GOLDBERG SEGALLA LLP

Professional Liability Monthly

A national professional liability newsletter

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In this month's edition:

FEATURED ARTICLE

Is Connecticut Poised for a Relaxation of its Strict Certificate of Good Faith Rules in Medical Negligence Cases in 2012?

The certificate of good faith required by Connecticut General Statutes Section 52-190a in medical negligence cases has been a hot topic in many recent Connecticut court decisions.

Professional Liability Monthly provides a timely summary of decisions from across the country concerning professional liability matters. The publication is distributed monthly via email. 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.

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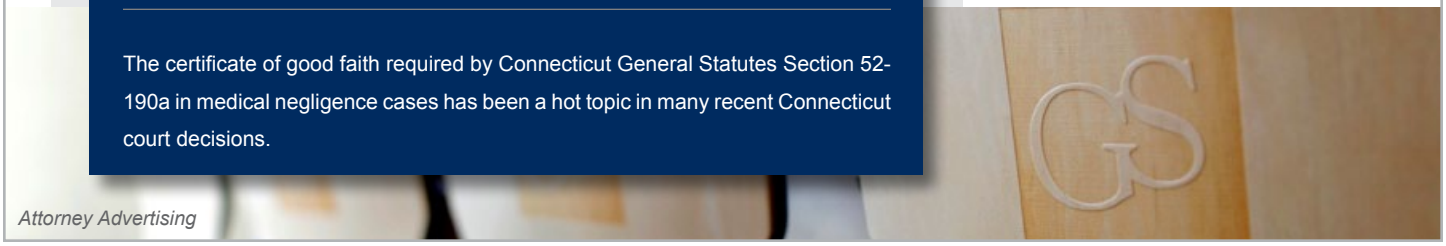

DIRECTORS AND OFFICERS

Court Rejects Shareholder's Attempt to Assert Direct Claims Against Corporation and Former Officers

JOHN J. RIVERS v. WACHOVIA CORPORATION, ET AL.
(4th Cir., Dec. 22, 2011)

The plaintiff, a former shareholder of Wachovia Corporation, commenced suit in South Carolina state court on or about October 1, 2009 against Wachovia (since acquired by Wells Fargo & Company) and four of its former officers. The complaint contains seven counts: fraud, negligent misrepresentation, gross negligence, breach of fiduciary duty, constructive fraud, breach of duties of corporate officers, and violation of the South Carolina Securities Act of 2005. The defendants removed the action to federal court based upon diversity of citizenship. Thereafter, the defendants moved to dismiss the complaint and the district court granted the motion, ruling that the proper remedy for the claims asserted by the plaintiff was a shareholder's derivative action, not a direct action. The plaintiff appealed.

In affirming the district court's decision, the Fourth Circuit firmly rejected the plaintiff's arguments and outlined the public policy underpinnings of the requirement that an action that a corporation concealed its true financial condition causing diminution in the value of its stock must be brought as a shareholder derivative action. First, the court noted that an individual, direct action would not protect the interests of all shareholders who suffered a common injury from the decline in value of the corporation's stock. Moreover, the recovery of a single shareholder would invariably be at the expense of other shareholders who suffered the same harm.

In addition, the procedural requirements for derivative actions "protect the corporation and its stockholders by preventing a 'multiplicity of lawsuits,' by limiting 'who should properly speak for the corporation' and by precluding 'self-selected advocate[s] pursuing individual gain rather than the interests of the corporation or the shareholders as a group, [from] bringing costly and potentially meritless strike suits."

Similarly, the court soundly rejected plaintiff's attempts to invoke two well-recognized exceptions to the general rule prohibiting individual suits for injuries to the corporation. The court found that the named officers owed no special duty to plaintiff and that plaintiff suffered no distinct and separate injury beyond the diminished value of the stock.

Impact: This case summarizes the public policy arguments supporting the requirement that suits for injuries to a corporation be maintained as derivative actions on behalf of all shareholders. It also underscores that any plaintiff attempting to bring an individual claim must clearly demonstrate that one of the exceptions applies: either that a special duty was owed to plaintiff or that plaintiff suffered an injury distinct from the diminution of the value of the stock incurred by all shareholders.

Court Orders Rescission of Policy for Failure to Disclose Claims Against the Insured

THE UPPER DECK CO. v. ENDURANCE AMERICAN SPECIALTY INS. CO.
(S.D. Cal., Dec. 15, 2011)

The California District Court granted an insurer's claim for rescission of two errors and omissions professional liability insurance policies. The underlying action involved the copying and printing of nine rare Yu-Gi-Oh cards and alleged claims for federal trademark counterfeiting and infringement, unfair competition in violation of federal law, copyright infringement, state unfair competition, common law trademark infringement and breach of contract. It was alleged that the insured shipped the cards to a sub-distributor, who in turn sold the cards.

While the insured was not named in the action until December 11, 2008 the suit was filed against the sub-distributor, which was owned by the same individual as the insured, in October. Around the same time, the insured applied for insurance. The application required the insured to disclose any claims experience, specifically whether it was aware of any alleged deficiencies, errors, or omissions not previously reported. The insured did not respond to these questions.

At a pretrial conference in the underlying action, the insured stipulated to a finding of willfulness in relation to the counterfeiting scheme. Shortly thereafter a settlement was reached between the parties in excess of the $2 million policy limits. The insured then commenced this breach of contract, breach of the implied covenant of good faith, and declaratory

action against the insurer. The insurer counterclaimed, seeking rescission of the policy and a declaration that the policy was void ab initio.

The court found in favor of the insurer, stating that although the insured was not named in the action until December 2008, the preliminary injunction in the underlying action extended to "all persons, firms and corporations in active concert or participation" with the then named entity. The court cited the injunction and the common ownership between the insured and the named entity in the suit finding that at the latest, the insured knew of the action on October 30, 2008.

The insured argued that there was no concealment on the policy because it drew a line through the questions and left them unanswered. The court rejected these assertions and concluded that "no reasonable person could disagree that if the insured had disclosed its long-term scheme to willfully violate the intellectual property rights" of another, that the insurer would not have issued the insurance contracts at issue. The court found that the concealment of this scheme constituted material information that had to be disclosed and therefore allowed the insurer to rescind the contracts of insurance pursuant to Cal. Ins. Code Section 331.

Impact: Rescission remains a powerful defense to coverage. However, concurrently it remains difficult to prove. The insurer has a two-fold burden. First, the insurer must establish that what the insured knew at the time of contracting and second, that if this information were disclosed the insurer would not have issued the policy. Here, the insurer was certainly able to establish the knowledge of the insured at the time it procured the policy. However, often times this burden is difficult for an insurer to meet.

