Medical Litigation Newsletter

September 2010 Issue

In This Issue

A Common Reduction?

The Illinois Fifth District Appellate Court recently considered the question of whether a hospital's statutory lien brought pursuant to the Healthcare Services Lien Act (Act) (770 ILCS 23/4/1 *et seq*.) is subject to a reduction under the common-fund doctrine for attorneys' fees incurred by a plaintiff in obtaining recovery against an individual liable for his injuries. The court answered the question in the affirmative.

Plaintiffs in the subject consolidated cases, *Howell v. Dunaway* and *Wendling v. Woodard*, 2010 WL 763918 (Ill. App. 5th Dist.) were injured in motor vehicle accidents and treated in one or more of defendants' hospitals. They sued the drivers of the vehicles that injured them, and the hospitals filed liens against plaintiffs' recovery pursuant to the Act. Both cases were settled and plaintiffs recovered damages.

Plaintiffs then filed petitions under the Act to adjudicate the liens and sought to impose the common-fund doctrine to reduce the amount of the hospitals' liens by one-third for attorneys' fees they had incurred in their lawsuits. The circuit court granted the petitions by applying the common-fund doctrine for the very first time to a lien filed pursuant to the Act. On appeal, the Fifth District reasoned that the common-fund doctrine was based on the equitable concept that an attorney who performs services in creating a fund should in equity and good conscience be allowed compensation out of the whole fund from all those who seek to benefit from it. The court explained that "the common-fund doctrine permits a party who creates, preserves or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees."

Defendants argued that pursuant to the Illinois Supreme Court's decision in *Maynard v. Parker*, 387 N.E.2d 298 (Ill. 1979), the common-fund doctrine did not apply to hospital liens under the Act. Plaintiff in *Maynard* was injured in an automobile accident and subsequently treated at the hospital. The hospital filed a lien pursuant to the Act against any proceeds from plaintiff's lawsuit against defendant. The case was settled in favor of plaintiff, who later filed a petition to adjudicate the lien. Plaintiff's attorneys sought attorneys' fees from the hospital under the common-fund doctrine. Defendant hospital argued that the common-fund doctrine applied only to situations involving a subrogor/subrogee relationship, and that it was thus not applicable to the case before the Court. The Court analogized the relationship between plaintiff and the hospital with a debtor's relationship with a creditor. It then noted that in a subrogor/subrogee relationship, recovery is dependent upon the creation of the fund because the plaintiff is required to repay the sum in advance only if, and to the extent, any recovery is made from a third party. On the other hand, in a debtor/creditor relationship,

Medical Litigation Specialty Group Chair

Daniel P. Slayden
Joliet, Illinois
dslayden@hinshawlaw.com
815-726-5910

Editors

Nathan D. Hansen
nhansen@hinshawlaw.com
219-864-4523

Dawn A. Sallerson
dsallerson@hinshawlaw.com
618-310-2340

Contributors

Charles A. Egner
cegner@hinshawlaw.com
815-740-5011

Untress L. Quinn
uquinn@hinshawlaw.com
618-310-2373

Contact Us

1-800-300-6812
info@hinshawlaw.com
www.hinshawlaw.com

HINSHAW & CULBERTSON LLP

Hinshaw Representative Matters

Each issue of the *Medical Litigation Newsletter* will showcase a few cases that have recently been handled by Hinshaw lawyers. We are pleased to report the following:

Scott B. Cockrum and *Nathan D. Hansen*, attorneys in Hinshaw's Northwest Indiana, office, obtained a defense verdict for an Indiana oncologist. The case involved a 29-year-old mother, who was suffering from a fever and a productive cough and was admitted to the hospital under the care of an oncologist. The oncologist immediately obtained consultations from infectious disease and pulmonology to assess the patient. Two weeks after her initial presentation to the hospital, the patient died after developing respiratory complications allegedly associated with one of her chemotherapy agents, Bleomycin. The allegations against the physicians were failure to diagnose Bleomycin toxicity, failure to timely administer steroids and failure to limit oxygen administration. Plaintiff also sued the decedent's consulting pulmonologists, who were represented by another law firm, and obtained a $5 million verdict against the co-defendant pulmonologists. The jury returned a defense verdict solely for the oncologist.

