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April 2024

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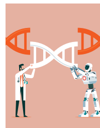

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Letter from the Chair

Zandra Foley. the chair of the Professional Liability Committee, is a trial attorney who represents clients in complex litigation matters related to products liability, mass torts, malpractice, and errors and omissions. She is a partner at Thompson Coe Cousins & Irons LLP. Her clients include lawyers, accountants, real estate agents, insurance agents, and other professionals. Zandra serves as national and regional trial counsel on medical devices, product liability, and mass tort-related matters and has extensive experience advising clients on a variety of complex disputes with an eye toward early and efficient resolution.

The ***Professional Liability Committee*** is looking forward to a very exciting 2024. We started the year off right with the first of a fantastic new meeting series called Hot Topic Tuesdays, a 30-minute quarterly lunch meeting wherein committee members get together to discuss a specific topic that we all face in our profession. These meetings provide a wonderful opportunity for members to talk, share new ideas, and socialize throughout the year. During our first Hot Topic Tuesday in January, the committee had a lively and interactive discussion about conspiracy claims filed against lawyers. We are looking forward to discussing a new topic in March of 2024.

In February, the Steering Committee attended our annual fly-in meeting in Miami on March 1 to kick off our seminar planning. This well-attended meeting was a resounding success. Our members worked diligently with our seminar Chair Andrea Schillaci and Vice Chair Susan Cohen and got us off to a great start putting together what will be another outstanding ***Professional Liability Seminar*** in New York City on December 4-6.

Last, there are plenty of opportunities to publish and edit articles for ***DRI's various publications***. In this issue, you can check out the following articles prepared by our experienced committee members:

- "Whose Fault Is It Anyway? Understanding Joint and Several vs. Proportional Liability in Accounting Malpractice Claims" by William R. Covino and Nicole Carnevale
- "Non-Compete Clauses and Professional Liability" by Andrea Schillaci and Christopher J. Kolber
- "Forecasting the Downfall of a Decades-Old Real Estate Practice" by Zachary Pyers, Kenton Steele, and Marissa Kuryla
- "Is It Legal Malpractice Not to Seek Treatment For Mental Health Issues?" by Cory Reed and Nadia Sheikh

Thank you to all who have contributed articles on behalf of our committee for this issue. These are just some of the many opportunities for lawyers to get involved in our committee, as we have a variety of roles for all of our members. If your practice involves professional liability, whether it be defense of lawyers, accountants, real estate agents, architect, engineers, or other professionals, we invite you to join us and get involved today.

Warmest regards,

Zandra Foley

Whose Fault Is It Anyway?

Understanding Joint and Several vs. Proportional Liability in Accounting Malpractice Claims

By William R. Covino and Nicole Carnevale

Factors have led accounting firms to be faced with a Hobson's choice: do they allow themselves to be extorted to pay cost-of-defense settlements or risk incurring nuclear verdicts?

For decades, litigators have relied on focus Successfully defending accountants in civil litigation can be challenging for even the most experienced practitioners. These claims are generally technical in nature, can be presented to juries with preconceived misconceptions about the duties and knowledge of accountants, and may involve losses that were jointly caused by the accountant's own client or third parties. Compounding these difficulties is the fact that accountants may be the target of litigation because of their "deep pockets" and because other responsible parties are insolvent. These factors have led accounting firms to be faced with a Hobson's choice: do they allow themselves to be extorted to pay cost-of-defense settlements or risk incurring nuclear verdicts?

For the last forty years, several of our nation's largest accounting firms have considered the liability exposure on their profession to be nothing short of a crisis. In conjunction with the American Institute of Certified Public Accountants and state associations, these accounting firms have successfully lobbied for changes on a national and state level. For certain types of accounting claims, accountants are no longer exposed to paying entire losses under principles of joint and several liability and are only exposed to paying their fair share of a loss under principles of proportional liability. When applied, these limitations can significantly reduce an accountant's financial exposure, change how parties litigate certain types of accounting claims, and allow defense counsel to negotiate an early cost-effective resolution.

This article explains the concepts of joint and several liability and proportional liability; the reasons why proportional liability should be applied to certain types of claims asserted against accountants; the exceptions to joint and several liability promulgated by Congress and various jurisdictions; and how defense counsel can use these exceptions to their advantage.

Understanding Joint and Several Liability

The common law origins of joint and several liability can be traced back to the 1771 English case of *Hill v. Goodchild*, 98 Eng. Rep., 465 (1771). Originally, defendants who acted in concert were jointly liable for harm caused to a plaintiff. Common law eventually abrogated this unity requirement. Today, this doctrine generally provides: "two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." Restatement (Second) of Torts § 875 (1979). In other words, a plaintiff who is harmed by multiple tortfeasors—regardless of their degrees of fault—may sue any tortfeasor to collect his or her entire loss. *See e.g.,*

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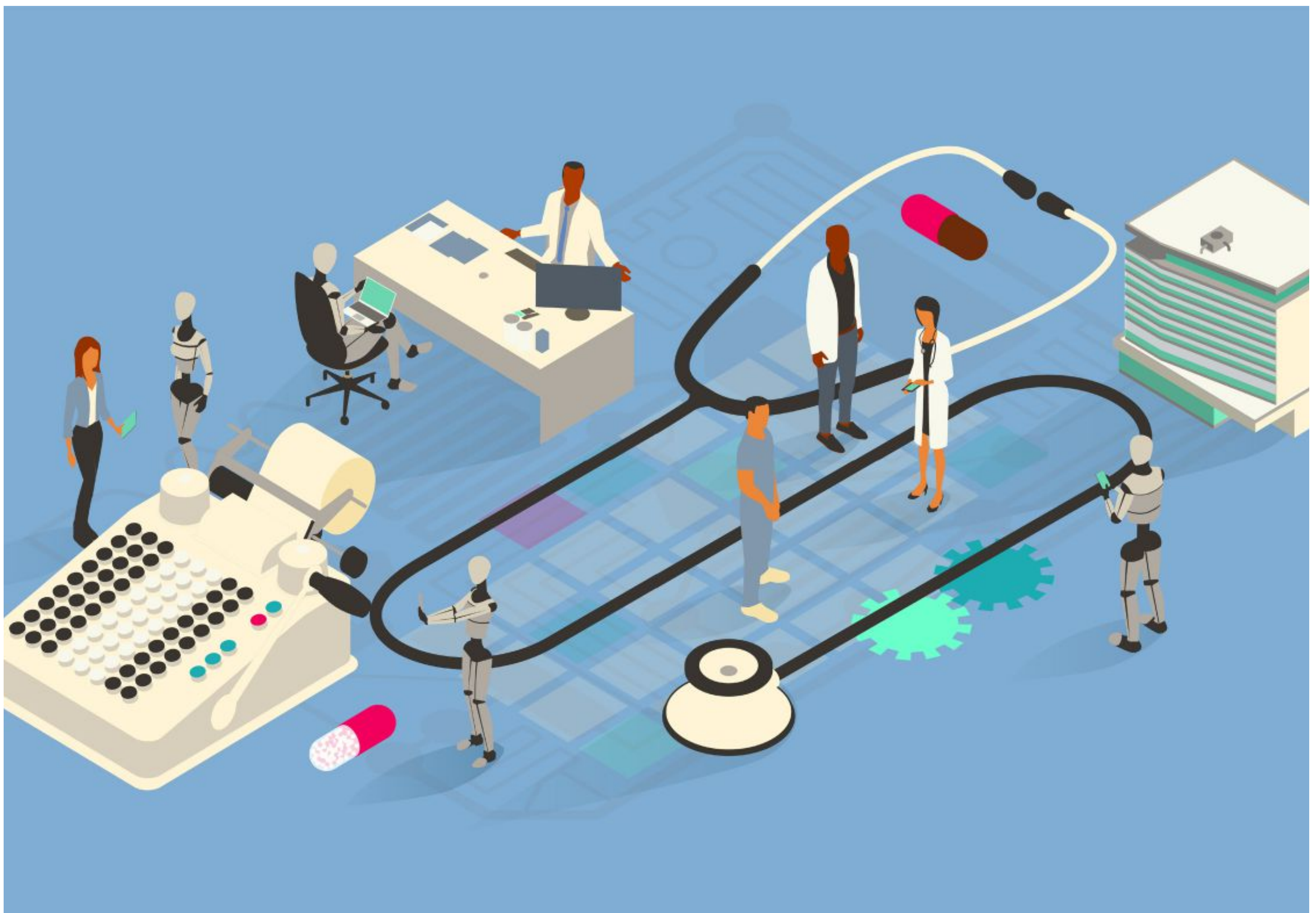

Mitchell v. Hastings & Kock Enterprises, Inc., 38 Mass. App. Ct. 271, 280 (1995).

Some states that recognize joint and several liability have sought to reduce its blunt impact on accountants through principles of comparative negligence and by providing accountants with a right of a contribution. Comparative negligence principles provide that an accountant's liability is to be reduced by the percentage of the plaintiff's fault in causing his or her damages. *See e.g., Lincenberg v. Issen*, 318 So. 2d 386, 389 (FL 1975). For example, if a plaintiff is 30 percent at fault for their own injury, the accountant would only be liable for up to 70 percent of the plaintiff's total loss. A right of contribution empowers accountants to try to collect a portion of what they paid to satisfy a plaintiff's entire loss from other joint tortfeasors.

Given the breadth of most jurisdictions' contribution schemes, accountant defendants can certainly get creative in who they join. For example, in *Axel Johnson, Inc. v. Arthur Andersen & Co.,* 830 F.Supp. 204, 208 (S.D.N.Y.1993), the court permitted a third-party Rule 10b-5 violation contribution claim against a wholly owned subsidiary of the plaintiff company to be brought by the company's auditing firm. The subsidiary objected, arguing that to have standing to assert a claim for contribution against a joint tortfeasor, a 10b-5 defendant must first establish itself as a seller or purchaser of securities and that the auditor's contribution claim must be dismissed because it "neither purchased nor sold any securities." Id. at 208. The court rejected this argument on the basis that, "[a]s long as a 10b–5 defendant can establish a prima facie case that the third party defendant may also be liable for plaintiff's securities injury, the defendant need not establish that it is a purchaser or seller of securities to assert a claim for contribution against the third party." Id. at 208. *See also Kingston Check Cashing Corp. v. Nussbaum Yates Berg Klein & Wolpow, LLP*, 194 N.Y.S.3d 495, 499 (2023) (permitting contribution claim brought by accounting firm against bank and law firm also involved in check cashing corporation plaintiff's business).

The purpose of joint and several liability is multifold. It encourages socially desirable behaviors of diligence and accountability, ensures that plaintiffs receive redress for their injuries, distributes losses among defendants, and punishes tortfeasors for their conduct. While each of these purposes are laudable, what is an accountant to do when a plaintiff is not comparatively negligent or when each joint tortfeasor is immune or insolvent?

In cases in which joint tortfeasors are immune or insolvent, joint and several liability has required defendants who are minimally at fault to pay a plaintiff's entire loss. For example, in *Walt Disney World*

Co. v. Wood, 489 So.2d 61 (FL Distr. Ct. App. 1986) the plaintiff was injured while using a bumper car. Despite being only 1 percent at fault, judgment entered against Walt Disney World for the plaintiff's entire loss (minus the plaintiff's comparative negligence). Similarly, in *Kaeo v. Davis,* 719 P. 2d 387 (Haw. 1986) the plaintiff was injured when riding in a vehicle being operated by an intoxicated driver. A jury assigned 1 percent of fault to the City of Honolulu who became responsible to the plaintiff for over a half million dollars of damages.

The risk that accountants will bear a plaintiff's entire loss is particularly concerning. Assume the following two fact patterns. In one case, an accountant is retained by a medical practice to conduct an audit. The practice regularly buys new, expensive medical equipment. The bookkeeper forges the names of authorized signatories to draw on the practice's line of credit, records these draws on the practice's books as being loans to purchase new medical equipment, and embezzles a portion of these funds. By the time the fraud is discovered, the statute of limitations to assert an action against the lender has expired and the bookkeeper is insolvent. In case two, a food processing company misrepresents its inventory to obtain greater financing from its lender and to induce prospective investors to provide additional capital. The company's inventory is then misrepresented to the accountant. When the fraud is uncovered, the company is insolvent. In both cases, the remaining (solvent) individual is the accountant.

Several concerns should be apparent from the fact patterns above. They remind us that cases against accountants commonly involve a single and indivisible harm. In many cases, a plaintiff's loss may be traced to several factors, including a lack of internal controls, poor management decisions, fraud, and fluctuations in the global economy. Even worse, jurors who are presented with a fraud—after the fact—can be tempted to engage in "Monday Morning Quarterbacking." It can be difficult to convince jurors that the accountants are not at least 1 percent at fault (i.e., were effectively perfect) for failing to uncover a fraud that spanned several years when confronted with the benefit of 20/20 hindsight. Finally, due to the insolvency and immunity issue in these fact patterns, the accountant would bear the risk of paying the plaintiff's entire loss. This is true even though the accountants' alleged failure to discover the frauds pales in comparison to the criminal or fraudulent activities of the accountants' joint tortfeasors.

An Alternative Approach - Proportional Liability

The alternative to accountants being subjected to the potential of paying "all or nothing" of a plaintiff's alleged loss under joint and several liability principles is proportional liability. Proportional liability seeks to equitably balance a plaintiff's loss. This system will generally limit an accountant's exposure to the percentage of the loss that the accountant caused the plaintiff to incur (i.e., the accountant's fair share of damages). *See e.g., Chelsea Hous. Auth. v. McLaughlin*, 482 Mass. 579, 593 (2019) (addressing Massachusetts' adoption of G.L. c. 112, § 87A ¾ which provides for proportional liability for accountants in limited circumstances and expressly provides that "the percentage of fault attributable to the fraudulent conduct of the plaintiff... contributing to the plaintiff's damages" shall be included in the calculation of proportional liability). G.L. c. 112, § 87A ¾ is discussed in further detail in Section V, below.