Securities Fraud Suit Dismissed With Leave to Re-Plead

DON KATZ v. CHINA CENTURY DRAGON MEDIA, INC., ET AL. (Centr. D. Calif., Nov. 30, 2011)

The plaintiffs, shareholders of the defendant China Century Dragon Media, Inc. (Dragon China), commenced suit against the company and some of its officers and directors alleging various securities violations in connection with China Dragon's initial public offering (IPO). The plaintiffs allege that defendants falsely stated China Dragon's earnings in its registration statement and prospectus. The registration statement was filed in February 2011. On March 21, 2011, Amex halted trading on China Dragon's stock and began proceedings to de-list China Dragon from the exchange. A week later, China Dragon's auditor issued a resignation letter indicating that China Dragon's accounting records had been falsified. While China Dragon's stock traded after the IPO at $5.25 per share, the stock has since fallen to $0.30 per share.

The defendant moved to dismiss the plaintiffs' claims alleging violations of Section 11 and 12(a)(2) of the Securities Act of 1933. Other defendants made similar motions to dismiss.

In their amended complaint, plaintiffs alleged, inter alia, that the revenue and profit figures the company reported in its prospectus differed substantially from figures reported to the Chinese State Administration for Industry and Commerce (SAIC). The plaintiffs alleged that the financial information reported to the SEC and to the SAIC should be substantially the same. The plaintiffs allege that the lesser figures reported to the SAIC are the true figures and that the figures reported in China Century Dragon Media's prospectus were false and misleading.

In analyzing the defendants' motions, the court explained that the requirements for asserting a claim under Section 11 of the Securities Act of 1933 are twofold: the claim must allege (1) that the registration statement contained an omission or misrepresentation; and (2) that the omission was material such that it would have misled a reasonable investor as to the nature of his or her investment. The court also noted that if a claim under Section 11 sounds in fraud, then such fraud must be pleaded with particularity under Rule 9(b). The court concluded that although the plaintiffs contended that their claims sounded in fraud, they were in fact so predicated. Although the plaintiff sufficiently alleged what statements were false and who made these statements, they failed to plead with particularity that the profit and revenue statements in the SEC filings were false. As such, the plaintiffs' claims under Section 11 must be dismissed.

With respect to the claims asserted under Section 12(a)(2), the court determined as to several of the individual defendants that the plaintiffs failed to sufficiently plead standing to sue based upon their failure to plead facts which causally linked plaintiffs' stock purchase with acts or omissions of each individual defendant. Accordingly,

Judge Kronstadt granted the defendants' motion to dismiss, with leave to amend.

Impact: Once again, this case highlights the high pleading standard which applies to fraud claims. All elements must be pleaded with specificity or the complaint is destined to be dismissed.

MEDICAL MALPRACTICE

Sanctions May Be Appropriate for Attorney Who Violates Certificate of Merit Rules Governing Professional Liability Actions

FALLON v. HAHNEMANN HOSP. (Philadelphia Court of Common Pleas, July 7, 2011)

In Pennsylvania, any claim that a licensed professional deviated from the applicable standard of care must be accompanied by a certificate of merit. Pursuant to these Certificate of Merit Rules, Pa.R.C.P. 1042.3, et seq., all claims of professional negligence must include a certificate affirming that a professional has reviewed the plaintiff's claims and, if true, the conduct amounted to professional negligence. These rules govern the steps necessary to plead professional malpractice and, in the event that a plaintiff fails to timely file a certificate, the defending professional may move to dismiss the claim. The holding in *Fallon v. Hahnemann* clarifies that sanctions may be appropriate for an attorney or party in violation of the Certificate of Merit Rules.

The issue before the court in *Fallon v. Hahnemann* was whether the plaintiff's counsel was appropriately sanctioned over $25,000 for improperly certifying the action under the Certificate of Merit Rules. The court upheld the sanctions based on its finding that the plaintiff improperly used a statement by an unqualified doctor to support a certificate of merit in a medical malpractice action. The Decedent, Jenna Fallon, was born with a blood abnormality. As part of her treatment she underwent a splenectomy. Following surgery, the decedent became ill and required Medivac transportation by the defendant, Hahnemann Medivac, to a non-party hospital where she subsequently died.

In their civil action complaint, the administrator of the decedent's estate (plaintiff) alleged medical malpractice against multiple defendants, including Hahnemann Medivac (HM), alleging that it failed to monitor her condition in transport. The plaintiff's counsel timely filed a certificate of merit as to HM. Subsequently, however, the court granted HM's motion for summary judgment on the basis that the plaintiff failed to support the allegations with the requisite expert report and the plaintiff's claims against it were dismissed.

Following its dismissal, HM filed a motion for sanctions on the basis that the plaintiff failed to comply with the Certificate of Merit Rules. Pursuant to Pennsylvania Rule of Civil Procedure 1042.3(a)(1)(2), part of the Certificate of Merit Rules:

"…a court may impose sanctions…if the court determines that an attorney violated [the Certificate of Merit Rules] by improperly certifying that an appropriate licensed professional had supplied a written statement that there exists a reasonable probability that the care, skill or knowledge experienced or exhibited in the treatment….fell outside acceptable professional standards."

In response, the plaintiff provided a written statement from Gerald Kaplan, MD, JD. Following a lengthy analysis, the court concluded that Dr. Kaplan's statement "clearly…was not intended to be a medical opinion for purposes of issuing a Certificate of Merit." Moreover, the court held that Dr. Kaplan was not an appropriate licensed professional qualified to opine as to HM's professional conduct. Finally, the court focused on the fact that Dr. Kaplan's statement did not provide an opinion that the treatment fell outside professional standards or that HM's conduct caused decedent's death. As a result, the sanctions were upheld.

Impact: This opinion highlights the importance of compliance with the Certificate of Merit Rules and provides an example of a defense attorney using the rules to his advantage in the defense of a professional.

Court Allows Negligent Infliction of Emotional Distress Against Hospital

TONEY v. CHESTER COUNTY HOSP. (Sup. Ct. of Pa., Dec. 22, 2011)

An evenly divided Pennsylvania Supreme Court recently permitted a claim for emotional distress to remain even where the plaintiff suffered no physical impact. The supreme court's even split left standing a divided superior court ruling which held that a claim for negligent infliction of emotional distress (NIED) could be brought where an expectant mother underwent an ultrasound and was advised her baby was normal but once delivered it was found that all four of the baby's limbs terminated at the elbow or knee.

