GOLDBERG SEGALLA

Professional Liability Monthly

A national professional liability newsletter | June 2013 Vol.5, No.5

IN THIS MONTH'S EDITION

PROFESSIONAL LIABILITY MATTERS

Click here to jump to our new section featuring the latest posts on legal developments and risk management tips impacting the professional community from our ***Professional Liability Matters*** blog.

To subscribe to the blog, click here.

EDITORS
Sharon Angelino
Brian R. Biggie
Richard J. Cohen

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

The Federal Medicaid Act's Anti-Lien Provision: A Look at the Supreme Court's Decision in *WOS v. E.M.A.*

The resolution of any personal injury action involves the calculation of damages a plaintiff should be awarded. This task is particularly difficult in cases involving catastrophic injuries where ongoing medical care is required during the duration of the plaintiff's life.

Click here to read this article.

MEDICAL MALPRACTICE

Motion for Judgment Was Improperly Granted by Trial Court

SARGIS v. DONAHUE
(Conn. App. Ct., May 14, 2013)

The defendant in this case, Dr. Donahue, performed laparoscopic repair of the plaintiff's umbilical and incisional hernia. The procedure involved the surgical implantation of a mesh on the plaintiff's abdominal wall. The plaintiff then developed cellulitis and the mesh became infected. Ultimately, the plaintiff underwent an exploratory laparotomy and surgical removal of the mesh. After the mesh removal surgery, she had disfigurement of her abdomen, experienced great pain, and required additional surgery. The plaintiff then filed suit against Dr. Donahue and his office alleging that they failed to observe, evaluate, and treat her postoperative infection timely and adequately.

The matter went to trial and the jury found in favor of the plaintiff and awarded damages. Consistent with the defendants' earlier motion for directed verdict, they filed a motion for judgment notwithstanding the verdict. The defendants argued that the plaintiff failed to offer, by way of requisite expert testimony, sufficient evidence regarding proximate cause for the plaintiff's injuries. The trial court granted the defendants' motion, finding that the plaintiff's expert's testimony failed to show that if what should have been done had actually been done, it would have affected the outcome for the plaintiff. In its decision, the trial court cited both the standard of proof for a lost chance claim, as well as the legal standard for causation for a lost chance cause of action. However, in a later articulation of its decision, the trial court indicated that it had applied a traditional malpractice standard in evaluating whether the plaintiff had met her burden of proof, rather than a lost chance standard.

The plaintiff appealed the trial court's ruling, aruging that the trial court used the improper standard of proof and that the court's articulation was inapposite to the original basis that the court set forth in its memorandum of decision granting the defendants' motion. The plaintiff also argued that there was evidence to support the jury's implicit finding of proximate cause. The appellate court found that even assuming, without deciding that the trial court used the appropriate standard of proof, there was sufficient evidence of causation based on the testimony of the plaintiff's expert and, accordingly, the court improperly granted the defendants' Motion for Judgment.

Although the appellate court did not reach the issue of whether the trial court used the appropriate standard of proof in this case, the court did note that the use of the lost chance doctrine in an ordinary medical malpractice case would not be appropriate. The court noted that the general standard of causation in ordinary medical malpractice claims contemplates omissions as well as commissions of negligent acts. To prove proximate cause under the lost chance doctrine, a specialized subset of ordinary medical malpractice, the plaintiff must prove, in essence, that what was done probably would have affected the outcome. The plaintiff must prove that (1) he has in fact been deprived of a chance for successful treatment and (2) that the decreased chance for successful treatment more likely than not resulted from the defendant's negligence. Proximate cause determinations under ordinary medical malpractice cases, however, do not focus on the outcome. Rather, a plaintiff need only prove that the conduct of the defendant was a substantial factor in causing the plaintiff's injury.

Impact: Although this case did not decide the issue of whether the trial court applied the wrong standard, the case illustrates nicely the distinction between the standards of proof for causation in ordinary medical malpractice cases versus cases alleging lost chance.

Plaintiff Avoids Dismissal Despite Failing to Comply with State Law

QUELET v. PRESTON, M.D., ET AL.
(M.D. Pa., May 31, 2013)

In this medical professional liability action the defendants filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The plaintiff filed medical malpractice claims against the defendants in the District of Maryland on June 25, 2012. The case was transferred to the Middle District of Pennsylvania on September 24, 2012. The defendants argued the complaint should be dismissed because a certificate of merit was not filed within 60 days of the complaint, as required by Pennsylvania Rule of Civil Procedure 1042.3(a). The certificate of merit requirement has been held by the Third Circuit to be a substantive rule of law, applicable to federal court actions brought in diversity.

Here, the plaintiff had filed certifications under Maryland law which were similar to the requirements imposed by Pennsylvania. When the case was transferred, he re-filed those certificates as Pennsylvania certificates of merit. Thus, the certificates of merit were filed well after 60 days from when the complaint was filed. Nonetheless, the court found that the filing of the certification under Maryland law substantially complied with the Pennsylvania requirements under rule 1042.3. The court also determined that it was not necessary for the plaintiff's expert to meet the same specialty requirements under the MCARE Act in order to provide the certificate of merit.

Impact: State procedural requirements are, at times, considered substantive law by federal courts. Therefore, in cases where diversity gives the federal court jurisdiction, state procedural requirements should be considered as part of the defense strategy.

Although the Middle District of Pennsylvania did not dismiss this case, different factual scenarios may warrant a different result.

