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FEATURED ARTICLE

Application of Consumer Protection Laws to Licensed Professionals: Conflicting Standards and Murky Coverage Implications

The vast majority of states have consumer protection laws, and over the last several decades in particular, courts across the country have debated whether such laws should apply to licensed professionals. Although the cases throughout the country are quite similar in nature, judges considering these similar issues have created a complex web of conflicting decisions based on highly subjective and speculative parameters.

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DIRECTORS AND OFFICERS

First Circuit Vacates Dismissal of Shareholder Derivative Suit Based Upon Futility of Pre-Suit Demand

UNION DE EMPLEADOS DE MUELLES DE PUERTO RICO PRSSA WELFARE PLAN v. UBS FINANCIAL SERVICES INC. OF PUERTO RICO

(First Circuit, January 4, 2013)

The plaintiffs, two Puerto Rico pension plans (the funds), filed a shareholder derivative action in the United States District Court for the District of Puerto Rico against the funds' directors, UBS Trust Company of Puerto Rico and UBS Financial Services Incorporated of Puerto Rico. The defendants jointly filed a rule 12(b) motion to dismiss. The district court granted defendants' motion and dismissed the complaint based upon the plaintiffs' failure to demonstrate that a pre-suit demand upon the Board of Directors would have been futile. On appeal, the First Circuit reversed, vacating the dismissal.

By way of background, the plaintiffs own shares in closed-end investment funds. In 2008, UBS Trust (a subsidiary of Swiss financial giant UBS AG), acting as the investment adviser for both funds, purchased approximately $757 million in bonds which were underwritten by UBS Financial (also a UBS AG subsidiary). UBS Trust also had served as financial adviser to Puerto Rico's burdened Employee Retirement System (ERS). Through a complex series of transactions, ERS sold $2.9 billion of bonds to its underwriter, UBS Financial, which then sold them to UBS Trust. UBS Trust, in turn, sold the bonds to a number of funds it advises, including the plaintiffs. Within one year of issuance, the bonds dropped 10 percent in value, significantly decreasing the worth of the funds. In February 2010, the funds filed the instant action, and the district court granted defendant's motion to dismiss.

On appeal, the First Circuit first addressed a threshold question which had been left unanswered by its previous decisions: what standard of review should be applied to a dismissal of a shareholder derivative action based upon the failure to adequately plead futility. The circuit court concluded that de novo review is appropriate.

Next, the court noted that although the lawsuit was governed by Puerto Rico corporate law, since the state had not addressed the issue of when the failure to make a pre-suit demand would be excused, Delaware corporate law would be applied. Delaware has enunciated two tests for demand futility: the Rales test and the Aronson test. The court concluded that the Rales test was more appropriate for mutual funds.

Under Rales, a plaintiff must allege specific facts "creating a raise reasonable doubt that, at the time the lawsuit is filed, the board of directors could have properly exercise its independent and disinterested business judgment in responding to a pre-suit demand." Rales, 634 A.3d at 933-934. Noting that all four of the funds in which the plaintiffs' owned shares was governed by a board of directors identical in composition, the court analyzed the allegations of the complaint to determine whether sufficient facts had been pleaded to call into doubt the impartiality of at least 6 of the 11 directors. The circuit court concluded that the district court's analysis was flawed in two significant ways. First, the district court focused too narrowly on whether the individual directors received any financial benefit from the bond transactions. Second, the district court "misconstrued plaintiffs' burden of demonstrating that the benefits received by the directors were subjectively material", and repeatedly failed to make reasonable inferences of materiality suggested by the facts alleged. Noting that many of the directors also served as advisers or managers of various UBS subsidiaries, the court ultimately had little difficulty concluding that reasonable doubt had been cast as to the independence and disinterested judgment of the majority of directors.

Impact: The First Circuit made two significant rulings. First, it answered a question previously unresolved in the circuit concerning what standard of review is appropriate for a district court's dismissal of a shareholder derivative action, and determined that de novo review was appropriate. The court also concluded that in evaluating the futility of a demand to the board of directors, the Rales test is the more appropriate test under Delaware law when dealing with mutual funds.

MEDICAL MALPRACTICE

Court Holds Subjective Belief Insufficient to Trigger Coverage

COMMUNITY HOSPITAL ALTERNATIVE FOR RISK TRANSFER v. ARIO

(Comm. Ct. of Pa., January 10, 2013)

In this declaratory judgment action, a hospital's primary medical professional liability insurer sought a determination that the Medical Care Availability and Reduction of Error Fund (MCARE) assume the defense and provide primary liability coverage for a medical malpractice claim.