Proportional liability is firmly rooted in our jurisprudence. In the early nineteenth century, the United States adopted the doctrine of "contributory negligence" in which a plaintiff was barred from bringing an action unless the plaintiff had exercised ordinary care. *Smith v. Smith*, 19 Mass. 621, 624 (1824). In 1908, Congress began to recognize that precluding recovery entirely because of a plaintiff's minimal degree of fault was inappropriate; it passed a statute that allowed injured railway employees to recover damages even if they were negligent. *See* 45 USC §§ 51-60. The statute began to apportion fault by requiring judgments be reduced by the percentage of the employee's own negligence. In turn, and throughout the twentieth century, states began enacting legislation that imposed a comparative negligence system that apportioned fault based on a plaintiff's negligence. *See e.g.,* Miss. Code. Ann § 11-7-15. Some jurisdictions maintained contributory negligence in limited situations, including when a client has withheld or misrepresented information essential to the tasks the professional was retained to perform. *See Columbia Med. Grp., Inc. v. Herring & Roll, PC,* 829 A.2d 1184, 1193 (Pa. Super. 2003) (physician barred under contributory negligence doctrine from seeking recovery against accountant when criminal indictment of physician showed that they used business funds for personal purchases and evidence in civil action showed that they withheld/misrepresented information to accountant and chose to disregard his advice); *Wegad v. Howard St. Jewelers, Inc.*, 605 A.2d 123, 128-29 (Md. 1992) (client not entitled to jury instruction that it was not contributory negligence to rely on accountant's knowledge and skill when instruction made no reference to client's responsibility to use reasonable measures for self-protection, finding that in a professional negligence case "a proper jury instruction should explain that a client's reasonable or justifiable reliance on his or her accountant satisfies its obligation to exercise reasonable care in safeguarding its interests."). As astutely noted, "contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot-free. No one has ever succeeded in justifying that as a policy, and no one ever will." *Hilen v. Hays,* 673 S.W.2d 713, 717 (Ky. 1984) (quotation omitted).

Practically speaking, proportional liability does not encourage targeted suits against "deep pockets" defendants, and it prevents cost-avoidance settlements from being extorted from professionals on tenuous claims to avoid the possibility of bearing a plaintiff's entire loss. Indeed, a criticism of joint and several liability is that it creates "coercive pressure for entirely innocent parties to settle meritless claims rather than risk exposing themselves to liability for a grossly disproportionate share of damages in the case." H.R. Conf.

Rep. No. 104-369, 104th Cong., 1st. Sess. (1995), reprinted in 1995 U.S.C.C.A.N. 730, 736-37. Even further, joint and several liability arose out of concern that a plaintiff would not receive redress for his or her physical injuries because he or she was unable to avoid the injury. This rationale is simply less appealing in a complex business transaction involving multiple actors in which a party had the ability to conduct its own due diligence and determine whether to make an investment.

Ultimately, a proportional liability system seems to be more consistent with the fundamental precept that each defendant should pay for his or her own fair share of liability. In this vein, the Supreme Court of Tennessee Court noted: "[o]ur adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault." *McIntyre v. Balentine,* 833 S.W.2d 52, 58 (TN 1992).

Efforts To Apply Proportional Liability to Accounting Claims

In the 1990s, the big six accounting firms aggressively lobbied for tort reform because of the significant exposure that they faced. They each pledged $2 million to this cause. They reported to the Securities and Exchange Commission in June of 1993 that the claims pending against them were estimated to be valued at more than $30 billion, which represented more than twenty times the combined partners' capital in all six firms. In a white paper entitled The Liability Crisis in the United States: Impact on the Accounting Profession, the chief executives of these firms reported that they had paid $477 million (or 9 percent of their domestic accounting and auditing revenue) defending and settling lawsuits in 1991. Indeed, a wave of catastrophic verdicts started to occur. Arthur Anderson was subject to $81 million judgment and in 1992, Coopers & Lybrand was ordered to pay $220 million for a deficient audit.

Lobbying efforts focused on how difficult it was for accounting firms to avoid significant liability under joint and several liability in cases in which fraudulent schemes had been concealed from them. It was undeniably true then, and is true now, that accountants must rely on information from third parties and a company's management over whom the accountant does not exercise control. As the Supreme Court of California stated, "an audit report is not a simple statement of verifiable fact that, like the weight of the load of beans [that] can be easily check against uniform standards of indisputable accuracy. Rather an audit report is a professional opinion based on numerous and complex factors… the report is the final product of a complex process involving discretion and judgment on part of the auditor at every stage." *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 400, 834 P.2d 745, 763 (1992), *as modified* (Nov. 12, 1992). Even further, "the auditing CPA has no expertise in or control over the products or services of its clients or their markets; it does not choose the client's executives or make its business decisions…." Id. at 400-01. "[R]egardless of the effort of the auditor, the client retains effective primary control of the financial reporting process." *Nycal Corp. v. KPMG Peat Marwick, LLP*, 426 Mass. 491, 494 (1998) (quotation omitted). "By the same token, the persons who hire accountants, usually business persons, should also be required to conduct their business activities in a reasonable and prudent manner." *Halla Nursery, Inc. v. Baumann-Furrie & Co.,* 454 N.W.2d 905, 909 (MN 1990). "[A]n auditing Certified Public Accountant rarely examines every aspect of a client's business, has little or no expertise or control over a clients' products, services, or markets, and does not choose or control the client's executives or make its business decisions. Thus, an investment decision based solely or primarily on an accountant's audit report would be, in most cases, difficult to justify." *White v. BDO Seidman, LLP,* 549 S.E.2d 490, 494 (Ga. App. 2001) (internal citation omitted).

These lobbying efforts further expounded upon how litigation threatened the continued viability of its profession, and particularly the audit function. Among other concerns was the fact that litigation had purportedly forced some accounting firms into bankruptcy, caused firms to avoid providing certain functions to high-risk clients such as technology companies or private companies making initial public offerings, had deterred individuals from entering the field, and had even forced others in the public accounting arena into an early retirement.

The Federal and State Changes to Accounting Claims

In response to the efforts above, Congress's Private Securities Litigation Reform Act of 1995 amended the Securities Exchange Act of 1934 to provide proportional liability in security fraud causes under Section 10(b) and Rule 10b-5 for accountants who did not "knowingly" commit a violation of the securities law. 15 U.S.C. A. §78u-4(F)(2)(A).

This reform also addressed what occurs when all or part of a judgment is uncollectible. It imposes joint and several liability for an uncollectible share of a judgment if the plaintiff is an individual whose damages are equal to more than 10 percent of his or her net worth and that plaintiff's net worth is less than two-hundred thousand dollars. 15 U.S.C. A. §78u-4(f)(4)(A)(i). For other plaintiffs, it provides that an accountant is liable in proportion to his or her percentage of responsibility for the uncollectible share of a judgment, except that this liability cannot exceed 50 percent of the proportionate share of that person. 15 U.S.C. A. §78u-4(f)(4)(A)(ii).

Following this reform, lobbying efforts continued on the state level to remove joint and several liability or to at least create exceptions in favor of accountants. The reforms provided by state jurisdictions vary widely and generally fit within one of the following four categories:

(1) Joint and several liability has been abolished or modified (e.g., Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Kansas, Michigan, Mississippi, Montana, Nevada, North Dakota, Oregon, Utah, Vermont, and Wyoming);

(2) Joint and several liability is abolished if the accountant's fault is below a certain percentage (e.g., Iowa,

Minnesota, New Hampshire, New Jersey, Oklahoma, and Wisconsin);

(3) Joint and several liability is abolished if the plaintiff is at fault (e.g., Washington); and

(4) Joint and several liability is abolished as to non-economic damages (e.g., California and Nebraska).

In these jurisdictions, a practitioner must carefully review any exceptions to these rules. For example, in some states, accountants may still be subject to joint and several liability if they acted pursuant to a common plan or scheme. In other jurisdictions, the definition of the term "fault" may cause certain claims against accountants to be subject to joint and several liability. For purposes of comparison, South Carolina's apportionment statute does not apply in favor of an accountant whose conduct is determined to be "willful, wanton, reckless, grossly negligent, or intentional," while North Dakota's modified comparative provides that "fault includes… reckless or willful conduct…." S.C Code Ann s 15-38-15 (F); N.D. Cent Code s 32-03.2-02.

One of the more recent statutory reforms in favor of accountants occurred in Massachusetts. Due to the lobbying efforts of the Massachusetts Society of Certified Public Accountants, Inc., the Commonwealth promulgated M.G.L. c. 112, § 87A ¾. It provides for proportional liability in certain types of fraud claims against accountants. Specifically, in claims against certified public accountants in which: (1) "a claim or defense of fraud is raised against the plaintiff or another party, individual, or entity," (2) the plaintiff, other party, individual, or entity is found to have acted fraudulently "in the pending action or in another action or proceeding involving similar parties, individuals, entities, and claims," and (3) "the fraud was related to the performance of the duties of the individual or firm licensed to practice public accountancy," an accountant who did not engage in "willful and knowing" misconduct shall only be required to pay damages equal to the percentage of the accountant's fault. What is unique about this statute is that the trier of fact will need to determine the total amount of fault by the individual who committed the fraud, whether a party to the action or not. This would include an individual who embezzled funds and is now insolvent. Consequently, the accountant's total exposure in a failure to detect embezzlement in Massachusetts should be significantly limited.

Key Takeaways

Tort reform has reduced the exposure for accountants in various types of claims across the United States. Defense counsel should always keep the following points in mind when defending these types of cases to posture the defense toward an early and cost-effective resolution:

Know the rules of your jurisdiction. Does the jurisdiction continue to apply joint and several liability or has it replaced this system with proportional liability? Even if the jurisdiction continues to apply joint and several liability to its claims, does it apply joint and several liability against accountants or the type of accounting claim that is at issue in your case?

Discuss the damage limitations with plaintiff's counsel. While there are several firms that routinely litigate claims against accountants, plaintiff's counsel may not be aware of the specific limitations involving the claim at issue in your jurisdiction. As discussed above, some statutes (e.g., Massachusetts' recent statute) can significantly limit the accountant's exposure. If a plaintiff suffers a $1 million harm and the accountant is only 5 percent liable, the recoverable damages under a proportional liability analysis would only be $50,000, which may cause plaintiff's counsel to reconsider whether an early resolution is appropriate.

Assess whether to add third-party defendants. If the jurisdiction continues to apply joint and several liability to all claims, use that rule to your advantage. What is good for the goose is good for the gander. If an accountant can be subject to liability for being only 1 percent responsible, so can other joint tortfeasors. In most complex business disputes, the plaintiff's harms were caused by multiple actors. At times, a plaintiff may decide to sue only one defendant for personal or tactical reasons. For example, the plaintiff may not feel that his longtime lawyer contributed to the failed business transaction, may have an ongoing personal relationship that he or she does not want to severe, may be fearful that adding this party could waive the attorney-client privilege, or may believe that the inclusion of additional defendants will unnecessarily complicate the matter. Defense counsel should carefully explore whether other individuals or entities who were involved in the underlying transaction could be—at a minimum—1 percent liable for the loss. In jurisdictions that require joint tortfeasors to pay an equal pro rata share, the addition of one joint tortfeasor can reduce an accountant's exposure by 50 percent and the addition of two joint tortfeasors can reduce the accountant's exposure by 66 percent.

Ask your client the right questions. After determining what flavor of fault-sharing your jurisdiction has in place and identifying potential third-party defendants, there are some critical considerations to discuss with your client. As lawyers, we can speak about how the law allocates and calculates fault among professional parties to malpractice matters. What we cannot speak to, especially if we do not have complete information, is the practical fallout that could occur for the client if we decide to join other professionals to a lawsuit. These collateral consequences are likely to be at the forefront of your client's mind. Does the value of offsetting the potential exposure to your client outweigh the risk of losing future revenue, or any of the political and personal implications that joining these professionals could cause your client? To answer this, you need to get your client talking about their history with the potential joint tortfeasor, their ongoing relationship with the potential joint tortfeasor, how much business they originate, the value of the referrals they provide, etc. For many professional liability cases arising from underlying business disputes, sophisticated individuals and entities understand that litigation is the unfortunate cost of doing business and that they are being added to the dispute because the defendant is following the advice of his or her counsel. Others may take their addition to a lawsuit personally and severe ties with your client(s) moving forward. Your client is in the best position to know whether the potential players you are discussing fall in that later category.

Practical consequences aside, you also need to ask the right questions of your accounting client to determine who to even consider joining in the first place. For example, if the alleged malpractice relates to a stock acquisition, you might ask: Who represented buyers? Who represented sellers? Who were the investment bankers? What information were these players privy to in relation to the facts forming the basis of the claim against your accountant client? Even if the accountant erred in his or her calculation, should the lawyers have added safeguards to the stock purchase agreement to avoid the loss at issue? Did someone fail to provide complete (or worse, inaccurate) information to the accountant that was used in their calculations?

The last scenario you want is to learn about a potential joint tortfeasor at the eleventh hour and on the eve of discovery closing. While most professional clients will be happy to share the identity of all potential "other pockets," you should not assume that clients have the knowledge to make a determination as to potential joint tortfeasors who (legally) could and should be blamed for the allegations lodged against them. It is the lawyer's job to ask the right questions in the beginning to guide the client through their options and present the legal ramifications and benefits of potential joining another party so that the client can, in tandem with the practical considerations discussed above, make an informed decision about whether to join a party to litigation.

Use the damage limitations in preparing the defense strategy of the case. In every case, defense counsel needs to assess the likelihood of success, the cost of the defense, and the strategy to obtain an effective resolution for their client. Jurisdictional limits on the potential exposure of the accountant may impact how aggressively the case should be litigated. In cases in which the accountants' exposure can be limited, scorched earth discovery and dozens of depositions might be unnecessary. Instead, it may behoove defense counsel to recommend a pre-, or early post-suit mediation after the exchange of either informal or formal discovery. This process may educate the plaintiff about the limits of the claim and lead to an early resolution. Even if the case does not settle at that time, defense counsel has laid the groundwork for a future resolution and likely obtained valuable insight about the plaintiff's allegations and risk tolerance.

Conclusion

While successfully defending accountants can be difficult, a thorough understanding of the rules limiting the exposure of accountants in your jurisdiction will assist you in joining the necessary parties to litigation at the outset, crafting a cost-effective defense plan tailor made to allegations made against your client, and posturing the defense toward a successful resolution.

