



The Global Legal Network
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UPDATES ON PROFESSIONAL LIABILITY LAW:
WHAT YOU MAY HAVE MISSED WITH
EVERYTHING GOING ON
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PRESENTERS



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OVERVIEW

- LEGAL MALPRACTICE UPDATE
- BROKER/AGENT UPDATE
- D&O UPDATE



CURRENT
LEGAL MALPRACTICE
TRENDS



LEGAL MALPRACTICE TRENDS

- Increase in claim frequency
- Increase in severity of claims
- Increase in larger multimillion dollar payouts
- Increase in defense cost
- Conflicts remain most common malpractice error
- Business Transactions and Corporate & Securities had most claims

CONFLICTS OF INTEREST

- *Revolaze, LLC v. Dentons US LLP, et al. (16-cv-01080)*
- Underlying patent matter in which Dentons was disqualified because it was deemed to have represented both the plaintiff and defendant in ITC matter.
- **Outcome:** \$32.3 Million jury verdict for plaintiff
- **Takeaway:** Proceed with caution under Rule 1.7

CONFLICTS OF INTEREST IN A TRANSACTIONAL MATTER

- *CCC Atlantic, LLC v. Rosenzweig*, 2020 WL 1150042 (USDC New Jersey March 10, 2020)
- Commercial property developer defaulted on loans and lender foreclosed.
- Developer claims its attorneys failed to negotiate better terms of forbearance agreement and failed to recognize a conflict of interest in representing both a lender and the developer

CCC ATLANTIC, LLC

- **Outcome:** Motion to dismiss granted because no evidence the other side of the transaction would have accepted a better deal and violation of ethics rules is not a basis for a claim of malpractice.
- **Takeaway:** Good defense outcome despite the facts.

CLAIMS AGAINST EXPERT WITNESSES

- *Estate of Voutsaras v. Bender*, (944 N.W.2d 677, Michigan Supreme Court June 26, 2020)
- Plaintiff sued her own legal expert retained by her counsel for professional malpractice.
- **Outcome:** Court of Appeals reversed trial court's dismissal based upon the doctrine of witness immunity.
- **Takeaway:** Concern for liability for those who serve as experts and be careful addressing issue in engagement letter with expert.

EXPERT WITNESS AFFIDAVITS

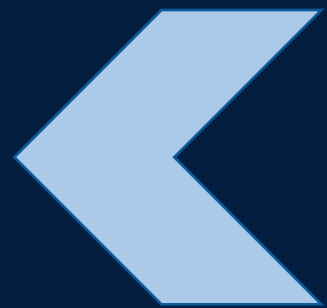
- Georgia law requires legal malpractice lawsuits to be accompanied by an expert affidavit. Plaintiff's lawyer supports a legal malpractice lawsuit with an affidavit from a member of his own firm.
 - A. The Court should dismiss the lawsuit because this presents a conflict.
 - B. The lawsuit should not be dismissed. It is permissible for Plaintiff's counsel to utilize an affidavit from another member of his firm.

LEGAL MALPRACTICE EXPERT

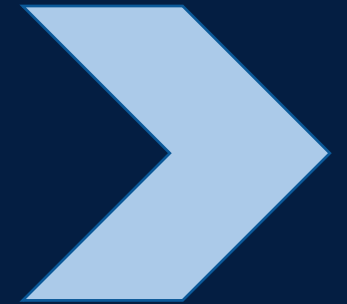
- *Mitchell v. Parian* (Georgia Court of Appeals, June 12, 2020)
- Affidavit supporting claims for legal malpractice was from plaintiff's counsel's law partner.
- **Outcome:** Court of Appeals found no conflict of interest and reversed trial court's dismissal of the claim.
- **Takeaway:** Erosion of the integrity of a legal expert and statute requiring expert affidavit in support of a legal malpractice claim.

CLIENT SUES LEGAL MALPRACTICE CARRIER

- *Irwin v. Texas Lawyers Insurance Exchange (September 2020)*
- Plaintiff was told by the attorney for the insurance company not to file a claim in connection with a real estate transaction and the statute of limitations ran on the malpractice claim.
- **Outcome:** Too early to tell.
- **Takeaway:** No duty to adversary.



LAW FIRM DATA BREACH



LAW FIRM DATA BREACH

- A law firm's computer system is "hacked" and a client's information is posted on the internet. Could the law firm be liable for breach of fiduciary duty?
 - A. No liability. The law firm did not breach any recognized fiduciary duties
 - B. Definitely liable. A company's failure to protect information is a breach of fiduciary duty
 - C. It depends. The law firm could be liable if it failed to take agreed upon steps to protect information

LAW FIRM DATA BREACH

- *Wengui v. Clark Hill PLC*, 440 F.Supp.3d 30 (D.D.C. Feb. 20,2020)
- Hackers breached law firm's computer system and published client's confidential information on internet
- The Court denied law firm's Motion to Dismiss breach of fiduciary duty and legal malpractice claim
- Plaintiff adequately pled law firm misrepresented security precautions



