Beyond Malpractice Claims

We are all familiar with garden variety malpractice claims against physicians, lawyers and accountants. However, less common causes of action are becoming increasingly prevalent in state courts across the country.

Many of these claims are recognizable to those who practice in the areas of products liability and/or mass tort litigation. These alternative causes of action, which include claims based upon consumer fraud statutes, breach of contact and false advertising, often vary widely from state to state as statutes and case law have permitted certain claims, but have specifically rejected others. This article will address some of the alternative state law claims against the so-called “learned professions” and will illustrate how these claims differ considerably from state to state.

Actions Based on Consumer Fraud Statutes

The most prevalent alternative theory against professionals is based upon alleged violations of consumer fraud statutes. These statutes, often referred to as “Little FTC Acts,” are the state counterparts to the Federal Trade Commission Act. 15 U.S.C.A. §45(a)(1).

Briefly, the Federal Trade Commission Act was enacted in 1914 as a means to prevent unfair competition and unfair or deceptive acts that affected commerce. The principal mission of the Act was to protect consumers and to eliminate and prevent anticompetitive business practices. While the Act grants broad authority to the Federal Trade Commission to enforce prohibitive conduct, it provides for no private right of action. Accordingly, individual plaintiffs have no standing to sue under the Federal Trade Commission Act.

Beginning in the 1960s, individual states enacted legislation prohibiting deceptive trade practices. Several states, including Delaware, Illinois and Maine, have adopted the Uniform Deceptive Trade Practices Act (UDTPA), which was initially drafted by the National Conference of Commissioners on Uniform State Laws in 1964. The UDTPA was revised in 1964 and the revised act was adopted by several states, including Colorado, Georgia, Minnesota and Ohio. Other states, including Kansas and Utah, have adopted the Uniform Consumer Sales Practice Act. The remaining states, while they did not adopt a uniform act, have promulgated legislation comparable to Federal Trade Commission Act.

Attorneys for learned professionals must be cognizant of alternative causes of action.
or subject to an unfair trade practice. The question as to what acts committed by a learned professional falls within the scope of the Little FTC Acts varies widely.

What Constitutes a Deceptive Trade Practice?
The UDTPA enumerates certain activities that constitute a deceptive trade practice. While the following is not intended to be all inclusive, it represents those deceptive practices that could realistically be alleged against a learned professional. These activities include those that:

- Cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
- Cause likelihood of confusion or of misunderstanding as to the affiliation, connection or association with or certification by another;
- Represent that goods or services are of a particular standard, quality or grade;
- Disparage the goods, services or business of another by false or misleading representation of fact; or
- Engage in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

Although these examples are derived from the UDTPA, they are equally applicable to all of the Little FTC Acts.

The increasing popularity of claims under “Little FTC Acts” is likely as a result of two considerations. First, under many state acts, and particularly those states that have adopted the UDTPA, a plaintiff need not prove actual confusion or misunderstanding to succeed on a claim. Second, the available remedies are often extremely liberal (i.e., plaintiff friendly) as many states provide for a statutory minimal amount of damages to a plaintiff who has demonstrated that defendant engaged in a deceptive trade practices regardless of actual damages. Some states permit treble damages, attorneys’ fees and/or the imposition of exemplary damages.

Representative Examples of the Applicability of Little FTC Acts to Attorneys


To no surprise, this often leads to questions as to what aspects of an attorney’s practice are entrepreneurial in nature.

Recently, the Supreme Court of Colorado considered whether the Colorado Consumer Protection Act (CCPA) applied to attorneys. In Crowe v. Tull, 126 P.3d 196 (Colo. 2006), plaintiff alleged that the law firm he retained to prosecute his personal injury claim utilized advertisements that promised to obtain full value for case, but claimed he was pressured into settling the case for less than full value. Under the CCPA, a plaintiff must demonstrate that: 1) the defendant engaged in an unfair or deceptive trade practice that occurred in the course of defendant’s business, vocation or occupation that significantly impacts the public as actual or potential consumers of the defendant’s goods, services or property; and 2) the plaintiff suffered injury caused by the challenged practice. In its decision, the Supreme Court of Colorado, while expressing concern of a blanket conversion of legal malpractice claims into consumer fraud claims, refused to force a distinction between the professional activities and the entrepreneurial activities of attorneys. Rather, the court held that “the proper test for CCPA liability… is whether or not an attorney’s conduct constitutes a deceptive trade practice with the requisite intent and meets the elements of public impact and causation…” 126 P.3d at 206. Accordingly, under Colorado law, an attorney may be found liable for consumer fraud violations even for acts that have historically been considered the actual practice of law and subject to legal malpractice claims.

