MARTIN CLEARWATER & BELL LLP

DEFENSE PRACTICE UPDATE

SEPTEMBER 2015

Is a Discovery Statute of Limitations on the Horizon?

BY: THOMAS A. MOBILIA AND DANIEL L. FREIDLIN

INTRODUCTION

Every state has its own statute of limitations applicable to medical malpractice actions restricting the time by which a plaintiff must file a lawsuit. The deadline imposed provides certainty to potential defendant health care providers, as well as their insurance carriers, that after a set period of time, it is unlikely that they shall be sued for allegedly negligent care rendered to a patient.

The New York statute of limitations for medical malpractice cases, codified under Civil Practice Law and Rules ("CPLR") § 214-a, provides that "an action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of…" In other words, with the exception of cases involving minor children, "foreign objects" or "continuous treatment," a prospective plaintiff has 2½ half years from the date of care to file a lawsuit against a defendant-physician. The current statute of limitations is based on the longstanding principle that a cause of action for negligence arises at the time of the alleged wrongdoing. The law in New York, however, *may* be undergoing a substantial transformation with the potential for increased exposure to healthcare providers and insurers.

LEGISLATIVE HISTORY

In 1975, New York CPLR § 214-a was amended to change the medical malpractice statute of limitations from 3 years to 2½ years. The goal of *shortening* the statute of limitations at that time was to place "reasonable restrictions on the statute of limitations, by placing reasonable limits on the application of the doctrine of informed consent and by revising court procedures…would assure more prompt and fair disposition of medical malpractice actions and thereby reduce insurance rates"[1].

PROPOSED "DISCOVERY RULE"

With medical malpractice premiums and verdicts at or near all-time highs in New York State, lawmakers have proposed extending the statute of limitations through the implementation of a "discovery rule" governing when the time to bring a lawsuit would begin to run. The contemplated change is in response to public outcry over the dismissal of a case brought by cancer victim, Lavern Wilkinson, who learned that her physicians failed to diagnose a lung nodule on chest x-ray after the statute of limitations had expired. As such, Ms. Wilkinson was never in a position to bring a lawsuit under New York State law. New York legislators have suggested that the current statute of limitations imposes undue hardship on potential plaintiffs who may not discover that their injury was due to malpractice until many years later.

Currently, New York is one of only six states whose medical malpractice statute of limitations commences with the date the alleged malpractice occurred, as opposed to the date the patient discovers the claimed negli-

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1 Governor's Memoranda, Medical Malpractice, *reprinted in* [1975 N.Y. Legis. Annt. 225].

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Enacting the proposed "discovery rule" would result in lawsuits being brought years, up to 10 or more, after the treatment at issue was rendered. With the passage of time, memories of the events fade, witnesses become unavailable, and records are lost or destroyed.

gence. The statute of limitations in jurisdictions with "discovery rules" begins to run when the patient knew or reasonably should have known that his or her injury may be the result of medical negligence. While it is true that most states have some form of "discovery rule," the amendment being considered in Albany would result in New York having the most generous and liberal medical malpractice statute of limitations in the entire country.[2] The proposed "discovery rule" would "amend the statute of limitations for medical, dental or podiatric malpractice actions to include a discovery of injury rule, allowing the current two and half year statute of limitations to run from the date an injured patient discovers, or should have discovered, that their injury was caused by malpractice," albeit for no greater than 10 years from the date of alleged malpractice or from the last date of treatment where there is continuous treatment.[3] In other words, the amendment would extend the statute of limitations to 2½ years from the time the prospective plaintiff learned that his or her injury was caused by alleged malpractice as opposed to when the treatment was rendered. Significantly, in cases involving the continuous treatment doctrine, the statute of limitations would be tolled, potentially for years, until the last date of treatment where a continuous course of treatment exists.

Current Legislative Status

On June 10, 2015, Bill A00285, also known as "Lavern's Law," was passed by an overwhelming margin in the Assembly.[4] A similar concurrent Bill drafted in the Senate, however, did not reach a vote before the 2015 legislative session ended. The Bill was held up in the Senate due to concerns regarding the substantial impact the proposed extension of the statute of limitations could have on health care costs. Indeed, most states that have passed a "discovery rule" have also implemented health care reform, such as limitations ("caps") on non-economic damages, i.e. pain and suffering awards, to contain the increased litigation and health care costs that would accompany the statute of limitations extension. While the Senate Bill was not voted on during this session, it is expected to be considered again when the legislature reconvenes early next year.