ARCHITECTS/ENGINEERS

Limitation of Liability Clause for Non-Nominal Amount is Enforceable by Breaching Party

SAMS HOTEL GROUP, LLC v. ENVIRONS, INC. 2013 U.S. App. LEXIS 11047
(7th Cir., May 31, 2013)

The plaintiff-appellant in this case, SAMS Hotel Group, LLC (hereinafter SAMS), contracted with defendant-appellant Environs, Inc. (hereinafter Environs), an architectural firm, for the design plans for a new six-story Homewood Suite Hotel to be built in Fort Wayne, Indiana. Environs was to be paid a flat fee of $70,000 for its design work. The contract was signed on March 1, 2007, with the design and construction work to begin soon thereafter. By the spring of 2008, serious structural defects were discovered, the county building department condemned the structure, and all subsequent attempts to remediate the building failed. The hotel was ultimately demolished in 2009. SAMS estimated its loss at more than $4.2 million.

SAMS filed suit in the U.S. District Court for the Southern District of Indiana for breach of contract and negligence against Environs, arguing that the architectural firm provided defective designs and negligently performed its contractual obligations. While that suit was pending, the Indiana Supreme Court held that the "economic loss rule" applies to construction contracts under Indiana Law. Under that rule, a party to a contract cannot be liable under a tort theory for any purely economic loss caused by the party's negligent performance of the contract absent personal injury or damage to other property.

Moreover, the contract between SAMS and Environs included a clause limiting Environs damages for negligence or breach of contract to $70,000. The clause did not refer specifically to a limit on damages for Environs' own negligence.

Environs was granted summary judgment by the district court with regard to the negligence claim when it applied the "economic loss rule" to this litigation. Furthermore, the court held that the limitation of liability clause was enforceable, so that SAMS' potential recovery on its surviving breach of contract claim would be limited to $70,000. After trial, Environs was found liable and the district court limited SAMS' recovery to $70,000 before deciding the total amount of damages SAMS incurred as a result of Environs' breach.

SAMS appealed the district court's determination that the limitation of liability provision is enforceable, and the United States Court of Appeals for the Seventh Circuit reviewed the contract *de novo*. SAMS argued that the language in the clause was broadly drafted and did not specifically limit damages for Environs' own negligence. SAMS' position was that the clause should only limit Environs liability for negligence of third parties.

The Seventh Circuit held that the contract provision limiting SAMS' recovery to $70,000 was enforceable. The court reasoned that a professional services contract that generally refers to liability for negligence and breach of contract, where the contract was freely bargained by two sophisticated commercial entities, is enforceable in favor of a breaching party even though the clause does not specifically refer to that party's own negligence.

The court distinguished this case, where damages are limited by contract, from those cases where a contract clause would completely indemnify or exculpate a defendant for its own negligence. In those cases, the contract language must "clearly and unequivocally" manifest a commitment by the plaintiff, knowingly and willingly made, to pay for damages occasioned by the defendant's negligence. Moreover, to be effective, these clauses must refer explicitly to the indemnified or exculpated party's own negligence. No Indiana court had applied such a strict rule to litigation where two sophisticated entities negotiated a limitation of liability clause so as to allocate those risks in advance.

In *dicta*, the court noted that if the clause were to have limited damages to a nominal amount, and if the plaintiff were an unsophisticated individual, a limitation of liability clause could be as harsh as a full exculpatory clause would be. But that was not the case here.

Impact: Where a sophisticated plaintiff agrees to a limitation of liability clause that limits damages to a non-nominal amount, the clause need not specifically refer to the defendant's own negligence in order to be enforceable.

Unlicensed Firm Awarded Fees for Architectural Work

McIVER-MORGAN, Inc. v. DAL PIAZ
(N.Y. 1st Dept., May 9, 2013)

New York's Appellate Division for the First Department affirmed an award of architectural service fees owed to a design firm even though the design firm itself did not have a license to practice architecture.

The property owners in this case retained the design firm to design a renovation of the owner's townhouse. For reasons unrelated to this lawsuit, the owner terminated its contract with the design firm. The design firm invoked the arbitration clause of the parties' contract and was awarded its fees for work completed, including an award for "architectural fees." The owner disputed that award in the trial and appellate courts on public policy grounds arguing that the contract was void as a matter of public policy and in violation of New York State Education Laws which prohibits a firm from holding itself out as a firm permitted to practice architecture without an architect's license. It is undisputed that the design firm was without a licensed and registered architect in its employ.

The relevant contract provided that the design firm may retain consultants, including engineers and others to perform services for each phase of the work. Indeed, the design firm employed a licensed, but not a registered, architect. The design firm also retained an independent licensed and registered architect as its consultant on this project. The design firm's architect and its consultant worked collaboratively drafting the architectural designs for this project.

The appellate division's ruling was, in part, based on the deference courts give to arbitrators and the ADR process. Beyond that, however, the court ruled that "whether an unlicensed entity offering services regulated by the Education Law may enforce its contract [for providing those services] must be decided on a case by case basis," and that the provisions of the Education Law requiring a license to provide architecture are not to be "slavishly applied" See, *Charlebois v. Weller Association.*, 72 N.Y2d 587 (App Div. 1988). This court, further quoting *Charlebois*, stated that "the purpose of the licensing requirements is to ensure that the regulated work is performed by those with the necessary skill and training" and not to mandate that the specific firm hold an architect's license or specifically name the architect in the party contract. An agreement, however, wherein the contractor was performing architectural services absent a license was held unenforceable, against public policy, and even perhaps criminal.

Impact: The facts of this case fall between those cases where an unlicensed entity performed the architectural services itself and those where here the architectural services were legitimately performed by a licensed architect. The court here believed that the contract's advisement that consultants would be and, in fact, were retained, coupled with the design firm's architect (licensed but not registered) did not offend public policy or the Education Law. Thus, the court affirmed the prior finding in favor of the design firm.