Texas has an extremely liberal consumer protection statute. Tex. Bus. & Com. Code Ann. 17.46. Although a 1995 amendment provides a general rule that lawyers cannot be sued, the statute delineates several exceptions to this rule. These exceptions are very broad, and depending on the specific facts, may allow a plaintiff to convert a legal malpractice claim to a consumer fraud claim. If successful, plaintiffs may be able to dispense with the “trial within a trial” requirement of a legal malpractice claim. For example, in 1998 the Supreme Court of Texas decided Latham v. Castillo, 972 S.W. 2d 66, 41 Tex. Sup. Ct. J. 994 (1998). In Latham, plaintiff retained defendant law firm to prosecute a medical malpractice case. As the matter was not filed within the requisite two year statute of limitations, plaintiff sued defendant attorney for legal malpractice as well as a claim under the deceptive trade practice act. Under the Texas act, one of the enumerated exceptions to the protections afforded to attorneys is for unconscionable actions. The court held that since there was some evidence that the defendant attorney misrepresented that the medical malpractice action was in fact filed within the applicable statute of limitations, the alleged misrepresentation can be construed as unconscionable conduct, thereby actionable under the Texas consumer protection statute. The court specifically addressed that this claim was essentially a “dressed-
A patient’s breach of contract claims will fail if they are simply medical malpractice allegations in another pretext.

Representative Examples of the Applicability of Little FTC Acts to Physicians

Similar to professional services rendered by attorneys, the applicability of state consumer fraud statutes against health care professionals also varies greatly. For example, Texas’ Deceptive Trade Practice Act applies to the sale of goods and services. In 1987, the Texas Supreme Court in *Birchfield v. Texarcana Memorial Hospital*, held in a case that appeared to be a garden variety medical malpractice claim, that there was no “legislative intent to exempt healthcare providers from liability” under their Deceptive Trade Practices Act. *Birchfield v. Texarcana Memorial Hospital*, 747 S.W. 2d 361, 368 (1987).

New York’s General Business Law §§349 and 350 prohibits all deceptive practices including false advertising in the conduct of any business, trade or commerce, or in the furnishing of any services in the state. These statutes, on their face, apply to “virtually all economic activity and their application has been correspondingly broad.” *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 712 N.E.2d 662 (1999). Based upon the plain language of the statute and the legislative history, New York does not have a blanket exemption for providers of medical services. *Id.* In *Karlin*, the New York Court of Appeals noted that there are numerous restrictions on the plaintiff’s ability to sue for malpractice based on the lack of informed consent (a common cause of action in a medical malpractice claim) including, *inter alia*, an abbreviated statute of limitations. *Id.* Plaintiffs sought in vitro fertilization treatment from defendants and, as they were unsuccessful in becoming pregnant, sued defendants pursuant to New York General Business Law §§349 and 350 for unfair and deceptive trade practices and false advertising. The court ruled that plaintiffs had stated a cause of action and that providers of medical services were not exempt from the consumer protection statutes. In so doing, the court recognized that this claim was substantially similar to a claim for lack of informed consent, but ruled that the plaintiffs were not limited to such a cause of action as defendants engaged in “consumer-related” conduct. *Id.*

Last year, the Supreme Court of Georgia addressed the question of whether their state’s Consumer Protection Law applied to medical professionals. In *Henderson v. Gandy*, 623 S.E.2d 465, 280 Ga. 95 (2005), the Supreme Court held that Georgia’s *Fair Business Practices Act of 1975 O.C.G.A.* §10-1-390 et seq. does apply to the entrepreneurial, commercial or business aspect of a physician’s practice, but specifically declined to extend the application of the statute to issues of medical competence, staffing, training, equipment or support personnel, the typical bases for medical malpractice claims.

