LeClairRyan Accountant and Attorney Liability Newsbrief

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Offshore Disclosure Programs—A Trap for CPAs?

by Elizabeth J. Atkinson, Esq.

The IRS has conducted several high profile Offshore Voluntary Disclosure Initiatives in recent years (commonly known as "OVDI") and there is one open currently. The program's requirements are very specific and are spelled out in detail on the IRS' website. The requirements for the program—completing amended returns and filing delinquent Reports of Foreign Bank and Financial Accounts ("FBARs")—are typical work of the tax CPA. But should you recommend that your client enter the program?

That is a question fraught with peril for the CPA. While the IRS loves to get as many taxpayers as possible into its programs, entering the OVDI program involves extending the statute of limitations for years that may already be closed and agreeing to penalties that may be in excess of what the taxpayer would have owed simply by filing late FBARs. The program is actually designed for those facing criminal risk. The task of evaluating the client's potential criminal risk, however, is not something a CPA should be taking on. That is a job for an experienced attorney who can discuss these matters with the client under the umbrella of the attorney-client privilege. The privilege in Internal Revenue Code Section 7525 applies only to non-criminal matters.

A CPA who advises a taxpayer to enter the OVDI program risks a subpoena to testify against his own client (if the taxpayer is not accepted into the program) or risks having to disclose sensitive discussions in the course of cooperating within the OVDI program or in the "opt-out" provision of the program. We have also seen cases recently where clients who entered the program are bringing malpractice claims alleging that they would have been better off without the program or that the CPA should have discovered the offshore accounts and brought the issues to the client's attention earlier.

Any situation involving potential undisclosed offshore bank accounts, underreported income, or anything that might warrant amended returns or voluntary disclosures warrants consulting with an attorney. An experienced attorney will be mindful of the issues facing the CPA and will be mindful of protecting the CPA from a situation of having to testify against his own client.

Contact the author at **elizabeth.atkinson@leclairryan.com**

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Superior Court Imposes Sanctions for Withholding Documents in Discovery

by Ben N. Dunlap, Esq.

The Court in *O'Brien, et al. v. American Medical Response of Massachusetts, et al.,* CV2011-00713-B, allowed the plaintiff's motion to compel discovery and imposed sanctions against one of the defendants in connection with its withholding of certain documents requested in discovery.

The case arose from a multi-vehicle accident resulting in alleged injuries to the plaintiff. The defendant had withheld certain documents concerning its driver's personnel file, as well as internal investigation reports, on the basis that such documents would not be admissible at trial. The Court admonished that inadmissibility is not a valid basis for withholding documents in discovery, stating that "a party may not (a) withhold documents (b) arrogate to itself the role as sole arbiter of the documents' admissibility, and (c) then use its own self-serving inadmissibility ruling as an excuse or pretext to continue to withhold documents as irrelevant."

The Court addressed the defendant's resistance to disclosing the driver's cell phone number. The defendant initially claimed that its disclosure would violate privacy laws, including G.L. c. 215, § 1B. After being served with the motion to compel, the defendant abandoned the privacy objection and disclosed the cell phone number. The Court was not satisfied with the timing of the disclosure, stating that "surrendering discoverable documents – or revealing their existence for the first time – only when one has been confronted with a motion to compel – is hardly a proper way to conduct discovery."

The Court also disagreed with the defendant's reasons for withholding documents concerning a collective bargaining agreement sought by the plaintiff. The defendant had declined to produce the agreement, informing the plaintiff that it was "not authorized to provide any additional documents in response" to the plaintiff's requests. The Court ruled that lack of authorization is not an adequate basis for non-disclosure, because "compliance with the Court's rules of discovery does not depend upon obtaining unspecified authorization from unknown third parties."

The Court concluded that the defendants responses to the motion to compel were "not substantially justified" and certain of the discovery responses were "unreasonable and obstreperous in nature" and, accordingly, awarded the plaintiff his attorney's fees incurred in bringing the motion to compel.

Contact the author at **ben.dunlap@leclairryan.com**

Expert Witness Faces Personal Liability for Professional Malpractice

by J. Douglas Cuthbertson, Esq.

