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# Professional Liability Monthly

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## 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

**Two Recent Cases Suggest the CEPA Tide Turning In Favor of Employers in New Jersey**

*By Caroline J. Berdzik and Michael S. Katzen*

The Conscientious Employee Protection Act (CEPA) — also known as New Jersey's "Whistleblower Act" — was designed to prohibit employers from taking certain protected "whistleblower activity."

Click here to read the article.

## DIRECTORS AND OFFICERS

### Malpractice Action Barred By Sole Actor Rule

*USACM LIQUIDATING TRUST v. DELOITTE & TOUCHE (9th Cir., April 22, 2013)*

USA Commercial Mortgage Company (USACM) filed for bankruptcy and created a bankruptcy litigation trust. The resulting Chapter 11 plan called for the creation of a Liquidating Trust (Trust). The Trust, in turn, sued USACM's former auditor Deloitte & Touche LLP alleging that Deloitte issued unqualified audit opinions in 2000 and 2001, concealing the misappropriations of USACM funds. Those misappropriations were alleged to be fraudulent schemes by USACM's owners and controllers, Thomas Hantges and Joseph Milanowski, and caused USACM to lose millions.

Deloitte filed a motion for summary judgment seeking dismissal of the action arguing that the time to file the malpractice claim had expired. The District Court agreed and granted summary judgment to Deloitte on the ground that the misconduct of the USACM owners and controllers must be imputed to USACM under Nevada's "sole actor" rule. The sole actor rule imputes an agent's actions on the principal corporation even when the agent abandons the principal's interest as long as the agent and principal are indistinguishable. Here it was clear that Hantges and Milanowski utterly controlled and dominated USACM. Accordingly, the sole actor rule applied, imputing Hantges and Milanowski actions to USACM. The practical result of this rule is that USACM was charged with being aware of the purported malfeasance no later than the dates the defendant completed the audits at issue, i.e. 2000 and 2001. Therefore, the two-year statute of limitations for the malpractice and breach of contract claims expired in 2003 and 2004, respectively. As the Trust's claims were not filed by that time, they were deemed untimely. Moreover, as USACM had knowledge of the acts, there would be no tolling of the statute of limitations. The court stated in part, "The district court correctly decided that there should be no concealment-based tolling of limitations because Deloitte could not have concealed from USACM that which USACM knew based upon the imputation of Hantges' and Milanowski'a knowledge to USACM."

The statute of limitations for aiding and abetting breaches of the fiduciary duty is three years and therefore expired in 2006 at the latest. This again preceded the petition date. Accordingly the court granted Deloitte summary judgment because the trust's claims were barred by the statute of limitations.

***Impact***: As always, understanding when the statute of limitations begins to run is key. Here, by virtue of common law the actions of the officers were imputed to the corporation starting the clock. This case is a perfect example of how differences among jurisdictions can have a substantial effect on litigation and potential claims.

## MEDICAL MALPRACTICE

### Plaintiff's Medical Malpractice Claim Could Not Be Saved Under Accidental Failure of Suit Statute

*SANTORSO v. BRISTOL HOSPITAL (Conn. Supreme Ct., April 23, 2013)*

The plaintiff sued the defendant hospital and defendant physicians claiming that they were negligent in that they failed to treat her decedent for a lesion in his lung, which ultimately led to the decedent's death. The plaintiff commenced an action against the defendants which contained neither an attorney's good faith certificate nor opinion letters from similar health care providers as required by Conn. Gen. Stat. § 52-190a(a). The defendants filed motions to dismiss based on the plaintiff's failure to include the required documents. The trial court denied the motions to dismiss, ruling that the plaintiff's omissions were curable. The plaintiff thereafter filed an amended complaint containing a good faith certificate and opinion letters from similar health care providers. The defendants again moved to dismiss, arguing that the opinion letters were improper because they were dated after the plaintiff originally commenced her suit. The trial court once more denied the motions to dismiss, concluding that the claimed insufficiencies were to be tested by a motion to strike rather than a motion to dismiss. Thereafter, the defendants filed motions to strike, which were granted by the trial court. The trial court concluded that because the statute required a pre-suit opinion from a similar health care provider, the complaint was legally insufficient and it was stricken. No appeal was taken and judgment entered against the plaintiff.

Approximately six weeks later, the plaintiff commenced a new action against the defendants alleging the same causes of action as before. The plaintiff attached the opinion letters that she had obtained in connection with her prior suit. The plaintiff indicated in her complaint that the action was brought pursuant to the accidental failure of suit statute, Conn. Gen. Stat. § 52-592(a), as the plaintiff's new suit was not commenced within the statute of limitations. The accidental failure of suit statute provides that:

If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits … or the action has been otherwise avoided or defeated by the death of a party or for any matter of form, the plaintiff … may commence a new action … for the same cause at any time within one year.

The defendants filed motions for summary judgment, arguing that the plaintiff's new suit was improperly commenced under the accidental failure of suit statute because the first action was not defeated for any "matter of form" and that the failure to comply with § 52-190a(a) precluded the plaintiff from taking advantage of the accidental failure of suit statute. The defendants also argued that the plaintiff's action was barred by the doctrine of *res judicata*. The trial court denied the defendants' motion for summary judgment and the defendants appealed to the Connecticut Appellate Court. The Appellate Court held that plaintiff's second action was barred by *res judicata* because the first action was decided on the merits due to the granting of the defendants' motions to strike.

Thereafter, the plaintiff appealed to the Connecticut Supreme Court, arguing that the Appellate Court incorrectly concluded that *res judicata* applied because the first action was not a decision on the merits. The plaintiff argued that the first action should have been challenged by way of motions to dismiss rather than motions to strike, in accordance with the language of § 52-190a(c). The plaintiff argued that the motions to strike should have been treated as motions to dismiss in the first action, which would not constitute a decision on the merits. The Connecticut Supreme Court agreed with the plaintiff and found that the first action should have been tested by way of motion to dismiss, which would not have constituted a judgment on the merits. The court held that the first action did not preclude the second action under the doctrine of *res judicata*.

However, the court also considered an alternate ground for affirmance advanced by the defendants: that even if *res judicata* did not bar the plaintiff's second action, the plaintiff could not maintain the second action under the accidental failure of suit statute and, as a result, the case was barred by the statute of limitations. Relying on past precedent, the Supreme Court noted that when a medical malpractice action has been dismissed pursuant to § 52-190a(c) for failure to supply an opinion letter by a similar health care provider required by § 52-190a(a), a plaintiff may commence an otherwise time-barred new action pursuant to the "matter of form" provision of the accidental failure of suit statute only if that failure was caused by a simple mistake or omission, rather than egregious conduct or gross negligence attributable to the plaintiff or his attorney. In the present case, the court found that plaintiff's counsel's failure to file a good faith certificate and opinion letters in the first action was not the result of "mistake, inadvertence, or excusable neglect." Thus, the plaintiff's first action was not dismissed for a "matter of form" and the second action could not be saved by the accidental failure of suit statute. The Supreme Court affirmed the Appellate Court's decision in favor of the defendants.

