Is Judicial Error A Superseding Cause That Can Defeat A Lawyer Malpractice Claim?

by Bruce A. Campbell

Over the thirty years or so that I have represented lawyers, I have heard on many occasions that the trial judge made a mistake of law, and it was the judge’s error that caused the harm which forms the basis of the former client’s lawsuit against them. Texas, like many states, has remained quiet on this point, until recently. Fortunately, for the lawyers in Texas there is now more hope that we can potentially argue, in some situations, that the court’s legal error was what caused the client’s injury.

In Stanfield v. Neubaum, ___S.W.3d___ (Tex. 2016), the Texas Supreme Court took up the issue of whether judicial error could constitute a superseding cause that broke any causal connection between the lawyers alleged negligence and the injury to the client. Typically in these cases the lawyer is being sued for the appellate costs incurred by the clients second set of lawyers who handled the appeal and set aside the trial court’s complained of ruling. In Neubaum, the Texas Supreme Court found judicial error by the trial court could constitute superseding cause which could break the causal connection for a legal malpractice action when the judicial error was not reasonably foreseeable under all of the circumstances, and the negligence of the attorneys, if any, is unrelated to the judicial error.

In Neubaum, in the underlying case, the lawyers were defending a claim of usury against the client. The lawyers filed a motion for summary judgment asserting that a usury cure letter was a bar to liability to the claim for usurious lending. The trial court denied the motion. At trial the lawyers did not put on evidence to support the usury cure defense, but instead as a strategy, opted to defend on the basis that an alleged agent who created the usurious charge was not the agent of the client. During trial, at the charge conference the lawyers objected to an actual or apparent agency submission arguing that there was no evidence to support an agency claim. The trial court overruled the objection and included an agency question in the jury charge.

The jury found against the client for almost $4 million in damages and penalties. The agency issue was challenged in a motion for new trial filed by the lawyers, which motion was denied. New counsel for the client then pursued an appeal, and on appeal, after spending $140,000 in fees, the court of appeals set aside the judgment against the client on the basis that the agency issue should not have been put before the jury.

Despite the win on appeal with new counsel, the client turned around and sued the original lawyers for malpractice. In the malpractice case, the client sued the lawyers to recover the appellate counsel’s attorneys’ fees incurred during the appeal. The client’s theory was that the lawyers in the trial court should have pursued not only the agency defense during the trial, but also the usury cure defense. This approach to the practice of law is often referred to as a “belt and suspenders” approach. That is, if you have two defenses, you need to support two defenses on behalf of the
The old saying, “the more you put into something, the more you get out of it” proves true for those who get involved with PLUS. People often become a member of PLUS because their supervisor or colleague encouraged them to check it out. Members stay involved because they find that PLUS offers a unique opportunity to connect with others in the industry and expand their knowledge base around professional liability. Yet, it’s the 278 most active and engaged members—the volunteers who give so much of their time and talent to benefit the overall organization and industry—who gain the most from their involvement.

Glenda Swan is the Director of Chapter Relations at PLUS. She can be reached at gswan@plusweb.org.

“I originally got involved early on because it was a great way to meet people in the industry and to learn more, which helped me in my career.”

“My motivation in the early part of my career was my company…wanted me to do it and it was good for my career [and] resume.”

For those who are willing to share their time, PLUS offers leadership experience, valuable business connections, the ability to guide and influence the industry, and lasting friendships that would not have been possible if not for joining a committee or chairing an event. People and Relationships, are the two main reasons that PLUS volunteer leaders site for getting involved and staying involved with PLUS.

“I get to meet fascinating people and make new connections and new friends.”

“I do it because of the people. It’s great to get to know a wide cross section of people across carriers, agencies and law firms so you can stay abreast of who and what is on the leading edge. And that’s what I get out of it…great relationships with smart people, and people that matter to what we do.”

Attending an event is a great way to network, but leading an event gives those involved a chance to know each other on a deeper level. Long after their term on the committee ends, they call on one other as they navigate their careers, hire staff, need a favor, or seek information and connections. In a competitive industry, competitors become collaborators as they work side by side in their role with PLUS.

“Being involved on committees, the board, and as the co-chair allowed me to meet and develop so many relationships throughout the industry.”

Only about 10% of PLUS members volunteer in the organization. Young professionals discover that volunteering with PLUS can open doors in their early career climb, experienced professionals sight the desire to “give back.”

“I look at it like we are part of a fraternity and it is a way to give back to the industry that has been so good to me.”

“My motivation in the early part of my career was my company…wanted me to do it and it was good for my career [and] resume. My motivation later was giving back to the industry.”

PLUS hosts over 100 events a year that are attended by 6,500 people. This is possible only because of the 278 dedicated people who provide leadership on the PLUS Board or volunteer on the planning committees, as well as the more than 500 others who speak at events and write articles for the PLUS Journal. There are many reasons to get involved as a leader and to volunteer with PLUS, and there are many ways that PLUS can channel your interests and talents to benefit the organization, the insurance industry, and the even the larger community. Leadership opportunities are open to all members.

CONTACT PLUS TODAY!

