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by: Colin E. Flora
Associate Civil Litigation Attorney

Indiana Medical Malpractice Filing Using Third-Party Carrier

The Indiana Court of Appeals handed down a decision that is sure to raise an eyebrow or two and may find its way to the Indiana Supreme Court. In *Moryl v. Ransone*, the court was asked to determine whether a medical malpractice complaint filed with the Indiana Department of Insurance (DOI) the day after expiration of the two-year statute of limitations was untimely. On first blush, this may seam like a no-brainer. But if you think that it turns out to be so, you not only are too quick to jump to conclusions but also think too little of your author. This issue is more complicated than it might seem.

The case finds itself at a nexus between the Indiana Medical Malpractice Act and the Indiana Trial Rules/Appellate Rules. In the typical civil case, in order to initiate the case a plaintiff need only file the claim by way of a complaint with an appropriate court, pay the filing fee, and issue a sufficient number of summonses to the defendants. Indiana medical malpractice claims are different. Before a complaint can be filed in a normal trial court, the case must first be filed with the DOI – though filing in both can be done simultaneously.

Thanks to TV and movies we are all familiar with the term "statute of limitations" meaning that there is a specific period of time in which a case must be filed or the ability to do so vanishes. As we've discussed in previous posts, there are

various doctrines to attempt to overcome the bar of the statute of limitations – e.g. fraudulent concealment and the discovery rule. However, there is another procedural avenue by which a claim may not actually be in the hands of the court by the cutoff deadline of the statute of limitations and yet not be deemed to have been filed late.

Indiana Trial Rule 5(F) provides a list of such scenarios in which the case is deemed to have been "filed" at an earlier date than it was actually received. The rule states:

> **Rule 5(F) Filing With the Court Defined.**
> The filing of pleadings, motions, and other papers with the court as required by these rules shall be made by one of the following methods:
> * * *
>
> (3) Mailing to the clerk by registered, certified or express mail return receipt requested; [or]
> (4) Depositing with any third-party commercial carrier for delivery to the clerk within three (3) calendar days, cost prepaid, properly addressed;

What this rule means is that you can either mail the necessary documents to the court clerk by certified or express mail in which case the case is deemed filed the moment the mailing is sent or it can be given to a third-party commercial carrier such as FedEx which extends the deadline by three days.

While Rule 5(F) is unquestionably the law of the land when it comes to file a case with a trial court, it is not directly applicable to filings with any other body, such as the DOI. What happened in the *Moryl* case is that the date of the malpractice was April 20, 2007. On April 19, 2009, the attorney for the plaintiff sent the proposed complaint to the DOI using FedEx. If this was a typical trial court filing, then Rule 5(F)(4) would mean that three days were tacked on to the statute and the filing would be timely. The only problem is that Rule 5 is a trial rule that is not directly applicable to filings with the DOI. As a result, defendants filed a motion for summary judgment, which was granted by the trial court, to kick the complaint as having been untimely filed.

On appeal, the Court of Appeals agreed with the trial judge. The reason for the both the trial judge's decision and the Court of Appeals is simple. The Medical Malpractice Act specifically designates methods for tolling the statute of limitations for filing a proposed complaint with the DOI. "Tolling" is a legal phrase that means to pause the clock. It is like an extra point in football or a free throw in basketball. Things are allowed to occur but the clock is stopped. The interesting, albeit

confusing distinction, here is that there is no standalone statute of limitations for filing a proposed complaint with the DOI. However, there is a statute of limitations for filing a claim with a trial court. Since filing a proposed complaint with the DOI is a prerequisite to filing a claim with a trial court, there is functionally a statute of limitations for filing the proposed complaint. The only reason I discuss the distinction is because the actual language of the Medical Malpractice Act can be a bit confusing if you don't grasp the distinction.

The Medical Malpractice Act states, in relevant part:

> **Ind. Code § 34-18-7-3**
>
> (a) The filing of a proposed complaint tolls the applicable statute of limitations to and including a period of ninety (90) days following the receipt of the opinion of the medical review panel by the claimant.
>
> (b) A proposed complaint under IC 34-18-8 is considered filed when a copy of the proposed complaint is delivered or mailed by registered or certified mail to the commissioner.

Of importance to us is subsection b, which lists the ways in which a proposed complaint can be filed. Just like Rule 5(F)(3), it is filed the moment that it is mailed by registered or certified mail. However, unlike Rule 5(F)(4), there is no provision addressing third-party carriers such as FedEx. In the absence of such language, the court found no merit in incorporating the provisions of Trial Rule 5 or Indiana Appellate Rule 23(A), which has similar language.

I have little doubt that the plaintiff will seek transfer of this decision to the Indiana Supreme Court. I am less certain that the Court will accept transfer. Sadly, the Court of Appeals' reasoning is sound. However, there is certainly room for the Indiana Supreme Court to overturn this decision so as to avoid a manifest injustice. As the decision stands now, it is perfectly fine to file a proposed complaint using registered or certified mail but not to use what may be an even more reliable service in a third-party carrier. Such a decision seems to have little merit.

In reaching its conclusion, the Court of Appeals referenced the doctrine of *expression unius est exclusion alterious* meaning that "the enumeration of certain things in a statute necessarily implies the exclusion of others." Thus, because the statute listed certified and registered mail it necessarily excluded third-party carriers. While this is certainly sound application of the doctrine, it is not the sole method for statutory interpretation. The Indiana Supreme Court discussed many of the statutory interpretation principles in *Pabey v. Pastrick*.

> The process of statutory construction is guided by well-recognized principles. "Our objective in statutory construction is to determine and effect the intent of the legislature." We do not presume that statutory language "is meaningless and without a definite purpose" but rather seek to give effect "to every word and clause." "Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute." We must assume that the language employed in a statute was used intentionally. We "will presume that the legislature did not enact a useless provision." **In interpreting a statute, we must seek to "give it a practical application, to construe it so as to prevent absurdity, hardship, or injustice, and to favor public convenience."**

I believe that there is certainly grounds to contend that incorporation of the third-party carrier provisions of Trial Rule 5(F)(4) and Appellate Rule 23(A)(3) may well be necessary to favor public convenience and to avoid injustice. Nevertheless, I quickly concede that application of such an extreme statutory interpretation tool is best left to the state's highest court and not its intermediary court.

As I said above, I fully expect that transfer will be sought, but have no clue what the outcome will be. This iteration of the Indiana Supreme Court has already provided at least one remarkably beneficial decision on behalf of injured persons seeking recovery through the Medical Malpractice Act – *Robertson v. B.O.* However, it does merit note that *Robertson v. B.O.* was the apparent result of a rigid textual interpretation of the Medical Malpractice Act.

Only time will tell whether this case illustrates yet another constraint on plaintiffs in medical malpractice cases or whether, such as in *Robertson v. B.O.*, we have a scenario where the balance between plaintiffs and defendants shifts, if perhaps only briefly, in favor of plaintiffs.

Join us again next time for further discussion of developments in the law.

Sources

- *Moryl v. Ransone*, ___ N.E.2d ___, No. 46A04-1112-CT-710 (Ind. Ct. App. May 9, 2013).

- Indiana Medical Malpractice Act – codified at Ind. Code art. 34-18.
- Indiana Trial Rule 5(F)(3) & (4).
- Indiana Appellate Rule 23(A).
- Indiana Code § 34-18-7-3.
- *Pabey v. Pastrick*, 816 N.E.2d 1138, 1148 (Ind. 2004).
- *Robertson v. B.O.*, 977 N.E.2d 341(Ind. 2012).