Similar to some consumer fraud actions against attorneys, there is an imprecise distinction between what constitutes the entrepreneurial or business aspect of a physician’s practice, compared to the medical aspect of that practice. The line between the two becomes even more blurred in the age of widespread advertising, promotions and marketing of elective and/or cosmetic medical procedures such as laser eye surgery, hair transplant and similar procedures. See, e.g., *Bollino v. Hitzeig*, 2001 N.Y. SLIP OP 40593U, 2001 WL 1729706, 2001 N.Y. Misc. LEXIS 1106 (2001) (plaintiffs alleged injuries as a result of defendants’ consumer-oriented deceptive material regarding hair transplant procedures).

Oftentimes, the validity of a cause of action based upon a state’s consumer protection statute raises multiple questions. First and foremost, one must examine who is the consumer and whether they are entitled to protection from the alleged deceptive practice. Unfortunately, from a defense perspective, these questions often involve factual issues, not suited to summary judgment dismissal.

Although these claims are becoming increasingly prevalent against the learned professions, it appears that the majority of state courts have been cautious not to allow a mass conversion of professional negligence claims to consumer fraud claims. From a practical perspective, however, these claims often offer an alternative, and sometimes less demanding, means for plaintiffs to prosecute an action. Also important, depending on the state, the consumer fraud statutes may provide a longer statute of limitations, less stringent pleading requirements and the possibility of enhanced damages. When facing such a suit, the learned professional must be aware that since the claim is not based on a negligence theory, professional liability coverage may be inapplicable. As these claims are often brought simultaneous with malpractice causes of action, the malpractice carrier may cover the malpractice aspect of the suit and disclaim or issue a reservation of rights on the consumer fraud claims.

Actions Based on Breach of Contract

The learned professional is faced with the prospect that he or she may become contractually liable to his or her clientele. This exposes the professional to breach of contract claims. As this section will illustrate, most breach of contract actions stem from the promise of a specific result. Seemingly, a simple way to avoid this potential realm of liability is to refrain from such promises in conversations and writings with clients. However, plaintiffs frequently allege that a defendant made an oral representation or promise that raises questions of fact that often hinge upon the credibility of the party. One must be aware that a typical breach of contract action generally has...
a longer statute of limitations then a run of the mill malpractice action. Thus, a professional may not be immune from suit simply because a negligence or malpractice statute of limitations has expired as the potential for a breach of contract action may exist.

Representative Examples of Breach of Contract Claims against Medical Professionals

In New York State, a contract claim that arises out of the performance of medical services will withstand a test to its legal sufficiency only where it is based upon an express promise to effect a cure or achieve a definitive result. *Monroe v. Long Island College Hosp.*, 84 A.D.2d 576, 443 N.Y.S.2d 433 (NY App. Div. 2nd Dep’t 1981). See also, *Liebler v. Our Lady of Victory Hosp.*, 43 A.D.2d 898, 351 N.Y.S.2d 480 (NY App. Div. 1974) (noting that a cause of action in contract is distinguished from malpractice as it is based upon the breach of a particular or special agreement). A patient’s breach of contract claims will fail if they are simply medical malpractice allegations in another pretext. *Monroe, supra*. This potential of contract liability for the rendering of medical services holds true whether the defendant is a hospital, see *Catapano v. Winthrop Univ. Hosp.*, 19 A.D.3d 355, 796 N.Y.S.2d 158 (NY App. Div. 2005) (plaintiff alleged that defendant failed to ‘properly examine… diagnose… and appropriately treat’ the decedent while in the emergency room), or whether the promises were made by a physician. *Monroe, supra*.

If the breach of contract claims are based upon provisions contained within a Patient’s Bill of Rights, the claims are likely to be deemed insufficient to form the basis for a patient’s breach of contract claim. In *Catapano*, the court specifically noted that the provisions at issue, the Patient’s Bill of Rights, will not withstand a test of legal sufficiency since they do not constitute the express promise or special agreement required for a breach of contract claim to succeed. *Catapano, supra*.