California Joins the Country by Enforcing Freedom of Contract

BRISBANE LODGING LP v. WEBCOR BUILDERS INC.
(Ca. Ct. of App., June 3, 2013)

California's Court of Appeals has officially aligned with the rest of the states in reinforcing a party's freedom of contract. In its June 3, 2013, opinion the court ruled that the public policy principles applicable to the freedom to contract afford sophisticated contracting parties the right to abrogate the delayed discovery rule by agreement.

In this case, a property owner retained a design and construction firm to build a 210-room, eight-story hotel. The parties engaged in extensive contract negotiations which were expressly understood and to the satisfaction of those involved (and their attorneys). Among the provisions agreed upon was the parties' agreement that the statute of limitations governing a cause of action "shall be deemed to have accrued in any and all events, not later that the date of Substantial Completion." It is undisputed that the hotel was substantially completed on July 31, 2000.

Following a plumbing issue in 2005, another plumbing problem arose in October 2007. During the inspection of the cause of this 2007 problem, it was discovered that a pipe inside the walls of the hotel had become disconnected. In early 2008, the owners further learned that the contractor and/or one of its subconsultants had used ABS (acrylonitrile butadiene styrene) pipe material rather than cast iron pipe for the sewer line, in violation of the Uniform Plumbing Code.

In May 2008, the hotel filed its complaint against the contractor for breach of contract, negligence, and breach of express and implied warranties. The contractor moved for summary judgment, arguing that the hotel's lawsuit was barred by the contract and specifically, the statute of limitations provisions the parties crafted and agreed to. In response, the hotel argued that the contract provision didn't include latent defects and that California's discovery rule and statute of repose afforded it 10 years from the statute's accrual date to commence its lawsuit.

The court clarified that California's delayed discovery rule has been applied in those cases where it is "manifestly unjust to deprive plaintiffs a cause of action before they are aware that they have been injured." The court further considered the legislative intent of the state's statute of repose, the passing of which expressly underscores the fact that claims for latent defects too must have an expiration date — a time by which an actor may exhale and rid itself of the anxiety that a lawsuit might some day come. Indeed, the court weighed the significance of a party's ability to create and be bound by its own contract terms against the need to extend the statute of limitations date beyond the limits of §337.15 of California's Code of Civil Procedure, providing a plaintiff four years from the date of substantial completion to commence its lawsuit.

While the Court of Appeals acknowledged that the enforceability of a contract provision establishing its own "statutes of limitation" was one of first impression, the court immediately recognized the raft of support other states have extended to precisely such a contract provision, and, perhaps more importantly, to a party's freedom of contract.

Ultimately, the court held that there was no public policy favoring the extension of time within which a party may commence its claim and ruled that:

> Like the out-of-state courts that have considered this provision, we conclude that sophisticated parties should be allowed to strike their own bargains and knowingly and voluntarily contract in a manner in which certain risks are eliminated and, concomitantly, rights are relinquished.

Impact: Given that the court acknowledged this was an issue of first impression in California, the importance of this decision is obvious. The court joined the majority of jurisdictions and upheld a party's right to negotiate a statute of limitations for any potential claims. This could be an important change for contracting parties in California and for insurers that commonly include such provisions in various insurance policies.

ACCOUNTANT MALPRACTICE

Accountants are Immune from CUTPA Liability Except for Their Entrepreneurial or Commercial Acts

STUART v. FRIEBERG
(Conn. App. Ct., May 18, 2013)

The party brothers were beneficiaries of their father's living trust, with the defendant brother to be sole trustee and executor of the trust upon the father's death. At the time of the trust's creation the father owned approximately $2 million in securities, cash, real estate, valuable antique furniture and artwork, including several famous works by Norman Rockwell.

In the months preceding the father's death in February 1993, the father completed a number of transactions which affected the estate. With the assistance of one of the defendant brothers and without the knowledge of the plaintiff brothers, the father created Stuart & Sons Limited Partnership with the defendant son — who was a general partner — and with the Norman Rockwell Museum in Stockbridge, Massachusetts as a junior partner. Shortly thereafter, nearly all of the father's assets, including the artwork, were transferred to Stuart & Sons, including the purchase of the real estate, the transfer of property from Stuart & Sons to the defendant son and his wife, and the commingling of Stuart & Sons assets with the defendant's own assets.

Ten months after the father's death the two plaintiffs brought suit against their brother in which they alleged that their brother had exercised undue influence over their father, who lacked the understanding and mental capacity to know and understand those transactions. The plaintiffs also sought injunctive relief preventing their brother as general partner of Stuart & Sons and as trustee of the trust from spending, wasting, or encumbering the assets. Trial occurred nine years later and the court found on nearly all counts for the plaintiffs determining that the defendant brother had exercised undue influence on the father. The court declared null and void the creation of Stuart & Sons and ordered all assets to be transferred to the father's estate. The court awarded damages in the approximate amount of $2.5 million.

The next litigation that followed was brought by the two brothers against attorney Peter Snyder as attorney for the defendant brother and for the various entities created by him. The complaint was multi-count, claiming fraud, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, unjust enrichment, and fraudulent concealment. Attorney Snyder filed a motion for summary judgment arguing that the plaintiffs' claims are barred by the statute of limitations and the Appellate Court affirmed the trial court's grant of summary judgment.

The present facts concern the plaintiffs' actions against Frieberg, a certified management accountant. The complaint alleged fraud, negligent misrepresentation, accounting malpractice, and violations of CUTPA. The claim was that Frieberg knew that their brother was mishandling the estate's assets and that he aided in this mismanagement by adjusting journal entries and mischaracterizing the brother's personal expenses, preparing misleading transaction summaries and compilation reports and providing the plaintiffs with incorrect compilation reports. In the CUTPA count, the plaintiffs allege that the defendant's conduct as the accountant for their father's estate was immoral, oppressive, and unscrupulous, and caused substantial injury and an ascertainable loss to the plaintiffs.