CHAPTER COMMITTEES
Glenda Swan: gswan@plusweb.org

NATIONAL EVENTS
Diane Dukes: ddukes@plusweb.org

PLUS FOUNDATION
Dan Jenney: djenney@plusweb.org

FUTURE PLUS COMMITTEE
Scott Billey: sbilley@plusweb.org

OUTREACH & COMMUNICATIONS
Lance Helgerson: lhelgerson@plusweb.org

Professional Liability Underwriting Society
Collaborative Defense in MPL: The New Era

Paul A. Greve, Jr., JD, RPLU

Consolidation in the health care industry has impacted literally every segment of the medical professional liability industry: Hospitals and health care systems; physician and groups; long term care; managed care organizations/health plans, and miscellaneous facilities (anything not acute care or long-term care). Hospital mergers and acquisitions, and the trend towards purchasing physician practices by hospitals, have resulted in far fewer hospital organizations and individual physicians/group insureds in most geographic areas.

More of these larger hospital and health system organizations have self-insurance programs for medical professional liability coverage, with the most common risk financing vehicle utilized being a captive insurance company typically domiciled in the Cayman Islands or Vermont, as well as other domiciles. Usually there is a significant self-insured retention, often ranging from $3M to $15M and even higher.

With fewer free-standing hospitals, especially in metropolitan areas and select geographic regions, these large self-insured hospital systems are co-defendants with traditional physician and other insurers with more frequency than ever before. Part of what is driving this is the creation of accountable care organizations (ACOs) and other contractual networks such as clinically integrated networks (CINs) and clinically integrated organizations (CIOs), and myriad versions of each, as well as joint ventures (JVs).

The parties to these arrangements more than ever share a common interest that can be of strategic value in the defense of MPL litigation. Collaborative defense potentially builds trust, promotes communication, aids in a more timely resolution, and eases the exchange of information beneficial to the defense of a case. Collaborative defense is primarily an attitude: let’s work together as much as we can as co-defendants while recognizing our duty to defend our respective clients and with an awareness of issues like privilege and discovery.

There has never been a time with both greater need and opportunity for the collaborative defense of medical professional liability (MPL) claims. Claim frequency is low but claim severity continues to rise, albeit manageably. There are still very large dollar amounts potentially exposed in MPL litigation.

The Goal of Collaboration/Initiation

The goal of the approach to a collaborative defense is to create clear communication between large hospital systems and traditional physician insurers and other carriers in MPL segments most likely to be co-defendants in claims with hospitals/systems (e.g. miscellaneous facilities, long-term care facilities). The collaboration of co-defendants promotes a vigorous defense.

Collaboration may also save expenses by sharing costs whenever possible, as with the copying of records. Shared ideas on defense, shared expert witnesses, shared costs and time saved can all be the fruits of a more collaborative approach to MPL litigation. Trust is foundational. There are to be no surprises sprung by co-defendants throughout the pre-suit and litigation process that furthers the plaintiff’s case, chiefly testimony by defense expert witnesses for the purpose of blaming other co-defendants.

If nothing else is achieved, a personal relationship between the systems’ in-house legal and risk management staff with responsibility for claims and the carrier’s local and regional claims staff goes a long way to opening communication and helps avoid issues that prevent the best possible defense, thereby benefiting the plaintiff. This means an introductory meeting of the appropriate representatives of entities that are most likely to be recurring co-defendants in malpractice litigation: the hospital/system and regional insurers most likely to be co-defendants in MPL litigation. This is especially true with independent physician groups and with contractual networks like ACOs, CIOs and CINs.

Collaborative Defense and Joint Defense

A collaborative defense can be distinguished from a joint defense strategy but the two approaches share certain goals. The main goal is to avoid infighting and thereby promote the best possible outcome for co-defendants. Joint defense strategies are more formalized than collaborative defense strategies and can be defined as follows:

“...a joint defense agreement is an agreement among attorneys for different defendants in a case who agree to share confidential information that would otherwise be protected by the attorney-client privilege to further a common defense goal...”

There are risks to these types of joint defense agreements or collaborative defense arrangements. Defining the scope of any collaborative defense agreement can be helpful to promote communication among the parties but it need not be formalized by written agreement. An outline of main points that promote collaboration would suffice, and such an outline could be used as an agenda for meetings to discuss collaboration. What is most important is fostering a collaborative attitude on the part of potential future co-defendants.

Introductory Meetings: Regional MPL Carriers & Hospitals/Systems

Regional insurers of physicians and miscellaneous facilities are most likely to be co-defendants with hospitals/systems in MPL litigation, particularly when there are local contractual networks in place. Accordingly, those insurers should take the initiative to...
Did you know that an agreement shortening the time within which to bring an employment law claim may be enforceable? Indeed, in *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 608, 67 S. Ct. 1355, 91 L. Ed. 1687 (1947), the Supreme Court stated with respect to contracts generally that “in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action … to a period less than that prescribed in the general statute of limitations, if the shorter period is a reasonable period.” This principle has been applied and enforced in the employment law context.