According to a federal court in Richmond, Virginia, a plaintiff may sue her hired expert witness for malpractice personally, even though her contract was with the expert's corporate employer, not with him personally.

In *Caruthers v. Thau*, 3:13CV483-JAG, 2013 WL 6048799 (E.D. Va. Nov. 14, 2013), the plaintiff, Linda Caruthers, sued her expert witness, Claude Thau, for malpractice after he allegedly undermined her earlier lawsuit by refusing to comply with a court order to produce certain documents, leading the judge to exclude his testimony.

"Unlike his prior efforts ostensibly on behalf of Ms. Caruthers, this time Mr. Thau will need to come to court to defend the case," wrote U.S. District Judge John A. Gibney, Jr., in the court's November 14, 2013 opinion.

Caruthers engaged Thau as an expert witness in her earlier state court lawsuit seeking additional compensation from a long-term care insurance company. He was to provide expert witness testimony on the typical compensation for someone such as Caruthers, who arranges access to a large member association for an insurance entity.

Under their engagement agreement, Thau's compensation was $400 per hour for his time, plus reasonable expenses.

Thau works as a long-term care insurance consultant, with extensive experience and expertise in his field. He holds himself out as an expert witness in the area of long-term care insurance, willing to testify in litigation at depositions and at trial. Thau serves as the President and sole employee of Thau, Inc., a Kansas "S" corporation.

In the underlying lawsuit, Thau based his expert opinions in part on facts he considered confidential (specifically, the identity of certain entities on which he based his opinion regarding compensation).

To address Thau's concerns about confidentiality, the state court entered a protective order to allow him to produce the confidential information under seal. After Thau still refused to produce the information, the state court ordered production. Thau refused to comply with the state court's order, leading the judge to exclude his testimony.

Caruthers lost her expert testimony on the eve of trial, forcing her to settle her lawsuit for what she claims was a small fraction of its worth. As a result, Caruthers alleges she was damaged in the amount of the fees she paid Thau for his worthless professional services, as well as the sum of money she would have received from a verdict or a settlement in the lawsuit but for Thau's malpractice. (cont. page 3)

Thau moved to dismiss the claim against him in his individual capacity, arguing that only his corporation can be held liable under the parties' engagement letter.

Caruthers' complaint alleged she retained Thau "personally" to perform services as an expert witness; Thau assumed a personal duty to provide such services; and he breached that duty by refusing to comply with the state court's production order.

The engagement letter provides it is an agreement for "personal professional services," and with his signature, Thau agreed to "provide all services under agreement personally." The court found the contract's wording plausibly supports Caruthers' contention that she employed Thau personally, and the reference to Thau as "President of Thau, Inc.," did not preclude her assertion.

The court rejected Thau's argument that only his S corporation could be liable. Judge Gibney pointed out that, in Virginia, professional liability cases are usually brought against the individual providing the services, and sometimes against the individual's corporate employer. The victim of malpractice normally pays a corporation, LLC, or partnership for professional services, and, in that sense, has a contract with the artificial entity. Nevertheless, the individual professional also owes a duty to the client. Thus, the court held that Thau's effort to escape liability by pointing to his S corporation, which is simply a conduit for payments to him, fails.

The *Caruthers* case is significant, because it holds that professional expert witnesses are not shielded from personal liability by the corporate structure of their employer. Generally, in order to hold a shareholder or officer of a corporation personally liable for the acts of the corporation, a plaintiff must pierce the corporate veil (i.e., ask the court to disregard the corporate entity and to hold the shareholder individually liable for an obligation of the corporation as though the corporation did not exist). Normally, courts will pierce the corporate veil only when they find that the company is merely the shareholder's "alter ego" or when the shareholder uses the company to perpetrate fraud.

Caruthers alleged an alter ego relationship between Thau and Thau, Inc. While the court acknowledged that this claim may arise later in the litigation, it held that the claim did not support Thau's motion to dismiss.

Professionals should recognize that in Virginia federal court, even in the absence of a claim seeking to pierce the corporate veil of their employers, they may still face personal liability for professional malpractice.