***Impact:*** This case illustrates that a medical malpractice case may be brought under the accidental failure of suit statute after dismissal for failure to attach a certificate of good faith, but only if the plaintiff's failure to do so was a simple mistake or omission rather than egregious or gross misconduct.

## Illinois Mother's Medical Malpractice Lawsuit is Time-Barred

*ARTEAGA v. UNITED STATES OF AMERICA*
*(7th Cir., April 1, 2013)*

In *Arteaga v. United States*, Gabriella Arteaga filed a lawsuit on the behalf of her minor child for an injury the child sustained during birth. The lawsuit was filed in state court in Illinois in 2010 (it was later removed) and accused the Erie Family Health Center (Erie) of disregarding prenatal symptoms which supposedly indicated that her baby should have been delivered via a Caesarean section. The child was born in 2004 with limited range of movement in her right arm after a complicated vaginal delivery.

Arteaga consulted four lawyers from 2004 to 2009 before finding one who would take her case in 2009. The second lawyer she consulted advised her that the statute of limitations for injuries to children in Illinois is eight years, but this was misleading. Erie received grant money from the U.S. Public Health Service. As a result, its employees were deemed federal employees. Therefore, tort suits against it were governed by the Federal Torts Claim Act and a two-year statute of limitations. The extension of the statute of limitations for a suit on behalf of a child victim did not apply to claims governed by the Federal Tort Claims Act. This apparently was not known by any of the lawyers the plaintiff consulted and never disclosed to her by any lawyer.

In March 2010, when her child was six years old, Arteaga finally sued Erie and its nurse-midwives. The government removed the case to federal district court in Chicago. The district court dismissed Arteaga's suit for her failure to exhaust administrative remedies under the Federal Tort Claims Act. Arteaga pursued those administrative remedies and refiled her lawsuit. However, the government moved to dismiss, arguing that the two-year Tort Claims Act statute of limitations had expired before commencement of any of Arteaga's legal actions.

On appeal, the Seventh Circuit upheld dismissal. Arteaga argued that her claim did not accrue until 2009 when she discovered the facts regarding the remedies under the Tort Claims Act. The Seventh Circuit indicated that the statute of limitations was triggered when a party has knowledge of an injury and the person likely responsible for that injury and thus Arteaga was on notice of her claim immediately after her daughter's birth. Arteaga's argument that the statute of limitations should be tolled also failed. The court noted Arteaga's own lack of diligence in bringing suit and that the "incompetence" of the various lawyers who represented her was not the government's fault. Thus, tolling was not appropriate, especially since Erie had done nothing to conceal its federal status. Indeed, the Seventh Circuit harshly noted:

[I]t's not asking too much of the medical malpractice bar to be aware of the existence of federally funded health centers that can be sued for malpractice under the Federal Tort Claims Act … and if a member of that bar is not aware and misleads a client, as lawyer number two did in this case by advising the Plaintiff that the applicable statute of limitations was eight years, the lawyer may be liable for legal malpractice but the government can still invoke the statute of limitations.

Quite remarkably, when lawyer "number two" rendered this incorrect advice, his law firm was representing another former patient of the Erie Family Health Center in the same federal court. The judgment for the defendants was affirmed.

***Impact***: *Arteaga* reflects not only the nuances of suing an arm of the federal government but how sloppy lawyering will not necessarily warrant a reprieve for a client who has relied on that advice. Legal malpractice ultimately doomed Arteaga. Yet, it did not convince the court it should deprive the defendants of the protection of the statute of limitations.

## Second Pennsylvania Federal District Court Recognizes Strict Liability Claim Against Prescription Drug Makers

*BERGSTRESSER v.*
*BRISTOL MYERS-SQUIBB CO.,*
*(M.D. Pa., April 24, 2013)*

The United States District Court for the Middle District of Pennsylvania has recently upheld a strict liability manufacturing defect claim against Bristol-Myers Squibb over Abilify, an antipsychotic prescription drug. U.S. District Judge Malachy Mannion of the Middle District ruled that Ryan Bergstresser could attempt to bring a strict liability claim based upon a manufacturing defect, joining a prior opinion by US District Judge William Yohn of the Eastern District of Pennsylvania in *Doughtery v. C.R. Bard*. In *Bergstresser*, the plaintiff alleged that Abilify caused him to develop a movement disorder. The original complaint alleged three causes of action against the drug's manufacturer, sounding in negligence, strict liability, and breach of implied warranty. In 1996, the Pennsylvania Supreme Court rejected strict liability failure to warn claims against prescription drug manufacturers, determining that such claims sound only in negligence in Pennsylvania (*Hahn v. Ricter*, 673 A.2nd 88 (PA. 1996)). In 2010, a Pennsylvania Superior Court decision in *Lance v. Wyeth* held that the *Hahn* decision would also foreclose a plaintiff's ability to make a design defect claim in strict liability.

Left unresolved, however, was the third type of defect that Pennsylvania law recognizes to support a strict liability claim, namely manufacturing defects. Here, Judge Mannion ruled that the plaintiff's complaint would not be barred and would be allowed to proceed, subject to the filing of an amended complaint. Such claims are relatively rare, however, because they require the plaintiff to establish that a particular drug deviated from the manufacturer's specifications. Accordingly, while Judge Mannion has preserved the plaintiff's day in court, it remains to be seen whether a viable claim can be established supported by appropriate medical and expert testimony. Judge Mannion also ruled that any claim by the plaintiff under theories of a breach of the implied warranty of merchantability or breach of the implied warranty of fitness for particular purpose would also be barred under Pennsylvania law, to the extent they were based on a design defect or failure to warn theory, but would be allowed to proceed if based upon a manufacturing defect theory.

***Impact***: This decision keeps open the door for a strict liability claim against drug manufacturers under Pennsylvania law. It is unclear how wide open and how long the door will remain open. However, manufacturers (and physicians) should take note of this decision.

## Court Limits Tolling of Statute of Limitations in Malpractice Actions

*WOJTKIEWICZ v.*
*MIDDLESEX HOSPITAL*
*(Conn. App., March 12, 2013)*

The plaintiff brought suit against the defendant hospital alleging negligence. The plaintiff was admitted to the hospital and, while sitting on the edge of her hospital bed on May 28, 2006, she became dizzy and fell off the bed, suffering injuries to her left arm and shoulder. Following the incident, the plaintiff claimed she had been continuously treated by the defendant until she initiated this action in October of 2008. The plaintiff claimed that the defendant was negligent in: failing to supervise properly its physicians, agents, employees, contractors, and subcontractors; failing to use a bed alarm; failing to place sidebars on her bed; and failing to assign staff to monitor the plaintiff while in her bed. The plaintiff also claimed that a nurse, an agent of the defendant, improperly left her unattended in an upright position on the bed.

The defendant claimed that the plaintiff's case was barred by the two-year negligence statute of limitations set forth in Conn. Gen. Stat. § 52-584. Specifically, the defendant argued that the plaintiff discovered the harm on the date of the fall, May 28, 2006, and was required to bring suit within two years of that date. The plaintiff argued that the statute of limitations was tolled pursuant to the continuing treatment doctrine as she was continually treated for her injuries from the fall through the year 2007.

