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IN THIS MONTH'S EDITION

PROFESSIONAL LIABILITY MATTERS

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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

Danger from Within? Sex Offenders in Long-Term Care Facilities

As evidenced by continued legislation on the controversial topic of sex offenders in long-term care facilities, it is clear that this is a difficult issue with many ethical, legal, and operational dimensions and consequences.

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MEDICAL MALPRACTICE

Court Notes Split of Authority in Connecticut as to Whether Pharmacist's Error is Medical Negligence or Ordinary Negligence

AUSTIN v. CONN. CVS PHARMACY, LLC
(Conn. Sup. Ct., June 6, 2013)

The plaintiff filed a suit against CVS Pharmacy in which she alleged that she was prescribed a certain medication by her doctor, and that her doctor instructed her and the defendant pharmacy not to use generic substitutes. The plaintiff alleged that the defendant pharmacy did in fact substitute a generic drug and that, as a result, she suffered certain injuries. The plaintiff alleged that the defendant was negligent in that it failed to fill a prescription as prescribed, failed to warn her that the prescription filled was not as prescribed, failed to supervise its employees so as to ensure that she received the prescription as prescribed, and failed to properly read the instructions for filling the prescription.

The defendant moved to dismiss, arguing that the plaintiff failed to attach to the complaint an opinion of a similar health care provider as required by Conn. Gen. Stat. § 52-190a. The plaintiff acknowledged that a pharmacist is a "health care provider" within the meaning of § 52-190a. However, the plaintiff argued that her complaint alleged ordinary acts of negligence where no medical judgment was required and, thus, the requirements of § 52-190a did not apply.

The court noted that there is a split of authority as to whether or not a pharmacist's misfilling of a prescription is medical malpractice claim or simple negligence. The court stated that the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involves the exercise of medical judgment.

In applying those criteria to the present case, the court determined that the complaint alleged medical negligence as opposed to ordinary negligence. First, the defendant was being sued in its role as a pharmacist. Second, what is alleged to have occurred arose out of the relationship with the plaintiff as her pharmacist. Third, the alleged negligence relates to the medical judgment exercised by a pharmacist. The court noted that the plaintiff's argument rested on the claim that the job of a pharmacist is simply to mechanically fill a prescription exactly as written with no use of judgment. However, the court pointed out various Connecticut statutes demonstrate that a pharmacist uses judgment beyond simply reading a prescription and filling it accordingly. That judgment involves the judgment of a pharmacist as a healthcare provider and therefore an action challenging the exercise of that judgment constitutes a claim of medical malpractice and not ordinary negligence. Thus, the court granted the defendant's Motion to Dismiss.

Impact: This case notes a split of authority as to the issue of whether a pharmacist's error in filling a prescription constitutes medical negligence or simple negligence. Perhaps the case would have been decided differently if the pharmacist provided a completely different prescription by mistake rather than using medical judgment to decide to switch the plaintiff's prescription to the generic version of the medication.

Third Circuit Applies Time Limitations of New Jersey's Tort Claims Act

MELBER v. USA
(3rd Cir., May 31, 2013)

In this medical malpractice matter, the plaintiff received two eye surgeries at the U.S. Veteran's Administration Hospital in East Orange, New Jersey. After the surgery he lost vision in his right eye. Subsequently, the plaintiff claimed the two surgeons who performed the procedures committed medical negligence. Both defendants were employees of the State of New Jersey through the University of Medicine and Dentistry of New Jersey.

Tort claims made against New Jersey state employees are generally precluded unless the procedural requirements of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 are met. Under this act, a claimant is barred from recovering against a public entity or public employee if he failed to file his claim with the public entity within 90 days of accrual of his claim. However, the court can permit notice of this claim at any time within one year after the accrual of the claim provided that the public entity or employee has not been substantially prejudiced and there are extraordinary circumstances that warrant the late filing of the notice.

In this case, the plaintiff filed the above-referenced notice past the 90-day deadline but argued extraordinary circumstances existed because he believed the defendants were federal rather than state employees. However, a letter sent to the plaintiff specifically stated the defendants were contract physicians and not employees of a federal agency. As a result, the court rejected the plaintiff's arguments and dismissed the complaint.

Impact: This case exemplifies the strict time constraints associated with the filing of a medical malpractice claim against a healthcare provider in New Jersey that is employed by a public entity.

Pending Legislation: Benevolent Gesture Medical Professional Liability Act

(Pennsylvania House of Representatives)

The Pennsylvania Senate last month passed the Benevolent Gesture Medical Professional Liability Act. The act, if passed by the House later this year and signed by Governor Tom Corbett, would allow health care providers to make benevolent gestures prior to the start of professional negligence actions, without those statements later being used against them in a legal proceeding. The current form of the bill does not cover statements of negligence or fault. Thirty-six other jurisdictions are reported to have some form of "apology rule" such as the act. The reported benefit of the "apology rule" is ultimately a decrease in medical malpractice filings.