Contact the author at **douglas.cuthbertson@leclairryan.com**

U.S. District Court Magistrate Narrowly Applies *In Pari Delicto* Doctrine in *Tamposi v. Denby* *by John W. Moran, Esq.*

In *Tamposi v. Denby*, CIV.A. 10-12283-RBC, 2013 WL 5460083, ___ F. Supp. 2d ___ (D. Mass. Sept. 30, 2013), a Magistrate Judge in the U.S. District Court for the District of Massachusetts applied New Hampshire law in denying a motion based on the *in pari delicto* defense to dismiss legal malpractice claims. The decision narrowly construed the *in pari delicto* doctrine, holding that even if a plaintiff acted in "bad faith" in an underlying proceeding, she may attempt to shift the blame (and adverse consequences) to her attorney if she can establish that the attorney's fault outweighed her own.

The *Tamposi* case had its genesis in trusts that a successful real estate developer established as vehicles to pass on his substantial wealth to his six children. The right to manage investment of the trust assets was vested not in the trustees, but in two of the plaintiff's brothers who were named as "investment directors." The trust included an "in terrorem" or "no contest" clause, which stated that if a beneficiary initiated litigation to alter or invalidate provisions of the trust, then he or she automatically forfeited all interest in the assets. The *in terrorem* clause did not bar lawsuits to enforce the trustees' or investment directors' duties. The plaintiff retained the defendant, Attorney Denby, to advise her regarding trust matters.

The plaintiff later sued her brothers alleging they violated fiduciary duties they owed to her as investment directors by failing to authorize distributions she claimed were required by the trust documents. (Attorney Denby did not represent the plaintiff in the suit, but plaintiff alleged she was the "architect" of the plan to sue). The lawsuit was unsuccessful, and a New Hampshire Superior Court judge ruled the lawsuit violated the in terrorem clause. Consequently, the plaintiff forfeited her substantial economic interest in the trusts and was required to return distributions she had received. The judge further ruled that the plaintiff initiated the action in bad faith, requiring her to repay her brothers' attorney fees under a provision of New Hampshire law.

The plaintiff then sued Attorney Denby (and other attorneys) alleging that their legal malpractice led to the forfeiture of her interest in the trust assets. Plaintiff alleged specifically that Attorney Denby told her there was "only a minuscule risk" of being found in violation of the *in terrorem* clause when she should have known the risk was much higher. Attorney Denby moved to dismiss the case arguing, among other things, that all claims were barred by the *in pari delicto* doctrine. (cont. page 4)

In Pari Delicto Doctrine cont.

The *in pari delicto* defense "applies where (i) the plaintiff, as compared to the defendant, bears at least substantially equal responsibility for the wrong he seeks to address and (ii) preclusion of the suit would not interfere with the purposes of the underlying law or otherwise contravene the public interest." (quoting *Gray v. Evercore Restructuring LLC*, 544 F.3d 320, 324 (1st Cir.2008)). A wrongful act is generally required to be "immoral" or "illegal" to support an *in pari delicto* defense. Traditionally, "the *in pari delicto* defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury, because 'in cases where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt.'" (quoting *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306–307 (1985))). But more recently, "many courts have given the *in pari delicto* defense a broad application to bar actions where plaintiffs simply have been involved generally in 'the same sort of wrongdoing' as defendants." *See also Choquette v. Isacoff*, 65 Mass. App. Ct. 1, 3, (2005) ("The doctrine of *in pari delicto* bars a plaintiff who has participated in wrongdoing from recovering damages for loss resulting from the wrongdoing.").

The *in pari delicto* defense arises most often in legal malpractice cases where a plaintiff is found to have committed intentional misconduct, such as fraud, and then alleges that he did so because of negligent legal advice and sues his former attorney to try to offset the consequences. In those cases, the *in pari delicto* doctrine may serve as a defense to the legal malpractice action. *See Isacoff*, 65 Mass. App. Ct. at 6 ("A court should not encourage others to commit illegal acts upon their lawyer's advice by allowing the perpetrators to believe that a suit against the attorney will allow them to obtain relief from any damage they might suffer if caught") (quoting *Evans v. Cameron*, 121 Wis.2d 421, 360 N.W.2d 25 (1985)).

