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FEATURED ARTICLE

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The *in pari delicto* defense, at first glance, appears to be a potent tool available to defendants named in malpractice lawsuits. The originally common-law defense is derived from the Latin term *in pari delicto potior est conditio defendentis* which, literally translated, means in a case of equal or mutual fault the position of the defending party is the better one.

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DIRECTORS AND OFFICERS

South Carolina Supreme Court Upholds Finding of Oppression to Minority Shareholder

BALLARD v. ROBERSON, THOENNES, THOENNES III, and WARPETH DEVELOPMENT, INC.
(S.C. S.C., August 29, 2012)

The plaintiff formed Warpath Development Inc., as a vehicle for development of a marina on Lake Keowee in South Carolina. When the corporation was formed, it was authorized to issue 100,000 shares common stock. Ballard was the sole stockholder of 40,000 shares. After Warpath entered into a lease for lakefront real property, the plaintiff began to solicit investors for the marina. Ballard eventually entered into a stock purchase agreement with the individual defendants pursuant to which each defendant paid \$1 million in exchange for 20,000 shares of Warpath common stock. A plan for the marina was developed, but the individual defendants became disappointed after learning that the leased land could only accommodate 102 slips instead of the 200 originally projected.

The individual defendants demanded that the plaintiff return their capital investments of \$1 million each. When the plaintiff refused, Ballard was removed as a director, and the remaining three shareholders were elected as directors and officers. Shortly thereafter, and without proper amendment of the articles of incorporation, the board issued an additional 900,000 shares for the purported purpose of raising capital but simultaneously diluting the plaintiff's interest to 2 percent. The plaintiff then commenced suit alleging fraud, breach

of contract, and promissory estoppel. After discovery, the plaintiff amended the complaint to assert shareholder derivative claims, breach of the stock purchase agreement, and allegations of minority oppression. The defendants counterclaimed for fraud, breach of contract, negligent misrepresentation, and violation of South Carolina Code Section 35-1-510 related to the sales of securities.

A jury trial commenced but the jury was discharged after the defendants withdrew their counterclaims with prejudice. The circuit court found sufficient evidence of oppression and ordered defendants to purchase plaintiff's shares at fair market value. The defendants appealed.

The Supreme Court reviewed based upon its own view of the preponderance of the evidence and affirmed. Among the facts which supported the finding of oppression were the unauthorized dilution of the plaintiff's stock, emails among the individual defendants which clearly reflected a desire to oust Ballard, the stated intent of Roberson to hire various members of his family and offer them employee stock incentives, and the failure to communicate the progress of development activities to the plaintiff. In addition, while the plaintiff was re-elected as a director after the lawsuit was commenced, no board meetings were held after his election. The court noted that illegal or fraudulent conduct was not required to demonstrate oppression by the majority. However, two justices dissented and concluded that the evidence was insufficient to demonstrate that Ballard was in "imminent danger of being excluded from returns, despite his exclusion from management."

Impact: This case underscores the importance of complying with corporate

formalities. Failure to do so can be construed as evidence of inequitable conduct.

A Residential Condominium Association Can Be Sued for a Connecticut Unfair Trade Practices Act (CUTPA) Violation

DiDOMENICO v. STRAWBERRY WOODS CONDO ASS'N
(Sup. Ct. Conn., August 2, 2012)

This issue has not been fully resolved by Connecticut's Appellate Court, and is the issue raised by the defendant in its motion to strike the Connecticut Unfair Trade Practices Act (CUTPA) count.

The plaintiffs are the owners of a residential condominium unit in the Strawberry Woods Condominium Association (Association), which was formed under the Connecticut Common Interest Ownership Act. The plaintiffs allege that their unit suffered substantial water damage due to a failed roof system. In addition to the water damage, the plaintiffs allege that there was water infiltration into their unit resulting in mold growth, which has caused a diminution in the fair market value of their unit.