On January 30, 2007 a writ of summons was filed against the insured hospital. The hospital had sent a potential event form to the third-party administrator (TPA). The TPA reported the matter to MCARE on a C-416 form dated May 1, 2007. On June 7, 2007 a complaint was filed against the insured hospital alleging medical malpractice for care and treatment rendered on January 5, 2003. The TPA submitted a revised C-416 form within 180 days of the filing of the complaint.

The primary insurer claimed MCARE had to provide defense and indemnity coverage pursuant to section 715 of the MCARE Act which governs claims made more than four years after the alleged tort. MCARE denied the coverage, asserting that it did not receive notice within the requisite 180 days of the date on which the hospital and primary insurer had notice.

The court found that MCARE had to provide coverage because the filing of a writ did not serve to start the notice period. A health care provider's subjective belief does not start the notice period, rather it was the verified complaint that triggered the period according to the court.

Impact: Upon notice that a claim is eligible for MCARE coverage, medical professionals and their insurers need to report claims to the fund promptly.

LEGAL MALPRACTICE

Motion for Summary Judgment Granted As to Plaintiff's Legal Malpractice Claim Because Plaintiff Failed to Demonstrate Causation

FINCH v. TOOHER, WOCL, LYDON, LLC (D. Conn. January 15, 2013)

A recent case decided by the Connecticut Federal District Court demonstrates that the issue of causation in legal malpractice cases, commonly treated as an issue of fact left for the jury, can sometimes be decided on motion for summary judgment. In *Finch v. Tooher, Wocl, Lyndon, LLC, et. al.,* the plaintiff retained the defendant law firm and its predecessor firm to seek compensation for her son's death from a local city police department after he died in a holding cell. Prior to being taken into custody her son had consumed a large amount of narcotics in front of officers in an effort to conceal the drugs from police. He was later found non-responsive in his cell.

The plaintiff retained the defendant firm and its predecessor to investigate and, if warranted, represent the plaintiff in a civil claim against the city and its police department. However, according to the plaintiff, the defendant firms failed to perform a proper investigation and failed to timely file a statutory notice of intent to sue with the city thereby barring the plaintiff's suit directly against the city.

The plaintiff subsequently retained new counsel and timely filed a subsequent civil action against the city in federal court, asserting both federal and state claims against the city. The federal court ultimately disposed of the plaintiff's federal claims by way of summary judgment. Additionally, it declined to exercise supplemental jurisdiction over the state claims, and the plaintiff elected not to pursue the separate state claims after the court's dismissal of her federal suit.

Instead, the plaintiff brought suit against the defendant law firms, alleging claims of malpractice and breach of contract for its failure to file a notice of intent to bring suit. The plaintiff claimed that because the defendant firms failed to file a notice of intention to sue the city, her suit was barred and she suffered damages as a result.

The defendant firms moved for summary judgment arguing, inter alia, that the plaintiff could not demonstrate that its failure to file the notice precluded her suit, and that she suffered damages as a result of its failure. The defendants argued that while it did not file a notice of intent to sue with the city, and that the one statute cited by the plaintiff did require the notice in order to sue the city directly for indemnification for the acts of its employees and agents, the plaintiff was still not precluded from bringing suit under a different second statute which still provided direct recovery against the city without the need for filing notice of intent to sue.

The court agreed with the defendants and concluded that the plaintiff had failed to demonstrate the causation and damages elements of her legal malpractice claim. The court hinged its decision on the complex statutory scheme surrounding suits against municipalities and recent Connecticut Supreme Court precedent interpreting the statutory scheme.

The court noted that while it was true that notice was required under the first statute cited by the plaintiff to bring a direct suit against the city for indemnity for the negligence of the city's agents and employees, the second statutory provision cited by the defendants specifically permitted a direct suit against the city for the negligence of its employees and agencies without filing notice. The court found that plaintiff could still have brought her suit and obtain recovery under that second statute instead.

In so holding, the court rejected the plaintiff's argument that she was precluded from bringing suit under this second statute, because the second statute precluded suits for discretionary activities of the police department and that the police department only engaged in discretionary activities. The court, citing to Connecticut Supreme Court precedent, noted that this second statute did not bar suits for discretionary activities as there was an imminent harm exception to the statute which permitted recovery for discretionary activities and that the plaintiff need only meet that exception to recover.

Finally, the court noted that it was apparent that the plaintiff was not precluded from bringing a direct suit as a result of the defendant firms' alleged negligence as the plaintiff did actually bring a direct federal suit against the city. The court found that even though the federal court in that suit did ultimately dispose of her federal claims on the motion for summary judgment, it did not dispose of the state law claims, but, instead declined to exercise supplemental jurisdiction. The court noted that further, the federal court in disposing of this suit, specifically suggested that the plaintiff had the ability to bring her state law claims in a separate state suit directly against the city under the second statutory provision as her claims would likely fall under the imminent harm exception.