Patients who become plaintiffs often report that they want answers or closure and physicians in Pennsylvania are hesitant to give statements that may ultimately be used against them in court. The act is meant to address those physician concerns and allow benevolent gestures without fear that any statements will be used against them later. The Pennsylvania House had previously passed a different version of the apology rule that would have forbid from admission into evidence statements of fault in addition to benevolent gestures. It is unclear at this point whether the House will pass the act in its current form.

Impact: If the act is passed later this year and signed by Governor Corbett physicians and other health care providers will have the opportunity to express sympathy and compassion where there is a bad outcome. How far the providers can go in terms of admitting fault remains to be determined. In either event, providers and their carriers should be aware of this important pending legislation.

ARCHITECTS/ENGINEERS

Nevada's Economic Loss Doctrine Bars Negligent Misrepresentation Claims Against Design Professionals in Construction Defect Litigation

HALCROW, INC. v. HE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, ET AL.
(Sup. Ct. Nevada, June 27, 2013)

MGM Mirage Design Group (MGM) retained architectural design and general contracting services from Perini Building Company, Inc. (Perini) in order to develop the Harmon Tower at CityCenter in Las Vegas, Nevada. Perini retained Halcrow, Inc. (Halcrow) to design the development, prepare drawings, and provide structural and steel engineering services throughout the CityCenter project. Century Steel, Inc. was retained by Perini to provide the steel installation, and Century later assigned its assets to Pacific Coast Steel (PCS) which included the contract for the Harmon Tower.

By contract agreement with Perini, PCS and Century were obligated to follow Halcrow's design and specifications for installing the reinforced steel on the project. During the construction, defects in the reinforcing steel's installation were discovered that prevented the Harmon from being built beyond the 26th floor despite the original plans calling for 40 floors.

Upon discovery of the defects, Perini sued MGM in Nevada State Court for failure to make timely payments. MGM counterclaimed for the defects to the steel reinforcement. Perini then filed a third-party action against both Century and PCS for contractual indemnity. Century and PCS subsequently filed a third- and fourth-party complaint against Halcrow, amongst others, for negligence, equitable indemnity, contribution and apportionment, and declaratory relief.

The court dismissed the claims of Century and PCS, upon a motion made by Halcrow, based on prior Nevada case law which Halcrow had argued barred unintentional tort claims against design professionals in commercial construction projects where the claimant incured economic losses only.

Both Century and PCS filed motions to amend their complaint to add negligent misrepresentation claims against Halcrow, alleging that Halcrow failed to conduct timely inspections in accordance with their representations that inspections would take place. They also alleged that Halcrow made erroneous statements when they claimed that on-site adjustments would fix errors in their design plans.

The court granted Century and PCS's motions but stayed the proceedings in order to allow the Nevada State Supreme Court to determine, at Halcrow's request, if the district court was correct in finding an exception for negligent misrepresentation to Nevada's economic loss doctrine's bar against unintentional tort claims in construction defect litigation. Halcrow's contention was that prior case law did, in fact, bar negligent misrepresentation claims as well.

The Nevada State Supreme Court held that the economic loss doctrine does bar claims for negligent misrepresentation against a design professional in construction defect litigation when a party is claiming purely economic losses, as Century and PCS were here. Halcrow was the design professional who planned and oversaw the installation of Harmon's steel infrastructure. The court reasoned that the parties' disappointed economic expectations are better determined by looking to the parties' intentions as expressed in their contract agreements. Design professionals "supply plans, designs, and reports which are relied upon to create a tangible structure; the ultimate quality of the work can be judged against the contract." Moreover, complex construction contracts generally include provisions addressing economic losses.

Impact: Nevada's economic loss doctrine bars claims for negligent misrepresentation against design professionals in commercial construction defect litigation when a party is claiming purely economic losses

LEGAL MALPRACTICE

Third Circuit Holds Plaintiff May Not Rest on Affidavit of Merit in Opposing Motion for Summary Judgment

SCOTT v. CALPIN
(3rd Cir., June 10, 2013)

In 2006, Appellant Norman Scott filed a divorce action in the Superior Court of New Jersey. Among other issues, the parties disputed whether a house that he had shared during his marriage was subject to equitable distribution. Shortly after Scott hired attorney Brian Calpin, the parties reached a settlement. Under its terms, Mr. Scott was to receive $8,500 from the sale of the home, a sum that was based on the premise that the house was not subject to equitable distribution.