Potential Impact of CPLR § 214-a Amendment

Enacting the proposed "discovery rule" would result in lawsuits being brought years, up to 10 or more, after the treatment at issue was rendered. With the passage of time, memories of the events fade, witnesses become unavailable, and records are lost or destroyed. The move towards electronic records may minimize the potential for lost or discarded medical records, but ancillary evidence, such as older non-digital films or software programs used to interpret imaging, may not be available years later. Given the potential of having to defend a case when it may be impossible to recall the rationale chosen for the course of treatment recommended, physicians would be wise to make sure that their contemporaneous documentation is sufficiently detailed to allow them to reconstruct their medical judgments years later. As New York State law only requires medical records to be maintained for 6 years from the last date of treatment, a lengthier statute of limitations may be problematic as the documentation of that treatment rendered may no longer be available.[5] As such, it would be advisable to maintain such records for at least 10 years from the last date of treatment.[6]

Litigation costs are very likely to rise with the enactment of a "discovery rule" secondary to the increased number of medical malpractice lawsuits that will be filed. Plaintiffs, whose claims under the current law would be barred by the statute of limitations, would be able to argue under the proposed amendment that they only recently discovered that alleged malpractice had occurred. Moreover, litigating the issue as to when the plaintiff actually knew that the claimed malpractice occurred, and when the proverbial "reasonable person" should have known that it occurred, will further

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2 Currently, Washington has an 8-year "discovery rule," which is the most forgiving for medical malpractice actions. RCW 4.16.080(2). Most other states have much shorter limitation periods, i.e. Connecticut C.G.S.A. § 52-584 provides that an action shall be brought within 2 years from the date the injury is first sustained or discovered but no greater than 3 years from the date of alleged omission; New Jersey has a 2-year statute of limitations from the date the injury is discovered, but not to exceed four years. C.G.S.A. § 52-584; *see also, Lopez v. Swyer, 300 A.2d 563 (N.J. 1973).*

3 *See,* Memo to New York State Bill A00285 (*http://assembly.state.ny.us/leg/?default_fld=&bn=A00285*)

4 The Assembly Bill passed by a margin of 120-25.

5 New York State Education Law § 6530(32). Records related to obstetrical treatment or minor children must be maintained until one year after the child's eighteenth birthday.

6 The current law in New York State provides that, with the exception of minors, medical records must be maintained for six years from the last date of treatment.

New Regulatory and Legal Challenges Face New York Employers in 2015 and Beyond

BY: GREGORY B. REILLY AND ADAM G. GUTTELL

The first half of 2015 brought new legal requirements for New York employers. This article showcases the changes to the New York employment landscape over the past six months.

Decreased Paperwork, but Increased Penalties

The year started off with welcome news that most New York employers would no longer need to provide employees with the annual wage notice. On December 29, 2014, Governor Cuomo signed an amendment to the Wage Theft Prevention Act (WTPA), which repealed the annual notice. Prior to the recent amendment, every year between January 1 and February 1, private sector employers in New York had to provide annual wage notices to each of their employees. The employers also were required to obtain and retain yearly signed acknowledgements from each employee. Providing the notice and obtaining the acknowledgements was burdensome and costly to many employers, and it served no practical purpose because employees usually received regular paystubs containing similar information. As a result of the amendment, employers still must provide the wage notice and obtain a signed acknowledgement from all newly hired employees, but the annual notice requirement has been repealed for most private sector employers, including those in the health care industry.

Although this change eliminated unnecessary paperwork for employers, the new law increased the penalties for failure to comply and provides some new avenues for redress. The maximum penalty for failure to timely provide a new hire's wage information statement was increased from $2,500 to $5,000. The penalty for failure to provide the correct information on an employee's paystub now can result in $250 per violation as opposed to the prior $100 per violation penalty. Further, the ten largest members of an LLC can now be held liable for unpaid "wages and salaries," which is similar to the existing law that permits personal liability for unpaid "wages and salaries" for the ten largest shareholders of a business corporation.

