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Reducing Frivolous Litigation

Affidavits of Merit in Drug and Medical Device Actions

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Part One of a Two-Part Article

Frivolous lawsuits are one of the most problematic issues facing drug and medical device companies today. Many frivolous lawsuits are either ultimately dismissed for lack of causation after years of litigation and the expenditure of exorbitant sums of money in defense costs, or settled by corporations that are not culpable, but "litigation-weary." This waste of time and resources easily could be avoided if plaintiffs were required to submit an affidavit of merit with respect to product defect and/or causation at the inception of the case.

A statutory affidavit of merit requirement is certainly not a novel concept and is currently employed in several jurisdictions in professional negligence cases with respect to the standard of care. The primary purpose of an affidavit of merit requirement in the professional negligence context is the reduction of frivolous claims. This rationale applies equally to products liability cases and begs the question as to why similar statutes do not exist in the pharmaceutical and medical device products liability context.

Affidavit of Merit Statutes in the Professional Negligence Arena

As part of the tort reform movement of the late 1980s and early 1990s, several jurisdictions enacted legislation in professional negligence actions requiring that plaintiffs make some showing, at the inception of a case, that the case has merit. Such statutes require, *inter alia*, varying types of affidavits of merit.

An affidavit of merit is a submission — typically early in the case — certifying that there is some merit to the case. Some statutes demand that affidavits of merit be filed shortly after the initial pleadings are filed. *See, eg,* N.J.S.A. 2A:53A-27; Ariz. Rev. Stat. Ann. § 12-2602. Others require that the affidavit of merit be filed simultaneously with the complaint. *See, eg,* Ga. Code Ann. § 9-11-9.1; Fla. Stat. Ann. § 766.104; Cal. Civ. Proc. Code § 411.35; N.Y. C.P.L.R. § 3012-a. Additionally, some statutes require that the affidavit be signed by a professional within the same discipline as the defendant, while others require only an attorney's certification that a consultation with such a professional has taken place and the attorney consequently has a good faith belief that the defendant violated the applicable standard of care. *Compare* N.J.S.A. 2A:53A-27; Ariz. Rev. Stat. Ann.§ 12-2602 with Ga. Code Ann. § 9-11-9.1; Fla. Stat. Ann. § 766.104; Cal. Civ. Proc. Code § 411.35; N.Y. C.P.L.R. § 3012-a; Mich. Comp. Laws Ann. §600.2912d.

In New Jersey, for example, the affidavit of merit law, which applies to actions for alleged negligence committed by a licensed professional, requires that the plaintiff provide an affidavit of

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merit within 60 days following the date of filing of the answer to the complaint. Such an affidavit must state 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." As of July 7, the statute was amended to require that the affidavit be made by a person "meeting the requirements of a person who provides expert testimony." *See* Assem. 50, 211th Legislature, (N.J. 2004). The original statute was part of a larger tort reform scheme enacted in 1995. The purpose of this legislation is "to weed out frivolous lawsuits at an early stage and to allow meritorious cases to go forward." *Galik v. Clara Maass Med. Ctr.*, 771 A.2d 1141, 1147 (N.J. 2001). *See generally* Peter Verniero, Chief Counsel to the Governor, Report to the Governor on the Subject of Tort Reform (Sept. 13, 1994).

Georgia has a similar expert affidavit requirement in professional malpractice actions. The Georgia statute requires that, with the filing of the complaint, an affidavit by a competent expert also be filed setting forth "at least one negligent act or omission claimed to exist and the factual basis for each such claim." Ga. Code Ann. § 9-11-9.1.

Florida limits its affidavit of merit requirement to medical negligence cases, but is even more stringent than New Jersey and Georgia in its provisions. Specifically, Florida requires that, before the lawsuit is filed, the plaintiff must obtain an expert report in which the expert opines that there is evidence of medical negligence. While this report is neither annexed to the initial pleading nor discoverable, the attorney obtaining the report must certify that he or she has made "a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the plaintiff." Fla. Stat. Ann. § 766.104. Other examples of jurisdictions with affidavit of merit requirements in professional negligence actions include Arizona, California, Michigan and New York. These statutes, like the others discussed, were primarily enacted as tort reform measures to reduce frivolous litigation. *See, eg, Guinn v. Dotson*, 28 Cal. Rptr.2d 409, 414 (App. 4. Dist. 1994) ("Section 411.35 has the purpose of discouraging frivolous professional negligence suits."); *Young v. Sellers*, 657 N.W.2d 555, 558 (Mich. 2002) ("The purpose of M.C.L. § 600.2912d is to deter frivolous medical malpractice claims.").

In next month's newsletter, we will discuss why affidavits of merit should be required in drug and medical device litigations and what obstacles may be hindering legislators from enacting such measures.