Approximately one year later, Mr. Scott filed a complaint in federal district court in New Jersey alleging that, as a result of Mr. Calpin's deficient representation, he did not receive an equitable share in the proceeds from the sale of the house. In support of his claim, Mr. Scott submitted an affidavit of merit of a family law attorney admitted to practice in Pennsylvania. That expert stated that he had reviewed materials related to the case and determined that the home should have been deemed marital property subject to equitable distribution. The expert concluded that Mr. Scott "suffered extensive financial losses" as a result of Mr. Calpin's negligent representation.

After unsuccessfully arguing a motion to dismiss on the grounds that the expert's affidavit should be rejected because he was not licensed to practice law in New Jersey, Mr. Calpin filed a Motion for Summary Judgment. Mr. Scott did not offer any material evidence to oppose that motion other than the aforementioned affidavit of merit. The District Court granted the motion holding that Mr. Scott had not established the proper standard of care or how Mr. Calpin deviated from it. Mr. Scott appealed the decision.

After reviewing the rudimentary principles of the affidavit of merit statute and legal malpractice claims in New Jersey, the United States Court of Appeals for the Third Circuit upheld the dismissal.

Mr. Scott argued that the district court erred in holding that the expert affidavit of merit was insufficient to defeat Mr. Calpin's Motion for Summary Judgment. However, the Third Circuit agreed that there was no genuine issue of material fact concerning Mr. Scott's legal malpractice claim. Mr. Scott's expert affidavit of merit simply stated that "Mr. Calpin failed to provide appropriate representation within the acceptable standard of care required of attorneys representing clients in divorce and equitable distribution proceedings." However, the Third Circuit noted that the expert failed to describe that standard of care or explain Mr. Calpin's relevant duty under it. Instead, the expert merely opined that he did not believe that counsel advised Mr. Scott of all the factors that would be looked at by a court in making a determination of equitable distribution. The expert provided no basis for this belief.

As the Third Circuit underscored, the expert's assertions lacked factual support in the record. Critically, the expert did not explain how the documents he reviewed established that Mr. Calpin breached the standard of care. For this reason, the Third Circuit affirmed dismissal.

Impact: Most jurisdictions require a plaintiff in legal malpractice lawsuit to provide an affidavit of merit supporting that there is a reasonable probability that the services provided by defendant-attorney fell outside acceptable professional standards. However, this case exemplifies that a plaintiff may not rest on the affidavit of merit if the affidavit does not provide key opinions on what the standard of care is, how it was breached and what support the expert used to justify that opinion. Only a proper expert report will be sufficient. The affidavit of merit is a threshold requirement only, one which exists to provide expert verification of the merits so that bad-faith malpractice claims will be terminated at an early stage in the proceedings. It is not intended to supplant an expert affidavit.

Collateral Estoppel Bars Attorney From Litigating Probable Cause Element in Vexatious Litigation Case

CHARLOTTE HUNGERFORD HOSPITAL v. KEVIN E. CREED
(App. Ct. Conn., July 16, 2013)

The plaintiff hospital brought a vexatious litigation lawsuit against defendant medical malpractice attorneys. The attorneys brought a medical malpractice action against the hospital and other doctors and staff alleging that they breached the standard of care when treating their client/decedent, a former patient at the hospital, for her psychiatric episode.

Specifically, that suit alleged that the hospital, inter alia, failed to admit her as a patient given her past known psychiatric history. The patient was discharged, and within 24 hours, she committed suicide using the medication prescribed to her by hospital doctors who never examined her. Instead, they relied on information provided by the hospital's social worker.

In that underlying medical malpractice action, the hospital filed a motion to dismiss arguing that the complaint failed to attach a letter of a similar health care provider in violation of C.G.S § 52-190a. The defendant attorneys initially filed

suit without the requisite letter but then, after the motion to dismiss was filed, they filed an opposition claiming that they had mistakenly failed to attach the letter and attached to the opposition an opinion letter of a nurse that was dated subsequent to the initiation of the action. Despite their attempt to cure the defect, the dismissal motion was granted by the trial court. Shortly thereafter, defendant attorneys brought a second identical medical malpractice action under Connecticut's savings statute also known as the accidental failure of suit statute, C.G.S § 52-592, arguing that the case was dismissed as a matter of form.

The trial court in the second medical malpractice law suit bifurcated the action and first heard evidence on whether the savings statute could be applied to this case to save it from being barred by the expiration of the statute of limitations. Central to its inquiry was whether the defendant attorneys had obtained the letter of a similar healthcare provider when it instituted the first action. The trial court heard evidence from the nurse, the healthcare provider the defendant attorneys retained to author the letter as to whether the standard had been breached by the hospital's employees. The trial court concluded that the nurse was not a similar healthcare provider within the meaning of the statute as to any of the hospital defendants, including the social worker. The trial court went on to conclude that the attorneys' behavior in selecting the wrong similar healthcare provider was blatant and egregious and not the result of mistake, inadvertence and neglect, and therefore they could not avail themselves of the savings statute. The court entered judgment for the hospital. The attorneys appealed the court's judgment and the Connecticut Supreme Court affirmed the trial court's ruling.