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Non-Compete Clauses and Professional Liability

By Andrea Schillaci and Christopher J. Kolber

As in life, communication is the key to successfully advising clients as to their rights and obligations under restrictive covenants.

Non-compete provisions have long been viewed by employers as reasonable and appropriate velvet handcuffs on departing employees and as an unfair burden on competition by the departing employees. The purpose of non-compete provisions is to guard valuable company assets, typically customers and clients which have often been developed over a long period of time and usually at great expense. These provisions are also used to protect proprietary trade secrets and the costs invested in training and developing employees. The search for the proper balance between these competing interests is frequently played out in the courtroom and increasingly in the legislatures and administrative arenas.

As attorneys representing professionals, we must be aware of our clients' contractual obligations to their employers as well as their fiduciary duties and duties of care to their clients. While admittedly rare, violations of non-compete agreements may have implications for professional liability. For instance, a professional employee who is sued by a former employer may find that their malpractice insurance does not cover legal fees or damages. Failure to advise a new employer of the existence of a non-compete agreement with a former employer may result in both the employee and new employer being sued. New employers may be sued for intentional interference with contract or even fraud. Former employers may also seek punitive damages.

Enforceability of Non-Compete Provisions

In recent years, the enforceability of non-compete agreements has been challenged and is in flux. States across the country continue to propose and pass restrictions that limit or eliminate an employer's ability to enforce a non-compete agreement on employees. Each state has been able to take a unique approach that fits their needs. Soon, however, that may not be the case. There has been pressure federally to pass regulations banning non-compete agreements. Most notably, the Federal Trade Commission ("FTC") has a proposed rule banning nearly all non-compete agreements federally that is set to be voted on in April of 2024. As this vote draws near, states may no longer have the opportunity to uniquely tailor their approach to non-compete agreements to fit their needs.

Employers across the country have had to monitor certain legislation that may limit their ability and what they can put in an employee's contract. There has been a lot of uncertainty and a lot of change over the years. Certain industries, like accounting, insurance, and real estate may be impacted more than others while employees across all industries and at all levels may stand to benefit. The uncertainty of employers and ambiguity between states may come to an end soon, and rather than wondering what they can and cannot do, employers will need to pivot their thinking to figure out how to best protect their businesses without the use of non-compete agreements.

Leveling the Field

It is well established that non-compete agreements for lawyers are prohibited, as discussed in ABA Model Rules of Professional Conduct Rule 5.6. Employees in other professions, however, have not

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had the same flexibility. That experience is already changing across the country.

Originally, non-compete agreements were designed to protect trade secrets and were typically limited to high-ranking employees and licensed professionals, including accountants, real estate and insurance brokers, and health care professionals. These agreements have been increasingly impacting all types of workers however, including those in such disparate businesses as food service, yoga, construction, and retail establishments. Indeed, it is likely the expansion of non-compete provisions to hourly workers and more diverse areas of employment that has resulted in the cry for reform.

The Traditional Use of Non-Compete Provisions

When not abused and used in the correct industry and with the types of employees that non-compete agreements are intended to cover, these agreements are effective and useful for employers. There is little debate regarding the pro-business effects that non-compete agreements can have. Generally, when these agreements are litigated, questions about the reasonableness of the provision's term and/or geographic scope, and general enforceability are raised. In addition, defenses may include breach by the employer, which may serve to nullify enforceability of the non-compete.

In 2004, the United States Court of Appeals, Ninth Circuit found a non-compete agreement between Nike and a former executive (a director of sales) to be valid when the executive attempted to leave Nike to become the VP of US footwear sales and merchandising at Reebok, a direct competitor of Nike. *Nike, Inc. v. McCarthy,* 379 F.3d 576, 578 (C.A.9 (Or.), 2004). The court reasoned that the non-compete agreement was enforceable not due to the general skills in sales and product development that the executive possessed, but rather it was enforceable due to the substantial risk of the diversion of part of Nike's business as a result of the potential use of highly confidential information that the executive had and the threat of the use of that information harming Nike. *Id*. at 565-586.

The enforcement of a non-compete agreement for this reason makes sense. A high-ranking and powerful executive who departs a position for employment with a direct competitor poses a significant risk of her using this information to benefit a new company employer. This situation poses a real threat to the former employer. While the need to prevent this situation appears reasonable, compare this to a sandwich chain or coffee shop; where someone's general skills in the industry are what is being restricted, without the threat of diversion of business away from the sandwich or coffee shop.

New York courts have routinely held that as a part of a non-compete agreement, an employer has a legitimate interest in protecting the goodwill and relationships that the employer has developed. *Grp. Health Sols. Inc. v. Smith*, 32 Misc. 3d 1244(A), 938 N.Y.S.2d 227 (Sup. Ct. 2011). It is important, however, to determine whose goodwill is actually in question.

The Indiana Court of Appeals has held that a non-compete agreement between an accounting firm and former employee was valid, where the scope of the agreement was limited geographically and in time. *See Coffman v. Olson & Co., PC,* 906 N.E.2d 201 (Ind.App. 2009). The court held that the goodwill generated between a customer and a business is a legitimate protectable interest that can be the subject of a non-compete agreement, where the goodwill was used to perform work by the former employee with clients that were former customers at the former employer's firm. *Id.*

Many states and even the FTC have proposed broad based bans on non-compete agreements.

Still, the enforceability was never automatic. There have been instances where a non-compete agreement in a more traditional area is not enforced, even in the context of goodwill. Where there was no evidence of an insurance agent employee using any confidential trade secrets of the former employer to unfairly compete with him, an employment agreement not to compete was deemed to be unenforceable as the court held that the insurance agent's services were not unique or extraordinary, and thus not an interest that could be protected by a non-compete agreement. *See Riedman Corp. v. Gallager*, 48 A.D.3d 1188, 852 N.Y.S.2d 510 (2008). This dispute stemmed from an agreement where plaintiff paid to release defendant from his prior employment agreement and purchased certain accounts of defendant at his prior employer. *Id.* at 1188. While this agreement did have a provision preventing the defendant from soliciting or accepting insurance or bond business from plaintiff's customers for two years, this agreement did not consist of buying the goodwill of the defendant. *Id.* After leaving plaintiff's business, the defendant continued to serve customers who chose to follow him and acquired new clients through his own efforts. The court held that this was not a violation of the employment agreement because the defendant created and maintained the goodwill with his customers through his own efforts, and thus the goodwill of those clients was not acquired by the expenditure of plaintiff and therefore plaintiff has no legitimate interest in preventing defendant from competing for the business of those clients. *Id.* at 1189.

When viewing non-compete agreements in the above contexts, it is easy to see how employers can benefit from their enforcement. The key here is that these agreements have been able to be litigated to determine whether or not they protect a legitimate interest and if they are fair and enforceable, giving both the employer and employee an equal opportunity to plead their case. By letting employers and employees litigate these issues, certain parameters are able to be set that help to limit abuse and promote effectiveness of these agreements, benefiting employers in the proper context while not unduly restricting employees. If a proposed ban was passed, obviously employers will not be able to explain why their non-compete agreement is necessary, rather we will likely see employers in court arguing that some other sort of agreement or restriction should not be deemed a non-compete agreement under the given definition.

State Limitations

Due to the impact that non-compete agreements have had on workers and their expansive interpretation by employers, attempts have been made to limit or ban their use across many states and many industries. Many states and even the FTC have proposed broad based bans on non-compete agreements. When enacting these laws, most legislatures have tried to balance the promotion of flexibility for and competition by employees and the protection of the interests of employers.

Over half of the states in the United States have a ban or restriction on non-compete agreements, and that number continues to grow. California, North Dakota, and Oklahoma have enacted near total bans on non-compete agreements. Other states fall short of a total ban, for example Virginia (Code of Virginia § 40.1-28.7:8) has a ban on non-compete agreements for certain low-wage workers and Nevada (NRS § 613.195) has a ban on non-compete agreements for hourly workers. Other states, including Oregon (ORS § 653.295), have bans subject to conditions such as a threshold minimum gross salary and require notice of the agreement after termination. Additionally, many states have industry specific bans, providing similar protection as those afforded to attorneys, such as bans on non-compete agreements for physicians. In these instances, patient choice is given greater deference that protection for employers. States such as Massachusetts and Oregon have provisions known as "garden leave" which essentially allow the employer to compensate the worker during the period of the non-compete agreement as a form of consideration.

One state that has recently been struggling with this issue is New York. Governor Hochul recently vetoed New York Senate Bill S3100A. If passed, this bill would have prohibited employers from requiring, demanding, or accepting non-compete agreements and other certain restrictive covenants from a defined group of covered individuals. The reason for the veto was based on Governor Hochul's belief that a one-size-fits-all approach was not appropriate in New York due to its anti-competitive economic nature. Governor Hochul seems to prefer a non-compete agreement ban that protects lower- and middle-class individuals, while excluding individuals making over $250,000 from non-compete agreements. This approach is similar to the original intent of non-compete agreements, where higher up executives and earners are the individuals that have the non-compete restrictions. While New York has not yet passed a non-compete ban, new legislation is expected to be proposed again this year.

The lack of non-compete agreement bans has not prevented Attorneys General from trying to limit the use of non-competes in their respective states. One of the more notable examples of the abuse of non-compete agreements involves the fast-food sandwich chain, Jimmy John's. Jimmy John's was making their workers sign non-compete agreements which were very limiting and lasted two years. The Illinois Office of the Attorney General filed suit against Jimmy John's and the New York Office of the Attorney General entered into a settlement agreement with Jimmy John's after an investigation into its non-compete agreements. *People v. Jimmy John's Enterprises*, LLC, 2016 CH 07746 (Ill. Cir. Ct. Cook Cnty. June 8, 2016). In 2016, as a result of both the New York investigation and Illinois lawsuit, Jimmy John's agreed to rescind all of the non-compete agreements and cease use of them going forward. In a press release regarding the settlement, then New York Attorney General Schneiderman said, "non-compete agreements for low-wage workers are unconscionable." Similarly, a coffee shop in Washinton State called "Mercurys Coffee," entered into a settlement agreement and voided its non-compete agreements after the Washington State Attorney General brought suit when the coffee shop began enforcing its non-compete clause for its low-wage and hourly employees, alleging that it was an unfair method of competition. *State of Washington v. Mercurys Madness Inc. dba Mercurys Coffee Co.*, No. 19-2-28449-8 SEA (Sup. Ct. Wash. 2019).

Application of Non-Compete Agreements to Independent Contractors

In some states, non-compete agreements can even be enforced against independent contractors. If a proposed federal ban is passed it would have a positive impact on independent contractors in all different industries. The FTC is clear that the proposed rule will apply to independent contractors. Below are a few examples of how courts have analyzed non-compete agreements for independent contractors.

A Florida court granted a temporary injunction that enforced a non-compete agreement between employer and an independent contractor photographer when an independent contractor breached a non-compete agreement that protected a legitimate business interest of the former employer of the independent contractor, resulting in risk to the employer's goodwill and customer relationships. *See Picture It Sold Photography, LLC v. Bunkelman*, 287 So. 3d 699 (FL Dist. Ct. App. 2020). Here, the independent contractor was seeking to supplement his income by providing services for some of the employer's customers on the side. *Id*.

Similarly, an Ohio court held that a non-compete agreement between an employer and disc jockey was valid where disc jockey agreed not to compete with the company directly or indirectly within a 50-mile radius for two years after the termination of the agreement. *See SJA & Associates, Inc. v. Gilder*, 2002 WL 1500862 (Ohio App. 8 Dist. 2002). Since the disc jockey was compensated by the company, the court held that this was valid consideration to enforce the agreement. *Id*.

If banned either by the state or federally, independent contractors will have more flexibility regarding how and to whom they provide their services to as well. However, they still must be leery of non-solicitation agreements as the above example was still a violation of the independent contractor's non-solicitation agreement with employer and that would continue to be the case even under the proposed rule.

Non-compete agreements were never originally intended for low-wage and hourly workers, as a legitimate protectible business interest is hard to argue in these cases. If Jimmy John's was really concerned about employees using their trade secrets, there is robust trade secret law in the United States to protect them, without having to hinder competition and wages of workers with non-compete agreements. While these settlements were a step in the right direction, they were not the end of the road. As discussed, New York still has not succeeded in passing legislation on non-compete agreements. Due to what appears to be continued abuses, the federal government is trying to take the matter into its own hands.

Federal Limitations

There are ongoing attempts federally to restrict or limit non-compete agreements as well. In 2021, President Biden issued an "Executive Order on Promoting Competition in the American Economy" encouraging the FTC to ban or limit non-compete agreements in order to promote competition and increase wages for workers. Additionally, the General Counsel of the National Labor Relations Board (NLRB) stated in a memorandum in May of 2023 that overbroad non-compete agreements are unlawful because they chill the ability of employees to exercise their rights under the National Labor Relations Act (NLRA). In September, the NLRB filed a complaint against a medical clinic and spa, claiming that the overbroad non-compete agreement was a violation of the NLRA. *Harper Holdings, LLC, d/b/a Juvly Aesthetics*, (09-CA-300239, et al.).

In January of 2023, the FTC issued a notice of proposed rulemaking that if passed, would ban nearly all non-compete agreements. The vote for this proposed rule is set to happen in April of 2024. The FTC believes that about thirty million Americans are impacted by non-compete agreements and believes the proposed rule to ban non-compete agreements could increase workers' earnings by $250-$296 billion per year. In short, the proposed rule would provide that non-compete agreements are a method of unfair competition and rescind all existing non-compete agreements. The proposed rule, 16 CFR part 910, can be found on federalregister.gov. The proposed rule expands to independent contractors, interns, volunteers, apprentices, and sole proprietors providing a service to a client. The proposed rule has a limited exception pertaining to buyers and sellers of a business allowing a non-compete agreement where the party restricted is an owner, member, or partner holding at least 25 percent ownership interest in a business entity.