The plaintiffs allege that they made demands on the association for repair of the roof and resulting damage, but that the association refused to take the necessary action authorizing the repair and failed to authorize the pre-renovation tests for asbestos.

The defendant moved to strike the CUTPA count because it fails to allege facts sufficient to support that the association was engaged in trade or commerce as required under CUTPA. The trial court agreed with the defendant and granted the association's motion to strike. In

so doing, the court relied on the only Appellate Court authority in Connecticut on this issue, *Rafalowski v. Old County Road, Inc.*, 245 Conn. 504 (1998). In *Rafalowski* the court held that CUTPA is inapplicable to the managerial activities of the condominium association as these do not constitute trade or commerce.

Since *Rafalowski*, numerous trial courts have discussed this issue. While almost all trial court decisions have found that management duties of a condominium association do not constitute trade or commerce, and, therefore, a condominium association is not subject to CUTPA liability, some trial court decisions hold otherwise by determining that it was the legislature's intent to create an expansive act encouraging litigants to act as private attorneys general and to bring actions that have as their basis unfair or deceptive trade practices.

The *Rafalowski* court looked to the cases dealing with CUTPA liability for attorneys and doctors which held that these professionals are liable under CUTPA for their entrepreneurial or commercial aspects of their profession. The trial court found persuasive this professional versus entrepreneurial dichotomy in connection with the duties of a condominium association and adopted it when deciding the motion to strike.

Moreover, the trial court found one trial court decision that furnished an example of entrepreneurial activities subjecting a condominium association to a CUTPA claim. In that case, the trial court refused to strike a CUTPA count when the plaintiff alleged that the poor maintenance was used as a tactic by the condominium association to effectuate a strategy to purchase condominium units that they

did not already own. In this case, the court determined that the association's advertising of renovated units to members of the public for pecuniary benefit went beyond mismanagement and was an entrepreneurial activity.

Impact. The courts highly scrutinize the allegations in the plaintiffs' complaint when determining if CUTPA has been properly pleaded. With some careful investigation and creative pleading, a typical mismanagement case can be turned into a CUTPA case which, if proved, imposes punitive damages and attorneys' fees.

LEGAL MALPRACTICE

Connecticut Appellate Court Sends Cautionary Reminder to Attorneys About Importance of Attorney Filings in Underlying Proceedings

COYLE CRETE, LLC v. NEVINS
(Conn. App. Ct., August 21, 2012)

Actions against attorneys often stem from an attorney's representation in a previous case. The actual filings made by attorneys during that representation can play a crucial role in the attorney's ability to escape liability and quickly resolve a second action brought against them. In a recent decision, the Connecticut Appellate Court sent a cautionary message to attorneys as to how crucial the contents of these filings can be in a subsequent second action against them. See *Coyle Crete v. Nevins*, 137 Conn. App. 540 (August 21, 2012). In *Coyle Crete*, the plaintiff secured a verdict against the defendant attorney's client. After agreeing to pay the plaintiff on her client's behalf, the defendant was served with a property execution

by one of the plaintiff's third party creditors commanding her to pay those funds to the creditor. Over the plaintiff's objection, the defendant complied with the execution and paid the funds to the creditor.

Anticipating issues with her compliance with the property execution, the defendant then filed with the trial court a motion for determination of a satisfaction of judgment seeking a ruling that despite the payment of the judgment funds to the third party creditor, her client had satisfied judgment. The plaintiff opposed the motion, filing opposition papers and in those papers the plaintiff alleged that while the defendant's client had tendered the correct amount of funds to the third party creditor, the judgment was not satisfied because the defendant's own conduct was improper in handling the judgment funds and tantamount to conversion.

Over the plaintiff's objection and without oral argument or issuing a written opinion, the trial court ultimately granted the defendant's motion.

The plaintiff then commenced a subsequent civil action against the defendant alleging the same claims of the defendant's improper behavior raised in its response to the satisfaction of judgment motion.