The court then concluded that because the plaintiff could still have brought a direct suit against the city, despite the defendant law firms' failure to file notice of an intent to sue, the plaintiff had not demonstrated that defendants' failure to file the notice precluded her ability to bring suit resulting in damages.

Impact: This case demonstrates that the issue of causation can be decided on motion for summary judgment provided that the court is willing to do so and the issue is factually straightforward. It also demonstrates the importance of being familiar with your audience. A state court in Connecticut would have been less likely to entertain such a motion, but here, the federal court not only entertained it but granted. In sum, counsel should not be so quick to rule out a Motion for Summary Judgment on causation as there may be some hope for its success.

Defendant Attorney May Bring a Third-Party Complaint For Contribution Against Plaintiff's Successor/Concurrent Attorneys

MILLENNIUM IMPORT, LLC v. REED SMITH LLP, ET AL
(N.Y. App. Div. 4th Dept., January 24, 2013)

The plaintiff, Millennium Import, is a beverage company owned by luxury goods company LVMH, the owner of such brands as Louis Vuitton, Moet, and Hennessy. The plaintiff marketed a high-end Polish vodka in the United States under the brand name of Belvedere, and was sued by a California winery, also named Belvedere, for trade name infringement. The dispute was resolved by a settlement agreement in which the plaintiff agreed to pay the winery $30,000 per year for a license to use the Belvedere name for its vodka; the agreement did not cover the use of the Belvedere name for distilled spirits.

The plaintiff's Belvedere vodka was highly successful, rendering the license fee "nominal." In what the parties speculate was a likely attempt to renegotiate the licensing fee, the winery wrote to the plaintiff stating that it was negotiating with a distributor of gin for a license of the Belvedere name. Upon receipt of the letter, the plaintiff forwarded it to the defendant, Reed Smith, as one of its attorneys. Reed Smith drafted a response and forwarded it to plaintiff's parent company LVMH and LVMH's counsel, third party defendant, Barack, Ferrazzano, Kirschbaum & Nagelberg. The responsive letter was sent to the winery asserting, among other things, that plaintiff had obtained certain rights in the mark and the gin distributor might be liable for "passing off its gin as associated with [the] plaintiff's vodka."

The winery did not respond for 15 months, and during that time LVMH became the 100 perecnt owner of the plaintiff. In its response, the winery stated that the Barack firm's letter was a challenge to the winery's right to license the mark and, therefore, a breach of the licensing agreement and demanded that the plaintiff cure the breach.

To this end, the plaintiff retained third party defendant, Berry & Perkins, to prepare a draft response which was shared with LVMH and Reed Smith, as well as with the Barack firm. The response also incorporated an analysis by third party defendant Fross, Zelnick Lehrman & Zissu, another law firm advising LVMH on the plaintiff's rights under the licensing agreement. The response maintained that a gin distributor's use of the Belvedere mark might infringe on rights acquired by plaintiff.

The winery then sued the plaintiff for breach of licensing agreement and prevailed on its motion for summary judgment. Rather than appeal, the plaintiff entered into a settlement agreement with the winery which included a $38 million payment.

The plaintiff has sued Reed Smith alleging legal malpractice. Reed Smith asserted an affirmative defense of contributory fault against the plaintiff and its agents, and then brought a third-party complaint against plaintiff's other law firms, Berry, Barack and Fross, seeking contribution under CPLR 1401, contending that their negligence with regard to advising plaintiff and/or LVMH contributed to plaintiff's loss.

The third party defendants filed motions to dismiss the third party complaints claiming that under *Hercules Chemical Co. v. North Star Reins Corp.*, 421 N.Y.S. 2d 67 (1st Dept. 1979), the defendant's affirmative defense of comparative negligence precludes a third party claim for contribution against any third party defendant who was acting as plaintiff's agent, since the third party claim and the affirmative defenses are duplicative. The motions court granted the third party defendants' motions to dismiss.

In overturning the motions court, the Appellate Division distinguished the facts in Hercules from the facts presented in this case. The court then commenced its legal analysis by stating that it is well settled than an attorney sued for malpractice may assert a third party claim against another attorney who advised the plaintiff on the same matter citing to the leading case of *Schauer v Joyce,* 54 NY2d 1(1981). In *Schauer* the court of appeals stated that CPLR 1401 provides that two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought. The Appellate Division in this case found this reasoning applicable to the third party claim against the law firm that served directly as plaintiff's counsel, and also saw no basis to find this reasoning inapplicable to the law firms whose alleged negligent advice was supplied to plaintiff via plaintiff's parent company.