The defendant filed a motion for summary judgment on all counts, but specifically argued with regard to the CUTPA count that the allegations were not within the scope of CUTPA because they did not involve entrepreneurial elements of the defendant's practice. The trial court granted the motion for summary judgment as to the CUTPA count, agreeing with the defendant that the actions alleged did not fall within the entrepreneurial exception to CUTPA as it is applied to accountants.

The appellate court affirmed the trial court's grant of summary judgment thereby holding that the entrepreneurial exception to CUTPA applies to accountants. The appellate court acknowledged that prior to this case there was no Supreme or appellate court case which held that the entrepreneurial exception applied to accountants. The appellate court was persuaded by the holding in the seminal case of *Haynes v Yale-New Haven Hospital*, 243 Conn. 17 (1997), in which only claims arising out of the commercial or entrepreneurial aspects of accounting should fall under CUTPA.

The appellate court went on to comment that the definition of "entrepreneurial" does not encompass any action performed by the defendant, reminding that our Supreme Court has held that the solicitation of business and billing practices, as opposed to claims directed to the competence of and strategy employed, fall under CUTPA. In order to succeed a plaintiff must allege and prove that some element of the defendant's business practices were deceptive or unfair. The court stated that the plaintiffs alleged fraudulent billing practices in name only, as their claim was supported with evidence of alleged poor decision-making and withholding of information underlying their other legal claims, rather than claims pointed at billing or other business related practices, as they must be to establish a CUTPA claim.

Impact: The appellate court case now affords accountants the same immunity under CUTPA as attorneys and health care professionals in Connecticut to argue that the allegations in the CUTPA count state nothing more than negligence and have no relation to the entrepreneurial aspects of the business of accountants which CUTPA addresses.

LEGAL MALPRACTICE

Fraudulent Statements Made in Course of Judicial Proceeding Protected by Litigation Privilege

SIMMS v. SEAMAN
(Sup. Ct. Conn., May 21, 2013)

In 2005 the plaintiff husband commenced post-dissolution proceedings against his defendant wife by filing a motion to modify alimony payments. The defendant wife was represented by several different attorneys in the post-dissolution proceedings which spanned a number of years.

During the post-dissolution proceedings, each defendant attorney that represented the defendant wife affirmatively represented to the court that the wife was in highly disadvantaged economic circumstances and that the plaintiff should be compelled to pay substantial sums of money for her necessary support and maintenance. Each defendant attorney allegedly made these representations despite knowing at that time that the defendant wife had become the beneficiary of a substantial bequest from her uncle and had received approximately $350,000 in inheritance. The defendant attorneys allegedly did not disclose these assets to the court until they were ordered by the court to do so in 2008. Following the disclosure, the court ruled that the information had been improperly concealed, causing the plaintiff to incur more than $400,000 in legal expenses.

After the ruling, the plaintiff brought suit against the defendant wife and her attorneys, asserting claims of fraud and intentional infliction of emotional distress for their conduct in failing to disclose the inheritance during the post-dissolution proceedings. At the trial court level, the defendant attorneys moved to strike the claims, arguing that the plaintiff's claims were barred by the common law litigation privilege, a privilege which affords attorneys immunity from liability for certain statements or conduct during judicial proceedings. The trial court agreed with the defendant attorney's arguments, granted the motion, and rendered judgment in their favor. The trial court's ruling was affirmed by the appellate court on a subsequent appeal. Thereafter, the plaintiff appealed the appellate court's ruling to the Supreme Court.

On appeal, the Supreme Court affirmed the decision of the appellate court and found that the appellate court correctly concluded that the defendant attorneys were protected by the litigation privilege against the plaintiff's claims of fraud and intentional infliction of emotional distress and were immune from liability. In so holding, the court rejected the plaintiff's argument that the court should extend its holding that the litigation privilege is inapplicable to the torts of vexatious litigation and abuse of process and find that it is inapplicable to the torts of fraud and intentional infliction of emotional distress as well. After providing a detailed history of the litigation privilege harkening back to medieval courts, the court recognized the well-established precedent shielding attorneys from liability for defamatory statements made in the course of judicial proceedings. The court also noted the overall importance of the purpose of the privilege which was to allow litigants to have unfettered access to courts and be assured of the unrestricted, undivided loyalty of their attorneys.

Turning to the plaintiff's fraud claims, the court also recognized that the litigation privilege did not provide immunity to attorneys when claims of vexatious litigation and/or abuse process were brought against attorneys. However, the court went on to distinguish claims of abuse of process and vexatious litigation from claims of fraud. The court described that claims of vexatious litigation and abuse of process were different because those claims challenged the underlying purpose of the entire litigation rather than the attorney's role as advocate for his or her client. Therefore, the court found that those cases addressing the litigation privilege and vexatious litigation or abuse of process had no application to claims of fraud, which is a claim challenging the attorney's role as an advocate.

The court describing how the litigation privilege has been repeatedly applied by courts when the claim is one of defamation, then reasoned that given the striking similarity between claims of fraud and claims of defamation extending the litigation privilege to claims of fraud was a natural result. The court reasoned that because the two claims are so similar, the policies behind the litigation privilege necessitating its application were also similar and the privilege should accordingly apply to both claims.