Thereafter, the hospital brought suit against the attorneys for vexatious litigation as to their initiation of both the first and second medical malpractice actions. After initiating suit, the hospital filed a motion for summary judgment arguing that the attorneys lacked probable cause to bring both actions. Specifically, with respect to the first medical malpractice action, the hospital argued that in order to prove that the attorneys had probable cause to bring the first action they would have to prove that they had the similar healthcare provider letter. The hospital argued that the letter was a prerequisite to having a valid cause of action for medical malpractice, and that because the defendant attorneys did not have one during the first action, they did not have probable cause to bring the action.

With respect to the second medical malpractice action, the hospital argued that under the doctrine of collateral estoppel, the attorneys were barred from re-litigating the issue of whether they had probable cause to bring the action under the savings statute. The hospital argued that because the court had found in the first action that the defendant attorney's behavior in the first action causing its dismissal was not as a matter of form for excusable neglect, inadvertence or mistake, but rather blatant and egregious behavior, the defendant attorneys were precluded from re-litigating whether they had probable cause to bring the second action.

The defendant attorneys filed cross motions for summary judgment. With respect to the first action, the defendant attorneys argued that the lack of a letter of a similar healthcare provider and the failure to meet the requirements of § 52-190a did not deprive them of probable cause to believe that they had a valid medical malpractice action. The similar healthcare provider letter was a procedural requirement and did not go to the substantive merits of the action. With respect to the second argument, the defendant attorneys argued that the hospital's use of the court's ruling in the underlying action to collaterally estop the defendants from proving the issue of whether they had probable cause to bring the second action was improper as their conduct in bringing the second suit was not adjudicated to be improper until after they had brought suit and they did not have the benefit of that hindsight.

At the trial court level, the trial court agreed with the defendant attorneys on all counts and granted their motion for summary judgment with respect to both the first and second actions and denied the hospital's motion. The hospital subsequently appealed.

On appeal, with regard to the first action, the Appellate Court agreed with the defendant attorneys and found that the letter of a similar healthcare provider was procedural in nature and the failure to attach a letter did not equate to a finding that the defendant attorneys lacked probable cause to bring the first action as the letter did not go to the substantive merits of the action. The court looked at all the evidence the defendant attorneys had available to them at the time they brought suit to determine whether the attorneys had enough information such that a reasonable attorney would conclude that there was reasonable basis to entertain bringing the medical malpractice action. Looking at all the evidence that was provided by the defendant attorneys as to their pre-suit investigation, the Appellate Court determined that the defendant attorneys had probable cause to bring the first action even though they may not have had a letter in hand of a similar healthcare provider.

However, with respect to the second action, the Appellate Court rejected the defendant attorneys' arguments and agreed with the hospital that the collateral estoppel doctrine could be used to bar the defendant attorneys from litigating the issue of whether they had probable cause to believe that they could bring the second malpractice action. The court held that the rulings in the underlying matter that the defendant attorneys engaged in blatant and egregious behavior

in selecting a similar healthcare provider precluded the defendants from proving that they had probable cause to believe that they could have availed themselves of the statute based on the dismissal of the first action. Interestingly, the court failed to discuss how a later decision can be applied retroactively to bar defendants from bringing forth the facts it had at the time they brought the second law suit. Instead, the court merely cited to an earlier decision which is factually distinguishable and stated that that earlier decision informed the defendant attorneys of the fact that blatant and egregious conduct is not saved under the savings statute.

Impact: The holding in this case has drastic repercussions for any attorney who believes that after a medical malpractice has been dismissed for failing to attach a similar healthcare provider letter, he or she can bring a second law suit under the savings statute simply because the incorrectly credentialed healthcare provider is selected. Attorneys who fail to attach the letter of the appropriately credentialed healthcare provider and seek to avail themselves of the accidental failure of suit statute will now always be at risk of a subsequent vexatious litigation suit and may be deprived of their ability to defend that vexatious suit because they are barred by the doctrine of collateral estoppel.

Plaintiff's Emotional Distress Claims Against Opponent's Attorneys Barred Under the Litigation Privilege

STONE v. PATTIS
(App. Ct. Conn., July 16, 2013)

In 2003, the plaintiffs brought a federal action against the Connecticut town of Westport. The plaintiffs were originally represented by counsel in the federal action, but at some point the relationship between the plaintiffs and their counsel deteriorated and their counsel withdrew from the representation. Prior to the plaintiffs' counsel's withdrawal, an associate from the plaintiffs' counsel's firm left the firm and went to work for the firm retained by their opponent, the town of Westport. After the withdrawal, the plaintiffs continued to represent themselves and eventually withdrew the federal action against the town.