Patrick F. Koenen, the Partner in Charge of Hinshaw's Appleton, Wisconsin, office, represented a general surgeon, who was accused of negligently performing a Nissen Fundoplication procedure on a 42-year old man who was suffering from Gastroesophageal Reflux Disease (GERD). Approximately three months after the surgery, a hernia developed in the patient's diaphragm, and a revision procedure was needed. It was alleged that the surgeon dissected the vagal nerves running along the patient's esophagus during these procedures and that the nerve damage resulted in the complete loss of stomach function; the stomach was ultimately removed at the Mayo Clinic. Plaintiff sought an award of approximately $5 million in

— Continued on Page 3

the plaintiff, as a debtor, is obligated to pay for services rendered by the hospital, and such obligation is not dependent on the creation of a fund. Consequently, the Court held that the common-fund doctrine did not apply to hospital liens under the Act.

The Fifth District opined in *Howell* that the action was more than a debtor/creditor relationship. It reasoned that the relationship was more of a debtor/lien holder relationship and that the action appealed was for the enforcement of the lien, and not the collection of a debt. The court explained that the lien existed only because of the creation of the fund, and that the right to enforce the lien was a direct benefit of the creation of the fund. It further reasoned that the hospital was entirely dependent upon plaintiff's attorney to create the fund against which to enforce its lien. The court felt that the relationship between plaintiffs and the lien holder hospitals was much more similar to a subrogor/subrogee relationship than a debtor/creditor relationship as the Illinois Supreme Court saw it in *Maynard.* The *Howell* court noted that the lien does not attach to all of the assets or resources of the debtor/plaintiff, but only to the plaintiff's recovery against a third party contained in the common fund.

The court also stated that the real question was "whether the hospitals have been so benefited by the plaintiffs' attorneys who rendered services in obtaining settlements that the attorney should in equity be allowed the compensation out of the common fund." By seeking payment from the common fund for their liens, the hospitals directly received the benefit of the work done by plaintiffs' attorneys. The court opined that it would be fundamentally unfair to allow a hospital to collect on its own lien without paying its prorated share of legal expenses. Further, without the creation of the common fund, the hospital would have to use its own legal resources to recover monies from plaintiffs. The court held that if a provider seeks to collect money owed to it out of a common fund created by the plaintiffs and their attorneys, the common-fund doctrine applies and the provider is responsible for its proportional share of attorneys' fees and costs.

The court declined to discuss the potential conflict of interest between plaintiffs and their attorneys as a result of its ruling, in that the plaintiff may owe more money to the hospital lien holders when the lien is reduced by the common-fund doctrine for the payment of attorneys' fees. Nonetheless, this ruling will have a direct impact on a hospital's course of action in collection of debts owed to it by injured plaintiffs.

Contact for more information: Untress L. Quinn

The Relation-Back Doctrine for Medical Malpractice Practitioners

Medical malpractice defense attorneys know to expect changes in plaintiffs' theories as discovery proceeds. In most cases, the court will search for commonalities of fact and time between the proposed amendments and the contentions of the original pleadings such as to permit the amendment on the ground that it "relates back" to the original pleading filed within the period of limitations.

One might then wonder, when are new allegations so different in nature from the original contentions of negligence that an argument can be made that the new allegations or theories of recovery in medical malpractice cases are time-barred? This is a very fact-specific matter. Following is a discussion of the "relation-back doctrine" as applied in medical malpractice cases in a few of the many jurisdictions in which Hinshaw & Culbertson LLP defends medical professionals.

Illinois

In Illinois, 735 ILCS 5/2-616 allows for the amendment of pleadings, without fear that the new allegations will be barred, if it appears that the amended pleading asserts a cause of action that "grew out of the same transaction or occurrence set up in the original pleading." Immediately clear from this language is the fact-specific nature of the inquiry. Case law must be examined to help determine the meaning of "same transaction or occurrence."

