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FMG Professional Liability Quarterly Report

A summary of the important professional liability topics by our expert team members for the third quarter.

SCOTUS LIMITS THE SEC'S ENFORCEMENT POWER

By: William R. Covino and Nancy M. Reimer

On June 27, 2024, the Supreme Court of the United States ("SCOTUS") issued its decision in Sec. & Exch. Comm'n v. Jarkesy, U.S., No. 22-859, 2024 WL 3187811 (June 27, 2024), affirming the Security and Exchange Commission violated George Jarkesy and Patriot28's right to a trial by jury under the Seventh Amendment of the United State Constitution by adjudicating various anti-fraud claims and seeking civil penalties in-house.

In March of 2013, the Securities and Exchange Commission ("SEC") brought claims against Mr. Jarkesy and Patriot28 for purportedly defrauding investors. It alleged between 2007 and 2010, Mr. Jarkesy launched two investment funds and misled investors by: (i) misrepresenting the investment strategies he and Patriot28 employed; (ii) lying about the identity of the funds' auditor and prime broker; and (iii) inflating the funds' claimed value to collect larger management fees.

In accordance with Congress' Dodd-Frank Act, the SEC opted to handle this matter in its own adjudicatory system in lieu of seeking relief in Federal Court. There is little mystery as to why it chose this path. Unlike cases litigated in Federal Court with a life-tenured, salary protected Article III judge; a jury of one's peers; a right to robust discovery and evidentiary safeguards provided by the Federal Rules of Evidence, SEC administrative proceedings are handled differently.

The SEC effectively opens, prosecutes, determines, and reviews these matters on appeal.

As is often the case, the SEC assigned an administrative law judge ("ALJ") to resolve this matter. The ALJ, employed by the SEC, was to rule on discovery requests, determine the date of the hearing, and—with a jury out of the picture—resolves both issues of law and fact. The right to challenge her factual findings on appeal was limited, and highly deferential (e.g., factual findings are "conclusive" if sufficiently supported by the record). The SEC's Enforcement Division took full advantage of its "home court advantage." It disclosed between 15 to 25 million pages of information to Mr. Jarkesy, and despite his protests it would take "two lawyers or paralegals working twelve-hour days over four decades to review," the ALJ provided him ten months to prepare for the hearing. As expected, the ALJ found against Mr. Jarkesy and the SEC affirmed the ruling. A divided Fifth Circuit vacated this order and SCOTUS granted certiorari.

The sole issue SCOTUS reviewed was whether the Seventh Amendment to the United States Constitution entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud. In a 6-3 decision (dissented by Sotomayor, Kagan, and Jackson), SCOTUS affirmed the Seventh Amendment applied to this matter.

After discussing the history and policy rationales for ensuring Americans receive a trial by jury, as well as the creation of the SEC and suite of laws designed to combat securities fraud, it explained the Seventh Amendment's guarantee of a trial by jury in "[s]uits at common law," was intended to apply expansively.

The Seventh Amendment to the United States Constitution was to embrace "all suits which are not of equity or admiralty jurisdiction" and extends to a statutory claim if the claim is "legal in nature." This is determined by considering "the cause of action and the remedy it provides." In short, it does not matter where the cause of action originates (by Congress or otherwise), but the substance of the action is determinative of whether the Seventh Amendment will apply.

In this case, SCOTUS found the remedy sought by the SEC of monetary damages was "all but dispositive" because they are the prototypical common law remedy.

To read the full blog post, click here.

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SUPREME COURT OVERTURNS CHEVRON DEFERENCE

By: David Shinder and Chad E. Weaver

On June 28, 2024, the Supreme Court of the United States ("SCOTUS") issued its 6-3 decision in *Loper Bright Enterprises, et al. v. Raimondo*, Secretary of Commerce, et al., No. 22-451, overturning the long-standing doctrine of *Chevron* deference.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), SCOTUS held that in the event a statute was unclear, the courts would generally accept the agency's interpretation of the statute, so long as it was reasonable. In short, the courts would defer to the agencies' interpretation of ambiguous statues.

Chevron deference empowered government agencies like the Securities and Exchange Commission ("SEC") with the ability to interpret financial statutes and enforce its interpretations of regulations, including those promulgated under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") . Notably, the SEC has the authority to create rules and regulations pursuant to securities laws passed by Congress, including Dodd-Frank. This includes the implementation of Regulation Best Interest ("Reg BI"), which redefined the standard of care of registered representatives when providing recommendations for securities or investment strategies. Following the introduction of Reg BI in June 2020, the SEC has steadily increased its regulatory enforcement actions year after year.

