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Emerging Trends in Litigation: Connecting the Lines Between Interest Rates and Professional Liability Claims

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Many experts agree that the economy is on the precipice of a recession. The Federal Reserve increased interest rates seven times in 2022. Congress is once again tasked with raising the debt ceiling to push the national debt north of $31.4 trillion. According to Bloomberg, in 2022, consumer price inflation in the U.S. soared to a 40 year high of 9.1%. Historically speaking, real estate and construction litigation increases when the economy heads down. As homeowners lose their jobs and watch the adjustable rates on their mortgages climb—causing payments to skyrocket—they historically file more lawsuits against real estate, construction and design professionals. People who are upside down on their payments are desperate for a solution and often take aim at the defects in their homes that they may have overlooked

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Letter from the President

Kathleen V. Buck, Esq. | *Minnesota Lawyers Mutual Insurance Company*

Dear PLDF Members,

March has arrived, and setting aside all varmint's contrarian predictions, this leaves less than twenty days until spring—countdown on!

As I draft my second President's letter, it occurs to me how much easier it would be to get to know one another if we used descriptors rather than titles. I imagine they would change year to year, month to month, even hour to hour at times, but maybe they'd say things like "father of triplets" or "champion pianist" or "soon to be retiree." They would allow us a glimpse of the real person. At times, my own descriptor might reference my resilient, imaginative children and husband,

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An economic downturn requires businesses to pivot and adjust to a new normal. Employing previously established risk management policies before economic downturns gives businesses a leg up in dealing with the unfolding uncertainty.

when times were better. The economic repercussions of the COVID-19 pandemic and the increased stress on the supply chain, in part caused by the war in Ukraine, have contributed to an economy plagued by inflation. Real estate professionals, the construction industry, and design professionals face particularly trying times sharing in the impact of financial uncertainty and responding to an increased litigation risk. Armed with historical data, the real estate and construction industries can take positive steps to prepare for a recession and minimize its impact on business growth.

The Impact of Recessions on Business Operations and Growth and Preparing for a Recession

The National Bureau of Economic Research defines a recession as "a significant decline in economic activity spread across the economy, lasting more than a few months." Normally, economists also identify a recessionary time as one where the gross domestic product (GDP) is falling along with income levels, industrial production, and wholesale retail sales. Recessions may also coupled with rising unemployment. The real estate and construction industries feel dramatic impacts of recessions as new construction screeches to a halt and real estate professionals are faced with a marketplace of weary consumers focused on saving versus spending.

Recessions typically curb consumer confidence and reduce spending habits. This, in turn, results in less readily available personal and business credit, and less cash flow. Businesses and individuals with less money, who cannot quickly adjust to harder economic times, may find themselves facing bankruptcy or a significant change in personal lifestyle or business operation.

The good news is the situation is not hopeless. Businesses can take action to prepare for looming economic downturn. Common methods of preparation include reducing the workforce, cutting unnecessary or speculative spending, and making smart adjustments to save costs in products and services offered to customers. Real estate professionals can reduce inventory, and design professionals in the construction industry can provide value engineering options to cost conscious clients. However, it is important to note that any value engineering decisions should be carefully vetted for potential implications on projects holistically and should be extremely well-documented with a clear recitation of all parties' understanding of the risks and benefits. Whatever strategies businesses employ, economic experts agree that preparedness is key.

An economic downturn requires businesses to pivot and adjust to a new normal. Employing previously established risk management policies before economic downturns gives businesses a leg up in dealing with the unfolding un-

certainty. Examples of policies that could be used to help recession-proof a real estate or construction-related business include putting off large expenditures or investments, delaying projects that may not be profitable in the short term, reducing marketing costs, determining opportunities for reducing costs on projects, and finding other ways to increase cash flow and protect savings in the immediate timeframe.

Buyer's Remorse and the Increase in Lawsuits Against Real Estate Professionals

As home prices start to fall in many areas of the country, claims against real estate agents and brokers are on the rise. Knowing that real estate professionals carry professional liability insurance, many homebuyers and sellers sue during an economic downturn claiming that real estate professionals misrepresented the value of the property. This results in a flurry of claims activity as those involved in a real estate transaction file claims to recoup losses under professional liability insurance policies. Sellers who waited to put their home on the market, perhaps on the advice of a real estate agent, or buyers who overlooked an issue discovered during a home inspection, feel strapped by the reduced value and increased monthly cost of their home. According to Business Insider, "lawsuits against real-estate professionals increased 9% between 2021 and 2022 as home prices declined."

Most of the lawsuits involve claims of nondisclosure of material information, or negligence and misrepresentation during the property transaction. A study of mortgage data completed by Black Knight revealed that over 270,000 borrowers were upside down on their mortgages as of December 2022. With more economic worries on the horizon, professional liability claims could increase—as could claims in the areas of wrongful evictions and short sales, as more homeowners face eviction if they are unable to make their payments with increasing interest rates. Property management companies and home inspectors similarly can expect an uptick in claims, which can pass potential exposure onto real estate developers.

Real estate agents and home inspectors are no more at fault during a downturn market than a booming one, but they are more likely to sued by a frustrated buyer or seller. Real estate agents and brokers can take action to help insulate themselves from liability, however. Simple acts like recommending that your buyers secure a home warranty can stave off frustrations when, for example, an appliance breaks a few months after purchase. Real estate professionals should utilize current comparable properties for the buyer's market and offer full and complete disclosure as to all potential defects that may exist at the property. Lastly, it is of course always advisable to maintain all appropriate insurance, including professional liability insurance, to potentially help protect, where possible, against potential legal troubles.

Consequences of the Sharp Increase in Inflation on Construction Industry Claims and Professional Liability

Property and construction insurance claims are particularly vulnerable to inflation as building, rebuilds, and repairs are directly impacted by the rising costs of materials and labor. Shortages of materials and longer delivery times due to supply chain issues have also increased the cost of maintaining and purchasing insurance policies. According to the valuation company, John Foord Construction, steel is about 50% more expensive than it was only a year ago. Consequently, design professionals should prepare for potentially increased premiums as a result of more frequent claims, or the increased costs to resolve claims.

Inflation also increases the likelihood of underinsurance. As inflation rises and the economy becomes more volatile, the risk of businesses being underinsured for losses becomes more prevalent. This is because it is more difficult for businesses to maintain an accurate valuation of their assets, replacement values and potential costs of business interruption. Insurers have already experienced claims in which there are significant gaps between the valuation provided by the business and the actual replacement value requested when issues arise.

At the recent National Association of Relators ("NAR") Annual Real Estate Forecast Summit (the "Summit"), it was predicted that the housing market will begin to stabilize and return to "normalcy" in 2023. This year home sales and prices overall should return to a more moderate level, but this may vary depending on the region of the country. For example, in areas people flocked to during the pandemic—so called pandemic "boomtowns"—home prices are likely to reset in 2023 and decrease significantly from their peak during the COVID-19 pandemic. At the Summit, NAR Chief Economist Lawrence Yun stated, "housing inventory is expected to remain tight in 2023, with housing starts below historical averages and fewer homeowners willing to sell." He added:"The ongoing housing supply challenges will prevent home prices from falling, though price appreciation will slow." Yun also offered his prediction that home sales will drop by 6.8% in 2023 with the first quarter being the worst for home sales due to consumer concerns about higher interest rates and economic uncertainty.

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The National Association of Home-builders also weighed in on the topic predicting that housing starts would drop "by double digits" in 2023, but it had a more positive outlook for the market starting in 2024. In 2022, builders also suffered as mortgage rates rose and buyers were more reluctant to take the lead in purchasing new construction. Many builders and sellers offered incentives such as mortgage rate buydowns and slashing prices to attract buyers. This reality, compounded with the labor and supply shortages as well as construction delays, has caused the amount of new builds entering the market to decline.

Implications for New Construction

Home builders are feeling the impact of the lack in consumer confidence. Buyers are hesitant, due to increasing interest rates. People are holding off on making improvements to their homes for fear of an impending recession or economic uncertainty ahead. Although in 2023 new construction might need to navigate rough waters, by 2024 many believe the outlook will improve. According to Robert Dietz, Chief Economist for the National Association of Home Builders: "Single-family home building will ultimately lead to a rebound for housing and the overall economy in 2024 as interest rates fall back on sustained basis, bringing demand back for the sales market."

Dietz also predicted that multifamily construction will decrease in 2023 despite the fact that 2022 was a strong year. "Multi-family home building, which accounts for more than 95% built-for-rent, experienced strength in 2022 as mortgage interest rates increased and for-sale affordability conditions declined. However, there are 930,000 apartments under construction, the highest total since January 1974. A rising unemployment rate, increased apartment supply, rising vacancy rates and slowing rent growth will slow multifamily construction this year."

Historically speaking, litigation goes up in the real estate and construction industry when the economy heads down. Much of this can be attributed to the strain businesses and consumers feel when economic volatility hits. Credit is harder to obtain. Sales volume changes. And the number of legal claims brought against construction and design professionals increases.

Mitigating Legal Risk in a Downturn Economy

Historically speaking, litigation goes up in the real estate and construction industry when the economy heads down. Much of this can be attributed to the strain businesses and consumers feel when economic volatility hits. Credit is harder to obtain. Sales volume changes. And the number of legal claims brought against construction and design professionals increases. During prior recessions, legal claims skyrocketed largely due to contractors and design professionals taking jobs they would not ordinarily take to generate more cash flow. Many times the result is potentially cutting corners or utilizing lower quality products on the project in an effort to decrease costs. Contractors may underbid a project to get it, but not have the resources necessary to complete it within their normal quality standards. Design professionals may take on projects outside of their area of expertise or agree to a heighted standard of care pursuant to contract. Additionally, contractors and design professionals are often tempted or otherwise left without a choice to use under-qualified personnel to take on complex projects. Promises to use senior staff on projects are broken when junior staff are utilized and if the project results in a claim, fuel is added to the fire for utilization of this allegedly under-qualified personnel. This reality, in conjunction with supply chain delays, manufacturing issues and labor shortages, combine in the perfect storm to potentially foster mistakes and open businesses up to additional liability and potentially increased costs of resolving the resultant claims.