The Illinois Supreme Court addressed this language in *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 882 N.E.2d 583 (Ill. 2008). In *Porter*, plaintiff's original complaint named as defendant an emergency room physician, who saw plaintiff after an automobile accident. Plaintiff alleged that the

physician failed to obtain a timely MRI scan, improperly discontinued spinal immobilization, and failed to appreciate signs and symptoms of spinal injury. The hospital facility was named as a respondent in discovery in the original complaint.

Plaintiff filed a first amended complaint within the two-year statute of limitations period, naming the hospital as a defendant and alleging that its employees failed to perform neurological checks as ordered, to record spinal assessments, to record extremity strength, and to report diminishing neurological status. It was alleged that these failures in care occurred during the hours leading up to plaintiff's surgery.

After the expiration of the period of limitations, plaintiff moved for leave to file a second amended complaint. The complaint included a count against the hospital arguing that a CT scan was misinterpreted by a physician. That physician was then, for the first time, alleged to be the agent of the hospital defendant. Indeed, the physician had not been named as a defendant or otherwise identified in the previous pleadings. The trial court initially allowed the second amended complaint to be filed. But in considering defendant hospital's motion to dismiss, decided that the allegations in the new count did not relate back to the original counts brought against the hospital because the hospital was not "apprised of the facts" of the alleged misinterpretation before the running of the statute of limitations.

The Illinois Supreme Court reversed the trial court's determination that the new allegations did not relate back to the original filing. In doing so, the Court examined *In re Olympia Brewing Company Securities Litigation*, 612 F. Supp. 1370 (N.D. Ill. 1985), adopted the language from that case in setting forth the standard in Illinois and called it the "sufficiently-close-relationship test."

The "sufficiently-close-relationship test" permits a liberality limited only by the imagination of the judge considering the amended pleading. The requirements are loose and allow for a relation back as long as there is "temporal proximity" between the original and new claims and facts that can be deemed "all part of the events leading up to the originally alleged injury." The facts do not have to be the same as those pleaded in the original pleading, or even, arguably, arising from the previously alleged occurrences. The events alleged are required to be only "close in time and subject matter" to those events alleged in the original complaint.

In applying the "sufficiently-close-relationship test" to *Porter*, the Illinois Supreme Court found that although the original and first amended complaint made no mention of the interpretation of the CT scan challenged in the second amended complaint or the physician alleged to be the hospital's agent, the interpretation of the study was adequately "close in time" to the events pleaded in the original complaint. In terms of the conduct upon which the hospital's negligence was based, the Court considered it sufficient that the first complaint naming the hospital alleged that the hospital provided "personnel, including nurses, aids, attendants, and others for the care and treatment of patients." Apparently, this allegation of "others" was sufficiently specific, according to the Court, to put the hospital on notice that it could be called into question for the conduct of any individual, including the unnamed physician involved in "any procedure or test . . . that might have impacted the ability to appreciate and report on plaintiff's diminishing neurological status in the critical hours."

The Court also found that the new allegations led to the same injuries as alleged in the original complaints. This, clearly, is the most easily determined part of the inquiry. It can only be surmised that a plaintiff would have a more difficult time arguing a relation back to the original pleading if the amendment brought allegations of new injury against the defendant.

The Illinois Supreme Court, again citing *Olympia Brewing*, provided some guidance as to when an amendment will be considered insufficiently related to the original pleading such as it will not "relate back." Specifically, it found that there would be no relation-back where:

> (1) The original and amended set of facts are separated by a significant lapse of time, or (2) The two sets of facts are different in character, as for example when one alleges a slander and the other alleges a physical assault, or (3) The two sets of facts lead to arguably different injuries.

damages. After a two-week trial, the jury returned a defense verdict finding that the surgeon was not negligent.

