

QUINTAIROS, PRIETO, WOOD & BOYER P.A.
Attorneys At Law

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Mississippi 2004 Tort Reform Affects State's Business Environment

The U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform released a report in March, ranking Mississippi as the worst state for its litigation environment, for the third year in a row. The report, *State Liability Systems Ranking Study*, ranks reforming punitive damages and tort reform as the two most important issues affecting both litigation environment and perceived important business decisions, and the impact of these decisions on states' economies.

In May, following the report, and along with pressure from the business sector and efforts in Congress to enact legal reform, Mississippi Governor Haley

Barbour convened the first Legislative Special Session of 2004, in an effort to produce tort reform legislation in the state. Mississippi is considered to be one of the most plaintiff-friendly states in the nation.

With the release of the U.S. Chamber of Commerce's first report in 2002, which denoted Mississippi as a haven for "jackpot justice," 71 insurance companies left the state. And when Mississippi lost the bid for an \$800 million Toyota plant, senior vice president of Toyota Motor North America, Dennis Cuneo, wrote Governor Barbour in April, "the litigation climate in Mississippi is unfavorable ... Reform of Mississippi's tort system would, in my opinion, substantially
(Cont. on Pg. 3)

Negotiated Risk Agreements: Residents Desires vs. Community Safety Measures

Provided by Robin N. Khanal, ESQ.

Assisted living communities provides for supportive personal and health care needs to residents in a setting that allows individual choice and autonomy. This mixture implies risk and safety concerns that could eventually result in liability. Currently, insurers are shifting potential liability to communities by offering less coverage at higher costs. As a result, communities and/or providers are searching for appropriate instruments to limit their potential liability while maintaining the ability to provide their residents with individual choice and autonomy. One such instrument is the

Negotiated Risk Agreement.

A Negotiated Risk Agreement (NRA) is a contract between a resident (or the resident's legal representative) and an assisted living facility. The NRA recognizes the conflict between a resident's desires and a facility's policies and procedures. When used properly, a NRA can be utilized for two very important purposes.

The NRA documents the recognition of the resident's desire to engage in an activity or behavior outside that which a community would normally allow.
(Cont. on Pg. 3)

Florida Legal Update

Provided by John Brekka, ESQ.

The cases identified below represent a snapshot of the more noteworthy recent rulings of the Florida Appellate courts.

FABRE

Jackson v. York Hannover Nursing Centers, 2004 WL 1057650 (Fla. 5th DCA 2004) This firm persuaded the judge to include in the verdict as a non Party Defendant a Hospital which rendered treatment to Anne Jackson prior to her residency, to be included on the verdict form as a Fabre (non party) defendant. The jury found Hospital was 75% liable Ms. Jackson's injuries. The trial court denied the Plaintiffs request to assess the full amount of the judgment against NHC (our client) and apportioned the verdict reducing the Defendants share of the damages by 75%. The Fifth DCA upheld the verdict and the inclusion of the Hospital on the verdict form as a Fabre Defendant, a big win for the defense.

Florida Legal Update

Provided by John Brekka, ESQ.

CORPORATE PARENT JURISDICTION

Enic, PLC v. F.F. South & Company, Inc. et al., 870 So.2d 888 (Fla. 5th DCA 2004) – In this case which followed the decision obtained by our firm in **Greystone Tribeca Acquisition, L.L.C. v. Ronstrom, 863 So.2d 473 (Fla. 2nd DCA 2004)**, the appellate court also dismissed complaints against a corporate parent corporation which was based outside Florida. In that case the court overturned a trial court decision which held that jurisdiction was proper. The court concluded that the Plaintiffs failed to establish a basis for personal jurisdiction over Enic, PLC when it could not establish that it exercised sufficient and significant control over its subsidiary. The language of the Plaintiff's complaint in Enic tracks many of the "plain vanilla" allegations Plaintiff's counsel insert into cases to try to bring parent entities into litigation and should be useful in dismissing these cases.

2 ARBITRATION AGREEMENTS

Richmond Healthcare Inc. v. Digati, 2004 WL 196637 (Fla. 4th DCA 2004) - This case where arbitration was denied was overturned on narrow grounds. It supports the position that this firm has taken that Chapter 400 does not purport to bar or regulate arbitration agreements. The court held that there is no common law basis to refuse to enforce valid agreements to arbitrate by competent parties merely because they involve a waiver of statutory rights and remedies. However is also reiterates a position taken in prior decisions that agreements which waive statutory rights may be declared invalid as unconscionable (and also against public policy).