Delays and shortages can cause parties involved in a construction project to default under their loans, suffer penalties, or even have to obtain extension fees. Funding sources can also be impacted or unavailable due to changing economic circumstances. In addition, with interest rates increasing on a regular basis in 2022, it changes the overall completion cost for many projects. Contractors seeking to recoup a shortfall in lost profits, in turn, assert claims against the design team, including push-back on value engineering decisions. In past recessions, issues surrounding claims made against contractors, who in turn sought to transfer risk to the design team were rampant in the litigation landscape.

Design Professionals are Particularly Vulnerable to Suit During a Recession

Design professionals are essential in the planning and outlining of construction projects. It may also be an area where project managers attempt to cut corners first. With little room for contingencies and revisions once the project is started, design professionals may be forced to uphold an impossible standard. When the contractor and others on the build team take liberties with the plans to cut costs, they often don't consult with design professionals to ensure that the changes maintain the integrity and industry standards of the project. When corners are cut, the likelihood of future problems mount and contractors, project owners and others look for someone to blame. This often results in a uptick in claims tendered to the insurance carriers for design professionals. Moreover, the claims presented are costing professional liability companies more than ever, due to inflation, supply chain concerns and lack of skilled labor and materials. According to Victor Insurance Managers, LLC, the average indemnity payment for the A&E program was $208,437 in 2019 and $271,337 in 2021.

Like contractors, in tough economic times many design professionals are more willing to sign on to projects that may not provide contract terms that protect their interests adequately, such as unfavorable attorney's fees and indemnity provisions that do not run in favor of the design professional. Additionally, design professionals may undertake projects outside of their area of expertise potentially opening them up to future claims or litigation.

Budgeting constraints, value engineering, and knowledge deficits may cause contractors to veer away from plans and specifications provided by design professionals. This is even more true in cases where the design is complex. Often the builder will not ask for explanation or clarification from the architect or designer through the RFI process resulting in mistakes or a subpar final project. Savvy plaintiff attorneys will often use this gap in communication and failure to follow the plans as a basis to question the "constructability" of the project as whole.

Conclusion

After the 2008-09 recession, claims for professional negligence against realtors, brokers, design professionals, and contractors rose sharply. This is likely to occur again in the current global period of economic uncertainty. Lingering effects of the pandemic, labor and supply shortages and delays, and the war in Ukraine have all significantly impacted businesses and communities. Though many of these problems feel far away, we see the impact in our daily lives in the form of increasing interest rates, inflation, increased frequency in professional liability claims, increased severity of claims, and a decline in consumer confidence. Although the future is uncertain, learning from the past and taking measures to prepare for the future is the best course action for all. ■

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Illegal Action as a Bar to Recovery: *In Pari Delicto* in the Healthcare Malpractice Context

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Introduction

This article discusses the issue of whether a plaintiff's illegal action may preclude recovery as a matter of law. Specifically, whether drug and rehabilitation centers may assert the defense of comparative negligence in personal injury claims arising from a plaintiff's illegal drug consumption. Almost every state follows some form of comparative negligence. But, most courts do not apply comparative negligence to cases involving illegal drug use. Instead, when the action by a plaintiff which contributed to his own injuries is a criminal act, the doctrine of *in pari delicto*, also known as the wrongful conduct rule, may apply. *In pari delicto* is a common-law affirmative defense based upon the principle that a plaintiff should not be permitted to recover for damages caused by their own wrongdoing. Although minimal case law exists in which *in pari delicto* has been applied in actions against drug and rehabilitation centers, courts readily apply the doctrine in cases centered upon illegal drug use. Additionally, courts across the country have permitted *in pari delicto* as a defense to a variety of professional liability actions.

In Pari Delicto vs. Comparative Negligence

The Pennsylvania Supreme Court recently affirmed the Commonwealth's adoption of the common law doctrine *in pari delicto*. *Albert v. Sheeleys Drug Store, Inc.*, 265 A.3d 442 (Pa. 2021). The equitable doctrine of *in pari delicto* "precludes plaintiffs from recovering damages if their cause of action is based, at least partially, on their own illegal conduct." *Id*. at 446-47; citing *Joyce v. Erie Ins. Exch.*, 74 A.3d 156, 164 (Pa. Super. 2013) ("[O]ur law will not allow recovery when an action is grounded in illegal behavior."). Under Pennsylvania's adoption of *in pari delicto*, courts consider two factors in choosing to apply the doctrine: "(1) the extent of the plaintiff's wrongdoing vis-à-vis the defendant; and (2) the connection between the plaintiff's wrongdoing and the claims asserted." *Albert*, 265 A.3d at 450.

Further, the Court instructed that the doctrine of *in pari delicto* is not preempted by Pennsylvania's comparative negligence statutes. *Id*. at 451. The doctrine of *in pari delicto* serves to prevent cases from proceeding which would: "(1) condone and encourage illegal conduct; (2) allow wrongdoers to receive compensation for, and potentially even profit from, their illegal act; and (3) lead the public to 'view the legal system as a mockery of justice.'" *Id*. at 448; citing *Orzel v. Scott Drug Co.,* 537 N.W.2d 208, 213 (Mich. 1995). In sum, the doctrine does not bar recovery because a plaintiff contributed to his own injury, but because the Commonwealth does not wish to reward illegal conduct as a matter of public policy. *Albert*, 265 A.3d at 451. Thus, comparative negligence statues do not necessarily eliminate or replace *in pari delicto* because the two are not on point. *Id*.; *see also Greenwald v. Van Handel,* 88 A.3d 467, 476 (Conn. 2014) (concluding comparative negligence, which relates to a plaintiff's contribution to his own injury, does not negate application of the wrongful conduct rule, which reflects public policy considerations). *But see Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo Cnty*., 773 S.E.2d 627, 635 (refusing to adopt the wrongful conduct rule because West Virginia's comparative negligence statute was better suited to evaluate the culpability of plaintiffs' illegal drug use or otherwise illegal conduct).

Illegal Drug Use

Although case law centering upon illegal drug use in the drug and rehabilitation setting is minimal, it is well established that illegal drug use is the sort of criminal conduct invoking *in pari delicto*. Courts across the country have held a plaintiff's illegal drug use justifies preclusion to recovery in a multitude of scenarios. *See e.g., Romero v. United States*, 159 F.Supp.3d 1275, 1276-79 (D. N.M. 2015) (holding a plaintiff who was clean from crack for several months could not recover against the government when a confidential informant enticed plaintiff into resuming a crack brokerage and consumption relationship); *Alexander v. Synthatron Corp.*, 10 Pa. D. & C.4th 584 (Com. Pl. 1991), *aff'd,* 426 Pa. Super. 632, 620 A.2d 1230 (1992) (concluding a plaintiff may not recover in a product's liability action when plaintiff was using the product to manufacture methamphetamine). Thus, drug and rehabilitation centers should evaluate whether the doctrine applies when defending claims involving a patient's illegal drug use.

A plaintiff cannot recover for injuries resulting from illegal drug use, even when a defendant pharmacy negligently assisted the plaintiff in obtaining such drugs. In *Albert*, decedent's estate brought a suit

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against the decedent's friend and a drug store. 265 A.3d at 445. The mother of the decedent's friend had a prescription for fentanyl at the drug store and the mother had specifically instructed the drug store to not allow her son to pick up the prescription due to his drug addiction. *Id*. Although the prescription itself read "do not dispense to son," the pharmacist still dispensed the fentanyl prescription to the friend of the decedent. *Id*. The decedent was aware of his friend's plan to obtain his mother's prescription and had driven him to the drug store. *Id*. at 446. Later that evening, the decedent passed away as a result of ingestion of the fentanyl, among other drugs. *Id*. The administrator of the estate claimed the drug store was negligent in dispensing the prescription, but the drug store raised the doctrine of *in pari delicto* as a defense. *Id*. The Supreme Court of Pennsylvania affirmed both the Court of Common Pleas and the Superior Court's grant of summary judgment in favor of the drug store on the principle of *in pari delicto*. *Id*. at 447.

In the opinion, the court referenced the Alabama Supreme Court case of *Oden v. Pepsi Cola Bottling Co.*, 621 So.2d 953 (Ala. 1993). In *Oden*, a vending machine crushed and killed a man as he was attempting to steal its contents. *Albert*, 265 A.3d at 449 (citing *Oden*, 621 So.2d at 954-55). The Alabama Supreme Court affirmed dismissal of the suit brought by the decedent's estate against Pepsi and the vending machine manufacturer, explaining:

> A person cannot maintain a cause of action if, in order to establish it, he must rely in whole or part on an illegal or immoral act or transaction to which he is a party… This rule promotes the desirable public policy objective of preventing those who knowingly and intentionally engage in an illegal or immoral act involving moral turpitude form imposing liability on others for the consequences of their own behavior. Even so, such a rule derives principally not from consideration for the defendant, but from a desire to see those who transgress the moral or criminal code shall not receive aid from the judicial branch of government.

Id. (quoting *Oden*, 621 So.2d at 954-55). In applying the Alabama Supreme Court's reasoning, the Pennsylvania Supreme Court acknowledged that the decedent could very well have been a "troubled youth" and that "addiction is not a question of morality." *Id.* Nonetheless, although the result of *Albert* "may seem harsh," *in pari delicto* is in place to prevent courts from condoning criminal conduct. *Id.*; *see also Orzel,* 537 N.W.2d at 442 (finding the wrongful conduct rule precluded recovery against a pharmacy who negligently filled Desoxyn prescriptions for plaintiff when plaintiff was addicted to Desoxyn and illegally obtained the drug from multiple sources).

Immoral conduct by a drug and rehabilitation counselor does not counteract a plaintiff's own criminal conduct. In *Errett*, the decedent died of an overdose on cocaine and heroin four months after being discharged from a rehabilitation center. *Estate of Errett by Whaley v. A Forever Recovery, Inc.*, No. 331521, 2017 WL 2348723, at *2 (Mich. Ct. App. May 30, 2017). Upon discharge from the rehabilitation program, the decedent was provided with aftercare support and regular contact with an aftercare specialist. *Id*. at *1. After the decedent's overdose and resulting death, the decedent's mother discovered communications between the decedent and his aftercare specialist which revealed an inappropriate relationship. *Id*. at *2. The mother alleged the inappropriate relationship hindered the decedent's ability to receive adequate counseling for his addiction and resulted in the decedent's overdose. *Id*. However, the Michigan Supreme Court affirmed summary judgment in favor of the defendant rehabilitation center on the basis of the wrongful-conduct rule. *Id*. at *9. The court reasoned:

> The decedent chose to use cocaine and heroin, which ultimately resulted in his death. Other than allegedly failing to provide competent addiction treatment aftercare, as alleged by plaintiff, defendants played no role in Errett's decision to engage in illegal activity, something they were trying to help him prevent. It would be a "mockery of justice"

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> to shift the blame of a person relapsing and engaging in illegal drug use to those treating the drug-addiction, and would condone illegal drug use.