The Appellate Division here reasoned that where a defendant charged with legal malpractice has a viable claim against other law firms that represented its client for concurrent or successive malpractice contributing to the client's damages, the defendant law firm is not necessarily afforded all the protection to which it is entitled by the affirmative defense of comparative negligence. The court stated that on the contrary, where several law firms allegedly participated in giving advice that led to plaintiff's damages, the sole law firm named as a defendant must be entitled to bring the other law firms in as parties to the action to ensure that it has the ability to fully protect its rights. The court also found that the third party complaint is not necessarily duplicative of the affirmative defenses.

The Appellate Division, in addition, reasoned that even if it agreed that the affirmative defenses precludes a claim for contribution that would only warrant dismissal of the third party claim against the Berry firm, as counsel to and agent of plaintiff. The court looked to the specific language of the affirmative defenses and noted that only the Berry firm was specifically named and the other firms were not named, which would still render the third party complaints viable against co-defendants Barack and Fross.

Impact: This case is important as it reinforces that under New York law successive, concurrent, independent and alternative tortfeasor attorneys can be brought in as third party defendants for contribution in a legal malpractice action even when the defendant attorney has pled an affirmative defense of negligence of plaintiff's agents.

Evolving Position – Attorneys Face Increased Damages In Breach of Contract Claims

LODATO v. SILVESTRO
(E.D.Pa. Jan. 15, 2013)

The issue before the court in *Lodato* was whether a plaintiff had asserted a viable breach of contract claim against her former attorney despite the fact that she had never paid the attorney for his services. The plaintiff retained the defendants, an attorney and a law firm, to represent her in a potential malpractice claim against the plaintiff's former dentist. In late 2007, the plaintiff executed a standard contingent fee agreement with the defendants. In March 2010, over two years after executing the contingent fee agreement, the plaintiff met with the defendants in her home to discuss the status of the underlying case. At this meeting, the plaintiff "was told … any claim … she may have had against [her former dentist] was now barred because [the] [d] efendants had failed to file suit within the two-year statute of limitations."

Nearly two-years after this meeting, the plaintiff commenced, in part, a legal malpractice breach of contract claim against the defendants founded upon their failure to timely file a claim against the dentist. The defendants moved to dismiss the breach of contract claim by arguing this cause of action could not proceed because the plaintiff had not paid her former attorney for the legal services he performed on her behalf. This argument centered on a prior Pennsylvania Superior Court precedent that "limited recoverable damages in a legal malpractice claim based on breach of contract to the amount actually paid for the services plus statutory interest." More recently, however, courts have called this rule into question at least in those instances where the underlying case was a civil, rather than criminal, matter. In Lodato, the court similarly concluded this limitation on damages does not apply where the legal malpractice claim is based upon a civil matter. As a result, the motion to dismiss was denied and the breach of contract claim was allowed to proceed.

Impact: The *Lodato* decision is noteworthy for a couple of reasons. First, it addresses an evolving area of law in Pennsylvania, namely what damages are recoverable in a breach of contract legal malpractice claim. Until the Pennsylvania Supreme Court rules on the issue, the majority position now appears to be that a plaintiff, pursuing a breach of contract claim against his or her former attorney, may recover damages in excess of the fees paid to the attorney. Second, from a practical standpoint, the opinion will likely impact the manner in which the statute of limitations operates in the context of legal malpractice claims in Pennsylvania. A tort based legal malpractice claim is subject to a two year statute of limitations in Pennsylvania, while a breach of contract cause of action is subject to a four year statute of limitations. The decision may, at least theoretically, allow a plaintiff to pursue a time-barred negligence claim against an attorney under a breach of contract theory and recover damages well in excess of the fees paid to the attorney.

Federal Judge Rules Insurer Not Entitled to Client's Documents

CAMICO MUT. INS. v. HEFFLER, RADETICH & SAITTA
(E.D. Pa., January 28, 2013)

Pennsylvania State and Federal Courts have issued conflicting decisions on the question of whether an insurance carrier's funding of its insured's defense invests the insured with "co-client" status, thereby entitling the carrier to review privileged documents generated by defense counsel in the underlying litigation.

In *Camico*, the law firm of Conrad O'Brien was retained and paid by Camico to defend HRS in a lawsuit brought by a class action member, who alleged that an HRS employee had misappropriated funds for a class action settlement fund. Camico sought a declaratory judgment it was only required to pay up to $100,000 in the underlying action, and sought to compel HRS to produce documents including privileged communications with Conrad O'Brien.