Mr. Koenen also represented the Wisconsin Injured Patients and Families Compensation Fund (a pool of money maintained to compensate injured patients in the event of malpractice). A physician and his employer, a health system, were accused of a 3.5-week delay in forwarding the results of a significantly abnormal liver test to a patient, along with instructions to stop taking Diclofenac, a known liver toxin. It was alleged that the delay in stopping Diclofenac resulted in further liver injury. The patient declined fairly rapidly over the next month and attempted to get a liver transplant, but ultimately died following widespread organ system failure. At trial, plaintiff sought approximately $2.1 million. After a 1.5-week trial, the jury returned a verdict finding that the physician was not negligent. The jury did find the health system negligent for failing to pass on the test results, but that the negligence was not causal.

Brendan A. O'Brien and *Thomas L. O'Carroll*, Partners in Hinshaw's Chicago office, defended a colon/rectal surgeon on a case alleging failure to diagnose and treat an intra-abdominal infection that later led to sepsis. Before the patient died of necrotizing fasciitis, she incurred $1 million in medical bills and was treated for nine years. Plaintiff claimed that the deconditioned state led to the death. A hospital defendant settled for $4.5 million prior to trial, leaving the surgeon as the only remaining defendant. Plaintiff sought $13.6 million. The jury deliberated for two days and reached a not guilty verdict on both the survival and wrongful death counts.

Michael P. Malone and *Jill M. Munson*, attorneys in Hinshaw's Milwaukee office, successfully defended an emergency room physician, obtaining a verdict finding that that defendant doctor was not negligent. Credibility was a key issue in the case given conflicting contentions as to whether the physician had told the patient about an abnormal CT finding.

HINSHAW
& CULBERTSON LLP

The Illinois Supreme Court listed 12 appellate court decisions in which the idea of the "relation-back" had been considered. It neither reversed any of those decisions, nor provided any in-depth analysis. Rather, it simply stated that the "decision today should provide adequate guidance for future cases." In one of the 12 cases listed, *McCorry v. Gooneratne*, 332 Ill. App. 3d 935 (2002), plaintiff filed an original complaint against defendant hospital alleging misinterpretation of pre-operative MRI films of plaintiff's cervical spine and seeking to hold the hospital liable based on allegations of agency. After the period of limitations had passed, plaintiff sought to amend the complaint to add a count against the hospital alleging a failure to have in effect certain policies and procedures regarding transmittal of radiology reports. The amended complaint further alleged a failure to timely perform and interpret post-operative MRIs.

The *McCorry* court considered the "pre-*Porter*" case law regarding the "relation-back doctrine." It stated that a later claim will be deemed to have grown out of the same occurrence as the claim in the original complaint if the original complaint provided the defendant with "all of the information necessary for preparation of the defense for the claim asserted later." The court held that nothing in the original complaint alleged negligence in the formulation or preparation of policies and procedures of defendant hospital and that the new allegations involved analysis of events occurring at times different from the occasions of the negligent acts alleged in the original complaint. In short, the court found that the original complaint in no way directed the hospital's attention to the conduct of its officers in formulating policies and procedures regarding radiology reports.

As to the interpretation of post-operative MRIs, the court stated that while the original complaint alleged that the hospital misinterpreted MRIs through its agents, the amended complaint brought allegations regarding MRIs not discussed in the original complaint. The new allegations were thus found not to relate back to the original complaint.

An examination of *McCorry* "post-*Porter*" suggests that the MRI-related allegations may have been allowed to proceed, while the allegations regarding the policies and procedures still, in this author's opinion, arguably would have been time-barred. Post-*Porter*, the issue of notice to the defendants and the ability of preparing a defense is given less weight. There is now a focus on the issues of temporal proximity and the character of the conduct challenged. As to policies and procedures, the negligence asserted would be to a time distant from the care originally challenged — the time when the policies and procedures were actually formulated. As to the character of the conduct, the drafting of the policies and procedures differs in character from the actual provision of care discussed in the original complaint.

The MRI allegations would be more problematic for defendant under the new analysis set forth by the Illinois Supreme Court. In terms of the character of the conduct challenged, while the studies at issue differed, they each involved the direct provision of care to plaintiff. Regarding the timeframe at issue, a post-*Porter* court would likely find that the subject conduct occurred during the course of care challenged in the original complaint and that it caused the same injury to the plaintiff. Under the *Porter* analysis, the temporal proximity standard would be satisfied if the facts are all "part of the events leading up to the alleged injury." Such is without regard to the defendant having been put on notice as to the specific facts pleaded in the amended complaint.