The plaintiffs then filed a second suit against counsel for the Town of Westport related to their conduct in the federal suit and alleged various claims, including tortious interference with a fiduciary relationship, abuse of process, fraud, breach of fiduciary duty, violations of Connecticut's Unfair Trade Practices Act (CUTPA), conspiracy, and negligent infliction of emotional distress. In support of these claims, the plaintiffs alleged that a conflict of interest arose when the associate went to work for the defendant adversary firm and that the defendant adversary firm also made misrepresentations to the federal court in the federal action and conspired with the plaintiffs' former counsel with respect to the subpoenaing of witnesses in the federal action.

After a flurry of filings, including various amended complaints and general procedural confusion on the part of the plaintiffs, the trial court eventually struck all of the plaintiffs' claims against the defendant adversary firm with exception of the negligent infliction of emotional distress claim finding that the claims against the defendant adversary firm were legally insufficient because the plaintiffs never alleged that this associate at their former attorney's office had any knowledge about the federal action or was involved in the federal action at any point in time. Shortly after striking those claims, the court then dismissed the plaintiffs' remaining claim of negligent infliction of emotional distress finding that plaintiffs' claims were barred under the litigation privilege, a privilege that affords immunity to attorneys for statements made during the course of judicial proceeding while representing their clients.

The plaintiffs subsequently appealed. On appeal, the court affirmed the trial court's rulings striking the majority of the plaintiffs' claims and dismissing the plaintiffs' claims of negligent infliction of emotional distress. After addressing many of the plaintiffs' extraneous arguments about various procedural improprieties of the trial court, the Appellate Court first examined whether the trial court correctly struck the plaintiffs' claims of fraud, violations of CUTPA, abuse of process, conspiracy, and fiduciary duty claims.

The Appellate Court declined to review the plaintiffs' claims that the trial court improperly struck its claims of violations of CUTPA, abuse of process, conspiracy, and fiduciary duty claims as they were inadequately briefed for its review. However, in declining to review the claims, the court made note of the general rule that attorneys are not held liable to persons other than their clients for rendering negligent services and that an attorney's duty to his or her clients would be undermined if he or she could be held liable to their adversaries. The court also went on to say that in support of these counts the plaintiffs relied solely on their argument that the defendant adversary firm's hiring of their former firm's associate created a conflict of interest but that the plaintiffs never alleged any involvement by this associate in the underlying federal suit.

The court found that without adequate briefing it would not disturb the trial court's holding. The court also noted that with respect to the abuse of process claims, the plaintiffs did not make sufficient allegations to support their claims. The court concluded that while the plaintiffs had made general allegations of fraud in their complaint, they did not point to the requisite specific misconduct that was intended to cause specific injury outside the course of normal litigation necessary for sustaining such a claim.

The Appellate Court then addressed the propriety of the trial court's ruling dismissing the plaintiffs' negligent infliction of emotional distress claims. In upholding the trial court's ruling, the Appellate Court noted that the issue of whether the litigation privilege affording immunity to attorneys in the course of judicial proceedings applied to negligent infliction of emotional distress was an issue of first impression. The court then went on to cite to a recent Supreme Court decision, *Simms v. Seaman*, 308 Conn. 532 (2013) which clarified that an attorney is shielded from suit stemming from conduct while representing or advocating for a client during a judicial proceeding that was brought for a proper purpose. The court, applying Simms, found that the plaintiffs' allegations of various conspiracies regarding the subpoenaing of witness and erroneous statements of fact to the federal court were all communications made within the context of a judicial proceeding, namely the federal action, rendering the defendant adversary firm immune from liability.

Impact: This case demonstrates the negative sentiment that Connecticut courts generally carry against suits brought by an attorney's former adversary for misconduct, even if the suit alleges overt acts of misconduct on the part of the adversary's attorney. Additionally, this case explicitly applies the Supreme Court's holding in *Simms v. Seaman*, 308 Conn. 532 (2013) and expands its holding to negligent infliction of emotional distress claims and conduct in the course of judicial proceedings. It also demonstrates the courts' willingness to apply the litigation privilege broadly to most adversary third party claims against attorneys.

Supreme Court Limits Use of DMV Records By Attorneys

MARACICH v. SPEARS, ET AL.
(U.S. Supreme Court, June 17, 2013)

The petitioners in this case were residents of South Carolina who sued the respondent attorneys for violating the Federal Drivers Privacy Protection Act of 1994 (DPPA). The attorneys had a pending lawsuit against several car dealerships for violation of a state law that protects car purchasers from "arbitrary, in bad faith, or unconscionable" actions by the dealership. The attorneys obtained records of thousands of car purchases from the DMV through Freedom of Information Act demands. Using the personal information obtained from the DMV, the attorneys mailed 34,000 letters to car purchasers explaining the lawsuit and asking the residents if they wanted to participate in the class action.