When determining the existence of a non-compete clause under the proposed rule, the FTC is not focused on the name of the clause, rather it is considering the substance of the clause and how it will impact the worker. The proposed rule's definition of a non-compete clause is "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the

conclusion of the worker's employment with the employer." Noticeably absent from this definition are certain types of non-disclosure and non-solicitation agreements, because they do not necessarily restrict employment and competition. However, if these provisions are too broad and begin to function as a non-compete clause, then they will not be valid. It is likely that this will be a large source of litigation in the future if this rule is passed.

Practical Impact of Banning Anti-Competition Agreements

Where non-compete agreements are still enforceable, it is prudent to ensure that they should be drafted in such a way as to permit enforcement. These provisions must be drafted and applied so that a reasonable interpretation would not find them to be unconscionable or to unfairly restrain competition. It is important to remember that one size does not fit all and what may be reasonable in one profession may not be similarly reasonable in another. It is best practice to consider which employees will be impacted and how it may hinder their prospects of future employment. For example, a low-wage worker in a company should not be subject to the same non-compete restrictions as a high earning CEO of the company. Employers must ensure they are protecting a legitimate interest of the business rather than just utilizing blanket provisions or, worse, punitive provisions. It is important to look at the traditional common law factors of non-competes such as time, scope, geographic location, and consideration.

As more and more states continue to pass legislation and with federal regulations being seemingly inevitable, some employers are preparing by opting to stop using non-compete agreements altogether. Other employers are reviewing their non-compete provisions to ensure the clauses are reasonable and not unduly restrictive.

It is inevitable that there will be a host of litigation pertaining to contractual provisions that are not necessarily called non-compete clauses but act as them. If an employee feels like they are being restricted by a non-disclosure or non-solicitation agreement in a way that prevents them from seeking or accepting employment, there likely will be litigation to determine whether the applicable provision, however named, really functions as a non-compete clause.

It remains to be seen how employers would react to and comply with a federal ban on non-compete agreements. As discussed, some states, like California, have passed a near total ban on non-compete agreements. However, this has not stopped all employers from continuing to put these clauses in employees' contracts, leading to the California Attorney General having to issue a reminder on oag.ca.gov that non-compete agreements are not enforceable. While such provisions are void and not enforceable, not every employee knows this, and they still can have a negative impact on workers' wages and competition. If the FTC does pass the federal ban, will this practice of employers continuing to put unenforceable non-compete provisions in their contracts continue? What will be the litigation consequences of an employer continuing to put unenforceable non-compete clauses in contracts, hoping to prey on an employee's potential lack of knowledge or understanding of the law?

Some companies have decided to be proactive and get ahead of the trend. For example, in 2022, Microsoft announced that it will not enforce non-compete agreements going forward in order to empower employee mobility. While applying to most employees, the non-compete agreements of certain Microsoft senior leadership will still be enforced. This type of initiative by Microsoft is more in tune with the true origin of non-compete agreements.

While non-compete agreements have recently arguably been enforced overbroadly, they do have a function when used properly to protect trade secrets, other confidential information, and the investments of employers. However, as the FTC points out, there is robust trade secret law to protect these interests. Additionally, true non-solicitation and non-disclosure agreements would still be valid under the proposed rule. It is still likely that in practice this will not be as simple as it appears, and it is inevitable that that this will play out in litigation.

It is also worth asking the question, is a full federal ban on non-compete agreements going too far? While there are many compelling reasons for a federal ban, as discussed above – there are scenarios where non-compete agreements make sense. It is clear that the consequences for low- and middle-wage workers will be positive, it remains to be seen what the consequences will be for accountants, real estate brokers, insurance brokers, and high-level executives, among others. There is the potential for a lot of litigation in the wake of a federal ban on non-competes. This will likely play out with regard to who certain goodwill belongs to and who certain clients belong to. However, this has not seemed to be an issue for law firms, as they have been operating in a world that has prohibited non-competes for years.

Some of the strongest opposition to the FTC's proposed rule comes from US Chamber of Commerce. The US Chamber of Commerce published comments that pertain to how the FTC essentially is using a one-size-fits-all approach, where individual circumstances are not considered, such as skill, responsibilities, access to certain information, and bargaining power. The US Chamber of Commerce also raises valid points describing how the FTC is failing to recognize the positive impact that non-compete agreements can have on businesses and how they can promote competitiveness, things that courts have recognized for many years. Id.

Is More Nuanced Regulation Needed?

There could be profound impacts felt by different states as a result of something that has typically been regulated by the states to now potentially being regulated federally. It is also important to recognize that each state has a unique economy and has unique needs, which is why states have had different approaches to dealing with non-competes, ranging from total bans to more nuanced bans. However, the FTC, under this proposed rule, will be treating each state and each economy identically, which could have some positive effects in one state while it is negatively impacting another state.

Most people can see the difference in how non-compete agreements are used properly and when they are abused. A worker making sandwiches at Jimmy John's should not be restricted from seeking any other employment while it makes sense

to restrict a high-ranking executive at Nike's ability to move to a competitor. It is likely that we will just see more litigation with regard to high-ranking executives and those alike to limit their ability to work, have mobility, or at least limit the harmful impact that move may have on his or her prior employer. These situations are different, and the FTC treating them the same may not be the most impactful solution. Abuse of non-compete agreements on low- and middle-wage workers may have clouded the original purpose of them, and as demonstrated above they are still useful when used properly in appropriate industries.

The overall attack on non-compete agreements across the country appears to be good news for all workers. To the contrary, while employers in certain industries will not feel the effects of a ban, there are many that will. Some employers will essentially have to reinvent the wheel when it comes to drafting contracts to protect their trade secrets, customer lists, and confidential information. It remains to be seen just what that will look like. One thing that is certain is that employers will test the limits to see just how broad a non-solicitation or non-disclosure agreement can be worded before a court will deem it a non-compete agreement prohibited by the proposed FTC rule.

While the end goal of a proposed ban on non-compete agreements is to protect employees, there comes a breaking point where employers will be harmed, which ultimately negatively impacts employees by having a chilling impact on the market. There certainly will be a benefit to a federal regulation, however, a total ban nationwide could have dire consequences. There is a clear need and desire for something to be done, but that something may not need to be a full federal ban, rather something that is more fact and industry specific could be more beneficial for employees, employers, and the market as a whole.

Practice Points

Employees who have non-compete agreements usually also have confidentiality and non-solicitation agreements. Employers who believe that former employees are acting in violation of these agreements, including non-compete agreements, often turn to litigation. Complaints often include allegations of breach of contract, fraud, misappropriation of confidential information, breach of fiduciary duty or unjust enrichment.

Professionals, including independent contractors, who are changing jobs must examine their employment agreements to determine what, if any, restraints exist. When restrictive covenants exist, they must be disclosed to prospective employers before accepting a new position.

It is often possible to seek release from an overly restrictive covenant and efforts to negotiate are advisable.

As in life, communication is the key to successfully advising clients as to their rights and obligations under restrictive covenants.

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Forecasting the Downfall of a Decades-Old Real Estate Practice

By Zachary B. Pyers, Kenton Steele and Marissa A. Kuryla

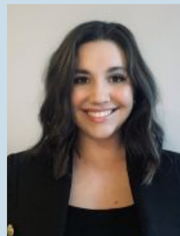
The end of an era is drawing near for the set 6 percent commission rate

The Real Estate Commission Controversy

The United States real estate market has been growing steadily over the past decade with its value expected to reach an astonishing height of over $119 trillion this year. As these numbers climb so have broker commissions. The commissions have remained at a fairly stable rate of around 6 percent for the past several decades thanks to a rule implemented by the National Association of Realtors (the "NAR"). Despite the popularity of the rule among brokers (who do not have to worry about adjusting their rates based on sale prices or market conditions) and homebuyers who do not have to pay their broker's commission fee, others are not as keen. Particularly, the controversy surrounding the commission rate stems from whether the NAR's rule dictating that brokers and agents charge and split a set commission fee violates federal antitrust laws. While several courts in the past have held that this practice does not violate the law due to the organizational structure of the real estate market, more recently courts are beginning to change their tune to find that the practice is in direct conflict with the Sherman Act. In October of 2023, in a rather unprecedented decision, a Missouri court held that this commission structure is in fact a violation because it restrains free market competition and trade. While this holding may be one of the first of its kind, it is certainly not the last. This article will explore the history behind the contentious commission rule to better understand how this new ruling is pivotal and will likely provide a new framework for approaching the issue in court. Understanding what this ruling means for real estate professionals can help inform them of the ways to protect themselves from committing antitrust violations in the future, assuming this trend continues.

A Historical View of the Intersection Between Realtor Rules and Antitrust Law

The National Association of Realtors is a trade association comprised of real estate professionals that has implemented mandatory policies and guidelines for its members to adhere to through its Handbook on Multiple Listing Policy. In 1996, the NAR adopted the Buyer Broker Commission



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Rule to the Handbook. This rule advises brokers and agents to charge and split a 6 percent commission fee between the buyer's and seller's brokers, regardless of the price of the sale. The effect of this rule has had a massive impact on the real estate market by allowing brokers to receive sizable commissions even on smaller sales. Additionally, the rule has the effect of placing the obligation of payment of the entire commission on the seller. While both home buyers and brokers alike have rejoiced since this rule took effect, it's become the bane of many home sellers over the years. Prior to the implementation of the rule, homebuyers were charged with paying their own broker's commission fee. Now, the seller bears the burden of paying its own broker and the buyer's broker as well due to the splitting nature of the commission. This has given rise to an increasing number of litigious actions against the NAR and real estate companies that enforce and follow the rule throughout the country.

The basis of these actions is rooted in allegations of antitrust law violations. Specifically, some have voiced their belief that the rule violates Section 1 of the Sherman Act which prohibits price fixing. Price fixing is an agreement, whether express or implied, between competitors to fix prices or wages in a particular industry. There are two types of price fixing: vertical and horizontal. While vertical price fixing involves an agreement to set prices between entities at different levels of the market, horizontal price fixing involves a conspiracy between competitors at the same market level. To establish a claim under Section 1 of the Sherman Act, a plaintiff must demonstrate: (1) that there was a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade; and (3) that the restraint affected interstate commerce. *Burnett v. National Association of Realtors,* 2022 US Dist. LEXIS 226614, 16 (W.D. Mo. 2022). To establish the first requirement, courts will look at direct evidence of an agreement or conspiracy as well as circumstantial evidence that tends to prove that there was a conscious commitment to a common scheme designed to achieve an unlawful objective. *Nosalek v. MLS Prop. Info. Network, Inc.,* 2022 US Dist. LEXIS 180409, 206 (Dist. Mass. 2022). To establish the second requirement, courts employ one of two different analyses depending on the circumstances of the particular case. *Hyland v. HomeServices of America, Inc.,* 771 F.3d 310, 318 (6th Cir. 2014). Most cases brought under Section 1 are analyzed under what is commonly known as the "rule of reason" which is applied in cases involving vertical price fixing. *Id.* Under this analysis, the court will look at the specific industry and circumstances in question to determine whether an alleged restraint is unreasonable. *Id.* Only those restraints on trade which are unreasonable will be deemed unlawful under the Act. *Id.* Conversely, when facing allegations of horizontal price fixing, the courts will find

the restraint unlawful per se if it finds that such price fixing exists. *Id*. These types of restraints are deemed unlawful per se due to their predictable and pernicious anti-competitive nature. *Id*. The Buyer Broker Commission rule falls comfortably under the scrutiny of horizontal price fixing given the commission sharing between brokers at the same level.

Despite the seemingly glaring horizontal price fixing-nature of the NAR commission structure, courts in the past have been reluctant to find that the rule constitutes an antitrust violation. While the issue is only just recently gaining attention, a few courts have addressed it in the years since the rule's inception. The Sixth Circuit visited the issue in 2014 when a class of homeowners brought suit against multiple broker firms alleging illegal price fixing. *Hyland*, 771 F.3d 310. Plaintiffs provided extensive direct and circumstantial evidence including discussions between the defendants regarding pricing structures, commissions levels, and marketing practices of other brokers throughout the community along with other statements made by real estate professionals and data explaining the dangers of inflated price fixing in the real estate market. *Id*. at 315-316. In response the defendants argued that due to the nature of their business being full-service broker firms and given the range of services they offered it justified a higher commission price. *Id*. Additionally, the defendants noted that the commission rate was open to negotiation outside of the standard 6 percent rate. *Id*.

On appeal, the court agreed with the district court that the plaintiffs failed to provide sufficient direct evidence that the defendants conspired to fix prices. *Hyland*, 771 F.3d 310, 319. Additionally, the court supported the district court's finding that the plaintiffs failed to meet their burden of showing circumstantial proof of a conspiracy. *Id*. at 319-320. In its analysis the court noted that the defendants would often deviate from the standard 6 percent commission rate, seeming to indicate an independent pricing decision. *Id*. The court also noted that the Sixth Circuit has previously held that setting "cooperative sale-commission rates" is not itself price fixing and that these types of rates can exist in a competitive market. *Id*. Taking all of this into account, the court affirmed that, "charging a standard commission rate across the board and retaining increasing profits from the sale of higher priced homes is consistent with rational business judgment and not probative of an illegal agreement to fix commissions." *Id*. at 321.

A Georgia court also rendered a similar decision in a case brought against the First Multiple Listing Service ("FMLS"), a joint venture that operates a multiple listing service in Georgia, and other real estate brokers who have adopted the FMLS's rules. *Bolinger v. First Multiple Listing Service, Inc.*, 838 F. Supp. 2d 1340, 1344 (N.D. Ga. 2012). The plaintiffs, like those in *Hyland*, alleged that the defendants conspired to fix commissions in violation of the Sherman Act. They cited the defendants' compliance with the FMLS's rules that included a hidden settlement fee which artificially raised the commission price to ensure at least a 6 percent commission rate. *Id*. at 1358. The fee, which is paid by brokers to the FMLS for use of its services when a property is sold, is included in the costs charged to the sellers. *Id*. This, plaintiffs said, results in higher fees and commissions paid to the brokers. *Id*. Conversely, defendants argued that the plaintiffs' assertion that the broker-members were conspiring to fix commission rates because they follow the FMLS's rules and pay the fee for its services was not sufficient to show any agreement to set commission rates. *Id*. The court agreed saying that defendants' enforcement of the rules being challenged by the plaintiffs did not show any concerted action that amounted to a conspiracy that would restrain competition. Id. at 1360. The court dismissed the case allowing the commission structure to live to see another day.