Id. at *11-12. The court also rejected the mother's argument that the decedent would not be benefitting from the illegal conduct because the action is for a wrongful death. *Id*. at *8. The court reasoned that because a wrongful action serves to put the administrator of the estate in the decedent's shoes, an estate cannot recover from a decedent's illegal conduct. *Id*.

Likewise, a sheriff's department was found not liable for the death of a detainee who swallowed large amounts of drugs to conceal the evidence. In *Graham*, the decedent swallowed an ounce of cocaine during his arrest for possession of marijuana. *Graham v. Secure Care*, No. 262138, 2007 WL 122127, at *1 (Ct. App. Mich. Jan. 18, 2007). While in custody, the decedent denied consuming any medications or narcotics multiple times. *Id*. at *1. Even after the decedent became ill, he continued to withhold the fact he had swallowed an ounce of cocaine. *Id*. The decedent's symptoms continued to progressively worsen and he died shortly after being transported to a hospital. *Id*. The court applied the wrongful conduct rule in holding the decedent's estate could not recover because the decedent's illegal ingestion of cocaine was the primary cause of his death. *Id*. at *2-3.

Professional Liability

The doctrine of *in pari delicto*, also referred to as the wrongful conduct rule, has been applied in a variety of professional negligence claims, including, but not limited to, claims against psychiatrists, social workers, and attorneys. In addition to the recognition of illegal drug use as a trigger for application of the doctrine, drug and rehabilitation centers can look to the doctrine's application in other professional liability contexts for guidance on successfully asserting the defense.

It was determined that a psychiatric patient's criminal conduct could not be the basis of a tort claim against the treating psychiatrists and psychologists. In *Cole*, a psychiatric patient attempted to bring a professional negligence claim against her psychiatrist for failure to prevent her from murdering her former husband. *Cole v. Taylor*, 301 N.W.2d 766, 767 (Iowa 1981). The plaintiff allegedly informed the defendant of her violent inclinations and desire to murder her former husband throughout the course of her treatment. *Id*. The plaintiff argued the defendant was negligent in failing to restrain her through hospitalization, inadequate treatment of her psychiatric condition, and failure to warn her former husband. *Id*. at 767-768. Although the Iowa Supreme Court previously held a plaintiff's criminal conduct was not an automatic bar to recovery in *Katko v. Briney*, the court dismissed the suit because "it would be, plain and simply, wrong as a matter of public policy to allow recovery." *Id*. at 768*; see also Glazier v. Lee*, 429 N.W.2d 857 (Mich. Ct. App. 1988) (holding a psychiatric patient cannot recover against his psychiatrist for emotional damages resulting from murdering his girlfriend).

It was also determined that a social worker did not have a duty to protect a patient from committing illegal acts which the patient admitted to in therapy. In *Greenwald*, the plaintiff was awaiting criminal charges for the downloading, viewing, and possession of child pornography when he initiated suit against his former social worker. *Greenwald v. Van Handel*, 88 A.3d 467, 470 (Conn. 2014). The plaintiff began treatment with the defendant social worker at the age of seven and remained in treatment with the defendant for ten years. *Id.* at 469. Two years after ending therapy with the defendant, the plaintiff's home was raided in relation to child pornography. *Id*. at 470. As the basis of his claim, the plaintiff alleged he admitted to viewing child pornography on multiple occasions during sessions with the defendant social worker over the years. *Id*. at 469-470. The plaintiff argued the defendant had a duty to protect him from committing the illegal act because he was a minor during the course of treatment and the defendant should be liable for damages arising from the impending criminal prosecution. *Id*. at 470, 476. The court refused to accept the plaintiff's theory of liability because imposing liability on a defendant for the legal consequences of a plaintiff's criminal conduct would create a system in which a plaintiff's recovery increases with the increasing severity of the illegal act. *Id.* at 477-478. The Supreme Court of Connecticut affirmed the defendant's motion to strike due to the plaintiff's claim contravening public policy. *Id*.

In another case, it was determined that a client who passively participates and observes the forgery of documents by his attorney cannot recover in a legal malpractice action. In *Quick*, an attorney mistakenly listed the president of a company instead of the company itself on a complaint against another company for breach of a consulting contract. *Quick v. Samp*, 697 N.W.2d 741, 743 (S.D. 2005). Once it was discovered the plaintiff's company, not the plaintiff himself, was the real party in interest, the attorney prepared a backdated document which assigned the company's rights under the consulting contract to the plaintiff. *Id*. The plaintiff watched the attorney forge the backdated document and, after the plaintiff stated he could not convincingly forge his ex-wife's signature on the document, passively watched the attorney

forge the ex-wife's signature. *Id*. A different attorney who was unaware of the forgery tried the case and the plaintiff did not object as the document was admitted into evidence. *Id*. After the first day of trial, the plaintiff disclosed to the trial attorney the document was forged. *Id*. In response, the trial attorney promptly settled the case for much less than its value to avoid having the plaintiff testify regarding the document at trial. *Id*. When the plaintiff brought a legal malpractice claim against the original attorney, the court reasoned the plaintiff had multiple options other than to passively participate in the forgery and was *in pari delicto* with the defendant attorney. *Id*.

Exceptions to *In Pari Delicto*

Although the doctrine of *in pari delicto* appears to be readily applied, there are some recognized exceptions defendants should be aware of. The Supreme Court held in *Bateman* that matters of public policy may be taken into consideration when deciding whether *in pari delicto* should apply to a set of facts. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 307 (1985). Additionally, the doctrine does not apply when one party acts "under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age so that his guilt may be far less in degree than that of his associate in the offense." *Choquette v. Isacoff*, 836 N.E.2d 329, 333 (Mass. App. Ct. 2005) (quoting 1 Story, Commentaries on Equity Jurisprudence § 423, at 399-400 (14th Ed. 1918)). For example, the District of Columbia Court of Appeals took into consideration the existence of a housing shortage, economic pressure on low income tenants, and disparity in bargaining power between low income tenants and landlords in refusing to apply the doctrine in a landlord-tenant dispute. *William J. Davis, Inc. v. Slade*, 271 A.2d 412, 415 (D.C. 1970). In the refusal, a landlord was unable to recover rent from a tenant who defaulted on a lease after the lease was deemed illegal due to the premises being in violation of multiple housing codes. *Id*.

Courts have found other exceptions to application of *in pari delicto* in cases involving a plaintiff's illegal drug use. A Pennsylvania District Court reasoned a plaintiff's illegal drug use may not invoke the doctrine of *in pari delicto* when the illegal drug use resulted from the defendant's conduct. *Laskowski v. U.S. Dept. of Veterans Affairs*, 918 F.Supp.2d 301, 331 (M.D. Pa. 2013). In *Laskowski*, a veteran suffering from PTSD brought a medical malpractice claim against the veteran's hospital. *Id*. at 305. The plaintiff asserted the hospital's failure to adequately treat his PTSD led to his mental deterioration and subsequent arrest. *Id.* The defendant hospital claimed the plaintiff underreported his symptoms to his psychiatrist and that the defendant's drug and alcohol abuse exacerbated his condition in defense. *Id*. at 310-11. The court ruled in favor of the plaintiff because the plaintiff was a good patient and actively sought help from the VA. *Id.* at 328. Thus, the plaintiff's drug and alcohol abuse, and therefore criminal conduct, resulted from the medical negligence at issue because the plaintiff developed his addiction due to uncontrolled PTSD. *Id*. at 328.

Conclusion

A plaintiff's claim against a drug and rehabilitation center may be barred from recovery under *in pari delicto*. The doctrine is consistently applied in cases centered upon a plaintiff's illegal drug use and in a variety of professional liability contexts. Although courts regularly recognize illegal drug consumption as the sort of crime encompassed by *in pari delicto*, there may be a policy argument that potential plaintiffs are in drug and rehabilitation centers for the purpose of preventing themselves from committing additional crimes. However, the Pennsylvania Supreme Court case of *Albert* clearly states that although drug addiction is devastating, illegal drug consumption is still a criminal act and a strong argument for application of *in pari delicto* in the drug and rehabilitation center context can be made. ■

About the AUTHORS

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Insurance Agent E&O Claims Arising from Insurer Insolvency

Matthew S. Marrone, Esq. | *Goldberg Segalla, LLP*

In this article the terms "broker" and "agent" are used, sometimes interchangeably. The author acknowledges that, historically, brokers generally owed duties to insureds, and agents owed duties to insurers. However, most jurisdictions now hold that, at least under certain circumstances, independent agents and brokers can owe duties to both insureds and insurers, and many states now refer to both under the comprehensive term of "producer." Thus, when used in this article, the terms are intended to connote independent insurance agents, brokers or producers who may owe duties to insureds. All duties owed by insurance professionals will vary by state.

Introduction

What responsibility, if any, does the insurance broker, agent or producer bear to the insured if a carrier becomes insolvent? For practical purposes, brokers who place relatively straightforward risks with admitted carriers traditionally have not had to concern themselves with this problem. If admitted carriers become insolvent, guaranty funds typically cover losses.

This problem is most frequently encountered with hard-to-place risks which require the broker to access the surplus lines market. Although some states regulate surplus lines insurers more closely than others, insurance commissioners are not typically going to hold them to the same reporting/deposit standards as admitted carriers. Thus, while rating agencies like A.M. Best will provide brokers with financial ratings of surplus lines carriers, those ratings will not provide the same level of security as insurance commissioner mandates. Rating agencies sometimes fail to downgrade insurers' ratings as quickly as they should. There have been instances of non-admitted carriers receiving an A+ rating one year, going into receivership the following year, and being liquidated the year after that.