For example, recently in *Njang v. Whitestone Grp., Inc.*, 2016 U.S. Dist. LEXIS 65370, 129 Fair Empl. Prac. Cas. (BNA) 362 (D.D.C. May 18, 2016), plaintiff filed an action alleging race discrimination in violation of both Section 1981 and Title VII. In its motion for summary judgment, the former employer argued that plaintiff’s claims—which were filed more than two years after the termination—were time barred because the employment contract required the employee “to file all claims or lawsuits in any way relating to employment with the Company no more than six months after the date of the employment action that is the subject of the claim or lawsuit.” *Id.* at *5.

The court held that the shorter limitation period was enforceable with respect to the Section 1981 claim but not with respect to the Title VII claim. With respect to the Section 1981 claim, the court relied on precedent in finding that “six months is a reasonable period of time … both because nothing within Section 1981 indicates that Congress intended for a longer window to bring such a claim, and also because the statute lacks other features that would make filing a claim within six months impracticable, such as an administrative exhaustion requirement.” *Id.* at *15.

By contrast, the court held that Title VII’s time-consuming administrative requirements, including (i) plaintiff’s need to first file a charge with the EEOC within 180 days after the alleged unlawful conduct, (ii) the EEOC’s investigation of the charge, and (iii) the EEOC’s issuance of a right to sue letter, make a 6-month limitation period unreasonable. *Id.* at **18-19. As the court in *Njang* explained, “merely by complying with the administrative exhaustion requirements of Title VII, plaintiffs are typically precluded from bringing their claims in court within six months of the challenged conduct, which means that a six-month limitations period has the practical effect of waiving employees’ substantive rights under Title VII.” *Id.* at *20.

As a practical matter, employers should consider implementing a clause in their employment contracts and employee handbooks reducing the statute of limitations of Title VII—a 1-year period might very well pass muster as a reasonable period of time.

Editor’s Note: This article originally ran on the PLUS blog on 8/31/16.
Three Factors to Consider When Underwriting D&O Insurance Abroad

by Perry S. Granof & Katherine Smith Dedrick, JD, MBA

When underwriting directors’ and officers’ liability insurance coverage for policyholders with multinational operations, one must consider that the customs and practices under which one normally operates may not apply in jurisdictions outside the U.S. The jurisprudence under which countries operate varies in a number of ways beyond common law vs. statutory law regimes. Three examples are set forth below.

1. Claims-Made vs. Date of Occurrence Policies

Most D&O policies issued out of the United States are “Claims-Made” policies, meaning that for a Claim to be covered, it must be made in the “Policy Period” as defined in the policy itself, or in certain instances, shortly thereafter. Coverage may also be granted if a notice of circumstances giving rise to a possible claim is made within the “Policy Period”, and an actual claim matching the circumstances manifests itself after the expiration of the policy period.

However, in certain jurisdictions such as France and Italy, “Claims-Made” policies are a relatively new concept and conditions have been incorporated into the respective laws of these countries to make “Claims-Made” coverage broader than what a United States D&O underwriter would normally expect. For example, under the French Insurance Code: C. Ass. Arts. L.124-5 and R.124-2 et seq, an insurer can remain liable for claims that are made within a five-to-ten year period, subsequent to the cancellation of a D&O policy, depending upon whether the policyholder had acquired replacement insurance.1 In Italy, a “Claims-Made” policy does not violate Article 2965 of the Italian Civil Code, as long as the governing policy provision does not make it “excessively difficult” for a policyholder to exercise its rights under the policy.2 Therefore, in certain jurisdictions an underwriter may need to contemplate longer tail coverage under a “Claims-Made” policy than what one would expect in the United States.

2. Indemnification Issues

In most United States jurisdictions, the right of a director or officer to obtain indemnification is typically granted by state law, and incorporated into a company’s articles of incorporation and by-laws by virtue of the enabling statute governing the place of incorporation. However, in many non-US jurisdictions, the right of indemnification is available only through an employment contract. In some jurisdictions, it is against public policy for a corporation to indemnify a director or officer until one is cleared of all liability, and in still other jurisdictions, it is against public policy to indemnify a director or officer in any instance.

For example, in Italy, the use of corporate funds to indemnify a director or officer for one’s personal liability is considered a misuse of corporate assets, and thus a crime.3 In France, indemnification is permissible for damages awarded to third parties, only where the manager’s wrongful conduct is inseparable from that of the corporation.4 Further, in such jurisdictions as Brazil and China, the availability of indemnification is uncertain. In light of the above, when underwriting a risk with non-US exposures, an underwriter must carefully consider the possible application of “Insuring Clause A” in instances where “Insuring Clause B” would otherwise appear applicable.

3. Admitted vs. Non-Admitted

Perhaps the most perplexing problems facing underwriters evaluating multinational exposures are whether a country, in which an insured conducts operations, requires an admitted insurance policy, and the consequences of not procuring a separate admitted policy. Aside from one or two jurisdictions within the United States, a policy issued from a domestic jurisdiction (e.g. the State of New York) to a foreign jurisdiction, especially one located in Latin America or Asia, may not be allowed or given effect. This can have significant adverse implications for both an insurance company issuing a non-admitted policy as well as a policyholder.