In further support of its conclusion, the court noted that there were other remedies for an attorney's fraudulent conduct that would be sufficient enough to deter such conduct apart from a direct suit by a party. For example, an unsatisfied litigant could seek relief under the Rules of Professional Conduct and file grievances against attorneys. The court also noted the judiciary's own power to regulate conduct and authorize grievance panels to investigate allegations of attorney misconduct and/or impose sanctions.

Finally, the court cited to federal precedent to support its claims that the litigation privilege should extend to claims of fraud and pointed to civil rights actions wherein the courts have recognized absolute immunity for government attorneys.

The court then quickly disposed of the plaintiff's intentional infliction of emotional distress claims against the defendant attorneys. The court concluded that the litigation privilege was also applicable to those claims because the plaintiff's claim of intentional infliction of emotional distress was a derivative claim of his claim of fraud.

Impact: This case establishes that the litigation privilege is applicable to claims of fraudulent conduct on the part of the attorney during the course of judicial proceedings. Thus, under this case, an attorney is immune from statements made during the course of judicial proceedings even if they are fraudulent.

Who is the Client? Court Dismisses Legal Malpractice Claim Brought by a Member of a Consolidated Group of Plaintiffs

WILSON v. GLADSTONE
(N.J. Super. Ct. App. Div., May 17, 2013)

At issue before the court in *Wilson* was whether one member of a consolidated group of plaintiffs could bring a legal malpractice claim against the attorney who represented the plaintiffs in a zoning dispute. The plaintiff, Merrick Wilson, was one of many property owners in a New Jersey town that sought to challenge a zoning ordinance the town adopted. The property owners pooled their resources and created a steering committee to oversee the litigation including approving legal strategy proposed by the lawyers. In short, the plaintiffs in the underlying litigation, including Wilson, made litigation related decisions through the steering committee which "acted as liaison with counsel."

Wilson periodically attended steering committee meetings wherein litigation strategy was discussed, but he never sought to opt out and obtain his own counsel or otherwise challenge the steering committee's decisions. After the plaintiffs in the zoning dispute lost at trial, Wilson filed a malpractice claim premised, in part, around the assertion that the attorney improperly relied upon the steering committee when making litigation decisions. At the close of discovery, the attorney defendant moved for summary judgment on the malpractice claim.

In ruling on the summary judgment motion, the court noted Wilson was aware of, but never exercised, his right to opt out and pursue the case on his own if he disagreed with the steering committee. Moreover, in the retainer agreement, Wilson specifically agreed he was a member of the group of consolidated plaintiffs and was responsible to pay his proportionate share of the litigation costs. The court concluded the above "conduct constituted a *de facto* assignment of decision-making authority to the steering committee and there was no legal impediment to [the attorney's] reliance on the consensus of that committee." As a result, summary judgment was granted in the attorney's favor and the legal malpractice claim was dismissed.

Impact: The decision in *Wilson* is important because it provides some guidance to attorneys who are representing a consolidated or large group of plaintiffs or defendants in non-class action type cases. In appropriate circumstances and where properly documented in writing, the attorney will be deemed to represent the interests of the group as a whole rather than the individual members of the consolidated group of plaintiffs or defendants. An attorney may properly make litigation decisions in consultation with an executive committee or an appointed group of people without contacting each individual plaintiff or defendant. On the flip side, an individual member of the consolidated group cannot stand idly by as the case progresses and then cry afoul after-the-fact when he or she disagrees with strategic decisions made during the course of the litigation. As long as everything is properly documented, an attorney may rely upon the decision-making authority of a litigation committee or other appointed group of people without being exposed to a malpractice claim.

Defendant Lawyer in a Legal Malpractice Case May Disclose "Confidential" Information About a Former Client in Defense of a Lawsuit

MICCOSUKEE TRIBE OF INDIANS, v. DEXTER WAYNE LEHTINEN
(Ct. of App. Fl., May 15, 2013)

In November 2011, the plaintiffs filed a class action complaint against their former attorney, Dexter Wayne Lehtinen, alleging legal malpractice, breach of fiduciary duty, negligent misrepresentation, fraudulent misrepresentation, fraud, constructive fraud, and fraud in the inducement. In January 2012, Lehtinen, represented by attorney Joseph Klock, Jr., filed a consolidated motion to dismiss and motion for summary judgment. Thereafter, the plaintiffs filed a motion to disqualify attorney Klock, alleging that he represented clients in litigation against the plaintiffs in unrelated matters and that his representation of Lehtinen in the underlying case would give Klock access to confidential, attorney-client privileged information that he would then be able to use in those other unrelated cases. The plaintiffs claimed that attorney Klock would be privy to this confidential information because Lehtinen had represented the plaintiffs, and the plaintiffs feared Lehtinen could possibly divulge substantial, confidential information to Klock that would permit him to gain an unfair informational advantage against plaintiffs in the aforementioned unrelated cases.

In May 2012, the trial court conducted a hearing on the motion to disqualify the attorney. The court denied the motion, finding a lack of proof that any confidential information had been divulged. The plaintiffs then appealed.

The Court of Appeals agreed with the trial court and noted that Klock had not definitively obtained an unfair advantage in his representation of Lehtinen and called that allegation "pure speculation." Furthermore, the court noted that the claim that Lehtinen had disclosed confidential information to his own attorney would breach the Rules of Professional Conduct was equally unsupported. The rules provide, in pertinent part, that a lawyer may reveal confidential information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client" or to respond to allegations in any proceeding concerning the lawyer's representation of the client." These rules also indicate that "when disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule."

The Court of Appeals ruled that the plaintiffs had waived their right to attorney confidentiality because they sued their former attorney for legal malpractice. In other words, Lehtinen was permitted to disclose confidential information that was necessary to defend himself or establish a claim against the plaintiffs to the extent that he disclosed no more information than was required to meet the requirements of the rule. For these reasons, the Court of Appeals denied the petition for writ of certiorari.

