Sports in the Workplace

Football season kicked off on Thursday, September 5, and, as a result, millions of otherwise well-respected and seemingly professional Americans turn their attention to a grown-up version of make believe; also known as fantasy sports. Over 25 million Americans now belong to at least one fantasy football league and fantasy sports represent a multibillion dollar industry. Surveys suggest that many of those fantasy football participants access their league at the workplace, on equipment provided by employers. Most employers are cognizant of the importance of maintaining up-to-date computer use policies, social media protocols and other important workplace regulations, yet they inexplicably miss regulating participation in fantasy sports.

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