For example, if a claim is made under a master policy procured from the jurisdiction in which an insured corporate headquarters is located, but venued in a foreign jurisdiction that requires an admitted policy, a policyholder may be precluded from recovering any defense costs or indemnification in the jurisdiction where the claim arose. Should a policyholder elect to receive a claim payment in the jurisdiction where the policy was procured, there may be tax liability due to the fact that a payment was made in a jurisdiction where no loss had occurred. Further, to the extent a policyholder elects to transfer the claim payment to the country where the loss occurred, that money may be treated as taxable income, or subject to a penalty due to the failure to procure an admitted policy. In addition to tax liability for claim payments, an underwriting company may be assessed with civil/criminal fines or penalties if it is discovered that the underwriter issued a non-admitted policy.5

continued on page 10
Employee Stock Ownership Plan Participant Cannot Pursue Fiduciary Breach and Bad Faith Claim Against Insurer of Plan’s Fiduciaries

By Nicole Audet Richardson

Applying Mississippi law, a federal district court has held that a participant in an employee stock ownership plan cannot pursue his claims against the insurer of the plan fiduciaries because those claims were previously released in a settlement agreement between the plan fiduciaries and the insurer. Sealey v. Beazley Ins. Co. Inc., et al., 2016 WL 4392624 (S.D. Miss. Aug. 17, 2016).

A company, on the advice of its attorney, created an employee stock ownership plan. Lawsuits against the company followed, as the U.S. Department of Labor and two plan participants alleged that certain plan transactions violated various ERISA provisions. The ultimate trial ended with a judgment of more than $6 million entered against the company owner and the plan fiduciaries, along with an additional $3.1 million in attorneys’ fees and expenses awarded to the private plaintiffs. The company owner had tendered the underlying actions to the company’s fiduciary liability insurance carrier. The insurer responded by reserving its rights and issuing a coverage position, which included a refusal to consent to the attorney who had advised the company on the ESOP to act as defense counsel.

The insureds filed a coverage action against the insurer, demanding defense and indemnity without a reservation along with the right to select their own independent counsel. The parties eventually signed a confidential settlement agreement and release that resolved the coverage action whereby the insurer agreed to withdraw its reservation of rights, pay defense and indemnity but at reduced policy limits, and allow the coverage action plaintiffs to retain independent counsel to represent them in the ERISA actions. The insureds chose the disputed attorney, who represented the insureds throughout the ERISA actions, ultimately exhausting policy limits before the judgments were entered.

One of the successful plan-participant plaintiffs, who had obtained assignments from the plan fiduciaries of any claims they may have had against the insurer, proceeded to institute this case against the insurer, asserting that the insurer breached fiduciary duties and engaged in bad faith. The insurer filed a motion to dismiss based on the affirmative defense of release, which the court granted, dismissing the claims with prejudice.

In so deciding, the court explained that the dispute was whether the agreement actually released the plan fiduciaries’ claims, whether the agreement constitutes an unenforceable anticipatory release, and whether the agreement is unconscionable.

The court concluded that the agreement unambiguously releases any and all claims—known or unknown—related to the insurer’s handling of the ERISA actions, and that such a release includes all the claims the plaintiff asserted. The court then addressed the plaintiff’s argument that, under Mississippi law, claims that accrued after the agreement was executed were not released by the agreement as a party may not use an anticipatory release as a means to escape liability for tortious acts. In rejecting this argument, the court stated that the plaintiff’s claims that the insurer failed to provide coverage under the policy, and that the insurer breached various duties concerning the insured’s counsel were both litigated in the coverage action. The court also noted that even if those issues had not already been litigated, the parties’ intent to release future claims is expressed in clear and unmistakable language in the agreement that was fairly and honestly negotiated.

The court also rejected the plaintiff’s contentions that even if the claims were released in the agreement, the agreement cannot be enforced due to the presence of undue influence (in the form of the plan fiduciaries’ attorney) and unconscionability. As to undue influence, the court explained that the plan fiduciaries’ attorney, who the plaintiff claimed took advantage of the plan fiduciaries to enter into the agreement to benefit himself personally, was an adverse party to the insurer in the context of the coverage action, not the insurer’s fiduciary, as well as an attorney that the plan fiduciaries picked on their own, at their own peril. Finally, observing that the agreement was not a contract of adhesion and not procedurally unconscionable, the court noted that it is not a substantively unconscionable result that the plaintiff lacks the ability to resurrect claims that the plan fiduciaries, represented by counsel of their choice, agreed to release.

Editor’s Note: This article originally appeared on Wiley Rein’s Executive Summary Blog.
PLUS hosted a record 70 students for the 2016 session of PLUS University, August 15 & 16 at the University of Chicago’s Gleacher Center.

PLUS University was designed to provide general industry knowledge for practitioners who are relatively new to the professional liability industry. The topics covered include: The History of Professional Liability Insurance; Commercial General Liability Concepts; Professional Liability Insurance (PLI) Concepts; PLI Reinsurance; PLI Claims; Basics of Financial Analysis; Introduction to Directors & Officers Liability; Introduction to Medical Professional Liability, and Employment Practices Liability Insurance. The sessions are followed by the discussion of a case study which includes elements of a variety of professional liability exposures and gives the attendees a chance to review what they have learned over the two-day program.