Conn. Gen. Stat. § 52-584 provides:

> No action to recover damages for injury to the person … shall be brought but within two years from the

> date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of.

The statute imposes two specific time requirements. The first requirement, referred to as the discovery portion, requires a plaintiff to bring an action within two years from the date when the injury is first sustained or discovered. The second provides that in no event shall a plaintiff bring an action more than three years from the date of the act or omission complained of.

In the present case, it was undisputed that the plaintiff became aware of, and thus discovered, her injuries on May 28, 2006, the date of her fall from bed. The court noted that when applying § 52-584 to determine whether an action was timely commenced, the court has previously held that an injury occurs when a party suffers some form of actionable harm. Actionable harm occurs when the plaintiff discovers that he or she has been injured and that the defendant's conduct caused such injury. The statute begins to run when the plaintiff discovers some form of actionable harm, not the fullest manifestation thereof. The focus is on the plaintiff's knowledge of facts, rather than on discovery of applicable legal theories.

The court noted that in *Rosato v. Mascardo*, 82 Conn. App. 396, 405 (2004), it had expressly held that the continuing treatment doctrine did not apply to the discovery portion of § 52-584. Therefore, because the plaintiff had discovered her injury on the date of her fall, the continuing treatment doctrine did not toll the statute of limitations.

***Impact***: The Connecticut Appellate Court reaffirmed its prior ruling that even if treatment is ongoing, the statute of limitations is not tolled by the continuing treatment doctrine if the plaintiff is aware of the existence of the cause of action prior to the cessation of the treatment.

## Court Addresses What is Required to Maintain Malpractice Claim

*NICHOLS v. THE MILFORD PEDIATRIC GROUP, P.C. (Conn. App., April 2, 2013)*

The plaintiff filed suit against the defendant for injuries sustained when the plaintiff fainted while one of the defendant's employees drew his blood. The plaintiff's one-count complaint alleged negligence. The defendant moved to dismiss, arguing that the plaintiff had failed to comply with Conn. Gen. Stat. § 52-190a(a) because he failed to attach a certificate of good faith and an opinion letter from a similar health care provider. The plaintiff objected to the motion, arguing that he was not required to comply with § 52-190a(a) because his claim sounded in ordinary negligence, rather than medical malpractice. While the motion to dismiss was pending, the plaintiff also filed a request for leave to amend his complaint containing two counts, one claiming negligent supervision and one claiming *res ipsa loquitur*. The plaintiff included a certificate of good faith with his amended complaint, but not an opinion letter from a similar health care provider.

The court granted the defendant's motion to dismiss on the basis of the plaintiff's failure to fully comply with § 52-190a(a), concluding that because the alleged negligence was substantially related to a medical diagnosis or treatment and involved the exercise of medical judgment, the court was constrained to conclude that the allegations of the complaint were those of professional negligence rather than ordinary negligence. The plaintiff appealed.

In analyzing the plaintiff's claim on appeal, the court noted the three-pronged test utilized to determine whether allegations sound in medical malpractice: (1) whether the defendants are sued in their capacities as medical professionals; (2) whether the alleged negligence is of a specialized nature that arises out of the medical professional-patient relationship; and (3) whether the alleged negligence is substantially related to medical diagnosis or treatment and involves the exercise of medical judgment.

In applying that test to this case, the plaintiff conceded that the first prong was met, as the defendant was sued in its capacity as a medical service provider. As to the second prong, the court found that the alleged negligence occurred as part of the medical professional-patient relationship because the plaintiff alleged that he was injured at the defendant's offices while a patient of the defendant for the purpose of undergoing a physical examination. The plaintiff attempted to argue that the finger-stick method of blood collection that was employed during his examination was a "wholly ministerial act," nor performed by a medically trained professional, thereby suggesting that the action that ultimately led to his injuries was not of a specialized medical nature. However, the court found that the blood collection at issue was conducted as part of the overall medical examination by the defendant and a physical examination is care or treatment that requires compliance with established medical standards of care and, thus, necessarily is of a specialized medical nature. The court stated that allegations of negligence directed toward the defendant's delegation of routine medical procedures performed as part of such an examination or the proper training of those agents who may be tasked with performing such procedures, such as the allegations raised by the plaintiff in this case, directly relate to the medical treatment of the plaintiff.

As to the third prong, the court noted that the negligence alleged by the plaintiff was that the defendant improperly trained and supervised the agent who collected the plaintiff's blood. As a result of that negligence, the defendant's agent allegedly failed to have the plaintiff lay supine on the exam table during the blood collection procedure and allegedly failed to recognize a "syncopic reaction to blood sampling," both of which allegedly resulted in the plaintiff's falling and injuring himself. The court stated that the mere fact that the blood collection technique used in the present case may have been routine in nature and may or may not have been performed by a medically trained professional was of no matter, because the court had already established that the blood collection had occurred as part of a physical examination of the plaintiff by the defendant:

A physical examination is related to medical diagnosis and treatment of a patient, therefore, any alleged negligence in the conducting of such an examination is "substantially related" to medical diagnosis or treatment. Further, whether the defendant acted unreasonably by allowing a medical assistant to collect blood samples unsupervised and in the manner utilized and whether it sufficiently trained its employee to ensure that any blood collection was completed in a safe manner, including imparting knowledge necessary to recognize a "syncopic reaction to blood sampling," clearly involves the exercise of medical knowledge and judgment.

Thus, the appellate court held that the trial court properly characterized the plaintiff's claim as sounding in medical malpractice. Because the plaintiff failed to comply fully with § 52-190a(a) in not attaching an opinion letter from a similar health care provider, the plaintiff's claim was properly dismissed.

***Impact***: Defense counsel should always scrutinize claims against health care providers which purport to sound in ordinary negligence to ensure that they are not actually claims of professional negligence. If the claim meets the three-pronged test discussed above but the plaintiff has failed to comply with § 52-190a(a), defense counsel should always move to dismiss the complaint.

## Court Grants Summary Judgment on EMTALA Claims

*BYRNE v. THE CLEVELAND CLINIC*
*(3rd Circuit, March 13, 2013)*

A *pro se* plaintiff brought this action against the Cleveland Clinic and Chester County Hospital under the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd, a federal law that requires hospitals to provide nondiscriminatory, appropriate medical screening and stabilizing treatment to persons needing emergency care. The screening procedures are determined by the hospital. EMTALA does not establish a standard of care but simply requires hospitals to treat all patients as other similarly situated patients would be treated within the hospital's capabilities, and it does not create a federal cause of action for malpractice.

In the instant case, the hospital had two policies governing the screening of individuals presenting to the emergency department complaining of chest pain. The plaintiff presented to the emergency room where various providers gave him indiscriminate care. He was given a physical exam, a medical history was taken, an EKG was given, cardiac work-up and chest x-rays were also obtained. Having reviewed the record in this case, the Third Circuit found that the hospital applied its screening policies to the plaintiff just as they would apply to any other patient. Therefore, the court granted summary judgment to the hospital on the plaintiff's EMTALA claims.