The plaintiff sought damages for NIED after witnessing the birth of her physically deformed child without having sufficient time to prepare herself. The defendants filed preliminary objections arguing the plaintiff did not meet any of the established requirements for NIED. Three Pennsylvania Supreme Court justices agreed that the mother had a cause of action for negligent infliction of emotional distress. Another three justices found the mother's theory was legally insufficient. Justice Orie Melvin did not participate. The plurality opinion leaves in place the superior court's decision to recognize the extension of NIED to the facts of this case.

Impact: It is noteworthy that Justice Orie Melvin did not participate because when the case was at the superior court she filed a dissenting opinion indicating she would not have allowed the NIED claim to proceed. Medical malpractice defendants should continue to challenge the legal validity of NIED claims with similar circumstances. In a similar case Justice Orie Melvin's participation would likely result in NIED claims being defeated.

Court Allows Malpractice Claim Based Upon Purported Misrepresentation

JEFFREY v. METHODIST HOSP.
(Ct. of Appeals Indiana, Oct. 25, 2011)

In *Jeffrey v. Methodist Hospital*, decided by the Court of Appeals of Indiana in October 2011, a claim against the defendant hospital for negligent misrepresentation survived the hospital's summary judgment motion. The plaintiffs were the adoptive parents of an infant born with mental retardation who was adopted by them shortly after birth. The birth mother intended to place her baby for adoption once born and the plaintiffs agreed to adopt the baby as long as there were no "significant health issues." The adoptive mother told a hospital social worker that she was relying on her judgment in deciding to adopt. She had rejected prior adoptions because the adoptees may have been special needs children.

After the baby was born, the plaintiffs (the adoptive parents) sent a HIPAA authorization to the hospital to obtain the medical records for the birth mother and the baby. Although a sonogram had been taken of the baby's brain, which showed a major developmental birth defect, this was not included in the records sent to the adoptive parents due to the manner in which sonograms were filed among patient charts. The adoptive parents learned of the sonogram, and of their new baby's mental retardation, after the adoption had been completed.

They commenced an action against the hospital for negligent misrepresentation on the basis that they justifiably relied upon the hospital in completing the adoption. Although the trial court granted summary judgment to the hospital, the Court of Appeals of Indiana reversed it on the basis that factual issues remained for resolution by a jury. Specifically, the court noted that in other professional relationships involving brokers, attorneys, abstractors, and surveyors, the central issue is whether or not the party had justifiably relied upon representations by the professional, to their detriment.

The court found that the plaintiffs had justifiably relied upon the hospital's representation that their baby had no significant medical issues when, in fact, the baby did have a significant developmental issue. On this basis, the court reversed the trial court and denied summary judgment to the hospital, requiring the case to go forward. From the court's decision, it does not appear that the parties addressed causation or the extent of damages.

Impact: The absence of that discussion from the decision begs the question of proximate cause since the baby's condition was a birth defect and not a result of malpractice, and also begs the question of damages, in that no indication was given as to the extent and scope of damages available to parents who claim they unwillingly adopted a mentally retarded child. We will report further on this interesting case if additional decisions are published.

LEGAL MALPRACTICE

New Jersey Appellate Court Analyzes "Common Knowledge" Doctrine to Overrule Dismissal of Legal Malpractice Action

SWAIN v. ALTERMAN
(Sup. Ct. N.J. App. Div., Dec. 9, 2011)

In *Swain v. Alterman*, the plaintiffs sued their former attorney for negligently representing them in a personal injury action stemming from a car accident. The attorney never filed a complaint, thereby allowing the statute of limitations to expire. The plaintiffs proceeded to file a legal malpractice claim against the attorney. The attorney claimed that he had forwarded a letter to the clients terminating his representation before the statute of limitations had expired, which the clients denied.

Pursuant to New Jersey law involving professional negligence actions, a plaintiff in a legal malpractice suit usually must submit an affidavit of merit alleging that the attorney's conduct fell below the standard of care. An affidavit is not required, however, if the breach can be proved without expert testimony (i.e. based on common knowledge). This falls under the aptly named common knowledge exception. The plaintiffs had not filed an affidavit of merit in their case, believing that the attorney's failure to timely file a lawsuit within the statute of limitations fell within this narrow exception.

The trial court granted the attorney's motion to dismiss and the plaintiffs appealed. The trial court agreed with the attorney that the common knowledge exception did not apply because there was no attorney-client relationship following his termination letter. Therefore, expert testimony was required regarding the existence of an attorney-client relationship, whether it was properly terminated, and the scope of any duty owed by the attorney. The appellate court disagreed, finding that the failure to file a complaint within the statute of limitations could be decided without expert testimony and fell under the common knowledge doctrine. The thrust of the court's analysis lay in the principal that in a common knowledge case, an expert is no more qualified to attest to the merits of a claim than someone who would be considered a non-expert. The court stated that no expert was needed on behalf of plaintiffs "to establish they were deprived of seeking compensatory damages for their personal injury claims when the complaint was not filed within the statute of limitations." The court also ruled that an expert was not needed to testify as to the formation of an attorney-client relationship. On this point, the court ruled that the plaintiffs had provided competent evidence that a retainer agreement was signed (even if there was a dispute whether the attorney provided a copy of that agreement to the plaintiffs). The court also reasoned that the complaint sufficiently alleged the existence of an attorney-client relationship, and that the core issues the attorney relied on in favor of arguing for an affidavit of merit were topics for the fact-finder to determine. In short, the plaintiffs had pleaded a cause of action that fell within the common knowledge doctrine. The trial court's ruling was reversed and the case was remanded.

Impact: This case illustrates that not all professional negligence actions require an expert affidavit of merit but those cases may be difficult to identify because what may or may not require expert testimony is difficult to identify. Therefore, counsel for the defendant-attorney should always consider filing a motion to dismiss if a plaintiff relies on the common knowledge exception (or its equivalent in other jurisdictions).

Availability of Statute of Limitations Defense on Motion to Dismiss

JAVAID v. WEISS
(M.D. Pa., Dec. 19, 2011)

In *Javaid v. Weiss,* the former client of an attorney filed a legal malpractice action centered around the attorney's conduct relating to a loan guarantee. Specifically, in 2002, the plaintiff, after the attorney provided legal guidance, executed a loan agreement that was secured, in part, by a personal guaranty of the plaintiff. Furthermore, this guaranty also "authorized the lender to confess judgment against [plaintiff] for any unpaid part of the [loan]." In February 2008, a confession of judgment was entered against the plaintiff "following an event of default." The plaintiff, who was still being represented by the same attorney, "filed a petition to strike or open the confessed judgment." Ultimately, the court of common pleas "denied the petition, but reduced the judgment to include a credit in the amount of $515,675.92…."

