

DEFENSE PRACTICE UPDATE

FALL 2005

Recent Cases Show Why Everyone Needs a Health Care Proxy1

U.S. Supreme Court Partially Closes Door to Age Discrimination Claims in New York and New Jersey3

Appellate Update: Damages for Emotional Distress ...5

Partner Profile: Anthony M. Sola ...6

MCB Partners Featured in New York Magazine's Best Lawyers8

MCB News10

Client Education Opportunity10

RECENT CASES SHOW WHY EVERYONE NEEDS A HEALTH CARE PROXY

BY: PETER T. CREAN AND ELLEN B. FISHMAN

The *Terri Schiavo* case illustrates the importance of appointing one person to act as the patient's designated health care agent. It also highlights the need for making such an appointment before disaster strikes. Although anyone going into the hospital will need a health care proxy, such proxies are not just for the elderly or the terminally ill.

While a patient's family may be consulted about treatment decisions, only a designated health care agent has the legal authority to make health care decisions when the patient is unable to do so. Through appointment of an agent – choosing, in advance, the person whom the patient would prefer to make health care decisions – everyone can take a significant step to control future medical treatment and avoid conflict among family members. Hospitals, nursing homes and physicians are required to honor the agent's health care decisions as if they were made by the patient.

NEW YORK'S HEALTH CARE PROXY LAW

In 1991, the New York Legislature enacted the Health Care Agents and Proxies Law as part of this State's Public Health Law. This law allows any competent person, age 18 or older, to appoint another trusted adult as a health care agent. Every adult is presumed competent to appoint a health care agent unless adjudged incompetent, or a committee or guardian of the person has been appointed for the adult.

A health care agent can be appointed by signing a short proxy form in the presence of two adult witnesses. It identifies the principal, who is the person creating the proxy. If the principal is unable to sign the proxy form, another person may sign it at the principal's direction, in the presence of the principal and the witnesses.

After consultation with a licensed physician, the health care agent is to make health care decisions in accordance with the principal's wishes. The agent only begins to

HEALTH CARE PROXY *Continued on page 2*

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HEALTH CARE PROXY CONTINUED FROM FRONT PAGE

make health care decisions when the principal is unable to do so. Should the principal become able to make health care decisions again (after general anesthesia wears off, for example), the agent is no longer authorized to act. In any event, the health care agent has no power to make financial or other decisions for the principal.

In general, if the principal's wishes or beliefs are unknown, the agent must act in the patient's best interests.

Unless the agent's authority is expressly limited, the agent will make any health care decisions that the patient could have made. The agent is entitled to the same information that would be provided to the patient and can decide if the patient should receive treatment, choose among treatments or decide against treatments.

In making these decisions, the health care agent must follow the principal's wishes, including his or her moral and religious beliefs. The standard health care proxy form has a section for making known the principal's wishes or instructions about organ or tissue donation in the event of death. Additional specific instructions may be provided orally, in the proxy, or in an optional, separate document known as a living will.

A broad grant of authority in a proxy allows the agent to make decisions in the event of unanticipated circumstances or as circumstances change. It is critical that the principal and the agent have a candid conversation about the principal's wishes before the health care proxy takes effect.

In general, if the principal's wishes or beliefs are unknown, the agent must act in the patient's best interests. In New York, however, an important exception to that rule concerns artificial nutrition and hydration: the agent can only make decisions about nourishment and water provided by feeding tube and intravenous lines if the agent knows the principal's wishes ahead of time.

AN ILLUSTRATIVE CASE

The New York Supreme Court had to grapple with such a problem earlier this year in the case of *Borenstein v. Simonson*. This Queens County case involved an 86-year-old patient who had appointed her adult daughter as her health

care agent. Upon admission to the hospital with multiple problems, including dementia, pneumonia and pulmonary edema, a nasogastric tube was inserted. Because that was a temporary measure with potentially life-threatening consequences if left in place over a prolonged period, a percutaneous endoscopic gastrostomy (PEG) tube was recommended. In accordance with her authority as the patient's health care agent, the daughter refused to consent to insertion of the PEG tube. The patient was then discharged back to her nursing home with the nasogastric tube in place.

Over a holiday weekend, lawyers acting at the behest of the patient's sister made an emergency application to a judge, who held an evidentiary hearing the next day. The petition before the Court sought to appoint the sister as guardian for the patient, to void the proxy designating the daughter or enjoin her from making decisions about artificial hydration and nutrition, and to transfer the patient to the hospital for insertion of the PEG tube.

