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THE NEW CERTIFICATE OF MERIT RULES: WILL FRIVILOUS LITIGATION BE DIMINISHED BY THIS NEW "PUT UP OR SHUT UP" PROCEDURE?

By Richard J. Davies, Esquire

Introduction

When driving a car, maintaining our property, and interacting generally with other members of the public, we operate with a fairly good understanding of what is reasonable care . . . what we should and should not do.

However, when we consider reasonable care in a professional setting, when we consider conduct governed by specialized learning and experience, we lose that implicit sense of right and wrong, unless we happen to be one of the specialists in that particular setting. When you are not one, you are just another "layman".

Yet, regardless of the subject of a lawsuit, there is no requirement of specialized learning for a juror who sits in judgment of the professional behavior of a defendant brought to court by a plaintiff complaining about that behavior. In fact, lawyers often strike from the jury pool persons with specialized learning in the field which is the subject of a lawsuit because the lawyers fear the jurors may rely too heavily on that juror's viewpoint.

So how does a jury reach a rational decision – one guided by an understanding of what is right and wrong according to the standards of behavior for that particular professional? The parties hire experts with specialized knowledge of the profession who testify in support of their positions.

Unfortunately, too often the party making a claim of professional malpractice and his counsel do not retain an expert to evaluate the case until they have set in motion very expensive and time-consuming legal machinery. This poorly considered rush to litigation compels the defendant professionals to incur legal fees that substantially disrupt their practices with meritless claims that might not have been brought had they first been evaluated by an expert. Recently, and prominently, the consequences of such frivolous claims have been the subject of the nightly news and other media. Few of us do not know about the medical crisis posed by physicians claiming they must move their practices from Pennsylvania to find affordable mal-

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A Note From The Editors:
This Bulletin addresses recent developments affecting Design Professionals as well as business concerns as important as the specific professional and technical issues they face.

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practice coverage.

There have been several attempts to enact legislation to address this problem by limiting or barring recovery of certain types of damages but our legislature has not passed such legislation.

Apparently, in recognition of these problems, the Pennsylvania Supreme Court has acted by promulgating new procedural rules which it is hoped will dampen the flow of frivolous claims. *These rules affect malpractice claims against architects and engineers, as well as physicians.*

These rules are procedural in nature and not substantive; that is, they do not create or extinguish rights or remedies. Rather, they create procedures to assure that plaintiff's claims have been reviewed by a professional and certified to be credible before a suit can proceed.

These new rules have come to be known as the *"Certificate of Merit Rules"* because one of the new procedural requirements is that a party making a claim of professional liability must, in most cases, produce a certificate signed by him or his attorney stating that an appropriately licensed professional has supplied a statement that *there exists a reasonable probability that the licensed professional has deviated from the applicable standard of care for that professional and has caused harm to plaintiff.*

Similar procedural rules were enacted in New Jersey several years ago and the perception is that they have aided somewhat in controlling frivolous claims.

The Pennsylvania Certificate of Merit Rules

These rules were enacted by an order dated January 27, 2003 and became effective immediately. In a highly unusual move, the rules were promulgated without prior distribution to, and thus comment from, the bar or other interested groups. Pennsylvania Supreme Court believed that immediate promulgation, without prior distribution and comment, was "required in the interest of justice and efficient administration." The current medical malpractice crisis was certainly one of the motivations for this quick action, but *these new rules apply to all actions in which a professional liability claim is asserted against a licensed professional, and licensed professionals are defined to include architects, engineers and land surveyors,* Pa.R.C.P. 1042.1.

There are two new basic requirements set forth in the rules. The first new requirement is that a plaintiff filing a complaint asserting a professional liability claim must identify each licensed professional against whom he is asserting such a claim, and do so by setting forth in the complaint the following statement:

> Defendant____________________ is a licensed professional with offices in ____________________ County, Pennsylvania. Plaintiff is asserting a professional liability claim against this defendant.