Minimum Wage on The Rise for Fast Food Workers

On July 22, 2015, New York's Fast Food Wage Board approved a proposal to raise the minimum wage for fast food workers in New York to $15 an hour. The Fast Food Wage Board was empaneled in May 2015 by State Labor Commissioner Musolino, at the behest of Governor Cuomo, to investigate and make recommendations for an increase in the minimum wage in the fast food industry. The three-member Wage Board's recommendation was to impose a $15/hour minimum wage rate to be phased in through periodic increments to take effect in New York City by Dec. 31, 2018, and the rest of the State by July 1, 2021. Currently, the minimum wage for all New York State employees is $8.75/hour. If the Fast Food Wage Board's proposal is implemented (which is expected), then for New York City fast food employees the minimum wage would increase to $10.50 on Dec. 31, 2015, $12.00 on Dec. 31, 2016, $13.50 on Dec. 31, 2017, and $15.00 on Dec. 31, 2018. It is anticipated that in the near future there will be political pressure and likely legislation to raise the minimum wage for workers in other New York industries.

NYC Hiring Practices Curtailed – "Ban the Box"

Following the lead of other large cities (and some states), New York City has implemented a "ban the box" law restricting the circumstances when employers can appropriately request information about a job applicant's prior criminal arrests or convictions.

On June 29, 2015, New York City Mayor, Bill De Blasio, signed into law the Fair Chance Act, which places restrictions on employers' ability to ask job applicants about prior criminal convictions and arrest records. Under the new law, most private-sector employers in New York City cannot inquire about a job applicant's criminal background unless the applicant is first provided a conditional offer of employment. Only after a conditional offer is made can covered employers then ask applicants about their criminal history and commence a criminal background check. If, thereafter, the employer decides to take adverse action based on the applicant's criminal record, the employer must provide a written explanation of the decision and hold the position open for three days to allow the applicant to respond. The Act does not apply to positions where any law requires criminal background checks or where as a legal matter criminal convictions serve as a bar to employment. In addition, the law exempts certain law enforcement positions, as well as a limited number of public trust positions. One of the more immediate and tangible effects of this 'ban the box' legislation, is that most employers should remove from job applications any criminal

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New Regulatory and Legal New York Employers in 2015

conviction questions where an applicant is required to check a box on the application if the applicant has a prior criminal conviction. The Act is set to take effect on October 27, 2015.

NYC Hiring Practices Curtailed – Credit Checks

On May 6, 2015, New York City Mayor, Bill De Blasio, signed into law a Bill (261-A) that prohibits employers from using credit checks for most job applicants, citing the practice's tendency to have a disproportionate impact on minorities and low-income individuals. The new legislation makes it an unlawful discriminatory practice for employers, labor unions, and employment agencies, except in limited circumstances, to use an individual's consumer credit history in making employment decisions. The law does exempt, however, a number of employment positions, including, but not limited to, certain law enforcement and security positions, those privy to certain trade secrets or other confidential or sensitive information, and those with control over funds valued at $10,000 or more. The law took effect on September 3, 2015.

NYC Employers Under Additional Scrutiny

On April 20, 2015, Mayor De Blasio signed legislation (Bill 690-A) establishing "an employment discrimination testing program." The law involves the use of two individual testers, with similar qualifications who will test for discrimination by applying for the same job with the same employer. Testing is to commence on or before October 1, 2015. Any actual or perceived incidents of discrimination revealed as a result of the "testing" will be referred to the Commission's law enforcement bureau. Although employers must always adopt practices to prevent and prohibit discrimination in hiring and employment, employers located in New York City may now be subjected to testing by simulated applicants without notice or warning.

Leave Practices Expanded

On February 25, 2015, the Department of Labor (DOL) issued a final rule expanding the federal regulatory definition of spouse under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601. The DOL regulatory action follows the 2013 U.S. Supreme Court decision in *United States v. Windsor*, which held Section 3 of the Defense of Marriage Act unconstitutional when it defined a "spouse" as a person of the opposite sex who is a husband or wife. The recent expansion of the definition of "spouse" allows eligible employees in legal same-sex marriages to take FMLA leave to care for their spouse or family member, regardless of where they reside. The effective date for this final rule was March 27, 2015. There are two major features of the DOL's final rule. First, the DOL has moved from a "state of residence" rule to a "place of celebration" rule. In other words, the final rule changes the regulatory definition of "spouse" to look to the law of the place in which the marriage was entered into, as opposed to the law of the state in which the employee resides. The new "place of celebration" rule guarantees all legally married couples (including opposite sex, same-sex, and common law couples) federal family leave rights regardless of where they live. Second, the definition of "spouse" now expressly includes individuals in lawfully recognized same-sex marriages, common-law marriages, and marriages that were validly entered outside the United States, as long as they could have been entered into in at least one state. To be compliant, employers should consider revising their FMLA policies and their internal employee/personnel forms to reflect the new regulatory definition of "spouse" and to make sure that they are complying with the new FMLA regulations effective March 27, 2015.