In short, Illinois' already liberal policies regarding the amendment of pleadings have become even more permissive under *Porter*. For an amended pleading to be time-barred, a defendant may need to show a resulting transformation in the nature of the litigation.

California

California has no statutory provision regarding the "relation-back" of amended pleadings. There is, however, case law addressing the "relation-back doctrine."

In California, in order for a new pleading to "relate back" it must "1. Rest on the same general set of facts; 2. Involve the same injury; and 3. Refer to the same instrumentality," as the original complaint. *Norgart v. Upjohn Company*, 21 Cal. 4th 383, 981 P.2d 79 (Cal. 1999). While the areas of inquiry may seem similar to those in Illinois, the results after application of the doctrine appear to be different under certain scenarios.

For example, in *Quiroz v. 7th Avenue Center*, 140 Cal. App. 4th 1256, the court found that a later filed pleading adding a survival action claim to an action which had previously been pleaded only as a wrongful death action did not "relate back" to the original pleading. The court held that the survivor cause of action argued a different injury under a different theory than was set forth in the initial complaint.

By way of comparison, Illinois law has long allowed a cause of action for pain and suffering to be added to a complaint originally seeking only damages for wrongful death. The position of the Illinois appellate courts has been that the statutory section at issue is to be construed liberally and that, when the defendant has had notice from the beginning that the plaintiff is trying to enforce a claim because of a specific conduct, the liberal rule regarding relation back should apply.

Indiana

In Indiana, the "relation-back doctrine" is addressed in Indiana Trial Procedure Rule 15, which provides that "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Indiana case law appears to be fairly liberal in allowing the "relation-back doctrine" to save a new theory of recovery from the applicable period of limitations. The Indiana Supreme Court addressed the issue in *McCarty v. Hospital Corporation of America*, 580 N.E.2d 228 (1991). In *McCarty*, plaintiff sued defendant hospital arguing that it had allowed unnecessary surgery on plaintiff, failed to investigate the need for plaintiff's operation and, in general, allowed defendant physician to perform unnecessary surgeries. The amended complaint sought to add additional claims against the hospital arguing a failure to employ qualified doctors, the failure of an agent of the hospital to recognize that the surgery was unnecessary, a failure to institute an investigation procedure to determine

the necessity of operations at the hospital, and a conspiracy with the doctor to perform unnecessary surgeries and for providing assistance to him in performing those surgeries. The trial court determined that the added counts were time-barred.

The Indiana Supreme Court reversed and in the process reformed Indiana's "relation-back doctrine," adopting the analysis set forth by the dissent in *McCarty*. The Court found that the language "conduct, transaction, or occurrence" in Indiana Trial Procedure Rule 15(c) was made up of the "factual circumstances" that gave rise to the original claims and injuries alleged. As a guide, the Court suggested determining whether evidence presenting or supporting the facts alleged in the new complaint could or would have been introduced under the original pleadings. The court indicated that at the heart of the inquiry was a need to allow liberal amendments to pleadings to allow the fact finder an opportunity to review all of the issues involved in a lawsuit. The Indiana Supreme Court gave a general warning that defendants, once put on notice by an original pleading, "should be aware that (they) may be subject to any additional claims . . . stemming from the "general injury and general conduct" at issue and not merely those claims or defenses resembling those already pled."

While this article generally does not address the issue of adding parties after the period of limitations, practitioners and potential medical malpratice defendants in Indiana should note that Indiana Trial Procedure Rule 15 was amended in 2002 to provide a 120-day timeframe after commencement of the action during which an amendment adding a party may be filed. Even if filed during that timeframe, however, the party newly named must have had notice of the institution of the action such as not to be prejudiced by the late filing and either constructive or actual knowledge that, absent mistake, the action would have been brought against him. (See *Seach v. Armbruster*, 725 N.E.2d 875 (Ind. App. 2000) for a discussion of the notice and mistake requirements of Indiana Trial Procedure Rule 15(c).