While all producers should be mindful of the volatility of surplus lines insurer ratings, those producers who frequently place risks in the surplus lines market are most likely to have insurer solvency problems. To address this situation, some states have surplus lines guaranty funds. These funds may provide some level of protection in the event these carriers become insolvent. But the levels of protection vary greatly from state to state. Consequently, producers are well-advised to familiarize themselves with any such funds which may exist in states where they write surplus lines business.

Legal Duties

In the majority of states, courts have held that insurance producers do have a duty to investigate the solvency of an insurance carrier prior to placing a policy for an insured. Some courts have held that an insurance producer has an obligation to investigate the financial soundness of the insurance carrier. If the insurer's financial health is found to be impaired the producer should refrain from placing insurance with that carrier (*See*, *e.g.*, *Al's Café, Inc. v. Sanders Ins. Agency*, 820 A.2d 745 (Pa. Super. 2003); *Nidiffer v. Clinchfield R.R.*, 600 S.W.2d 242 (Tenn. Ct. App. 1980); *Sternoff Metals Corp. v. Vertecs Corp.*, 693 P.2d 175 (Wash. App. 1984)). While recognizing that an insurance producer is not a guarantor of the financial condition or solvency of an insurance company, these jurisdictions have applied the general rule that producers are required to use reasonable care, skill, and judgment with a view to the security or indemnity for which the insurance is sought. These courts generally assert that an insurance producer is required to perform varying levels of investigation before placing coverage with a carrier. These courts further hold that the failure may render the producer liable to the insured for any resulting losses due to the insolvency.

An issue of concern for producers with the general rule outlined above is that it potentially imposes liability upon them for the failures of state regulators. State departments of insurance regulate the amounts of unimpaired capital and surplus that insurance carriers must maintain. The state regulations also force the insurers to deposit securities with the insurance commissioners. If the insurance commissioners are not doing their jobs to ensure carriers are solvent, why should the producers take financial responsibility? It is a fair question, and some jurisdictions have in fact held the producer has no duty to investigate the financial condition of an insurer authorized to do business in a state because that duty is already imposed on the insurance commissioner (*Wilson v. All Serv. Ins. Corp.*, 153 Cal. Rptr. 121 (Cal. Ct. App. 1979)). For instance, if a producer pro-

cures a policy from a carrier duly authorized to conduct business in a particular state, a court may find that the producer need not conduct any independent investigation of the carrier, particularly if it is also rated highly by ratings agencies (*See e.g., Wyrick v. Hartfield*, 654 N.E.2d 913 (Ind. Ct. App. 1995)).

In fact, in many of the cases which have addressed this issue, the distinction between admitted carriers (which are often highly rated) and surplus lines carriers (which are not typically as regulated or as highly rated) is often an important one. It underscores the caution which must be exercised when placing coverage with non-admitted insurers. Placing non-standard risks in the surplus lines market is clearly not forbidden and is often necessary to satisfy the insured's insurance interests. The surplus lines insurers are an essential and important part of the insurance market. But because of the potential instability in these circumstances, some courts have held it is the producer's duty to act with reasonable care in:

a) evaluating the financial stability of an insurance company with which the producer intends to place insurance;
b) informing the insured if the investigation reveals evidence of financial infirmity; and
c) informing the insured that the producer nonetheless intends to submit the application with the impaired insurer (*See e.g., Carter Lincoln-Mercury, Inc., Leasing Division v. EMAR Group, Inc.*, 638 A.2d 1288 (N.J. 1994)).

Aside from any duty owed to the insured while the producer is trying to place the coverage, does the producer owe a continuing duty after the policy is issued? What if the carrier is solvent and rated A+ at the time the policy is placed, but is downgraded and goes insolvent thereafter? Does the producer owe the insured a duty to continuously monitor the carrier's financial condition, and notify the insured of any developments? The majority of jurisdictions have held that producers cannot be liable under such circumstances. It is the insurer's financial condition only at the time of policy placement which can be considered when determining whether a producer was negligent (*See e.g., Eastham v. Stumbo*, 279 S.W. 1109 (Ky. 1926); *In re Highway Equipment Co.*, 153 B.R. 186 (Bankr. S.D. Ohio 1993); *Zubres Radiology v. Providers Insurance Consultants*, 276 S.W.3d 335 (Mo. Ct. App. 2009); *Higginbotham & Assoc., Inc. v. Greer*, 738 S.W.2d 45 (Tex. App. 1987); *Wyrick v. Hartfield*, 654 N.E.2d 913 (Ind. Ct. App. 1995)).

While all producers should be mindful of the volatility of surplus lines insurer ratings, those producers who frequently place risks in the surplus lines market are most likely to have insurer solvency problems.

Best Practices

All producers using non-admitted carriers are well-advised to follow a few best practices to help prevent or defend insurer solvency E&O claims. Documentation of meetings with insureds, both internally and via correspondence to the insured, is always a producer's best friend when it comes to defending E&O claims. Try to use an admitted carrier to place an insured's coverages, and document efforts to do so. This is typically mandated by state insurance regulations, but it bears repeating.

Maintain current ratings for all of the carriers you commonly use, both the admitted and non-admitted. If the coverage cannot be placed with an admitted carrier, notify the insured and explain the conditions when placing coverage with a surplus lines carrier. Confirm that the insured would like you to try to place the coverage on a non-admitted basis. If a surplus lines carrier is willing to accept the application, check the rating and convey that rating and other relevant information about the surplus lines carrier to the insured before binding the coverage. Also, be sure to follow all applicable statutes pertaining to using surplus lines carriers. These statutes may require a reasonable investigation into the financial solvency of the carrier. Usually regulations require the use of an affidavit that the insurance could not be placed with a regular insurer. In general, it is a good idea to stay informed about the markets and carriers being used.

If you previously placed coverage with a carrier who has recently been downgraded, then you should communicate that information to the insured. Most jurisdictions do not mandate that a producer continually monitor an insurer's financial health. However, the regulations may require a producer to communicate any such changes when the producer acquires new knowledge that the financial health of the carrier has changed.

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[F]or their own E&O coverage concerns, it is important for producers to be aware of the rating of the insurer and make an attempt to place coverage for clients with the most highly-rated carrier whenever possible.

Coverage Concerns

Finally, it is worth noting that claims arising from insurer insolvency are often not covered under professional liability insurance policies marketed to insurance agents and brokers. A typical exclusion in such a policy might read:

> This policy does not apply to any claim: Based upon or arising out of the insolvency, receivership, bankruptcy, liquidation or financial inability to pay, of any insurance Insurer, reinsurer, risk retention group or captive (or any other self-insurance plan or trust by whatsoever name) in which the Insured has placed or obtained coverage for a client or on account; provided, however, this exclusion shall not apply if at the time the Insured placed the insurance with the above-described entity, such entity:
>
> 1. Held an AM Best rating of B+ or higher, or a Demotech Rating of A or higher; or
> 2. County mutual reinsured by a carrier AM Best B+ or higher; or
> 3. Was guaranteed or operated by a governmental body or bodies;

Consequently, for their own E&O coverage concerns, it is important for producers to be aware of the rating of the insurer and make an attempt to place coverage for clients with the most highly-rated carrier whenever possible. Obviously, an agent cannot control what will happen with any insurer after it places a risk. However, best efforts to ensure that the insurer is as financially sound as possible when placing the risk will first, help avoid this situation, and second, avoid a potential denial of coverage if a claim does arise. ■

About the **AUTHOR**

Matthew S. Marrone is vice chair of *Goldberg Segalla, LLP's* Management and Professional Liability practice group. He has defended hundreds of lawyers, insurance agents and brokers, and other professionals in malpractice and related litigation, and often represents these same professionals in ethics investigations and disciplinary proceedings. Matt has extensive complex jury trial experience, some involving exposures in excess of $25 million. He is licensed and actively practices throughout all state and federal courts of both Pennsylvania and New Jersey. He can be reached at mmarrone@goldbergsegalla.com.

Meet a Member: Andrew Sayles of Moreira Sayles Ramirez LLC

Interviewed by **Corinne G. Ivanca**

Do you have a personal motto or a driving principle?

I would say a driving life principle is that "you get out of life what you put in." There is no shortcut to putting in the time and the work to be better. That applies to my career and my personal life. I really enjoy what I do and the clients I work with. It's my goal that my clients understand my commitment and investment in their lives, careers and businesses. At the same time, I place a very high priority on my family. I have a wife who also works full time and two active boys that keep us happily occupied. Striking a balance between work and home can be difficult at times but my goal is to not sacrifice one at the expense of the other.

In both my professional and personal life I really value doing the right thing, taking the high road. I've been active in the

Brennan-Vanderbilt Inn of Court for many years, and I'm currently its curriculum chair and CLE chair. It's a litigation Inn focused on teaching trial skills to newly admitted attorneys. We really put an emphasis on instilling professionalism. I think it's important to set a collegial tone in the work that we do.

You've recently struck out with two partners to form a new firm. What spurred this move?

Yes, in January we founded Moreira Sayles Ramirez LLC, which we refer to as MSR Legal. Previously, I was a partner with Connell Foley, a large New Jersey based law firm (approximately 160 attorneys) and had worked there for over 15 years. I started within the firm's professional liability group and expanded my practice, in large part due to the various specialties the firm had, it's exposure to a variety of clients and the great colleagues there. Until last year, the idea of leaving the firm was not really something I had considered. However, I was presented with a great opportunity to build a new practice with several excellent attorneys.

I'm now partners with Mitchell Ramirez, a colleague from Connell Foley, and his wife, Monique Moreira. Monique had an existing firm with her father, Jose Moreira, with a focus on insurance defense, municipal work, worker's compensation and general practice clients. Mitchell and I worked closely for several years on various commercial litigations and professional liability claims. We worked well together and are good friends. Monique's father, Jose, was looking to move more towards retirement and Monique was interested in expanding her practice. When I looked at things, my practice and book seemed liked a great supplement to what Monique had in place. I decided to take the leap.

Honestly, I've been working full days from day one. In addition to the clients I brought with me, I've already brought in new matters this first month, as have my new partners. We have a great staff and intelligent, experienced attorneys to share the workload.

I will admit that striking out like this was a very hard decision. I'm not a person who jumps from job to job and I really valued the relationships I had at my prior firm. At 43 years old, I had to weigh the investment I had put into my career at my prior firm against the risk of starting a new law firm. Although it's only been a month, I know this is the best decision I've made in my career. It might sound kind of corny, but I hope my experience in this transition may inspire others to have the confidence to do this too.