Impact: This case demonstrates again that when a former client places the competency or skill of his former lawyer at issue in the form of a legal malpractice lawsuit, the former client may not use "confidentiality" or even privilege as a shield to prejudice the defendant lawyer's defense.

Attorney Malpractice Claim Can Proceed Despite Guilty Plea

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

The plaintiffs in this case, a husband and wife, opened the Fifth Street Club. They described the club as "an amusement and recreation center for adults with a large variety of activities." Among the events that members could access were billiards, darts, chess, and Monopoly. Buried in the list was poker, although gambling was never specifically mentioned. However, upon further investigation, many of the activities plaintiffs claimed would take place did not, and the club actually ran gambling tournaments.

Prior to opening the club, the plaintiffs sought the advice of an attorney who advised them that if the club did not receive remuneration from the gambling proceeds and if the players were all on equal footing, they would not be in violation of New Jersey's gambling law. During an undercover sting, the husband bragged to an undercover officer that they had found a loophole in the law. However, the attorney's interpretation was incorrect, and the husband and wife were arrested. The husband pled guilty to a single count on a lesser charge and the wife entered a Pretrial Intervention Program (PTI) without pleading guilty. Prior to sentencing, the husband moved to withdraw his guilty plea, but the motion was denied.

The husband and wife sued the attorney for malpractice seeking additional damages for emotional distress. The trial court granted the attorney's motion for summary judgment, relying on New Jersey appellate case Alampi v. Russo, 345 N.J. Super. 360 (App. Div. 2001). In that case, the court granted the defendant's motion for summary judgment on the basis that the plaintiffs could not sue their attorney on a different factual basis than the one under which they pled guilty. To do so would violate the "public policy expressed by the doctrine of judicial estoppel." In Alampi, the plaintiffs were convicted of tax crimes in the underlying action and sued their lawyer for failing to advise them of a potential criminal investigation and failing to set up a meeting with the IRS to possibly discuss a plea agreement. The motion for summary judgment in Alampi was upheld because the plaintiffs' claims in the civil trial, if proven correct, would contradict the underlying facts in the criminal case. This violated judicial estoppel and the defendant's motion for summary judgment was granted.

The appellate court in this case examined two questions. First, could the plaintiff husband "sue defendant for incorrect legal advice that [the husband] claims resulted in his conviction, by way of a plea agreement?" Second, could the plaintiff wife "sue defendant on the same theory of liability, despite the State consenting to her admission into the [PTI]?"

The court reversed the trial court saying that this case can be distinguished from Alampi. In Alampi, the very basis of the malpractice claim directly contradicted the facts under which the plaintiffs in the malpractice action pled guilty. The court in Alampi saw the malpractice claim as another opportunity to re-litigate the criminal claim. In addition, those plaintiffs knew that they were conducting illegal activity before they hired the attorney. However, in this case, the underlying facts leading to the guilty plea did not contradict the theory in the malpractice theory. The plaintiff husband acknowledged his actions but undertook those actions based on faulty advice from his attorney. The plaintiff wife could sue for malpractice on the basis that applying an estoppel argument in her case would undermine the policy basis for the PTI — namely, "to [p] rovide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with 'victimless offenses." As for the emotional distress, neither plaintiff could produce an expert to prove the distress. Consequently, it was dismissed.

Impact: The case is a cautionary tale for attorneys. Here, the court found a distinction that permitted the malpractice action to proceed against counsel. It would appear, to the extent there are no conflicting theories of liability, a criminal conviction will not give rise to an estoppel defense.

FEATURED ARTICLE

The Federal Medicaid Act's Anti-Lien Provision: A Look at the Supreme Court's Decision in *WOS v. E.M.A.*

The resolution of any personal injury action involves the calculation of damages a plaintiff should be awarded. This task is particularly difficult in cases involving catastrophic injuries where ongoing medical care is required during the duration of the plaintiff's life. Under 42 U.S.C. § 1396k(a)(1)(A), Congress has directed states in administering Medicaid programs to seek reimbursement for medical expenses incurred on behalf of beneficiaries who later recover from third-party tortfeasors. However, Section 1396p(a)(1) prohibits states from attaching a lien on the property of a Medicaid beneficiary to recover benefits paid by the state on the beneficiary's behalf. This provision does not permit a state to take any portion of a Medicaid beneficiary's judgment or settlement that does not pertain to payments for medical care.

In *Wos v. E.M.A.*, 133 S.Ct. 1391 (U.S. March 20, 2013), a medical malpractice claim was filed in North Carolina state court on behalf of a child who suffered injuries at birth that rendered her deaf, blind, unable to sit, walk, crawl, or talk. Moreover, the child is mentally retarded and suffers from a seizure disorder. It was determined that she requires between 12 and 18 hours of ongoing skilled nursing care each day. The child will never be able to work or live independently.

The plaintiff's expert witnesses in *Wos* determined medical and life-care expenses, loss of future earning capacity, and other expenses such as specialized transportation equipment will total in excess of $42 million. Furthermore, damages were sought for pain and suffering in addition to her parents' emotional distress. However, the plaintiff's experts did not calculate the last two categories.

Under North Carolina General Statute Annotated § 108A-57, up to one third of any damages recovered by a beneficiary for a tortious injury must be paid to the state for reimbursement of any payments it made for medical treatment. In compliance with this statute, the plaintiff in *Wos* informed the North Carolina Department of Health and Human Services of settlement negotiations. A representative from the state indicated Medicaid paid $1.9 million for medical care. The court ultimately approved a $2.8 million settlement, which apparently represented the defendants' policy limits. One-third of this amount was placed into an interest-bearing account pursuant to the aforementioned statute.