The defendant quickly moved for summary judgment in the second action, arguing that because the plaintiff had raised the same issues and claims of her improper behavior on the motion for determination of satisfaction of judgment, and because the court on that motion found that despite these allegations the judgment was satisfied, the court's ruling was tantamount to a ruling that her conduct in handling

the judgment funds was proper and the plaintiff was precluded under the doctrines of res judicata and collateral estoppel from raising these same claims again in a second action.

The trial court in the second action agreed and granted the defendant's motion for summary judgment finding that the plaintiff was precluded under the doctrines of res judicata and collateral estoppel from raising its claims of the defendant's alleged improper behavior in handling the judgment funds based on the other trial court's ruling granting the motion for determination of satisfaction of judgment.

An appeal by the plaintiff followed. On appeal, the plaintiff argued that the trial court improperly applied the doctrines of res judicata and collateral estoppel and granted summary judgment to defendant.

The Appellate Court agreed with the plaintiff and reversed the trial court's decision.

The Appellate Court disagreed that the trial court in the underlying action, in ruling on the motion for determination of satisfaction of judgment, necessarily considered whether the defendant's actions were improper in handling the payment of judgment. The Appellate Court concluded that the only issue that was determined by the trial court in the underlying action on the motion for determination of satisfaction of judgment was whether the defendant's client had satisfied the money judgment by making payment equivalent to actual payment to the plaintiff and that the court in the underlying action did not consider the defendant's alleged conduct such that the plaintiff was precluded from raising its claims.

The court hinged its conclusion on certain facts contained in the documents filed in conjunction with the motion for determination of satisfaction of judgment. First, the court noted that in the motion for determination of satisfaction of judgment filed by the defendant, she argued that the issues raised by the plaintiff surrounding her conduct and whether the funds were subject to an execution of judgment by a third party were irrelevant and ancillary to the question of whether her client had merely satisfied its obligation of payment of judgment. The court hung on this argument to conclude that the defendant's own motion represented that issues regarding her conduct were irrelevant and that the sole issue before the trial court in the underlying action was whether the judgment was paid.

The court also seized on the fact that no reply was filed by the defendant with respect to the arguments raised by the plaintiff's opposition surrounding her conduct. The court noted that the plaintiff filed an objection that alleged malfeasance on the part of the defendant and the defendant never acknowledged or disputed the allegations of malfeasance raised.

On that basis, the court concluded that the trial court in the underlying action could have granted the defendant's client's satisfaction of judgment motion without ever considering the propriety of the defendant's own conduct. In sum, the court concluded that based on the pleadings filed by the defendant, the satisfaction of judgment proceedings were solely related to the very narrow issue of whether her client had satisfied the judgment. The issues of her conduct were outside the scope of that review, completely tangential, and not fully litigated. Thus, the court found

the defendant could not claim that the plaintiff was not precluded from raising these issues again.

Impact: This ruling demonstrates how important attorney filings in the course of the attorney's representation are when that representation becomes the subject of a second lawsuit. The case sends a cautionary message to attorneys to be cognizant of their filings in the course of their representation particularly when they have an inkling that the representation will likely be the subject of further litigation against them.

Legal Malpractice Action Dismissed Based Upon Improper Venue

LAY v. BUMPASS
(M.D. Pa., August 8, 2012)

The plaintiff is a resident of Pennsylvania. The defendant is an attorney whose business address is in Arkansas. After the plaintiff's alleged injury, he hired the defendant to institute a personal injury claim pursuant to the Federal Torts Claim Act, 28 U.S.C. § 1346 (FTCA). In this legal malpractice case, the plaintiff alleges that the defendant failed to timely provide notice pursuant to the terms of the FTCA, which violated the applicable statute of limitations.