The SEC's increase in enforcement actions highlights the unchecked power of the commission and its ability to regulate the securities industry without adequate oversight. This concentration of power in the hands of a single agency has drawn criticism due to concerns regarding inconsistent enforcement practices, an absence of transparency, and the difficulty in ensuring accountability in the face of potential enforcement errors.

Loper Bright began as a challenge to the National Marine Fisheries Service's ("NMFS") interpretation of the Magnuson-Stevens Act. The Magnuson-Stevens Act requires certain commercial fishing boats to allow federal agents, also known as observers, to join the vessel's fishing expeditions to collect data, including data related to the prevention of overfishing. By way of *Chevron* deference, the NMFS interpreted the statute to require certain fishing vessels to subsidize the salary of these observers. The NMFS interpretation of the Magnuson-Stevens Act was challenged, and the case ultimately found its way to SCOTUS.

SCOTUS used this case as an opportunity to reconsider the *Chevron* doctrine. In a 6-3 decision, the Court held that the *Chevron* doctrine was inconsistent with the Administrative Procedure Act ("APA"), which governs judicial review of agency actions. The APA requires courts to decide all relevant questions of law, and SCOTUS held courts must exercise their own independent judgment when interpreting statutes, even if they are ambiguous.

The Court's decision to overturn *Chevron* is a pivotal change for the future of administrative law, which will have significant impact on how courts will review the actions of agencies in the future, including the actions of the SEC.

Prior to *Loper Bright* there had been challenges to the SEC's implementation of Reg BI. However, these challenges have failed given the broad authority granted to the SEC to commence rulemaking as it saw as necessary or appropriate. Now, without the ability to rely on *Chevron* to defend their interpretations of ambiguous statutes, if challenged, agencies like the SEC will need to be prepared to defend their interpretations pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and before a Federal Court Judge and a jury of one's peers.

To read the full blog post, click here.

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KENTUCKY BECOMES FIRST STATE TO DECRIMINALIZE MEDICAL ERRORS

By: LaShay L. Byrd and Kyle Virgin

Kentucky recently became the first-ever state to pass a law shielding healthcare providers from being criminally charged for medical errors.

House Bill 159 was passed unanimously by both chambers of the Kentucky legislature signed into law by Governor Andy Beshear on March 26, 2024. It became state law on June 1st. The law ensures that healthcare providers providing health services "shall be immune from criminal liability for any harm or damages alleged to arise from an act or omission relating to the provision of health services." The law does not limit liability for gross negligence or wanton, willful, malicious, or intentional misconduct and does not protect health care professionals from civil litigation.

The law was championed by medical associations and came in the aftermath of the high-profile *State of Tennessee v. RaDonda L. Vaught* case which garnered national media attention in 2022. In 2017, Vaught, a critical care nurse at Vanderbilt University Medical Center, using an electronic medicine cabinet, overrode a function and mistakenly gave a patient a powerful sedative rather than an anti-anxiety medication, which resulted in the patient's death. Vaught reported her mistake as soon as she realized it, but she was ultimately fired from the hospital, arrested, and charged with reckless homicide. The Tennessee Department of Health's Board of Nursing revoked Vaught's license in 2021.

The following year, in 2022, Vaught was convicted of criminally negligent homicide and impaired adult abuse and was sentenced to three years of probation.

The *Vaught* case sent shockwaves through the healthcare community and sparked many conversations and debate about whether healthcare providers should be criminally charged for unintentional medical errors.

In support of this legislation, the Kentucky Nurses Association issued a statement saying "[Kentucky] has a shortage of nurses, and we need to ensure nurses aren't leaving the profession for fear of being criminally charged for making a medical error." "Fear of criminal charges can hamper voluntary reporting and cooperation, which is essential so systems and processes can be changed to prevent further errors."1

The American Bar Association has also issued a statement saying that, "A robust culture of safety relies on self-reporting and transparency to drive process improvement, and criminalizing errors instead foments blame and creates fear."2

While no Kentucky nurses have faced criminal charges for on-the-job errors, this legislation appears to have been a proactive effort to ensure it never happens.

The nursing profession in Kentucky is already extremely short-staffed and hasn't yet recovered from the effects of the pandemic. This legislation is expected to support recruitment and retention efforts, encourage transparent reporting of mistakes, and provide reassurance to caregivers who enter the medical field. Now that Kentucky has taken this step, other states could follow.