The key to the success of PLUS University is the dedicated volunteer leaders who are experts in their various areas of expertise and serve as instructors for the program. THANK YOU to the instructors who participated in the 2016 PLUS U program:

Serge Adam, Esq., Partner, Cope Ehlers, PC
Robert J. Cap, Esq., RPLU, CPCU, ARM, ASLI, Executive Underwriter, Monitor Liability Managers
Jonathan Freeburg, JD, Vice President, Stateside Underwriting
Deb Goldberg, Esq., JD, MPH, RPLU, Managing Director, Markel
Edmund McAlister, Esq., Partner, Baugh Dalton LLC
David Stewart, MS, RPLU, CPCU, AAI, ARe, Vice President, Transatlantic Re
Jim Stewart, RPLU, Senior Vice President, Pioneer Special Risk

One of the highlights of PLUS University is always the Leaders’ Roundtable, which was moderated by PLUS President, Heather Fox, General Counsel at ARC Excess and Surplus, LLC. During this session senior industry leaders share their insights about the professional liability insurance industry and key events and people who influenced their careers. THANK YOU to the senior leaders who participated in the roundtable:

Rick Cavaliere, Senior Broker, Senior Vice President, Willis Towers Watson
Heather Fox, General Counsel, ARC Excess and Surplus, LLC and PLUS President
Eileen Hess, Financial Lines Midwest and South Zone Leader, Allianz Group
Phil Norton, Ph.D., Vice Chairman, Midwest Region, AJ Gallagher Risk Management Services
Debbie Schaffel, RPLU, Managing Director, Aon, and PLUS Trustee

🎓 Congratulations to the 2016 PLUS University Graduates!
client, even if the client should prevail on either defense.

In the malpractice case, the lawyers moved for a traditional motion for summary judgment on proximate cause and argued that the error of the trial court in allowing the agency issue to go to the jury was the superseding cause which broke the causal connection between any actions of the lawyers and the client’s injury. Because the lawyers had only moved on causation, the Supreme Court declined to address directly the issue of whether the lawyers had a duty to put on evidence of both defenses. Thus, we do not directly know yet whether Texas law requires lawyers to be “belt and suspenders” lawyers, although the language of the Court about this “novel” theory fortunately suggests that is not the standard of care for lawyers practicing law in Texas.

Inasmuch as the Texas Supreme Court had not previously addressed whether judicial error could constitute superseding cause, the Court turned to established negligence principles and in particular, proximate-cause decisions for guidance.

The Court noted that for a breach of duty to proximately cause an injury, the breach must be a cause in fact of the harm, and the injury must be foreseeable. Cause-in-fact requires proof of two elements: (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission (‘but for’ the act or omission), the harm would not have occurred.” The Court pointed out that a negligent act or omission that “merely creates” the condition that makes the harm possible,” is not a substantial factor in causing the harm as a matter of law.

The Court noted that a superseding cause may intervene between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause,” Dew v. Crown Derrick Erectors, Inc., 208 S.W.3d 448, 450 (Tex.2006). A new and independent cause thus destroys any causal connection between the defendant’s alleged negligence, and the plaintiff’s harm, precluding the plaintiff from establishing the defendant’s negligence as a proximate cause. See Columbia Rio Grande Healthcare, L.P. v. Hawley, 284 S.W.3d 851, 856 (Tex.2009) (explaining how a new and independent cause “destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question”); Dew, 208 S.W.3d at 450.

The Court also pointed out that in contrast to a superseding cause, a concurring cause “concurs with the continuing and co-operating original negligence in working the injury,” leaving the causal connection between the defendant’s negligence and the plaintiff’s harm intact. See Gulf, C. & S.F. Ry. Co. v. Ballale, 66 S.W.2d 659, 661 (Tex.Comm’n App.1933, holding approved).

According to the Court, the critical questions that distinguish between a superseding cause and a concurring cause are: “… was there an unbroken connection? Would the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?” The Court pointed out that if “nothing short of prophetic ken could have anticipated the happening of the combination of events’ then the harm is not reasonably foreseeable and is a superseding cause.

In determining if the judicial error was a superseding cause, the Court noted that the question is not whether judicial error is generally foreseeable, but whether the trial court’s error is a reasonably foreseeable result of the attorney’s negligence in light of all existing circumstances. A judicial error is a reasonably foreseeable result of an attorney’s negligence if “an unbroken connection” exists between the attorney’s negligence and the judicial error, such as when the attorney’s negligence directly contributed to and cooperated with the judicial error, rendering the error part of “a continuous succession of events” that foreseeably resulted in the harm. Citing Bigham, 38 S.W. at 164.

If the lawyers conduct merely furnished a condition that allowed a judicial error to occur then it does not establish the ensuing harm was a reasonably foreseeable result of the defendant’s negligence. If an attorney does not contribute to the judicial error itself and the judicial error is not otherwise reasonably foreseeable in the particular circumstances of the case, the error is a new and independent cause of the plaintiff’s injury if it “alters the natural sequence of events” and “produces results that would not otherwise have occurred.” See Hawley, 284 S.W.3d at 857.