Relying upon a Superior Court opinion, a decision of the U.S. Court of Appeals for the Third Circuit and the Restatement (Third) of the Law Governing Lawyers, U.S. District Judge Jan E. DuBois decided that an insurance company that funds the defense of a company it insures is not necessarily a co-client who would be entitled to see all of the documents in a case simply by virtue of having paid for the attorney. Although he found that there is no absolute rule governing the extent of the relationship between an insurer and its insured for the purposes of attaching attorney-client privilege, Judge DuBois held that in this case, Camico Mutual Insurance was not entitled to co-client status.

Camico agreed that the documents were subject to attorney-client privilege, but argued that it shared a common interest with Heffler, which meant that it, too, was a party to the privileged papers. The judge was not convinced. In examining this unsettled area of law, Judge DuBois relied heavily on a 2007 opinion from the Third Circuit captioned *In re Teleglobe Communications*. Although that opinion dealt primarily with the application of Delaware law, "its discussion of the common-interest doctrine was not so limited," DuBois said. "In fact, Teleglobe has been cited by courts around the country as a leading opinion on the common-interest doctrine," that opinion said. Teleglobe divided the issue into two separate exceptions: common interest and co-client. The first applies when clients retain separate counsel, but share information in order to further their common legal interest, according to the opinion. That exception clearly does not apply, the court held. The second exception applies when clients share the same lawyer. Camico argued that Conrad O'Brien was representing the joint interests of itself and Heffler in the underlying action, so documents from that case should be open to both companies.

"There are two ways by which Camico may be considered a co-client with Heffler," DuBois said. "First, the parties would be co-clients if, by virtue of an absolute rule, insured and insurer are always considered co-clients whenever the insurer pays for the defense of the insured. Second, even if an absolute rule does not apply, the parties may be co-clients if the facts of the case demonstrate that a joint representation occurred." It is on the first question that the courts have split. DuBois looked to the Pennsylvania Superior Court's 2011 opinion in *Eckman v. Erie Insurance Exchange* to find that no co-client relationship necessarily exists when an insurance company pays for its insured's lawyer. That opinion cited the Pennsylvania Rules of Professional Conduct, which notes that lawyers are often paid by a third party, whether it is a relative or a friend of the client or an insurance company, and that does not necessarily mean that the funding party is a co-client. Similarly, DuBois quoted from the Restatement (Third) of the Law Governing Lawyers, saying, "That insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer." Holding that there is no absolute rule as to whether or not insurer and insured are necessarily bound as co-clients for the purposes of attorney-client privilege, DuBois said, "The court concludes, in line with Eckman, the Restatement (Third) of the Law Governing Lawyers and Teleglobe, that where an insurer funds the defense of its insured, the insurer may be, but is not always, a co-client of the insured."

Impact: With conflicting rulings on this issue now splitting Pennsylvania's state and federal courts, we anticipate that the Pennsylvania Supreme Court will address this issue as soon as an appropriate case is presented for review.

FIDELITY INSURANCE

Interpretation of 'Direct Means Direct' in Computer Fraud Claim

RETAIL VENTURES, INC., et al v NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA.
(Sixth Circuit – August 23, 2012)

This insurance coverage dispute arises from a final judgment against the defendant insurer for $6.8 million in stipulated losses and interest under a computer fraud rider to a "blanket crime policy" for losses resulting from a computer hacking scheme that compromised customer credit card and checking account information. On appeal, the defendant insurer claims that the court erred in finding that plaintiffs suffered a loss "resulting directly from" the "theft of any Insured property by computer fraud;" and (2) in rejecting application of the exclusion of "any loss of proprietary information, trade secrets, confidential processing methods, or other confidential information of any kind."

The underlying incident arose out of scheme where hackers used the local wireless network at one DSW store to make unauthorized access to the plaintiffs' main computer system and downloaded credit card and checking account information pertaining to more than 1.4 million customers of 108 stores. Fraudulent transactions followed using the stolen customer payment information. As a result of this breach, the plaintiffs incurred expenses for customer communications, public relations, claims, lawsuits, and attorneys fees. The largest share of the losses arose from the compromised credit card information. While the initial coverage opinion found coverage was triggered, later opinions backtracked from that opinion and found that coverage was excluded. The declination questioned the location of the alleged loss; stated that the loss appeared to be solely the theft of confidential information which was excluded and added that the alleged loss appeared to be indirect which was also excluded by the policy language.

The policy in question provided coverage for theft of any insured property by computer fraud. Computer fraud was defined to mean the wrongful conversion of assets under the direct or indirect control of a computer system by various means. The policy also contained three exclusions that were possibly applicable. The policy excluded from coverage costs of defense of any legal proceeding; damages of any type except compensatory damages and costs and fees incurred by the insured to establish a potential loss. The key issue for the court to decide was whether the trial court was correct in concluding that the loss the plaintiffs sustained was loss "resulting directly from the theft of insured property by computer fraud." The trial court applied the proximate cause standard and found that there was a link between the computer hacker's infiltration of the plaintiffs' computer system and the plaintiffs' financial loss to require coverage under the policy.