***Impact***: EMTALA is a specific statute governing how hospitals must provide indiscriminate care to patients. The plaintiffs attempt to use it to establish standards of care, which is not appropriate under the law.

## Depositions of Defendant-Physicians Under F.R.C.P. 30

*MAURER v. WILLIAMS*
*(M.D. Pa., April 9, 2013)*

In this medical malpractice claim, the plaintiff alleged that the defendant, Dr. Llewelyn Williams, negligently administered a steroid injection that resulted in a spinal cord compromise. The plaintiff was subsequently rendered paraplegic. During the course of Dr. Llewelyn's deposition, he was asked various questions by the plaintiff's counsel about the standard of care related to the administration of a steroid injection. However, the defense counsel objected and stated his client did not have to answer any questions that seek expert opinion testimony.

The plaintiff filed a motion to compel Dr. Llewelyn to undergo a second deposition and answer various questions about the applicable standard of care. The court confirmed that the Federal Rule of Civil Procedure 30(c)(2) only permits an attorney to instruct a deponent not to answer a question when necessary to preserve a privilege or to enforce a limitation ordered by the court. Hence, counsel should have preserved his objections to this line of questioning on the record but permit his client to answer same. Nonetheless, the court ruled that a second deposition was unnecessary because the plaintiff's counsel re-worded his questions and obtained the information initially objected to by the defense counsel.

***Impact***: When a physician is deposed in a medical malpractice action in federal court, he may be questioned about the applicable standard of care. It is not permissible for defense counsel to instruct his client not to answer a question about this issue unless it involves some form of privilege or a limitation previously ordered by the court.

# LEGAL MALPRACTICE

### Prior Representations by an Attorney Give Rise to a Continuing Duty

*TARGONSKI v. CLEBOWICZ*
*(App. Ct., April 23, 2013)*

In 2004, the Targonskis entered into a real estate contract with Mrs. Delahunty to purchase a lot. The real estate contract was negotiated by the buyers and seller without the assistance of any attorneys. The seller agreed to give the Targonskis a right of way for ingress and egress over a strip of land that the seller owned. The closing took place in July 2004, but there was no language in the deed or in any separate easement agreement memorializing the easement. About four months after the closing the seller's attorney, realizing that there was no written easement agreement, sent three letters to Clebowicz, the buyers' attorney, setting forth the error and proposing a resolution. Clebowicz did not respond to the seller's attorney.

The plaintiffs constructed a house on the land purchased and in August 2005, realizing that they had encroached onto the seller's land by building a corner of their house on her property, had another closing in which Clebowicz represented them with respect to the acquisition of a small triangular piece of land that would cure the encroachment issue and give the buyers the zoning setback clearance needed. In October 2005, the Targonskis alleged that based on the alleged misrepresentation made to them at the July 2004 closing that they could use the land as if it were theirs, they built a stone wall on that portion of the seller's land.

In August 2008, nearly three years after the construction of the stone wall and four years after the closing, Clebowicz received a letter from seller's attorney claiming that the Targonskis had improperly constructed on the seller's land. Upon receipt of the letter, Clebowicz informed the plaintiffs that they had no right-of-way over the seller's property and that she had a claim against them for trespass and nuisance and that she was seeking injunctive relief. On September 29, 2008, Clebowicz sent the seller's counsel a letter attempting to resolve the alleged trespass and nuisance issues arising from the Targonskis' use of the seller's property.

On March 6, 2009, the Targonskis filed the instant legal malpractice action against Clebowicz claiming that his conduct, after failing to include the right-of-way in the deed, included engaging in a continuous course of conduct to prolong the harm flowing from his drafting error by failing to respond to the seller's attorney's letters proposing to cure the defect by having the parties enter into an easement agreement. Clebowicz, by way of special defense, alleged that the action was barred by the three year tort statute of limitations as the representation of them ended in July 2004 with the termination of the closing, more than three years before the action was commenced.

The Appellate Court overturned the trial court's grant of summary judgment, stating that there were material questions of fact presented as to whether the continuing duty doctrine tolled the statute of limitations. The Appellate Court stated:

[E]ven after an attorney's representation of a client ends, he owes a duty to his client, which relates back to his original wrong of rendering negligent services to the client, to correct the results of such prior negligence if he later learns of the negligence at a time when he has the power to remedy the problems arising from it … By force of simple logic, this duty continues until such time as he takes action to cure his prior negligence or the opportunity to cure such prior negligence ceases to exist.

***Impact***: This case shows the wide scope that the continuing duty doctrine has in Connecticut extending the attorney's duty beyond the original representation date, here the real estate closing. While the doctrine has limitations, attorneys and courts alike must be careful to avoid breathing life into a case where none exists.

### Playing With House Money: Legal Malpractice Claim to Proceed Despite Guilty Plea to Gambling Charges

*WINSTOCK v. GALASSO*
*(N.J. Super. Ct. App. Div., May 6, 2013)*

The issue before the court in *Winstock* was whether a defendant could pursue a legal malpractice claim against his former attorney despite pleading guilty to certain crimes arising out of running an illegal gambling operation. The defendant named in the malpractice case provided the plaintiff with legal advice, including allegedly approving the business model for the operation. Likewise, the attorney represented the plaintiff at a hearing wherein a county zoning board ultimately approved the operation of the club; the zoning board was unaware gambling would be taking place at the club. Shortly after the club opened, the plaintiff was arrested and charged with a number of offenses including operating and maintaining an illegal "gambling resort." The plaintiff agreed to plead guilty to a number of the criminal charges he was facing relating to the gambling operation.

The plaintiff subsequently filed a malpractice claim against the attorney who purportedly approved the club's business model and represented him at the zoning hearing. The attorney sought and was granted summary judgment by arguing the plaintiff was estopped from pursing the malpractice claim as a result of his guilty plea. On appeal, the appellate court reversed, finding estoppel was inapplicable because the attorney acted as the plaintiff's "legal advisor" throughout the entire process of developing and opening the club. If the attorney provided improper advice about the legality of the club, the plaintiff should not be barred from pursuing a malpractice claim by his prior guilty plea.

***Impact***: The decision in *Winstock* is noteworthy for one important reason. In New Jersey, along with many other states, a party who pleads guilty is precluded from pursuing a malpractice claim against his or her former criminal defense attorney in the absence of obtaining some form of post-conviction relief. Here, however, the doctrine was inapplicable because the attorney provided allegedly improper advice about the club thereby purportedly causing the plaintiff to engage in criminal conduct; the attorney did not represent the plaintiff in the resulting criminal proceedings. The malpractice claim was not barred because the attorney's alleged error occurred when he was advising the plaintiff about the club's operations rather than as part of the resulting criminal case. While a guilty plea will bar a large swath of subsequent legal malpractice claims, it will not insulate an attorney from potential liability in every instance.

