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Navigating Section 41 Notice Requirement

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Few aspects of personal injury practice cause as much anxiety for the practitioner as the pitfalls of Section 41 of the Metropolitan Transit Authority Act.[1] In conquering this anxiety, the best defense is a good offense, and the best offense is to have a thorough understanding of the nuances of the CTA's Section 41 defense of *strict compliance*. Namely, that "the requirements of section 41 are mandatory and not lightly excused."[2]

Unfortunately, the legislative intent in enacting Section 41 gives little guidance to the practitioner when it comes to understanding the draconian enforcement of strict compliance by the courts. The purpose of the enactment of Section 41 is to allow the CTA to make a timely investigation into the facts surrounding an injury claim, better enable the CTA to locate witnesses, and assure that those witnesses are better able to recall the facts of the occurrence.[3] In so doing, the CTA "thereby can more effectively defend itself against bogus claims."[4]

Regardless, the lack of actual prejudice to the CTA is not a legal excuse for the failure to strictly comply with Section 41. Specifically, "the fact that the CTA had or could have obtained the correct information despite deficiencies in the plaintiff's notice is irrelevant to the issue of whether notice was properly provided, as the CTA has no affirmative duty to obtain information that is missing from or reported incorrectly in a plaintiff's Section 41 notice."[5]

The end result of the strict compliance requirement is that justice is often set aside. A plaintiff's meritorious (i.e. not "bogus") claim, which has been *fully* investigated by the CTA, is barred due to a technical deficiency in the Section 41 notice. This is the quintessential "trap for the unweary." The following practice tips aim to assist the practitioner from becoming another statistic of Section 41.

Know the Elements of Section 41

Statute of Limitations: *No civil action shall be commenced in any court against the Authority by any person for any injury to his person unless it is commenced within one year from the date that the injury was received or the cause of action accrued.*[6]

Notice Requirements: A highlighted dissection of Section 41 reveals the following four (4) procedural notice requirements:

(a) within *six (6) months* from the date that such an injury was received or such cause of action accrued;
(b) a statement, *in writing;*
(c) *signed* by the injured person, his agent, or attorney;
(d) shall be *filed* in the office of the *secretary of the Board*, and also in the office of the *General Counsel for the Authority.*[7]

Further dissection highlights the following five (5) basic pieces of substantive information which must be included in the notice:

(1) The name of the person to whom the cause of action has accrued;
(2) The name and residence of the person injured;
(3) The date and about the hour of the accident;
(4) The place or location where the accident occurred; and
(5) The name and address of the attending physician, if any.[8]

Know the Nuances of Section 41

On its face, compliance with Section 41 appears to be rather simple and straightforward. *For the most part*, it is. Probably the three biggest lessons to be learned from the dozens of First District opinions which have found noncompliance with Section 41 are that practitioners are not adhering to the plain language of the Act, practitioners are not properly investigating their cases in time to cure any defects in their notice, and practitioners are violating the golden rule of K.I.S.S. (Keep It Simple, Stupid). Unfortunately, this last rule can also be the proverbial catch-22 when it comes to Section 41.

One of the first and most important admonishments we, as lawyers, give to our clients when preparing them for their depositions is to listen to the question asked and answer only the question asked. Yet when it comes to Section 41, many practitioners seem to lose site of this virtue. Compliance with Section 41 is *not* the time or place for creative lawyering. It does, however, demand smart lawyering, which means starting the process early (assuming that your client does not come to you for the first time five months and three weeks after the occurrence).

One-Year Statute of Limitations: The one-year statute of limitations period is subject to the statutory tolling provisions for minors and persons under legal disability.[9] As such, the time in which to file a minor's *complaint* is tolled until his or her 20th birthday in accordance with the more specific provisions of Section 13-211 of the Code of Civil Procedure.[10] Likewise, derivative actions for loss of consortium, including actions for medical expenses of minors or persons under legal disability,[11] are similarly tolled to coincide with the period of time in which the injured person must commence his or her cause of action.[12]

It should also be noted that the application of Section 41 is applicable

to *all* claims for personal injuries filed against the CTA regardless of the nature of the occurrence, including those claims which do not arise out of the CTA operations as a common carrier, including injuries suffered during construction related activities.[13] On this latter point, the one-year statute of limitations under Section 41 has been held to be more specific than, and thus prevails over, the four-year statute of limitations in construction cases.[14]

Six-Month Notice Deadline: Like any statute of limitations, the six-month notice deadline under Section 41 is the continental divide between having a claim and not having claim. Unfortunately, no reported decision yet has specifically addressed whether the six-month notice deadline of Section 41, like the one-year court filing deadline, is tolled for minors and disabled persons.

