BRACH EICHLER LLC
Counsellors at Law

Quarterly Advisor

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Newly Implemented Information Blocking Regulations Bring Much-Needed Protection to Medical Providers Against Unscrupulous Vendors

Medical practices often encounter the difficult task of obtaining the prompt return of clinical and/or financial data from an electronic health record (EHR) or medical billing vendor once the business relationship ends. Outgoing EHR and billing vendors frequently use the tactic of delaying data migration or threatening to withhold this critical information, in exchange for exorbitant data transfer fees or other charges aimed at getting one more "bite at the apple" from its former customer.

Recognizing this problem, Congress passed a series of "information blocking" laws in the 21st Century Cures Act (enacted in December 2016). Information blocking is defined as a practice that interferes with, prevents, or materially discourages access, exchange, or the use of Electronic Health Information (EHI). EHI is stated as, "electronically protected health information in a designated record set, irrespective of whether the records are used or maintained by or for a covered entity." This designated record set, as outlined by the Health Insurance Accountability and Portability Act (HIPAA), includes medical records and billing records of individuals or other records used by physicians.

On May 1, 2020, the Office of the National Coordinator for Health IT (ONC) issued a Final Rule which establishes authorization requirements for health IT developers, to improve patient access to electronic health information through standardized apps, and prevents information blocking.

Section 4004 of the Final Rule defines various practices that could constitute information blocking. For example, information blocking could be the implementation of health information technology in nonstandard ways that are likely to substantially increase the complexity of accessing, exchanging, or using EHI.

Effective as of April 5, 2021, the Final Rule ensures the accessibility of authorized and requested EHI between patients, healthcare providers, health information technology developers, and health information networks and exchanges. The failure to provide authorized and requested EHI, absent an exception to the Final Rule, exposes parties to liability and a penalty of up to $1 million per violation. Given the hefty penalty risks, it is prudent for all individuals and entities covered by the Final Rule, which includes physicians and medical practices, to understand the disclosure requirements and the available exceptions.

The concept of interoperability under the Final Rule requires healthcare providers to ensure reasonable access to EHI. Thus, application of the Final Rule starts when a request for EHI is made. For example, if a patient requests electronic access to medical data, the Final Rule requires access to be provided unless an exception applies.

The Final Rule also sets forth categories of reasonable and necessary activities that do not constitute information blocking. There are two categories of these exceptions: (1) those related to not fulfilling requests to access, exchange or use EHI; and (2) those related to procedures for fulfilling requests to access, exchange or use EHI. To apply, each exception has clear and specific conditions that must be satisfied.

Physicians and practice managers should carefully review the Final Rule to ensure compliance with requests made by patients and referring providers, but also, to avoid being exploited by outgoing EHR and billing vendors.

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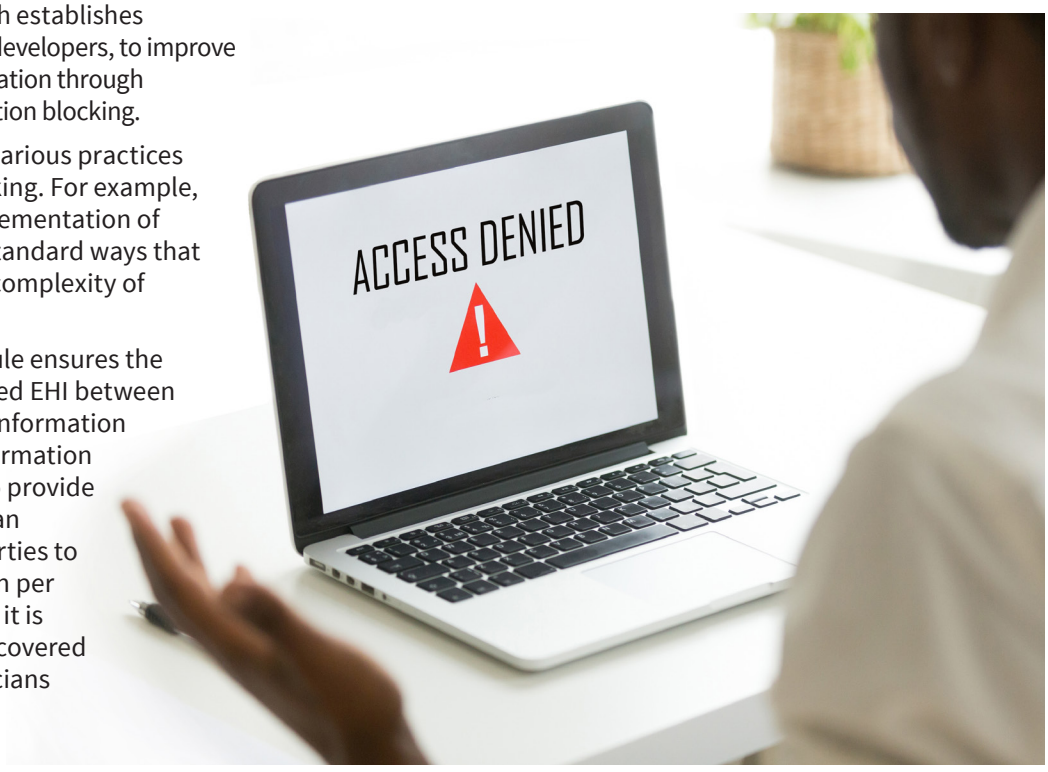