What these cases have in common is the unwillingness of courts to find collusion among members of the real estate community simply because they are adhering to the rules imposed on them by their regulators and local listing services. Both courts in *Hyland* and *Bolinger* noted the independent nature of determining the commission fee, even though brokers very rarely deviate from the set rate. Due to these holdings, the Buyer Broker Commission rule, and its adopted variations, has endured despite the evidence that it is inherently unfavorable toward competition. But as more and more sellers become disillusioned with their unfavorable position in the game, courts are starting to rethink the fairness of the arrangement.

Recent Developments

A recent landmark case out of Missouri marks a shift in the tide from previous rulings. The case, commonly known as *Burnett*, was originally filed in 2019 by a class of home-seller plaintiffs who claimed, like others have in the past, that the Buyer Broker Commission rule violates the Sherman Act. *See Burnett*, 2022 US Dist. LEXIS 226614. The plaintiffs argued that the commission structure is unfair toward home sellers in that it forces them to pay an inflated commission price due to the commission sharing nature between the buyer's and seller's brokers. In other words, the rule's effect is that sellers have to pay a commission fee to the buyer's broker that they would not ordinarily pay absent the rule. Conversely, the defendants, the NAR, HomeServices of America, and Realogy Holdings Corp. to name a few, argued that, while the commission structure appears to be fixed, the commission rates have always been negotiable, and the Buyer Broker Commission rule is not a mandatory rate.

The court considered the training imposed on real estate professionals, the encouragement by the MLS to engage in cooperative compensation between brokers, and the fact that the NAR Handbook's rules lay out mandatory guidelines that its members must adhere to. The court found plenty of evidence, both direct and circumstantial, to point to a conspiracy to commit price fixing and denied the defendants' motion for summary judgment. While the plaintiffs settled with several of the defendants, the case made it all the way to a jury trial where, in October 2023, the jury rejected the defendants' arguments stating that even if the commissions are negotiable, the seller is still on the hook for paying, which makes it an unfair practice because it restricts price competition. The jury returned a verdict for the plaintiffs holding the defendants NAR, HomeServices, and Keller Williams Realty liable for $1.8 billion for conspiring to keep commissions artificially high. The case, which is now pend-

ing on appeal, marks a notable and drastic change from past holdings.

Looking Ahead

So, what does this mean for the real estate market? Even with the case still on appeal, a trend appears to be forming. In fact, the NAR and other well-known brokers are currently involved in several other similar suits and are being closely monitored by the Department of Justice. Several market analysts have also posited that, in light of the recent ruling and other government actions, in the long run we should expect to see a restructuring of the brokerage industry's commission practices. This would include eliminating the Buyer Broker Commission rule altogether which affects brokers and agents nationally. Not only could brokers face significant financial losses from paying damages in court, but they could lose out on higher commissions. Elimination of the rule could also affect homebuyers. With the current inflated cost of interest rates, the added burden of having to pay a broker commission may deter people from buying at all. In turn, brokers could also face a decrease in business from a lack of buyers in the market. With this in mind, it is crucial to assess whether the decision in *Burnett* was merely an anomaly or if it is the beginning of a chain reaction so that brokers and buyers alike can be prepared for what the future holds.

There are currently a couple of cases pending in the northern district of Illinois and the district of Massachusetts against many of the same defendants as those in *Burnett*. The first, *Moehrl*, is one to keep an eye on as the plaintiffs have already teamed up with those in *Burnett* to settle their claims against Realogy Holdings Corp. (since renamed "Anywhere Real Estate") and RE/MAX LLC (collectively the "settling defendants"). See Mot. For Preliminary Approval of Settlements, pp. 1-2, *Moehrl v. National Association of Realtors,* et al., No. 19-CV-00332-SRB (W.D. Mo. Oct. 5, 2023). In October 2023, the plaintiffs from both cases settled with the settling defendants for a staggering sum of $138 million along with an agreement by the settling defendants to implement practical changes to their commission structure as well as not requiring agents to be members of the NAR. Id.; *See also* Bahney, Anna, *After a $1.8 Billion Verdict, the Clock is Ticking on the 6 percent Real Estate Commission*, CNN, November 5, 2023, ***https://www.cnn.com/2023/11/05/homes/nar-verdict-real-estate-commission-fee/index.html***. However, the NAR and other remaining defendant real estate broker companies are still fighting to preserve the commission. Given the trajectory and outcome of *Burnett*, it is not presumptuous to assume that *Moehrl* may come out the same way for these defendants.

The second, *Nosalek*, is another case currently making its way to trial. The case was filed in 2022 and the court recently granted the plaintiffs' motion to compel discovery against defendant Anywhere Real Estate (formerly "Realogy Holdings Corp."). *See generally Nosalek*, 2022 US Dist. LEXIS 180409. The plaintiffs filed the motion seeking to obtain all documents and statements made by the company about the Buyer Broker Commission rule. *Id*. As the case progresses, real estate professionals in the New England area should begin preparing for a similar outcome to that of *Burnett* given the courts' seemingly plaintiff-friendly attitude in the prior orders.

The Missouri ruling has not gone unnoticed throughout the real estate professional community either. As one broker from Minnesota said in an interview with CBS, "the entire real estate market is talking about it [Burnett]." Lauritsen, John, *Missouri Antitrust Lawsuit Has Minnesota's Real Estate Industry on Guard*, CBS News, December 18, 2023, ***https://www.cbsnews.com/minnesota/news/missouri-antitrust-lawsuit-minnesota-real-estate-industry-reaction/***. Other brokers have started to come to terms with what a similar verdict in their state could mean for them. Many are aware that sellers may soon be able to avoid paying the buyer's agent and the buyer may be faced with paying the commission making it harder for them to afford their own realtor considering how high current interest rates are. Since the ruling, some broker companies are already beginning to shift their commission structure from a set percentage rate to a flat rate fee with an option to the seller to pay the buyer's broker. *Id*. Doing so will help eliminate the risk involved in continuing to adopt the current structure.

Warning to Real Estate Professionals

Given the Missouri court's stance on the matter, and the other cases on the horizon, it is imperative for real estate brokers and agents across the country to be cognizant of the possibility that soon their state could face similar rulings. A word of advice: take care to avoid and change the existing commission structure. With more of these verdicts seemingly imminent, it's critical that the NAR, and real estate professionals in general, begin to think long-term regarding commissions. Going forward, the best practice would be to either set a variable commission price based on the sale price of the real estate property or charge a flat rate fee to both the seller and buyer. This will help ensure the avoidance of any undesirable consequences that would come with violation of the Sherman Act (as we saw in *Burnett* with a multi-billion-dollar repercussion).

Additionally, brokers and agents should be as transparent as possible with their clients regarding the commission rates. Buyer's brokers should be up front with the buyer about the possibility that they may need to pay the commission instead of the seller. Being up front with clients now and keeping them informed of potential changes to look out for in the future will help ease any burden they might feel if they suddenly need to start paying a commission fee they haven't had to pay in the past.

Conclusion

An unknown road lies ahead for the Buyer Broker Commission rule; however, these new developments are all pointing to its days being numbered. With this in mind, and the possibility of being held liable for millions, if not billions, brokers and agents will need to start considering a change. Getting ahead of these changes will help brokers and agents avoid costly litigation and give buyers time to adjust to the new commission structure that will likely require them to pay their own portion. The end of an era is drawing near for the set 6 percent commission rate, and out of an abundance of caution, brokers should heed the warning signs and do away with it.

Is It Legal Malpractice Not to Seek Treatment for Mental Health Issues?

By Cory Reed and Nadia Sheikh

Mental health has moved centerstage over the last several years.

There is a dangerous combination brewing. The number of grievances and legal malpractice cases against attorneys is steadily rising. At the same time, attorneys are facing a reckoning in the mental health arena. At the intersection of these two issues lies a fundamental question: is it legal malpractice not to seek treatment for mental health issues such as depression, anxiety, and substance use disorders?

Mental health has moved centerstage over the last several years, due in large part to the COVID-19 pandemic. During the pandemic, everyone was forced to take a step back from their normal day-to-day life while simultaneously confronting mortality on an individual and global scale. The collective struggle brought on by the pandemic broke barriers and forced a collective conversation about mental health and well-being. Life as we all knew it came to a halt and many individuals embarked on a journey of self-reflection because of what happened across the world starting in 2020. This spotlight on mental health and well-being traversed its way into many facets of life, including work. Many companies – across a variety of sectors including law firms – incorporate wellness into their business model to provide resources to employees and to prove adaptive to the needs of employees. As our awareness of the importance of mental health expands, there will be an emergence of potential issues to subsequently consider. One such issue is the potential for mental health challenges to impede upon the ability of attorneys to do their job at the requisite level.

The legal profession is notorious for being riddled with mental health struggles including high stress, anxiety, depression, burnout, and substance abuse. According to the American Bar Association's 2023 Profile on the Profession, 66 percent of respondents indicated their time in the legal profession has been detrimental to their mental health and 46 percent indicated they considered leaving the profession due to high stress and burnout. Recent national reports indicate lawyers suffer from exceedingly high rates of depression, anxiety, and substance misuse. At the same time, attorneys are human. Mental health does not discriminate by profession. Lawyers are not immune from encountering problems in their personal lives simply because their profession is laced with stress. It is essentially inevitable that practically all attorneys practicing law will face a mental health challenge at some point in their career – either large or small, either professional or personal.

Let's say you are presented with a potential legal malpractice case wherein the plaintiff alleges their former attorney missed a dispositive motion deadline, or an expert designation deadline, or there is an allegation of an undisclosed conflict of interest, or there is an allegation of the misappropriation of client funds. These are just a few of the many reasons someone may choose to pursue a legal case against their former lawyer. Now, how would it change your assessment of the potential

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legal malpractice case if you found out the accused attorney had a diagnosed mental health issue such as major depressive order? How would it change your assessment of the potential legal malpractice case if you found out the accused attorney was a known alcoholic? How would it change your assessment of the potential legal malpractice case if you found out the accused attorney suffered from anxiety? As defense attorneys, our legal minds are trained to analyze potential risks and formulate arguments almost automatically. As human beings, our society is transforming in such a way where we are finally confronting the potentially debilitating nature of mental health struggles. When we fuse these two realities together, the ultimate conclusion is that it is possible for a mental health struggle – especially if untreated – to affect one's ability to effectively practice law.

Common Reasons Clients Sue for Legal Malpractice and the Rise in Claims

The most common reasons lawyers get sued are for missing deadlines, breaching confidentiality, not keeping clients informed of material developments, misuse of client funds, inadequate investigation or discovery, undisclosed conflicts of interest, failure to know or apply the law, and failure to obtain client consent. Regardless of whether the claim has merit or is ultimately successful, clients are increasingly emboldened to pursue legal action against their former lawyers. Moreover, attorney malpractice claims are emotionally charged given the client believes there would have been a different outcome to their matter but-for the purported malpractice.

Insurance brokerage Ames & Gough regularly surveys the ten leading lawyers' professional responsibility insurers, which together provide insurance to 80 out of the 100 largest law firms in the nation. In the 2020 survey, Ames & Gough reported 8 of the 10 insurers saw as many or more legal malpractice claims in 2019 as they did in 2018 and three insurers reported double digit increases in claims. The 2019 surge comes after five straight years wherein the majority of insurers reported claims had either remained the same or decreased year-over-year. According to Ames & Gough's 2022 survey, the number of malpractice claims has remained steady since the 2019 surge and is not showing signs of slowing down.

Brief Overview of the Legal Malpractice Framework

Across the nation, attorney malpractice cases are based upon theories of negligence, breach of contract, and breach of fiduciary duty. There are differences across jurisdictions, but virtually every jurisdiction across the nation allows for a negligence-based attorney malpractice claim.

In general, the plaintiff must prove (1) there is a duty owed to him by the defendant, (2) a breach of that duty, (3) the breach proximately caused his injury, and (4) that he incurred damages. Every jurisdiction's basis for legal malpractice claims is built upon the principle that the attorney failed to use the requisite level of skill, care, and knowledge and so the attorney's conduct fell below a standard of care. Additionally, every jurisdiction requires the plaintiff to prove such failure caused damages in order to prevail on the legal malpractice claim. Most often, plaintiffs put forth evidence of an attorney-client relationship and thereby impute duty as it relates to their legal malpractice claim. Damages vary depending on the specific facts of the malpractice claim. The more challenging elements – and most relevant for purposes of this article – are whether the attorney breached the standard of care and whether such breach caused the plaintiff's alleged damages. Over the course of the litigation, the plaintiff will need to designate an expert to opine as to the applicable standard of care and whether the defendant's actions constitute a breach of the standard of care. In order to prevail on a legal malpractice claim, the plaintiff must show that the purported failures would not have been committed by a reasonably prudent attorney under the same or similar circumstances. Further, the plaintiff must show that the breach, if any, was the prox-

imate cause of the alleged damages. There must be a direct link between the conduct that fell below the standard of care and the harm caused to the plaintiff.

> **As our workplaces continue to transform and the legal profession continues to expand its awareness surrounding mental health, it is crucial for each attorney to be more mindful**

In virtually every single attorney malpractice case, the plaintiff seeks to hold the law firm vicariously liable for the actions of the individual attorney. This raises additional factors to consider such as whether the supervising or managing attorney's conduct fell below the standard of care. In other words, this raises questions of whether the supervising attorney should have acted or done something in order to prevent the alleged failures made by the attorney working the case.

Powering through Issues

In March of 2022, an attorney was suspended for a year and a day because the attorney did not inform his client or the supervising partner about an adverse decision on a tax assessment appeal and then failed to timely file a subsequent appeal. The attorney repeatedly lied to the client stating he was investigating the matter while failing to inform the client the assessment appeal had already been denied. A lien was ultimately imposed on the client, which caused a default of the client's loan provisions. The attorney also prepared a false affidavit stating he could not locate the decision related to the appeal matter. This attorney had also recently accepted a practice group leader role within his firm.

At the disciplinary hearing, it came to light that the attorney had separated from his wife a few years prior and was diagnosed with severe depression and anxiety. The attorney testified, in retrospect, he should have taken some time to address his mental health prior to accepting the position as practice group leader. The attorney mistakenly thought he could power through his issues.