On the Horizon

With the Obama administration, the New York City Council and Mayor De Blasio advancing progressive agendas, employers can expect to see new legislation and executive orders affecting personnel practices.

In June, the White House announced that it would seek a rule change that would increase the threshold to qualify for exempt status from $23,660 to $50,440 per year. The rule change, which would be implemented by the Department of Labor, would make employees earning less than $50,440 (who are otherwise considered exempt from overtime laws based on criteria other than wages) eligible for overtime pay for any hours work in excess of 40 hours per week. This change promises to have a substantial impact on employers who treat certain employees making between $23,660 and $50,440 as exempt. Not only would employers be required to pay such employees overtime pay, but employers would need to begin tracking the hours of such employees to

Challenges Face and Beyond *Continued from page 3*

comply with wage and hour laws, as well as maintain records of all hours worked in order to defend against wage and hour claims. This change will have a far reaching impact, especially in areas outside of urban centers where wages generally are lower.

Further, on September 7, 2015, the White House issued an executive order requiring federal contractors to provide paid sick leave to their employees. New York City and other municipalities have already adopted some form of mandatory paid sick leave. It would not be surprising to see similar legislation move through Congress or the New York State legislature in 2015 or 2016.

For appropriate guidance on how to properly plan for and address these new laws and regulatory requirements, you may speak with one of the attorneys in Martin Clearwater & Bell LLP's Employment and Labor Practice Group.

Gregory B. Reilly is a Partner and the Head of Martin Clearwater & Bell LLP's Employment & Labor Practice Group. Greg is an experienced litigator and counselor who has been practicing in the employment and labor law field for over 20 years in a variety of areas including healthcare, hospitality, staffing and retail.

Adam G. Guttell is a Partner in Martin Clearwater & Bell LLP's Employment & Labor Practice Group. He has extensive experience advising employers of all sizes in diverse industries including health care, finance, manufacturing, transportation and hospitality. As a member of MCB's Employment & Labor Practice Group, he represents clients in employment-related issues ranging from discrimination and harassment to violations of all state and federal fair employment law.

REMINDER

MCB's Fall CLE Webinar

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Presented by:

John L.A. Lyddane, Michael A. Sonkin and Nancy J. Block

Thursday, October 22, 2015

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Medicare/Medicaid Liens and Settlements: Disposing of Lawsuits without Strings Attached

By: Barbara D. Goldberg and Iryna S. Krauchanka

As the Medicare/Medicaid lien laws evolved in the last ten years, settlements of personal injury lawsuits have increasingly provoked dichotomous feelings of relief and anxiety. Generally favored by all involved, an amicable resolution is a desirable outcome: everyone prefers to limit the attorneys' fees and expenses; plaintiffs and their counsel seek expeditious recovery; and defendants, their counsel, and their insurance providers are eager to put the matter to rest once and for all. Indeed, for defendants who enter into a settlement, defined as "an agreement *ending* a dispute," the finality of the resolution is key.[1] The fairly recent Medicare/Medicaid law developments, however, have shaken that concept.

It is now well-known that Section 111 of the Medicare & Medicaid SCHIP Extension Act of 2007 requires the payers (most often defendants' insurance providers) to collect social security numbers from the plaintiffs to whom they issue a settlement payment.[2] The payers must then submit the social security number to the Centers for Medicare & Medicaid Services ("CMS") to determine whether CMS has any medical lien that can be reimbursed with settlement proceeds.[3] The stakes are increased by the Code of Federal Regulations, section 411.24, which empowers CMS with "a direct right of action to recover from any primary payer."[4] The primary payer may be required to reimburse Medicare for the full amount of the lien, despite having issued payment to the plaintiff. It can also face a penalty of $1,000.00 per day for noncompliance.[5]

Having acquired this additional burden, how can defendants ensure that plaintiffs play their part by supplying all of the requisite information before payment becomes due? The section of the Civil Practice Law and Rules ("CPLR") pertaining to payment of settlement proceeds offers some guidance, but because it predates the new regulations and does not account for the new requirements, it does not have all the answers.