Tell me about your practice.

My main practice areas are professional liability defense, class action litigation, consumer law and commercial litigation. In professional liability, I mainly represent lawyers, architects and engineers, and medical professionals. I've also developed a niche practice within that defending claims against creditor's rights attorneys and other professionals within the consumer financial services field. This involves a substantial amount of class action law. I expect this area to be a growth area because of a few factors. First, the Consumer Financial Protection Bureau enacted new debt collection rules late last year. Second, the foreclosure moratorium associated with the pandemic lifted about a year ago and now there's more activity for consumers to complain about. Third, increased consumer debt. Combine those factors with a growing number of consumer law attorneys, the availability of fee shifting and class-action relief, and a recent Supreme Court ruling that has pushed a lot of these suits to state courts, and I believe we'll see an increase in consumer financial services claims over the next year.

At MSR Legal, I'm running our Professional Liability and Class Action practice groups. What I love about it is everyone's involved in all our cases. Even if you're not actively handling a file, we're condensed enough that we each are able to provide insight on a given claim. I like this intimate atmosphere. And I love that we can build things from the ground up to serve our specific practice. Now I have a system in place that fully supports my practice tailored the way I want it.

Tell me an interesting fact that people might now know about you.

I have a family of redheads—my wife, Amanda, and both my sons are unmistakably red. We are disproving the myth that redheads will be extinct soon.

On a similar theme, I'm a Deadhead. Well not really a Deadhead, because I'm not quitting work to follow the band, but I've really gotten into the Grateful Dead's live recording catalogue and their touring remnants, Dead & Co. I try to catch them whenever they play in the area. Often a Friday night is me watching a football or basketball game on mute while listening to music.

So besides the music, what do you do outside of work?

Family or sports, or both combined. I coach my 13-year-old son's traveling basketball team. They're the defending champions of our league so I'm pretty proud of that. I also coach my 9-year-old son's basketball clinic. In the fall I coach their soccer teams. I don't coach anything in spring, so I get a little time off there and get to be just a spectator. Coaching has really become a source of fulfillment that

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I didn't expect. Sports provide so many great life lessons and I'm happy that I'm able to play a constructive role in the players' lives. I learned to coach just by doing it. As most people can appreciate for younger children, there's often a lack of volunteers to coach the recreation club sports. I volunteered when the kids were young and over the years I've learned a lot about how to work with the kids. I also get a lot of help from my wife too, in learning how to deal with the kids in a way that fits the age that they're at. She's an elementary teacher and I've come to understand how hard the role of an educator is.

I'm also an avid Buffalo Bills fan; I grew up in a small town outside of Buffalo. My kids have joined me in this fandom.

Being from Minnesota, I don't quite get New Jersey. What's the allure?

You're not the first person I've heard that from. I will say that once you get off the turnpike and get into the actual neighborhoods it's a great place to live. My wife and I moved to New Jersey for work when I was done with law school—we met at Syracuse University—and we just haven't left. I grew up in a small town of about 3,000 in Western New York. My wife grew up in Albuquerque, New Mexico. Now I look out my window and can see the Manhattan skyline. This is not an area either of us ever imagined we would live but we really enjoy the lives we have and the area (other than the traffic). And, if anything has cemented me in New Jersey for the long-term, it is starting a law firm.

And remind me, what do you do with PLDF?

I'm the Chair of the Lawyers Professional Liability Committee. We're a very active committee—we have monthly zoom meetings and always have articles in the PLDQ. When my term expires, I'm interested in joining the PLDF Board of Directors or becoming more engaged in one of PLDF's other committees. ■

About the **AUTHOR**

Corinne G. Ivanca is a Senior Associate General Counsel with *Allina Health*, where she manages medical malpractice claims and provides advice and counsel related to the provision of health care. Previously, Corinne spent 14 years in private practice where she focused on defending professionals in malpractice and licensing matters, and prior to that was a claim attorney at a legal malpractice insurance company. She may be reached at Corinne.Ivanca@allina.com.

Practicing Well: Ground Yourself

Patty Beck | *A Balanced Practice, LLC*

During a recent visit with my nieces, I introduced them to meditation. I said it was something I enjoy because it helps keep me grounded. With an understandable look of horror on their faces, they asked why I would ever want to do that! After explaining that I was not being sent to my room and that it was instead a way to reset and feel relaxed, they were much more receptive to the idea and enjoyed a short meditation session with me.

I explained that grounding practices are about finding ways to get our bearings, to pause the chaos of the world around us, and to feel a sense of calm. They help us feel connected to ourselves and help us get perspective when we feel overwhelmed by life. The beauty of them is that they can truly look and feel however you want them to. You can practice them any time of day whether it is first thing in the morning, the last thing before bed, or something you do throughout the day during a stressful moment. You can also practice them daily, weekly, or even monthly depending on what grounds you.

For daily practices, I find things like taking a few intentional deep breaths, sipping a warm beverage, and feeling fresh air on my face are ways that help me hit the reset button when I'm in the midst of a chaotic day. For others, it means turning on nostalgic music, going for a walk, or spending time with a beloved pet. Sometimes saying a collection of phrases that give you strength can have a restorative effect. Anything that deliberately engages your senses can be helpful for bringing a feeling of peace and calm to your day.

When it comes to long-term grounding practices, many people find support in a consistent exercise routine that helps them feel connected to themselves and/

I encourage you to take a minute and think about a time where you felt like your cup was full. What had you done to feel that way? Is that something you can use to help you feel grounded each day or long term?

or a community at their local gym, yoga studio, or running club. Others, myself included, also find that spending quality time with people we care about or writing down something you're grateful for is a way to feel like our cup is full. Also, spending time with a new or existing hobby like art, playing an instrument, or fishing/hunting/building something with your hands can make you feel like "you" again.

Being a busy professional can feel exhilarating and rewarding. It can also be overwhelming on days when it feels like there's not enough of you to go around (I've been there!). I like to think of grounding practices as things that help me in the moment, but that also help me build stamina over time so that when I have those chaotic days, I can handle them with more grace and ease. That doesn't mean that I don't still have those days where I'm feeling crazed, behind on my work, or like I can't keep up—I have many of them! But learning how to ground myself has helped me immensely with navigating the challenging days and stressful moments.

One of the things I miss about working in an office was when my coworker and I would pop our heads over our cubical wall to take 30-second stretch breaks throughout the day. Once remote work set in, we scheduled a weekly virtual coffee date to replace our stretch breaks (and to ensure we always stayed current on binge-worthy TV shows and other developments in our lives). Bringing someone else into your practice can help you feel connected to others and with yourself.

I encourage you to take a minute and think about a time where you felt like your cup was full. What had you done to feel that way? Is that something you can use to help you feel grounded each day or long term? It's also helpful to think about any obstacles in this area (i.e., time, remembering to practice, needing ideas for what to do, etc.) and how you can overcome them—do you need an alarm on your phone, a calendar reminder, or a friend to check in with?

As always, if you are struggling with anything—feeling overwhelmed, stressed, languishing (feeling "meh"), anxiety, depression, or something else entirely—please talk to someone about it! Reach out to a friend, colleague or family member. Contact your state's confidential lawyers' assistance program or another trained mental health provider (information is available in the new PLDF 50-State Survey of Lawyer Mental Health & Well-Being Resources located on the PLDF website). Wishing you all the time, space, and inspiration to design a grounding practice that works for you! ■

About the **AUTHOR**

Patty Beck is the President & Owner of *A Balanced Practice, LLC*, where she teaches attorneys practical strategies for incorporating well-being into their personal and professional lives. Prior to discovering her passion for attorney well-being, she worked as an associate at a large law firm in Minneapolis, MN practicing employment law and as a Claim Attorney for *Minnesota Lawyers Mutual Insurance Company* where she helped attorneys navigate challenging legal malpractice and ethics complaints. Through her experience in private practice and helping lawyers through difficult times, she discovered her passion for teaching lawyers the "little things" they can do each day to improve their relationship with stress and overall satisfaction with their careers. She can be reached at patty@abalancedpracticellc.com.

Interview with Patty Beck

A Balanced Practice LLC

Patty Beck is the owner and founder of a Balanced Practice LLC, where she teaches lawyers and other legal professionals how to infuse well-being into their professional lives. After working at a big law firm and Minnesota Lawyers Mutual assisting insured attorneys with various professional claims made against them, Patty discovered the daily ethical pitfalls attorneys encounter and the central role mental health often plays in those claims. She has since dedicated herself to increasing mindfulness, self-compassion and resilience to enhance the lives of legal professionals across the country and we had the privilege of sitting down with her to discuss that journey.

What has been the biggest change in your personal and professional life since starting a business?

The biggest (and best) change is how much time I am able to devote to immersing myself in the well-being world by taking workshops, devouring books, and reading articles on various well-being topics like mindfulness and self-compassion (among others). While I always enjoyed learning about well-being as a compliment to my previous work at Minnesota Lawyers Mutual, it has been a wonderful experience to know that my full-time job is learning about well-being and then applying it to all members of the legal profession.

What have some of the challenges been?

It has been a challenge being on my own and not having someone readily available to bounce ideas off of, but I am fortunate to have many wonderful people in my life who are supportive and there for me when I need a chat.

It has also been a learning process deciding which projects to invest my time in and knowing how much time is required for each given that just about everything I do is brand new, and for a perfectionist who always spends more time than I should on projects, time management is indeed a challenge!

Another important lesson I learned is that doing what you are passionate about does not make you immune to anxiety and mental health issues. I always assumed that once I was able to focus my time solely on well-being that my work-related anxiety would magically disappear, and it has been both challenging and rewarding learning how to work through that.

> PLDF is where I found my voice and learned how to share my passion for well-being with a community of professionals that I have come to know and care deeply about over the last five years.

How have your past experiences shaped your approach to the new business?

When I sit down to develop new tips for lawyers and other professionals, I draw my inspiration from thinking about what would have helped me when I was a young associate sitting at my desk stressed out of my mind. I also think about conversations I had with defense counsel and insureds while working at Minnesota Lawyers Mutual, and the common issues that tend to cause lawyers stress. I try to make my well-being tips as practical as possible so that anyone can apply them regardless of where they are. I also do my best to practice what I preach so that when I give presentations, I am drawing on personal experience rather than generalized recommendations.

