



Partner Stuart Lederman quoted in “Late Notice Tougher For NJ Tort Plaintiffs In Gov’t Suits”

Publication:

Law360

Late Notice Tougher For NJ Tort Plaintiffs In Gov't Suits

By Martin Bricketto

Law360, New York (March 14, 2013, 7:26 PM ET) -- Plaintiffs who may have tort claims against public entities in New Jersey but miss a 90-day deadline for putting them on notice could have an even harder time bringing their cases following a state Supreme Court ruling Tuesday that inattentive counsel and nondebilitating medical conditions can't excuse a failure to meet such presuit requirements.

Critics say the ruling — in the case of a community health organization founder who wanted to sue Rutgers University and the University of Medicine and Dentistry of New Jersey for allegedly disclosing her private health information in a press release — could be too restrictive and prevent courts from considering the full picture in deciding whether to allow late notices.

But other observers contend the ruling should give public entities more certainty and doesn't represent a major change when it comes to tort notices.

“It is a case-by-case determination and it doesn't necessarily mean that judges going forward are going to decide these differently, unless you have an exact or pretty close set of facts to this case,”

said Stuart Lederman, a partner with Riker Danzig Scherer Hyland & Perretti LLP whose practices include

government affairs.

The New Jersey Tort Claims Act requires presuit notification of a tort claim within 90 days of the claim's accrual, and inattentive or incompetent counsel doesn't rise to the level of the "extraordinary circumstances" necessary to allow notice after that window, a majority of justices found Tuesday. The plaintiff in the case, who was only identified as "D.D.," alleged that her initial attorney had effectively abandoned her.

The majority also refused to find extraordinary circumstances in the plaintiff's alleged health problems following the disclosure in November 2009. There was no evidence that the plaintiff's medical or emotional state prevented her from acting, according to the majority.

In her dissent, Justice Jaynee LaVecchia said her colleagues had taken a "crabbed view" of what constitutes extraordinary circumstances and that the circumstances in the case shouldn't have been viewed in isolation. The majority's holding was "so unduly restrictive that it subordinates the interests of justice to a mere technicality," she wrote.

Calling the majority opinion "troubling," Levinson Axelrod PC partner Adam Rothenberg said Wednesday that, under state law, trial courts can allow a late tort claim notice in extraordinary circumstances, not just one particular circumstance.

"The court merely parsed each circumstance and said each did not meet the requirements. However, it is the collective in this situation which suffers from 'dissection of discrete facts' as stated in the dissent. The court examined individual fingers when the hand of justice should have been wielded," said Rothenberg, who chairs the product liability and toxic tort law section of the New Jersey State Bar Association.

The ruling changes the landscape but doesn't affect a large number of cases, according to Rothenberg, who stressed that most claims are properly noticed.

"In those rare circumstances where someone does make a motion for extraordinary circumstances it may be harder because the courts will not look at the totality of the circumstance and will instead potentially focus on each reason," Rothenberg said.

Most cases do in fact boil down to one reason, so it's even rarer for someone to assert a collection of justifications for late notice, he added.

"The court basically said that will not work. It does make the issue more black and white," Rothenberg said.

But Marcus Rayner, executive director of the New Jersey Lawsuit Reform Alliance, argued that the majority got it

right and recognized that time requirements under the TCA should be respected.

“I think it will provide public entities with the predictable and reasonable liability that the Legislature intended when it enacted the TCA,” he said. “To have ignored the plain statutory language and broadened the time period to provide notice of claim would have exposed public entities to indefinite and limitless liability.”

The majority on Tuesday also reaffirmed that the TCA requires a written notice and declined to apply the doctrine of substantial compliance to allow otherwise. D.D. had argued that the defendants in this case were effectively put on notice during a December 2009 meeting between the parties.

The justices should have found that the plaintiff was substantially compliant with notice requirements based on that meeting, during which counsel for the parties was present, according to attorney E. Drew Britcher, who represented the New Jersey Association for Justice as an amicus in the case.

“There's absolutely nothing that a written tort claims notice would have humanly or possibly provided that the meeting did not,” said Britcher, of Britcher, Leone & Roth LLC.

Britcher noted Justice LaVecchia's comments that her colleagues may have been concerned about opening the floodgates for the late filing of tort claim notices. The present case involved such unique facts that allowing a late notice wouldn't have such ripple effects, according to Britcher.

“They not only wouldn't have opened the floodgates, they wouldn't have even opened the faucet,” Britcher said.

In the end, the decision may not have a particularly broad application and one could argue the majority here simply wanted to clarify that attorney incompetence isn't grounds for filing a late tort notice, according to Britcher.

For Lederman, the opinion doesn't draw a line in the sand on the issue of late tort claims because deciding such applications will remain a fact-sensitive analysis for courts.

And while the opinion may not change the landscape for tort claims, it does underscore that plaintiffs and their attorneys have to be vigilant in complying with notice requirements and that courts will only grant exceptions under limited circumstance, according to Lederman.

“It serves more as a reminder to the bar that the notice provisions are there for a reason and you need to remember that they're there,” he said.

Attorney:

Stuart M. Lederman

Practice:

Governmental Affairs