

PRACTICE TIPS FOR SUBROGATION COUNSEL
IN THE NEW JERSEY STATE COURT

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Familiarity with the New Jersey Court rules will enable subrogation counsel to successfully prosecute claims in the State Courts. There are many idiosyncracies of New Jersey State Court practice that must be mastered by subrogation counsel. This presentation will review four peculiarities of New Jersey practice that subrogation practitioners should understand and employ to maximize recovery from cases litigated in the state courts. These four areas are (1) affidavits of merit; (2) the entire controversy doctrine; (3) the creation of business court; (4) mediation.

(1) Affidavits of Merit.

Subrogation counsel must follow certain steps when prosecuting claims against licensed professionals in the State of New Jersey. On June 29, 1995, the State Legislature enacted N.J.S.A. 2A:53-2 et seq. which requires the filing of Affidavits of Merit in any suit filed against a licensed professional as defined by statute. This law was one of several "tort reform" laws passed with regard to professional liability.

The statute specifically states:

In 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 professional occupation, the plaintiff shall, within sixty days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person 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 or occupational standards or treatment practices.

The court may grant no more than one additional, not to exceed sixty days, to file the affidavit period pursuant to this section upon the finding of good cause.

The person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion by the person's practice substantially to the general area or specialty involved in the action for a period of at least five years.

The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

N.J.S.A. 2A:53A-27.

The statute also states that if a plaintiff fails to provide an affidavit or a statement in lieu thereof, it shall be deemed a failure to state a cause of action. N.J.S.A. 2A:53A-29. The case will then be subject to dismissal. Kornblatt v. Barow, App. Div. No. 263-96T3 (approved for publication July 7, 1977), certific. pending and emergent stay granted, App. Div. No. A-0263-96.

One significant caveat to the mandatory filing requirements of the statute exists. If there are records in the possession of the defendant, which are necessary for the preparation of the affidavit, the claimant must identify these records early and request them in writing. The writing must be sent by certified mail or personal service, and the claimant must allow forty-five days for the defendant to reply. If the defendant produces no records, the claimant may thereafter file, within the initial sixty days, a statement, in lieu of affidavit, noting the defendant's failure to provide records necessary for the filing of the affidavit. Unfortunately, neither the statute nor the courts have addressed the issue of whether an affidavit must be filed if records are produced at a later date. As a precautionary measure, an affidavit should be filed immediately after records are produced.

The lead case interpreting the statute is Kornblatt v. Barow, supra. The Kornblatt case involved a legal malpractice cause of action. The claimant failed to submit a timely affidavit; and a certification later submitted was rejected by the court.

The Kornblatt court first noted that the term "property damage" includes both damage to real and personal property. The court defined "personal property" as including all tangible and intangible property, including a monetary loss. Consequently, claims for business interruption would seem to fall within the definition of property damage.

The court next noted that a "certification" is not an acceptable substitute for an "affidavit". Moreover, the court noted that the affidavit submitted must have legal sufficiency, including a specific statement that "there exists a reasonable probability that the care, skill and

knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint fell outside acceptable professional or occupational standards or treatment practices. Also, the affidavit must be more than a "net opinion" that the [defendant] wronged the claimant. The affidavit, according to the Kornblatt Court, must be specific as to the standard for care required and how the defendant deviated from that standard. The affidavit also must state that the affiant has no financial interest in the outcome of the case.

The most significant aspect of the case involved the court's strict construction of the deadline dates that must be met. The Court found that only one additional period of time is permitted under the statute. otherwise, the case will be dismissed with prejudice since a failure to provide the affidavit is not a mere technical violation, but rather a direct non-compliance with the statutory mandatory.

One issue not addressed by Kornblatt is the constitutionality of the statute to the extent that it infringes upon the Supreme Court's rule-making powers to set dates that expert reports must be furnished. Furthermore, Kornblatt did not identify how a defendant must act when it asserts a cross claim for contribution or indemnification based upon claims against a licensed professional. Finally, the court did not resolve the issue of whether an affidavit is necessary in a "common knowledge" case where an expert is not needed at trial.