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1. Kentucky Nurses Association, News & Announcements, March 18, 2024, https://kentucky-nurses.nursingnetwork.com/nursing-news/198134-tell-the-senate-to-vote-yes-on-hb159-
2. "Criminal Conviction of Nurse for Fatal Medication Error Diminishes Patient Safety". American Bar Association. 2022-04-22.

OUT OF THE WOODS?: PROVIDER LIABILITY FOR MEDICATION ABORTION

By: Lisa R. House and Cecilia A. Walker

While the Supreme Court of the United States has failed to ban or restrict medication abortion in *FDA v. Alliance for Hippocratic Medicine*, providers, professionals, and insurers are far from being out of the woods for potential criminal and civil liability.

In the wake of the Court's 2022 decision of *Dobbs v. Jackson Women's* overturning the Court's 1973 seminal abortion access case in *Roe v. Wade*, much of the forty years of legal framework built atop Roe's foundation, designed to accommodate, regulate, and provide abortion in the states, remain tepidly aloft while new laws to regulate or restrict abortion are built. Since *Dobbs*, twenty-one states have banned or limited access to abortion with the passage of new state laws or by the revival of some pre-*Roe* precedent limitation.

For the first time since 2022, the Supreme Court heard a challenge to abortion in *FDA v. Alliance for Hippocratic Medicine* where a professional association of doctors brought suit against the Food and Drug Administration's approval of mifepristone, a medication used in two-thirds of all abortions in the U.S. The Court stopped short of deciding the merits of the case and ruled unanimously that while plaintiffs had "sincere legal, moral, ideological, and policy objections to elective abortion and to FDA's relaxed regulation of mifepristone" those objections alone were not enough to rise to having a real case or controversy.

For now, mifepristone and access to medication abortion is not restricted at the federal level, but the merits of access to patients could very well be decided in a later case if a plaintiff brings forth suit with standing.

However, the Court's present rulings in both Dobbs and *FDA v. Alliance* have created more questions than answers, particularly those of potential criminal and civil liability for physicians and medical providers at the state level. Differences in state law can create exposure not only on the question of *if* an abortion can be performed but also on *when, how, by who* and *for whom* an abortion can be performed. In states like Maryland and North Carolina, qualified health care professionals, like nurse practitioners, can provide mifepristone to patients, but states like Georgia and Florida only allow doctors to provide and prescribe abortion medication. While legislators in states like New Mexico and Maryland have provided "shield laws" to protect abortion providers from investigations by other states for prescribing abortions to patients, legislators in some states like Texas and Oklahoma have proposed laws that would provide more ways to impose both criminal and civil liability on those that provide or assist those that provide abortions outside the regulations of their state and even across state lines.

These seemingly small state level nuances of the who, how, and when of abortion open the door to potential liability when a provider or professional fails to follow the tightly held state lines on a medical procedure that spurs social and political ire on both sides of the aisle. Legal challenges abound from those in favor of and opposed to abortion, and without federal framework or a more definitive decision in place from the Supreme Court in the near future, changes to state statutory schemes will make parsing through those changing regulations and existing law more difficult for providers, especially those that operate in multiple states. Now more than ever, it is imperative that physicians, providers, and those that insure them implement and update policies and procedures with an eye for both where they provide their services and from what states their patients reside in order to protect their practice and evaluate exposure to changing legal risks.

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IS THE STANDARD 6% COMMISSION FEE FOR REAL ESTATE AGENTS A THING OF THE PAST?

By: Mandy D. Hexom and Tim Soefje

You may have heard the news about upcoming changes to real estate commissions throughout the nation. The National Association of Realtors ("NAR"), the largest trade association of more than 1.5 million real estate professionals, was sued in multiple lawsuits over the way commissions were offered, facing millions of dollars in potential liability.

On March 15, 2024, the NAR announced a settlement ending some of the litigation involving claims asserted by home sellers related to broker commissions. The settlement, pending court approval, will result in a financial payment to certain NAR members as well as a new MLS Rule prohibiting offers of broker compensation on the MLS (Multiple Listing Service). Prior to this settlement and new Rule, the home seller pays their listing agent, who then splits the commission with the buyer's agent according to the current NAR rules. Traditionally, that works out to a 5% to 6% commission split evenly between the buyer's and seller's agents.