In Neubaum, the Court noted that at the time the lawyers made the strategic decisions that were challenged in the malpractice case, the record showed the lawyers were neither negligent nor incorrect in arguing there was no evidence of agency. The trial court erred in allowing the agency issue to go to the jury. Accordingly, the lawyers in their motion for summary judgment in the malpractice case had presented evidence that the judicial error was not reasonably foreseeable because they did not contribute to the error.

The Supreme Court also pointed out that the appellate court’s reversal of the adverse judgment conclusively established that taking all the lawyers’ negligent and non-negligent acts omissions, and strategic decisions together no adverse judgment would have occurred if judicial error had not intervened. The lawyers’ negligence may have created a condition that allowed the client’s injury of having a judgment entered against them to occur, but the lawyers’ negligence did not actively contribute in any way to

continued on page 9
Interest in Speaking at a PLUS Event? Now Accepting Topics!

PLUS welcomes suggestions for event topics and speakers from our members. If you have an idea for a topic or speaker, please download the form located at [http://tinyurl.com/SubmitTopicPLUS](http://tinyurl.com/SubmitTopicPLUS)

Now Accepting Topics for the Following Symposia:

- **2017 PLUS MedPL Symposia**
  - March 14-15, 2017 | Loews Hotel | Chicago, IL

- **2017 PLUS Prof Risk Symposia**
  - April 5-6, 2017 | Hyatt Regency | Chicago, IL

- **2017 PLUS Cyber Symposia**
  - April 5-6, 2017 | Hyatt Regency | Chicago, IL

The Court found, as a matter of law, the trial court’s error of law on the agency issue was a superseding cause of the usury judgment and the ensuing appellate litigation costs. The Supreme Court also found that the trial court’s legal error constituted a superseding cause as a matter of law, and therefore no expert testimony was necessary for the lawyers to negate causation.

Courts in California, Utah and Illinois appear to follow the same position as Texas. See *Kasem v. Dion–Kindem*, 230 Cal.App.4th 1395, 179 Cal. Rptr.3d 711, 716 (2014) (recognizing that “[j]udicial error by the underlying trial court can negate the elements of a legal malpractice claim”); *Crestwood Cove Apartments Bus. Tr. v. Turner*, 164 P.3d 1247, 1255 (Utah 2007) (agreeing “that a plaintiff cannot establish a claim for legal malpractice where judicial error was the proximate cause of the adverse result”); *Huang v. Brenson*, 379 Ill.Dec. 891, 7 N.E.3d 729, 737–38 (Ill.App.Ct.2014) (concluding judicial error acted as a superseding cause, rather than a concurring proximate cause, when there were no allegations the attorney contributed to the error, the attorney preserved the error, and the attorney was “vindicated on appeal”).

How far the Courts will take the judicial error defense is hard to tell at this time. Often the issue of causation is a relatively fact driven evaluation. The decision in *Neubaum* suggests that if there is one legal defense that the client could prevail upon and the lawyer’s conduct did not fall below the standard of care on that defense then the judicial error defense may work. An open question is how will a court in a malpractice case look at the judicial error defense if the client has not appealed the underlying action? Will expert testimony be required in order to try to evaluate the likelihood of success on appeal? There undoubtedly will be some questions whether the lawyers’ conduct influenced the result on all of the defenses. In those the judicial error defense may not work. There will probably also be cases in which the defense, if it is successful, will only work on part of the case leaving the lawyer still exposed on other claims. For now, we will have to wait to see how the judicial error defense develops over time.
City of Hope is a world leader in cancer, diabetes and HIV/AIDS research, treatment and prevention. They transform laboratory breakthroughs into treatments that outsmart disease. Combining science with soul to work miracles—they care for the whole person, so life after illness can be rich and rewarding.

City of Hope’s mission is to transform the future of health. In our first 100 years we have:

- Helped create medicines that benefit 100 MILLION people each year
- Performed more than 12,000 bone marrow and stem cell transplants in the sickest of patients—giving 30,000 additional years of life
- Created a pipeline of 35+ novel drugs, biological and cell therapies with the most first-in-human clinical trials of any other center

Determining which jurisdictions require an admitted policy and which jurisdictions do not can present challenges, especially when evaluating whether a jurisdiction requiring an admitted policy will enforce its rules and regulations. Some jurisdictions may be lax, while others may be quite stringent. For example, but for a few exceptions, non-admitted insurance companies are not allowed to operate in Brazil. Moreover, admitted Brazilian companies are required to place at least 40% of each facultative or treaty reinsurance cession with local reinsurers. The Superintendencia de Seguros Privados (SUSEP) governs the Brazilian reinsurance and direct markets, and monitors market activity. Therefore, it may be difficult for non-admitted insurers to operate in Brazil without detection.

Of course, there are other considerations impacting an underwriter's evaluation of an insured's exposure when the insured has multi-national operations. There are tax considerations, regulatory issues, and claim handling strategies, not to mention a variety of liabilities that differ from the liabilities found in US jurisprudence. Insurers, brokers, and policyholders of multi-national operations should have a process in place that leads to an independent review of one's potential risks. Once those risks have been identified, they should then be analyzed, and addressed through insurance and non-insurance solutions.