The DPPA bars the use of personal information in motor vehicle records. However, the attorneys claimed that their use of the information fell within a permitted exception in the DPPA which allowed the use of personal information obtained from motor vehicle records "in connection with any civil, criminal, administrative, or arbitral proceeding," including "investigation in anticipation of litigation." 18 U.S.C. §2721(b)(4). The question for the U.S. Supreme Court was whether or not the attorneys' solicitation of clients for a class action before litigation was a permissible exception under the DPPA.

The U.S. Supreme Court, noting that the DPPA restricted use of personal information obtained from the Motor Vehicle Department in response to threats from criminals or concerns over states selling such information for marketing and solicitation businesses, held that the attorneys' solicitation of prospective clients through use of personal information from records obtained from the DMV is neither a use "in connection with" litigation nor "investigation in anticipation of litigation."

The court held that the records could only be used by attorneys to decide whether a potential claim has sufficient merit to warrant a lawsuit or to locate witnesses, but cannot be used for activities designed to solicit clients for a case. The case was remanded to the District Court to make a determination on whether the "predominant purpose" of the DMV information was for client solicitation, which is illegal use; or for permissible litigation-related purposes, which is legal use.

Impact: This case serves as warning to attorneys that they may become embroiled in litigation for misuse of records that may be obtained through FOIL or subpoenas.

FIDELITY/CRIME BOND INSURANCE

Direct Loss — A Question of Fact

DAVID H. MARION, RECEIVER FOR BENTLEY FINANCIAL SERVICES, INC. v. HARTFORD FIRE INSURANCE CO.
(3rd Cir., May 16, 2013)

The plaintiff brought suit against the defendant insurer seeking coverage under the Insured's fidelity bond issued to Bentley Financial Services, Inc. (Bentley) and the Entrust Group (Entrust) for a claim where the president and CEO of Bentley embezzled funds from both Bentley and Entrust accounts. The president and CEO was the controlling shareholder of Bentley, a Pennsylvania investment firm that brokered certificates of deposit (CDs). Entrust was formed to act as custodian for CDs brokered by Bentley. For a period of seven years, the CEO orchestrated a Ponzi scheme through Bentley and Entrust. The CEO sold fictitious CDs, even selling the same fake CD to multiple customers and often misrepresenting their terms to his customers. He would sell the CDs on behalf of Bentley and instruct investors to send their funds to Entrust. Entrust would sometimes transfer funds to Bentley

accounts, from which interest payments would be made to investors to help keep the scheme afloat. Throughout the scheme, it appears that the CEO embezzled the bulk of the funds taken in for his own uses.

The plaintiff brought this action seeking coverage under the fidelity bond issued to the insureds. The defendant insurer moved for summary judgment in the District Court asserting that the Insureds did not suffer a direct loss because the CEO did not steal any money that was owned by the Insureds; rather, he stole money from investors. Further, it was argued that even if this was a direct loss, for there to be coverage under the policy, the funds had to be obtained lawfully and not though fraud. The plaintiff argued that it suffered a loss when the company incurred contractual liability to its investors. The District Court found in favor of the insurer, concluding that no money was actually expended in restitution to the investors and there was no direct loss to Bentley.

The Third Circuit reversed, and found that questions of fact precluded summary judgment. The court found that to the extent the CEO embezzled funds from Bentley accounts, that money was clearly money held by Bentley for investors and were funds for which Bentley was legally liable. The Third Circuit found genuine factual disputes regarding whether Bentley suffered covered losses under the policy.

Impact: This case presents a good factual scenario where the theory of direct loss can be challenged inasmuch as the acts of the insured's employee presents questions of fact that need to be reviewed, analyzed, and developed.

FEATURED ARTICLE

Danger from Within? Sex Offenders in Long-Term Care Facilities

By Angeline Ioannou

As evidenced by continued legislation on the controversial topic of sex offenders in long-term care facilities, it is clear that this is a difficult issue with many ethical, legal and operational dimensions and consequences. This article provides a brief overview of the law as it pertains to registered sex offenders living in these facilities and the unique challenges long term care facilities and their legal providers encounter in managing registered sex offenders and others demonstrating propensities to commit sexual abuse who reside in these facilities. Additionally, the impact that housing and caring for registered sex offenders may have on the facility, fellow residents, employees, and visitors will be discussed. As the population continues to age and as acuity levels increase, more registered sex offenders will be in need of treatment in long term care facilities. The industry needs to be prepared to manage the difficulties and risks that these individuals may pose to a facility and its residents and staff.