According to NAR, the new MLS Rule would mean that offers of broker compensation could not be communicated via the MLS, but they could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. In other words, agents for home sellers will no longer set commission rates for buyer agents.

It was reported that the DOJ played a role in the settlement through its push for more competition in the real estate market and pressure from the DOJ's antitrust division.

The settlement and new MLS Rule, which is currently scheduled to go in effect in mid-July 2024, may result in the following changes:

- Some buyers may opt against hiring an agent or only doing so toward the end of the process after going through most of the home hunting themselves.
- Real estate brokers will get creative and offer alternative types of real estate business models, perhaps using brokers that will list a home for a flat fee.
- Commission rates could fall to 2.5% to 4%.

It is not clear how these changes may affect claims against brokers and agents and whether there will be changes either in the cost of E&O insurance or insurance products for real estate professionals. Regardless, changes are coming that will affect real estate professionals, home buyers and sellers, and the real estate industry as a whole.

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ABA ISSUES FORMAL GUIDANCE FOR LAWYERS' USE OF GENERATIVE AI

By: Sunshine R. Fellows

On July 29, 2024, the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility issued its first opinion regarding attorneys' use of generative artificial intelligence ("GAI"). *Formal Opinion 512* on Generative Artificial Intelligence Tools confirms that while GAI can be a useful tool to increase efficiency in the practice of law, attorneys utilizing GAI need to appreciate the effect on their ethical obligations. Opinion 512 discusses the use of GAI in the context of six ethical obligations covered by the ABA Model Rules of Professional Conduct: competence, confidentiality, communication, candor toward the tribunal, supervisory responsibilities, and fees.

Competence: Under Model Rule 1.1, lawyers must exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary" for competent representation, as well as to understand "the benefits and risks associated" with technologies used for legal services. In regard to GAI, Opinion 512 clarifies:

- Attorneys should have a reasonable and current understanding of the specific capabilities and limitations of any GAI tool they seek to employ, accounting for reliability, accuracy, completeness, and bias;
- Attorneys should not rely on GAI outputs without independent verification or review; and
- Although attorneys should independently verify or review generative AI outputs, they are not required to verify each and every output. Rather, the appropriate level of review depends on the specific task and tool used.

Confidentiality: Model Rule 1.6 requires lawyers to keep all information related to their representation of clients confidential, including by making reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, such information. Model Rules 1.9(c) and 1.18(b) extend similar protections to former and prospective clients. Opinion 512 recommends:

- Prior to inputting information related to representation of a client into a GAI tool, attorneys should consider the likelihood of disclosure or unauthorized access to the information, the sensitivity of the information, the difficulty of implementing safeguards, and the extent to which safeguards would negatively impact the lawyer's ability to represent the client;
- Attorneys should be aware that "self-learning" GAI tools create risks that confidential information input into the tool may be disclosed to others and must obtain informed client consent prior to inputting confidential client information into such tools; and
- Attorneys should understand any applicable terms associated with a GAI tool prior to its use and consult with qualified technical experts as appropriate.

Communication: Model Rule 1.4 covers lawyers' duty to communicate with their clients. Lawyers might be required to disclose use of GAI to their clients in certain circumstances. For instance:

- Attorneys must disclose their use of GAI tools if asked by the client how they conducted their work or whether GAI tools are used by the attorney;
- Attorneys must be aware of and comply with any disclosure requirements included in their engagement agreements or in outside counsel guidelines;
- Attorneys must consult with clients about the use of GAI, if such use is relevant to the basis or reasonableness of fees; and

To read the full blog post, click here.

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TOO CLOSE FOR COMFORT: MASSACHUSETTS COURT WARNS ATTORNEYS ON CONFLICTS IN JOINT VS. SINGULAR REPRESENTATION

By: Allison H. Eddy and Nancy M. Reimer

In *Koch, et al. v. Curley, et. al*, the Massachusetts Superior Court disqualified an attorney from defending a client when the attorney previously represented the client's former employer who was the Plaintiff. The opinion reminds attorneys to be mindful of potentially adverse interests when engaged by business entities and their agents, as accommodating a former client in a friendly deal can create confusion regarding joint or singular representation.

