MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 21 | NO. 4 | DECEMBER 2015

Defense Digest

On The Pulse...

PROFILE OF OUR HARRISBURG OFFICE

By Timothy J. McMahon, Esq.*

Timothy J. McMahon

More than 30 years ago, Marshall Dennehey began serving the firm's clients in central Pennsylvania from our Harrisburg office, which currently has over 20 attorneys, including 11 shareholders. Consistent with our commitment to providing excellent legal representation within distinct and focused practice groups, the Harrisburg office has dedicated attorneys in the Casualty, Health Care, Professional Liability and Workers' Compensation Departments.

The casualty group consists of three shareholders: me, Christopher Reeser and Brooks Foland. Along with our talented associates, we handle a range of litigated cases, such as product liability, premises liability, trucking and transportation, and other casualty matters.

The professional liability group is staffed in Harrisburg by five shareholders: Brigid Alford, Donald Carmelite, Christopher Conrad, Sharon O'Donnell and Edwin Schwartz. Brigid Alford handles insurance coverage and bad faith litigation with two associates, and she is a frequent speaker at seminars hosted by the Pennsylvania Defense Institute and the Pennsylvania Bar Institute. Don Carmelite and his associate concentrate their efforts on the defense of civil rights and other litigated matters involving public officials, municipalities and other governmental entities. Sharon O'Donnell and Christopher Conrad routinely represent employers in discrimination and other employment-based litigation. Each also represents school districts and educational entities in litigation involving students, staff and others arising in the educational area. Ed Schwartz, along with his associate, concentrates his practice on the defense of attorneys in professional liability actions. Both Ed and his associate are active members of the Pennsylvania Bar Association's Professional Liability Committee. Each routinely speaks in the Committee's semiannual malpractice avoidance programs, both at the County Bar levels and upon request with individual law firms.

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** Tim, the managing shareholder of our Harrisburg, Pennsylvania office, can be reached at 717.651.3505 or tjmcmahon@mdwcg.com.*

OUR ASBESTOS AND MASS TORT LITIGATION PRACTICE GROUP

By Daniel J. Ryan, Jr., Esq.*

Daniel J. Ryan, Jr.

Litigation related to asbestos injuries is one of the longest-running mass torts in United States history. Marshall Dennehey's Asbestos and Mass Tort Litigation Practice Group has been involved since a flood of this litigation began in the 1970s. Through the decades, the law, medicine and overall how these cases are defended has constantly evolved. The practice group attorneys know how important it is to stay on top of each change and remain zealous advocates for our clients in these complex, multi-million dollar matters. Our group consists of twenty-five attorneys and ten paralegals, with the majority of attorneys having over twenty years of experience. These veteran attorneys mentor and share insights with our younger associates in the group to ensure that the same philosophies and skills are provided at each level of representation.

Our Asbestos and Mass Tort Litigation Practice Group is not only housed in our Philadelphia office, but we have a regional presence with attorneys residing to the north within our Long Island office, to the west in our Pittsburgh office, to the south in our Delaware office and also in both of our New Jersey offices. Our representation is not contained within the local jurisdiction of each office, but our attorneys represent clients across the country as national or regional counsel. Additionally, these offices are certainly not isolated from each other, and each has the capacity and ability to work together on any particular case. We are a paperless group and have easy access to any asbestos case via our computer system. Our asbestos and mass tort attorneys make a consistent effort to meet and confer about the trends in our respective jurisdictions. This practice group has developed internal continuing legal education courses to ensure that all of our attorneys understand key concepts in the ever-changing defense of asbestos cases. Further,

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** Dan is chair of our Asbestos and Mass Tort Litigation Practice Group. He works in our Philadelphia, Pennsylvania office and can be reached at 215.575.2740 or djryan@mdwcg.com.*

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A MESSAGE from the EXECUTIVE COMMITTEE

By Thomas A. Brophy, Esq.
President & CEO

FURTHER THOUGHTS ON LEGAL AUDITING

In the last column that I wrote for this publication, I said, "There had to be a better way" than the current process of bill review wherein bill auditors analyze legal bills with the express purpose of identifying billing entries for which they can deny payment. It is the single most frustrating feature of representing insurance carriers and their insureds in civil litigation. Ask any one of our lawyers, many of whom have defended difficult cases with bad facts before hostile juries and hostile judges, and they will tell you they would much rather deal with those issues than deal with the constant barrage of exceptions to billing entries they see from a significant number of insurance carrier clients.