What do you do to stay grounded?

Time outside is crucial for me. I try my best to get outside each day and truly engage in that experience, which means being off my phone, feeling the wind on my face, and listening to the sounds of my environment. Journaling has also been a new and incredibly helpful tool in getting me to understand and be more aware of my thoughts and emotions. It's helpful to sit down and rationally work through exactly what I'm experiencing rather than getting stuck on the emotional side of things. Staying physically active with yoga and HIIT classes three days per week further helps keep my anxiety in check. I have also found that investing quality time in my relationships helps me to keep a healthy perspective on the "big picture," especially on days that are challenging.

How has PLDF helped you further your career and business?

PLDF is where I found my voice and learned how to share my passion for well-being with a community of professionals

that I have come to know and care deeply about over the last five years. The Practicing Well column was something I came up with after attending the 2018 Annual Meeting and wanting to find a way to contribute to the organization in a meaningful way. The column has helped to shape and drive my passion in thinking about new ways to broaden the well-being concept to make it accessible to everyone, and I am truly grateful to PLDF for the opportunity and support I've received over the years.

Where do you see the profession heading in the next five to ten years?

I think the profession has been changing for the better for many years and will continue to do so in the years to come. One of the best things to come out of the pandemic is that it has helped shine a spotlight on mental health and well-being, showed us how resilient and adaptable we are, and created new opportunities to redefine how work fits in with our personal lives. Lawyers seem much more willing to talk about mental health, which is encouraging given the profession's prior reluctance to show such vulnerability. I am optimistic about where the current and next generation of lawyers are leading the profession on the well-being front and believe it will continue to be a priority going forward. ■

Dabbling in Debt Collection: Is Your Law Firm Unwittingly Acting as a "Debt Collector" Under the Fair Debt Collection Practices Act?

Patrick D. Newman and **Benjamin D. Gilchrist** | *Bassford Remele, P.A.*

Federal courts have noted the "cottage industry" of litigation—often nothing more than a "glorified game of gotcha"—that has sprung up around the Fair Debt Collection Practices Act ("FDCPA") in jurisdictions across the country. *Barclift v. Keystone Credit Servs., LLC*, 585 F.Supp.3d 748, 755-56 (E.D. Pa. 2022) (internal quotations omitted and citing *In re FDCPA Mailing Vendor Cases*, 551 F.Supp.3d 57, 61 (E.D.N.Y. 2021)). Indeed, consumer attorneys filed more than 4,500 FDCPA lawsuits last year. https://webrecon.com/webrecon-stats-dec-22-year-in-review/. As well, the Consumer Financial Protection Bureau fielded more than 60,000 consumer complaints about first- and third-party debt collectors in 2022. *Id*.

Though these numbers surprisingly represent a recent *downward* trend, economic pundits have been warning us to brace ourselves for the impact of an incoming financial downturn for some time now. *Id*. No soothsayer is needed to conclude that, if those predictions become reality, consumers facing the economic pressures attendant to recession will be more apt to commence suit under statutes like the FDCPA as a means to ward off the collection efforts of their creditors.

Add to this brewing storm a slew of recent decisions that, pursuant to Article III of the United States Constitution, would-be FDCPA litigants must allege—and later *prove*—a "concrete" injury-in-fact in order to seek redress in federal court. *See, e.g., Casillas v. Madison Avenue Associates, Inc.*, 926 F.3d 329 (7th Cir. 2019); *Larkin v. Fin. Sys. of Green Bay, Inc.*, 982 F.3d 1060 (7th Cir. 2020); *Spuhler v. State Collection Serv., Inc.*, 983 F.3d 282 (7th Cir. 2020). In other words, an averment that "your collection letter stressed me out" no longer is enough "harm" to open the federal courthouse doors to a putative FDCPA plaintiff.

The potency of these variables becomes apparent when they are considered together. First, we are already dealing with thousands of FDCPA claims filed each year. Second, economic forecasts indicate that conditions will be ripe for an *increased* number of FDCPA filings in the coming months (perhaps even years). Third, following the wave of "no standing" decisions in FDCPA cases, the plaintiffs' bar is on the lookout for claims involving actual consumer "harm" in order to avoid being booted out of federal court.

What collection efforts might give rise to "concrete injury," you ask? How about claimed "injuries" arising from legal proceedings or post-judgment collection efforts. You know, the kinds of things lawyers routinely do in attempting to make their clients whole in court in breach-of-contract and other "collection adjacent" litigation.

Regardless of the economic climate and the existence (or not) of some cognizable "injury" to the consumer, the fact is that the mere involvement of an attorney in the collection process automatically puts most consumers on the defensive. As one court noted, a "consumer, getting a letter from an 'attorney,' knows the price of poker has just gone up. And that clearly is the reason why the dunning campaign

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escalates from the collection agency, which might not strike fear in the heart of the consumer, to the attorney, who is better positioned to get the debtor's knees knocking." *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996).

And that's precisely why this issue matters for PLDF members (and their attorney clients as well). An "upped ante" from the consumer's perspective means the lawyer's own risk of exposure is also "upped." Put bluntly, this dynamic makes an attorney attempting to collect a consumer debt a target for legal action under the FDCPA. Most insidiously, that exposure—i.e., up to $1,000 in statutory damages, plus actual damages, *plus* reasonable attorneys' fees and costs to a prevailing plaintiff's counsel (almost always the highest figure in this equation)—can manifest without the attorney even realizing they're engaged in consumer debt collection. 15 U.S.C. § 1692k(a).

So, counsel, is your firm engaged in consumer debt collection? Let's find out (and what you can do to mitigate risk if you are).

It's the "Principal" of the Thing (or Even Just "Regular" Collection of Consumer Debts)

Happily, the FDCPA only applies to "debt collectors" collecting consumer "debts" that are in default at the time of placement or retention. A consumer "debt" is "any obligation … to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes …." 15 U.S.C. § 1692a(5). Broad, yes, but sufficiently detailed to allow a reasonable determination whether a particular financial obligation falls within the statutory scheme.

The debt collector requirement is trickier. It includes (1) anyone in "any business the principal purpose of which is the collection of any debts … owed or due or asserted to be owed or due another," **or** (2) anyone "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (emphasis added).

> "…[T]he fact is that the mere involvement of an attorney in the collection process automatically puts most consumers on the defensive…And that's precisely why this issue matters for PLDF members (and their attorney clients as well). An 'upped ante' from the consumer's perspective means the lawyer's own risk of exposure is also 'upped.'"

It's a fairly easy call to say that a collection agency specializing in the collection of, say, defaulted retail credit card accounts has both a "principal purpose" of, and is "regularly" engaged in, collecting consumer debt.

But consider a three-person law firm where one partner focuses exclusively on professional liability defense, a second has a robust trusts-and-estates practice, and a third represents a number of small-to-medium-sized businesses with all of their litigation needs, including the occasional lawsuit to collect defaulted accounts receivable arising from "personal, family, or household" financial obligations. Perhaps the firm's "principal purpose" is not consumer debt collection, but is the third partner's "from-time-to-time" handling of consumer collection lawsuits "regular" enough to make them and their firm a "debt collector" subject to the FDCPA?

Courts have grappled with this issue, and it usually requires a developed fact record to determine, but here are some factors courts have used to guide the analysis:

(1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s),
(2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable,
(3) whether the entity has personnel specifically assigned to work on debt collection activity,
(4) whether the entity has systems or contractors in place to facilitate such activity, and whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations.

Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 62–63 (2d Cir. 2004) (citation marks omitted and re-formatted).

An additional factor is the role debt collection work plays in the firm's practice as a whole. *Id*. at 63. But be careful—the stats potentially cut either way: "debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas

such work constituting 1% of an individual lawyer's practice might not." *Id*.

In short, this is a fact-dependent inquiry that your firm should undertake at the front end (rather than waiting to sort it out while defending a FDCPA claim) based on the unique circumstances of the firm's overall structure and practice areas.

Collecting Consumer Debt Versus Enforcing a Security Interest

The Supreme Court recently confirmed that "security interest enforcers" are not subject to the FDCPA's full coverage. In *Obduskey v. McCarthy & Holthus LLP*, the Supreme Court held that, with the exception of § 1692f(6) (which prohibits a debt collector from taking or threatening to take an action on the collateral without a present right of possession), the FDCPA's strictures simply do not apply to those merely enforcing the creditor's security interest in property, like the non-judicial foreclosure of a home mortgage. *Obduskey v. McCarthy & Holthus LLP*, 203 L. Ed. 2d 390, 139 S. Ct. 1029, 1036–37 (2019). Though the FDCPA does not define "security interest," the concept generally encompasses a "property interest created by agreement or by operation of law to secure performance of an obligation." SECURITY INTEREST, Black's Law Dictionary (11th ed. 2019).

And therein lies the key distinction: enforcing the creditor's right to property securing the consumer's obligation to pay (e.g., repossessing a car), rather than taking measures to involuntarily force payment (e.g., bank or wage garnishment on a judgment). Understanding whether your firm is engaged in consumer debt collection (subject to the complete FDCPA) versus enforcement of a creditor client's security interest in property held by the consumer (subject to § 1692f(6) only), is critical to charting a compliant course for your firm under the Act.

Additional Risk Mitigation Considerations

The first consideration is the most important (and now review material for you since you've made it this far in the article): is your firm a debt collector? At a high level, the three questions to be answered are (1) do we do any collection work for our clients; (2) if so, is it "consumer debt" (personal, family, or household purposes) in default; and (3) do we do enough of it such that we "regularly" attempt to collect (or it is somehow the firm's "principal purpose")?

As discussed above, the first two questions are *mostly* straightforward. The third, however, can be more complicated. Nonetheless, it is critical that your firm figure out the answer because hanging your defense hat on "not-regular-enough-to-be-a-collector," and proving it on summary judgment or at trial, is likely to cost far more money and employee resources than establishing compliance protocols that avoid the suit in the first instances. (Ounce of prevention, pound of cure … you're lawyers—you know the drill!)