Endnotes

2 Ibid, page 125.
3 Ibid, page 124.
An Afternoon with Jim Gaffigan

A Luncheon Keynote with 2016 Presidential Candidate & Former Hewlett-Packard Chairman & CEO Carly Fiorina!

Leeza Gibbons, Pop-culture icon, Emmy award-winner and Celebrity Apprentice champion

A Breakfast Keynote with NASA Astronaut Scott Kelly!
2016 PLUS Cyber Symposium
Thank You, Sponsors!

Diamond Sponsors

Platinum Sponsors

Gold Sponsor

Silver Sponsors

Bronze Sponsors

Aon Risk Services Cyber Team
Axio
Berkley Cyber Risk Solutions
CRC Wholesale Group
The Crypsis Group
Davis Wright Tremaine LLP
Greenberg Traurig, LLP

Lewis Brisbois Bisgaard & Smith
OneBeacon Technology Insurance
PT&C | LWG Forensic Consulting Services
RLI Corp.
RT Specialty
Willis Towers Watson
Deb Ropelewski Retires

By PLUS Team

Deborah Ropelewski, CPCU, AU, ARM, Are, CPIW, retired in September after 10 years as Director of Education at PLUS, and more than 33 years total in the professional liability insurance industry.

Deb’s association with PLUS began as a member of our Society, then progressing to volunteer, trustee, Founder’s Award winner in 2006, and finally as a member of staff. She has worked on countless PLUS events and educational products, helped to found the Medical PL Symposium, and made a significant impact on volunteers, members, and her colleagues on staff.

“Education is at the core of PLUS’ mission, and Deb has made a lasting contribution to the association’s reputation as a leader in education,” stated Robbie Thompson, PLUS Executive Director. “Everyone at PLUS HQ wishes her the very best as she begins her retirement.”

“Volunteering for PLUS is a rewarding, yet very demanding, undertaking. Deb made it interesting, enjoyable, and easy,” said William Fleming, RPLU, Senior Vice President, Regional Operating Officer for The Doctors Company and long-time PLUS volunteer. “Whether the project at hand was curriculum development or a committee meeting, Deb was always well-prepared, had thought through the issues, and gave us a manageable set of options to consider. She always sincerely thanked volunteers and took great care of us, like we were friends and family. Her presence will definitely be missed!”

“I want to thank everyone for making my ten years on the PLUS staff fly by! It sounds very cliché, but it has literally taken a village—and a good-sized one, at that—to accomplish everything that we have done during my tenure as Director of Education.

Hundreds of volunteers have shared their expertise to contribute to the PLUS curriculum, PLUS University, PLUS essentials, and PLUS events, and I could not have done it without your help. The icing on the cake is to have met business associates and made such wonderful friends all over the country through my association with PLUS, as a member, then Trustee, and finally, on staff.”

Deb would like to thank everyone she’s met along the way at PLUS...

Deb won the PLUS Founder’s Award in 2006

Deb with President George W. Bush

Deb with 2011 Conference keynote Tony Blair

Deb at the Education booth at the PLUS Conference
meet with local hospitals/systems inhouse staff responsible for overseeing and coordinating litigation and risk management. The larger traditional physician insurers have now expanded their coverages and services, and hospitals/systems are potential buyers. Without a track record of having a collaborative approach to claims and litigation in physician claims, it is highly unlikely such insurers would be considered for a hospital/system excess layers of MPL coverage or other lines of coverage and unbundled services.

The focus of the initial meeting(s) is to find multiple ways to collaborate whenever the parties are codefendants in MPL litigation. The parties need to have an expectation of conduct in future cases. Collaboration among the codefendants to the greatest extent possible throughout the litigation is the goal. That goal must be communicated and accepted by all defense lawyers for potential future codefendants.

Here are some possible agenda items for an initial meeting to discuss collaborative defense:

- Past relationships/insight of defense when codefendants
- Past areas of disagreement/dissatisfaction
- Identification of common goals
- Review future scenarios that create potential for collaboration and/or conflict: e.g. unfavorable defense expert opinions
- Review possible participation in mediation/arbitration
- Discuss conduct expected going forward: e.g. no “finger-pointing”, cross-claims, etc.
- Discuss potential for shared expenses going forward

It is possible to memorialize the aforementioned points but this can create risk, as discussed below.

**Collaborative Defense: Minefield**

Collaborative defense approaches, like joint defense, are not without some risk to those who choose to participate. Simply put, the main issue is discoverability during the course of the litigation in question and potentially in any insurance coverage dispute. The parties should be aware of any applicable local laws. However, these risks need not always be controlling.

**Conclusion**

Consolidation in the health care industry has brought disparate organizations together more closely than ever before. So has the creation of many types of contractual networks in the form of CINs, CIOs, partnerships, and joint ventures. Inevitably, these organizations will be drawn into medical professional liability (MPL) litigation.

There is a unique opportunity in today’s changing health care industry environment to be creative in anticipating litigation and collaborating once MPL litigation is filed in order to promote the best possible outcome for the codefendants and thereby save money for all parties.

The plaintiff’s bar shares information and collaborates to further their purposes. The MPL carriers and MPL defense bar can do likewise.