## Lack of Privity Precludes Party From Pursuing Legal Malpractice Claim

*STEELE v. FIRST NAT'L BANK OF MIFFINTOWN*
*(M.D. Pa., March 25, 2013)*

In *Steele*, the plaintiff filed suit against a bank and another third-party, who was not an attorney, arising out the estate planning they performed for the plaintiff's grandmother. After responding to the initial complaint, the defendants sought to join a number of attorneys as additional defendants. The defendants sought to join these attorneys in the case based upon a theory of common law contribution. The attorneys, according to the defendants, were "jointly and severally liable to [the defendants] . . . for their respective roles in creating and implementing the . . . botched estate plan." The attorneys filed a motion to dismiss premised around the argument that the claims asserted against them could not proceed in the absence of privity.

In reviewing the motion to dismiss, the court initially noted in Pennsylvania "a prerequisite to any claim for legal malpractice [is] that the plaintiff stand in privity with the attorney against whom he [or she] brings suit." Moreover, according to the court, "a professional malpractice claim" cannot proceed where a plaintiff fails "to plead he [or she] was in privity with any of the defendants" who "performed [a] specific service for" the plaintiff. In *Steele*, since the claims against the attorneys were based upon a theory of derivative liability, the court evaluated the pleadings to determine if there was privity of contract between the plaintiff and the attorneys who were joined in the case. The court reasoned the pleadings were devoid of allegations establishing the privity between the plaintiff and the attorneys necessary for the claims to proceed. As a result, the court granted the attorneys' motion to dismiss based upon the lack of privity.

***Impact***: The *Steele* opinion is noteworthy because it strongly endorses the position that a plaintiff cannot assert a viable legal malpractice or other professional liability claim in Pennsylvania in the absence of privity of contract. In recent years, the courts in Pennsylvania have slowly chipped away at the protections afforded to professionals under the privity doctrine by, for example, allowing negligent misrepresentation claims to proceed in the absence of privity. The *Steele* opinion, however, reinforces the notion that privity of contract is a viable and strong defense that, in appropriate cases, may be invoked to defeat a professional malpractice claim early on in the litigation.

## A Law Firm's Tweak of a Report Gives Rise to Malpractice Liability

*GRABOFF v. THE COLLERAN FIRM*
*(E.D. Pa., March 28, 2013)*

The plaintiff, Dr. Steven R. Graboff, an orthopedic surgeon, won a verdict for $392,000 against the law firm that used what he claims was an unfinished expert report, which ultimately resulted in his suspension. Moreover, this verdict encompassed an award against The American Association of Orthopedic Surgeons and the Academy of Orthopedic Surgeons (AAOS) for refusing to remove an article from its website concerning Dr. Graboff's suspension. Specifically, the claim against AAOS was based upon Dr. Graboff's allegations the organization portrayed him in a false light.

Dr. Graboff was hired by the Colleran Firm to serve as an expert witness in a medical malpractice action. He submitted a draft report that contained the phrase "DRAFT REPORT" and warned it was preliminary because additional time was needed to review all of the medical records. Nonetheless, the phrase "DRAFT REPORT" was whited out and used in a settlement conference. Colleran ultimately settled the medical malpractice case, but proceedings were initiated against Dr. Graboff for violating standards of professionalism by providing false testimony as an expert witness.

Dr. Graboff was suspended for two years, and AAOS published news of same. Dr. Graboff raised a breach of contract claim against Colleran. Moreover, a claim for false light was raised against AAOS. Dr. Graboff claims he lost business as an expert after being suspended. He ultimately achieved separate verdicts for $196,000 against both defendants. AAOS' motion for judgment notwithstanding the verdict was denied.

***Impact***: This holding exposes the obvious dangers of altering an expert report. The expert's reputation and career has been severely damaged by the law firm's alleged actions. Consequently, the law firm's reputation has been damaged by the nature of this lawsuit. The case should send a message to all attorneys to avoid altering expert reports in any manner.

### Expert Testimony Needed Where Breach of Fiduciary Claim Mirrors Legal Malpractice Claim

*GROGINS, et. al. v. LAMPERT, WILLIAMS & TOOHEY, LLC*
*(Sup. Conn., March 11, 2013)*

The individual plaintiff retained the defendant law firm to represent him in negotiations in a joint business venture with a third party to buy property and build two single family residences. The firm assigned the first defendant attorney to structure the transaction and draft an agreement between the plaintiff and the third party.

This third party purchased two parcels of property for the joint venture and in doing so obtained a blanket mortgage on both parcels of property. The first defendant attorney did not tell the plaintiff about this blanket mortgage. Instead, the first defendant attorney, in furtherance of the joint venture, formed a limited liability plaintiff building company on the individual plaintiff's behalf, making the individual plaintiff the sole member. The plaintiff building company was to handle the construction of two homes on the parcels and a construction agreement was drafted by the first defendant attorney and signed by both the individual plaintiff on the advice of the first defendant attorney and the third party. At some point thereafter the third party refinanced the previous mortgage using one of the properties as collateral unbeknownst to both plaintiffs. The third party also obtained another mortgage on the same property without plaintiffs' knowledge.

Shortly thereafter, a buyer sought to purchase a home on the property encumbered by the mortgages. However, based on the way the agreement was drafted the third party was able to refuse the sale of the home unless the full amount of the mortgage was paid from the sale. The first defendant attorney and the firm attempted to negotiate a settlement with the third party but were unable to compel the sale, causing both plaintiffs to lose all monies expended on the project. A second defendant attorney at the firm then stepped in and brought a direct action against the third party, arguably in order to mitigate the first defendant attorney's legal malpractice.

The plaintiffs then brought suit against the first defendant attorney, the second defendant attorney, and the firm. The plaintiffs alleged that the first defendant attorney was negligent in, among other things, failing to inform the plaintiffs of the nature of the mortgages on the properties. The plaintiffs alleged that the second defendant attorney and the firm were also negligent and breached their fiduciary duties to the plaintiffs because they failed to inform the plaintiffs of the first defendant attorney's malpractice and continued to represent the plaintiffs despite the conflict of interest created by their alleged malpractice.

After depositions were held, the second defendant attorney moved for summary judgment on the grounds that the plaintiffs failed to provide a sufficient expert to testify as to whether the second defendant attorney breached the standard of care. The second defendant attorney first argued that because the plaintiffs' proposed expert testified in his deposition that he had no opinion as to whether the second defendant attorney breached the standard of care, the plaintiffs had not provided an expert that could testify that this attorney engaged in conduct which amounted to legal malpractice. He argued that a sufficient expert was a prerequisite to maintaining the action. The court agreed and granted summary judgment. In doing so, the court rejected the plaintiffs' argument that because he had expert testimony that the first defendant attorney committed malpractice and evidence that the second defendant attorney knew about the malpractice, no expert was needed, as the jury was capable of deciding based on such evidence whether the second attorney was under an obligation to disclose the first attorney's malpractice. The court found that the allegation of the second defendant attorney's failure to inform the plaintiffs of the first defendant attorney's malpractice was one of professional negligence requiring expert testimony. The court further reasoned that the indirect testimony of the expert concerning the first defendant attorney's alleged malpractice was insufficient to satisfy the expert testimony requirement with respect to the second defendant attorney because the allegations against the second defendant attorney concerned different acts. The court also rejected the plaintiffs' argument that the second defendant attorney's conduct amounted to gross negligence and therefore, did not require expert testimony.
The second defendant attorney next argued that the plaintiffs' breach of fiduciary duty count should also similarly be disposed of by way of summary judgment because of their lack of an expert. In support of his motion, the second defendant attorney did not argue that an expert opinion is always required on breach of fiduciary duty claims. Rather, the second defendant attorney argued that because the plaintiffs' claims of breach of fiduciary duty mirrored those of their legal malpractice claims and were the same in substance, the plaintiffs similarly needed expert testimony to prove these claims.