On or about June 6, 2011, the plaintiff filed a malpractice claim against the attorney based upon the latter's actions pertaining to the execution of the loan guarantee and later court proceedings to open the confessed judgment. The plaintiff alleged in the complaint that during the proceedings to open the confessed judgment the attorney failed to make or otherwise abandon a choice of law argument that may "have resulted in [p]laintiff being granted 'substantial rights.'" The proceedings to open the confessed judgment took place in March and April of 2008.

Based on the foregoing, the attorney filed a Rule 12(b)(6) motion to dismiss the malpractice claim. The motion to dismiss was premised, in part, on the assertion that plaintiff's malpractice claim was barred by the controlling two-year statute of limitations. The plaintiff argued that a federal court, similar to Pennsylvania state courts, "is not permitted to consider the statute of limitations on a motion to dismiss."

The court flatly rejected the plaintiff's above argument. The court reasoned that "[i]n the Third Circuit, district courts may consider the application of the statute of limitations where the complaint demonstrates that the claims are untimely." Restated, "in cases where application of the statute of limitations is obvious from the allegations in

the complaint, and not reasonably susceptible to dispute, a court may reach the issue of timeliness on a motion to dismiss."

As a result, the attorney's motion to dismiss was granted "without prejudice to [p]laintiff being given [an] . . . opportunity to file an amended complaint…." The court reasoned that based upon the allegations in the complaint, taken together with the facts set forth in the pleadings filed as part of the petition to open the confessed judgment, plaintiff's malpractice claim was time-barred. The attorney's alleged malpractice in 2002 and 2008 took place "well over two years before" the plaintiff filed the complaint in June 2011. The statute of limitations, in short, was ripe for disposition given that the facts set forth in the above pleadings made it clear that plaintiff's malpractice claim was barred by the controlling two-year statute of limitations.

Impact: The court's opinion in this case is noteworthy for one very important reason. The court strongly endorsed the rule in the Third Circuit that a party, in proper circumstances, may file a motion to dismiss founded upon the controlling statute of limitations. In Pennsylvania state court, a party is expressly precluded from moving to dismiss a claim or complaint pursuant to the statute of limitations. *Javaid v. Weiss* illustrates a clear and critical difference between Pennsylvania state courts and federal district courts sitting in Pennsylvania. A party named as a defendant in a malpractice action filed with a Pennsylvania federal district court should carefully evaluate the allegations in the complaint to determine if it is appropriate to file a motion to dismiss based upon the statute of limitations.

Motion to Disqualify Defendant's Counsel Granted Due to Conflicts of Interest

OLSZEWSKI v. JAMES F. JORDAN III (Conn. Super., Dec. 5, 2011)

After the plaintiff prevailed on his motion for summary judgment as to liability against defendant in his action on a promissory note, judgment was entered after a hearing on damages in favor of the plaintiff in the amount of approximately $128,000. The plaintiff obtained a property execution on the judgment. The defendant's attorney, Carlo Forzani, filed a claim for determination of interests in disputed property, a mutual investment account, in the defendant's name. In the claim for determination, defendant claimed he had a right to the property, prior in right to the plaintiff's, by virtue of the court's order in his dissolution of marriage action. Forzani also claimed he had a claim prior in right to the plaintiff's by virtue of the same decision in the defendant's dissolution of marriage case and by virtue of his lawyer's charging lien arising out of operation of law.

The plaintiff moved to disqualify Forzani and/or require him to withdraw as counsel in the pending claim for determination of interests in the disputed property. The plaintiff argued that Forzani is the true party in interest since he claims the right to the disputed property himself, and that his claim violates Rules of Professional Conduct 1.7 and 1.8 regarding conflicts of interest, and Rule 3.7 regarding a lawyer as a witness.

The court looked to Conn. Gen. Stats. §52-356c to analyze the competing interests in attached property. After reviewing the statute, the court determined that the question is whether, pursuant to the Rules of Professional Conduct, Forzani can represent not only the defendant's interests in the property, but his own as well. In deciding this issue, the court affirmed that it has the authority to regulate the conduct of attorneys and has the duty to enforce the standards of conduct regarding attorneys, and held a hearing on the motion at which the parties offered evidence as to the issues presented.

The court first looked to the plaintiff's argument that Forzani's representation of the defendant is a conflict of interest prohibited by Rule 1.8(i), which states that a lawyer shall not acquire a proprietary interest in the case the lawyer is conducting for the client, except that the lawyer may acquire a lien granted by law to secure the lawyer's fee or expenses. The court determined that Forzani, by filing a claim in this matter, was claiming a right in his own name in the investment account, the same account in which his client is claiming an interest. Moreover, Forzani was claiming that any funds owed to his client from that investment account should go to him. The court rejected Forzani's argument that he was asserting a lawyer's charging lien, which is an exception under the rule, as the issue presented in the case is not whether he has a charging lien but whether he has a right to do so in this case. The court looked to the fact that Forzani was not asserting an interest in an asset his efforts created in the litigation in which he was representing his client, but rather he was asserting a lien in this case for his efforts in the dissolution of marriage action. The court stated that Rule 1.8 prohibits an attorney from acquiring a proprietary interest in the cause of action or the subject matter of litigation the lawyer is conducting for his client, which is exactly what Forzani

was doing, and, therefore, granted the motion to disqualify because Forzani's actions violate Rule 1.8.

The court also looked at the plaintiff's argument that Forzani's actions violate Rule 1.7, which regulates when an attorney may represent a client in a situation of a concurrent conflict of interest. Citing to the commentary to Rule 1.7, which states that "concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests" the court held that here Forzani was making a claim to the same moneys as is his client. Additionally, the court looked at the defendant's hearing testimony, at which he testified that he was not advised that it may not be in his best interests to pursue payment of his attorneys' fees before satisfying the judgment against him. The court held that Forzani's claim violates Rule 1.7 and granted the motion to disqualify on that ground as well.