Attorneys in the News

Christina C. Mesa has received her certification from the Supreme Court of Florida as a Circuit and County Mediator (non-Family law). Mesa is certified throughout the state and is available to serve clients in that capacity. For assistance in coordinating such conferences, please contact her at our Tampa office, (813) 286 8818, or you can e-mail her cmesa@qpwb.com.

State of the Medical Malpractice Insurance Industry

Provided by Michael R. Ragan, DMD, JD, LLM

Healthcare Professional Liability 2004

According to the A.M. Best 2003 Property/Casualty Review, "Given the continued deterioration in operating profitability, weakened capitalization, uncertainty in the adequacy of loss reserve because of the heightened severity of claims, and continued adverse trends, increased reinsurance costs and greater retention levels, A.M. Best views the medical malpractice sector as negative."

The 2003-2004 "medical malpractice insurance crisis" is part of a continuing cycle.

"Like Measles in a Nursery, Doctors' Strikes Seem to be Erupting All Across the Nation," the June 9, 1975 Newsweek headline trumpeted. "What the doctors are protesting is the skyrocketing cost of their malpractice insurance premiums...the astronomical rise in malpractice insurance rates stems from a complex welter of causes. These include consumers, the phenomenon of so-called run-away juries, the disappearance of the old family-doctor relationship, inflation and to some degree, hungry lawyers and incompetent doctors...."

About 5 percent of the nation's doctors were involved in 54 percent of medical malpractice payments.

"...many doctors are now talking openly of moving from heavily populated cities to rural areas where the malpractice premiums are lower...others have even elected to retire early rather than pay higher premiums."

The medical malpractice crisis obviously isn't new, nor has the hyperbolic language used to chronicle the event changed. The difference is that in 1975, several states - in particular, California - rose to the

challenge and enacted fair and reasonable legislation to protect its constituents.

The top 22 insurance carriers underwriting medical professional liability in 2001 had been impacted severely by 2003-2004. Of those carriers, six are in receivership, four were beset with capacity problems and four others were exiting the market and/or the medical malpractice section was in run-off.

Since the mid-1990s, the number of active medical malpractice insurance companies in Florida had decreased from 66 to 12, of which only four are writing primary medical malpractice insurance. These companies have exited the market because of several factors.

Because health care today is a zero-sum game, any increases in medical malpractice/administration costs would result in decreasing access to health care. The American College of Obstetrics and Gynecologists has identified nine states in which access to care is compromised because of liability insurance availability and affordability. The American Medical Association 2002 Report lists 12 states it considers in crisis: Florida, Georgia, Mississippi, New Jersey, Nevada, New York, Ohio, Oregon, Pennsylvania, Texas, Washington and West Virginia.

A recent study of physicians revealed that, as a result of their fear of litigation, 79 percent had ordered more tests; 74 percent had referred patients to specialists when they otherwise wouldn't have; 51 percent had ordered invasive tests they weren't convinced were necessary; and 41 percent had prescribed medications that weren't medically necessary.

For the complete article, please visit our website at www.qpwb.com.

New Additions to QPWB

QPWB is pleased to announce the addition of three new attorneys: Jade M. Gummer, Peter J. Molinelli and Christopher J. Steinhaus. Additionally, QPWB is pleased to announce the addition of Caroline Smith as the Director of Marketing and Client Relations.



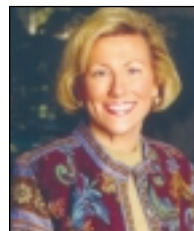
Jade M. Gummer is an associate and practices from the firm's Orlando office. His areas of practice include insurance defense, premise liability, and nursing home defense litigation.



Peter J. Molinelli is a partner and practices from the firm's Tampa office. His areas of practice include insurance defense, medical malpractice, and nursing home defense litigation.



Christopher J. Steinhaus is an associate in the firm's Orlando office. His areas of practice include medical malpractice, nursing home, professional malpractice, law enforcement, and governmental defense litigation.



Caroline Smith, BS, CNHA, has a degree in marketing and nursing home administration. Caroline has been a licensed Florida nursing home administrator for the past 12 years and was selected/awarded by the Florida Health Care Association (FHCA) as the Administrator of the Year last year. She now oversees the marketing and client relations for the firm.

QPWB "Shows" of Support

MHCA:

In June, QPWB actively participated in the ongoing educational opportunities of the Mississippi Health Care Association (MHCA) Annual Convention and Trade Show. We are proud to have sponsored the Opening Keynote Speaker for the Convention.

