

A Newsletter by Budd Larner Rosenbaum Greenberg & Sade, P.C.

New Jersey's Affidavit of Merit Statute: Impact on Insurance Industry

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Insurance professionals need to be aware of the New Jersey Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 et seq. Intended to reduce the filing of frivolous negligence claims, the statute, enacted in 1995, originally required a plaintiff asserting a negligence or malpractice claim against a physician, lawyer, or persons in certain other licensed occupations to provide an expert affidavit supporting the claim within sixty days of the defendant's answer.

The statute was amended effective January 8, 2002, to include "insurance producers" among the licensed occupations for which the affidavit requirement applies.

Persons involved with the insurance industry should be aware of this law, both to ensure that its strictures are satisfied where, for example, an insurer sues an insurance agent or broker for errors or omissions, as well as to be in a position to move for dismissal where a party asserting a claim against an insured within the protection of the statute fails to file the required affidavit.

The Affidavit of Merit Statute provides in pertinent part:

The statutory mandate is plain. A plaintiff asserting a malpractice or negligence claim against a person subject to the statute must provide, within sixty days after the defendant's answer has been filed, the affidavit of an appropriate expert that there exists a reasonable probability that the defendant's conduct fell outside acceptable professional or occupational standards.



In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon finding of a good cause . . . N.J.S.A. 2A:53A-27.

There have been no published cases dealing with insurance brokers. However, the law is sufficiently developed with respect to other licensed profes-

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sionals to understand its application and requirements.

Purpose of Statute

The Affidavit of Merit Statute serves a gatekeeping function, to help ensure that only cases meeting a merit threshold proceed through the litigation process. *Cornblatt v. Barow*, 153 N.J. 218, 242, 708 A.2d 401 (1998); *Hubbard v. Reed*, 331 N.J. Super. 283, 751 A.2d 1055 (App. Div. 2000). See also *Hyman Zamfit & Manard v. Cornell*, 309 N.J. Super. 586, 593 (App. Div. 1998) (legislative intent to curtail filing of frivolous malpractice actions, and to require plaintiffs to make a threshold showing that their claim is meritorious, so that meritless lawsuits are readily identified at the early stages of litigation).

In order to proceed with an action, a plaintiff bears the burden of establishing that its claim possesses the requisite merit level. *Cornblatt*, 153 N.J. at 242.

Where a plaintiff fails to satisfy the merit threshold, its claim is deemed frivolous, thereby making the case ripe for dismissal with prejudice unless "extraordinary circumstances" exist. *Cornblatt*, 153 N.J. at 246. See also *Chamberlain v. Giampapa*, 210 F.3d 154, 163 (3d Cir. 2000) (when no extraordinary circumstances exist, defendant's motion to dismiss for failure to file an affidavit of merit should be granted).

"Insurance Producer" Defined

The statute defines "insurance producer" by reference to New Jersey in-

sure law, N.J.S.A. 17:22A-1 et seq. Under N.J.S.A. 17:22A-2(j), "insurance producer" means an insurance broker, agent, or consultant. The law defines a broker as a person who acts as the representative of an insured or prospective insured in the negotiation, solicitation, or effectuation of insurance contracts, or as a person who places insurance with an insurer that the person does not represent as an agent. N.J.S.A. 17:22A-2(g).

An "insurance agent" is defined as a person authorized in writing by an insurer to act as its agent in the solicitation, negotiation, or effectuation of insurance contracts on its behalf, or to collect insurance premiums. N.J.S.A. 17:22A-2(f).

"Insurance consultant" is defined in N.J.S.A. 17:22A-2(h) to mean a person who, for payment, offers advice or service concerning the benefits, advantages, or disadvantages of any insurance policy that is or could be issued in New Jersey. Bank trust officers, lawyers, and certified public accountants who provide general financial advice or negotiate contracts are excluded from this definition unless a commission or broker's fee is paid for the services.

Application of Statute

The statutory mandate is plain. A plaintiff asserting a malpractice or negligence claim against a person subject to the statute must provide, within sixty days after the defendant's answer has been filed, the affidavit of an appropriate expert that there exists a reasonable probability that the defen-



"Insurance provider means an insurance broker, agent or consultant"

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dant's conduct fell outside acceptable professional or occupational standards.