The court rejected the "direct means direct" approach, which has been adopted by many jurisdictions. The court looked at the intent of the parties in entering this insurance contract. The court concluded that the phrase "resulting directly from" does not unambiguously limit coverage to loss resulting "solely" or "immediately" from the theft itself.

The court also examined the exclusion which provided and excluded coverage for any loss of "proprietary information, trade secrets, confidential processing methods, or other confidential information of any kind." The court found the term "loss" was ambiguous since it plainly reads claims are excluded for both losses by destruction and loss of possession of the specified items. The court concluded that loss of proprietary information would mean the loss of information "to which plaintiffs own or hold single or sole right." The court held that to interpret "other confidential information of any kind" as the defendant insurer urges would mean any information belonging to anyone that is expected to be protected from unauthorized disclosure, would be swallowed not only the other terms in this exclusion but also the coverage for computer fraud. The Sixth Circuit affirmed the trial court's decision.

Impact: This decision provides an excellent discussion on the interpretation of "directly" and whether its jurisdiction applies the proximate cause approach or the "direct means direct" approach.

FEATURED ARTICLE

Application of Consumer Protection Laws to Licensed Professionals: Conflicting Standards and Murky Coverage Implications

I. Introduction

The vast majority of states have consumer protection laws, and over the last several decades in particular, courts across the country have debated whether such laws should apply to licensed professionals. Although the cases throughout the country are quite similar in nature, judges considering these similar issues have created a complex web of conflicting decisions based on highly subjective and speculative parameters. This article will explore some of these decisions, and the rationale behind them. It will conclude with a number of considerations relevant to both insurers and defense counsel.

II. Background of Antitrust and Consumer Protection Laws

The study of consumer protection laws should begin with antitrust, as the Federal Trade Commission (FTC) Act protects consumers both from deceptive practices related to competition and unfair trade practices. Today the FTC is entrusted with enforcement of both antitrust and consumer protection. Consumer protection laws used in almost every state in the nation were drafted borrowing language from the FTC Act. The most important connection between antitrust and consumer protection is Section 5 of the FTC Act, which the FTC uses to discharge both is antitrust and consumer protection missions.

While broad in mission, the FTC has often taken a narrow path in choosing its enforcement actions — likely because of budgetary constraints. *(See Mark D. Bauer, The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent, 73 Tenn.L.Rev. 131-176 (2006) (citations omitted)*.

Subsequently, states began enacting their own consumer protection statutes, often referred to as "Little FTC Acts" because they contain identical language to the FTC Act forbidding, typically, "unfair competition and unfair deceptive acts and practices."

Despite the moniker of "Little FTC Acts," there is actually considerable variation between state consumer protection laws. Typically, states have either a) copied Section 5 of the FTC Act in its entirety; b) adopted all or part of three model state consumer protection laws; c) copied the FTC or a model act but changed some of the wording; or d) combined two or more of these approaches. Although the states have followed different paths in trying to protect consumers, there are very significant and strong commonalities between most – if not all – of the states.

With the exception of Iowa's Consumer Fraud Act, all state acts provide for private enforcement and private remedies. State consumer protection laws prohibit unfair or deceptive practices in the trade or commerce in goods or services. Anyone harmed by such practices may bring a private action against the offending party, and if successful, may recover costs of suit, attorney's fees, and triple the amount of her actual damages. As such, a plaintiff's incentive to assert such a cause of action (and the insurer's potential exposure) is great.

III. Licensed Professionals and States' Little FTC Acts

Whether the learned professions, such as doctors, lawyers, accountants, architects, and engineers should be included under Little FTC Acts has been debated for years. Presently, it appears that roughly half the states in the country permit such claims to be asserted against licensed professionals, without any statutory or case law exceptions. New York and California, for example, appear to be included among these states.

The states where courts have found some or all professionals to be outside the scope of their Little FTC Act, however, have suggested more than one reason to exempt professionals.

A. Trade or Commerce Exemptions

Similar to the FTC and Sherman Acts, the majority of states require that allegedly unlawful conduct under consumer protection laws be made in "trade or commerce." Substantially all of the remaining states require the offending conduct arise from "trade." What constitutes "trade or commerce" is subject to debate.

For instance, in *Short v. Demopolis*, 691 P.2d 163 (Wash. 1984), the Washington Supreme Court held that an attorney's conduct in the practice of law may not be "trade or commerce." A billing dispute arose between a law firm and client concerning both the size of the bill and whether the client had agreed that two associates – rather than a partner – would work on the case. The client alleged a violation of Washington's Little FTC Act. The Washington Supreme Court held that the learned professions are not part of trade or commerce; ergo, the practice of law cannot constitute trade or commerce under the Washington Little FTC Act. Id at 168. Although the Washington Supreme Court did hold that "certain entrepreneurial aspects of the practice of law may fall within the 'trade or commerce' definition" of the Little FTC Act, it refused to recognize that all attorney conduct was trade or commerce.

