

A Long Term Care and Seniors Housing Law Update

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Washington Supreme Court Issues Ruling on Certificate of Merit and Continues to Preclude CPA Claims in Professional Liability Cases

The Washington Supreme Court has recently issued two significant rulings impacting the Long Term Care and Seniors Housing industry:

Certificate of Merit Requirement Declared Unconstitutional

In *Putnam v. Wenatchee Valley Medical Center*, the Washington Supreme Court recently struck down a state law that required medical malpractice plaintiffs to file a certificate of merit supporting the validity of their claims. The certificate of merit statute, passed in 2006, mandated that upon filing of a medical malpractice lawsuit, the plaintiff must also file a certificate of merit containing a statement from a qualified expert "that there is reasonable probability that the defendant's conduct did not follow the accepted standard of care required to be exercised by the defendant." RCW 7.70.150.

The *Putman* Court found that the statute unduly burdened a plaintiff's access to the courts because it required the plaintiff to file a certificate of merit before obtaining discovery that could yield the very evidence necessary to satisfy the certificate of merit requirement. The Court concluded that the statute also violated the doctrine of separation of powers because it directly conflicted with CR 8 and 11's pleading requirements, thereby encroaching on the judiciary's power to set court rules.

The certificate of merit requirement forced attorneys and their clients to justify the merit of their claims as a prerequisite to filing suit. The requirement also served as an effective procedural tool to dispose of meritless claims as early as possible. At a minimum, the *Putman* ruling removes a layer of protection for defendants subject to marginal medical malpractice claims. However, the ruling might also open the door to frivolous lawsuits and baseless fishing expeditions. Either way, the *Putnam* ruling likely will result in more litigation and greater costs for defendants.

CPA Claims Continue to be Precluded Against Health Care Providers

The Washington Supreme Court also recently reiterated that personal injury claims based on alleged professional negligence generally are not actionable under the Consumer Protection Act ("CPA"). The CPA requires a plaintiff to prove injury to his or her "business or property." Damages for personal injuries, however, are not actionable.

In *Ambach v. French*, the Court considered whether the increased cost a consumer pays for surgery constitutes actionable injury to "business or property," or non-actionable personal injury damages.

In the case, the defendant doctor performed surgery on the plaintiff's shoulder. Following the surgery, the plaintiff experienced excessive shoulder pain and had a subsequent surgery to remove the work done by the defendant. The plaintiff argued that the cost of the additional surgery qualified as injury to "business or property" within the meaning of the CPA. The Supreme Court disagreed, and held that medical expenses are not compensable under the CPA where they are inseparable from the plaintiff's personal injuries.

For more information, please contact the Long Term Care and Seniors Housing Law Group at Lane Powell:

206.223.7000 Seattle

503.778.2100 Portland

longtermcareandseiorshousing@lanepowell.com

www.lanepowell.com

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