However, the Illinois Supreme Court has long recognized that notice requirements, which serve as a condition precedent to bringing a claim against a public entity, are *inapplicable* to minors as a matter of public policy. Unless specifically indicated otherwise by the legislature, minors cannot make a legally binding appointment of an agent or attorney.[15] Notwithstanding, a serious question appears to remain open as to whether or not a minor who obtains majority prior to resolution of his claim must file a Section 41 notice at all, file within six months of his 18th birthday, or file by his 20th birthday pursuant to Section 13-211.

Accordingly, despite the logical conclusion that the six-month notice requirement of Section 41 shall be tolled for minors, good practice mandates the most conservative action - *always* file within six months of the occurrence, if possible. If not possible, then certainly within six months of the injured minor's 18th birthday.

In writing: Several cases have discussed, but not ruled upon, whether or not a complaint which contains each and every one of the provisions of Section 41 could satisfy the notice requirements.[16] Rather, a review of Section 41 itself suggests that this is not possible, and in fact, the notice and the complaint must be two separate documents.

Specifically, a plain reading of Section 41 instructs that the notice shall be filed by "any person who is *about* to commence any civil action..." If one was to strictly construe this provision of Section 41, as the courts would be asked to do by the CTA in a motion to dismiss, then it is apparent from the statute itself that the filing of proper notice is a condition precedent to the filing of a complaint, and as such the two cannot occur as one.

Further support for the improperness of filing a complaint in lieu of a separate written notice is found in the legal fact that proper notice must be both *pleaded* and proved.[17] It is simply incongruous and illogical to aver in a complaint that proper notice has occurred when it is the complaint itself which is intended to eventually serve as notice. In light of the strict construction and application of Section 41 by the courts, any semblance of ambiguity in notice practice must be avoided.

Signed: As set forth in Section 41, notice must be signed by the injured person, his agent or his attorney. While any one of these suffice, many practitioners choose to have their clients sign the notice either exclusively or in addition to the attorney's signature. The logic being that, in case there is incorrect information contained on the notice, the client's signature ostensibly creates a defense to a legal malpractice claim. Such logic, however, is little more than a legal fiction and recipe for disaster. An attorney cannot to rely upon a client's potentially faulty recollection in lieu of a competent and timely investigation into the facts necessary for a proper notice.

Filed with Secretary of the Board and General Counsel of the Authority: While there is no provision within Section 41 that notice must be filed *in person*, obvious concern must be given to the burden on the plaintiff to prove at trial that proper notice was served upon the CTA.[18] It is not unheard of for debate to arise as to whether notice served via mail was in fact received by the CTA, let alone received by both of the proper entities: secretary of the Board and General Counsel of the Authority.[19]

Rather, in-person filing assures that the notice receives the appropriate file stamp of both the secretary of the Board and General Counsel of the Authority, signed by an authorized agent for each. Note that the issue here is not proving that notice was received by the CTA, but received specifically by the secretary of the Board and General Counsel of the Authority. The filing of notice with or providing the notice information to any other person, whether claims agent or other officers of the CTA, even including the president, have been held to be grounds for dismissal.[20]

Name of the person to whom the cause of action has accrued: There is a certain amount of ambiguity that is inherent in the request for the name of the person to whom the cause of action has accrued. When providing notice of a claim, the practitioner must be mindful of the correct identification of the person and/or estate to which the cause of action belongs. Paying close attention to the proper naming of persons to whom the cause of action has accrued is particularly necessary with claims involving the Survival Act,[21] Wrongful Death Act,[22] Family Expense Act,[23] as well as a minor's cause of action, a spouse's loss of consortium and similar derivative claims.

The omission from a Section 41 notice of the identification of a real party in interest would likely result in that party's claim, with the exception of minors[24] and legally disabled persons, being precluded from recovery. However, there is a lack of guidance in the Act and from the court on the specific need to expand beyond the mere naming of a survival or wrongful death estate, and actually naming

each and every beneficiary of the estate. Although there is no apparent requirement to do so, there is also no apparent harm in providing this otherwise superfluous information.

Name and residence of the person injured: As with the preceding requirement, there is an amount of unbridled ambiguity when it comes to disclosing the name and address of the person injured. For example, are you required to provide the residence of your client for both the date of the occurrence and at the date of filing the notice, if different? If your client has several addresses in several states, does this element refer to a place of legal residence, or of general abode even if temporary?