The court agreed and granted summary judgment as to the plaintiffs' breach of fiduciary duty claims. Citing to Appellate Court authority, the court found that because the plaintiffs' allegations supporting their breach of fiduciary duty claim mirrored those in their negligence claim, the plaintiffs were required to produce expert testimony to prove this portion of their claim. The court found that despite the fact that the plaintiffs included different language necessary to state breach of fiduciary duty claims in the complaint, the two counts contained the same substantive allegations concerning the second defendant attorney's failure to report the first defendant attorney's negligence and were substantially similar enough to require expert testimony as to the breach of fiduciary duty count.

***Impact***: This case demonstrates that an expert must unequivocally state that each defendant breached the standard of care in order to maintain a legal malpractice action against multiple defendants and that the issue of whether a defendant attorney had duty to inform of another attorney's malpractice requires expert testimony. This case also demonstrates that where a plaintiff sets forth a breach of fiduciary duty cause of action against an attorney that mirrors that of his malpractice count expert testimony is required.

## Legal Malpractice Cases Are Not *Per Se* Unassignable

*VILLANUEVA v. FIRST AMERICAN TITLE INSURANCE COMPANY*
*(Sup. Ct. Georgia, March 18, 2013)*

The appellant, Villanueva, acted as the closing attorney for a mortgage-refinance transaction in which Homecomings Financial, LLC served as the lender supplying loans to pay off earlier mortgages on the secured property. The appellee, First American Title Insurance Company, issued title insurance on the transaction. Pursuant to Villanueva's instructions, Homecomings wired the funds into a specified escrow account; however, the funds were withdrawn and the account closed by a person who was not a lawyer. First American paid off the earlier mortgages and pursuant to its closing protection letter to Homecomings, became subrogated to all rights and remedies Homecomings would have had against any person or property. First American then filed suit against Villanueva, among others, seeking damages for legal malpractice and breach of contract with Homecomings.

The trial court denied summary judgment to appellants. The Court of Appeals affirmed the trial court's denial of summary judgment on the claim of legal malpractice, agreeing with Villanueva that First American's subrogation was an assignment since the protection letter transferred to First American Homecomings' right of action in addition to its rights of recovery, but disagreeing with Villanueva's assertion that a legal malpractice is never assignable. Recognizing that OCGA § 44-12-24 states that a right of action is assignable if it involves a property right but not when it is for personal torts or for injuries arising from fraud, the Court of Appeals concluded that a legal malpractice claim may be assignable under § 44-12-24 when it involves injury to property in the form of financial loss and is not based on fraud or does not involve a personal tort.

The Georgia Supreme Court determined that since a legal malpractice action is based upon a breach of a duty imposed by the contract of employment between the attorney and client, and sounds in contract when it alleges negligence or unskillfulness, it may qualify as an assignable chose in action under § 44-12-24. The court acknowledged that a legal malpractice claim may sound in tort, and under § 44-12-24 the unassignable claims for legal malpractice are only those that seek recompense for personal torts described as tortious injury to the person, such as physical and bodily injury, injury to reputation, false imprisonment, malicious arrest, and injury to one's health, in contrast to injury done to the person's property.

Villanueva asserted that the assignment of a legal malpractice claim violates Georgia's public policy pointing to the fact that a majority of states bans the assignment of legal malpractice claims as void against public policy. The Supreme Court pointed to the fact that the judicial decisions that reach this conclusion generally find the assignment to be one of personal injury and/or cite the need to preserve the sanctity of the unique relationship, the incompatibility of assignment and an attorney's duty of loyalty and confidentiality, the need to avoid encouragement of the commercialization of legal malpractice claims the could promote champerty and debase the legal profession, and the concern that attorneys would be hesitant to represent insolvent, underinsured, or judgment-proof defendants for fear that a malpractice claim would be used as tender.

The Supreme Court also rejected Villanueva's argument that the court has the inherent power to govern the practice of law in Georgia and that it is authorized and should carve out an exception to the statutes regarding the assignability of legal malpractice claims. The court stated that this case did not present the facts that call into question the regulation of the conduct of attorneys or the control and supervision of the practice of law and the court refused to posit and answer hypothetical questions.

***Impact:*** This case is important as it very clearly discusses cases from other jurisdictions and the rationale behind the majority and minority views when it comes to the assignability of legal malpractice claims.

## ARCHITECT AND ENGINEERS

### DOB Delays Leave The Architect Without a SOL Defense: Martin Act Preempts Plaintiff's Private Causes of Action

*BOARD OF MANAGERS OF NV v. MORTON ET. AL.*
*(N.Y. Sup. Ct., April 12, 2013)*

Justice Schmidt, of Brooklyn's Supreme Court (Kings County), recently dismissed the plaintiff Condominium Association's complaint asserting causes of action against the Project Architect for breach of contract, negligent misrepresentation and professional malpractice. The plaintiff's complaint names multiple defendants, but only its claims against the architect are discussed here.

Because the architect's contract with its client, the sponsor (not the plaintiff Association), included a provision obligating the architect to assist the Sponsor in obtaining the Certificate of Occupancy (CO), the court would not dismiss the plaintiff's complaint of May 29, 2012, on statute of limitations grounds. While the architect completed its professional services, including submitting all of the necessary documents to the Department of Buildings (DOB) to obtain the CO by no later than April 28, 2009 — more than three years (i.e., the relevant statutory period), before the plaintiff filed its lawsuit — the court rejected the Architect's argument citing the CO's issuance date of July 19, 2009, as the trigger for the three-year statute of limitations. The court focused only on the contract requirements referenced above, and gave no consideration to whether the architect was simply waiting for the DOB or actively providing design services for its client after April 2009.

The court, however, ultimately dismissed the plaintiff's causes of action against the architect, properly finding that the plaintiff's claims were preempted by the Martin Act and § 352 of New York's General Business Law. Here, the plaintiff alleges that it/they relied, to its detriment, on statements made by the architect in the sponsor's public offering statement and related certifications — the precise submissions mandated by the Martin Act.

The court, applying the language of the Martin Act, ruled that no private cause of action can exist where the plaintiff's claims stem, as they do here, exclusively from omissions and/or misrepresentations in filings and statements mandated by the act itself. In other words, because the plaintiff's claims would not exist but for the statute, the plaintiff's private causes of action cannot stand and are, by statute, exclusively owned by the attorney general.