Other courts have indulged in more creative analyses. In trying to distinguish antitrust cases concerning the learned professions, the Illinois Court of Appeals in *Frahm v. Urkovich*, 447 N.E.2d 1007 (Ill.Ct.App. 1983) suggested that such cases "dealt only with the commercial aspects of the legal profession through activities which would have a direct effect on the consuming public and not with the practice of law itself." Although the court failed to describe the type of activity which would involve the practice of law but not have a direct effect on the consuming public, the court held that "trade or commerce" did not include the actual practice of law.

B. Non-Entrepreneurial Activities Exemptions

The jurisprudence underlying the aforementioned cases perhaps set the stage for further distinction within the learned professions when determining whether consumer protection laws apply. Several state courts have created a subjective test to determine the applicability of a Little FTC Act: if the licensed professional is engaged in an "entrepreneurial activity," then the conduct falls within the ambit of the Little FTC Act; if the activity involves the learned profession itself, then the Little FTC Act does not apply.

For instance, in *Kessler v. Loftus,* 994 F.Supp. 240 (D. Vt. 1997), a Vermont law firm represented to a divorce client that her claims against her former spouse's land were "adequate security" for a debt that was owed, and that the firm committed to provide her with "competent representation," neither of which she received. Although the court noted that it was required to construe Vermont's law in accordance with FTC precedent, and that attorneys received no blanket exemption from the law, the court held that representations of "adequate security" and "competent representation" were legal opinions and not entrepreneurial. Therefore, no viable claim could be asserted.

In *Suffield Development Associates, L.P. v. National Loan Investors, L.P.*, 802 A.2d 44 (Conn. 2002), a debtor alleged that a law firm fraudulently and deceptively tried to collect a debt. While the Supreme Court of Connecticut agreed that the law firm abused the debt collection process, the court denied relief under relevant Connecticut law. Id. at 53. Although the debtor alleged that the law firm sought to recover an amount in excess of what was owed, the court concluded it was not entrepreneurial and instead may have been actionable professional misconduct.

In a Tennessee case, *Constant v. Wyeth*, 352 F.Supp. 847 (M.D.Tenn. 2003), a doctor prescribed the drug Fen-Phen to a patient, and the drug was later withdrawn from the market because of concerns about serious health effects. The court succinctly held that doctors are immune from Tennessee's Little FTC Act when the "allegations concern the actual provision of medical services."

C. "Regulated" Professions Exemptions

Another reason that some state courts have chosen to exempt licensed professionals stems from the license itself, as some states' courts yield to the regulatory scheme already in place for licensed professionals. In *Gadson v. Newman*, 807 F.Supp. 1412 (C.D.Ill. 1992), an Illinois psychiatrist accused a hospital and another psychiatrist of deceptively creating financial incentives to admit patients to the hospital. While the court acknowledged that state-regulated professionals were not exempt from the FTC Act itself, and that the Illinois Little FTC Act called upon courts to consult FTC precedent, the court found "[t]he medical and legal professions are afforded immunity from the Illinois law primarily, because, unlike other commercial services, medical and legal bodies are regulated by governmental bodies."

In *Hampton Hospital v. Bresan*, 672 A.2d 725 (N.J.Super. 1996), a New Jersey plaintiff alleged that a hospital inflated its medical bills by unnecessarily extending a patient's stay. Holding hospitals to be beyond the scope of the New Jersey Consumer Fraud Act, the court noted that hospitals were already strongly regulated by the state department of health. The court did not note, however, whether this separate regulatory scheme included a right of private action or multiple damages. New Jersey has similarly ruled that consumer fraud act claims cannot be asserted against attorneys or insurance producers.

In New Hampshire, the state Supreme Court decided that attorneys and other professionals were exempt from the New Hampshire law because of vague wording exempting trade or commerce subject to a "regulatory board." *Rousseau v. Eshleman*, 519 A.2d 243 (N.H. 1986). The New Hampshire Legislature has since repealed the relevant language, suggesting a legislative intent to include professionals.

IV. The Beyers Decision of the Pennsylvania Supreme Court

Pennsylvania is a state that has addressed this issue more recently than other states, in the 2007 case of *Beyers v. Richmond*, 937 A.2d 1082. In fact, the split opinion (5-2) of the Pennsylvania Supreme Court (the highest appellate court) in Beyers effectively incorporates all of the above rationale, and represents the competing viewpoints advanced most often when considering this issue.