Although the patient had signed a valid health care proxy, it stated that if there was any hope of recovery, the principal wanted her agent to ask for life-sustaining treatment. The proxy included no specific authority regarding artificial nutrition and hydration. The patient's daughter, who had been named as agent in the proxy, conceded that her mother had never specifically expressed her wishes regarding nutrition and hydration.

Although the Court found that the patient, while competent, had properly designated her daughter as agent, it granted some of the emergency relief sought in the petition. In particular, the designated agent was found to have no authority to make decisions about artificial nutrition and hydration for her mother. As a result of the Court's conclusion that the patient was entitled to life-sustaining treatment, she underwent the PEG surgery.

The *Borenstein* decision expresses the hope that families should privately resolve their differences as to the medical care of an incompetent patient, without resorting to expensive and arduous legal proceedings. ■

U.S. SUPREME COURT PARTIALLY CLOSES DOOR TO AGE DISCRIMINATION CLAIMS IN NEW YORK AND NEW JERSEY

BY: STEVEN M. BERLIN

The last major employment decision of the Rehnquist Court, *Smith v. City of Jackson* ("Smith"), permits employees to bring claims of age discrimination under what is known as a disparate impact theory. While the recognition of this right may be unwelcome by employers throughout most of the nation, in New York and New Jersey, the decision appears to limit an employee's ability to sue.

There are two basic methods for proving discrimination under federal law: disparate treatment and disparate impact. Disparate treatment requires proof that the employer intended to discriminate against the employee when it established the challenged employment practice or took the disputed action. Disparate impact claims derive from a theory that employment practices which appear neutral or non-discriminatory on their face may adversely affect some groups more harshly than others.

While both theories have been cognizable under Title VII of the Civil Rights Act of 1964 ("Title VII"), which is the primary federal anti-discrimination law (but not for age claims), for three decades, there was a split among the circuits of the United States Court of Appeals as to whether disparate impact claims could also be brought under the federal Age Discrimination in Employment Act ("ADEA"). Until *Smith*, the federal circuits differed over whether language in ADEA that diverged from Title VII by allowing employers to make decisions on the basis of "reasonable factors other than age" ("RFOA") effectively negated a disparate impact approach.

Smith resolved this issue by stating that disparate impact claims are viable under ADEA and effectively held that an affirmative defense exists for RFOA. That means unless the policy or action complained of is based on an unreasonable factor other than age, it is not actionable.

The next issue tackled by the Supreme Court was which appropriate analytical framework should be utilized for disparate impact ADEA claims. It noted that it set forth such a framework in its *Wards Cove Packing Co. v. Antonio* ("Wards Cove") decision which was applicable to Title VII cases (and age only in circuits where the claim was recognized). Congress then amended Title VII in 1991 to set forth a specific analytical model for disparate impact claims in those federal discrimination cases, easing an employee's burden as set forth under *Wards Cove*. However, Congress did not so amend ADEA. *Smith* addressed these textual differences and concluded that the narrower analysis under *Wards Cove* applies to ADEA disparate impact claims rather than the more employee friendly analysis under Title VII as amended.

Under the *Wards Cove* framework, ADEA disparate impact claims are analyzed through "shifting burdens" analyses. An employee establishes a *prima facie* case by identifying a specific employment practice which, although facially neutral, has had an adverse impact on that employee as

The holding in Smith will almost certainly limit the scope of available ADEA disparate impact causes of action in New York and New Jersey.

AGE DISCRIMINATION *Continued on page 4*

U.S. SUPREME COURT PARTIALLY CLOSES DOOR TO AGE DISCRIMINATION CLAIMS IN NEW YORK AND NEW JERSEY CONTINUED FROM PAGE 3

a member of a protected class, such as age, race and gender. The employer then must make a showing explaining the business necessity of the challenged employment practice. Once the employer does so, the employee may still prevail only by showing the employer's explanation was merely a pretext for discrimination. Easing an employee's burden, the 1991 Amendments to Title VII provide an employee can prevail by establishing the existence of less discriminatory alternatives which the employer refused to adopt, without having to establish evidence of pretext.

The holding in *Smith* will almost certainly limit the scope of available ADEA disparate impact causes of action in New York and New Jersey. Prior to *Smith*, the federal courts in those states were among the circuits that permitted ADEA disparate impact claims but they also followed the analytical models applicable to Title VII claims. *Smith*, however, directs that such claims must now be analyzed under the narrower *Wards Cove* framework and offers the affirmative defense based on RFOA.