FHCA/FALA:

QPWB was proud to be a silver sponsor of the Florida Healthcare Association (FHCA) and Florida Assisted Living Association (FALA) Annual Convention, which celebrated the FHCA 50th Anniversary and FALA 10th Anniversary. QPWB provided all Annual Convention attendees with leather briefcases, hosted a golf tournament beverage cart with complimentary "QPWB" brand water bottles, and co-sponsored the FALA 10th Anniversary Reception. Proceeds from the golf tournament benefited FHCA's scholarship programs. QPWB also co-sponsored a hospitality party on June 29th at the Boca Resort, with music provided by Dana Paul and the Real Deal Band. Honorable mention goes to Robin Khanal, Esq. of the Jacksonville office, who conducted a seminar lecturing on Negotiated Risk Agreements providing the healthcare industry with ongoing educational opportunities.

FAHA:

In August, Deborah Moskowitz, Esq., and managing Partner of the Orlando office, presented the seminar, "A Full Census vs. A Full Docket: Are Your Facility Practices Preventing Profitability?" at the Florida Association of Homes for the Aging (FAHA) 41st Annual Convention & Professional Exhibit Show. Besides maintaining an exhibit, QPWB also sponsored the awards luncheon with complimentary "QPWB" brand treasure chests for all attendees.

If you are interested in having one of the QPWB attorneys present an educational seminar at your facility, please contact Laura Murray, Marketing Coordinator, at 305-670-1101.

We continue our efforts to support the healthcare industry throughout the Southeastern United States and beyond.



Photo compliments of FHCA.

Mississippi 2004 Tort Reform *(continued from cover)*

improve your business climate and improve the State's prospects in attracting new economic development."

On June 16 Governor Barbour signed the 2004 Tort Reform Act, after intense debates in both the Senate and House. The bill addresses the legal rules that affect civil litigation in the state and which have contributed to large jury awards in excessive or frivolous law suits. The legislation, which amends the 2002 tort reform bill, is considered to be Mississippi's most comprehensive tort reform package the state has ever seen. The bill goes into effect September 1, 2004.

Immediately following the Governor's enactment of the legislation, MassMutual Insurance Company and its affiliates announced it would return to the Mississippi municipal bonds market. General Counsel for MassMutual Financial Group (a global financial services organization), Lawrence Burkett remarks, "By enacting significant legal reform, Mississippi has signaled that it is once again open for business."

The 2004 Tort Reform package includes innovative measures to curb mass tort suits, frivolous lawsuits and excessive jury awards. To learn more about the specific amendments in the bill, please refer to our website at www.qpwbllaw.com.

Negotiated Risk *(continued from cover)*

Some of the most commonly recognized behaviors include smoking, dietary preferences, medication management, clothing preferences, and the refusal of care. NRAs are not to be utilized as a tool for admitting or retaining a resident in a community that is unable to care for him/her because of the resident's physical or mental condition.

Second, the NRA can be used in an attempt to shift potential liability from the facility to the resident. NRAs are a relatively new concept and have not generated a body of established case law, however. Therefore, to improve the chances of enforceability, the community should follow and document the following recognized step-by-step approach:

The desired effect is that the resident contractually agrees to assume the risk, and release a community and/or provider from liability for the harm that is

associated with the recognized risk. This is a continuing process. The community should regularly assess the resident to ensure the appropriateness of the agreement.

As a final note, NRAs should only be used on a case-by-case basis. Communities that utilize these agreements must continue to promote overall safety. Careful thought and consideration should be given before entering into such an agreement. When utilized properly, these agreements allow residents to enjoy individual choice and autonomy while protecting the facility from the risk associated with the resident's desires.

To learn more about how Negotiated Risk Agreements may be suitable for your community, please contact Robin Khanal, Esq. at 904-354-5500.

Speaking Engagements

• **Michael R. Ragan**, of the Miami office, will be a guest speaker at the Florida Medical Malpractice Claims Council, Inc. (FMMCCI) Annual Seminar in Hallendale, Florida on September 9th, 2004. His presentation, "The Medical Malpractice Insurance Complex," reviews the past, present and future state of the medical malpractice insurance industry.

• **Martha D. Bolton**, Esq., of the Jacksonville office, will be a featured speaker at the Florida Assisted Living Affiliation (FALA) Regional Meeting, September 29th, in Jacksonville. The topic of her speech will be, "Documentation and Working with Defense Counsel through Litigation."

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