The court dismissed the plaintiff's complaint on other grounds too. The plaintiff's breach of contract claim was dismissed as being more appropriately brought in tort. The court also held that because the plaintiff Condominium Association was only a theoretical class of people and not intended third-party beneficiaries of the architect's services, the plaintiffs were not in privity with the architect, and their breach of contract and negligence claims could not stand. Finally, the court confirmed that the plaintiff's claims for economic loss could not stand absent privity, dismissing the case on those grounds as well.

***Impact***: The court here has gone to great lengths, in this author's opinion, to qualify the proposed misrepresentations as statements which are mandatory under the Martin Act. Frankly, such a broad definition can only help design professionals defend against claims that are brought against them alleging defects in construction with which the Architect was never involved.

### Design Professional's Failure to Comply With the Terms of Contract Does Not Evince Reckless Indifference

*SOJA et. al. v. KEYSTONE TROZZE, LLC*
*(3RD Dept., May 2, 2013)*

The plaintiff homeowner brought suit against defendant architect for claims of negligence and breach of contract. The homeowner had contracted with the defendant Keystone Trozze, LLC and Keystone Associates, LLC (Keystone) for design services regarding the construction of their residence. The plaintiff alleged that due to the faulty design plans of Keystone, their home was constructed two feet below what the applicable regulations allowed resulting in increased flood insurance premiums and other related damages.

Keystone moved for partial summary judgment whereby it sought to enforce the limitation of liability clause contained within the contract for the design services rendered to the plaintiff. In relevant part, the plaintiff had agreed that the liability of Keystone would be limited to the fullest extent of the law for any claims, losses, costs, damages of any nature whatsoever, or claims expenses from any cause or causes. This clause was intended to limit Keystone's liability so that Keystone's total aggregate of liability should not exceed its total fee for services rendered on the design project.

On March 14, 2012, Keystone's motion was granted. The effect of the trial court's decision was that Keystone's liability was limited to the amount of fees paid by the plaintiff to Keystone, plus interest and costs. Shortly thereafter, the plaintiff appealed the decision.

On appeal, the plaintiff argued that a letter they had received from Keystone in 2001 established that Keystone failed to use the flood elevation report provided by plaintiffs' surveyor. Moreover, the letter established that Keystone failed to consult with the local Federal Emergency Management Agency coordinator (FEMA) when designing the plaintiff's home. Keystone was obligated by their contract with the plaintiff to ensure both requirements were met during the design process. The plaintiff argued to the Appellate Court that Keystone's actions constituted gross negligence and were the cause of his home being defectively designed and built. Therefore, the plaintiff argued, Keystone's gross negligence abrogated the limitation of liability clause within the contract.

The plaintiff's legal argument was that parties are free to enter contracts that absolve one another from its own negligence or limit liability to a nominal sum. But as a matter of public policy, limitation of liability clauses are not enforceable in the face of grossly negligence actions by one of the parties to the contract.

The Appellate Court held that the conduct of Keystone in regards to the failure to use the flood elevation report and the failure to coordinate with FEMA did not constitute gross negligence. The court reasoned that gross negligence differs in kind, not only in degree, from claims of ordinary negligence. The court went on to elaborate that gross negligence evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing. And while the letter from Keystone to the plaintiff may ultimately be used to prove claims of breach of contract, common-law negligence, or professional malpractice, it did not raise a question as to whether Keystone was grossly negligent. Keystone's conduct did not evince the requisite reckless indifference to the rights of others that would render the limitation of liability clause unenforceable.

***Impact***: On its own, a design professional's simple failure to comply with the terms of their contract with their client does not rise to the level of gross negligence that renders a limitation of liability contract clause unenforceable.

## FIDELITY INSURANCE

### Theft By an Employee — Narrow or Broad Interpretation?

*HARTFORD FIRE INSURANCE COMPANY v. THE MITCHELL COMPANY, INC., et. al.*
*(11th Cir., September 8, 2011)*

In this case, the court was asked to address whether an employee's self dealings constituted theft under the crime policy. The Hartford policy defined theft as the "unlawful taking of money … to the deprivation of the Insured." There, one of Mitchell's employees, who headed the division responsible for single-family developments, analyzed various properties, and provided reports and recommendations to Mitchell to purchase the properties. If approved by Mitchell's senior management, the employee would negotiate the purchase price, and senior management would give final approval. Unbeknownst to Mitchell, the employee recommended properties he owned by himself or with another person or where he received a portion of the sale price after recommending that Mitchell purchase properties owned by this other person.

The court, in not finding a "theft" as defined by the policy, found that Mitchell was not deprived of money as it bargained for and received property that could be used for future developments; Mitchell "received exactly what it bargained for – a piece of property with good title- and it approved the purchase for just that." Mitchell argued that it would never have purchased the property "but for the unlawful actions" of the employee. The court was not persuaded by this argument as it held that Mitchell failed to demonstrate that it lost money since it paid a price for a "known quantity." The court found that the employee's actions may have violated his fiduciary duties to the company but he did not steal from company funds.

***Impact***: This case represents a theory on theft policies. Generally, theft policies are under scrutiny. The definition of theft under some policies omits any reference to dishonest conduct or manifest intent. There is no indication that the state of mind of an employee is relevant or whether it is necessary for the employee to obtain a financial benefit. It could be argued that because of the lack of restrictions or clarifications, a broader interpretation can and should be adopted. On the other hand, because the language only involves theft, a term that implies intentional conduct, a narrow interpretation could be followed as well. Generally, theft policies will require that there be a direct causation; a loss of money or property; and theft by the employee. This case demonstrates that there must be a theft of the employer's property — that the employer must be deprived of getting something that it bargained for.

## FEATURED ARTICLE

### Two Recent Cases Suggest the CEPA Tide Turning In Favor of Employers in New Jersey

*By Caroline J. Berdzik and Michael S. Katzen*

### Background

The Conscientious Employee Protection Act (CEPA) — also known as New Jersey's "Whistleblower Act" — was designed to prohibit employers from taking retaliatory action against an employee because the employee engages in certain protected "whistleblower activity." In order to make a case under CEPA, an employee must establish that:

he/she reasonably believes that his/her employer's conduct was violating either a law or a rule or regulation promulgated pursuant to law, or a clear mandate of public policy (or in the case of a licensed or certified healthcare professional, he/she reasonable believes that the conduct of the health care provider he/she is employed by constitutes improper quality of patient care that violates a law, rule, regulation, or professional code of ethics);

- he/she performed a "whistleblowing activity" described in CEPA (e.g., complains to a supervisor or discloses to a public body);
- an "adverse employment action" was taken against the employee (e.g., discharge, suspension, demotion, or other negative change in the terms and conditions of his/her employment); and
- a causal connection exists between the whistleblowing activity and the adverse action.

Historically, New Jersey courts have interpreted CEPA and the definition of "protected whistleblower activity" broadly, erring on the side of providing employees with the most legal protection possible. However, one recent CEPA decision, and another decision that is on the way, might chisel away at CEPA's unmitigated expansion, signaling some much needed relief for New Jersey employers.