The plaintiff in *Wos* filed a declaratory judgment action in federal court and argued the North Carolina statute violated section 1396p(a)(1). The issue on appeal to the Supreme Court concerned the interaction between provisions of the federal Medicaid statute and North Carolina law. The United States Supreme Court confronted this issue previously in *Arkansas Dept. of Heath and Human Servs. v. Ahlborn*, 547 U.S. 268 (2006). In that case the court held the general anti-lien provision in the federal Medicaid statute does not permit a state from recovering any portion of a settlement or judgment not attributable to medical expenses. While the federal law enables the state to recover the amount paid for medical care, it cannot attach the remainder of a settlement because the beneficiary has a property right in the proceeds of same. The Supreme Court agreed to re-visit the issue previously addressed by Ahlborn because unlike *Wos*, the parties in that case entered into a stipulation concerning the amount that represents appropriate compensation for medical care.

The *Wos* court emphasized the long-standing rule under the Supremacy Clause that where state and federal law conflict, the state law must give way. Hence, the Medicaid anti-lien provision prohibits North Carolina from making a claim on any part of a Medicaid beneficiary's tort recovery not designated as payments for medical care. The state law does not have a process for determining what portion of a beneficiary's tort recovery pertains to medical expenses. Consequently, the North Carolina statute was preempted and struck down.

The obvious distinction between *Wos* and *Ahlborn* is that the parties in the former never agreed to the amount of medical expenses paid by Medicaid. However, a judicial or administrative proceeding can be conducted on a case by case basis if the beneficiary and the state cannot agree on what portion of the settlement pertains to medical expenses. Trial judges and trial lawyers can find objective benchmarks to make projections of the damages the plaintiff likely could have provided.

The Supreme Court's decision is *Wos* is significant because it provides clear guidance for any attorney involved in a personal injury action with a Medicaid beneficiary. State Medicaid programs are prohibited from enforcing programs that arbitrarily determine how much a beneficiary can recover. Such reimbursements must be limited to the amount that was actually designated for medical care.

PROFESSIONAL LIABILITY MATTERS

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

Professionals Beware: Unpaid Internships May Prove Costly for Employers

With summer break in effect, many students are utilizing the time off from school to participate in internships. An internship can provide students with an opportunity to gain work experience in a particular field and, arguably, make them more marketable upon graduation. However, these intangible benefits may not excuse an employer from failing to pay interns under state and federal labor laws.

Hell's Kitchen: Star Chef Sued for Wage and Hour Violations

On Thursday, June 13, 2013, a proposed class action was filed on behalf of all former and current employees of chef Gordon Ramsey's Los Angeles restaurant The Fat Cow. The class action is led by a former server, barista, and two hostesses who are taking their beef to California state court against the celebrity chef's restaurant. The class action alleges that the restaurant's management took tips from former employees, and violated a series of other wage-and-hour labor codes. The Fat Cow opened its doors on October 1, 2012, and is already catching steam over improper managerial practices.

Nonprofits at Risk: Unprepared and Underinsured

A recent study suggests that the nonprofit sector is generally underinsured and unprepared for liability risks. In its Nonprofit Risk Survey, (click here) an international risk advisor concluded that nonprofits are not allocating enough dollars to properly protect against risk. Far too many non-profits have not completed an independent risk assessment meaning that they are unaware of their vulnerabilities. Since many non-profits surveyed are purchasing the bare minimum coverage, this is a recipe for disaster.

The "Loss of Chance" Debate Continues

A recent decision provides hope for supporters of the "loss of chance" doctrine and further fuels the debate. Pursuant to this controversial doctrine, which has now been adopted in 23 states, a plaintiff may recover damages from a defendant due to a heightened risk of injury, even if the plaintiff cannot prove causation. The Minnesota Supreme Court recently joined those courts embracing the doctrine in the medical malpractice context. In its recent decision, the court permitted the parents of a 7-year-old girl afflicted by a rare form of cancer to pursue a medical malpractice recovery even though they could not prove that the defendant caused her condition. The suit has reignited an intense debate and has generated national attention.

Breach of Contract or Negligence: Does it Really Matter?

The Pennsylvania Supreme Court is set to entertain argument on an important appellate issue regarding the types of damages available to a plaintiff in a legal malpractice dispute. The decision may also highlight the fundamental differences, if any, between a malpractice suit grounded in tort or contract. In 2006, a national law firm agreed to represent the plaintiffs in the sale of a company that had incurred over $2 million in unpaid taxes. According to the plaintiffs, the law firm advised them that the sale would terminate their personal liability for the unpaid taxes. When the company's assets withered after the transaction, however, the individuals that sold the company were held personally liable for all unpaid taxes and they turned to their former lawyers to recover.

Legal Implications of Philadelphia's Deadly Building Collapse

On June 5, two Philadelphia buildings collapsed, killing six and injuring at least 13 others. Contractors were in the process of demolishing an empty building when a four-story wall unexpectedly tumbled into the neighboring Salvation Army thrift store leaving a pile of debris and a cloud of smoke. Philadelphians, and beyond, are searching for answers and debating over who is to blame.

Anatomy of a Ponzi Scheme in a Post-Madoff World

The Ponzi scheme expired with the arrest of Bernie Madoff, right? Absolutely not. Ponzi schemes are alive and well. Many of these scams are reported but presumably many go unnoticed as criminals target the unsuspecting of millions. Apparently, Madoff's 2008 arrest did little to dissuade others from engaging in similar crimes, although on a lesser scale. According to the SEC, which compiles Ponzi scheme data, these crimes continue at a disheartening rate.