Representative Examples of Breach of Contract Claims against Attorneys

Much as it is with any profession, an attorney may be sued for those actions that may be interpreted as negligent. In addition, legal malpractice actions have been premised upon the breach of a fiduciary duty. While rare, attorneys may also face allegations of legal malpractice claiming they had breached a contractual obligation to clients. “Relatively few modern actions against attorneys are for breach of an express or written contract. Although the subject matter of the representation and the fee arrangement are common contractual terms, seldom do attorneys guarantee or promise a specific result.” JD Honeycutt, III, *The Down Side of Optimism: Attorney Liability for Promising Specific Results*, 21 J. Legal Prof. 215, 216 (1997) quoting Ronald E. Mallen & Jefferey M. Smith, *Legal Malpractice* $8.4 at 415 (3d ed. 1989).

A 1957 decision, *Glens Falls Ins. Co. v. Reynolds*, 3 A.D.2d 686, 159 NY2d 95 (NY App. Div. 1957) is an early New York case that allowed a claim to proceed against an attorney for failing to produce a certain result for his or her client. In the case, two theories of liability were pled by the client against his or her attorney: breach of specific contract and negligence in the performance of specific duties. The court, in reviewing a dismissal based upon the expiration of the statute of limitations, held:

Carelessness resulting in professional miscarriage, in the absence of agreement to obtain a specific result or to assure against miscarriage, would usually be governed by the three-year Statute of Limitations for negligence…. But if there was an agreement to obtain a specific result, or to assure against miscarriage, would usually be governed by the six-year Statute of Limitations in contract may apply… Since both theories are sufficiently pleaded on their face, on a motion based on the pleading alone we are not able accurately to apply the appropriate Statute of Limitations. *Id.* at 686.

As New York jurisprudence has developed, an attorney’s potential liability for breach of contract has expanded. In a legal malpractice action, it was alleged that the defendant attorney who represented plaintiff as a subordinate lien holder in several mortgage foreclosures failed to investigate and discover claimed fraud and collusion by the borrower. *Schimenti v. Whitman & Ransom*, 208 A.D.2d 470, 617 N.Y.S.2d 742 (NY App. Div. 1994). In *Schimenti*, while the Appellate Division held that the attorney was not liable for failing to investigate, the court, citing to *Santulli v. Englert, Reilly & McHugh*, 586 N.E.2d 1014, 78 N.Y.2d 700 (NY App. Div. 1991), stated that “an action for breach of contract may be based upon the breach of an implied duty of due care, even in the absence of an express promise by the attorney to obtain a specific result.” *Schimenti, supra* at 743. Attorneys have likewise been sued under breach of contract theories for failing to ensure marketable title see *Boecher v. Borth*, 51 A.D.2d 598, 377 N.Y.S.2d 781 (NY App. Div. 1976) (plaintiff was successful as court held the retainer agreement to contain an express promise to achieve the specific result of marketable title), and draft a security agreement. *Brainard v. Brown*, 91 A.D.2d 287, 458 N.Y.S.2d 735 (NY App. Div. 1983) (plaintiff was unsuccessful as the court determined from the pleadings that the action sounded in negligence).

In *Cherokee Restaurant, Inc., v. Piereson*, 428 So.2d 995 (La. Ct. App. 1983), *writ denied* 431 So.2d 773 (La. 1983), the Louisiana Court of Appeals noted that while the law of that state allows for breach of contract claims against attorneys, the circumstances of same are extremely narrow. In *Cherokee Restaurant*, an attorney was sued by a former client under a breach of contact theory for drafting a defective lease. The court there stated, “when an attorney expressly warrants a particular result, i.e., guarantees winning a lawsuit, guarantees title to property, guarantees or warrants the ultimate legal effect of his work product, or agrees to perform certain work and does nothing whatsoever, then clearly there would be an action in contract….,” 428 So.2d at 999. The court noted that, notwithstanding the attorney’s representations concerning the preparation of the lease, the attorney’s role necessarily entailed the exercise of discretion that is “contradictory to the idea of contracting for a specific result.” 428 So.2d at 999. Accordingly, plaintiff’s action was dismissed as it was not commenced within the one year statute of limitations for malpractice actions. In another Louisiana case, *Elzy v. ABC Insurance*, 472 So.2d 205 (La. App. 1985) *writ denied* 475 So.2d 361 (1985), an attorney was sued under a breach of contract theory for not properly filing a personal injury claim. The court held that the shorter malpractice-
tice statute of limitations applied because the facts amounted to “malperformance” rather than “nonperformance.”

