Medical Malpractice Update:

The Disclosure of a Plaintiff's Section 5/2-622 Healthcare Professional

In order to minimize frivolous medical malpractice lawsuits in the State of Illinois, the legislature enacted Section 5/2-622 of the Illinois Code of Civil Procedure, which requires a medical-malpractice plaintiff to file an affidavit and accompanying healthcare professional's report with the complaint, which both demonstrate that a reasonable and meritorious cause exists for filing the action. Of great importance, the healthcare professional's report must be written by a licensed physician who has taught or practiced in the same area of medicine at issue, and who is qualified by experience or has a demonstrated competence in the subject of the case. Prior to 1995, a plaintiff was not required to disclose the name and address of his/her reviewing healthcare professional. As such, a defendant had no basis for challenging the qualifications of the plaintiff's anonymous consultant.

On March 9, 1995, the General Assembly passed the Civil Justice Reform Amendments in Public Act 89-7, which included an amendment to Section 5/2-622. The amendment specifically required all plaintiffs to disclose the name and address of their reviewing healthcare professionals. However, in 1997, the Illinois Supreme Court issued its opinion in *Best v. Taylor Machine Works*, 179 Ill.2d 367 (1997), and held that certain "core provisions" of Public Act 89-7 were unconstitutional and inseparable from the remainder of the Act. Thus, the entire Act was declared void in its entirety, including the amendment to Section 5/2-622 which required the disclosure of reviewing healthcare professionals. The Supreme Court explained that the amendment to Section 5/2-622 was only deemed invalid because the Civil Justice Reform Amendments did not have a severability clause. As such, the General Assembly was free to reenact this amendment at a later time if it deemed it appropriate.

On May 1, 1998, after the Supreme Court issued its opinion in *Best*, the General Assembly again amended Section 5/2-622 through the enactment of Public Act 90-579, which also contained the same language as Public Act 89-7 requiring the name and address of the health professional. The only change that the General Assembly made to the statute was the addition of a special requirement for medical malpractice cases involving a naprapath.

The passage of Public Act 90-579 has fueled serious debate between plaintiffs and defendants over whether or not the General Assembly intended to resurrect the amendments to Section 5/2-622 as inserted in Public Act 89- 7. The plaintiff's bar has argued that the General Assembly intended to resort back to the pre-1995 version of the statute, and simply used the wrong version of the statute when adding the special requirement for naprapath cases in Public Act 90-579. To the contrary, defense attorneys have argued that the General Assembly would not have used the Public Act 89-7 version of the statute in Public Act 90- 579, unless it was their intention to resurrect the amendments to that statute held invalid under *Best* due to their inseparability from the Civil Justice Reform Act .

In *Cargill v. Czelatdko*, 353 Ill.App.3d 654 (4th Dist. 2004), the Fourth District Appellate Court definitively concluded that Public Act 90-579 resurrected the amendments to Section 5/2-622 as

inserted by Public Act 89-7, including the disclosure requirement. The Appellate Court in *Cargill* made it clear that, under Section 5/2- 622, a defendant had the right to investigate and challenge qualifications of the plaintiff's reviewing healthcare professional.

Under Illinois law, a circuit court is required to abide by the ruling of the appellate court, even if the circuit court is in a different district than the appellate court. The only exception is where two appellate court's holdings conflict, and then the circuit court is bound by the ruling of the appellate court in the district in which it sits. To date, there has been no appellate court decision contradicting the Fourth District's ruling in *Cargill*. Indeed, the First District and the Second District Appellate Courts have both issued opinions that are consistent with *Cargill*, without directly addressing the disclosure issue. See, i.e., *Beauchamp v. Zimmerman*, 359 Ill.App.3d 143 (1st Dist. 2005) and *Giegolodt v. Condell Medical Center*, 328 Ill.App.3d 907 (2nd Dist. 2002).

However, in a surprising ruling, the circuit court of Cook County completely disregarded the Fourth District Appellate Court's decision on November 10, 2005, and issued a memorandum decision and order in *O'Connor v. University of Chicago Hospital*, finding that the legislature did not reenact the identity disclosure requirement through the passage of Public Act 90-579. Notably, other counties continued to follow the Fourth District's ruling in *Cargill*, thus causing inconsistency and conflict throughout the State.

To further complicate the matter, on June 25, 2007, in *O'Casek v. Children's Home & Aid Society of Illinois*, 374 Ill.App.3d 507 (4th Dist. 2007), the Fourth District momentarily overruled its decision in *Cargill*, holding that the General Assembly did not intend to reenact the amendments to Section 5/2-622 through the passage of Public Act 90-579. The *O'Casek* decision caused great confusion among the many counties who continued to follow the *Cargill* decision and require the disclosure of reviewing healthcare professionals.

On October 11, 2007, in a critical decision, *Crull v. Sriratana*, the Fourth District Appellate Court overturned its decision in *O'Casek*, and once again affirmed that Section 5/2-622 requires the disclosure of a plaintiff's reviewing healthcare professional. In *Crull*, the Fourth District found that no other appellate court had contradicted its decision in *Cargill*, including the First District where Cook County sits. Although the Circuit Court of County has refused to consider any motions to dismiss brought under *Cargill* since issuing the *O'Connor* opinion, the circuit court judges are beginning to entertain motions to dismiss brought pursuant to *Crull*. The practical impact of *Crull* is that this decision has provided defense counsel with renewed authority for challenging a plaintiff's failure to disclose under Section 5/2-622 in Cook County.

Notably, on August 25, 2005, Governor Blagojevich signed into law the Illinois Tort Reform Act, in which the General Assembly definitively inserted the disclosure requirement into Section 5/2-622 for all cases which accrue as of the passage of the Act. However, all cases which accrued before August 25, 2005 are not effected by this Act, and therefore, defense counsel is still required to challenge a plaintiff's non-disclosure in those cases under *Crull*.

On November 13, 2007, Cook County Circuit Court Judge Diane Larsen ruled that certain core provisions of that Act, specifically the cap on non-economic damages in medical malpractice cases, violated the Illinois Constitution. Judge Larsen held the Act void in its entirety, and once

again, due to being inseparable from the Act, the amendments to Section 5/2-622 were invalidated. Until the Appellate and/or Supreme Court rules on Judge Larsen's decision, defense counsel will be required to challenge a plaintiff's nondisclosure under *Crull* in Cook County. *[Editor's note: Judge Larsen's decision holding provisions of the Tort Reform Act as unconstitutional was featured in our December 2007 issue.]*

In order to prevent the filing of frivolous lawsuits, and to protect the rights of defendants in malpractice cases, it is crucial for defense counsel to actively challenge any anonymous Section 5/2-622 reports under *Crull v. Srirtana*, until every circuit court in Illinois, including Cook County, accepts *Crull* as the current status of the law.

* * *

Jamie Goldstein, an associate in our Chicago office, concentrates her practice in healthcare liability and medical malpractice. She previously worked at another Chicago law firm, where she handled all aspects of medical malpractice litigation and mediation.

If you have questions regarding this article, please feel free to contact Jamie via jgoldstein@querrey.com, or via 312-540-7552. If you have questions regarding Querrey & Harrow's medical malpractice and healthcare liability practice, please contact either James Bream (jbream@querrey.com or 312-540-7520) or Robert Huebsch (rhuebsch@querrey.com or 312-540- 7534), Group Co-Chairs of our Medical Malpractice practice group.