In *Beyers*, a woman who had settled her personal injury case sued her attorney, claiming he improperly siphoned some $26,000 in phantom costs out of her settlement. She alleged he listed these costs as a loan repayment and various medical bills, when in fact they did not even exist. In addition to various other causes of action, she claimed he violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) in the process of collecting and distributing the settlement proceeds.

Generally speaking, the UTPCPL — like other states' consumer protection laws — prohibits unfair or deceptive practices in the trade or commerce in goods or services. Anyone harmed by such practices may bring a private action against the offending party, and if successful, may recover costs, attorney fees, and treble damages. Clearly, the incentive to assert such a cause of action is great.

The narrow issue presented in Beyers was whether the practice of law falls within the "services" contemplated by the UTPCPL. The majority found it does not, but in doing so, chose to view the case more broadly. Attorneys in Pennsylvania are regulated exclusively by the Pennsylvania Supreme Court. Thus, the majority ruled, including attorneys' conduct within the ambit of the UTPCPL would effectively subject them to regulation by someone else, thereby encroaching upon the court's authority. The majority found this unacceptable and therefore exempted attorney misconduct from the UTPCPL.

The majority view in *Beyers* echoes the rationale used by other courts to exempt professional misconduct from consumer protection laws. This rationale accepts that such laws essentially are enacted to keep the conduct of purveyors of goods and services in check. By contrast, attorneys (and other licensed professionals) are already subject to licensing bodies which regulate their conduct and impose disciplinary measures when appropriate. Thus, the reasoning goes, it would be inappropriate to additionally subject them to consumer protection laws.

The dissenting justices in *Beyers* represented the counterargument, disagreeing with the micromanagement espoused by the majority. They questioned how licensing bodies are supposed to police each and every instance of professional misconduct. Consumer protection laws, they said, are laws of general applicability, and people should not be exempt just because of their status as (insert: attorneys, physicians, insurance brokers, real estate agents, etc.).

They further noted that many jurisdictions which have generally exempted attorneys from consumer protection laws have refused to exempt their business, non-professional activities. The dissent argued since the mere distribution of settlement funds is not a "core function of legal representation" and "does not involve the exercise of legal judgment," any court-created exemption to the UTPCPL should not apply.

V. Conclusion

The hodgepodge of conflicting court interpretations exempting licensed professionals from state Little FTC Acts is difficult to fully understand, and presents a challenge, in particular, for insurers writing business across the country. The conduct of a doctor or a lawyer in one state may be ruled unlawful, while the same conduct in another state under an identically worded statute may not be actionable.

Even worse, the entire decision may be predicated on whether a judge subjectively determines the action at issue was one of entrepreneurialism or professional judgment.

If a law firm pads its bills, is that entrepreneurialism run amok, or is it a lapse in professional judgment? If a plastic surgeon advertises a procedure to improve one's looks and it fails, is that false advertising akin to rabid entrepreneurialism, or can it be excused as a professional failure outside the scope of a Little FTC Act? If a certified public accountant fails to give one's finances the attention promised in print ads, can the wrong be characterized solely as malpractice, or is it also false advertising? How would the conduct of "miscellaneous professionals" — who may not be licensed by any governing body — be addressed?

From the perspective of defense counsel, the jurisdictions which have exempted professionals can provide guidance for arguments to be made in those jurisdictions which have not. It never hurts to advance an argument, preserve a basis for appeal, and try to make new (or change existing) case law in a particular state.

From an insurer's perspective, these issues can be tricky, and pose numerous questions relevant to both the defense and coverage of professionals. From a liability standpoint, where do you draw the line between "professional services" and "business activities?" And is that line different from a coverage standpoint? Is the coverage grant (i.e. definition of "professional services") in an insuring agreement more broad or narrow than the liability the insured is subject to in a particular jurisdiction? Is there an exclusion in the policy for activities that parallel the "business activities" contemplated by existing case law in a particular state?

On the issue of damages and indemnity, are treble damages imposed by consumer protection laws considered the equivalent of punitive damages that may or may not be covered by the professional liability insurance policy? What if the policy form covers the activities of a professional which would fall within the purview of a state's consumer protection law, but contains an exclusion for punitive or statutory damages? In such a scenario, a conflict in the policy might arise as the insurer would have agreed to cover the professional activities giving rise to a consumer protection claim, but not the resulting damages.

When these questions are raised in jurisdictions around the country — and they will be, if they haven't been already — individual judges will be the people who ultimately answer them. However, they are questions worth considering by the insurer when drafting the policy form, the broker and underwriter when offering coverage, claims personnel when making coverage determinations, and defense counsel when advancing the defense.

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