This attorney's experience highlights a few key matters. First, the idea one can power through their issues is commonly held across our profession. Second, an attorney may not realize the severity of their issues until it is too late. Hindsight is 20/20, right? While this instance did not result in a legal malpractice claim, it could have. Had the attorney's former client not filed a grievance, what would it have taken for the attorney to realize he needed take a step back and work through his issues?

Mental Health Issue Is Not Conclusive Evidence of Malpractice

In Texas, a former client brought action against attorneys who had represented him in an underlying divorce action alleging that the attorneys had advised or permitted client to include his closely held corporations' stock and their assets in the property division under a mediated settlement agreement thereby causing injury to the corporations. Beck v. Law Offices of Edwin J Terry, Jr., PC, 284 S.W.3d 416 (Tex. App. – Austin 2009). The attorneys obtained dismissal of the client's breach of fiduciary duty, breach of contract, and Deceptive Trade Practices Act claims. Thereafter, the remaining negligence claim went to a jury trial where the District Court entered a take-nothing judgment.

The client appealed. Central to the client's case were factual allegations that the attorney suffered from alcoholism and substance abuse during the representation. Specifically, the client alleged the attorney's alcohol and substance abuse addictions caused or contributed to the attorney's failure to exercise a reasonable standard of care when providing legal services. Moreover, the client had also sued the law firm and alleged the firm knew of the attorney's alcohol and substance abuse problems and failed to disclose these problems to the client. During the course of the litigation, the client obtained medical records from an Arizona rehabilitation center wherein the attorney had previously sought treatment related to alcohol use. These same records reflected clinical findings of alcohol dependency and depression. Further, the records showed the attorney had left the facility against medical advice. There were also accusations of cocaine abuse.

The trial court excluded this evidence during the trial on the grounds that the potential for unfair prejudice or confusion of the issues substantially outweighed the probative value of the evidence. On appeal, the client urged the alcohol and substance abuse evidence was a critical component of their malpractice claim. The Court of Appeals ultimately upheld the lower court's rulings noting the client had not put forth sufficient evidence to link the attorney's alleged alcohol and substance use issues to his actions during the mediation issues made basis of the claims.

An Iowa trial court allowed the plaintiff to present evidence of the smell of alcohol on his former attorney's breath during trial. Tim McCandless, Inc. v. Yagla, No, 09-1738, 2011 WL 578692, *1 (Iowa 2011). Ultimately, the Supreme Court of Iowa upheld the Court of Appeals decision reversing the admission of such evidence because the plaintiff had not introduced evidence of impairment. In other words, had the plaintiff sufficiently connected the smell of alcohol on his attorney's breath during trial to an impairment in the attorney's skill or abilities during trial, the evidence would have been admissible.

What is developing here through the limited case law directly on this issue is a plaintiff needs to link the mental health issue to specific actions during the representation showing the attorney did not meet the standard of care. This is unsurprising given the legal framework for negligence. This is notable given the prevalence of mental health issues plaguing the legal profession.

It is important to note the mere presence of a mental health issue is not conclusive evidence an attorney has committed malpractice. Having a substance use or misuse disorder and practicing law without

seeking treatment is like walking a fine line. It is not out of the realm of possibility for a plaintiff to successfully hold an attorney liable for negligence stemming from a mental health issue. Similarly, a law firm may be held vicariously liable for the negligence of its attorney stemming from a mental health issue.

Understanding the Potential Impacts of Mental Health Issues

Millions of people across the country struggle with mental health issues every single day. According to Mental Health America, the number of people seeking help for anxiety increased 93 percent following the pandemic. Fundamental to any discussion surrounding mental health is the need to appreciate the nuanced differences between different mental health issues and the fact there are professionals trained to diagnose and treat these issues on an individual level. That being said, there is information available to the general public to aid in our understanding of the potential side effects and impacts of mental health struggles. The Diagnostics and Statistical Manual of Mental Disorders, commonly known as the "DSM" is a reference book on mental health conditions. The DSM is written, edited, reviewed, and published by the American Psychiatric Association.

To even attempt analyzing the potential for legal malpractice as it relates to mental health struggles, we must start by understanding the practical implications. Pop psychology has popularized people throwing around psychology terms such as anxiety, depression, or trigger haphazardly. But it is important to recognize the true meaning of these issues. It is equally important to recognize these issues, if gone ignored and untreated, have real consequences.

Most attorneys feel nervous before a hearing or before starting trial; it is not uncommon to conflate this feeling of nervousness with feelings of anxiousness. According to the DSM-5, anxiety is complex. For example, Generalized Anxiety Disorder is a mental health condition which causes fear, a constant feeling of being overwhelmed and excessive worry about everyday things. Generalized Anxiety disorder can affect adults of all ages and is manageable with talk therapy and/or medications. Operating in a constant state of feeling overwhelmed or being plagued with excessive worry can result in misapplying the law on a case, not filing a dispositive motion, or missing an important deadline.

Most humans feel sadness for a variety of reasons and for different periods of time. Loss of a loved one, an unexpected change in life, losing out on a promotion or a raise, or strain in personal relationships for instance. According to the DSM-5, there is a multi-faceted classification for the types of depression. There is clinical depression (also referred to as major depressive disorder), persistent depressive disorder, disruptive mood dysregulation disorder, seasonal depression, atypical depression, prenatal depression, postpartum depression, and depression related to another medical condition such as hypothyroidism. Researchers estimate more than 16 percent of adults in the US will experience some form of depression at some point in their lifetime. The Department of Psychiatry at the University of Minnesota recently found in a large nationwide study of 12,825 licensed and practicing attorneys, 28 percent reported symptoms of depression. There are various symptoms and practical consequences of depression; most relevant to the day-to-day practice of law are a decreased efficiency with which routine tasks are completed and an impaired ability to think, concentrate, or make decisions.

Attorneys are seen as heavy drinkers. But there is a difference between drinking and having alcohol use disorder. There has also been discussion for many years about attorneys using substances to help them power through a large workload or fight through fatigue. But there is a difference between using substances and having substance use disorder. According to the DSM-5, alcohol use disorder, also known as alcoholism, is a medical condition which involves heavy or frequent alcohol drinking even when it causes problems, emotional distress, or physical harm. According to the DSM-5, substance use disorder is a complex condition that involves a problematic pattern of substance use and it can range from mild to severe. Both alcohol use disorder and substance use disorder are treatable but require professional help.

At the end of the day, is it not prudent for someone suffering from these issues to seek treatment in a wholehearted effort to avoid any ramifications to their work?

Appreciating the Importance of Diagnosis and Seeking Help

According to the American Psychiatric Association, the first step in treating any mental health condition is accurately diagnosing the condition. This is similar to physical illnesses or conditions. Most people go to the doctor when they get sick and can appreciate the importance of doing so in order to get better. Even more clear is the need to seek medical treatment for a major physical condition such as cancer, tumors, broken bones, or a stroke. Yet, attorneys of all ages and backgrounds still struggle to admit they may need help for mental health issues; this is true despite the monumental leaps our society has made over the last several decades to normalize seeking treatment for mental health.

Attorneys are bred in competitive and adversarial environments – from competing with other attorneys to climb the proverbial ladder and make partner at the firm to competing against opposing counsel. In the heat of battle, the last thing anyone wants to do is admit weakness and tell their opponent exactly how they are vulnerable. Most attorneys would sooner tell their opposing counsel they need an extension on discovery because they have the flu than because they are having a major depressive episode and can barely get out of bed. Frankly, most attorneys would be hard pressed to admit to opposing counsel – or their colleagues – that they are feeling extremely burned out and need some more time to get something done. These fears are not baseless, but they could be costly. There is no doubt the attorney himself or herself will suffer if fear precludes them from taking a step back and taking care of themselves. Then, there is the potential that clients and colleagues will be negatively impacted too.

Having a mental health struggle – diagnosed or not – does not in and of itself mean an attorney cannot adequately handle their cases or practice law. It does mean there is the potential, depending on the situation, for them to make mistakes which might be detrimental to their

client's interests. It also means there is the potential for their mistakes to cost their firms as well.

The same way we explain to our clients what the strengths and weaknesses of their case are and strategize on how to manage personalities in the case, we must be honest with ourselves and our colleagues about our own weaknesses. Even more important, we should work to remove the stigmas associated with our profession.

Tying It All Together

There is an attorney who is burned out, running on fumes and only a few hours of sleep each night who is still showing up and practicing law every day. There is an attorney battling major depression due to a significant personal loss who is still showing up and practicing law every day. There is an attorney grappling with severe anxiety who is still showing up and practicing law every day. Is it only a matter of time before one of these attorneys makes a critical mistake on a case and the damage cannot be undone? Is it only a matter of time before the attorney widely yet privately known as an alcoholic makes a mistake directly attributable to his drinking that causes irreparable damage to the client?

Practically speaking, if you are defending an attorney accused of committing malpractice and the plaintiff relies upon evidence of a mental health struggle, it will be critical to immediately investigate: (1) was the attorney truly facing a mental health challenge whether diagnosed or undiagnosed and (2) is there a sufficient link between the mental health challenge and the specific mistake the plaintiff alleges the attorney made.

Asking these questions will help us make the legal profession better. There is no bright line rule for us to memorize and apply. This is not a situation where we can prevail by relying solely on logic. The truth of the matter is mental health is a sensitive and recently emergent topic. Navigating mental health with our colleagues requires heart. We must pay attention to the people we work with and be bold enough to ask the tough questions. We have to make a collective effort to move the needle and make it normal for folks to take care of themselves whether the matter be physical or mental. Partners and supervising attorneys at firms need to be mindful of whether the mistakes being made on cases are attributable to mental health struggles that are not being managed by the person battling them.

There are several resources available to attorneys across the nation. Virtually every state bar has some form an attorney assistance program aimed at raising awareness about mental health issues and to help lawyers find solutions for dealing with mental health issues. These programs are confidential and provide a safe space for attorneys struggling to navigate seeking help. As our workplaces continue to transform and the legal profession continues to expand its awareness surrounding mental health, it is crucial for each attorney to be more mindful of themselves and their colleagues. If you think you, a colleague, or a friend in the legal profession are struggling with a mental health issue – big or small, personal or professional – then please seek help before the matter becomes detrimental for you, your clients, and your firm.

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All in the Family

Does the Use of an Applicant's Family History of Diseases or Disorders in Life Insurance Underwriting Violate Illinois' Genetic Information Privacy Act?

By Joseph R. Jeffery

The plaintiffs' lawsuits generate smoke, but there is no fire.

The Illinois legislature has led the charge on privacy rights for decades with legislation like the Biometric Information Privacy Act ("BIPA"), which gave rise to actions and class actions against companies like Facebook, Google, and Snapchat and paved the way for similar legislation in Texas and Washington. *See* 740 Ill. Comp. Stat. 14/10 (regulating the collection and use of "biometric identifiers" and "biometric information," including retina or iris scans, fingerprints, voice prints, and vein patters); *see also* TEX. BUS & COM. CODE ANN. § 503.001, et seq. and WASH. REV. CODE ANN. § 19.375.010, et seq. At first blush, four recently filed class action lawsuits founded on Illinois' Genetic Information Privacy Act ("GIPA") make one wonder whether there is another far-reaching Illinois privacy statute that, in this instance, could disrupt life insurance underwriting in Illinois and serve as a template for similar legislation in other states.

The lawsuits allege the defendant life insurers violated GIPA by using the plaintiffs' family histories of diagnoses of and/or deaths due to certain diseases or disorders for underwriting purposes. *See Dan Johnson v. Pacific Life Ins. Co. and Pacific Life Annuity Co.,* Case No. 2023 CH 09247 (Circuit Court of Cook County, Illinois); *Susan Miller v. Massachusetts Mutual Life Ins. Co.,* Case No. 2023 LA 001176 (Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois); *Milton Reynolds v. State Farm Life Ins. Co. and State Farm Life & Accident Ins. Co.,* Case No. 2023 LA 000465 (Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois); *Brynn Thompson v. The Prudential Insurance Company of America and PruCo Life Ins. Co.,* Case No. 3:23-cv-03904 (S.D. Ill). The use of such information in life insurance underwriting is common, so if that use is a violation of the Act, it would significantly transform life insurance underwriting. Furthermore, the damages for alleged violations could be substantial in the class context because the Illinois legislature gave GIPA real teeth. Liquidated damages for each negligent violation of the Act are $2,500 or actual damages, whichever is greater, and liquidated damages for each reckless or intentional violation are the greater of $15,000, or actual damages. 410 Ill. Comp. Stat. 513/40(a) (2015).

The plaintiffs' lawsuits generate smoke, but there is no fire. The Act's plain language makes clear that it is no violation of GIPA for a life insurer to use the information an applicant may provide about his or her family history of diseases and disorders for underwriting purposes.

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The Alleged Violation of GIPA

The defendants' applications for life insurance reportedly asked whether the plaintiffs' family members were diagnosed with or died as the result of health conditions such as high blood pressure, cancer, diabetes, kidney disease, heart disease, coronary artery disease, and cardiovascular disease. The insurers allegedly used the plaintiffs' responses to underwrite their life insurance coverage. According to the plaintiffs, the information they provided about their family members' health histories was "genetic information" and, under Section 20(b) of GIPA, could not be used for "underwriting purposes." See discussion of "underwriting purposes" in Section C, *infra*. Section 20(b) provides in relevant part that, "An insurer shall not use or disclose **protected health information** that is **genetic information** for underwriting purposes." 410 Ill. Comp. Stat. 513/20(b) (2020) (emphases added). The terms in bold are defined by GIPA and are discussed below. Even assuming the information the plaintiffs provided was "genetic information," it was not "protected health information" and, therefore, the insurers' use of the information to underwrite the plaintiffs' coverage did not violate GIPA.

Unpacking GIPA's Definitions

GIPA's definitions of "genetic information" and "protected health information" come from federal regulations promulgated under the Health Insurance Portability and Affordability Act ("HIPAA"). 410 Ill. Comp. Stat. 513/10 (2023) (citing 45 C.F.R. § 160.103). Both definitions rely on other defined terms. Unpacking the relevant definitions is key to understanding what information GIPA prohibits when underwriting insurance.