An LLC Agreement Not Signed by All LLC Members May Not Be Binding

In a case that may have significant implications for professional practices and other closely-held businesses, the Appellate Division recently held that a draft operating agreement could only be binding after all the original members of the company assented to the agreement.

In *Premier Physician Network, LLC v. Maro, Jr. MD*, the original members of the practice agreed to form a limited liability company ("LLC") upon the execution of a "Letter of Intention Agreement." A few months after formation, a draft operating agreement was circulated among the members. However, it was only signed by some, not all of the members. The members began to work together as a group by sharing resources, assuming debt, and billing out of the LLC.

A little over a year later, some members who had not signed the operating agreement voluntarily left the practice. The LLC then sued those departing members alleging they owed shortfall amounts and penalties under the terms of the operating agreement. On a motion for summary judgment, the trial court ruled that the departing members were bound to the terms of the draft operating agreement under the New Jersey Revised Uniform Limited Liability Company Act ("RULLCA"), N.J.S.A. 42:2C-12(b), which provides that a "person that becomes a member of a limited liability company is deemed to assent to the operating agreement."

However, the Appellate Division reversed, holding that an operating agreement does not become binding unless there is an agreement of **all the original members** under N.J.S.A. 42:2C-2. Furthermore, the Appellate Division held that future members of an LLC will only be bound to the terms of an operating agreement that was already agreed upon.

In light of this decision, if an operating agreement is presented and is not agreed upon by all the existing members, it remains a draft. Once an agreement is approved by all the existing members, it becomes the operating agreement of the LLC and any subsequent members are bound by assent. Finally, a member can demonstrate this assent in writing, verbally, or through actions. In *Premier*, the parties consented that the departing members did not agree in writing or verbally to the draft operating agreement. There was a factual dispute, however, as to whether the various actions of certain members constituted consent to the draft operating agreement. This factual dispute, together with the trial court's incorrect interpretation of N.J.S.A. 42:2C-12(b), formed the basis of the Appellate Division's decision.

This case is a good reminder that members of LLCs must be certain that their company's key corporate documents are agreed to and signed by ***all*** members. Too often operating agreements are not signed by all the members of an LLC, creating grounds for expensive and time-consuming litigation.

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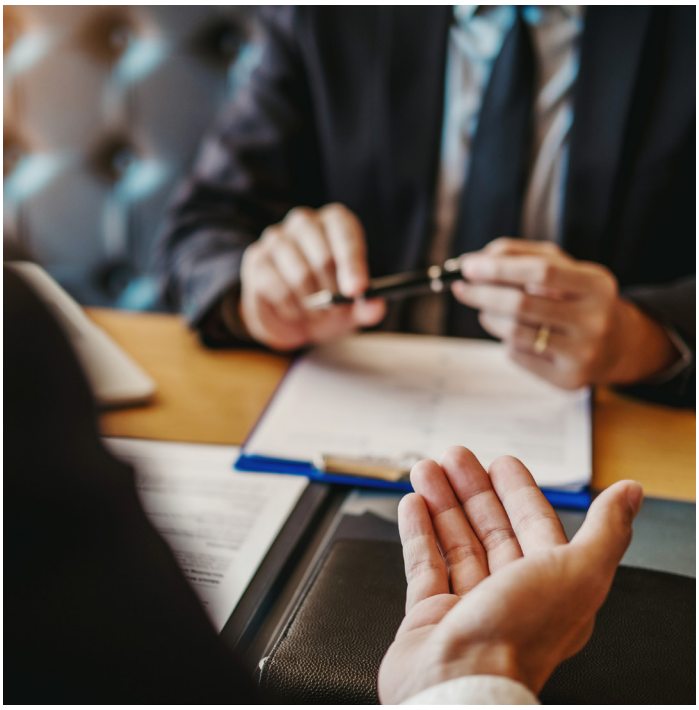
GC's Beware of the Possible Loss of Attorney-Client Privilege

On May 3, 2021, the Delaware Court of Chancery, a court that has historically handled corporate-type matters, issued a ruling in *Tornetta v. Musk*, C.A. No. 2018-0408-JRS, further questioning the attorney-client privilege for a General Counsel and in-house counsel. The ruling raises concerns regarding when internal communications between Counsel and company personnel are privileged and confirms, there is not a blanket protection for such communications, particularly when adverse interests exist among counsel and executives of the organization.