Wisconsin

Wisconsin's provision in its Code of Civil Procedure governing the "relation back" of amendments is similar to those other provisions discussed in this article. In order to "relate back," the claim asserted in the amended pleading must arise out of the "transaction, occurrence, or events set forth or attempted to be set forth in the original pleading." Wisconsin Statutes Section 802.09.

Wisconsin has relatively little "relation-back doctrine" case law. The seminal case appears to be the *Korkow v. General Casualty Company Wisconsin*, 117 Wis. 2d 187 (1984), which involved an action to recover under a fire insurance policy. The amended pleading added a plaintiff and an additional claim under the policy. In discussing the "relation-back doctrine" the Wisconsin Supreme Court referred to the state's "liberal civil procedure rules." The Court also referred to federal law, stating that Wisconsin's "relation-back" statute was very similar to Federal Rule of Civil Procedure 15(c).

The Court in *Korkow* focuses on fair notice to the defense and acknowledges that in Wisconsin the "identity of transaction" test is used to examine whether an amendment arises out of the same transaction, occurrence, or events set forth in the original pleading. (*See Ishmael v. Moretti*, 503 N.W. 2d 21, 177 Wis. 2d 620 (Ct. App. 1993), for an example of a plaintiff failing to meet the "identity of transaction" requirements).

If the liberally applied "identity of transaction" requirements are met, a Wisconsin court will then shift the burden to the defense to prove prejudice from exercise of the "relation-back doctrine." The Wisconsin Supreme Court stated that the trial court has discretion to allow amendment and that there must be a convincing assertion by the defendant of prejudice to the ability to prepare to meet the claim in the amended complaint in order for the court to deny the amended pleading.

It should be emphasized that the addition of parties after the passing of the period of limitations is a different inquiry, and one which is more likely to result in a ruling against plaintiffs—even when the new claims arise from the same occurrence. (*See e.g., Biggart v. Garstad* 182 Wis. 2d 421 (Ct. App. 1994) and *Barnes v. Wisco Hotel Group* 318 Wis. 2d 537 (Ct. App. 2009)). This makes sense when considering that at the heart of most of these decisions is the court's examination as to notice of the potential for additional claims arising from the occurrence.

Florida

Florida's provision regarding the amendment of pleadings is found at Florida Rule of Civil Procedure 1.190, which contains the familiar refrain of same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

Because all of this law is fact-specific, and the determinations as to the "relation-back doctrine" are left primarily to the court's discretion, it is difficult to tell where Florida falls on the spectrum of liberality in regards to amendment of pleadings. Just as in other states examined, Florida's appellate courts refer to the Federal Rules of Civil Procedure when ruling on these issues. Florida courts have adopted the position set forth in Moore's Federal Practice regarding the amendment of pleadings. *Brown v. Wood*, 202 So. 2d 125 (2nd Dist. 1967) *citing* 3 Moore, Federal Practice 852 (2d Edition 1953). It states:

> If the original pleading gives fair notice of the general fact situation out of which the claim or the defense arises, an amendment which merely makes more specific what has already been alleged generally, or which changes the legal theory of the action will relate back even though the statute of limitations has run in the interim.

In *Brown*, plaintiff filed an original pleading listing three medical procedures during which it was alleged that there was medical malpractice and breach of contract. An amended complaint filed after the period of limitations had passed added the date of an additional surgical procedure. The appellate court found that the amended filing related back to the original pleading. The court held that the specific date did not need to have been mentioned in the original pleading and that the fact that there was a reference to the type of procedure done was adequate to put defendants on notice that the operation could be at issue.