Lastly, the court looked at the plaintiff's argument that Forzani may be disqualified from representing the defendant because he would be required to be a witness in order to prove the amount of attorneys' fees he is claiming. The court held that the exceptions to Rule 3.7 (giving uncontested testimony; giving testimony as to the nature and value of the attorney's services and fees; and disqualification causing substantial hardship to the client) are not applicable here. The court looked only to the third exception, stating that the first two did not apply, in which Forzani stated that he had been acting as the defendant's counsel since 2007 and that disqualification would result in a substantial hardship to the defendant. The court held that this exception did not apply because the defendant had co-counsel who had also been representing defendant since October 2010 and disqualification in this instance would not result in a substantial hardship to the defendant.

Impact: This case shows the importance of determining early on if a party's counsel should be disqualified because of violations of Rules of Professional Conduct. This is especially important when defending a legal malpractice action in which plaintiff, who claims that he settled the underlying action for less than its full value, is being represented by the same attorney who settled the underlying action. Defense counsel must be vigilant to immediately file a motion to disqualify under Rule 3.7.

Opposing Party Not Allowed to Use an Ethical Rule to Intrude in the Attorney-Client Relationship

JACKSON V. TRULY GREEN LANDSCAPE AND MAINTENANCE, INC.
(Conn. Super., Nov. 2, 2011)

The plaintiffs, condominium owners, brought suit against numerous defendants for causing a fire at the condominium complex. The defendant, Salatiel Onofre, alleged to be a resident of White Plains, NY, an employee of Truly Green Landscape and Maintenance, Inc., filed a motion to dismiss, challenging the court's exercise of personal jurisdiction.

The plaintiffs objected to the motion to dismiss, arguing entirely on their claim that counsel for defendant Onofre had no authority from his client to file the motion to dismiss challenging personal jurisdiction, because counsel had allegedly violated the Rules of Professional Conduct, Rule 1.5(b), which provides that the scope of representation, the basis or rate of the fee, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Attached to the objection to the motion to dismiss was an email from Onofre's defense counsel that post-dated the filing of the motion to dismiss.

The court disregarded the email as it was not authenticated. The court stated that the marshal failed to comply with Connecticut's long arm statute. The court further stated that since plaintiff have failed to present any evidence that the defense counsel violated Rule 1.5(b), they have failed to meet their burden that the court has jurisdiction despite the marshal's noncompliance with the long-arm statute.

The court went on to discuss plaintiffs' attempt to use a rule of ethics as a tactical advantage in this litigation and clearly stated that an "opponent in a civil lawsuit has no standing to intrude into the other party's attorney-client relationship to overcome a glaring defect in service of process." The court relied on the preamble to the Rules of Professional Conduct, Scope, p. 3, which states that nothing in the rules should be deemed to augment the extra-disciplinary consequences of violating such a duty.

Impact: This case continues to follow precedent that in Connecticut violations of the Rules of Professional Conduct do not give rise to a private cause of action. The violation of the rules may, however, be used in a legal malpractice action to establish a violation of the standard of care by violation of the rule.

Court Finds Coverage for Law Firm That Fell Victim to Internet Scam

LOMBARDI, WALSH, WAKEMAN, HARRISON AMODEO & DAVENPORT v. AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY (N.Y. 3rd Dept., June 2, 2011)

The plaintiff law firm was contacted by email by someone claiming to be the chief executive officer (CEO) of a Taiwanese corporation seeking legal assistance in collecting a large debt in North America. The law firm received a signed retainer agreement from the CEO and a check for $384,700 from the alleged debtor corporation. The law firm opened an account at Berkshire Bank and deposited the check. Then, at the request of the CEO, the law firm instructed the bank to wire the value of the check minus legal fees to a third-party in South Korea who was allegedly a supplier of the Taiwanese corporation. After the transfer, the bank notified the law firm that the check was counterfeit and that the law firm's account was overdrawn. The bank commenced an action against the law firm, seeking to recover the overdraft amount. The law firm then turned to its professional liability insurance carrier and asked that it defend and indemnify. The insurance company denied coverage; claiming that the law firm was not providing legal services that are required for the liability insurance.

The policy described legal services as "those services performed by an insured as a licensed lawyer in good standing … or in any other fiduciary capacity, but only where the act or omission was in the rendition of services ordinarily performed by a lawyer." The court noted that, although the imposter may not have intended to receive legitimate legal services, someone requested legal assistance and signed a legal retainer agreement to engage the lawyer to perform legal services. The law firm was under the impression it was legitimately retained and attempted to perform services of a lawyer. Therefore, regardless of whether the imposter qualified as a client, the policy does not require a client, it only required that the plaintiff "render legal services for others" and the imposter fell within that broad category. The court held that, therefore, the insurance company was under an obligation to defend the law firm in the action commenced by the bank. The law firm had confidentially settled the underlying action and, therefore, the court was unable to determine whether the insurance company was also obligated to indemnify and the court remitted that issue for further proceedings.

Impact: The New York Appellate Court's opinion is not only noteworthy because it declares that a lawyer is acting as a fiduciary as long as he believes that he is acting on behalf of a client, even where the client is a hoax and does not exist; but it is also noteworthy because it shows that even a long-established law firm can fall victim to these debt collection schemes.

Court Upholds Disclosure of Communications Between Expert and Counsel

BARRICK v. HOLY SPIRIT HOSPITAL (Superior Court of Pennsylvania, Nov. 23, 2011)

An en banc panel of the Pennsylvania Superior Court recently issued a ruling that serves to prevent one party from reviewing written communications by the opposing party to the opposing party's expert. The court essentially focused on the mechanism by which the defense sought out information from the plaintiff's expert and treating physician, which was by way of a subpoena to the treating physician for a copy of his file.

In *Barrick v. Holy Spirit Hospital*, the plaintiff was injured when a chair in which he was sitting collapsed in the cafeteria of the defendant hospital. The hospital's property management company issued a subpoena was directed to the orthopedic center with which the plaintiff's treating physician was associated. The subpoena requested a "complete copy of the entire medical chart/file." The center withheld from production those records pertaining to plaintiff. In response, the property management company filed a motion to enforce the subpoena.

The trial court's order directed the orthopedic center to produce "any and all documents" pertaining to the plaintiff, including the correspondence between the center's counsel and the treating physician. The issue presented on appeal was whether "the trial court erred by ordering a treating physician, who will also be testifying as [an] expert witness, to disclose letters and emails between the physician and counsel … that addressed the strategy as to how to frame the physician's expert opinions … ."