Although you might not think this requirement particularly useful, those of us who regularly represent architects and engineers are often faced with a complaint for which the allegations do not clearly allege professional liability; rather, they assert vague claims of negligence or breach of contract. This vagueness can create a problem when the design professional seeks insurance coverage for the claim and the professional liability and GL carriers argue about whether a professional liability claim has been asserted, since the carrier's decision to cover is driven by the "four corners of the complaint" and the assessment of whether or not that complaint makes claims of professional liability.

Now, a plaintiff will have to expressly state whether he or she is asserting a professional liability claim, and if plaintiff does not clearly do so then the licensed professional may seek to have the complaint dismissed, or at least compel plaintiff to amend it to clearly state whether or not a professional liability claim is being asserted.

The second new requirement is the production of a certificate of merit. According to the new rules, in any action "based upon an allegation that a licensed professional deviated from an acceptable professional standard," the plaintiff or counsel must file with the complaint, or within sixty (60) days after its filing, a certificate of merit signed by the plaintiff or counsel stating one of the following:

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm; or

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard [and in that case certificates of merit must be filed as to the other licensed professionals upon whom defendant's liability is based]; or

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim [that is, the malpractice was so obvious you do not need the help of an expert to appreciate it].

Pa.R.C.P. 1042.3.

Such a certificate must be filed as to each licensed professional against whom a professional liability claim is asserted. Even a defendant must produce such a certificate if he asserts a counterclaim of professional liability against the plaintiff. However, such certificates are not required of a defendant who joins a licensed professional (e.g. an architect who joins his consulting engineer) if he bases his claims against that licensed professional on the acts of negligence alleged by the plaintiff.

This certificate must be produced with the complaint or within sixty (60) days after the filing of the complaint. If it is not, the licensed professional can enter a judgment of non-pros which procedure has the effect of dismissing plaintiff's claims against that defendant.

If plaintiff does not file the required certificate with the complaint but instead chooses to wait sixty (60) days, then the professional does not need to file his answer to plaintiff's complaint, thereby incurring the costs of furthering the litigation, until plaintiff produces the required certificate; defendant then has twenty (20) days after the filing of the certificate to answer.

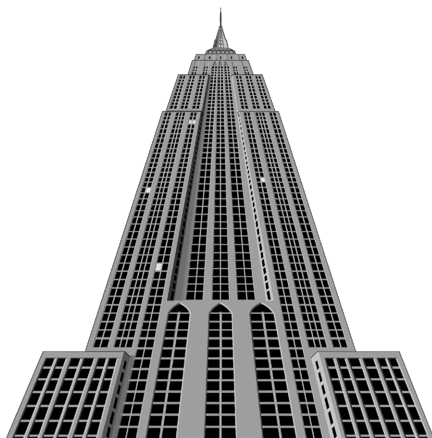
A limited exception to this deadline for submitting the certificate exists to assist a plaintiff who has sought counsel shortly before a statute of limitations is about to expire, or whose claims require for their assessment documents not available to the plaintiff. In such cases a plaintiff or his counsel can obtain an extension of time for securing the required expert's statement and filing the required certificate. Yet, the court's agreement to such an extension of time must be based upon "good cause".

Additionally, and importantly, the new rules prohibit a plaintiff from obtaining any discovery, except the production of documents and the entry upon property for inspection, from the licensed professional until plaintiff has produced the required certificate.

These rules have the beneficial effect of avoiding significant litigation expenses if, in the end, plaintiff is unable to locate an expert who can support the claims. While this may not seem a significant benefit, from our experience we know that very substantial expenses can be incurred responding to a complaint and discovery early in the case.

Conclusion

The jaded among us who have been subjected to frivolous claims may say that the new rules will have no real impact because there are too many hired guns who will say what is needed to support a claim. Others will worry about the exception that no expert's statement is needed when malpractice is clear. However, experts do not work for free and plaintiffs' counsel, typically, are motivated by the profit which may be generated by a lawsuit, not simply by the process of initiating a lawsuit. Thus, if the claim is not that strong then it might not be worth the cost of an expert. Also, in addition to the certificate of merit rules, the Pennsylvania Supreme Court has recently enacted a procedural rule similar to Federal Rule 11 which provides that every pleading must be signed by at least one attorney of record, in that attorney's individual name, and that by signing the pleading the attorney certifies that "to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, . . . the claims . . . are warranted by existing law . . . [and that] the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery."