Likewise, if you provide your client's married name, but she never legally changed it from her maiden name, is your notice defective? In a wrongful death case, is the person injured considered the decedent or the dependant next-of-kin for whose *exclusive benefit* the action is brought?[25] While it may be easy to say that the answers to these questions are easy, these are questions which have not been addressed in published decisions by the courts. Until better guidance is provided, the cautious act, perhaps overly, is to provide as much superfluous information as possible in one's Section 41 notice to assure that all possible questions are answered.

Date and about the hour of the accident: Giving proper notice of date and time is, *for the most part*, straight forward. The closest the courts have come to a bright line rule defining the meaning of *about the hour* is that "it cannot be said that noon is 'about' 8 a.m."[26]

However, certain situations, no matter how extensive your investigation, will not provide you with a precise time frame, or even an exact date. For example, an individual struck by a train or bus or who falls from a platform late in the evening, and is killed or rendered with a brain injury, may not be found for a number of hours after the occurrence.

Here, the hour or even the date (i.e. before midnight or after midnight) of the occurrence may not be known despite the practitioner's best investigative efforts. In such situations, notice should be given as to a comfortable range, based upon your investigation, which also *reasonably* apprizes the CTA: such as: "Between December 31, 2006 at about 11:30 p.m. and January 1, 2007 at about 1:00 a.m."

Place or location where the accident occurred: *Buses* - the most common mistake practitioners make in citing the location of an occurrence is relying exclusively on information provided either by the client or contained in a police report, rather than conducting their own independent investigation.

Simply viewing a City of Chicago street map and visiting the scene to confirm the address of the occurrence and direction of travel, as described by your client or in the police report, are minimal steps necessary to assure the information provided in the notice is correct. Providing a nonexistent location or the wrong location is the same as failing to provide any location at all.[27] Likewise, identifying the bus route involved (e.g. Archer Avenue bus), but not providing the address of the occurrence, is insufficient notice because a CTA bus is not, by itself, a place or location.[28]

Trains - unlike incidents involving buses, where an approximate address or intersection can be described and there is no *apparent* need to reference the specific bus route number, incidents involving trains require a different degree of specificity.

A Section 41 notice for a train incident should include *both* the color of the train line involved: e.g. Red Line, *and* the location upon the track: e.g. "at Belmont station" or "between Belmont station and Addison station."[29] A notice which provides the *correct place or location where the accident occurred* upon the track - which ostensibly is all that is required by strict compliance with this element of Section 41 - but incorrectly identifies the color of the train line, is a deficient notice.[30]

The First District has determined that the color of the train line is not "superfluous" to the location.[31] Nonetheless, simply providing the location as being "the Brown Line" without more specificity is also insufficient.[32]

The hazardous question now becomes whether to superfluously add the bus route number to the Section 41 notice as a prophylactic measure in light of *Hemphill*, and risk misidentifying the route. The forcing of such guess-work should have no place under Section 41 where failure to strictly comply has such a dire personal result for the injured party and dire professional result for the attorney.

Name and address of the attending physician, if any: No other element of Section 41 has invoked as much visceral reaction from practitioners as the need to identify the name and address of the attending physician. First, given the legal reality that without subpoena power and without HIPAA authorizations, merely providing a physician's name and address to the CTA does nothing to enable it to timely investigate the claim or weed out fraud.

However, the statute is what it is, and it is strictly construed. The end result is that the "attending physician" is an individual *person*, not a hospital and not a "physician's group."[33] Likewise, the attending physician must be one who actually treats the plaintiff for the injuries alleged to have been caused by the occurrence.[34] The naming of a single physician who turns out to have treated the plaintiff for unrelated conditions, or conditions which could not be attributed to the occurrence, renders the notice deficient.[35] As with naming an improper location, naming an improper physician is tantamount to naming no physician at all.[36]

Unfortunately, this element is not so much a trap for the unweary, as it is unrealistic in its requirement that an unsophisticated plaintiff state the

etiology (i.e. medical causation) of his or her injuries by identifying the associated treating physician. This element becomes particularly dangerous in situations where the causal connection of an ailment or degree of aggravation of a preexisting condition may be initially uncertain, even to the plaintiff's physicians. The risk is that the practitioner discloses an attending physician for purposes of Section 41, but that physician later determines that his or her particular treatment is unrelated. Under the First District's holdings in *Margolis* and *Davis*, such a scenario would lead to the drastic measure of dismissal of the claim.