The superior court concluded that the plain language of the Pennsylvania Rules of Civil Procedure on discovery of expert testimony permit only the discovery (such as through specific interrogatories) of the facts and opinions on which experts are expected to testify and a summary of the grounds for each such opinion. Therefore, the information requested by the defense's subpoena

exceeded the scope of the pertinent state rule governing discovery of expert testimony. The court also held that the correspondence between counsel and the expert were protected from discovery as work product. The court also held that the defendant's subpoena to the treating doctor/expert for his file was beyond the scope of rules because the defendant had not first shown cause to support this request for additional information from the opposing party's expert.

Impact: This decision may have additional ramifications pertinent to expert communications. It is possible now, for example, that the attorney offering up the expert may remove any correspondences from the attorney to the expert from the expert's file before the opposing party is permitted to review the file.

ARCHITECT/ENGINEER MALPRACTICE

Limitation of Liability Clause In Design Professional's Contract May Be Void If In Violation Of Public Policy

TOWN OF BOW v. PROVAN & LORBER, INC.
(N.H. Superior Court, June 3, 2011)

A limitation of liability clause provides a method for a professional to potentially reduce his exposure in the event of a lawsuit. Such clauses may limit recovery to the amount of fees recovered by the professional. Another limitation of liability clause may limit potential recovery to an agreed-upon amount. Jurisdictions differ on whether these clauses are enforceable in a design professional's contract. By way of example, the clauses are generally enforceable in New Jersey so long as the language is clear and unambiguous. See, *Marbro, Inc. v. Borough of Tinton Falls*, 297 N.J. Super. 411 (NJ Super. Law Div 1996). In New York and Pennsylvania, the clauses are enforceable except in the case of gross negligence or intentional torts. See, *Fiorenza v. A & A Consulting Engineers*, PC, 77 A.D. 3d 569, 909 N.Y.S.2d 356 (NY App. Div. 2010); *Flatrock Partners, LP v. Kasco-Chip Constr*, 2007 Phila. Ct. Com. Pl. LEXIS 123 (Pa. CP 2007).

In *Town of Bow v. Provan & Lorber, Inc.,* the New Hampshire Superior Court recently addressed this issue and held that a limitation of liability clause in a design professional's contract violates public policy when the work is of great importance to the public. In this case, the town initiated suit against its design and construction professionals for alleged defects in a retaining wall. However, a contractual provision within one of the design professional's contracts limited its liability to the greater of $50,000 or the amount of its contract.

The court held that the clause was invalid in this instance. According to the court, engineers of public projects are required to consider the public's safety. The court wrote that allowing a limitation of liability in the construction of public improvements and public roads would "encourage carelessness."

Impact: As a result of this decision, the enforcement of all limitation of liability clauses in public projects may be questioned in the state of New Hampshire.

ACCOUNTANT/ FINANCIAL PLANNING

The Limited Duties of an Accountant When Performing a Compilation

BANCROFT LIFE & CASUALTY INSURANCE COMPANY v. INTERCONTINENTAL MANAGEMENT LTD.
(W.D.Pa. Nov. 29, 2011)

In this case, the former client of an accounting firm filed, in part, a malpractice claim alleging that the latter's work was deficient and otherwise not in accordance with the controlling professional standards. The client, an insurance company headquartered and based in St. Lucia, retained the accounting firm to only perform "a compilation of financial statements and other documents … ." The thrust of the client's malpractice claim was the assertion that the accounting firm's allegedly improper work caused it "to be out of compliance with the laws and regulations governing insurance companies in St. Lucia." The accounting firm filed a motion to dismiss the malpractice claim, pursuant to Fed.R.Civ.P. 12(b)(6), for failure to state a claim upon which relief can be granted.

The court, in reviewing the accounting firm's malpractice claim, initially analyzed the standard of review applied in ruling on a Rule 12(b)(6) motion to dismiss given that it has undergone substantial changes over the past couple of years. In particular, the "no set of facts" standard that previously applied to federal complaints has been rejected in favor of a more stringent plausibility standard. Under the plausibility standard, a complaint, in order to survive a motion to dismiss, must contain sufficient factual

matter, accepted as true, to state a claim for relief that is plausible on its face. The sheer possibility that, based upon the allegations within the complaint, a defendant could be found to have acted unlawfully or improperly is insufficient to satisfy the plausibility standard. The court considers the context of the claims and draws on its judicial experience and common sense to determine if a claim meets the plausibility threshold.

The court, in analyzing whether the plaintiff had asserted a plausible malpractice claim, looked to the scope of the engagement as defined by the parties' engagement letter. The court reasoned that "[t]he specific scope of an accountant's duty to a client is determined primarily by the terms and conditions of the [engagement letter]"; the underlying engagement letter expressly noted that the accounting firm would only be performing a compilation. Moreover, the court described the scope of a compilation as follows: "A compilation is the lowest level of assurance regarding an entity's financial statements. It expresses neither an opinion nor any level of assurance. When performing a compilation, an accountant need not verify or corroborate the financial statement information provided by the client." An accounting firm performing a compilation, despite the limited scope of the engagement, still has a duty "to bring any red flags" to its client's attention.

The complaint failed to specifically identify any red flags that the accounting firm purportedly failed to bring to the client's attention. To the contrary, the complaint simply contained "a formulaic recitation of the elements of [plaintiff's] professional malpractice claim … " without alleging any supporting facts. This type of complaint is insufficient to survive a rule 12(b)(6) motion to dismiss under the more stringent plausibility standard discussed above. As a result, the court granted the accounting firm's motion to dismiss the professional malpractice claim.

Impact: The court's opinion in this case is noteworthy for two distinct, but equally important, reasons. First, the decision provides some insight into how federal district courts, at least in Pennsylvania, will apply the plausibility standard when ruling upon a motion to dismiss. A plaintiff, in short, will no longer be able to survive a motion to dismiss by merely setting forth legal conclusions and the elements of their claim; the complaint must also contain factual allegations indicating that plaintiff has asserted a plausible claim. Second, the opinion provides judicial recognition of the limited duties and obligations an accountant owes to his or her client when performing a compilation. In Pennsylvania, the accountant's duties when performing a compilation, rather than an audit or even a review, are generally limited to bringing "red flags" to the client's attention.

FIDELITY INSURANCE

Rescission of Fidelity Bond Denied

BANCINSURE, INC. v U.K. BANCORPORATION INC.
(E.D. K.Y., Nov. 16, 2011)

The plaintiff brought this declaratory judgment action seeking rescission of a financial institution bond (FIB) and extended professional liability policy (EPL) (collectively, the policy) issued to the defendants that would have rendered claims for losses sustained as a result of the defendants' president/CEO's embezzlement of funds totaling over $2 million null and void. The defendants sought via counterclaims coverage under the policy and also sought a judgment declaring that the plaintiff was in violation of various state law claims and in bad faith.