The Court concluded that because Musk was adverse to Tesla's in-house counsel with respect to the negotiation of his compensation package, any applicable attorney-client privilege was waived. Therefore, the plaintiff was permitted to review communications between Musk and Tesla's in-house counsel regarding the compensation package, regardless of whether legal advice was contained within those communications.

The Court, however, rejected the plaintiff's request for privileged communications between in-house counsel, Tesla's Compensation Committee, and Tesla's outside counsel (as it related to Musk's potential influence over Tesla's Compensation Committee) concluding that the plaintiff had not satisfied the exacting standard set forth in *Garner v. Wolfinbarger* which requires a good cause analysis. Thus, the plaintiff was denied the right to review emails between in-house and outside counsel based upon the *Garner* exception.

In conclusion, in-house counsel should be mindful of when their communications may become discoverable. Protecting



confidential or sensitive communications may often require consultation with outside counsel, and prefacing that an email, for example is a "confidential attorney-client privileged communication." The litigation attorneys at Brach Eichler can assist in-house counsel on how best to protect sensitive or confidential internal communications from disclosure.

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NEED TO KNOW

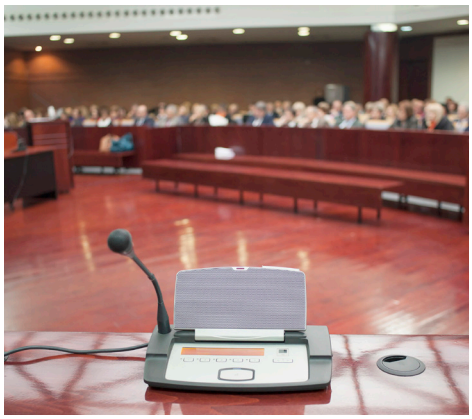
Key Highlights That Could Impact Your Business Litigations

Jury Trial Update:

Resumption of In-Person Jury Trials on or After June 15, 2021 – At the beginning of the COVID-19 public health emergency, the New Jersey state judiciary halted in-person jury trials for the safety of the public. Approximately fourteen (14) months later, on May 11, 2021, the New Jersey Supreme Court entered an Order permitting in-person jury trials to resume on June 15, 2021. The Order states in part "Public health indicators — including the millions of COVID-19 vaccines administered statewide — suggest that the judiciary should be positioned to resume in-person jury trials on or after June 15, 2021." Before this pronouncement, the New Jersey Supreme Court targeted May 18, 2021, as the date to start loosening restrictions and to begin in-person jury trials. Continuing COVID-19 related concerns, however, required a postponement to June 15, 2021.

The May 11, 2021 Order directs the resumption of in-person criminal jury trials on June 15, with cases that involve detained defendants receiving the highest priority. Civil trials will continue to be conducted in a virtual format, unless an assignment judge determines there are compelling circumstances, such as a medical condition by a plaintiff with limited life expectancy, to warrant an in-person trial. For criminal trials, jury selection will be virtual for the first phase and will be in person for the final phase. Jury selection for civil trials will remain remote.

On May 17, 2021, the state judiciary issued "Information and Guidance" according to the May 11, 2021 Order. The Guidance explains the process for jury summons and selection, the selection of cases for trial, the presentation of testimony and evidence, and courthouse COVID-19 protocols. On June 2, 2021, the state judiciary issued a notice regarding the anticipated increase in court personnel throughout the summer. This notice confirms that the current 50% on-site employee presence will "increase substantially" by August 2, 2021.



This increased on-site presence anticipates more in-person court proceedings, and, perhaps, a light at the end of the tunnel for trial attorneys whose practices depend on a functioning jury trial system. Given the recent loosening of public restrictions in New Jersey, it is hopeful the courts can continue increasing the number of in-person jury trials, and no further setbacks will occur.

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Motions for Reconsideration:

The Appellate Division Clarifies Standards Governing Final and Interlocutory Orders – On May 27, 2021, the Appellate Division issued a precedential decision providing much-needed clarification on the often misunderstood distinction between motions seeking reconsideration of **final orders** and motions seeking reconsideration of **interlocutory orders**.

In *Lawson v. Dewar*, 2021 WL 2148885, *1 (App. Div. May 27, 2021), the Appellate Division held that the strict reconsideration standard outlined in Rule 4:49-2 – which requires a party to affirmatively demonstrate the "matters or controlling decisions" that the court overlooked in the first instance – applies only to motions to amend final judgments and orders, as does the 20-day filing deadline.