"**Genetic information**" means, in relevant part, "information about (i) [an] individuals' genetic tests; (ii) [t]he genetic tests of family members of the individual; (iii) [t]he manifestation of a disease or disorder in family members of such individual; or (iv) [a]ny request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by the individual or any family member of the individual." 410 Ill. Comp. Stat. 513/10 (2023) (defining "family members" and "manifestation" and adopting HIPAA regulatory definitions for "genetic services" and "genetic test"). The plaintiffs do not contend the insurers used information about "genetic services" or "genetic tests" to underwrite their coverage, so categories (i), (ii), and (iv) of the "genetic information" definition are not at issue. The plaintiffs contend the insurers underwrote coverage using "information about... the manifestation of a disease or disorder in" the plaintiffs' family members. While that sort of information appears to qualify as "genetic information," GIPA does not prohibit insurers from using *all* types of genetic information for underwriting purposes. It only bars underwriters from using genetic information that is also "protected health information." *See* 410 Ill. Comp. Stat. 513/20(b).

"**Protected health information**" means, in relevant part, "**individually identifiable health information**" that is transmitted by electronic media, maintained in electronic media, or is transmitted or maintained in any other form or medium. 45 C.F.R. § 160.103. "**Individually identifiable health information**" is "a subset of health information, including demographic information" that is "collected from an individual and:

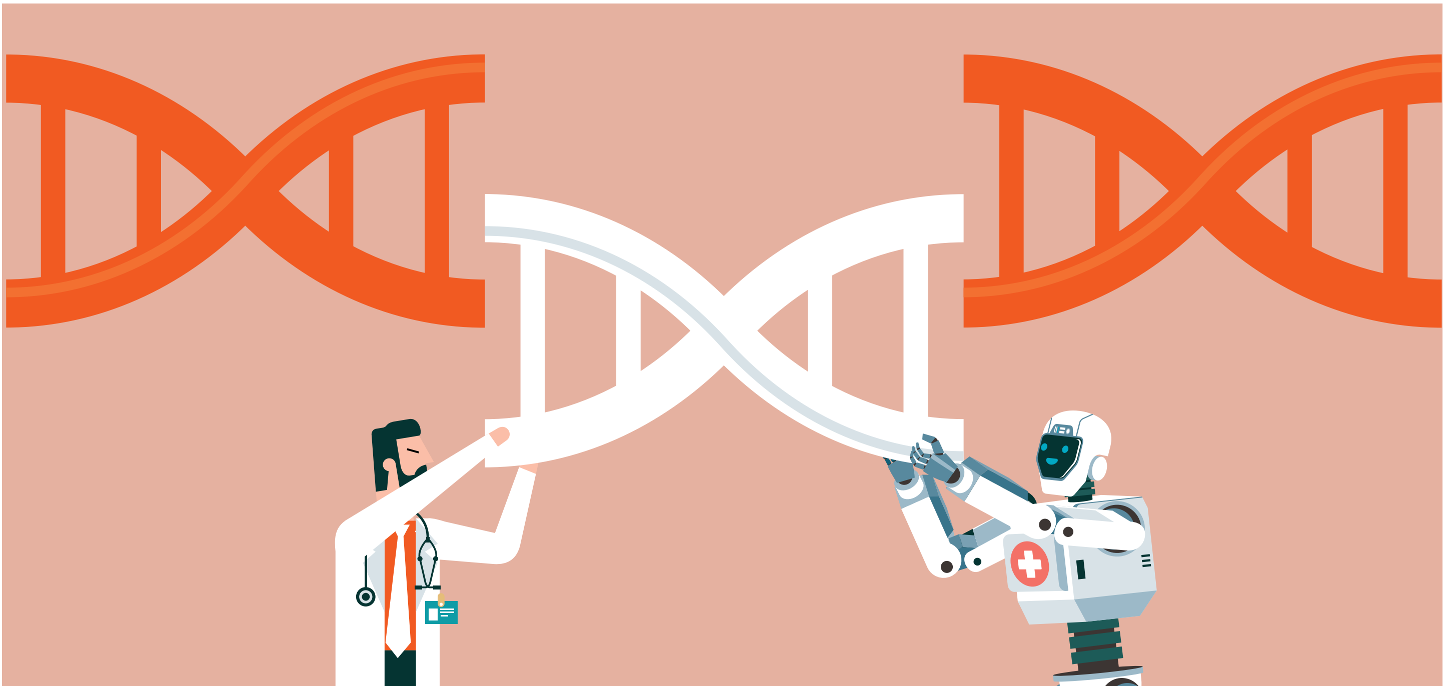
(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
  (i) That identifies the individual; or
  (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual."

45 C.F.R. § 160.103 (defining "individually identifiable health information," as well as "health care provider," "health plan," "employer," or "health care clearinghouse").

Substituting the terms "genetic information" and "individually protected health information" used in Section 20(b) with their regulatory definitions (and with their definitions' definitions) reveals that GIPA only bars the use of information about an applicant's family history of diseases or disorders for underwriting purposes if that information: (i) was created by and/or received by health care providers, health plans, employers, or health care clearinghouses; (ii) "relates to [inter alia] the past, present, or future physical or mental health or condition of an individual, and [it] identifies that individual or … there is a reasonable basis to believe the information can be used to identify the individual;" and (iii) the information concerns "the manifestation of a disease or disorder in" an applicant or his or her family members. See 410 Ill. Comp. Stat. 513/20(b) (2023); 45 C.F.R. § 160.103 (definitions of "genetic information" and "individually identifiable health information").

> **GIPA makes clear in several ways that it was designed to regulate health insurance, not life insurance.**

The plaintiffs do not allege that the "genetic information," i.e., the histories of family diseases and deaths, they provided in their life insurance applications was created by health care providers, health plans, employers, or health care clearinghouses. They also do not allege that the defendant life insurers acted as health care providers, health plans, employers, or health care clearinghouses when they received the plaintiffs' "genetic information." The plaintiffs, in other words, do not contend the genetic information they provided was "individually identifiable health information." As a result, their genetic information was not "protected health information." Because GIPA Section 20(b) only bars the use of genetic information for underwriting if the information also qualifies as protected health information, the insurers' use of the plaintiffs' purported genetic information for underwriting purposes did not violate GIPA.



GIPA Targets Health Insurance Underwriting, Not Life Insurance Underwriting

GIPA makes clear in several ways that it was designed to regulate health insurance, not life insurance. In short, GIPA "abounds with the language and terminology" of health insurance "and must be construed against" that background. *Cf. Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2073 (1993).

At the time it was originally enacted in 1998, the Illinois legislature described GIPA as an Act intended to serve the public health. It found that: (i) "[t]he use of genetic testing can be valuable to an individual;" (ii) "many members of the public are deterred from seeking genetic testing because of fear that test results will be disclosed without consent or be used in a discriminatory manner;" and (iii) "[t]he public health will be served by facilitating voluntary and confidential nondiscriminatory use of genetic testing information." 410 Ill. Comp. Stat. 513/5 (1998). The 1998 version of Section 20 did not include the subparagraph (b) on which the plaintiffs' claims are based. Instead, in 1998, Section 20 regulated the use of genetic testing in two ways that made GIPA's health insurance focus clear. The Act barred insurers from "seek[ing] information derived from genetic testing for *use in connection with a policy of accident and health insurance*" and it authorized insurers to "consider the results of genetic testing *in connection with a policy of accident and health insurance* [only] if the individual voluntarily submits the results and the results are favorable to the individual." *See* 410 Ill. Comp. Stat. 513/20(a) and (b) (1998).

In 2015, the Illinois General Assembly added two legislative findings and statements of intent that further reinforced GIPA's health insurance focus. It found that "[t]he use of electronic health record systems and the exchange of patient records... should be encouraged to improve patient health care and care coordination, facilitate public health reporting, and control health care costs, among other purposes." 410 Ill. Comp. Stat. 513/5(4) (2015). It also found that "[t]he disclosure of genetic information, when allowed by this Act, shall be performed in accordance with the minimum necessary standard when required under HIPAA" because "[l]imiting the use or disclosure of, and requests for, protected health information to the minimum necessary to accomplish an intended purpose, when being transmitted by or on behalf of a **covered entity** under HIPAA, is a key component of health information privacy." 410 Ill. Comp. Stat. 513/5(5) (2015). A "**covered entity**" is one of the following "(1) A health plan; (2) A health care clearinghouse; (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 410 Ill. Comp. Stat. 513/10 (2020) (citing 45 C.F.R. § 160.103).

The legislature also amended Section 20 in 2015, adding the new subparagraph (b) on which the plaintiffs' claims are based. Amended Section 20(b)'s prohibition on the use of certain information for underwriting appears to have been based on a similarly stated portion of the HIPAA privacy regulation: "Notwithstanding any other provision of this subpart, a health plan... shall not use or disclose protected health information that is genetic information for underwriting purposes." 45 C.F.R. § 164.502(a)(5)(i). Notably, the HIPAA regulation was promulgated in response to an explicit directive in HIPAA: "The Secretary [of Health and Human Services] shall revise the HIPAA privacy regulation" to ensure the "use or disclosure by a covered entity... of protected health information that is genetic information about an individual for underwriting purposes under [a] group health plan, health insurance coverage, or [M]edicare supplemental policy shall not be a permitted use or disclosure." 42 U.S.C. § 1320d-9(a). GIPA's definition of "underwriting purposes" appears to have been borrowed from the HIPAA privacy regulation, as well. *Compare* 410 Ill. Comp.

Stat. 513/20(b) (2020) with 45 C.F.R. § 164.502(a)(5)(i). More significant than Section 20(b)'s antecedents, however, is that each element of the GIPA definition of "underwriting purposes" contains unmistakable references to health insurance.

> For purposes of this Section, "underwriting purposes" means, with respect to an insurer:
>
> (1) rules for, or determination of, eligibility (including enrollment and continued eligibility) for, or determination of, benefits under the plan, coverage, or policy (including **changes in deductibles** or other **cost-sharing mechanisms** in return for activities such as **completing a health risk assessment** or **participating in a wellness program**);
>
> (2) the **computation of premium or contribution amounts** under the plan, coverage, or policy (including discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities, such as **completing a health risk assessment** or **participating in a wellness program**);
>
> (3) the application of any **preexisting condition exclusion** under the plan, coverage, or policy; and
>
> (4) **other activities related to** the creation, renewal, or replacement of **a contract of health insurance or health benefits**.

410 Ill. Comp. Stat. 513/20(b) (2020).

The cost-sharing mechanisms, deductibles, wellness programs, health risk assessments, and preexisting condition exclusions GIPA uses to illustrate the ways in which genetic information may not be used to underwrite insurance are common features of health insurance coverage. *See* 42 U.S.C. § 1320b-5(a) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage... shall provide coverage, and shall not impose any *cost sharing* (including *deductibles*, copayments, and coinsurance) requirements or prior authorization or other medical management requirements, for the following items and services furnished during any portion of the emergency period....") (emphasis added); 42 U.S.C. § 300gg-4(j) (stating that a "*wellness program*" generally refers to "a program... that is designed to promote health or prevent disease....") (emphasis added); 215 Ill. Comp. Stat. 5/356z.17(b) (2021) (defining "*wellness coverage*" as a form of "health care coverage") (emphasis added); 42 U.S.C. § 300gg-3(a) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any *preexisting condition exclusion* with respect to such plan or coverage.") (emphasis added). GIPA's reliance on HIPAA terminology and standards reinforces the argument that Section 20(b) regulates health insurance underwriting, not life insurance underwriting. HIPAA regulates the flow of protected health information by "covered entities" and the "business associates" that help covered entities carry out their activities and functions. 45 C.F.R. § 160.103 (defining "business associate"). Health insurance companies are "health plans" under HIPAA and, thus, are "covered entities," 45 C.F.R. § 160.103, but, generally speaking, there is nothing about the operations of a life insurance company that would bring it within the definition of a "covered entity" or a "business associate" of a covered entity.

GIPA's adoption of HIPAA's terminology and standards for the use and/or disclosure of protected health information is best understood as the Illinois legislature's effort to extend HIPAA's standards to a particular type of protected health information, i.e., genetic information that is protected health information and which covered entities and business associates use, transmit, and/or receive. GIPA's explicit focus on public health and its heavy reliance on HIPAA leaves little room to doubt that the Illinois General Assembly added Section 20(b) to the Act to target the use of genetic information in health insurance underwriting. While GIPA's health insurance backdrop is not dispositive of the plaintiffs' claims, it provides added support for the argument that the defendant life insurers' use of the plaintiffs' genetic information to underwrite their life insurance coverage did not violate the Act.

Conclusion

GIPA's regulation of genetic information is far-reaching, but the Act's unpacked definitions and its unmistakable origins in health insurance regulation confirm that a life insurer does not violate the Act when it underwrites life insurance coverage using information provided by an applicant about his or her family history of diseases and disorders.

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Counting Is Not Causation

Plaintiffs' Flawed Reliance on the So-Called "10 Key Characteristics" of Cancer

By Heather Pigman and Marchello Gray

In this article, we will examine the origins of the theory, how it is used by plaintiffs, and how to successfully defend against it.

Plaintiffs in product liability litigation are increasingly using the so-called "10 key characteristics of cancer" to connect plaintiffs' alleged exposure to an alleged carcinogen with the development of cancer. The concept – at least as plaintiffs describe it to juries – is simple:

- Each of the "key characteristics" is a mechanism by which the chemical at issue can cause cancer;
- Plaintiffs' experts will explain to the jury that one or more "key characteristics" are met; and
- Jurors should "check the box(es)" for the "key characteristics" that are met and conclude there is causation.

Plaintiffs' counsel and their experts urge jurors to conclude that if a chemical satisfies even one of these "key characteristics," the mechanism by which the chemical can and does cause cancer is proven and so is causation. This "check the box" approach allows plaintiffs to claim they have established general causation (and perhaps specific causation depending on the expert's qualifications and materials reviewed) without meeting the generally accepted requirements for doing so. It also allows plaintiffs to claim their burden of proof is met by a lower level of evidence (i.e., screening-level mechanistic studies of varying - and often low - quality) than traditionally required (i.e., human data or high-quality rodent data).