Also suggesting liberality in Florida on this issue are cases somewhat similar to the *Porter* decision in Illinois. In *Maraj v. North Broward Hosp. Dist.* 989 So. 2d 682 (4th Dist. 2008) and *Cinque v. Ungaro Weber and Brezing* 622 So. 2d 1051 (4th Dist. 1993), Florida appellate courts allowed new allegations of medical negligence brought outside of the applicable period of limitations to proceed when those allegations were based upon the conduct of physicians and liability against the entities was founded upon an agency theory. Although a new cause of action against the physicians would have been time-barred, the courts allowed the same conduct to be challenged through the alleged principal, requiring only a relationship between the allegations of the original and the amended pleadings and that the alleged principal was named as a defendant prior to the expiration of the limitations period.

Federal Law

Federal Rule of Civil Procedure 15, which addresses the "relation-back doctrine," provides that an amendment relates back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of a conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Federal case law interpreting this provision holds that in a case proceeding in federal court the federal provision controls in the event that the state rules regarding relation back of amendments are less generous and liberal than the federal statute.

The U.S. Supreme Court addressed the "relation-back doctrine" in *Tiller v. Atlantic Coast Line*, 323 U.S. 574, 65 S.Ct. 421 (1945), and allowed allegations of new facts in the amended pleading. In so doing the Court stated that "the cause of action now, as it was in the beginning, is the same – it is a suit to recover damages for the alleged wrongful death of the deceased." The high court discussed notice in a broad sense, stating that "respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death."

Most recently, in *Krupski v. Costa Crociere S.p.A.*, 130 S.Ct. 2485 (June 7, 2010), the U.S. Supreme Court resolved a conflict among the circuits and construed Federal Rules of Civil Procedure 15(c) to decide if an amended pleading related back to the date of a timely filed original pleading. Rule 15(c) provides, in part, that "the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." The Court held "that relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading."

Most state statutory provisions regarding the relation-back of amendments very closely track the language of Federal Rule of Civil Procedure 15(c). The question then is whether the case law interpreting such language is more or less liberal in the state providing the substantive statute of limitations law. As a result, a determination as to the "relation-back doctrine" and its applicability under any particular set of circumstances in federal court will require both a federal and state court analysis.

Conclusions and Recommendations

As mentioned, the inquiry as to whether a court will allow an amended pleading to relate back to an original filing is very fact-specific. The statutory and case law provided in this article may serve as a good starting point for analysis as to whether a motion to strike or dismiss in any of the jurisdictions discussed will be granted. In those and other jurisdictions, Hinshaw attorneys can evaluate the circumstances of any particular case and evaluate the likelihood of success of using a limitations argument to bar new allegations of negligence or different theories of recovery against the medical professional.

By way of recommendation, the lawyer representing a medical defendant should be sensitive to the possibility of untimely amendments from the very outset of the litigation. The argument that a proposed amendment is time-barred begins with pressure placed upon plaintiff's counsel to better define the allegations of the original pleading. Motions to dismiss or strike, arguing the vagueness of plaintiff's allegations of negligence or upon a failure to identify the individual or individuals whose conduct is being called into question, may force the plaintiff to plead with greater specificity at the outset of the litigation. (In Illinois, the seldom used Demand for Bill of Particulars can be issued in an attempt to force plaintiff to provide more details concerning the allegations of the original pleading. 735 ILCS 5/2-607)

The goal of such challenges to the original pleading will be to have the court require plaintiff to fully identify the allegedly negligent care provider(s) and the specifics of the conduct challenged. Defense counsel will then have an easier time distinguishing the allegations of a proposed amended pleading from those pursued from the outset of the litigation.

The defense attorney must be prepared, however, for the application of the liberal standard and the likelihood that the plaintiff's amended pleading will be allowed. If the challenge to the amendments fails, defense counsel must be prepared to petition the court to allow for additional time for written and oral discovery, perhaps even to the extent of taking additional depositions of witnesses previously deposed so as to completely prepare the defense for trial. A court will presumably be likely to grant such requests after having just refused the defendant's well-reasoned motion to strike or dismiss the amended pleadings containing new facts, new causes of action, and new theories of recovery filed after the passing of the period of limitations.

Contact for more information: Charles A. Egner

Contributors:
California – Marie E. Colmey
Indiana – Michelle P. Burchett
Florida – Paul J. Gamm
Wisconsin – Michael P. Russart & Angela M. Rust