The plaintiff hired an attorney with an office in Pennsylvania to file suit. A personal injury action was filed in the Middle District of Pennsylvania, which was dismissed for failure to present a timely claim. Subsequently, this suit followed. The plaintiff argued venue was appropriate in the Middle District based upon diversity jurisdiction.

The defendant filed a motion to dismiss the plaintiff's claim under Federal Rule

of Civil Procedure 12(b)(6) based upon improper venue. The court granted this motion and transferred the case to the Western District of Arkansas. While the FTCA contains a venue provision that permits tort claims only in the judicial district where the plaintiff resides or where the omission complained of occurred, the underlying case is separate from the malpractice claim. Thus, 28 U.S.C. § 1391 applies, which states that in matters based upon diversity of citizenship, a plaintiff may bring a case in:

1. a judicial district where any defendant resides, if all defendants reside in the same state,
2. a judicial district in which a substantial part of the events ... occurred ... and,
3. a judicial district in which any defendant is subject to personal jurisdiction at the time the action commenced

To determine venue, it is not the defendant's contacts with a particular district but rather the location of those events or omissions giving rise to the claim. In this case, the defendant did not solicit the plaintiff's business in Pennsylvania, the defendant did not travel there, the defendant was not admitted to practice law in that state, and did not maintain any business contacts with Pennsylvania. Furthermore, the defendant did not purposefully direct any activity toward that jurisdiction.

Consequently, the plaintiff failed to set forth sufficient contacts to establish jurisdiction in Pennsylvania. The plaintiff hired an Arkansas attorney to prosecute his claim. The court found that this relationship, in itself, does not constitute an intentional direction of activity toward Pennsylvania warranting personal jurisdiction over the defendant.

Impact: In a legal malpractice suit, proper venue is not premised upon where the underlying tort occurred. Venue is generally appropriate in the location where the allegedly negligent legal representation occurred.

MEDICAL MALPRACTICE

Court Permits Expert Testimony In Case Concerning Lack of Informed Consent

DOWNS v. TRIAS
(S. Ct. Conn., Aug. 21, 2012)

The plaintiff alleged that the negligence of the defendant, a gynecologist, resulted in the plaintiff developing ovarian cancer. The plaintiff had an extensive family history of breast cancer which led her to undergo a bilateral mastectomy in 1981 at age 22 to reduce her cancer risk. In 2005, the plaintiff also underwent a partial hysterectomy to remedy a uterine fibroid condition caused by tumors that are ordinarily noncancerous. The plaintiff's cervix and ovaries were not removed. The defendant, who had treated the plaintiff for the prior 20 years, performed the surgery. Prior to the surgery, the defendant advised the plaintiff that although she had an extensive family history of breast cancer, that history, unless coupled with genetic testing which the plaintiff did not have performed, did not point to an increased risk of ovarian cancer. The defendant advised the plaintiff that there was no reason to remove her ovaries. Approximately one year after the surgery, the plaintiff was diagnosed with late stage ovarian cancer which had spread to her abdomen. At the time of her hysterectomy, the plaintiff did not have ovarian cancer. Nevertheless, if

her ovaries had been prophylactically removed at that time, she would not have developed the cancer.

Before trial, the defendant moved to preclude expert testimony regarding the professional standards governing the defendant's duty to inform the plaintiff of her cancer risk and to give related advice, arguing that such expert testimony was inadmissible because the case solely involved the duty to obtain informed consent, which was governed by a lay standard of care. The trial court denied the motion and permitted the plaintiff's experts to testify that the defendant had failed to adhere to the applicable standard of care which required him to appreciate the plaintiff's elevated risk of ovarian cancer, to warn her of this risk, and to recommend that she have her ovaries removed to mitigate this risk, and to document that he had done so. After a plaintiff's verdict was rendered, the defendant appealed.