The plaintiff had been insuring the defendants since 1992 and had provided coverage under the policy since that time. The defendants' former president/CEO completed all applications for the policy prior to his death in 2008. Thereafter, his successor, Donna Wood (Wood), had the authority to manage the operations and affairs of the bank. Unbeknownst to the defendants, Wood had been embezzling funds, totaling over $2 million, from the defendants since 2003.

An investigation revealed that each time Wood took money she prepared a fraudulent general ledger debit ticket and a deposit slip or general ledger credit ticket to place the funds into one of three accounts. To cover the thefts from the auditors and bank examiners, Wood delayed preparing their reconciliation until the next month's bank statement was received. Wood took figures from that statement and recorded them as outstanding on her reconciliation. Wood used figures from the next bank statement so when the auditor or examiner reviewed that account, she could provide them with a document that appeared to agree to her figures. Wood then added the outstanding figures so the reconciliation showed the bank balance agreed to the balance in the bank's accounting records.

In 2010 and upon notifying the defendants that the policy was about to expire, the Board of Directors confirmed that they should renew with the plaintiff

and they gave Wood the authority to complete any applications or other documents on behalf of the defendants. During her tenure, Wood completed "anniversary" applications in Novemeber 2008 and October 2009 as well as the renewal application in August 2010.

Wood completed the applications in her capacity as president and affirmatively stated that she was unaware of any information that may give rise to a claim. The application indicated that if any such knowledge existed, any resulting claims were to be excluded from coverage. Based on the information provided in the applications, the plaintiff renewed the policy.

With respect to the FIB, the plaintiff agreed to provide coverage to the defendants for losses directly resulting from employee dishonesty. The FIB also provided that the plaintiff was to give the defendants 90 days notice before canceling or terminating the FIB and the FIB provided that any intentional misrepresentations made in the applications were grounds for rescission of the FIB.

In February 2011, the defendants' outside auditing firm advised the defendants that they discovered "irregularities" in the bank's general register. The auditing firm determined that Wood had embezzled over $2 million from the bank. The next day, the defendants submitted a proof of loss statement under the FIB. In May 2011, the plaintiff advised the defendants that it was rescinding the FIB and returned the premium to the defendants. The plaintiff's decision was solely based on Wood's intentional misrepresentations in the renewal application.

Under Kentucky law, the plaintiff argued that it was entitled to rescission of the FIB because it had established that the application contained intentional, fraudulent misrepresentations and the plaintiff relied on the statements in the renewal application in issuing the FIB. While it was undisputed that the application contained fraudulent statements that were relied upon by the plaintiff, the defendants argued that those statements made by Wood about Wood's own embezzlement should not be imputed to the defendants. The plaintiff asserted that while corporations can only act through their agents, the adverse interest exception was applicable to these facts.

The adverse interest exception provides that knowledge of an agent cannot be imputed to the principal when it is clear that the agent would not communicate the fact "in controversy to the principal." In other words, the exception applies when the transaction relates to personal matters of the agent and where it is adverse to the principal. The court found that since Wood's acts were clearly adverse to the defendants, her knowledge of her embezzlement would not be imputed to the defendants.

The adverse interest exception, however, has its own exceptions. The exception will not apply where the interested officer is the sole representatives of the two corporations (sole actor); where the corporation benefits from the transaction; and where the interested officer acts for principal. The plaintiff contended that these exceptions applied because Wood was the sole actor relating to renewing the insurance; Wood was acting with the interests of the defendants in mind; and the defendants benefited by acquiring the insurance. The court disagreed finding that Wood was not the sole actor as the board met and decided on important matters of the bank and Wood was acting outside the scope of authority when she was engaged in dishonest acts. Further, the court found that Wood was not acting for the defendants when she lied on the applications nor did the defendants benefit from her actions of embezzlement and misrepresentation.

In denying that portion of the plaintiff's application, the court found that the very purpose of the FIB was to cover losses caused by an officer or director's dishonest or fraudulent acts. The court opined that if only one director or officer was engaged in fraudulent activity that no one else knew about, that was exactly the scenario where the FIB should be triggered. The court found that it would be unjust to rescind the FIB and determined that the defendants were entitled to coverage under the FIB.

Impact: This decision provides a good discussion of how knowledge of a director of her own dishonest acts may not simply be imputed to the principal in determining whether a bond may be rescinded simply because that director may make fraudulent misrepresentations on an application for insurance.

MERGERS AND POLICY COVERAGE

PAUL FIREMAN, ET AL v. TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA
(S.D. Fl., Sept. 21, 2011)

This matter involved an insurance coverage dispute between the defendant insurer and the plaintiffs, PFP Associates LLC (PFP LLC) and Willowbend Development, LLC (Willowbend).

It was alleged that the plaintiffs sustained losses when Arnold Mullen (Mullen), whom the plaintiffs alleged was a joint employee of Willowbend and PFP LLC, allegedly stole tens of millions of dollars from his employers. The plaintiffs contended that they were each covered under the policy or to the extent that the policy did not cover each plaintiff, they argued that the policy, by inadvertence or mutual mistake, failed to conform to the contemplation of the parties and should be reformed.

The defendant insurer argued that the policy did not cover the plaintiffs' losses because a merger involving the named insured terminated the plaintiffs' rights under the policy because Mullen was not employed by an insured party and because an insured did not have liability for the property stolen.

The defendant insurer moved to dismiss the action and contended that the policy did not cover the loss incurred because all claims were extinguished when Willowbend (the named insured) took part in a merger; (2) Mullen was not employed by an insured party; and (3) the money stolen was not owned by an insured party.

Willowbend and Willowbend Golf Management Liberty, LLC (Willowbend Golf) executed a statutory merger in which Willowbend Golf was the surviving party. With respect to the merger, the defendant insurer asserted that the merger constituted an impermissible transfer of rights under the policy. The policy provided that any transfer of rights or duties under the policy without the written consent of the defendant insurer was prohibited. The purpose of this provision was to protect the defendant insurer from increased risk by the non-consensual transfer of a policy to a stranger to that policy. The court found that there was no risk to the defendant insurer where the insured merely transferred the right to collect based on losses that predated the transfer. This was especially true where in a merger, the acquiring entities succeeded to all the rights and liabilities of the acquired company.