Here, Plaintiff, an owner of several business entities, entered into a contract to sell property owned by one of the entities to an employee, the Defendant, who managed various aspects of Plaintiff's operations in 2015. The property was worth $9 million, but Plaintiff agreed to sell it to Defendant for $500,000 and an agreement that the Defendant would work for the Plaintiff for the next 20 years while forgoing annual six-figure bonuses. On the recommendation of Plaintiff's in-house counsel, the Defendant hired an attorney ("Attorney") to facilitate the property conveyance. Attorney had represented the Plaintiff in several prior real estate transactions. Notably, the Plaintiff and the in-house counsel believed Attorney was representing the Plaintiff in the conveyance, even though he provided legal advice to both parties throughout the transaction. Attorney did not execute an engagement letter with either party.

In 2018, the Defendant allegedly breached his promise to remain employed by the Plaintiff. As a result, the Plaintiff brought this action claiming breach of contract and fraud. The Defendant hired Attorney to defend him in the action.

The Plaintiff moved to disqualify Attorney from representing the Defendant, arguing Attorney has a conflict of interest prohibited by Mass. R. Prof. C. 1.9(a), which forbids lawyers from representing a client against a former client in a substantially related matter. The Court agreed with the Plaintiffs, holding Attorney could not represent the Defendant because 1) it was clear Attorney had a longstanding attorney-client relationship with Plaintiff in the specialized area of real-estate transactions, 2) documentary evidence of Attorney's and in-house counsel's actions in connection with the 2015 transaction supported the notion that Attorney had an attorney-client relationship with Plaintiff, and 3) if Attorney truly was only representing Defendant, Attorney was required to comply with his obligation to obtain "informed consent, confirmed in writing" from both parties under Mass. R. Prof. C. 1.7(b)(4).

The Court found disqualification to be "mandatory" because the issues in the breach of contract and fraud action were substantially related to the 2015 transaction.

The Court also clarified, under the Rule, it need not be proven that Plaintiff's confidential information obtained in the 2015 transaction was used to advance Defendant's position in the present case. Rather, Mass. R. Prof. C. 1.9 provides possession of confidential information need only provide a "tempting situation" to use such confidences.

This case is a reminder that attorneys should tread lightly when facilitating deals between clients and their agents, as even amicable transactions often have interests that are potentially adverse. It may be tempting for an attorney to assist all parties in a friendly business deal, but it presents issues when conflicts arise, and the attorney is pulled to one side. Once adverse interests present themselves, it's the attorney's job to recognize the conflict of interest and notify the parties that new counsel is required. Moreover, this decision emphasizes the importance of having a written engagement agreement with a client. Not only does an engagement agreement serve to identify an attorney's client, but it is a valuable risk management tool should disputes or malpractice allegations arise.

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ILLINOIS APPELLATE COURT REAFFIRMS THE STATE'S BROAD APPLICATION OF THE LITIGATION PRIVILEGE

By: Thomas T. Bishop and Donald Patrick Eckler

Yes, even emails to interested nonlitigants can be protected by litigation privilege in Illinois. That is the result from the Illinois Appellate Court, First District, in *Qualizza v. Freeman et. al.*, 2024 IL App (1st) 231534-U.

In a dispute arising out of an alleged misappropriation of business funds and fee splits, one of the defendants ("Qualizza") filed a counterclaim alleging defamation per se against one of the Plaintiffs (Freeman), and a third-party complaint alleging defamation per se against Freeman's lawyer, John Perkaus, and his law firm Perkaus & Farley, LPP. The defamation claims related to three email communications made by Plaintiff and his lawyer.

The communications stemmed from an email thread initiated by one of Plaintiff's business partners, inquiring about the status of Plaintiff's funding with the partner's business. The email thread included the Plaintiff, the third-party defendant attorney, and 13 other recipients who were not parties to the litigation but were involved in a business project that was identified in the complaint. In that email thread, the Plaintiff's lawyer responded to the inquiry by summarizing the allegations of defendant's misdirection of funds and attached a copy of the filed complaint. Plaintiff then responded to his lawyer's previous email by saying "the courts can decide whether [Defendants] misappropriated millions of dollars without the knowledge of the majority owners," and again attached a copy of the filed complaint. Defendant alleged that the Plaintiff and his lawyer's emails to 13 non-parties to the litigation, and the allegations in the complaint attached to the lawyer's email, were defamatory *pe se* to Defendant.

The Plaintiff moved to dismiss the defendant's claims for defamation, arguing that the emails were protected by litigation privilege. The circuit court agreed and dismissed the defamation claims. The Illinois Appellate Court affirmed the lower court's dismissal of the defendant's defamation claims.