Of particular interest is the effect that *Smith* will have on age discrimination disparate impact claims brought under New York State's Human Rights Law ("NYSHRL") and New Jersey's Law Against Discrimination ("NJLAD"), which prohibit discrimination on the basis of age as well as other protected categories. Until *Smith*, age and other discrimination claims under NYSHRL and NJLAD had been analyzed the same way as federal courts in the region analyzed discrimination claims under Title VII. However, NYSHRL and NJLAD are more similar to ADEA than Title VII in that they do not contain language analogous to the 1991 Amendments addressing and providing an analytical framework for disparate impact claims.

Since *Smith* held that absence of the 1991 Amendments in ADEA relegated the disparate impact analysis under that law to the *Wards Cove* framework, there is a basis for employers to now

argue that the narrower *Wards Cove* model should be applied to all discrimination claims, particularly age claims, under NYSHRL and NJLAD.

As for the ADEA affirmative defense based on RFOA recognized by *Smith*, NYSHRL also sets forth that differentiation based on age is prohibited "except... where the differentiation is based on reasonable factors other than age." Thus, it appears that NYSHRL disparate impact claims are subject to the RFOA affirmative defense. Similarly, NJLAD states that it is unlawful to discriminate based upon age "unless justified by lawful considerations other than age." To the extent "lawful considerations" are interpreted to be similar to ADEA's "reasonable factors," NJLAD appears to provide for the same affirmative defense as ADEA.

Furthermore, *Smith* will likely have a limiting effect on age based disparate impact claims brought under New York City's Human Rights Law ("NYCHRL"). Unlike ADEA, NYCHRL explicitly creates a cause of action for unlawful discrimination practice based upon disparate impact, including for age, and it does not specifically address the impact of RFOA or something similar. It does, however, provide an analytical framework similar to the language

under *Wards Cove*, rather than the more employee-friendly model set forth in the 1991 Amendment of Title VII.

Despite this language, pre-*Smith*, courts declared that although there are differences between NYCHRL and ADEA, age discrimination suits brought under NYCHRL are subject to the same analysis as claims brought under ADEA, which in New York were interpreted under Title VII. Now, New York City employers have a basis to argue that courts

should follow the reasoning of *Smith* and analyze claims according to the more limited *Wards Cove* analysis, without the benefit however of the defense based on RFOA's.

Thus, while *Smith* was heralded nationally as a pro-employee decision because it opened the door for disparate impact claims under ADEA, for New York and New Jersey employees, the door is not quite as open as it had been before *Smith*. ■

APPELLATE UPDATE: DAMAGES FOR EMOTIONAL DISTRESS

BY: ELLEN B. FISHMAN

Martin Clearwater & Bell LLP attorneys are continuing to monitor developing case law on money damages payable by obstetricians and other specialists (see Emotional Distress: A New Area of Exposure [Defense Practice Update, Winter 2005]). A recent New York Court of Appeals opinion is a significant, positive development in this trend.

In *Sheppard-Mobley v. King*, our highest State Court decided a case in which the intermediate appellate decision had excited considerable comment. The plaintiff in this action was a woman who alleged that her obstetrician had given her bad advice and improperly administered an abortion drug.

Although she was given methotrexate to abort the fetus, it was subsequently discovered that the patient was still pregnant. After giving birth to a severely impaired child, the woman sought recovery for her alleged emotional anguish, as well as for the infant's injuries.

At the outset, the Kings County Supreme

Court granted the doctor's motion to dismiss the mother's claim for her "emotional harm" associated with the alleged medical malpractice. Then, on the plaintiff's appeal, the Appellate Division, Second Department, reinstated her claim. The Court of Appeals was left to decide whether the intermediate appellate decision had improperly expanded the scope of the legal holding in *Broadnax v. Gonzalez*.

The 2004 *Broadnax* case set off a wave of new claims by plaintiffs asserting emotional injury, based on that Court of Appeals opinion, which had created a new cause of action. Under *Broadnax*, a mother who sustains no independent physical injury may be awarded damages for her emotional distress based on malpractice leading to a miscarriage or the delivery of a stillborn. The much-anticipated appeal in *Sheppard-Mobley* offered the Court of Appeals the first opportunity to revisit

APPELLATE UI D/ : Continued on page 9