With respect to Mullen's employment, the defendant insurer argued Mullen was an employee solely of Paul Fireman doing business as PFP Associates. The defendant insurer contended that the allegations contained in the state court proceeding established that the loss caused by Mullen was not covered by the policy. The plaintiffs rebutted those contentions and argued that state court allegations regarding Mullen's employment with Paul Fireman did not foreclose the possibility that Mullen was also an employee of PFP LLC or Willowbend. The plaintiffs further responded that a court cannot take judicial notice of allegations before another court established their truth. The court found that it could not take judicial notice of the accuracy of factual allegations in documents of other courts, only that that the allegations were made.

The court found that the allegations in the federal court action raised a reasonable expectation that discovery would reveal evidence in support of the claim.

The court also found that the ownership of the stolen funds could not be conclusively established. The court would not use judicial notice to settle issues that the stolen property was owned by Paul Fireman individually and therefore not covered by the policy.

Impact: This decision demonstrates that an insured, under a contract for insurance, can be an insured by virtue of its status as a subsidiary of the named insured and subsequent mergers do not extinguish any claims the subsidiary had prior to the merger.

FEATURED ARTICLE

Is Connecticut Poised for a Relaxation of its Strict Certificate of Good Faith Rules in Medical Negligence Cases in 2012?

The certificate of good faith required by Connecticut General Statutes Section 52-190a in medical negligence cases has been a hot topic in many recent Connecticut court decisions. The issue promises to be at the forefront in 2012 as well because there are several significant proposed amendments to the current statutory scheme that are on the horizon for the coming year.

Connecticut General Statutes Section 52-190a requires that in any civil action alleging negligence by a health care provider, reasonable inquiry must be made to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment

of the plaintiff. To show the existence of such good faith, the plaintiff or the plaintiff's attorney must obtain a written and signed opinion letter authored by a "similar health care provider" stating that there appears to be evidence of medical negligence and include a detailed basis for the formation of such opinion.

Section 52-190a does not specifically define "similar health care provider" but refers to the definition contained in Connecticut General Statutes Section 52-184c. Section 52-184c states that if the defendant health care provider is not board certified and is not a specialist, a "similar health care provider" is one who is licensed by the state and is trained and experienced in the same discipline of practice and has practiced or taught in the same discipline within five years of the incident giving rise to the claim. Section 52-184c further states that if the defendant health care provider is board certified or is a specialist, a "similar health care provider" is one who is trained and experienced in the same specialty and is board certified in the same specialty.

Several recent Connecticut Supreme and Appellate Court cases have dismissed medical malpractice cases due to the plaintiff's failure to comply strictly with the mandates of Section 52-190a and the requirement that the opinion letter be authored by a "similar health care provider." For example, in *Bennett v. New Milford Hospital, Inc.*, 300 Conn. 1, 12 A.3d 865 (Jan. 5, 2011), the Connecticut Supreme Court dismissed the plaintiff's action because the certificate of good faith was authored by a board-certified general surgeon with added qualifications in surgical critical care when the defendant was a physician who specialized in emergency medicine. Additionally, in *Lucisano v. Bisson*, 132 Conn. App. 459, __ A.3d __ (Dec. 13, 2011), the Appellate Court recently dismissed a dental malpractice case because the plaintiff's opinion letter failed to set forth any qualifications whatsoever of its author, thus preventing the court from determining that the letter was, in fact, authored by a "similar health care provider."

In *Bennett*, the Connecticut Supreme Court noted that Section 52-190a sets a higher bar for the credentials of the author of the pre-litigation opinion letter than is set for an expert who would testify at trial pursuant to Section 52-184c. Section 52-184c(d) permits any health care provider to be a trial expert in a medical negligence case if the court is satisfied that he or she possesses "sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience or knowledge shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim." On the other hand, the credentials required for an expert rendering the initial pre-suit opinion letter are much more stringent and specific.

In response to the Connecticut Supreme Court's decision in *Bennett*, the Connecticut legislature proposed Substitute House Bill 6487 during the 2011 legislative session. The proposed bill offered several significant changes to Sections 52-190a and 52-184c. For example, the bill proposed that rather than a "similar health care provider," an opinion letter accompanying a medical negligence case need only be authored by a "qualified" health care provider. Also, rather than the opinion letter including a "detailed basis for the formation of such opinion" that medical negligence occurred, the proposed bill would require only that the opinion letter state one or more specific breaches of the prevailing standard of care. Additionally, the proposed bill makes dismissal discretionary for failure to attach an opinion letter and provides a plaintiff the opportunity to cure such a failure within 60 days of being ordered to do so by the court.

Further, Substitute House Bill 6487 addressed and remedied the distinction noted in *Bennett* – that heightened qualifications are required for an expert authoring the pre-litigation opinion letter as opposed to an expert who would be permitted to testify at trial. The bill proposed an amendment to Section 52-190a that stated that a "qualified health care provider" means a "similar health care provider" as that term is defined in Section 52-184c, or any other health care provider who may testify as an expert pursuant to Section 52-184c(d).

Additionally, there has also been recent debate in the Connecticut courts as to whether the mandates of Section 52-190a apply to other types of cases against health care providers besides medical negligence, such as lack of informed consent claims. For example, in *Shortell v. Cavanagh*, 300 Conn. 383, 15 A.3d 1042 (Mar. 15, 2011), the Connecticut Supreme Court expressly held that Section 52-190a did not apply to a claim of lack of informed consent because that claim is not a medical negligence claim. The court noted that a lack of informed consent claim is based on a lay standard of materiality rather than an expert medical standard

of care. The Connecticut Appellate Court adopted the holding of *Shortell* in *Lucisano v. Bisson*, supra, also finding that an opinion letter under Section 52-190a was not required in a lack of informed consent case.

One version of proposed House Bill 6487 also included language specifically stating that Section 52-190a does not apply to cases alleging lack of informed consent, assault, or simple negligence, thus proposing to codify the rule set forth in *Shortell* and *Lucisano*. However, this language was apparently removed in later drafts of the proposed bill.

These various amendments proposed in House Bill 6487, if passed, would constitute a significant relaxation of the strict rules currently required by Sections 52-190a and 52-184c that benefit health care providers and reduce the number of frivolous lawsuits. As illustrated by the recent court decisions discussed above, this topic continues to be a hot-button issue in Connecticut and courts continue to follow the strict statutory scheme which often results in dismissal of cases.

Although proposed House Bill 6487 died in the Senate at the end of last year's legislative session, this is certainly an area to watch in 2012 as it is believed that the legislature will re-introduce the proposed amendments during the 2012 session. If passed as proposed, the legislation will considerably dilute the thresholds and requirements currently in place, to the detriment of health care providers.

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