OUR GLOBAL INSURANCE SERVICES AND PROFESSIONAL LIABILITY TEAM:

To learn more and view biographies, please click on the attorney's name and be directed to www.GoldbergSegalla.com.

Chairs

Richard J. Cohen
Chair, Professional Liability
Co-Chair, Global Insurance Services

Daniel W. Gerber
Co-Chair,
Global Insurance Services

Thomas F. Segalla
Co-Chair,
Global Insurance Services

Partners

Sharon Angelino
Caroline J. Berdzik
Peter J. Biging
Michael D. Brophy
Steven C. Capobianco
Elizabeth M. Cristafaro
Albert J. D'Aquino
Sarah J. Delaney
Paul S. Devine
Jennifer H. Feldscher
Helen A. Franzese
Michael T. Glascott
Anthony J. Golowski II
Emilio F. Grillo
Christopher Kendric
Jeffrey L. Kingsley
Jonathan M. Kuller
Kenneth R. Lange
Seth L. Laver
David E. Leach
Matthew S. Lerner
Matthew S. Marrone
Paul D. McCormick
Brian W. McElhenny
Colleen M. Murphy
Patrick B. Naylon
Joseph A. Oliva
Latha Raghavan
Joanna M. Roberto
Michael S. Saltzman
Tanguy de Schwarz
Edward V. Schwendemann
James J. Wrynn
Jonathan S. Ziss

Special Counsel

Brian R. Biggie
Marc. W. Brown
Jonathan P. Ciottone
Mark R. Cramer
Eric S. Cohen
James P. Gilroy
Angeline N. Ioannou
Sandra Snaden Kuwaye
Jill C. Owens
Matthew R. Shindell
Sean T. Stadelman
Melanie S. Wolk

Associates

Aaron J. Aisen
Carrie P. Appler
Troy A. Bataille
Matthew D. Cabral
Jason L. Ederer
Annmarie Giblin
Marissa T. Jones
Michael P. Luongo
Lila M. McKinley
Patrick B. Omilian
Bryan D. Richmond
Joanne J. Romero
Saleel V. Sabnis
Paul C. Steck

Goldberg Segalla is a Best Practices law firm with offices in Philadelphia, New York, Princeton, Hartford, Buffalo, Rochester, Syracuse, Albany, White Plains, Long Island, and London in April 2012. The Professional Liability Practice Group is comprised largely of seasoned trial attorneys who routinely handle all matters of professional liability claims and cases, with an emphasis in the areas of fidelity, directors and officers, insurance agents and brokers, nursing home defense, health care, and accountants' and lawyers' professional liability.

The Global Insurance Services Practice Group routinely handles matters of national and international importance for both domestic and foreign insurers, cedents and reinsurers. This includes: comprehensive audit, policy review, regulatory advice, and positioning disputes for resolution at the business level (either through interim funding or non-waiver agreements), negotiations among counsel, mediation or fully-involved arbitration or litigation. For more information on Goldberg Segalla's Professional Liability or Global Insurance Services Groups, please contact Richard J. Cohen or Daniel W. Gerber.

To subscribe to *Professional Liability Monthly* and additional Goldberg Segalla publications, visit *'Resources'* at GoldbergSegalla.com or scan the code to the left.

GOLDBERG SEGALLA

READ ADDITIONAL PUBLICATIONS

Reinsurance Review

Reinsurance Review is a monthly summary of decisions affecting the insurance/reinsurance industry. For more information contact Jeffrey L. Kingsley at jkingsley@goldbergsegalla.com.

CaseWatch

CaseWatch is a summary of appellate decisions concerning insurance law from across the country. For more information, contact Sarah Delaney at sdelaney@goldbergsegalla.com.

The Insurance Fraud Reporter

The *Insurance Fraud Reporter* is dedicated to the proposition that fighting insurance fraud is not just a statutory mandate or moral imperative — it is a business imperative. For more information, contact Anthony J. Golowski II at agolowski@goldbergsegalla.com

Interactive PDF: Case titles, headlines, and other references are linked to full-text decisions and additional resources.

We welcome you as a fan: Global Insurance Services Facebook Page

Follow us on Twitter for daily industry updates: @InsureReReport

Read our blogs for daily professional liability and insurance coverage case law updates: professionalliabilitymatters.com insurerereport.com

OFFICES

NEW YORK
780 Third Avenue, Suite 3100 | New York, New York 10017
OFFICE 646.292.8700

LONDON
No. 1 Cornhill | London EC3V 3ND
OFFICE +44.20.3427.6560

PHILADELPHIA
1700 Market Street, Suite 1418 | Philadelphia, Pennsylvania 19103
OFFICE 267.519.6800

PRINCETON
902 Carnegie Center, Suite 100 | Princeton, New Jersey 08540
OFFICE 609.986.1300

HARTFORD
100 Pearl Street, Suite 1100 | Hartford, Connecticut 06103
OFFICE 860.760.3300

BUFFALO
665 Main Street, Suite 400 | Buffalo, New York 14203
OFFICE 716.566.5400

ROCHESTER
2 State Street, Suite 1200 | Rochester, New York 14614
OFFICE 585.295.5400

SYRACUSE
5786 Widewaters Parkway | Syracuse, New York 13214
OFFICE 315.413.5400

ALBANY
8 Southwoods Boulevard, Suite 300 | Albany, New York 12211
OFFICE 518.463.5400

WHITE PLAINS
11 Martine Avenue, Suite 750 | White Plains, New York 10606
OFFICE 914.798.5400

GARDEN CITY
100 Garden City Plaza, Suite 225 | Garden City, New York 11530
OFFICE 516.281.9800