The Appellate Division held that courts must apply the more liberal standards summarized in Rule 4:42-2 when evaluating reconsideration of interlocutory orders. Specifically, Rule

4:42-2 allows courts to grant reconsideration in their "sound discretion" and the "interests of justice" at any time during the case. Accordingly, a litigant seeking reconsideration of an interlocutory order does not need to establish something "new" occurred or that the prior ruling by the court was "arbitrary, capricious, or unreasonable" to succeed, and is not bound by the 20-day filing deadline. The *Lawson* Court made this point abundantly clear.

The Appellate Division in dicta emphasized the importance of courts taking into consideration the substantial trial backlog present throughout the state court system when evaluating extension requests. The *Lawson* Court noted that lower courts should not arbitrarily deny extension requests to parties who are not going to trial anytime soon, if doing so would run contrary to the interests of justice. This decision should give trial court judges who typically seek to "move their cases" some leeway to extend discovery and other pre-trial deadlines in cases that require it, due to the COVID-19 pandemic or otherwise.

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WINS AND SIGNIFICANT BRACH EICHLER LITIGATION DEVELOPMENTS

Bob Kasolas represented Villa Restaurant Group/Scotto against their landlord for the Office Tavern & Grill in Ridgewood. The Court determined that we asserted valid claims for not having to pay rent to the landlord during the Executive Order periods based upon frustration of purpose, impossibility of performance and impracticality of performance, and refused to grant a motion to dismiss the Complaint despite a standard boilerplate *force majeure* provision in the lease.

Anthony Rainone successfully represented a well-known plastic surgery practice in Morris County. A nurse/injectable specialist quit her employment and opened up a competing enterprise within the 30 mile radius after also taking patient info. Brach Eichler obtained a temporary restraining order barring the former employee from operating at the new location, followed by expedited discovery and depositions, the Court issued an opinion enforcing the restrictive covenant without any modification.

ATTORNEY SPOTLIGHT

Get to know the faces and stories of the people behind the articles in each issue. This month, we invite you to meet Member **Frances B. Stella** and Associate **Paul J. DeMartino, Jr.**

Frances B. Stella

Frances Stella has over 30 years of experience in federal and state environmental litigation, site remediation, and environmental regulatory compliance counseling in real estate redevelopment and transactions. Her practice includes CERCLA and New Jersey Spill Act claims and compliance issues, natural resource damage claims, cost recovery/contribution litigation, and mediation, environmental insurance coverage litigation, environmental enforcement defense, permitting, defense of toxic torts, asbestos, and vapor intrusion claims, and government compliance environmental investigations and audits.

On the weekends in the summer, Francie enjoys spending time boating with the family or playing golf. She also keeps herself busy with gardening and at-home projects spending lots of time at Home Depot. Francie likes ending her days, when possible, with a good book or a good glass of wine.

Paul J. DeMartino, Jr.

Paul J. DeMartino, Jr. is an associate specializing in assisting business and healthcare clients in complex contractual and corporate disputes involving minority oppression, LLC and partnership divorces, business dissolutions, restrictive covenants, fraud, and contractual disputes of all kinds. Paul litigates on behalf of clients in state and federal courts including the Chancery Division, General Equity Part, and the United States District Court. As a former Chancery Division law clerk, Paul offers a unique perspective to clients often reaching practical solutions for client's complex matters.

In his spare time, Paul enjoys playing golf and spending time at the Jersey Shore.

Brach Eichler Litigation *In The News*

On May 10, Litigation Co-Chair **Rose Suriano** along with Associate **Lauren Adornetto Woods**, issued a client alert discussing "Legal Questions Surrounding Vaccine Passports."

On May 12, **John D. Fanburg**, **Keith Roberts**, and **Matthew Collins** spoke at NJAASC's 11th Annual Ambulatory Surgery Conference.

On June 1, Labor and Employment Law Co-Chairs **Matthew Collins** and **Anthony Rainone** issued a client alert entitled "New Jersey Executive Order 243: The New Rules for Office Reopening and Remote Work."

On June 8, Labor and Employment Law Co-Chair **Matthew Collins** remarks in the *New Jersey Law Journal* on the end of the NJ Public Health Emergency.

On June 14, Litigation Member **Bob Kasolas**, issued a client alert, "Superior Court Confirms Viability of Restaurant's Claims to be Excused from Lease Obligations Due to COVID-19 Restrictions."

On July 15, Litigation Co-Chair **Rose Suriano** along with Associate **Edward Velky**, issued a client alert entitled "Combatting Material Escalation with the Implementation of Contract Escalator Clauses."

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