This issue came to the attention of the Federal Government in 2006, when Congress asked the Government Accountability Office (GAO) to evaluate the prevalence of sex offenders living in long term care facilities such as skilled nursing and intermediate care facilities. The study examined the national sex offender database and eight state databases for sex offender registries and found about 700 registered sex offenders living in nursing homes or intermediate care facilities for people with mental retardation. Most of these registered sex offenders were male and younger than 65, and represented .05 percent of the approximately 1.5 million residents of nursing homes and intermediate care facilities. In this survey, about 3 percent of nursing homes housed at least one identified sex offender. There has not been an update to this survey, but ostensibly this number has increased as states have continued to broaden and refine the categories of sex offenses and the relevant population has continued to age.

Federal law requires that law enforcement in the 50 states enact sex offender registries and notification laws in order to receive funding for law enforcement initiatives. States are free to set their own laws on how registries and notifications are made and this has created a "hodge podge" of conflicting regulations. Consequently, this can be very confusing for operators of long-term care facilities that operate in a variety of states. Few states have enacted legislation regarding notification of registered sex offenders in long term care facilities and/or certain procedures regarding admission or the prohibition of admission of certain registered sex offenders in facilities. Among them are California, Illionois, Minnesota, Oklahoma, Virginia, Oregon, Massachusetts, and Texas. Similar legislation is pending in Iwoa, Ohio, and South Carolina.

Proponents of such notification statutues argue that these laws provide information to residents that are not easily accessible to them, because not all residents have internet access. More importantly, many residents are elderly, infirm, or cognitively impaired and as such unable to appreciate the potential dangers present when a registered sex offender is living in their facility. Thus, notification laws provide valuable personal safety information to residents and their families.

Opponents of these laws cite obvious privacy issues and point out that most sex offenders in nursing homes are not predatory, such as those required to register following a conviction for statutory rape. Thus, those residents are "outed" as sex offenders when they never posed any

real threat to the other residents. Therefore, in the absence of any real risk of sexual assault in the facility, these notification laws will stigmatize the resident and create fear and possibly hysteria when the incidence and risk of harm is very low.

Obviously, depending on the state in which the long-term care facility is in, the population that it treats and its tolerance for risk, a determination needs to be made as to what the facility's policy will be in terms of admitting sex offenders to long-term care facilities. As many providers will tell you, because of regulatory requirements regarding readmissions and difficulty in discharging residents, the best time to prevent registered sex offenders from living in a long term care facility is at admission. However, it may be difficult for a facility to outright ban the admission of any registered sex offender because it may implicate due process concerns, the Americans with Disabilities Act (as amended), or other laws. There are different ways providers can seek to obtain or conversely, not obtain this important information.

Long-term care facilities can conduct background checks of all prospective residents after seeking legal authorization to run these checks from the resident or his or her legal representative, if he or she is incompetent to authorize such a background check. In addition to the significant costs associated with conducting a criminal background check of all potential residents, there is the time associated with conducting such a check. However, if a facility chooses to do a background check, it should conduct a thorough background check or the check could be useless. Many times national registries are insufficient to pick up state level crimes. These background screening results can take several days and many times admissions to these facilities come at nights, on weekends and facilities must act quickly to accept these admissions from hospitals or other medical providers or the facilities may potentially lose a steady flow of patients from the admitting source to a competing facility.

Perhaps a facility will instead decide to make passage of a successful background check a condition of admission in the admissions agreement and then seek to discharge the resident or void the admissions agreement if negative information is received. However, as many operators will attest, this can become quickly complicated by regulatory agencies who more often than not will intervene on behalf of the resident and will make such a discharge or transfer a complicated and legally risky endeavor for the facility.

In an effort to save money on background screenings of potential residents and to better leverage their internal resources, some long-term care facilities will have staff members conduct background checks or similar searches on prospective residents. Unfortunately, many times these searches may run afoul of the Fair Credit Reporting Act (FCRA) as the facility has not secured the authorization of the resident or their legal representative prior to conducting the search. As these registries vary greatly from state to state in terms of how they are organized (Social Security number, last name, city where the individual resides) and how the various offender levels are defined, there is significant room for mistaken identity and error which could lead to regulatory action and litigation.

Another possibility is to have a question on the admission application inquiring whether the individual is a registered sex offender. While this self disclosure may be the least administratively intensive way of obtaining this information, such a query will obviously invite further questions from potential residents and their families on how the facility safeguards against admission of registered sex offenders beside the self-disclosure. Admissions staff may also be weary of such a question on an application as it may be believed it would chill admissions or signal to a prospective resident that there has been a problem with registered sex offenders in the past at the facility.