Ultimately, the appellate court determined that the emails survived the "pertinency test," such that they were protected by litigation privilege. The pertinency test in Illinois hinges on two factors: 1) whether the publications relate to the underlying litigation and 2) whether the recipients of the publications have a sufficient interest in the litigation. As for the first factor, the appellate court held that both Plaintiff and his lawyer's emails with the allegations of misdirected fee splits were relevant responses to the inquiry about the business partnership's funding, and addressed "how the ongoing litigation affected the status of one of the projects described in the complaint." *Qualizza*, page 12.

Secondly, each of the recipients had an interest in the business partnership which was cited in the complaint, and were not just random members of the public. Accordingly, the recipients were each "sufficiently interested parties," even though 13 of the email recipients were not parties to the lawsuit. Because both factors of the pertinency test were satisfied, the Illinois Appellate Court found that the litigants' emails were protected under litigation privilege.

The court's ruling serves as a reminder that Illinois courts will protect certain communications to nonlitigants from defamation claims.

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3 LEGAL MALPRACTICE CASES SHOW MULTITUDE OF OUTS FOR LAWYERS

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By: Donald Patrick Eckler

Three recent Illinois Appellate Court decisions in legal malpractice cases show powerful defenses to such claims: statute of limitations, causation, successor counsel doctrine, and absence of an assignment of a claim where there was no pre-existing attorney-client relationship upon which to sue.

In *Landers Children Family, LLC v. Rees*, 2024 IL App (4th) 230460-U, the court affirmed the dismissal of claims against multiple attorneys on the basis of breach of the two-year statute of limitations. The alleged malpractice involved a loan secured by certain parcels of land and the transfer of other parcels into a trust that was found to have been a fraudulent transfer.

The plaintiffs filed suit on Dec. 28, 2020. The trial court found, and the appellate court agreed, that as a matter of law, the statute of limitations began to run on Dec. 20, 2018. That was when the court in the underlying matter entered summary judgment against the legal malpractice plaintiffs, finding the fraudulent transfer of the parcels about which the legal malpractice plaintiffs were complaining.

In addition to arguing that the entry of summary judgment did not place them on notice that the advice they received was negligent, the plaintiffs also argued that the doctrines of equitable estoppel and fraudulent concealment tolled the statute of limitations.

The plaintiffs contended that the defendant lawyers failed to advise them on the remedies they had in the underlying proceeding, but the court held that the legal malpractice plaintiffs were damaged upon entry of the summary judgment on Dec. 20, 2018. Further, the court held that the legal malpractice plaintiffs failed to allege anything that prevented them from discovering the damage from the entry of summary judgment.

Finally, in March 2020, when the legal malpractice plaintiffs were told of the errors of the defendant lawyers by subsequent counsel, there was still nine months remaining on the statute of limitations, which the court found was ample time to file suit.

Next, in *Petey's Two Real Estate v. Goedert*, 2024 IL App (1st) 220960, which arose out of a condemnation action by the Illinois Department of Transportation, the legal malpractice plaintiffs were awarded preliminary compensation, but sought more. The expert the defendant lawyers hired to justify the amount sought by the legal malpractice plaintiffs violated "the unit rule," which requires property to be valued as a whole, not as the sum of its parts. The legal malpractice plaintiffs sued their original counsel and the firms he worked for during the time he represented them.

The direct legal malpractice defendants filed a third-party action against subsequent counsel, but that claim was dismissed as were the claims against the direct legal malpractice defendants. Essentially, the court found that the legal malpractice plaintiffs could not show causation. In affirming the trial court, the appellate court stated:

"We agree with Dommermuth [direct legal malpractice defendant Dommermuth, Cobine, West, Gensler, Philipchuck, Corrigan & Bernhard Ltd.] that this case admits of only one conclusion. Despite being aware that the 2006 preliminary compensation was always going to be subject to proceedings to determine final compensation, Plaintiffs litigated against IDOT for over a decade, never relenting on their position that they were entitled to keep the entirety of the preliminary compensation even after the size of the taking was reduced. Plaintiffs' retained expert, [Joseph] Thouvenell, tried to match his opinions with Plaintiffs' desire to keep the entirety of the preliminary compensation. In so doing, he rendered opinions and testimony that were without foundation. Without any opportunity to correct Thouvenell's errors, [Thomas] Goedert and Dommermuth could not have prevented the ultimate outcome."

To read the full Chicago Daily Law Bulletin article, click here.

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