Furthermore, the element fails to appreciate the fact that for many plaintiffs treated in emergency room settings, and certainly many indigent plaintiffs treated within the public health system, it can be difficult to identify the name of the attending physician. Unfortunately, from the practitioner's stand point, it requires extensive time, often several months, just to get the records and billing statements which may or may not contain the name (legible or otherwise) of the attending physician.

Know the CTA's Burden

In addition to the notice requirements which a plaintiff must meet under Section 41, Section 41 also requires that the Authority, within ten days after being notified in writing of an injury, shall furnish a copy of Section 41 to the person either by certified mail or hand delivery to the person with signed receipt.

Notably, in the event the Authority fails to furnish a copy of Section 41 as provided with this Section, any action commenced against the Authority shall not be dismissed for failure to file a written notice as provided in this Section.

This latter provision "shall be liberally construed in favor of the person required to file a written statement" so as to trigger the Authority's obligation to provide a copy of Section 41, regardless of whether the notice comes from the plaintiff himself or his counsel.[37] Moreover, in giving liberal construction to the type of notice which triggers the Authority's obligation to provide a copy of the Section, the mere receipt of a courtesy card from a plaintiff-passenger following an accident is sufficient to invoke the Authority's duty despite no expressed reference to injury.[38]

Conclusion - Know the Checklist

While Section 41 certainly has its share of pitfalls - some foreseeable and some unforeseeable - the practitioner can take certain affirmative steps to preclude a Section 41 defense by the CTA.

•Start your *investigation* as early as possible. Visit the scene with your client. Order police and paramedic reports and interview witnesses. Order medical records and bills.

•Do not wait to file the Section 41 notice. Remember: you can file an *amended* Section 41 notice as many times as you need to within the six month period.

•File your complaint as soon as possible after filing the notice. In addition to averring the serving of the Section 41 notice, mirror the actual disclosures from your notice in the allegations of your complaint so that you have an answer to your pleading from the CTA on those key allegations. Filing your complaint will also afford you use of the court's power to compel production of medical records and bills if time is an issue.

•Finally, once in suit, make full and immediate use of Supreme Court Rules 213 and 214 to solicit the necessary information, admissions and denials from the CTA regarding the sufficiency of your allegations. Perhaps the best tool for achieving immediate admissions and denials as to the sufficiency of a Section 41 notice is the propounding of a Rule 216 request to admit.[39] Not only does Rule 216 mandate a *sworn* and *good faith* response within twenty-eight (28) days, but the failure to properly respond or timely respond within twenty-eight (28) days from date of service of the request will deem properly asserted allegations of your request, and consequently your Section 41 notice, true for purposes of trial.[40] As such, you will know within twenty-eight (28) days whether or not the Section 41 notice is contested, and likewise you will also know which specific element is potentially insufficient.

Endnotes

[1] 70 ILCS 3605/41 (2007).
[2] See *Murphy v. CTA*, 191 Ill. App. 3d 918, 923 (1st Dist. 1989).
[3] *Hinz v. CTA*, 133 Ill. App. 3d 642, 645 (1st Dist. 1971).
[4] *Hinz,* 133 Ill. App. 3d at 645.
[5] *Curtis v. CTA*, 341 Ill. App. 3d 573, 580 (1st Dist. 2003).
[6] 70 ILCS 3605/41 (2007).
[7] 70 ILCS 3605/41 (2007).
[8] 70 ILCS 3605/41 (2007).
[9] *Harris v. CTA*, 299 Ill. App. 3d 152, 156 (1st Dist. 1998)(relying on 735 ILCS 5/13-211).
[10] *Harris*, 299 Ill. App. 3d at 156; 735 ILCS 5/13-211 (2007)(distinguishing its holding from its earlier holding in *Serafini v. CTA*, 74 Ill. App. 3d 738 (1st Dist. 1979) in which it held that the statute of limitations was tolled only until a minor's 19th birthday. The *Harris* court explained that *Serafini* was decided before the legislature enacted Section 13-211, and therefore *Serafini* is no longer applicable). *Harris*, 299 Ill. App. 3d at 154-155.
[11] 750 ILCS 65/15 (2007)(commonly referred to as the Family Expense Act).
[12] 735 ILCS 5/13-203 (2007).
[13] *Wheatley v. CTA*, 289 Ill. App. 3d 60, 64-65 (1st Dist. 1997).
[14] *Wheatley,*289 Ill. App. 3d at 64-65(holding the four-year statute of limitations under 735 ILCS 5/13-214 is inapplicable to lawsuits filed against the CTA in light of the more specific nature of Section 41).
[15] *Haymes v. Catholic Bishop of Chicago*, 33 Ill. 2d 425, 428 (1965)(citing *McDonald v. City of Springfield*, 285 Ill. 2d 52 (1918).
[16] *Johnson v. CTA*, 366 Ill. App. 3d