Overall, subrogation claims asserted against accountants, architects, or engineers (as well as medical practitioners) must specifically comply with the mandate of this statute pending further clarification from the courts. Consequently, before suit is instituted, it is advisable to have an expert prepare the appropriate affidavit of merit so that a timely submission can be made.

(2) Entire Controversy Doctrine.

Of the many peculiar procedural rules in the State of New Jersey, the "Entire Controversy Doctrine", codified at R. 4:30A, has been an anathema to state practitioners. Over the

past several months, the doctrine has been both expanded and restricted by the State Supreme Court. The future of the doctrine is uncertain.

The entire controversy doctrine is a common law doctrine unique to New Jersey. The doctrine requires "the joinder virtually all causes, claims and defenses relating to a controversy between the parties engaged in litigation". Codgell v. Hospital Center at Orange, 116 N.J. 7, 16, 568 A.2d 1169 (1989). The codified rule states:

Non-joinder of claims or parties required to be joined by the Entire Controversy Doctrine shall result in the preclusion of the omitted claims to the extent required by the Entire Controversy Doctrine

In Codgell, the Court officially embraced the notion that the Rule required not only the joinder of all related claims between the parties but also the joinder of all persons who have a material interest in the controversy. Cases that followed echoed Codgell's sentiments. Circle Chevrolet v. Giordano, Halleran & Ciesla, 142 N.J. 280, 662 A.2d 509 (1995), marked the furthest extension of the doctrine. In Circle Chevrolet, the plaintiff filed a malpractice claim against its former attorney. The Supreme Court dismissed the case ruling that the entire controversy doctrine does not have an exception for legal malpractice claims. The Court found that a party must bring a legal malpractice claim against an attorney in an underlying action even if the party is required to waive attorney/client privileges.

Circle Chevrolet was overruled recently by Olds v. Donnelly, _____ N.J. ____ (July 16, 1997). The Olds Court held that the party joinder requirements of the entire controversy doctrine do not extend to attorney malpractice claims.

Although Olds involves a retreat from the harsh application the entire controversy doctrine, certain claims can still be subjected to the Rule. For example, in Prevratil v. Mohr, 145 N.J. 180, 678 A.2d 243 (1996), the Supreme Court of New Jersey refused to grant exception given the entire controversy doctrine for litigants represented by insurance counsel in the initial action.

Although the case concerned only an insured's right to maintain a personal injury action subsequent to the settlement of automobile negligence action in which he was a defendant, the decision went well beyond the facts of the case. The Court applied the doctrine to property subrogation cases as well. The Court suggested that insurance companies and their counsel take the following precautionary measure to avoid the doctrine's application:

- (1) notify the insured(s) of the requirement of mandatory joinder;
- (2) explain that the insureds must join all related claims in the pending suit; and
- (3) advise the insured(s) of the need to seek the advice of personal counsel regarding affirmative claims.

Although the doctrine clearly applies to automobile property subrogation claims, there is authority for the proposition that the doctrine should not preclude a subrogee/insurer from pursuing its claims where the subrogee/insurer is unaware that the insured has brought a prior claim. Ohio Casualty v. Meadowlands Toyota, 295 N.J. Super. 271, 685 A.2d 7 (App. Div. 1996). In Meadowlands, an insured brought a claim against an automobile repair shop for damages of the contents of his automobile and related property damages. The Court found that the insured's \$60 recovery in that action did not later bar the insured's insurance carrier from bringing a subsequent suit against the shop for its net subrogation loss.

An issue not resolved by the Courts is whether a property insurer who contests coverage for a loss is obligated, under the entire controversy doctrine, to assert any potential subrogation claim it may have against third-parties in the event that coverage is established within the coverage action. Although a subrogation claim may not accrue until an insurer has made payment, there are cases that reject technical accrual trigger as a prerequisite for asserting a party's claims. Buck v. McDonnell, 300 N.J. Super. 158, 692 A.2d 108, 110 (App. Div. 1997) (indemnification or contribution claims must be brought within the initial action). one alternative carriers may elect is notification to the Court of its potential subrogation rights, and a request that subrogation claims be reserved. Interchange State Bank v. Beglia, 286 N.J. Super. 164 (App Div.