In *Tamposi*, the defendant, Attorney Denby relied on the New Hampshire judge's finding that plaintiff had acted in bad faith in bringing the suit against her brothers, arguing that such a finding was binding on plaintiff under the *collateral estoppel* doctrine, and established plaintiff's own wrongful conduct so as to support the *in pari delicto* defense. The District Court Magistrate denied the motion to dismiss, ruling that "a finding of 'bad faith' made in the context of awarding attorneys' fees alone does not foreclose inquiry into other issues relevant on a legal malpractice claim, such as what advice, warnings, and representations were made by the attorney to the client."

The Magistrate noted that even if plaintiff acted in bad faith, the "extent of her knowledge and her role in encouraging [the] litigation" had not been resolved, and ruling on a motion to dismiss the Court had to accept as true that Attorney Denby encouraged the filing of the suit against the brothers "without fully researching the law or fully advising plaintiff of the realistic risks." The Court further noted that there was authority to limit application of the *in pari* delicto defense where there was "inequality of condition between the parties," or "a confidential relationship between them that determined their relative standing before the court." The Court concluded that in order to fully resolve the *in pari delicto* issue, the plaintiff's bad faith would have to be examined "in light of Attorney Denby's alleged advice, representations and conduct," to determine whether the parties bore "at least substantially equal responsibility" for the ill-fated New Hampshire lawsuit. Such an inquiry would require examination of facts not yet established at the motion to dismiss stage.

The *Tamposi* decision should be somewhat concerning to lawyers, as it arguably weakens the *in pari delicto* defense by allowing even a plaintiff previously found to have committed wrongdoing to essentially plead ignorance and argue that she only did so because of faulty legal advice, and that her (presumably more sophisticated) attorney's culpability exceeded her own. It should be emphasized, however, that the decision addressed a motion to dismiss, so the procedural posture required the Court to accept all of the plaintiff's allegations as true. The defendant attorney in *Tamposi* still might prevail on the *in pari delicto* defense at the summary judgment stage or after trial. Moreover, the plaintiff's "bad faith" at issue in *Tamposi* is not necessarily equivalent to a finding of fraud or similar intentional misconduct, so the decision may have minimal application to those types of legal malpractice cases in which the *in pari delicto* issues more frequently arises.

Contact the author at john.moran@leclairryan.com

Two-Year Statute of Limitations under the Federal Tort Claims Acts Creates a Trap for the Unwary Plaintiff's Attorney *by Matthew M. O'Leary, Esq.*

In Sanchez v. United States, ___ F. 3d ___ (1st Cir. 2014), the plaintiff, Angel Sanchez, a widower and the executor of his wife's estate, sued his wife's doctors for medical malpractice arising out of his wife's death. The doctors, unbeknownst to the plaintiff or his attorneys, were employees of the Federal government. Thus, the two-year statute of limitations under the Federal Tort Claims Act ("FTCA") applied, rather than the three-year statute of limitations for medical malpractice claims under Massachusetts state law. The plaintiff filed suit weeks shy of three years after his wife died. Thus, the First Circuit affirmed dismissal of the claims because they were barred by the statute of limitations.

Dr. Rafaela Sanchez, the plaintiff's wife, died on April 24, 2009, after she delivered a child by caesarean section at North Shore Medical Center-Salem Hospital ("NSMC"). The doctors who treated her at NSMC worked for Lynn Community Health Center ("LCHC"). The plaintiff alleged the doctors knew or should have known his wife had at least one of two potentially dangerous conditions, placenta previa and placenta accreta, and, thus, required special care in the removal of her placenta, and probably a hysterectomy, to minimize the risk of hemorrhage. The plaintiff claimed neither doctor performed a hysterectomy until after hemorrhaging began. When the bleeding persisted, Dr. Sanchez died.

The plaintiff retained legal counsel at some point prior to February 2010. His counsel waited until April 11, 2012 -- two years and eleven and a half months after Dr. Sanchez's death--to file suit in Massachusetts state court. Apparently, the plaintiff's counsel believed the three-year statute of limitations under state law for medical malpractice actions applied. The United States removed the case to Federal court, and substituted itself as the defendant pursuant to the applicable statute. The United States then moved to dismiss the claims based on the two-year statute of limitations under the FTCA, which the District Court granted.

