



## Alerts

### New Jersey's Affidavit of Merit Statute Interpreted to Apply to Intentional Torts Where the Focus of the Claim Is the Deviation from the Professional Standard of Care

June 9, 2014

*Professional Lines Alert*

*Nuveen Municipal Trust v. Withumsmith Brown P.C.*, --- F.3d. --- (2014), 2014 WL 1910579, 3d. Cir., filed May 14, 2014

The case arose from a loan transaction between plaintiff/appellant (Trust) and Medical Center based on Trust's purchase of a \$10 million Bond Anticipation Note from Medical Center. Medical Center had provided Trust with an audit report and opinion letter authored by Medical Center's accountants and lawyers. Shortly after the transaction, Medical Center filed Chapter 11 bankruptcy.

Plaintiff sued Medical Center's accountants and lawyers in federal court alleging negligent misrepresentation, fraud, and malpractice. Plaintiff asserted that the audit report and opinion letter concealed aspects of Medical Center's financial condition that, if known, would have led Plaintiff not to purchase the Note.

The District Court dismissed Plaintiff's case because it failed to file an Affidavit of Merit as required by New Jersey's Affidavit of Merit Statute, N.J. Stat. Ann. sec. 2A:53A 26-29 (AOM). The AOM requires a plaintiff to file an affidavit of merit in actions seeking "damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation." As interpreted by the New Jersey Supreme Court, the "overall purpose of the statute is to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation." *Couri v. Gardiner*, 173 N.J. 328, 801 A.2d 1134, 1137 (N.J. 2002) (internal citations omitted).

Plaintiff appealed and the U.S. Court of Appeals for the Third Circuit issued an opinion that if the AOM applied, then dismissal was proper. The Court certified two questions to the New Jersey Supreme Court regarding the proper interpretation of the AOM. First, whether the nature of the claimed injury qualified as "property damage" under the AOM. Second, whether intentional torts, like fraud, relating to a claim of professional malpractice or negligence, but not requiring proof of malpractice or negligence, are subject to the AOM requirements. The New Jersey Supreme Court denied the petition of certification and the Court issued a new opinion to address its responses to the

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certified questions.

### **Questions Before the Court and How the Court Decided Them**

*Does a claim for money damages based on a loan transaction qualify as "property damage" under the AOM? Yes.*

The Third Circuit found that Plaintiff's claim did qualify as "property damage" under the AOM. In 2010, the New Jersey Supreme Court confirmed that the AOM "applies to all actions for damages based on professional negligence." *Paragon Contractors, Inc. v. Peachtree Condo. Ass'n*, 202 N.J. 415, 997 A.2d 982, 985 (N.J. 2010). Plaintiff argued on appeal that the New Jersey Supreme Court previously had determined that compensatory damages did not qualify as "property damage" under the AOM. The Court disagreed with Plaintiff and stated that the nature of Plaintiff's claim was not to recoup money already paid, but for "unspecified money damages stemming from its loan transaction with non-party[...]" The Court opined that this type of damage qualified as "property damage" under the AOM. *Cornblatt v. Barow*, 303 N.J. Super. 81, 696 A.2d 65, 68 (N.J. Super. Ct. App. Div. 1997) ("a claim against an attorney for alleged malpractice is a claim for property damage within the legislative intent and plain meaning of the statute."); *Nagim v. N.J. Transit*, 369 N.J. Super. 103, 848 A.2d 61, 70-71 (damages sought against an engineer qualified as "property damage" under the AOM).

*Can a fraud claim trigger the requirements of the AOM? Yes.*

New Jersey courts have found that the AOM applies and an affidavit of merit is required where the "claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession." *Couri*, 801 A.2d at 1141. The Court examined the evidence necessary to establish a claim of fraud against the attorneys and accountants; and determined that "they nonetheless require proof [that the attorneys and accountants] deviated from professional standards of care." The Court further clarified that fraud claims can be subject to the AOM because "the focus is deviation from a professional standard devoid of any claim label."

### **What the Court's Decision Means for Practitioners**

Parties to these types of lawsuits must be cognizant of the draconian effect that a failure to comply with the AOM can have — the dismissal of a complaint. When prosecuting a professional negligence claim in New Jersey, carefully analyze the damages sought and whether any of the claims can be read to rely on a deviation from a professional standard of care because that will trigger the requirement of an affidavit of merit under the AOM. When defending a claim against a professional, whether styled as professional negligence or another cause of action, *Nuveen* teaches that dismissal may be appropriate if the plaintiff fails to submit an affidavit of merit under the AOM where deviation from a professional standard is at issue.

For more information, please contact your Hinshaw attorney.

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