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Expert Opinion Required at Outset of Case to Sustain Cause of Action Against Design Professionals in New Jersey

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Introduction

In 1995, Governor Christine Todd Whitman signed into law a package of five bills to "bring common sense and equity to [New Jersey's] civil litigation system." Part of this package, the Affidavit of Merit Bill (the "Law"), placed a new requirement upon plaintiffs seeking damages in professional negligence or malpractice. Such plaintiffs must furnish an affidavit issued by an appropriately licensed professional concluding that there was "a reasonable probability that the [defendant's actions] fell outside acceptable professional or occupational standards or treatment practices." The legislation sought to make it more difficult for a plaintiff in New Jersey to sue professionals frivolously for malpractice. This legislation applies to design professionals.

In March of this year, three years after enactment, the New Jersey Supreme Court interpreted the Law in its ruling in Cornblatt v. Barow. While the Court in Cornblatt agreed that a professional negligence or malpractice suit filed without an affidavit of merit may be dismissed with prejudice, it ruled that the Law did not apply to cases where the operative facts occurred prior to the Law's enactment. The Court also took an expansive view of how a plaintiff may comply with the Law, finding a certification sufficient in certain circumstances. This article explores the implications of the Law in light of the recent Cornblatt decision.

Legislative Intent

By requiring an affidavit of merit, the New Jersey legislature introduced a minimum threshold for plaintiffs to meet in filing professional negligence and malpractice claims. The plaintiff must provide the affidavit within 60 days of the filing of the defendant's answer. Theoretically, a plaintiff filing a frivolous claim would be unable to find a professional willing to provide the required affidavit. Failing to meet the Law's requirements, an unfounded claim could be quickly and finally dismissed.

According to the Law, the act was to "take effect immediately [June 29, 1995] and . . . apply to causes of action which occur on or after the effective date of this act." Following the Law's enactment, many plaintiffs' attorneys did not file affidavits, interpreting the Law to mean that an affidavit only had to be filed if the alleged negligence occurred after the date of the Law. Defendants seeking to dismiss cases for failure to comply with the Law quickly tested the meaning of this passage. The case which worked its way up to the Supreme Court of New Jersey is Cornblatt v. Barow.

Cornblatt v. Barow

Alan J. Cornblatt represented Aileen Barow in a lengthy matrimonial action. Barow disputed Cornblatt's billings for legal services. Following arbitration hearings on October 1, 1995, Cornblatt was awarded a judgment of over $170,000. Barow failed to pay, so Cornblatt filed a complaint to collect on his judgment. Barow

answered the complaint and filed a counterclaim alleging that Cornblatt negligently breached his contract, causing Barow to incur additional costs and fees by failing to settle the matrimonial action.

Barow's counterclaim was based on professional malpractice. The bill had already been signed into law so Cornblatt, in his answer, demanded that Barow submit an affidavit of merit within 60 days, as required under the Law. Weeks after the deadline, Barow failed to provide the required affidavit. Cornblatt then moved to dismiss Barow's counterclaim for failure to comply with the Law. The trial court granted Cornblatt's motion and dismissed the counterclaim with prejudice. Barow appealed the trial court's decision on the grounds that the Law did not apply to her case and, even if it did apply, a certification subsequently submitted by her attorney met the requirements of the Law.

The Appellate Division Decision

A year later, the Appellate Division heard Barow's appeal. The two-judge panel affirmed the trial court's decision, ruling that the Law applied to legal malpractice cases and the certification provided by Barow's attorney did not comply with the Law. According to the Appellate Division, failure to file the affidavit of merit warranted dismissal with prejudice.

While not raised in Barow's appeal, the Appellate Division decided to address the timing of the Law ("causes of action which occur on or after the effective date of this act"). Looking to the legislature's choice of the words "which occur" rather than "which accrue", the Appellate Division interpreted the legislature's intent that the Law should apply to all cases filed after the date of enactment.

The Appellate Division's analysis in Cornblatt was cause for concern in the legal community, particularly for plaintiffs' attorneys in the malpractice area. At the time, more than 1,000 New Jersey cases would be affected by such a ruling on the Law's timing. In September 1997, the Supreme Court decided it would address the Law's interpretation. The Court heard arguments on a further appeal of Cornblatt and issued a stay in the affected cases.

The New Jersey Supreme Court Decision

In a unanimous decision, the New Jersey Supreme Court overruled the Appellate Division's holding in Cornblatt. The Court held that the Law does not apply to actions where "the underlying legally-sufficient facts . . . happen, arise, or take place on or after the effective date of the statute." It "determined that the phrase 'cause of action which occur,' in effect, imports the meaning the happening of facts that constitute a legal basis for remedial relief." According to the ruling, the Law does not apply when the purported negligence upon which the claim was made occurred before June 29, 1995. Plaintiffs filing claims based on negligence on or after that date, however, must be file an affidavit of merit.

The Court also found that the certification provided by Barow's attorney satisfied the affidavit requirement of the Law. While a certification is not an affidavit, the Court determined that it could satisfy the purpose of an affidavit when specific criteria are met. In Cornblatt, the Court found that the certification was timely filed, the certification otherwise complied with the requirements of an affidavit of merit, there was an adequate reason for submitting a certification rather than an affidavit, and the certification gave the defendant sufficient notice.

Finally, the Court ruled that "a dismissal for failure to comply with the [Law] should be with prejudice in all but exceptional circumstances." This means that, barring exceptional circumstances, dismissal is on the merits. The claim is forever lost and the plaintiff may not file the same claim. By ruling that a failure to comply with the Law may result in dismissal with prejudice, the Court affirmed the ultimate power of the Law. The Court, however, has not defined what would be considered an "exceptional circumstance" in the context of the Law.

Summary

New Jersey's Affidavit of Merit Bill has made it more difficult for plaintiffs to maintain a meritless claim in professional negligence or malpractice. The Supreme Court's ruling in Cornblatt, however, has taken some of the bite out of the Law. It has found the Law does not apply to cases for which the alleged negligence pre-dated the Law's enactment. It has also somewhat eased the requirements of the affidavit itself. The Law's real power, however, remains in effect. Plaintiffs who fail to comply with the Law may have their claims dismissed with prejudice.