The Connecticut Supreme Court affirmed the trial court's decision to permit the expert testimony, finding that the plaintiff's complaint alleged medical negligence as well as a claim of lack of informed consent. The court noted the distinction between the two types of cases. An informed consent case is governed by a lay standard of materiality in which a physician is obligated to disclose "material" information, or information that a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy. Expert testimony is not required to determine whether a physician's disclosure satisfies the lay "materiality" test. In contrast, a medical negligence case requires proof of the breach of the standard of care, which required expert

testimony in order to establish what the professional standard of care is.

Thus, a physician has both the duty to exercise medical care in accordance with the prevailing professional standards and a duty to provide patients with material information concerning a proposed course of treatment. The present case involved the relationship between the two obligations and whether a physician may be found liable for breaching the standard of care by failing to provide a patient with information. The court answered this question in the affirmative, noting that a physician has a professional duty to possess or obtain certain medical knowledge as well as an additional “lay” duty to communicate a subset of that information to the patient. A physician who fails to apprise a patient of a certain fact may therefore, in appropriate circumstances, be held liable for failing to know the fact in the first place (medical negligence) and for failing to convey the fact to the patient for consideration in making medical treatment decisions (lack of informed consent).

Impact: This case illustrates that although medical negligence and lack of informed consent are separate causes of action, the same set of facts can give rise to both causes of action.

Personal Jurisdiction Put to The Test in Professional Malpractice Context With a Favorable Outcome For The Professional

MENDEL v. WILLIAMS
(Pa. Super. Ct., 2012)

In *Mendel v. Williams*, the plaintiff/appellant sought review of a decision of the Court of Common Pleas, Philadelphia County, to grant the dismissal of a New Jersey doctor based on lack of personal jurisdiction in Pennsylvania. The Superior Court affirmed the trial court’s decision to dismiss the New Jersey doctor.

In April 2008 two doctors performed laminectomy surgery on the plaintiff, April Mendel, in the Albert Einstein Medical Center in Philadelphia (Einstein). Following the surgery, Mendel returned to her home in New Jersey. Soon thereafter, Mendel suffered from complications from the procedure and went to her local emergency room in New Jersey. The New Jersey ER physicians (the New Jersey defendants) opined that Mendel’s wound was infected. Although Mendel made arrangements to transfer to Einstein in Philadelphia the next morning, she spent the night in the New Jersey hospital where her condition worsened. The following morning, doctors from Einstein performed additional surgery to correct the infected wound. That surgery revealed that Mendel suffered from an abscess that extended to her spinal cord resulting in permanent paralysis below the waist. It was later determined that the failure of Mendel’s New Jersey defendants to diagnose and treat the abscess led to her permanent paralysis.

Mendel filed suit in Pennsylvania against her treating physicians at Einstein as well as the New Jersey defendants. As to her claims against the New Jersey defendants, Mendel alleged that their failure “to timely diagnose and treat her injury, or to warn doctors at Einstein of her worsening condition, caused her paraplegia in Pennsylvania.” In response, the New Jersey defendants filed preliminary objections - Pennsylvania’s version of a motion to dismiss - alleging lack of personal jurisdiction in Pennsylvania. The court granted the motion and Mendel timely appealed.

Although Mendel provided examples of the New Jersey defendants’ business associations with other physicians and hospitals in Pennsylvania, the court disagreed that such activity was sufficient to permit general jurisdiction in Pennsylvania. The Superior Court concluded that the New Jersey defendants did not engage in “continuous and substantial” activities within Pennsylvania for purposes of general jurisdiction under Pennsylvania law. Moreover, the court held that the New Jersey defendants did not engage in a course of conduct “from which it is proper to infer an intention to benefit from, and thus an intention to submit to, the laws” of Pennsylvania. While the injury was discovered in Pennsylvania, the negligence occurred in New Jersey and therefore Pennsylvania’s long arm statute did not extend to the New Jersey defendants. Finally, the court concluded that jurisdiction was improper under due process principles because the New Jersey defendants could not have “reasonably anticipated being called to court in Pennsylvania based on their treatment of Mendel in New Jersey.”