Specifically, section 5003-a(a) provides that payment of settlement will be made to plaintiff within 21 days of tender of "a duly executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff."[6] Failure to pay permits plaintiff to enter judgment, without further notice, for the settlement amount, together with costs, disbursements, and interest.[7] The statutory language, however, does not explicitly mention CMS liens and the additional information owed to the payer to protect itself from future litigation and having to pay twice. We thus turn to case law.

New York courts consistently hold that because CMS has a right of direct recovery against defendant, it is incumbent upon plaintiff to include a provision releasing and holding defendant harmless from a potential Medicare/Medicaid lien in the general release and/or stipulation of settlement.[8] Alternatively, the release can provide for satisfaction of the lien from the settlement proceeds.[9] Failure to include such language renders the closing documents defective and precludes plaintiff from entering a judgment with interest.

At first glance it may appear that the law affords defendants sufficient protection. In reality, however, if there remain uncertainties about whether CMS has a right to a portion of the recovery or whether plaintiff will in fact satisfy the lien, the agreement to "release and indemnify" does little to achieve the crucial element of finality. If it remains unclear whether CMS can assert a lien against the settlement, it is hardly comforting to know that should CMS bring a lawsuit against the payer at some point in the future, the payer can implead plaintiff and his counsel, incur additional expenses in defending the litigation and prosecuting a third-party action, and potentially be forced to tender a second payment to CMS but be unable to get reimbursement from a judgment-proof third-party. The question then becomes, does the law actually require plaintiffs to supply the Medicare/Medicaid information that defendants are statutorily required to obtain in order to ensure that the matter is put to rest for good?

On a very basic level, the answer is yes. Earlier this year, the Appellate Division, First Department, held that plaintiff did not satisfy his obligations under CPLR section 5003-a "since he failed to provide defendant with the information relating to his Medicare status that defendant requires to comply with its reporting obligations....."[10] However, this decision did not shed any light on what specific information is required and the extent of same. What would happen, for example, if plaintiff has supplied the minimal information to contact CMS for lien information, but CMS requests

1 *Settlement, Black's Law Dictionary,* (3d ed. 2006)(emphasis supplied)
2 *See*, 42 U.S.C. § 1395y
3 *See*, 42 U.S.C. § 2651
4 *See,* 42 C.F.R. § 411.24(e)
5 *See, Id.*
6 CPLR 5003-a(a)
7 CPLR 5003-a(e)
8 *Liss v. Brigham Park Cooperative Apartments Sec. No. 3, Inc.*, 264 A.D.2d 717 (2d Dept. 1999); *Torres v. Hirsch Park LLC*, 91 A.D.3d 942 (2d Dept. 2012)
9 *Torres, supra; Tencza v. St. Elizabeth Medical Center*, 87 A.D.3d 1375 (4th Dept. 2011)
10 *Torres v. Visto Realty Corp.*, 127 A.D.3d 545 (1st Dept. 2015)

additional submissions in order to issue the final "no lien" letter? Or if plaintiff acknowledged a lien and provided that a portion of the settlement will be used for its satisfaction, but refused to provide a CMS verification letter? Under such circumstances, with the appropriate language in the release and/or stipulation of settlement, plaintiff may demand payment, arguing full compliance with the prerequisites, while the payer is unsure whether he/she has fully complied with the statutory requirements and whether he/she risks facing penalties and future litigation.

There have been instances where the judiciary went the extra mile and permitted the payers to take all the steps they found necessary to protect themselves from liability, but many other decisions imply that plaintiff's duty is fulfilled by merely releasing the interested parties from any potential liability or providing for satisfaction of the lien.[11] On at least one occasion, however, an appellate court went as far as explicitly stating that if defendants wanted additional information, such as a CMS verification letter, they should have provided for that in the stipulation of settlement because the law did not impose any such requirement.[12]

These issues are fairly new and legal authority will continue to develop and evolve. Under the current state of the law, we can be assured that plaintiffs cannot get away with not offering any Medicare/Medicaid information at all and that they must agree to release and indemnify defendants and their representatives from any potential liens in the settlement documents. However, it is much less certain whether a court would unequivocally protect the payers' entitlement to specific additional information that they deem necessary to protect their rights. It is thus imperative that defense counsel be advised of the specific verification measures required by each payer to ensure that the settlement agreements explicitly contemplate that payment will not be issued unless and until these conditions are met.