1995) (holding that the court has the right to direct reservation of claims against existing or unjoined parties for later action and that the entire controversy doctrine does not apply when the court has done so or was likely to have done so).

Overall, it appears that the State Courts are beginning to restrict the overbroad applications of the entire controversy doctrine. However, the rule has not changed and prudent subrogation counsel must note three potentially problematic areas: (1) lawsuits commenced by insured for uninsured losses before subrogation claims are asserted; (2) coverage actions commenced by insureds against insurers where third parties' responsibility may lie; (3) notification of insureds of potential uninsured losses and a recommendation that insured's claims should be included in a single action.

(3) New Jersey Business Courts.

In January 1997, a pilot project was commenced in Bergen and Essex Counties to implement a business court and establish guidelines so that specialized courts can be eventually placed throughout the entire state. The New Jersey Supreme Court's Complex Commercial Subtrack Advisory Committee has now recommended that business courts be created within all Superior Court Law Divisions to handle complex commercial cases. This recommendation follows the creation of a business courts in many other states, including those most recently established in the New York Supreme Court Trial Division. The Committee recommends that judges with expertise in the laws of commerce be assigned to hear these cases.

The Committee's recommendation requires that these cases be managed under a process similar to the Differentiated Case Management (DCM) program currently tracking complex cases in the New Jersey state courts. Once a case is classified as a "complex commercial litigation" case, a judge will be assigned to specifically handle the case and become involved with case management conferences from the onset. Judges will be vested with authority to conduct periodic

case management and case status conferences, undertake settlement negotiations, and speed the case to trial.

The purpose of this recommendation is twofold: the business track is intended to send a signal to the business community that New Jersey is business-friendly; and the business track will allow the resolution of complex cases without clogging the court's dockets.

Most important is the court's involvement with the quick resolution of business disputes. one procedural mechanism recommended allows judges to use telephone conferences to resolve discovery disputes without requiring the parties to file motion papers. Another device will require parties to participate in alternative dispute resolution programs.

Subrogation counsel should take advantage of the business courts to the extent that property damage claims involve commercial parties. Certainly, to the extent that counsel elects to pursue the claims in the name of the carrier, business court judges will be far more savvy in evaluating subrogation claims and facilitating resolution of subrogation claims.

(4) Alternative Dispute Resolution Under the New Jersey Rules.

Recently, The New Jersey Lawyer noted that almost 100t of U.3. corporations are using ADR, and that 90t view it as a critical cost-control technique. 6 NJL at 1821. The New Jersey Lawyer survey found that corporate attorneys prefer mediation or similar non-binding third party techniques to arbitration, with mediation the preferred method of resolving products liability and commercial cases.

One of the often overlooked procedural rules is R. 1:40 entitled Complementary Dispute Resolution Programs. Under R. 1:40-4, a court can require parties to attend a mediation session at any time following the filing of a complaint. This rule then sets forth confidentiality requirements, limitations on services mediated, methods for conduct of mediation proceedings, and guidelines for requiring a party to participate in good faith.

Under this specific rule, a motion to compel mediation can be filed and ordered by the court. In addition, R. 1:40-9 also allows parties to participate in private dispute resolution programs with the court retaining jurisdiction over the litigation.

Following promulgation of this rule, the Vicinage Complementary Dispute Resolution Advisory Committee authorized the creation of the office of Dispute Resolution with offices in Newark and Trenton. The Office of Dispute Resolution accepts all cases from either the state or federal courts. The parties can choose from a variety of complementary dispute resolution formats, including binding or non-binding mediation, binding or non-binding arbitration, high-low arbitration, and the like. The parties pro rate the hourly mediator charge (which is currently \$150 per hour] which is far below the market rate for private mediation programs outside the courts.

Overall, use of this particular procedural rule requires defendants to evaluate the case, and requires all parties to meet and discuss the strengths and weaknesses of a case in an effort to amicably resolve the matter without the need for trial.

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