---

**Endnotes**


---

Check out the latest on professional liability at the PLUS Blog

www.plusblog.org
designees report a
90% of
RPLU
OFFICERS
President
Heather Fox • ARC Excess & Surplus, LLC • Jericho, NY
President-Elect
Peter Herron • Travelers Bond & Financial Products • Hartford, CT
Vice President
Debbie Schaffel, RPLU • AON • Chicago, IL
Secretary-Treasurer
Catherine Cossu • Validus Underwriters, Inc. • New York, NY
Immediate Past President
James Skarzynski • Skarzynski Black LLC • New York, NY
TRUSTEES
John Benedetto • Berkley Professional Liability, a W.R. Berkley company • New York, NY
Susan Chmielecki • Allied World • Farmington, CT
Leib Dodell • Lexecute • Kansas City, MO
Corbette Doyle • Vanderbilt University • Nashville, TN
Sarah Goldstein • Tressler LLP • Los Angeles, CA
Randy Hein • Chubb Specialty Insurance • Warren, NJ
Carl Metzger • Goodwin Procter LLP • Boston, MA
PLUS JOURNAL EDITORIAL BOARD
Chair
Bruce A. Campbell • Campbell & Chadwick, P.C. • Dallas, TX
Board
Daniel Aronowitz • Euclid Specialty Managers • Vienna, VA
Tad A. Devlin • Kaufman Dolovich & Voluck LLP • San Francisco, CA
David R. Dwares • CNA • Chevy Chase, MD
Anthony J. Fowler • Hartford Financial Products • New York, NY
Ciara Frost • Kerns, Frost & Pearlman, LLC • Chicago, IL
Paul A. Greve, Jr., RPLU • Willis Health Care Practice • Ft. Wayne, IN
David Grossbaum • Hinshaw & Culbertson, LLP • Boston, MA
Kimberly Melvin • Wiley Rein, LLP • Washington, DC
Stacey McGraw • Troutman Sanders LLP • Washington, DC
Lynn Sessions • Baker & Hostetler LLP • Houston, TX
Luigi (Lou) Spadafora • Winget, Spadafora & Schwartzberg, LLP • New York, NY
Lance Helgerson • PLUS Director of Strategic Marketing • Minneapolis, MN
PLUS STAFF
See our staff listing at plusweb.org/about/contactplusstaff.aspx
Professional Liability Underwriting Society
5353 Wayzata Blvd., Suite 600
Minneapolis, MN 55416-4758
phone 952.746.2580 or 800.845.0778
e-mail info@plusweb.org
www.plusweb.org
Calendar of Events

Chapter Events*

Canadian Chapter
- November 17, 2016 • Networking Reception • Toronto, ON
- November 2016 • Networking Reception • Montreal, QC

Eastern Chapter
- December 14, 2016 • Winter Social • New York, NY

Hartford Chapter
- October 20, 2016 • Future PLUS Reception • Hartford, CT
- November 2016 • Networking Reception • Hartford, CT
- December 2016 • Educational Seminar • Hartford, CT

Mid-Atlantic Chapter
- December 1, 2016 • Educational Seminar • Philadelphia, PA

Midwest Chapter
- October 20, 2016 • Educational Seminar • Milwaukee, WI
- November 2016 • Future PLUS Reception • Chicago, IL
- December 6, 2016 • Holiday Party • Chicago, IL

New England Chapter
- December 1, 2016 • Holiday Party • Boston, MA

North Central Chapter
- December 1, 2016 • Educational Seminar • Minneapolis, MN

Northern California Chapter
- December 6, 2016 • Networking Reception • San Francisco, CA

Northwest Chapter
- October 20, 2016 • Educational Seminar • Seattle, WA
- December 2016 • Educational Seminar w/ IIABKC • Seattle, WA

Southeast Chapter
- November 17, 2016 • TopGolf Outing • Atlanta, GA

Southern California Chapter
- December 8, 2016 • Holiday Party • Los Angeles, CA

Southwest Chapter
- November 2016 • Educational Seminar • Las Vegas, NV

Texas Chapter
- December 2016 • Holiday Party • Dallas, TX

International Events

2016 PLUS Conference
- November 9-11, 2016 • Hyatt Regency • Chicago, IL

2017 D&O Symposium
- February 8-9, 2017 • Marriott Marquis • New York, NY

2017 Medical PL Symposium
- March 14-15, 2017 • Loews Hotel • Chicago, IL

2017 Cyber & Prof Risk Symposium
- April 5-6, 2017 • Hyatt Regency • Chicago, IL

THANK YOU, DIAMOND SPONSORS!

The mission of the Professional Liability Underwriting Society is to be the global community for the professional liability insurance industry by providing essential knowledge, thought leadership and career development opportunities.

As a nonprofit organization that provides industry information, it is the policy of PLUS to strictly adhere to all applicable laws and regulations, including antitrust laws. The PLUS Journal is available free of charge to members of the Professional Liability Underwriting Society. Statements of fact and opinion in this publication are the responsibility of the authors alone and do not imply an opinion on the part of the members, trustees, or staff of PLUS. The PLUS Journal is protected by state and federal copyright law and its contents may not be reproduced without written permission.