

New Developments in Health Law - Some Surprises in 2006

By Marlene S. Garvis

Professional Malpractice - Will There Be A New Cause Of Action?

Until 2005, hospitals in Minnesota rested secure in the knowledge that the physicians who had privileges would, if sued, accept the entire burden of exposure to malpractice liability.

In cases of professional malpractice, trial courts have traditionally denied *negligent credentialing*¹ claims against hospitals. And the issue has never been considered by the Minnesota appellate courts. That landscape is now changing, however. For the first time, the Minnesota Court of Appeals will consider whether this state “recognizes a common law cause of action of negligent credentialing/privileging of a physician against a hospital or other review organization.” This is all happening because on June 29, 2005, the Honorable Gerald Seibel, Wilkin County District Court Judge, held that “Minnesota will and does recognize, at common law, a professional tort against hospitals and review organizations for negligent credentialing.” *Larson v. Wasemiller*, 2005 WL 2000972, slip op. at 1, 3 (Minn. Dist. Ct. 06/29/2005).

The case before Judge Seibel arose out of Mary Larson’s gastric bypass surgery performed by Dr. James P. Wasemiller at St. Francis Medical Center, Breckinridge, Minnesota, in 2002. Larson subsequently brought a medical malpractice action against Dr. Wasemiller, his brother, Dr. Paul Wasemiller, and their clinic, Dakota Clinic, Ltd., for claimed serious injuries that she suffered as a result of the surgery. In the course of discovery, Larson’s attorneys learned that Dr. James Wasemiller had a long history of educational, training, and practice deficiencies predating his surgery on Larson that should have prompted St. Francis to restrict his surgery privileges and not allow him to perform complex gastric bypass procedures.

In November 2004, Judge Seibel granted Larson’s motion to amend her complaint to add claims against a new defendant, St. Francis Medical Center, for negligent credentialing and negligence in a joint venture. *Larson v. Wasemiller*, 2004 WL 2776402, slip op. at 1 (Minn. Dist. Ct. 11/17/2004). St. Francis moved to dismiss the lawsuit, on the basis that Larson had failed to state a claim against it because Minnesota did not recognize a cause of action for either *negligent credentialing* or *negligent privileging* against a hospital. Judge Seibel disagreed, denied the motion, and determined, based on his analysis of decisions from other jurisdictions, that Minnesota does recognize a

cause of action for *negligent credentialing/privileging* against hospitals and review organizations.

In his decision, Judge Seibel expressed the view that hospitals owe a legal duty to their patients to exercise reasonable care in approving privileges to physicians to treat patients and the procedures that they can perform at their facilities. To expedite St. Francis’ appeal, in his order Judge Seibel certified the question of negligent credentialing as “important and doubtful” to the Minnesota Court of Appeals. The appeal is in process, and we have yet to hear from the appellate court—stay tuned!²

¹ Credentialing is the process by which a physician is allowed privileges to practice at a hospital.

² More than 30 states recognize that a hospital has a legal duty to exercise reasonable care in granting practice privileges to physicians. See *Kadlec Medical Center v. Lakeview Anesthesia Associates* (E.D. La. May 26, 2006) (\$4.1 million judgment for negligent credentialing).

Health Practitioners Gain Special Immunity From Civil Liability.

Newly enacted legislation in Minnesota will protect physicians, physician assistants, certified nurse practitioners, and psychiatric/mental health clinical nurse specialists [practitioners] from civil liability for the conduct of a former prisoner or civilly committed person. The new law provides protection “for conduct of a former prisoner or civilly committed person that is related to the use or nonuse of medicines prescribed by the [practitioners] . . . before the prisoner’s or committed person’s release.”¹ This limitation on liability applies only if the prescription was written by the practitioner “in good faith, within the scope of lawful practice, and with reasonable care,”² and only during the period of time from the release from confinement until the former prisoner or committed person is scheduled to receive new medicines under a new prescription written after the release. Only time will tell as to how effective this law will be to limit the liability of the practitioners.

¹ Minn. Stat. § 147.231, a new law added under chapter 147 (enacted in 2006 Regular Legislative Session). Its language was applied to amend Minn. Stat. § 604A.31 as well.

² Id. at (b).

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Comments or inquiries may be directed to Shannon Banaszewski.

2006 Legislative Update

By Jason Koch and Peter Wanning

The 2006 Minnesota Legislative Session came and went with much of the focus on sports stadiums and spending. In addition to that well publicized debate, there were several laws passed that are of significant interest to the insurance industry. The following is a brief overview of substantial changes in Minnesota law and other legislation pertinent to the insurance industry.

“Camacho Legislation”

Considering the volume of claims with regard to residential construction defects, from the insurance industry standpoint, probably the most significant piece of legislation passed in 2006 was in response to the Minnesota Supreme Court’s decision in *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49 (Minn. 2005).

As the **JLO legal • ease Spring 2006** newsletter detailed, in *Camacho*, the Minnesota Supreme Court held that a homeowner may not bring an action against a builder more than two years after the builder voluntarily dissolved pursuant to Minn. Stat. §302A.727. The Court also extended the protection of the two-year statute of limitations to the dissolved corporations’ insurers.