Pa.R.C.P. 1023.1. If the court finds that an attorney has violated that rule the court can impose sanctions including the payment of a penalty or of reasonable attorney's fees and the expenses incurred as a result of that violation.

Finally, there are very few cases for which the malpractice is clear and the courts are capable of recognizing a case which requires an expert's support, and of dismissing such a case without it. A plaintiff relying upon this provision takes a substantial risk that the action will be dismissed.

There may be unscrupulous attorneys who would sign a certificate stating that an expert has provided the required statement when in fact no such statement has been produced. However, the new rules provide for sanctions against an attorney who does so, and permit a defendant who has been dismissed from the case (through a voluntary dismissal, a favorable verdict, or an order of the court) to compel the plaintiff to produce the statement of his purported supporting expert so that defendant can test the validity of the certificate.

This new set of rules will not end frivolous litigation, but we hope that it will at least diminish it.

Major Changes Proposed to Fair Labor Standards Act (FLSA) Regulations covering Overtime Wages: Addressing the Economic Realities of the 21st Century Workplace

By: Richard L. Bush, Esquire

As you may know, the FLSA covers non-exempt employees and requires they be paid wages or salary at the rate of time and one-half for all time worked in excess of 40 hours in any work week. The federal law also provides for several types of employee classifications that are *exempt* from the overtime provisions of the Act.

For the first time in more than 50 years, the U.S. Department of Labor (DOL) has proposed sweeping new regulations under the FLSA, published in the Federal Register on March 31, 2003, many of which are beneficial to employers. The new regulations are subject to a 90-day public comment period only and could take effect as early as the third/fourth quarter of this year.

Key Features of Proposed Regulations

- For the *professional* employee exemption, the proposed regulation requires either knowledge of an advanced type in a field of science or learning acquired through course of specialized instruction *or* the equivalent of knowledge and skills gained through a combination of job experience or military training and course of instruction, thus relaxing the requirement of possessing a bachelor's degree from a university. The new primary duties for the professional exemption are:

  creative professionals (whose primary duty consists of work that is original and creative in character in a recognized field or artistic endeavor and the result of which depends primarily on the invention, imagination or talent of the employee), and

  learned professionals (whose primary duty of performing office or non-manual work requiring advanced knowledge in a field of science or learning customarily acquired by either a course of specialized intellectual instruction OR acquired by an equivalent combination of intellectual instruction and work experience (this latter standard recognizes the exempt status "professional" position for an employee who has several years of engineering or architecture study at a university + several years of experience in the field of engineering, even though the employee does not have a bachelor's degree in engineering or architecture);
- Dramatically changes the salary level for exempt status, increasing it from $155 per week to $425 weekly (or $21,100 annually);
- Modifies the definitions of FLSA's "white-collar" exemptions for executive, administrative and professional positions by adopting a "primary duty" test in place of the "long test" which restricted exempt employees from devoting more than 20% of their time performing non-exempt duties;
- Permits employers to deduct the salary from exempt employees – without losing their exempt status – for full-day absences for disciplinary reasons due to infractions of workplace conduct rules (e.g., suspensions without pay because of sexual harassment, workplace violence and safety issues), thus treating exempt employees more fairly and uniformly as non-exempt employees who commit such infractions.
- Creates a new "safe harbor" provision, replacing the "window of correction" (where an employer makes an inadvertent impermissible salary deduction of an exempt employee), protecting an employer from losing the exemption for its salaried workforce where it: has a written policy prohibiting improper deductions, notifies employees of that policy, and reimburses employees for any improper deductions, so long as the improper deductions are not repeatedly and willfully violated.

Steps Employers Need to Consider Now

Employers should consider taking the following steps before the proposed regulations become final: 1) conduct an internal wage & hour audit; 2) review existing practices; 3) revise position descriptions; and 4) develop new policies.

Additional information about the proposed FLSA regulations covering overtime wages can be viewed at the DOL's website: www.dol.gov

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