***Hitesman v. Bridgeway:***

Employee's Reliance Upon a Professional Code of Ethics Not Applicable to His Employer Cannot Support a Claim Under CEPA

In *Hitesman v. Bridgeway Inc.,* 2013 N.J. Super. LEXIS 44 (App.Div., March 22, 2013), Bridgeway Care Center, a long-term care facility, terminated the employment of Jason Hitesman, a registered nurse, after he called various governmental agencies and the media to report his concerns about Bridgeway's response to what he considered an inordinate rate of infections among residents. He sued, alleging Bridgeway violated CEPA. Hitesman alleged he had an objectively reasonable belief, in part based on the American Nursing Association's ("ANA") Code of Ethics, that Bridgeway provided "improper quality of patient care." A jury ruled in Hitesman's favor on the issue of liability, but awarded no damages, and both parties appealed.

The sole issue facing the Appellate Division was whether Hitesman had established a reasonable belief that Bridgeway's conduct violated a professional code of ethics. The court decided that Hitesman had not met this standard and ruled that Hitesman's belief that Bridgeway violated the ANA's Code of Ethics was not "objectively reasonable" because the section of the code at issue provided standards for employees to follow, and did not apply to Bridgeway as an employer. It is expected that Hitesman will appeal this ruling to the New Jersey Supreme Court.

***Battaglia v. United Parcel Service***

How broad is the definition of "protected whistleblower activity" under CEPA?

A case currently before the New Jersey Supreme Court provides some hope to employers that are seeking for the court to limit what is considered to be "protected whistleblower activity." In A-86/87-11 *Michael Battaglia v. United Parcel Service, Inc.* (069405), the plaintiff, Michael Battaglia, alleged that his employer, United Parcel Service (UPS), violated CEPA by demoting him in retaliation for complaints he voiced about the work practices of other employees. Specifically, the sole basis for Battaglia's CEPA claim was one alleged conversation between Battaglia 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." Battaglia also brought claims under New Jersey's Law Against Discrimination.

The jury found for Battaglia and awarded him $500,000 in economic damages and another $500,000 for emotional distress (which was later reduced to $205,000), and the trial court judge denied UPS's post-trial motion for judgment on the CEPA claim. The Appellate Division similarly denied UPS's request for judgment or a new trial on the CEPA claim, but vacated the emotional damages award and ordered a new trial. Both parties appealed to the New Jersey Supreme Court, which granted certification and heard oral argument on April 17, 2013.

During oral argument, counsel for UPS argued that there was no valid basis for Battaglia's CEPA claim, and asked the New Jersey Supreme Court to, among other things: (1) require that a whistleblower actually report an activity that is intended to be covered by CEPA (as opposed to a "nebulous allegation of liquid lunches"); (2) uphold CEPA's requirement that an employee must, at a minimum, have a reasonable belief that fraud or illegality occurred (noting that Battaglia did not actually witness any of the conduct he complained of, never testified that anyone was falsifying credit card documentation, and conceded during cross-examination that he did not believe the activity he complained of constituted fraud); and (3) follow settled law that does not allow CEPA claims for disputes over internal policy issues.

This will be a critical decision for New Jersey employers, as employees are continuing to stretch the definition of protected activity. If employees are permitted to bring CEPA claims based on vague allegations that appear to implicate purely private disputes over internal company policy issues, practically any type of complaint could conceivably fall under CEPA's purview which will increase litigation in this area.

## Practical Pointers

In light of these cases, employers should continue to investigate and thoroughly document whistleblower allegations, the outcome of such investigations, and any communications with the whistleblower. This evidence could play a crucial role in defending against a future CEPA lawsuit. When a CEPA lawsuit comes in, discovery should be focused on having plaintiff specifically identify the protected activity he or she engaged in and what law, public policy, or other basis is being relied upon in support of the claim.

## PROFESSIONAL LIABILITY MATTERS

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

### OJ Simpson's Bid for Freedom: It's My Lawyer's Fault

OJ Simpson's fall from fame is well documented. The disgraced football running back's latest legal woes stem from an altercation in a hotel room in which the Juice was allegedly joined by armed men. That story ended with his incarceration. Now, OJ is back in a Las Vegas courtroom with a new team of attorneys and a novel argument: Simpson's former attorney is to blame for the 2008 conviction. In the latest chapter in OJ's lengthy legal history, the "Juice" claims that poor legal advice is the sole reason he was incarcerated.

### Failure to Disclose Jeopardizes Coverage in Malpractice Claim

A law firm's failure to disclose a potential claim on its insurance application may act as a waiver of coverage. Lloyd's of London recently argued that coverage did not apply to a California based law firm in a multi-million dollar legal malpractice action. According to Lloyd's, the professional liability insurance policy contained an exclusion for claims the firm knew or reasonably should have known about prior to the effective date of the policy. At the time the law firm procured the policy, an attorney from the insured entered into a tolling agreement extending the statute of limitations on a potential malpractice claim. This pre-claim was not disclosed on the insurance application.

### Arrests Follow Massive, International Cyber-Heist

Recent arrests followed one of the more complex cyber attacks in history. A reported $45 million was stolen in the blink of an eye, but it may take years to comb through the unprecedented cyber-liability issues. Two major banks are now evaluating novel liability issues and presumably deciding whether to lodge a series of lawsuits with major implications on the landscape of cyber-liability.

### Attorney Sued for Wrongful Death

One of the foundations of the attorney-client relationship is confidentiality. Apart from limited exceptions, attorneys are generally precluded from disclosing a client's confidential information to a third-party and must act at all times in the client's best interest. It is well established that failure to do so may constitute an ethical violation and perhaps professional misconduct. A recent $40 million lawsuit claims that an attorney's breach of his client's confidences led to the client's murder.

### Golfer Tees-Up Professional Malpractice Lawsuit

A professional golfer — with a famous ex-fiance — recently filed a professional malpractice claim against his former accountant for allegedly concealing unpaid taxes in excess of $500,000. Hank Kuehne is an amateur champion who last played in a major tournament at the 2012 Honda Classic, but is perhaps best known for his prior engagement to tennis great Venus Williams. Reportedly, Kuehne had no idea of his mounting tax liability until he fired his advisor and retained a new accountant to manage his portfolio. It's a classic example of poor communication leading to malpractice.

### Insurance Implications in the West, Texas Explosion

One million dollars of coverage for $100 million in losses? Unfortunately, that appears to be the case for the West, Texas, fertilizer plant that recently exploded. Reportedly the owners of West Fertilizer Co. hold a negligible amount of insurance compared to the estimated cost of the damage caused by the blast. The plant did not hold excess or umbrella insurance policies. The fact that the company's owner has not breached any applicable regulation has been the subject of heated debate on the national level regarding regulating mandatory insurance coverage for companies that handle hazardous materials.

### Ignoring Prejudgment Interest

Prejudgment interest awards are often overlooked in evaluating a claim, especially legal malpractice matters. Typically, when valuing exposure, the focus centers upon the underlying action had the attorney avoided alleged negligence. But overlooking the impact of prejudgment interest can prove to be a costly mistake. Depending upon the statutory interest rate in your jurisdiction and the potential amount of the award, prejudgment interest can transform a nuisance value malpractice case into a hefty judgment.

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