If the Act *does* apply to your firm, no more dabbling. It's time to commit 100% to compliance. The first step is to put someone in charge of managing your firm's processes. That should be a competent attorney within your firm (potentially assisted by outside counsel or other external resources) who acts as the "point person" in making decisions about the "do's and don'ts" of your collection practice and training firm employees accordingly.

If you've guessed that the "appoint-a-point-person" talk was a lead-in to a discussion about compliance policies and procedures, you're absolutely correct. But first, it's time to dig not only into the text of the FDCPA (and the decades of case law it has produced), but also the Consumer Financial Protection Bureau's debt collection rule, Regulation F, which implements the Act. 12 C.F.R. § 1006 *et seq*.; *see also* https://www.consumerfinance.gov/rules-policy/final-rules/debt-collection-practices-regulation-f/ (last accessed February 1, 2023).

The regulation is complex and lengthy and imposes significant additional requirements on debt collectors that did not exist 18 months ago. So, start your FDCPA compliance and risk management journey with the Bureau's "Debt Collection Rule Small Entity Compliance Guide," which takes the 600-plus pages of the actual regulation and condenses it into an "easily digestible" 116-page summary. https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_small-entity-compliance-guide.pdf (last accessed Feb. 1, 2023). Seriously, it's an excellent "crash course" resource and the place to start.

Now, about those policies and procedures. Generally speaking, the debt collector's intent is irrelevant to the determination of whether the FDCPA has been violated. But Congress included an important defensive "safety valve" in the Act: the *bona fide* error defense. 15 U.S.C. § 1692k(c). To wit, "[a] debt collector may not be held liable … if the debt collector shows by a preponderance of the evidence that the violation was **not intentional** and resulted from a **bona fide error** notwithstanding the maintenance of **procedures reasonably adapted to avoid any such error**." *Id*. (emphasis added)

Simply put, if the debt collector has reasonable policies and procedures in place—i.e., written down, actually trained, and actually followed—to avoid the issue giving rise to the FDCPA claim, that's potentially a complete defense. To

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be sure, implementing policies and procedures governing your firm's adherence to the FDCPA's many nuanced requirements serves this legal purpose. But putting the firm's expectations and protocols in writing and training them also serves a practical purpose: avoiding the lawsuit in the first place.

In sum, the FDCPA waters are choppy and deep, but they are navigable. The first step is recognizing that your practice is subject to the Act. From there, reading up on recent regulatory changes and activating intentional and mindful compliance protocols is the entire game. ■

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Patrick D. Newman is a shareholder with *Bassford Remele, P.A.* and co-chairs the firm's Consumer Law Defense practice group. Patrick is a commercial litigator who defends a broad range of professionals and financial institutions, including attorneys, debt collectors, fintechs, debt buyers, repossession agencies, and credit unions. Patrick is experienced with class actions and litigates cases, including jury trials and appeals, in state, federal, and bankruptcy courts across the country. He also provides risk management and compliance advice to his clients to help avoid lawsuits and increase revenue. He can be reached at pnewman@bassford.com.

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The Benefit Rule: A Silver Lining Defense for Accountants after Failing to Timely File or Pay Taxes

Douglas W. MacKelcan and **Skyler C. Wilson** | *Copeland, Stair, Valz & Lovell, LLP*

Failing to timely file and pay taxes on a client's behalf happens. Maybe the accountant miscalculated the amount due or forgot to have the client pay an estimate of tax liability in conjunction with a request for an extension on income taxes. Perhaps the accountant's scope of work included ensuring employment taxes were paid quarterly and the accountant relied on bookkeeping software, but it's later discovered the taxes were not filed or paid. Maybe the client simply failed to provide the necessary information for prepare the returns or didn't make the payment as instructed. Whatever the scenario, failing to file and pay taxes on time usually leads to the taxing authority imposing penalties and interest on top of the amount originally due. Taxpayers often then attempt to blame their accountants and look to them for amounts owed to the taxing authorities.

Although liability defenses will depend on the circumstances leading to the imposition of interest, some consistencies exist in contesting damages. The benefit rule may be the best bet to reduce exposure in a subsequent claim by the client.

The Benefit Rule and its Many Forms

In general, the benefit rule states: "When the defendant's tortious conduct has caused harm to the plaintiff . . . and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." Restatement (Second) of Torts § 920 (1979). In the accounting malpractice context, the benefit rule is a defense that can prevent a plaintiff from recovering the interest due taxing authorities in an action against the accountant because the plaintiff had the benefit of the funds while interest accrued. The rule distinguishes between penalties and interest, with only the latter being recoverable. But the rule has at least two forms depending on the jurisdiction. In a minority of jurisdictions, the benefit rule is an absolute bar to recovering interest. The more modern, and majority, trend is to permit recovery of interest if the interest due the taxing authority exceeds the value to the plaintiff of having use of the money in the meantime.

The Blanket Bar — Interest Never Recoverable

A minority of states hold that the benefit rule absolutely prevents an accountant's client from recovering from the accountant interest owed to the taxing authority tied to the underpayment or failure to pay taxes. The states most often cited for following the minority approach include Alaska, California, New York, and Washington. *Orsini v. Bratten*, 713 P.2d 791, 794 (Alaska 1986); *Eckert Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230, 1235 (E.D. Cal. 1996); *Ackerman v. Price Waterhouse*, 591 N.Y.S.2d 936, 946 (N.Y. App. Div. 1992), *rev'd on other grounds* 644 N.E.2d 1009 (N.Y. 1994); *Leendertsen v. Price Waterhouse*, 916 P.2d 449, 452 (Wash Ct. App. 1996).

The blanket bar's primary policy is one of equity—to prevent a windfall. *See Leendersten*, 916 P.2d at 451; *see, e.g.*, *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 72 (N.Y. App. Div. 1990) ("[T]he equities militate in favor of barring recovery of such interest rather than allowing plaintiffs the windfall of both having used the tax monies for seven years and recovering all interest thereon."). The interest represents the time value of the money. *Leendersten*, 916 P.2d at 451; *Eckert Cold Storage*, 943 F. Supp. at 1235 ("[T]he interest paid to the [IRS] represents a payment for the plaintiffs' use of the tax money during the period after taxes came due and before they were paid . . . ."). Permitting the plaintiff to have use of the money and to collect interest as damages would result in a windfall. The other courts adopting the blanket bar reach the same result by different terminology, finding the blanket bar prevents a double recovery or unjust enrichment. *See Leendersten*, 916 P.2d at 452.

Courts do not appear to focus on whether the plaintiff actually earned interest while he or she had use of the money, and mention the plaintiff is not damaged to the extent the taxing authority charges market rate interest. *Orsini*, 713 P.2d at 794; *Eckert Cold Storage*, 943 F. Supp. at 1235. Not examining plaintiff's use of the funds and references to the market rate suggest courts are implicitly considering a failure to mitigate within the context of the benefit rule.

If the plaintiff invests the money, however, it supports the blanket bar on causation grounds. For example, the *Leendersten* court acknowledged an accountant's miscalculation of a tax liability led to larger refunds than the client was entitled to, but the client invested the money in another business, earning profit, and that investment represented independent judgment breaking the chain of causation and making the interest damages too speculative to recover. *Leendersten*, 916 P.2d at 451-52.

In sum, the blanket bar version of the benefit rule is followed by a minority of jurisdictions, but the rationale is straightforward and does not depend on *how* the plaintiff used the funds while the funds were in the plaintiff's possession. The more modern trend, however, examines *how* the plaintiff used the funds.

In sum, the blanket bar version of the benefit rule is followed by a minority of jurisdictions, but the rationale is straightforward and does not depend on *how* the plaintiff used the funds while the funds were in the plaintiff's possession. The more modern trend, however, examines *how* the plaintiff used the funds.

The Majority Approach— Interest Recoverable under Certain Circumstances

Most jurisdictions who have considered the benefit rule in the context of accounting malpractice hold it is not an absolute bar to recovery of interest. These jurisdictions include Arizona, Illinois, Massachusetts, Nebraska, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, and South Dakota. *Jobe v. International Ins. Co.*, 933 F. Supp. 844 (D. Ariz. 1995); *Dail v. Adamson*, 570 N.E.2d 1167 (Ill. App. 1991); *Miller v. Volk*, 825 N.E.2d 579, 582 (Mass. App. 2005); *Frank v. Lockwood*, 749 N.W.2d 443 (Neb. 2006); *Ronson v. Talesnick*, 33 F. Supp. 2d 347, 353 (D.N.J. 1999); *Loftin v. QA Invs., LLC*, No. 03 CVS 16882, 2018 WL 691199 (N.C. Super. Feb. 1, 2018); *Wynn v. Estate of Holmes*, 815 P.2d 1231 (Okla. App. 1991); *McCulloch v. Price Waterhouse LLP*, 157 Or. App. 237, 246, 971 P.2d 414, 419 (1998); *Amato v. KPMG LLP*, No. 06CV39, 2006 WL 2376245 (M.D. Pa. Aug. 14, 2006); *O'Bryan v. Ashland*, 717 N.W.2d 632 (S.D. 2006).

These courts are unpersuaded by reasoning from jurisdictions with an absolute bar, specifically noting that the windfall concern and speculation or causation of the interest damages are addressed by other functions of the judicial

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system. Taking interest damages claims on a "case-by-case" approach, rather than an absolute bar, will adequately address windfall concerns because it allows courts and juries to analyze whether the plaintiff actually received a benefit from using the funds owed the taxing authority. *McCulloch*, 971 P.2d at 419; *O'Bryan*, 717 N.W.2d at 637-38. Damages or causation issues are typically for the jury to decide, but the court is empowered to decide the issues as a matter of law if the plaintiff does not meet his or her burden of proof and the evidence is clearly insufficient. *McCulloch*, 971 P.2d at 419.

Instead, these courts find the competing public policies for tort recovery warrant allowing plaintiffs to recover interest if they can prove they were actually damaged by the interest the taxing authority charged, but the recovery should be reduced by any benefit caused by a defendant's actions. *See Ronson*, 33 F. Supp. 2d at 354; *O'Bryan*, 717 N.W.2d at 639-40. On the one hand there is an overriding policy of making the plaintiff whole, i.e., placing plaintiff in the position the plaintiff would have been but for the defendant's actions. *Ronson*, 33 F. Supp. 2d at 354; *O'Bryan*, 717 N.W.2d at 637. In addition, defendants should not escape liability for their tortious conduct. In this line of reasoning, the plaintiff would not have had to pay interest had the defendant not failed to timely pay taxes. Therefore, the defendant paying the interest places plaintiff in the position he or she would have been absent the defendant's conduct and prevents the defendant from escaping liability.