In response to this decision, the Minnesota Legislature revised state statutes to protect consumers from being negatively affected by the protection afforded to voluntarily dissolved corporations and their insurers under *Camacho*.

On May 16, 2006, Governor Pawlenty signed into law Minnesota Senate File 1287. Enacted in response to *Camacho*, Senate File 1287 will protect consumers from businesses seeking protection through dissolution. Specifically, it amended the following Minnesota statutes:

(1) Minn. Stat. §60A.08, subd. 6, was amended to protect consumers from insurers refusing to pay for their insureds’ liability under policies simply because of the insured’s dissolution. In pertinent part, the amendment to the “Bankruptcy, insolvency, or dissolution clause” of §60A.08 states, “The bankruptcy, insolvency, or dissolution of the insured shall not relieve the insurer of any of its obligations under this policy....”

(2) The Legislature sought to further secure consumers’ warranty rights provided under Minn. Stat. §302A.781, Subdivision 4 by amending it to read: “The statutory warranties provided under section 327A.02 are not affected by a dissolution under this chapter.” Additionally, the Legislature added the same language to Minn. Stat. §322B.863.

(3) Finally, Minn. Stat. §327A.02 was amended by

adding Subdivision 2a, which states: “The statutory warranties provided in this section are not affected by the dissolution of a vendor or home improvement contractor that is a corporation or limited liability company.”

Clearly, from Senate File 1287’s amendments to the aforementioned Minnesota Statutes, the Legislature made a concerted effort to remedy the injustice it felt consumers would experience as a result of the Minnesota Supreme Court’s decision in *Camacho*. Therefore, it seems Senate File 1287 will render the *Camacho* decision obsolete.

Eminent Domain

In response to the controversial United States Supreme Court decision in *Kelo v. City of New London, Connecticut*, 125 S.Ct. 2655, (2005), concerning the City of New London’s power of eminent domain over certain property, the Minnesota Legislature enacted a law to protect property owners. In *Kelo*, the City of New London’s taking of private property for the economic development of certain property was deemed a proper “public use,” and therefore constitutional.

Minnesota Senate File 2750 restricts the ability to redevelop blighted or contaminated properties. Additionally, the legislation is likely to make the eminent domain process more costly for the government entity performing the taking or condemnation. The law provides for the award of reasonable attorney fees to the challenging individual(s) or entities if the judgment or award for damages, as determined at any level in the eminent domain process, is more than 40% greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition. Further, the legislation is likely to increase the costs of eminent domain actions because it also requires compensation for removal of a legal nonconforming use under certain circumstances;

and compensation to businesses or trades for loss of going concern if that business or trade is destroyed by the compensation or taking.

This legislation will most certainly impact and restrict cities, municipalities and other government entities’ ability to “take” or condemn blighted or contaminated property and also make the entire exercise of eminent domain more expensive.

Sports Legislation

After years of debate, the legislature approved funding for a new major league baseball stadium. The new stadium has a construction budget of \$390 million. Under the new legislation, the Minnesota Twins must contribute \$130 million toward construction costs, less a proportionate share of any amount by which the actual costs are less than the budgeted amount. Additionally, the Twins are responsible for all cost overruns that exceed the \$390 million budget. The bill requires the Twins to play all regular-season and post-season home games at the new ball park for a period of at least 30 years from the date of ball park completion. Under this new legislation, the Metropolitan Sports Facility Commission must transfer \$5 million of the proceeds from the sale of the Metrodome to Hennepin County to offset expenditures for grants for capital improvement reserves for the new ballpark. The remainder of the net sales proceeds from the sale of the Metrodome will be distributed to a football stadium account to be used to pay debt service on bonds issued to pay for the construction of a football stadium for the Minnesota Vikings.

As part of the stadium legislation, representatives of Anoka County and the Minnesota Vikings are required to negotiate an agreement for the development and financing of a retractable roof stadium for the Minnesota Vikings, to be located

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NEWS FLASH - Construction Defect Statute of Repose

On June 29, 2006, the Minnesota Supreme Court issued a significant decision concerning the statute of repose for contribution and indemnity claims of general contractors in *Weston v. McWilliams & Assoc., Inc.*, ___ N.W. 2d ___, 2006 WL 1770606, (Minn. 2006). In *Weston*, the general contractor’s contribution and indemnity claims against the subcontractors were extinguished at the district court level via summary judgment because the general contractor failed to bring its claims against the subcontractors within ten years of the substantial completion of the construction of the subject residence. The Minnesota Supreme Court reversed the Minnesota Court of Appeals and reinstated the district court’s dismissal of the general contractor’s contribution and indemnity claim. The Court held that Minn. Stat. §541.051, subd. 1(a) bars a contribution and indemnity action by a general contractor against a subcontractor or materials supplier if the contribution and/or indemnity action did not accrue and was not brought within ten years after substantial completion of the construction. Additionally, the Court also held that the application of the statute of repose to contribution and indemnity claims that did not accrue prior to the expiration of the ten-year statute of repose does not violate the due process of remedies clauses of the Minnesota Constitution. For a more detailed analysis of the facts and law surrounding this important case and its affect on the insurance industry, please visit our website at www.jlolaw.com.