INSURANCE BROKER'S
DUTY TO ADVISE



INSURANCE BROKER'S DUTY TO ADVISE

- The past three years Bob Broker procured insurance coverage for Appleseed Farms. Until an employee was recently injured, Appleseed Farms did not know state law required worker's compensation coverage. Appleseed Farms now has no coverage for that accident.
 - A. Bob Broker had a duty to inform Appleseed Farms it was required by state law to obtain this coverage
 - B. Bob Broker had no duty to inform Appleseed Farms that state law required worker's compensation coverage

INSURANCE BROKER'S DUTY TO ADVISE

- *Merrick v. Fischer, Rounds & Associates, Inc.*, 305 Neb. 230 (2020)
- Client alleges Broker failed to advise of Nebraska's statutory requirement for employers to carry worker's compensation insurance
- Supreme Court of Nebraska: Broker did not have a duty to advise employer of its worker's compensation obligations

INSURANCE BROKER'S DUTY TO ADVISE

- Other states are consistent with Nebraska
 - *Gemini Ins. Co. v. Meyer Jabara Hotels, LLC*, --- A.3d ---; 2020 Pa.Super. LEXIS 277 (April 3, 2020) : Generally, brokers have no duty to advise clients about the client's insurance needs
 - *Yenchi v. Ameriprise Financial, Inc.*, 639 Pa. 618, 161 A.3d 811 (2017): However, a broker may have “confidential relationship” with client giving rise to enhanced duties of care

INSURANCE BROKER'S DUTY TO ADVISE

- *Wakefern Food Court v. BWD Group, LLC, 2020 N.J. Super. Unpub. LEXIS 630 (App. Div. April 8, 2020):* Verdict against broker upheld for negligently presenting a quote that included a large deductible.
- This case hinged on communications by broker at the time the client elected to renew policy

CURRENT TREND – BUSINESS INTERRUPTION CLAIMS

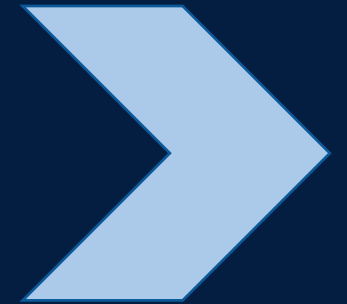
- Currently, Plaintiffs are alleging brokers did not procure policy that fully covered business income losses in connection with pandemic
- However, brokers are not required to predict pandemics and advise customers to purchase specific coverage, unless customer requests such coverage

CURRENT TREND – BUSINESS INTERRUPTION

- *Vandelay Hospitality Group LP v. The Cincinnati Ins. Co.*, 3:20-CV-1348-D (N. Dist. Tex., Aug. 18, 2020)
- Plaintiff alleged broker negligently misrepresented policy would cover losses



D & O CLAIMS UPDATES



CAREMARK CLAIMS

- *Marchand v. Barnhill, 212 A.2d 305 (Del. 2019): “Caremark”* case allowed to proceed against Blue Bell Ice Cream Company when complaint sufficiently plead directors did not have adequate board oversight for “mission critical” food safety performance.
- “If *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty”.

CAREMARK CLAIMS

- Boards have oversight duties and can be liable if they leave compliance and oversight entirely to management.
- Implications in terms of cybersecurity and privacy suits

COVID-19 AND D&O CLAIMS

- Like any major financial crisis or event- it will result in an uptick in D&O claims
- But where are those claims going to come?

COVID-19 AND D&O CLAIMS

- Claims relating to companies that experienced COVID-19 in their facilities: Norwegian Cruise Lines, GEO Group
- Claims involving companies that made misrepresentations about the company's ability to gain from the pandemic: Inovio
- Claims involving companies that have experienced financial hardships due to the pandemic: Colony Capital



HEALTHCARE PROFESSIONALS

HEALTHCARE PROFESSIONAL LIABILITY UPDATES

- Intuitively COVID and the lives lost and people harmed seems like grounds for an upswell in healthcare professional liability claims;
- Particularly true in the case of nursing homes, which have been hard hit;
- To counter this, many states have enacted qualified immunity statutes in regards to claims arising directly from COVID
- Examples: NJ Exec. Order 112, NY Exec Order 202

HEALTHCARE PROFESSIONAL LIABILITY UPDATES

- Even with enhanced liability shields, Plaintiff's lawyers find a way:
- *Estate of Joseph Maglioli v. Andover Subacute Rehabilitation Ctr.* (Superior Court of New Jersey, Sussex County 2020), case no. SSX-L-000176-20; (gross negligence exception);
- *Gill et al. v. PA Dep't of Health* (E.D. P.A. 2020), case no. 2:20-cv-02038; class of Plaintiffs sued a long-term care facility alleging violations of federal laws, including ADA;
- *Sniadach v. Walsh*, 3:20-cv-30115 (D. Mass 2020); Fourth Amendment Claims

HEALTHCARE PROFESSIONAL LIABILITY UPDATES

- For physicians telemedicine provision is a hot topic in terms of insurance coverage; generally policies cover this, but a physician needs to be aware of licensure issues

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PLEASE CONTACT ONE OF THE PRESENTERS



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