Recently, when discussing this topic with an auditor at a large insurance carrier, the auditor asked, "What are you complaining about? The percentage of write offs that you are experiencing is less than the industry average." I asked what industry average she was talking about, and she said, "Seven percent." I was shocked by her response. Perhaps I was being naïve, but I thought that clients genuinely had an interest in paying our fees to the extent that our fees had been generated in fairly representing their insureds. I told that carrier's auditor that we were unwilling to accept any "industry average."

However, this comment compelled me to take a further look at the industry practice of auditing billing entries. I say billing entries because the type of audit that I am discussing audits only billing entries. It does not audit legal work or the case itself. The first problem with this type of audit is the one-size-fits-all mindset. The carrier publishes a set of billing "guidelines." Those billing "guidelines" are then applied in the same manner to every case, whether it is an asbestos case, a workers' compensation case, a professional liability case or a general liability case. The reality is that no one set of guidelines can cover every situation. However, the auditors are trained to apply the same guidelines to every situation, which is akin to fitting a square peg into a round hole. Whatever parts of the peg don't fit in the round hole are then written down or off in one way or another, and the lawyers are then left to accept the "discounted" fee or to reconstruct that which has been written off.

The problem of the one-size-fits-all mindset is further compounded because many carriers assign one or two auditors to audit an entire book of business being performed by a particular law firm. This reality often leads to a failure to appreciate the type of work that is being performed, the jurisdiction in which it is being performed or the attorneys who are adversarial to its insured.

Let me give you a specific example. In Philadelphia asbestos litigation, in an effort to control costs and to eliminate redundancy, one defense firm will be selected in each case to handle the "defense medical." The law firm that is responsible for the "defense medical" will have to gather all of the medical records and diagnostic tests that are material. That law firm will also have to communicate with plaintiff's counsel and the various defense counsel about the status of the "defense medical." Counsel will also have to communicate with defense experts and address the need for further medical evidence and the timing of expert reports. In asbestos cases, there are multiple defendants, and this responsibility is passed from one defendant's attorney to another, resulting in substantial savings to our insurance carrier clients since so much redundancy is eliminated.

Despite the fact that this process is mandated by the court, and the despite the fact that the insurance carrier is saving significant dollars by participating in this joint process, we find fee auditors constantly challenging the fees that we bill for this task, alleging that they are administrative or paralegal. In other words, reducing the fees that would be billed to our clients by participating in this joint process is not adequate. We must also be in compliance with the letter of each case handling guideline, even though it is impossible to be compliant with each carrier's guidelines while fulfilling the obligations associated with handling the defense medical.

There is also the question of bias. The responsibility of a civil defense lawyer is to represent the interests of his or her client. That lawyer is dealing with attorneys who are adverse to the client's interests. That lawyer may also be dealing with a judge who is hostile to the interests of his client and, in some cases, may be dealing with a legal system that is hostile to the interests of his client. That lawyer needs to balance the needs of all of the clients whom he is representing, in every case that he is handling, and he needs to readjust almost on a daily basis the time that he can allocate to a particular task given the requirements of each case and the demands of opposing counsel and the courts. A fee auditor brings a single perspective and a single set of rules and applies it to the work that the lawyer is doing, no matter how unrealistic those rules are when applied to a given situation. Thus, a phone call made to the lawyer by opposing counsel or by the trial judge will be written off as administrative, depending upon the subject matter of the conversation, notwithstanding the fact that the time that the lawyer expended was mandated by the activity initiated by plaintiff's counsel or by the court.

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PROFILE OF OUR HARRISBURG OFFICE

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The four health care attorneys, including shareholders Kevin Osborne and Michael Mongiello, defend hospitals, physicians and other health care providers in medical negligence actions. The members of this group also represent health care professionals in licensure actions.

Kacey Wiedt, the assistant director of the firm's Workers' Compensation Department, is a resident in the Harrisburg office. Kacey, along with three other attorneys, represents employers in the defense of workers' compensation actions.

All of the attorneys in our Harrisburg office try cases within their areas of concentration. The office typically serves 14 counties in Central Pennsylvania, and our Harrisburg-based lawyers are recognized by the courts and adverse counsel alike for being consistently prepared to defend cases through trial. A majority of our attorneys are frequently invited to speak at continuing education and other programs on trending issues, noteworthy decisions and the art of advocacy within their respective practice groups.