The plaintiff's main argument on appeal was the accrual of the cause of action was delayed by the discovery rule, which provides a statute of limitations does not begin to run until a plaintiff knows or reasonably should know both that he is injured and what caused his injury. To delay commencement of the running of the statute of limitations, the factual basis for the cause of action must be incapable of detection through the exercise of reasonable diligence at the time of injury. The Court stated, in the medical malpractice context, once a plaintiff knows of the injury and its probable cause, he bears the responsibility of inquiring among the medical and legal communities about whether he was wronged and should take legal action.

The Court held it was beyond reasonable dispute that the plaintiff's claim accrued well over two years before she filed her complaint on April 11, 2012. Dr. Sanchez died on April 24, 2009, after giving birth. As the Court stated, "her injury was then, by its nature, complete and obvious." The cause was both known and chronicled contemporaneously in the medical records. The Court noted the death of a generally healthy woman in childbirth is sufficiently rare in this country today so as to make most reasonable people ask why it happened. The plaintiff, as any reasonable person would do under the circumstances, retained a lawyer sometime prior to February 2010. The decision to retain malpractice counsel following a mother's death in childbirth is a telling sign that a reasonable person would have concluded "reasonable diligence" was called for in order to determine whether there was negligence. Moreover, there was sufficient information available to Plaintiff and his counsel in the operative and discharge reports to raise further cause for diligent inquiry.

In sum, the claim accrued at least by the date prior to February 2010 when the plaintiff retained counsel to investigate a malpractice claim, especially where the death was witnessed by identifiable doctors who chronicled the injury, its cause, and their own actions in medical and operative reports, which were available to the plaintiff and his counsel at that time.

The plaintiff also argued equitable tolling delayed the running of the statute of limitations. The doctrine of equitable tolling states a statute of limitations shall not bar a claim in cases where the plaintiff, despite use of due diligence, could not or did not discover the injury until after the expiration of the limitations period. Assuming without deciding that equitable tolling could apply to the statute of limitations under the FTCA, the Court held the plaintiff could not invoke equitable tolling because his attorneys did not exercise due diligence. With reasonably inquiry, they could have discovered the doctors were Federal employees.

A publicly-searchable federal database and a hotline for the Department of Health and Human Services would have adequately informed the plaintiff or his counsel that LCHC and its employees were Federally funded and may have been covered by the FTCA. Moreover, LCHC was previously sued in a separate malpractice action under the FTCA that was the subject of a reported decision by the First Circuit available on both Westlaw and Lexis.

The Court stated it is not asking too much of the medical malpractice bar to be aware of the existence of federally funded health centers that can be sued for malpractice only under the FTCA and if a member of that bar is not aware and misleads a client, the lawyer may be liable for legal malpractice but the government can still invoke the statute of limitations. Lawyers handling medical malpractice cases cannot simply assume without investigation that the longer of the two potentially applicable limitations periods controls. Instead, they need make inquiry (or, perhaps, simply sue within two years of accrual).

The Court noted that good lawyers, like good doctors, make mistakes. The plaintiff's counsel was either unaware of the FTCA two-year deadline or simply assumed without asking that none of the possible defendants was a federal employee. Neither inaction born of ignorance nor recklessness in the face of a known risk could provide a basis for establishing diligence given "due diligence is a sine qua non for equitable tolling." (cont. page 6)

Two-Year Statute of Limitations cont.

The Court stated, "while Mr. Sanchez has thus lost his claim against his wife's doctors, he may not have yet lost altogether his chance to recover full compensation for that loss from any professionals responsible for the effects of the judgment in this case."

The trap for the unwary into which the plaintiff fell arose because doctors who work at facilities that may appear to be nongovernmental may nevertheless be deemed federal employees because of the manner in which their employers receive Federal funds. The risk of encountering such a trap must be taken seriously and all steps should be taken as expeditiously as possible to determine the applicable statute of limitations.

Contact the author at **matthew.o'leary@leclairryan.com**

Plausible v. Speculative Claims: When Should You Seek a Dismissal?

by Lauren Appel, Esq.