The failure to provide an expert affidavit has dire consequences. Under N.J.S.A. 2A:53A-29, the failure to serve the affidavit constitutes a failure to state a cause of action, requiring dismissal of the complaint with prejudice. *Cornblatt v. Barow*, 153 N.J. 218, 242, 708 A.2d 401 (1998). The Affidavit of Merit Statute applies to actions pending in federal courts based on diversity jurisdiction. *Chamberlain v. Giampapa*, 210 F.3d at 161.

The requirement of an affidavit can be avoided only if the plaintiff provides a sworn statement showing that: (1) the defendant has failed to provide plaintiff with records or information having a substantial bearing on the preparation of the affidavit; (2) a written request for the records was made by certified mail or personal service; and (3) at least 45 days have elapsed since the defendant received the request. N.J.S.A. 2A:53A-28. The failure to serve the affidavit constitutes a failure to state a cause of action, requiring dismissal of the complaint with prejudice.

Statute Does Not Apply to Contract Claims

A breach of contract claim that does not require proof of deviation from a professional standard of care lies beyond the purview of the Affidavit of Merit Statute. This does not mean that every contract action is outside the statute. *Couri v. Gardner*, 2002 WL 1732928 *8 (N.J.). In *Couri*, the

New Jersey Supreme Court listed three factors to be considered when analyzing whether the statute applies to a particular claim: (1) whether the action is for damages for personal injuries, wrongful death or property damage; (2) whether the action is for malpractice or negligence; and (3) whether the "care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint . . . fell outside acceptable professional or occupation standards or treatment practices." *Id.* at *3.

Statute Not Retroactive

The critical inquiry in determining whether the Affidavit of Merit Statute applies to a claim is whether the conduct underlying the claim took place before the effective date of the statute, rather than whether the claim itself accrued after that date. *Christie v. Jeney*, 167 N.J. 509, 518-520 (2001).

The statute, therefore, can be expected to apply to claims against insurance producers only where the legally operative negligent acts or omissions took place after January 8, 2002, the date on which the law was amended to apply to insurance producers.

Extensions of Time

It is not necessary that an application for a sixty-day extension to file an affidavit of merit under N.J.S.A. 2A:53A-27 be made within the first sixty-day period prescribed by the statute. *Burns v. Belafsky*, 326 N.J. Super. 462, 475-477, 741 A.2d 649 (A.D. 1999), *aff'd* 166 N.J. 466, 766 A.2d 1095 (2001). However, when submit-

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ting an affidavit during the statutory sixty-day extension period, a plaintiff must demonstrate good cause in order to comply with the statute. Burns at 477. "In order to constitute 'excusable neglect' for failing to timely file an affidavit of merit, 'a mistake must be honest such that it is compatible with proper diligence ... failure on the part of an attorney through mere inadvertence or lack of proper diligence is insufficient.'" Id. at 469, quoting Bauman v. Marinaro, 95 N.J. 380, 394, 471 A.2d 395 (1984).

Counterclaims and Cross-Claims

The affidavit of merit requirement applies to counterclaims seeking damages for professional negligence, because a counterclaim is an affirmative effort to enforce a claim for damages. Manganoro Consulting Engineers, Inc. v. Carneys Point Township Sewerage Authority, 344 N.J. Super. 343 (App. Div. 2001). Where professional negligence is raised only as an affirmative defense,

however, no affidavit of merit is required. Id.

An affidavit of merit is not required where a defendant asserts a cross-claim against a co-defendant, Burt v. West Jersey Health Systems, 339 N.J. Super. 296 (App. Div. 2001), at least where the cross-claim relies on the plaintiff's proof of the co-defendant's negligence. Manganoro, 344 N.J. Super. at 348.

Conclusion

Insurance professionals are often in the position of asserting claims against professionals and other persons in occupations within the scope of the Affidavit of Merit Statute as well as in the position of defending claims asserted against such persons. It is important to be aware of the statute in order to avoid losing claims without ever setting foot in the courtroom and to be prepared to move for dismissal in appropriate cases. †

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