11 *Bey v. City of New York*, 2013 WL 439090 (E.D.N.Y. 2013); *White v. New York City Housing Authority*, 16 Misc.3d 598, 2007 N.Y. Slip Op. 27229 (Sup. Ct., Kings County 2007); *Panella v. CBS Broadcasting, Inc.*, 2011 NY Slip Op 32349U (Sup. Ct., NY County 2011); *Liss, supra; Torres v. Hirsch, supra; Torres v. Visto Realty Corp., supra*

12 *Tencza, supra*

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drive up legal fees and costs. As these are often factual issues decided by a jury, the entire case may have to be tried before the statute of limitations defense can be litigated. It has been suggested that the overall costs secondary to the proposed amendment will result in an approximate 15% increase in medical malpractice insurance premiums.

"Lavern's Law" had significant support from the Assembly, Senate and Governor Cuomo. Governor Cuomo has stated that he will pass the Bill if it reaches his desk. It is expected that the proposal will either pass or at the very least become a negotiating chip in discussions on broader packages of tort reform in future legislative sessions. Accordingly, it is recommended that health care providers plan ahead by maintaining their records for at least 10 years after the last date of treatment, as well as maintain sufficient detailed documentation about their encounters with patients so that they will be in a better position to defend themselves years later should a lawsuit arise.

Thomas A. Mobilia is a Senior Partner at Martin Clearwater & Bell LLP, who has defended major teaching hospitals, medical practices and individual physicians in high exposure neurosurgery, obstetrical, cardiothoracic, and ophthalmology malpractice cases for over 20 years.

Daniel L. Freidlin is a Partner at Martin Clearwater & Bell LLP. Mr. Freidlin focuses his practice on the defense of medical malpractice and professional liability cases.

Defense Verdicts

Defense Verdict in Spine Surgery Case

On June 30, 2015, senior partner **Bruce G. Habian** obtained a defense verdict in a cervical spine surgery case, in Supreme Court, Westchester County. The plaintiff, an athletic middle-aged woman, presented with minimal pre-operative symptoms (left arm tingling and neck pain). However, CT and MRI workup revealed multi-level pathology at C3 through C6; the differential diagnoses included lymphoma/herniated discs ventral to the spinal cord. Once a PET scan ruled out a malignancy, two anterior discectomies were performed. Post-op pain and symptoms were extensive following the first operation, they were not relieved by the second operation, and were permanent. These included right-sided body burning, hand weakness, inability to ambulate, bowel and bladder dysfunction, with all disabilities confirmed in rehab records. Plaintiff claimed intra-operative trauma during disc removal that had directly injured the cord; this was supported by treating neurosurgical record entries. The defense capitalized on a pre-operative diagnosis of cord edema and myelomalacia, per the pre-op films which demonstrated a significantly compressed cord as well as interruption of the CSF at several levels. No dural tears or hematomas occurred during surgery. Re-expansion/re-perfusion edema was established as the cause of the post-op deficits. While re-perfusion is well-recognized concerning brain pathology, the testimony extended the causation issues to the spinal cord per se.

Defense Verdict in Case of Alleged Failure to Diagnose Rare Dermatologic Condition

Partner **Daniel L. Freidlin** obtained a defense verdict in Supreme Court, Nassau County. The suit, brought by the daughter of the deceased 81 year old patient, alleged a failure to diagnose pyoderma gangrenosum following femoral-femoral bypass surgery. Following the surgical procedure, the patient developed a rash over the incision site that became ulcerated and progressively larger. After an extensive two-week workup including consultations in infectious diseases, plastic surgery and wound care, hematology, dermatology and allergy, an allergic reaction was ruled out and pyoderma gangrenosum was considered. To confirm the diagnosis, a biopsy was recommended but the patient instead elected to transfer her care to another hospital where the suspected condition was diagnosed and treated with steroids. The patient died three weeks later due in part to complications of steroid treatment. The plaintiff alleged that this 1:100,000 condition should have been considered earlier and that the delay contributed to the patient's death. The defense demonstrated that pyoderma was a diagnosis of exclusion that was timely considered after all other possible conditions were systematically ruled out, and that the patient's death was due to complications of the treatment. After a near month-long trial, the jury returned a defense verdict finding that there was no delay in diagnosis and treatment.

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