The Supreme Court of Alaska allowed a plaintiff’s breach of contract claims against his attorney to proceed. Jones v. Wadsworth, 791 P.2d 1013 (Alaska 1990). The plaintiff in Jones sued his former attorney in negligence and breach of contract for failing to expediously move a lawsuit to trial and to keep plaintiff informed as to the status of the action. While defendant claimed that he did not promise any unique service or guarantee any specific results, it appears that he did not contest plaintiff’s allegation that he promised to “move the case… expeditiously.” Accordingly, the court held that such a promise created a contractual duty and applied the longer contract statute of limitations.

A similar finding was made in the Arizona case of Towns v. Frey, 721 P.2d 147, 149 Ariz. 599 (Ariz. Ct. App. 1986), where the Court of Appeals, in reversing the trial court’s grant of summary judgment, held that “[i]f one is going to assert a breach of contract claim against a lawyer, the contract relied upon must itself contain an undertaking to do the thing for the nonperformance of which the action is brought.” 721 P.2d at 600. In Towns, plaintiff asserted that defendant agreed to file a lawsuit on his behalf and successfully alleged that an oral contract was formed.

Representative Examples of Breach of Contract Claims against Accountants

Like attorneys and physicians, so too must accountants be wary of this potential form of liability. Potential liability of an accounting firm for breach of contract existed when they failed to complete and deliver to the plaintiff a post-closing audit in a timely fashion. CAE Industries Ltd., v. KPMG Peat Marwick, 193 A.D.2d 470, 597 N.Y.2d 402 (NY App. Div. 1993). Potential liability under a breach of contract theory also existed for an accountant who rendered poor tax advice to the intended beneficia-


In FDIC v. Ernst & Young, 967 F.2d 166 (5th Cir. 1992), suit had been brought by the FDIC, as assignee of a bank, against Ernst & Young claiming that Ernst & Young breached their contract to audit the bank. The contract claim was unsuccessful, as under Texas law, a claim of failure to use professional care was a tort and, thus, the facts as pled did not support a claim for breach of contract. The court did not close the door completely, however, as mention was made that while the accounting firm’s engagement letter enumerated its duties to the bank, the breach of contract claim was not based upon specific violation of those duties, but upon a common law duty of due care.


Actions Based on Claims of False Advertising

Misrepresentations, deceptive trade practices and false advertising typically fall within the rubric of liability based upon the violation of a consumer fraud statute. However, if a professional’s advertising is found to be false or misleading, the professional may be subject to liability for the false or misleading representation without involving liability of a state’s Little FTC Act. Certain states have enacted statutory frameworks for regulating a learned professional’s advertisements. Section 2271 of California’s Business & Professions code, which pertains to the healing arts, is such a statute. The statutory text states that “[a]ny advertising in violation of Section 17500 (“False or Misleading Statements, Generally”), relating to false or misleading advertising, constitutes unprofessional conduct.” An example of how the statute has been enforced is demonstrated in Kahn v. Medical Board, 12 Cal. App. 4th 1834 (1993), where a physician was found to have engaged in false advertising regardless of whether the false statement was the result of his mistake of fact.

In Kahn, the physician advertised that his sister, who was licensed in Pakistan but not California, worked for his clinic and that an employee, who was unlicensed, was a physician assistant. As the physician had actual knowledge of the falsity of his statement pertaining to his sister and had the responsibility to assure that the other employee was licensed, he was found to have violated California’s Business & Professions code §2271.

Conclusion

While the overwhelming majority of actions brought against the learned professional continue to be negligence/malpractice actions, these alternative theories often provide for a viable option for plaintiffs. Attorneys for learned professionals must be cognizant of the possibility of an alternative cause of action, particularly when counseling a client on statute of limitations, potential damages and coverage issues. One can no longer presume that they are “out of the woods” because a former patient or client did not initiate a lawsuit within the statute for negligence actions. Likewise, insurance coverage, even for what traditionally would have been a routine malpractice issue, may not be applicable if plaintiff is successful in proving an alternative theory. Defense counsel must familiarize themselves with the specifics of these alternative causes of action applicable in the states in which they practice. Doing so will allow them to provide appropriate legal advise to their clients and may prevent counsel from being named as defendants themselves in a lawsuit based on an alternative cause of action.