Congratulations to Tom Cummings

In *Meyers v. K Byte-Hibbing Manufacturing*, 713 N.W.2d 41 (Minn. 2006), the Supreme Court of Minnesota summarily affirmed a reversal and modification obtained by **Thomas L. Cummings** before the Workers' Compensation Court of Appeals. Mr. Cummings succeeded in substantially reducing a compensation judge's award of penalties against his client for failure to issue timely payments following a workers' compensation award.

Congratulations to Jim Golembeck and Elisa Hatlevig

On June 27, 2006, in *Nelson v. Short-Elliott-Hendrickson, Inc. and City of Stillwater*, ___N.W.2d ___, 2006 WL 1738230 (Minn. App. 2006), the Minnesota Court of Appeals affirmed the lower court's summary judgment dismissal of plaintiff's claims against the City of Stillwater based on *res judicata*. In a published decision, the court also conclusively held that sedimentation ponds and its structures were improvements to real property under Minn. Stat. §541.051.

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in the city of Blaine. The legislation requires a report on the agreement to be presented to the legislature by January 15, 2007.

The state legislature also approved funding for a new University of Minnesota football stadium to be constructed on the East Bank campus of the University of Minnesota. The bill states that \$110,750,000 of stadium costs will come from pledges, gifts, sponsorships, and other non-state general fund sources. The bill further provides that the state will contribute up to \$10,250,000 annually for stadium costs.

Hockey was not abandoned in the midst of all the aforementioned stadium legislation. The legislature also approved a .20 cent tax per taxable ton on taconite and iron sulfides to be paid to the City of Eveleth for distribution in 2007 through 2011 to be used for the support of the United States Hockey Hall of Fame. The City of Eveleth will only receive this distribution if it continues to operate the Hockey Hall of Fame and receives donations for the support of the Hockey Hall of Fame in an amount at least equal to the amount of the distribution.

Spending

The 2006 legislature approved total capital improvement appropriations of \$999,980,000. The largest portions of that amount went to the University of Minnesota (\$115,733,000); Minnesota State Colleges and Universities (\$191,430,000); natural resources (\$100,704,000); transportation (\$143,000,000); and employment and economic development (\$160,642,000).

Workers' Compensation Appeals

The legislature modified the procedure for workers' compensation appeals. A party may now file by facsimile a copy of the Notice of Appeal with the chief administrative law judge and the commissioner. Additionally, if the \$25 filing fee is not received by the Office of

Administrative Hearings within 10 days after the appeal period, the appeal will not be timely filed.

Limits on Tort Claims Against Cities/Municipalities

The legislature amended the liability limits on tort claims brought against the state or a municipality. For claims arising after January 1, 2008, the liability limit will be \$400,000, as opposed to the current limit of \$300,000. The liability limit will increase to \$500,000 for claims arising on or after July 1, 2009. In addition, the limit for any number of claims arising out of a single occurrence will increase from \$1 million to \$1,200,000 for claims arising out of a single occurrence after January 1, 2008. The liability limit for multiple claims arising out of a single occurrence will increase to \$1,500,000 for claims arising on or after July 1, 2009. Finally, Minn. Stat. §471.59 was amended to protect a governmental unit participating in a joint venture or joint enterprise from being liable for the acts or omissions of another governmental unit participating in the joint venture or joint enterprise.

Child Care Training Requirements

Child care training requirements in Minn. Stat. §245A were modified to require more training for child care centers. The new legislation primarily requires more training in early childhood development and first aid.

Identity Theft Legislation

A new bill was enacted that will allow a consumer to place a security freeze on their consumer report by making a request to the consumer reporting agency. The security freeze will prohibit the consumer reporting agency from releasing the consumer report or any information obtained in it, in connection with the extension of credit or the opening of a new account, without the express authorization of the consumer. The reporting agency must place a freeze on the consumer's report within three business days after receiving a request. In addition, the

reporting agency must then send a written confirmation of the security freeze to the consumer and provide the consumer with a personal identification number or password to be used by the consumer when providing authorization for the release of the consumer's report. In addition, the reporting agency must also disclose the process of placing and temporarily lifting a freeze, including the process for allowing access to information from the consumer's report for a specific party or period of time while the freeze is in place.

In an effort to protect minors' credit, the legislature also passed a new law prohibiting a creditor from knowingly offering to provide credit to a minor except at the request of the minor's parent or guardian. New legislation also states that a credit card issuer that mails an offer of solicitation to receive a credit card and, in response, receives a completed application for a credit card that lists an address that is different from the address on the offer of solicitation, must verify the change of address before issuing the credit card.

Finally, the legislature requested that the Minnesota Supreme Court "consider amending its Rule of Evidence to permit admission of business records, at least in civil and criminal cases alleging identity theft, based upon an authenticating affidavit of the custodian of the business records, rather than requiring the in-person authentication testimony of the custodian of the business records."

Application

The insurance industry must wait to observe how the foregoing laws will be applied and interpreted by Minnesota Courts. •

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

Coming in the Fall 2006 Issue...
Municipal Law