Impact: This decision serves as an important reminder for practitioners to always consider the implications of jurisdiction in professional malpractice matters.

Third Circuit Certifies to New Jersey Supreme Court Two Questions Pertaining to Applicability of New Jersey Affidavit of Merit Statute

NUVEEN MUN. TRUST v. WITHUMSMITH BROWN, P.C.
(3rd Cir., August 16, 2012)

The United States Court of Appeals for the Third Circuit has certified two questions to the Supreme Court of New Jersey pertaining to the state's affidavit of merit statute and requested clarification on whether the law applies to actions requesting damages for alleged acts of professional malpractice or negligence that do not cause personal injuries, wrongful death, or property damage and whether the law applies to intentional torts. The underlying lawsuit involved a loan transaction between Nuveen Municipal Trust and Bayonne Medical Center. In connection with the transaction, Bayonne provided Nuveen with an audit report authored by its accounting firm and an opinion letter authored by its counsel. Several months after the loan was executed, Bayonne filed for Chapter 11 bankruptcy. Nuveen claimed that both the audit report and the opinion letter concealed problems with regard to Bayonne's financial condition and that it would not have entered into the loan had it known of the information which was concealed.

Nuveen filed suit against the accounting firm alleging fraud and against the law firm alleging malpractice. Nuveen did not file any Affidavit of Merit as required

under state law in lawsuits against professionals. The trial court dismissed Nuveen's action while holding that it had failed to timely file affidavits of merit attesting to the viability of its claims directed against each of the professional defendants. On appeal, Nuveen claimed that the New Jersey rule pertaining to the affidavit of merit was a procedural pleading requirement, which notably conflicted with the pleading provisions contained with Federal Rule 8. The Third Circuit rejected this argument. It noted that the purpose of the affidavit is to substantiate the professional malpractice claims based on two initial considerations: (1) whether the action is for damages for personal injuries, wrongful death or property damage (nature of injury) and (2) whether the action is for malpractice or negligence (cause of action);

The court noted that New Jersey law allows the affidavit of merit requirement to be extended or even forgiven if the plaintiff can show, among other things, "substantial compliance" with the affidavit requirement, or at least "extraordinary circumstances" warranting equitable relief. While the Third Circuit found that Nuveen had not met either standard, it was ultimately unable to determine whether the affidavit of merit requirement could be applied to the subject claims at all. The Third Circuit was reluctant to determine whether Nuveen's action triggered the requirement for an affidavit of merit which warranted an analysis of the "nature of the injuries" prong. The court also attempted to determine whether Nuveen's claims for fraud could be regarded as those sounding in either malpractice or negligence under the "cause of action" prong. Here, the Third Circuit noted that the standard for proof of malpractice did not align with the elements of fraud. Moreover,

the court reiterated that the Affidavit of Merit Statute requires submission of an affidavit of merit as a prerequisite for "any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation." It noted that courts in states with similarly worded statutes providing for the submission of some form of independent verification of professional malpractice or negligence actions had arrived at differing conclusions regarding whether their statutes apply to actions for fraud. As a result, both issues were certified to the New Jersey Supreme Court for review.

Impact: The separate questions which the Third Circuit certified will go a long way in determining the scope of New Jersey's Affidavit of Merit statute and may provide a platform for plaintiffs to file professional liability claims without filing an affidavit of merit in certain cases.

ENGINEERING/ CONSTRUCTION MALPRACTICE

Retroactive Statute of Repose Held Unconstitutional as Applied, but Nevertheless Bars Suit by Plaintiffs because Action was Untimely Filed

*OAKTREE CONDO. ASSOC. v. THE
HALLMARK BLDG.*

(Ct. of App. Ohio, August 27, 2012)

The plaintiff, Oaktree Condominium Association Inc., commenced their suit on December 16, 2005 against Hallmark Building Company for failing to install the footers of the building's foundation deeper than 42" below ground, beyond the "frost plane", to prevent the structure from shifting. The building was completed in 1990. Shifting occurred and formed cracks which were discovered in September 2003.