Professionals defending malpractice suits may increasingly face challenges in obtaining a dismissal at the outset of litigation, even where the plaintiff's damages are unclear. In *Ascher v. Duggan*, CIV12-12418-FDS (D. Mass. 2013), the District of Massachusetts allowed a legal malpractice case to move forward to discovery, despite the Court's acknowledgement that the plaintiff's alleged damages were somewhat speculative. *Ascher v. Duggan* arose from Attorney's representation of Ascher in a proceeding with the Massachusetts Board of Bar Overseers ("BBO"). A former client of Ascher, a Massachusetts attorney, filed a complaint with the BBO claiming Ascher mismanaged client funds. Attorney and Ascher discussed a stipulated resolution of the claim with the BBO. The stipulation would include Ascher's indefinite suspension from practicing law. In October 2005, Ascher asked Attorney if he could work as a paralegal during his suspension. According to Ascher, Attorney advised him he could do so, contravening SJC Rule 4:01 § 17(7)'s explicit prohibition of suspended attorneys performing legal or paralegal work. According to Ascher, on Attorney's advice, Ascher agreed to the stipulation and began working as a paralegal in Florida in 2007. Ascher did not discover until March 2010 that his paralegal work could harm his chances of reinstatement as an attorney. He filed a suit for malpractice against Attorney in December 2012, and sought reinstatement from the BBO in August 2013. While Ascher's reinstatement proceeding was pending, Attorney filed for dismissal of the malpractice claim under Rules 12(b)(5) for insufficient service of process and 12(b)(6) on the grounds that the complaint did not properly allege damages because the negative impact of his paralegal employment on his reinstatement was "conclusory and speculative."

The Court recognized that *Ascher's* case had weaknesses and potential procedural issues. First, the Court was skeptical that the three-year statute of limitations for a malpractice claim began to run in March 2010, as Ascher argued, and not in 2005 during his BBO proceeding. The Court, however, determined that the question of whether the action accrued in 2010 – and thus, whether Ascher's claim was barred by the statute of limitations – was appropriate for summary judgment. Second, the Court recognized that Ascher had served the complaint in August 2005, more than four months after the original service deadline, without notifying Attorney that the Court had granted an extension, in violation of Rule 12(b)(5).The Court ruled that it was within its discretion, however, to grant the time extension and that service was timely. Finally, the Court recognized that Ascher had not yet realized any damages because the BBO had yet to rule on his reinstatement petition. Nonetheless, the Court held Ascher met the pleading standard to survive a motion to dismiss, stating:

> "[Ascher's] alleged injury is not so speculative as to require dismissal under Rule 12(b)(6)…it is certainly plausible that his reinstatement petition would be in some way harmed by his violation of a SJC rule."

Pending the outcome of Ascher's reinstatement proceeding, the Court acknowledged that Attorney's argument for dismissal essentially addressed the ripeness of Ascher's claim. Without a specific motion on ripeness, however, the Court declined to directly address the issue.

While one could argue that *Ascher's* ruling shows that the line between a "speculative" versus a "plausible" claim is becoming increasingly blurred, the case demonstrates that courts are showing a greater willingness to allow a plaintiff to develop the record through discovery rather than grant a motion to dismiss in close cases. This may be particularly true in cases where, as in *Ascher*, the plaintiff's damages may accrue over a long period of time or are not apparent until long after the statute of limitations has run.

Defense attorneys should keep in mind that plaintiffs are not required to quantify damages in order to survive a motion under Rule 12(b)(6). If a plaintiff is able to state the other elements of his claim, the court may allow the case to move forward, even where the plaintiff has not clearly articulated the extent of her damages. An early dismissal certainly is favorable for the client before significant time and resources are expended on a weak case. Given the high bar that a defendant must meet to obtain dismissal under Rule 12(b)(6), however, the better course of action in cases with limited factual support may be to engage in discovery and seek summary judgment after establishing the material facts of the case.

Contact the author at **lauren.appel@leclairryan.com**

New York Modernizes its Nonprofit Law *by Thomas Pitegoff, Esq.*

Forming nonprofit entities in New York State will be far simpler starting July 1, 2014, when the Nonprofit Revitalization Act of 2013 becomes effective. Governor Andrew Cuomo signed the Act into law on December 18, 2013.

