

Legal Dimensions

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Plaintiff's Settled Claim Revived as Mass. SJC Finds Loophole in Standard Release

In *LeBlanc v. Friedman* (SJC - 08766), the Massachusetts Supreme Judicial Court issued an opinion which will require insurance companies to re-evaluate their standard release of all claims forms to avoid the disaster that befell the defendant in the *LeBlanc* case.

In *LeBlanc*, the Court tortured the language of a standard release executed by the plaintiff in a medical malpractice case, breathing life into a claim that had apparently been put to rest by the general release and settlement agreement.

The plaintiff developed pelvic pain in June, 1991. An ultrasound determined that her left ovary was approximately one-half the size of her right ovary and also detected signs of endometriosis. She was referred to the defendant, Dr. Friedman, for treatment. On March 16, 1992, Dr. Friedman performed a laparoscopy (an internal pelvic-abdominal examination) on the plaintiff. The surgery confirmed the endometriosis but Dr. Friedman failed to detect the left ovary and concluded it was absent.

Following the surgery, the plaintiff continued to experience pelvic pain. She later discharged a piece of a medi-

cal instrument that had been left in her abdomen by Dr. Friedman. The doctor apologized for the mistake but continued to treat the plaintiff for her endometriosis. He advised the plaintiff that she had been born with only one ovary. After further consultation with Dr. Friedman, the plaintiff decided to undergo a hysterectomy which was performed by Dr. Friedman on June 3, 1992. He removed the right ovary and again failed to notice or remove the left ovary.

At some point between March and August, 1992, the plaintiff was contacted by the insurance company that provided malpractice liability insurance for Dr. Friedman. The claims adjuster negotiated a settlement with the plaintiff and obtained a release of all claims in consideration of payment of \$7,000. The plaintiff executed a release of all claims in favor of Dr. Friedman, releasing claims of every name and nature, and "more especially from all claims arising out of any and all personal injuries ... resulting from care and treatment rendered to the plaintiff on or about March 16, 1992." The release further provided language releasing the defendant from all claims "currently existing but unknown to either or both parties hereto."

Approximately one year later, the plaintiff again began to experience pain in her pelvis. Diagnostic studies revealed a possible tumor, although a urologist determined that the remaining ovary was the cause of the pain. The left ovary was surgically removed and the plaintiff sued the defendant for failing to remove the ovary during the laparoscopy procedure one year earlier. The trial court granted summary judgment based upon the explicit terms of the release.

On appeal, the Supreme Judicial Court analyzed the language of the release and concluded that the language in the first paragraph of the release (i.e., "more especially from all claims ... resulting from care and treatment ... on or about March 16, 1992") limited the scope of the release. The Court noted that the remaining paragraphs of the release referred back to the first paragraph, which included the specific reference to the treatment on March 16, 1992. In interpreting the release, the Court applied the general rule of construction that any ambiguity in a contract must be construed against the drafter of the contract. The Court concluded that the language which purportedly released all claims "currently existing but unknown to either" was ambiguous in the context of the release because the other release clauses referred to the first paragraph. Accordingly, the Court construed the clause to apply only to "currently existing but unknown" claims that arose from the treatment on March 16, 1992. After concluding that the release discharged claims arising solely from the initial surgical treatment, the Court determined that there were issues of material fact as to whether or not the doctor committed malpractice by failing to remove the ovary at the time the laparoscopy was per-



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formed, or by his failure to review the prior ultrasound that revealed the existence of the left ovary.

A strong dissenting opinion written by Justice Cowin and joined by Justice Sosman accused the Court of reading a limitation into the release that did not exist solely to avoid the harsh result of leaving the plaintiff without a cause of action. The dissent correctly noted that the release was a general release that released all claims, including but not limited to claims that accrued from the March 16, 1992 treatment.

The dissent further criticized the Court's opinion for finding an ambiguity in the release where none existed to reach the result the Court desired. The final clause of the release specifically released all claims "currently existing but unknown to either or both parties" without reference to the first paragraph or the treatment of March 16, 1992, thus making the agreement a general release.

The **LeBlanc** decision may open a Pandora's Box as litigants who wish to revive settled claims will attempt to seize upon any specific language in a release to invalidate a general release. In light of the comprehensive release that was deemed insufficient to release all causes of action, the **LeBlanc** decision presents a new challenge to defense attorneys and insurance companies in finding the magic words that will definitively resolve a case and permit the insurer to close its file. As Judge Cowin noted in her dissenting opinion, the **LeBlanc** case is another example of a hard case making bad law. □

Mancini to Address Central Mass. CPCUs

Francis A. Mancini, executive vice president of the Massachusetts Association of Insurance Agents, will address the Feb. 27 meeting of the Central Massachusetts Chapter of the CPCU Society at the Beechwood Hotel in Worcester, Mass.

Mancini will address key issues affecting the insurance industry. The meeting is scheduled to start at 5:30 p.m. More information can be obtained by contacting Suzanne Gryb, CPCU, at sgryb@commerceinsurance.com or (800) 221-1605, ext. 5519. □

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