The plaintiff filed an action against defendant alleging malpractice. On remand, the Lake County Court of Common Pleas held that the plaintiff's claims were time-barred by R.C. 2305.131, a statute of repose that bars tort actions against designers and engineers of improvements to real property brought more than ten years after completion of the construction service. The plaintiff appealed.

The Ohio Court of Appeals had to determine if R.C. 2305.131 was unconstitutional as applied to the facts of this case. By its own express terms, R.C. 2305.131 is intended to be retroactive and applies to any action commenced after the effective date of the statute. However, this retroactivity does not apply to actions pending prior to the statute's effective date.

This plaintiff occupied a unique position because it had an injury that was discovered before the statute took effect. To apply R.C. 2305.131 to this plaintiff would essentially take away its right to redress its injury in court. This would be in violation of the Ohio State Constitution. Therefore, as applied to a Plaintiff that had an accrued injury prior to the enactment of this law, the retroactivity portion of the statute was found to violate the Ohio State Constitution.

However, applying a bright-line rule of two years to bring a cause of action, the Ohio Court of Appeals denied Plaintiff's appeal and held that the action was untimely filed. Here, Oaktree discussed the defect at issue with a construction expert on October 27, 2003, well before the April 7, 2005 effective date of the repose statute, but more than ten years after the construction was completed.

The Court of Appeals looked to a Supreme Court precedent interpreting a similar statute of repose, in the case of *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192 (2008). There, the Supreme Court of Ohio determined that a statute of repose cannot be retroactively applied to a plaintiff whose cause of action had already accrued before the effective date of the statute, and as a result, would not be afforded a reasonable amount of time to bring suit. The court further held that a reasonable time for plaintiff to file its claim is two years from its first notice of the injury. Because Oaktree's claim was filed more than two years after it had discovered the injury, its claim was barred as untimely.

Impact: While this holding will only be applicable to a relatively small number of plaintiff's, it serves as an example of how this appellate court struck a balance between the practical need for a

statute of repose to insulate contractors, architects, and developers from liability and the state constitutional protections for plaintiffs who have suffered an injury. Moreover, the opinion itself details Ohio's decade-long struggle to bring their statute of repose into compliance with the Ohio State constitution, demonstrating the legislature's awareness of the need for such statutes.

FEATURED ARTICLE

The *In Pari Delicto* Defense in the Context of Accounting Malpractice Cases - Potent Weapon or Fool's Gold?

Introduction

The *in pari delicto* defense, at first glance, appears to be a potent tool available to defendants named in malpractice lawsuits. The originally common-law defense is derived from the Latin term *in pari delicto potior est conditio defendentis* which, literally translated, means in a case of equal or mutual fault the position of the defending party is the better one. The *in pari delicto* defense has been applied by the courts in a wide variety of cases, but one very common scenario where the defense is trotted out is in the context of malpractice claims brought against accountants. At the same point, despite large amounts of ink being spilled by the courts attempting to explain the *in pari delicto* defense, it still remains a muddled, complex and sometimes downright confusing area of law. As the Third Circuit Court of Appeals recently explained, "[i]n *in pari delicto* is a murky area of law" comprised of "an ill-defined group of doctrines that prevents courts from becoming involved in disputes in which the adverse parties are equally at fault." The law of Pennsylvania

stands not only as a prime example of the confusion that surrounds the *in pari delicto* defense, but also illustrates how the doctrine continues to evolve within the framework of accounting malpractice claims.