867, 874 (1st Dist. 2006)(discussing, *inter alia, Murphy v. CTA*,191 Ill. App. 3d 918 (1st Dist. 1989); *Streeter v. CTA*, 272 Ill. App. 3d 921 (1st Dist. 1995); *Joseph v. CTA*, 306 Ill. App. 3d 927 (1st Dist. 1999).

[17] *Hayes v. CTA*, 340 Ill. App. 375, 383-383 (1st Dist. 1950); *Hinz,* 133 Ill. App. 3d at 645.

[18] See *Hayes,* 340 Ill. App. at 383-383; *Hinz,* 133 Ill. App. 3d at 645.

[19] See *Murphy,* 191 Ill. App. 3d at 921.

[20] *Watson v. CTA*, 322 Ill. App. 3d (1st Dist. 2001)(dismissal proper where service of notice was on president and General Counsel, not on secretary and General Counsel); *Streeter v. CTA*, 272 Ill. App. 3d 921 (1st Dist. 1995)(dismissal proper even though plaintiff completed and returned to CTA claims agent CTA Form 4417 which provided all information required under Section 41); *Segarra v. CTA*, 265 Ill. App. 3d 480 (1st Dist. 1994)(dismissal proper where service only on General Counsel); *Sanders v. CTA*, 220 Ill. App. 3d 505 (1st Dist. 1991)(dismissal proper where information provided solely to claims adjuster).

[21] 755 ILCS 5/27-6 (2007).

[22] 740 ILCS 180/2 (2007).

[23] 750 ILCS 65/15 (2007).

[24] *Girman v. County of Cook*, 103 Ill. App. 3d 897, 900 (1st Dist. 1981)(holding that wrongful death action could proceed exclusively for the benefit of minor beneficiaries where estate failed to comply with mandatory notice requirement).

[25] See 740 ILCS 180/2 (2007).

[26] *Davis v. CTA*, 326 Ill. App. 3d 1023, 1028 (1st Dist. 2001).

[27] *Davis,* 326 Ill. App. 3d at 1028; *Yokley v. CTA*, 307 Ill. App. 3d 132, 137 (1st Dist. 1999).

[28] *Barrera v. CTA*, 349 Ill. App. 3d 539, 542-543 (1st Dist. 2004).

[29] *High v. CTA*, 345 Ill. App. 3d 964, 967-968 (1st Dist. 2004).

[30] *Hemphill v. CTA*, 357 Ill. App. 3d 705, 713-714 (1st Dist. 2005).

[31] *Hemphill*, 357 Ill. App. 3d at 713-714.

[32] *High,* 345 Ill. App. 3d at 967-968.

[33] *Cione v. CTA*, 322 Ill. App. 3d 95, 99 (1st Dist. 2001).

[34] *Margolis v. CTA*, 69 Ill. App. 3d 1028, 1033 (1st Dist. 1979); *Davis,* 326 Ill. App. 3d at 1028.

[35] *Margolis v. CTA*, 69 Ill. App. 3d at 1033; *Davis,* 326 Ill. App. 3d at 1028.

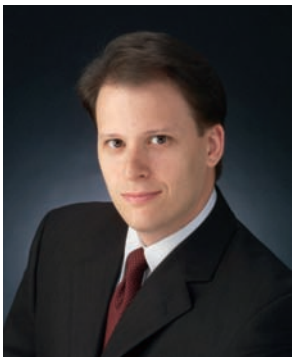
[36] *Davis,* 326 Ill. App. 3d at 1028.

[37] *Puszkarska v. CTA*, 322 Ill. App. 3d 75, 79 (1st Dist. 2001).

[38] *Fields v. CTA*, 319 Ill. App. 3d 683, 689 (1st Dist. 2001).

[39] Ill. Sup. Ct. R 216 (2007).

[40] *Moy v. Ng*, 341 Ill. App. 3d 984, 988-990 (1st Dist. 2003).



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