

Is Your Treating Physician Now Required to Submit an Expert Report?

Product Liability Advisory

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In a case of first impression for the Ninth Circuit Court of Appeals, the three-judge panel held that treating physicians who were previously exempt from the written report requirements of Federal Rule of Civil Procedure 26 are now required to provide an expert report to the extent that their opinion goes beyond the scope of the specific treatment rendered. See *Goodman v. Staples Office Superstore, LLC*, 2011 WL 1651246, No. 10-15021, at *1 (9th Cir. May 3, 2011).

Background Facts

In *Goodman*, the plaintiff tripped and fell in a grocery store, sustaining head, neck and foot injuries. *Id.* The plaintiff was taken to the hospital, where she had a CT scan of her head and neck that did not show any fractures. *Id.* After experiencing continued pain, the plaintiff returned to her treating physician who had performed a spinal fusion on her prior to her trip and fall accident. *Id.* at 2. The treating surgeon took a CT scan and an updated MRI and determined that the plaintiff had a fracture near her fusion plate. *Id.* As a result, the plaintiff underwent two post-accident surgeries. *Id.*

At trial, the court prohibited the plaintiff's spinal surgeon from testifying about causation in the plaintiff's case-in-chief "due to her failure to comply with expert disclosure rules." *Id.* at 6. Although the plaintiff urged that her treating spinal surgeon was not subject to the Rule 26 requirements and did not have to produce a written expert report, the court precluded the surgeon and other treating physicians from testifying as to any "information provided by [plaintiff's] attorney that they hadn't reviewed during the course of treatment." *Id.* at 6, 8.

Legal Framework

Prior to the *Goodman* ruling, treating physicians were exempt from the reporting requirements of Rule 26(a)(2) and could testify without producing a written expert report. See Fed. R. Civ. P. 26(a)(2). Rule 26(a)(2) provides that a witness is only required to submit an expert report "if the witness is one retained or specially employed to provide expert testimony in the case." *Id.* Post-*Goodman*, a treating physician who is given additional information about the plaintiff and who testifies regarding the causation of a particular injury is a Rule 26 expert subject to the

reporting requirements. *Goodman*, 2011 WL 1651246, at *6-8. Now, "once the lawyer for the [plaintiff] undertakes to elicit an opinion whether a particular traumatic event caused the condition as opposed to another cause, the expert has been transformed into the same type of expert envisioned by the report requirement" and is required to submit a written expert report. *Id.* at 3.

Possible Impact

The impact of the *Goodman* decision could be far-reaching. Not only will the decision likely limit any treating physician's ability to testify as to causation in the absence of a written report, but the case's holding is potentially significant for our clients who rely on in-house experts to defend claims against them.

To the extent the opinions of in-house experts extend into matters beyond their everyday duties for the company or are based on information and research developed post-litigation, the *Goodman* decision may require those in-house witnesses to provide expert reports in accordance with Rule 26(a)(2)(B). Failure to provide a report could result in the exclusion of their testimony.

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