Pennsylvania Case Studies

Specifically, the Pennsylvania Supreme Court recently affirmed in, *Official Comm. of Unsecured Creditors of Allegheny Health Educ. and Research Found. v. PriceWaterhouseCoopers, LLP*, 989 A.2d 313, 333 (Pa. 2010) (AHERF), that the doctrine of *in pari delicto* is still a viable defense to an accounting malpractice claim. In order for this defense to be triggered, the bad acts of the agent(s) or officer(s) who initially engaged in the improper or illegal conduct must be imputed to the plaintiff asserting such a claim. However, the AHERF opinion created a clear demarcation between cases involving third parties who acted in good faith and those situations where the defendant either participated, or intentionally attempted to conceal the agent's wrongful conduct. Under AHERF, only an auditor that acted in good faith may invoke the *in pari delicto* defense to a malpractice claim by imputing the agent's or employee's acts to the plaintiff or principal.

The purpose of the AHERF decision was to provide both guidance and clarification on the proper application of the *in pari delicto* defense in accounting malpractice cases. While this may have been the driving force behind the decision, there is scant evidence that this goal was achieved. Instead, the courts in Pennsylvania are continually struggling with the doctrine's application at least against the backdrop of ruling upon dispositive motions such as motions to dismiss and for summary judgment.

The court's opinion in *Bechtle v. Master, Sidlow & Assocs., P.A.* (E.D. Pa. 2011) represents one of the first decisions that has evaluated the *in pari delicto* defense since the AHERF decision. A court-appointed receiver, on behalf of various investors, filed a malpractice claim against the outside auditors of a defunct investment firm. The underlying investment firm had operated a "Ponzi scheme," but the accounting firm, while this was taking place, continued to issue clean audits of the investment firm's financial statements. The accounting firm filed a rule 12(b)(6) motion to dismiss the complaint on the grounds that all the claims within it were barred by the doctrine of *in pari delicto*. The court, while recognizing the continued viability of the *in pari delicto* defense in the context of auditor malpractice cases under Pennsylvania law, denied the motion to dismiss largely on the grounds that this issue implicates a fact sensitive inquiry which, in the absence of discovery, was not ripe for disposition at the pleadings stage. The court, in large part, chose to punt on the issue at the motion to dismiss stage, thereby guaranteeing that the accounting firm named as a defendant in the lawsuit would be forced to engage in protracted discovery or settle the case early to avoid the costs associated with discovery.

Analysis & Discussion

The lessons that should be learned from the meandering journey of the *in pari delicto* defense, under Pennsylvania law, are clear. The term *in pari delicto* should invoke cautious optimism in the minds of attorneys representing accountants in malpractice lawsuits. First, the defense, while still viable in many jurisdictions, including Pennsylvania, is available in a limited set of factual scenarios; namely, the plaintiff or its agents and employees

must have engaged in improper, inequitable or illegal conduct. Second, the proper application of the defense implicates a number of moving parts that, in many instances, center around a fact sensitive inquiry. This, in reality, means that the chances an accounting malpractice case will be dismissed early on in the litigation process, based upon the *in pari delicto* defense, are somewhat slim. Third, the *in pari delicto* defense is best described as a work in progress that is continually being tweaked and fleshed out by the courts.

To circle back to the question posed by the title of this article, the *in pari delicto* defense, is both a potent weapon and fool's gold. The defense is a powerful tool in the sense that it may be used as a pressure point, during the course of litigation, to negotiate a potentially more favorable settlement. Moreover, through carefully tailored discovery, a defendant may be able to compile all the information that is necessary to file for and succeed upon a summary judgment motion founded upon the *in pari delicto* defense. On the flip-side of the coin, the *in pari delicto* defense can be characterized as fool's gold because of the seemingly low probability that a defendant will be able to get out of a malpractice case, in the early stages, by filing a dispositive motion founded upon this defense. The more likely result is that the court will defer ruling on this issue until the parties have engaged in the discovery process. In short, the *in pari delicto* defense is a powerful tool available to attorneys representing accountants in malpractice lawsuits in certain factual scenarios, but it is by no means a cure-all for the issues and potential points of exposure that may arise in such cases.

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