The Act removes the distinctions among four statutory types of nonprofit corporations, leaving just two categories: charitable and noncharitable. The new law also eliminates the requirement to obtain certain state agency consents as a condition of incorporation. These provisions of New York law had created incentives for organizations to form nonprofit entities in other states.

The New York State Bar Association worked to revise the Not-for-Profit Corporation Law for many years. The Association's Business Law Section developed legislation that was first introduced in 2008. In its memorandum urging approval, the Bar Association stated that the four current statutory types of nonprofits "complicate the formation process given some ambiguity among types," while the need to obtain certain state agency consents as a condition of incorporation results in "unnecessary and unwarranted delay in incorporation with unclear benefits to the public interest." The state bar President expressed praise for Governor Cuomo, State Attorney General Eric T. Schneiderman, and the bill's legislative sponsors, Sen. Michael H. Ranzenhoffer (R-Williamsville) and Assemblyman James F. Brennan (D-Brooklyn).

The New York State Attorney General's Office played a central role in developing and supporting modernization of New York's nonprofit law. The Attorney General's office press release contains an excellent summary of the Act, listing the ways in which the Act reduces unnecessary and outdated burdens on nonprofits while enhancing nonprofit governance and oversight to prevent fraud and improve public trust. Nonprofit organizations will now be able to incorporate, dissolve and merge more easily; communicate and hold meetings by conference call and videoconference, and engage in certain transactions without having to go to court. At the same time, the Act will require nonprofit boards to adopt stricter financial oversight requirements, conflict-of-interest policies, and policies to protect nonprofit employee whistleblowers from retaliation.

The act is available online at http://open.nysenate.gov/legislation/bill/A8072-2013 and the Attorney General's press release is available at http://www.ag.ny.gov/press-release/ag-schneidermans-nonprofit-revitalization-act-signed-law.

Contact the author at thomas.pitegoff@leclairryan.com.

Affordable Care Act: ERISA Self-Compliance Tool and Checklist plus Recent Update on "Skinny Plans" *by James P. Anelli, Esq.*

In an effort to provide information to our clients and business colleagues on key aspects of the Affordable Care Act (ACA), we are sharing a helpful self-compliance tool (from the DOL) concerning the ACA's impact on ERISA and plan requirements. Also, within the same document is a partial checklist of key developments for 2014.

In recent consumer plan news, the Department of Health and Human Services (HHS) announced that consumers can buy so-called catastrophic coverage or "skinny plans" - designed to replace policies that were canceled by carriers this year. Consumers will need to fill out a hardship exemption form that presumably will exempt them from the requirement to purchase ACA compliant coverage at least for some period of time, and will need to provide evidence that their prior plan/coverage was canceled by their carrier.

The HHS announcement can be found online at:
http://www.dol.gov/ebsa/pdf/part7-2.pdf.

It is unclear what this stop-gap measure means going forward, and this hardship exemption could easily become permanent given the overall political situation underlying both the ACA's implementation and the upcoming mid-term elections.

What is clearly on the minds of insurance carriers, however, is whether the fundamental underlying economic assumptions concerning the ACA's implementation are still valid. Will continued exceptions towards non-compliant healthcare plans mean that the cost of healthcare overall will substantially increase next year? It must also be assumed as the costs associated with these changes mount, they will likely be passed on to consumers and employers. For example, as the number of "skinny plans" rolled out increase, more consumers may be tempted to simply scale back until they need full coverage, where those in "skinny plans" can simply opt to buy up as there are no preexisting conditions that would preclude them from doing so. As a potential unintended consequence, it will be interesting to track how broad this exception becomes in 2014.

The Self-Compliance Tool and Checklist pdf is available at:
http://www.leclairryan.com/files/Uploads/Documents/Self%20Compliance%20Tool%20Part%207%20of%20ERISA%20Affordable%20Care%20Act%20Provisions.pdf

Contact the author at james.anelli@leclairryan.com.

LeClairRyan's Accounting and Legal Malpractice Attorneys

Jeffrey L. Alitz
Lauren Appel
Elizabeth J. Atkinson
Douglas H. Amster
Michael E. Barnsback
Janet R. Barringer
Catherine A. Bednar
Josiah M. Black
Daniel J. Blake
Paul G. Boylan
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