Other long-term care facilities that are located in states where it is not required to disclose the existence of registered sex offenders in the facility may decide not to inquire about the status of a resident upon admission at all. This could stem from concern that if there is information that is obtained that there is a registered sex offender and a decision is made either to admit and there is a negative outcome that it can increase potential liability to the facility. Many times these types of policies are called into question when it is discovered by another resident, employee, or family member who does his or her own research on the registry and discovers that a registered sex offender is living in the facility.

While there do not appear to be any laws which strictly prohibit a facility from denying admission to a registered sex offender, facilities need to be careful not to inadvertently violate the law by not admitting someone who may have committed a sex crime based on a mental disability or other medical condition or by failing to administer a policy on a consistent basis (denying admission to male registered sex offenders, but admitting female registered sex offenders). A facility would be prudent to weigh the pros and cons of admission of a registered sex offender such as the level of offense, the years since the offense was committed, the nature of the offense, whether or not any rehabilitation occurred, and the resident's current medical condition. If the risk of admitting the resident is too great to bear, then the facility may decide not to move forward with the admission. Some facilities will outright deny admission to any registered sex offenders without

conducting any type of risk analysis and would rather deal with any litigation that is brought by the registered sex offender.

On the other hand, if a facility decides to admit a registered sex offender, any notification required by law must be given. Further, it is also wise to devise a safety plan to deal with the resident. It may not be possible to place this resident in a semi private room based on a risk assessment. The resident may need more frequent checks by staff than other residents.

There are varying state and federal laws pertaining to registered sex offenders in long-term care facilities. There is not a one size fits all approach in dealing with registered sex offenders in the resident or employee population. However, it is clear that facilities must enact certain protocols to protect residents and to limit liability without compromising the interests of the registered sex offenders. Operators should consult with counsel need to keep apprised of legal developments in this area and should enact proactive policies to mitigate risk.

PROFESSIONAL LIABILITY MATTERS

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

NY Attorney's Attempt to Recover Legal Fees Backfires

Let it be said: we don't work for free. The business of law, like any profession, is based on a simple formula: quality work + results = payment. Sometimes obtaining payment can be the most difficult piece of the equation. When a fee dispute does arise, an attorney may be required to strike a balance between demanding full compensation and maintaining a productive and ongoing relationship with the client.

The Effective Litigation Hold Letter

Our recent post on the ramifications of destroying social media content got us thinking about the importance of an effective legal hold letter. Also known as a "preservation" or "hold" order, this document instructs an entity or individual to preserve all data that may reasonably relate to pending or anticipated litigation. A goal of the litigation hold is to suspend the normal dispositions of records and to prevent spoliation. Another goal is to avoid the potential for sanctions and ethical issues facing those who destroy relevant content. Given the importance of a legal hold, and the serious ramifications for failing to comply, all professionals must be aware of the contents of a proper legal hold.

Facebook Discovery Infraction Leads to Attorney Sanction

The proliferation of social media has altered the litigation landscape. Most attorneys on both sides of the case understand the implications of social media, particularly during the discovery stage. Nonetheless, the law governing social media and discovery is still in its infancy. The result is troublesome: practitioners encounter social media issues but the rules governing those scenarios are not entirely clear. One rule that is well established is the requirement that a legal hold be implemented for all relevant materials, including social media content. The failure to abide by this rule could be dire.

Secret Video Exposes Expert Witness to Criminal Proceedings

A New York state judge recently provided a compelling reminder of the serious ramifications for failing to provide truthful testimony on the stand. The focus of Queens Supreme Court Justice Duane Hart's admonition was an orthopedist routinely hired to assist in the defense of personal injury cases. When the court discovered through a hidden camera recording that the expert's testimony was exaggerated at best — or an outright lie at worst — the court ordered a mistrial and directed his attention to potential criminal proceedings against the expert.

The Cost of an Apology: Pennsylvania Considers Apology Law

Malpractice is devastating. Professionals work tirelessly to earn a degree (or more), develop client relationships and trust, and subsequently a book of business, all of which can be at risk in the event of professional negligence. The professional's reaction may be to approach the client or patient with an apology, explanation or consolation but there are serious risks to doing so. Depending on the professional's E&O policy, an apology may constitute a waiver of coverage. Moreover, that apology may be an admissible "confession" which can be introduced at trial. Pennsylvania legislators have considered this conundrum and introduced a bill that would preclude reference to a doctors' apologies to patients during medical malpractice lawsuits. Practitioners believe this could greatly reduce the number of medical malpractice lawsuits in the state.

ABA's Blawg 100 — Nominations Due August 9th

The *ABA Journal* is putting together its annual list of the 100 best legal blogs, based on reader votes. As publishers of the *Professional Liability Matters* we are proud to be considered for this prestigious list — and we would be honored if you would help. If you enjoy visiting the *Professional Liability Matters*, and believe it is worthy of industry recognition, please click here to visit the ABA Blawg 100 Amici page and nominate us before the August 9 deadline. Thank you!

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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