In this article, we will examine the origins of the theory, how it is used by plaintiffs, and how to successfully defend against it.

Origins of the 10 KC Theory

In 2000, Hanahan and Weinberg published a paper entitled "The Hallmarks of Cancer." Douglas Hanahan & Robert A. Weinberg, *The Hallmarks of Cancer*, 100 Cell 57 (2000). Noting that cancer is "a disease involving dynamic changes in the genome," they identified four essential changes in cancer cells that control whether or how much cancer grows. "Each of these physiologic changes - novel capabilities acquired during tumor development - represents the successful breaching of an anticancer defense mechanism hardwired into cells and tissues." *Id.* at 57. In 2011, the same authors added two additional hallmarks. These factors are shared by many different cancers and are not unique to one type of cancer or tumor location. The authors noted that the hallmarks were merely features that healthy cells acquire in their transition to cancer cells regardless of the cancer's cause.

In 2016, and in part building off of the Hallmarks of Cancer, a different group of scientists led by Dr. Martyn Smith created a list of "10 key characteristics of carcinogens" as a way to organize mechanistic data when assessing "whether an agent is a potential human carcinogen." Smith et al., 124 Env't Health Persp. at 713. According to the authors, a chemical displays a "key characteristic" if it:

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1. Is electrophilic or can be metabolically activated,
2. Is genotoxic,
3. Alters DNA repair or causes genomic instability,
4. Induces epigenetic alterations,
5. Induces oxidative stress,
6. Induces chronic inflammation,
7. Is immunosuppressive,
8. Modulates receptor-mediated effects,
9. Causes immortalization, or
10. Alters cell proliferation, call death or nutrient supply.

Id. at 714.

Like the Hallmarks, these characteristics were derived from features seen in cancer cells, not from the properties of substances that may cause cancer. This fact was made clear in the paper:

> Herein we describe these 10 key characteristics and discuss their importance in carcinogenesis. These characteristics are properties that human carcinogens commonly show and can encompass many different types of mechanistic endpoints. They are not mechanisms in and of themselves nor are they adverse outcome pathways. Further, we describe how the 10 key characteristics can provide a basis for systematically identifying, organizing, and summarizing mechanistic information as part of the carcinogen evaluation process.

Id. at 714; *see also* at 719 ("These characteristics, although not necessarily representing mechanisms themselves, provide the rationale for an objective approach to identifying and organizing relevant mechanistic data.").

In essence, the authors propose the use of characteristics seen in cancer cells to organize/prioritize the assessment of mechanistic data and to assess possible cancer hazards prior to conducting a full cancer risk assessment. *Id*. at 719 ("This approach also lays the groundwork for a structured evaluation of the strength of the mechanistic evidence base, and therefore its utility in supporting hazard classifications."). The authors contend that the presence of more than one of the "key characteristics" provides stronger evidence of a potential mechanism than satisfying only one "key characteristic." *Id*. at 714.

However, while the authors compare their list to two chemicals deemed by IARC to be known carcinogens, *id*. at 714, they do not apply their approach to known non-carcinogenic compounds. In fact, the "key characteristics" have not been validated against non-carcinogens, as would be necessary to support a causation analysis.

The authors acknowledge the weaknesses inherent in the approach they suggest. They concede that the proposed organizational system is difficult to translate to some chemicals and that it "would not permit comparisons across agents, including attempts to understand similarities or differences with human carcinogens." They also note that use of the "10 key characteristics" method to organize data "may be biased against the most recent mechanistic and molecular epidemiology studies that have not been the subject of a prior expert review." *Id*. at 714.

Comparing the "key characteristics" to substances deemed carcinogenic by IARC also ignores the suspect nature of IARC's own cancer classifications, including but not limited to the facts that IARC 1) conducts a hazard rather than human health risk assessment, 2) frequently prioritizes lower weight animal and mechanistic data over human data, and 3) adopted a protocol that prohibits it from reviewing all the relevant data. *See, e.g.*, Angela Logomasini, *U.S. Should Stop Funding the International Agency for Research on Cancer*, Competitive Enter. Inst. (Sept. 18, 2018), ***https://cei.org/studies/u-s-should-stop-funding-the-international-agency-for-research-on-cancer.***

At most, according to its creators, the "key characteristics" "provide guidance for further assessments of the science behind the chemical, including dose relevance, species relevance, and temporality of events." Smith et al., 124 Env't Health Persp. at 718. Simply possessing one or more characteristics does not establish that the substance causes cancer or that a specific plaintiff's injuries were caused by the substance at issue.

In the wake of Smith et al. 2016, several of the same authors applied the "key characteristics" approach to other chemicals IARC had already found to be carcinogenic or probably carcinogenic. Kathryn Z. Guyton et al., *Application of the Key Characteristics of Carcinogens in Cancer Hazard Identification*, 39 Carcinogenesis 614 (2018). Not surprisingly, they concluded that of 35 chemicals reviewed, only five did not meet one or more of the "key characteristics."

The lack of scientific rigor and potential biases by those who created the "key characteristics" concept as applied to unproven carcinogens have been noted in the scientific literature. For example, one set of authors noted the following critiques:

- "In addition, simply counting how many KCs known or probable carcinogenic agents possess is not informative regarding whether the approach is useful and accurate, on the whole. Rather, external validation of the methodology is needed, and in particular, it must be shown that these KCs can differentiate carcinogens from non-carcinogens. Guyton et al. (3) did not evaluate whether agents deemed non-carcinogens may also show evidence for KCs."
- "Perhaps even more importantly, in Table 3, Guyton et al. (3) stated the number of studies that addressed KCs for each agent, and simply checked off which KC is 'supported' by that evidence. However, as discussed in detail by Goodman and Lynch, IARC does not determine the level of support for KCs for each agent via a systematic evaluation of the literature; it does not consider the quality, external validity or relevance of each study, or whether evidence is consistent within and among KCs (6). A study merely has to have a positive finding, regardless of its quality, validity or consistency with other studies, for IARC to conclude it supports some evidence for a KC. Thus, determinations regarding the strength of a particular characteristic appear ad hoc, are not transparent, and cannot be objectively replicated by independent experts."
- "Guyton et al. briefly discussed a few examples of other weaknesses of the KC approach, including critical technical limitations of mechanistic evidence in general, such as difficulties in validation and extrapolation of in vitro to in vivo exposure levels, as well as the need for uniformity of evaluations through 'documentation and clarification of procedures by the IARC Secretariat'

(3). However, there was no thoughtful discussion of the implications of these various limitations on the utility of the KC approach. In fact, these issues may lead to false-positive results; i.e., a conclusion that an agent possesses a given KC, when the evidence as a whole does not indicate that it does."

- "As discussed by Goodman and Lynch, the KC approach may prove to be very helpful in identifying and classifying carcinogens (6). However, it needs to include a consideration of the biological significance of mechanistic endpoints, inter- and intra-individual variability, study quality and study relevance. It should explicitly address how mechanistic evidence should be integrated, and how it should be considered in light of other realms of evidence. Until this is done, the KC approach will have limited utility in evaluations of cancer hazards."

Although the "key characteristics" do not determine carcinogenicity, plaintiffs present them to juries as a useful checklist to assess complex mechanistic data

Julie E. Goodman, et al., *Letter to the Editor Re: Guyton et al. (2018), 'Application of the Key Characteristics of Carcinogens in Cancer Hazard Identification,'* 39 Carcinogenesis 1089 (2018). Not surprisingly, the authors of Guyton 2018 disagreed and defended their approach. Kathryn Z. Guyton et al., *Re: 'Application of the Key Characteristics of Carcinogens in Cancer Hazard Identification': Response to Goodman, Lynch and Rhomberg*, 39 Carcinogenesis 1091 (2018).

Although some regulatory agencies consider "key characteristics" as one of many parts of their scientific analysis, use of the "key characteristics" as a causation assessment tool is not supported in science or by courts that have addressed it. For example, in the pending *In re Zantac (Ranitidine) Products Liability Litigation*, the court declined to consider the plaintiffs' experts testimony regarding the "10 key characteristics" in excluding their testimony under *Daubert* and FRE 703. As the court noted:

> The Court does not consider the mechanistic in vitro studies and the IARC 10 Key Characteristics of Carcinogens upon which the Plaintiffs' experts relied. In their Response, the Plaintiffs assert generally that their experts rely upon "various mechanistic evidence," including the in vitro studies and the IARC 10 Key Characteristics of Carcinogens. The Plaintiffs' only argument on why relying upon this secondary mechanistic evidence constitutes a reliable methodology is that their experts considered this evidence as part of their weight-of-the-evidence methodologies. Id. The Plaintiffs' mere assertion that their experts followed weight-of-the-evidence methodologies is insufficient to carry their burden that their experts' opinion is reliable.

In re Zantac (Ranitidine) Prod. Liab. Litig., 644 F. Supp. 3d 1075, 1278 n. 164 (S.D. Fla. 2022).

How It Is Used Today in Litigation and Strategies for Defense

Although the "key characteristics" do not determine carcinogenicity, plaintiffs present them to juries as a useful checklist to assess complex mechanistic data, a process with which most jurors will have no scientific training or experience. Their impact on juries can be powerful, and the best defense will depend in large part on the nature of the chemical at issue, the accompanying science, and the operative defense strategy.

For example, for chemicals that the defense acknowledges are potentially carcinogenic at some level, focusing on certain "key characteristic" concepts may be part of a successful specific causation defense strategy. These include:

- The concepts of low exposure and/or internal dose;
- Species-specific mechanistic differences, particularly if animal models are the basis for the plaintiff's identification of a "key characteristic;"
- The presence of the same key characteristics in other, non-carcinogenic compounds;
- The method of exposure and its relationship to potential methods of human exposure;
- The many steps beyond cellular damage that must occur for cancer to develop.

Importantly, these lines of attack are supported by the authors of the "key characteristics" and elsewhere in the scientific literature. For example, Smith et al. 2016 noted:

> In general, the strongest indications that a particular mechanism operates in humans derive from data obtained in exposed humans or in human cells in vitro. Data from experimental animals can support a mechanism by findings of consistent results and from studies that challenge the hypothesized mechanism experimentally. Other considerations include whether multiple mechanisms might contribute to tumor development, whether different mechanisms might operate in different dose ranges, whether separate mechanisms might operate in humans and experimental animals, and whether a unique mechanism might operate in a susceptible group.

Id. at 719; see also U.S. EPA, Guidelines for Carcinogen Risk Assessment at § 1.3, *available at* ***https://www.epa.gov/sites/default/files/2013-09/documents/cancer_guidelines_final_3-25-05.pdf*** (last accessed Jan. 12, 2024) (discussing EPA's weight of the scientific evidence evaluation and the components thereof, including dose assessments and the types of evidence considered); *id.* at § 2.2.1 (noting "[e]pidemiologic data are extremely valuable in risk assessment because they provide direct evidence on whether a substance is likely to produce cancer in humans, thereby avoiding issues such as: species-to-species inference, extrapolation to exposures relevant to people, effects of concomitant exposures due to lifestyles. Thus, epidemiologic studies typically evaluate agents under more relevant conditions. When human data of high quality and adequate statistical power

are available, they are generally preferable over animal data and should be given greater weight in hazard characterization and dose-response assessment, although both can be used.").

For chemicals that do not cause cancer and/or are not labeled as a carcinogen, additional potential defenses may be available. For example:

- If high-quality human epidemiology studies in real people using the actual product at real-world exposure levels do not show an increased risk of cancer in a relevant population, the general causation question is answered regardless of how the mechanistic data is organized and interpreted and regardless of whether one or more of the "key characteristics" is present. These scenarios reveal the types of mechanistic data contemplated in the 10 KC theory for what they are – studies focused on whether there is a potential mechanism by which a substance *may* cause cancer. Many of these tests are *in vitro* test tube studies that do not do not mimic what happens in a living system. *If* there is a mechanism by which the substance being studies causes cancer in humans, it will be evident in high quality epidemiology data; and
- One common defense applicable to most chemicals without a signature disease or mutation is that none of the genetic damage purportedly seen in the presence of any of the "key characteristics" is unique to exposure to a chemical. In actuality, these are the standard cellular responses to environmental stress on the cells, which can result from both chemical and non-chemical, natural exposures. For example, the natural replication of cells in our body leads to many DNA copying errors per day, all of which have the potential to become genotoxic mutations possibly leading to cancer. *See* Cristian Tomasetti & Bert Vogelstein, *Variation in Cancer Risk Among Tissues Can Be Explained by the Number of Stem Cell Divisions,* 347 Science 78 (2015); and Christian Tomasetti

et al., *Stem Cell Divisions, Somatic Mutations, Cancer Etiology, and Cancer Prevention*, 355 Science 1330 (2017).

In short, the KC theory focuses on tests that look for any changes or alternations in the cell. To check the box, the change need not be detrimental, permanent, or problematic. Any change is assumed to be a causal change. However, science shows that this assumption is false. The human body has a variety of built-in defenses to repair or eliminate cells that are damaged by the natural occurrences or exposure to an environmental factors cells encounter. This includes the dozens of household and other chemicals humans are exposed to on a daily basis. Any defense should include explaining to the jury that our cells are prepared for that and can adapt or otherwise respond to influences. Not everything that could impact a cell will permanently impact a cell in a way that could cause cancer.

And, as always, the quality of the science offered to support checking a box next to one of the "key characteristics" matters a lot. Anyone can do a study, but that does not mean the study is of high quality or produces reliable results. For some "key characteristics," there are no methodologies or study types that reliably link an exposure to cancer. Even when high-quality guidelines studies exist, those often are not considered in the analyses present to juries. Because of the unproven nature of some of the "key characteristics," many of them are not considered by worldwide regulatory agencies as predictive of causality of cancer.

Ultimately, there is no "one-size-fits-all" defense to cases in which plaintiffs and their experts rely upon the "key characteristics" method of organizing data as a tool to demonstrate causation. However, keeping in mind what the characteristics are – and more importantly focusing the court (during pre-trial evidentiary challenges) and the jury (at trial) on what they are not – is a key step in the right direction.

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