On the other hand, the law disfavors double recoveries or windfalls, and recognizes plaintiffs should not profit from their injuries. *See Ronson*, 33 F. Supp. 2d at 354; *O'Bryan*, 717 N.W.2d at 639-40. If the plaintiff invests the money due the taxing authority and earns any interest, reducing the plaintiff's recovery by the amount of the benefit obtained prevents a windfall and plaintiff from profiting from the injury. Further, defendants are still free to argue the plaintiff failed to mitigate damages if the plaintiff did nothing to invest or safeguard the funds due the taxing authority. *McCulloch*, 971 P.2d at 419.

The plaintiff's burden of proof on causation and damages, and the court's ability to decide those issues as a matter of law in certain scenarios, are universal principles across jurisdictions that favor the majority approach.

Overall, the majority approach is likely the better policy because it considers the circumstances of each case and is based on a balancing of equities and competing tort recovery public policies. Indeed, the text from which the rules springs—Restatement (Second) of Torts—explicitly states the benefit rule should be applied "to the extent [it] is equitable." The blanket bar, although a much easier and straightforward approach, has the effect of penalizing unsophisticated plaintiffs who are not savvy enough to invest funds or otherwise put the money to use to obtain a benefit. On the bright side, under the majority's case-by-case approach there is a possibility the benefit the plaintiff obtains far exceeds the amount of interest the taxing authority charges and, by extension, the greater the reduction the defendant is entitled to from the ultimate award.

Guidance for Practitioners in the Majority or Undecided Jurisdictions

The lucky attorneys practice in a jurisdiction with the blanket bar. But if your jurisdiction is undecided, or you have the misfortune of practicing in a jurisdiction that permits recovery, there are steps you can take to determine and reduce your client's exposure to interest damages arising from a failure to pay taxes.

First, given the modern trend and that the majority permit recovery, it is likely undecided jurisdictions will permit recovery if asked to decide the issue. Permitting interest damages accounts for the competing public policies of tort recovery. However, it is likely each undecided jurisdiction has, in other contexts, addressed "making the plaintiff whole," windfalls, or double recoveries. The courts' impressions of these policies in other contexts will inform how they decide in what form to adopt the benefit rule.

In addition, the decided jurisdictions have found persuasive how their jurisprudence treat causation, speculative damages, and the collateral source rule. The plaintiff's burden of proof on causation and damages, and the court's ability to decide those issues as a matter of law in certain scenarios, are universal principles across jurisdictions that favor the majority approach. However, the majority's reliance on the collateral source rule appears misplaced, and in fact relies on a tangential public policy. Stated simply, the collateral source rule should not bar consideration of how the plaintiff used the money owed the taxing authority because any benefit received would not be an independent payment to compensate the plaintiff for injuries the defendant's conduct caused. The primary case in the

majority addressing the collateral source rule did so recognizing a tortfeasor should not benefit from a third-party's generosity, or the plaintiff's ingenuity—"plaintiff's ingenuity" being the tangential public policy. In our opinion, this reasoning fails to recognize the flip side of the failure to mitigate defense, i.e., the plaintiff has an obligation to mitigate damages and when the plaintiff does so, the defendant theoretically gets credit for that mitigation through a reduced damages demand. Ultimately, the collateral source rule's impact on a jurisdiction adopting one form of the benefit rule over another is likely inconsequential.

Second, even if your jurisdiction is undecided, there are a few methods to reduce your client's exposure through litigation, including early written discovery to determine how plaintiff utilized the funds owed the taxing authority. Obtain admissions the plaintiff had the use of the funds owed the taxing authority. Question whether the plaintiff invested or safeguarded the funds, and whether the plaintiff realized a benefit from retaining the funds. Also, determine the plaintiff's sophistication. Common sense indicates a more sophisticated plaintiff either obtained a benefit from the funds, or should have given his or her education or experience. Further, the plaintiff's ability to recover interest damages should be affected by how long plaintiff allowed interest owed to the taxing authority to accrue after becoming the aware of the failure to pay taxes.

In conclusion, because an accountant's liability for the failure to file or pay taxes can be difficult to defend and case specific, damages defenses become extremely important to reducing your client's exposure. Although the effect of the benefit rule depends on your jurisdiction, it is a great defense to interest damages that could limit overall exposure. ■

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Doug's defense of professionals includes attorneys, accountants, medical professionals, real estate agents and brokers, insurance agents, and other professionals. In addition, he defends directors and officers in management liability matters, with particular experience in community association defense. Doug also represents clients in commercial litigation, premises liability, ERISA disability, employment practices, and he provides insurance coverage opinions. In addition to his busy practice, Doug serves as CSVL's commercial litigation practice group co-leader. He can be reached at dmackelcan@csvl.com.

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or might allude to my charitable mother, a dedicated educator who encouraged me to never stop learning. They would often refer to my witty brothers or my formidable, gifted best friend, my sister. Particularly of late, mine would say "daughter of a retired Lt. Colonel, a career Marine."

My dad. You may have seen him out and about. He's the fella whispering to the young TSA agent that his multiple metal knee and shoulder replacements will set the alarms blaring. He's the octogenarian snow blowing much younger neighbors' sidewalks, bringing groceries to a sick friend, or dropping everything to care for grandchildren while a family member battles cancer or while a parent spends her days and nights caring for a child in the hospital. He is the man who wakes up early every day and without being asked, offers his support to whomever may need it. "Semper Fidelis"—Always Faithful.

As I know many of you have experienced, at times, life lands body blows, leaving you holding your breath, struggling to focus, exhausted. The mental toughness my father instilled in me through example, coupled with the tremendous support of a dedicated extended family, compassionate friends, and dependable colleagues, allowed me to withstand a few hits of late and persevere. For those of you facing similar life trials, I hope you find the strength and support you need. PLDF's Immediate Past President, Andrew Jones, Managing Director Sandra J. Wulf and PLDF members Andrew Carroll, Patty Beck and Samantha Panny compiled a 50-State Survey focused on wellness; a valuable resource housed on PLDF's website. I encourage anyone who may find that resource helpful to check it out.

And now as we inch closer to spring, I again encourage you to take advantage of the multiple opportunities PLDF offers.

Annual Meeting

Denver September 27th-29th

PLDF's board just wrapped up our virtual retreat, energized and looking forward to planning the annual meeting in picturesque, vibrant Colorado. The planning committee is hard at work developing our CLE/CE programming. We are looking forward to offering timely, exceptional presentations again this year.

Committee Involvement

The PLDF committee chairs and vice chairs value member participation in their calls and discussions and would love to increase their numbers. Please visit the PLDF website and update your profiles, marking all committees you want to learn more about, be actively engaged in, or keep posted on. With ten dynamic committees holding calls throughout the year, the opportunities to be involved and expand your networks are vast.

Webinars

From March through August, we will be continuing to work with the committees to offer free CLEs during this year. If you would like to contribute a topic or offer to speak, please send me a note, or give me a call. We would love to involve as many members as possible in these programs. We also want to encourage everyone to mark your calendars and tune in.

As I did in my first missive, I end on a note of thanks. Thank you to everyone who helped kick-off our 2022-2023 term. Many of our members came together to celebrate and catch-up with one another as we hosted well-attended and merry events in Omaha, Minneapolis, and New York City. Several committees held productive and insightful calls and started to build momentum for the year. A new initiative focused on membership gained traction. We feel lucky to have welcomed twenty-eight (28) new members since September and encourage all of you to reach out to them and connect. We were also thrilled to present our first CLE of the year, *Redefining Winning*. Tremendous thanks to our excellent panelists Allison Wood, Erin Higgins, Lisa Tulk and Louie Castoria for sharing their experience, wisdom and lessons learned. All things considered, an excellent start to our year!

Wishing you the best,
Kathleen

About the **AUTHOR**

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2023 PLDF ANNUAL MEETING
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SAVE THE DATE!
Please make plans to join us September 27-29 for the 2023 PLDF Annual Meeting in Denver. We are excited to offer lively discussions of developments in professional negligence claims and fantastic networking! Learn more at www.PLDF.org.

JOIN US IN THE MILE HIGH CITY!
We cannot wait to get back together with you and have already begun planning for our Annual Meeting. The Annual Meeting will feature exceptional education programs, great tours, a wonderful group dinner, and a fantastic opportunity to mix and mingle with old (and new!) friends and colleagues from across the country. We can't wait to see you there!

ANNUAL MEETING SPONSORSHIP
We are excited to once again offer an opportunity for your firm to participate in this special event. With your firm by our side, we're sure to have a successful event. Please review the Annual Meeting Sponsorship Opportunities available here: https://www.pldf.org/page/AnnualMeetingFirmSponsorship and contact our staff to secure your sponsorship.

EXHIBIT OPPORTUNITY
We will also offer opportunities for vendors to participate in the Annual Meeting in Denver. Please feel free to share this link to our Exhibitor Opportunities: https://www.pldf.org/page/AnnualMeetingVendorSponsorship with the vendors you work with.

Welcome New Members

We are thrilled to welcome the following new members to the Association:

Jennifer Bovitz, *Minnesota Lawyers Mutual Insurance Company,* Minneapolis MN

Ryan Danahey | *Downey & Lenkov LLC* | Chicago IL

Theresa Doeden | *Minnesota Lawyers Mutual Insurance Company* | Minneapolis MN

Anne Ellis | *Minnesota Lawyers Mutual* | Minneapolis MN

Lauren Fackler | *Melick & Porter, LLP* | Boston MA

Benjamin D. Gilchrist | *Bassford Remele* | Minneapolis MN

Randall Goyette | *Baylor Evnen LLP* | Lincoln NE

Kevin Mulcahy | *Flannery Georgalis, LLC* | Detroit MI

Matt Quinlivan | *Deutsch Kerrigan, LLP* | Gulfport MS

Kristen Thompson | *Copeland Stair Valz & Lovell, LLP* | Charleston, SC

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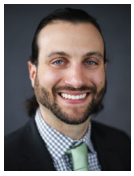

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