Although not specifically listed here, the 11 associate attorneys in the Harrisburg office are vital to the fulfillment of our mission. They are talented, efficient and innovative in their work. They continue the firm's tradition of providing legal services which are responsive to our clients' needs.

The lawyers and staff in Marshall Dennehey's Harrisburg office take pride in their demonstrated provision of excellent representation and responsiveness to our clients' goals and unique needs. ■

OUR ASBESTOS AND MASS TORT LITIGATION PRACTICE GROUP

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the same clients are often represented across county and state lines by our various offices. This makes it possible for our attorneys to provide a consistent and knowledgeable defense in every court our clients find themselves in.

The practice group represents various types of clients—including manufacturers, suppliers, contractors, employers and premises owners—in multi-party matters. With the broad scope of representation, we understand that it is imperative to be efficient, organized and cost effective. We exceed at this at every juncture of litigation, which allows us to provide strong, excellent representation while also providing considerable savings to our clients. All of our attorneys have access to an internal, electronic asbestos reference database that stores medical journals/articles, past expert depositions, jury selection information, naval documents and jurisdictional law, among other resource material. Our attorneys are never left to "reinvent the wheel" as they have access to this detailed and expansive source of information.

We strive to provide our clients with the most up-to-date information as to the developing trends in the litigation. This group issues several Legal Updates over the course of the year to keep our clients abreast of special news and updates. At the request of various clients, our attorneys have also organized and given presentations at various seminars. We encourage anyone who is interested in scheduling a presentation or being included on our electronic mailing list to contact one of our attorneys.

At trial, Marshall Dennehey attorneys are consistently considered the most experienced team in the courtroom. Our asbestos and mass tort group has tried hundreds of cases to verdict. The trial talent of our attorneys is best shown by our impressive results obtained over the last twenty years. During any trial, our lawyers optimize the access to our firm's highly respected appellate practice group, chaired by John J. Hare, Esquire. Our appellate attorneys not only provide monitoring at trial for appellate issues, but they also assist with the preparation and argument of dispositive and pre-trial motions to ensure early and favorable rulings. The proficiency of our attorneys is known locally, regionally and nationally. Several of our attorneys are members of national trial teams that send them to defend our clients across the country. At times, the involvement is on short notice; however, the defense is never short on skill.

In addition to our practice group's extensive experience in the defense of asbestos claims, our attorneys also have experience in handling other toxic tort matters, including benzene, mold, chemical sensitivity, lead and other chemical exposures. We encourage our clients to contact us to determine how we can be of assistance on these other matters.

With our dedication, outstanding resources and seasoned trial attorneys, our practice group is a strong and incomparable team dedicated to the protection of the interests and welfare of each and every client. Retaining a single attorney is impossible as each client has this team working together and striving for an outstanding result with every case. We are confident that, if a client finds themselves in court where our attorneys are present, the client not only finds that our attorneys are known for their talent and diligence, but that they are also known as the jurisdictional leaders in the defense of these matters. ■

Federal—Employment Law

THE NLRB'S LATEST DECISION ON THE JOINT-EMPLOYER STANDARD SIGNALS INCREASED COMPLICATIONS FOR COMPANIES THAT USE TEMPORARY AND SUBCONTRACT WORKERS

By Candace D. Embry, Esq.*

KEY POINTS:

- Use of temporary or contract workers has increased in workplaces nationwide.
- Contractual agreements that name the supplying organization as sole employer of temporary workers may not be sufficient to insulate employers from liability to temporary workers.
- In *Browning-Ferris Industries (BFI) of California*, the NLRB returns to a broad interpretation of "joint employer," subjecting unsuspecting employers to potential liability for temporary workers.

Candace D. Embry

On August 27, 2015, the National Labor Relations Board announced a decision that will primarily impact companies and organizations that outsource temporary or contract workers when it revised the standard used to determine joint-employer status under the National Labor Relations Act (NLRA). Under this revised standard, the NLRB may find that "two or more statutory employers are joint employers of the same statutory employees 'if they share or codetermine those matters governing the essential terms and conditions of employment.'"

While this decision is ultimately a restatement of the NLRB's prior rule on joint employer status, the major change arises from the fact that the Board will no longer require that a putative joint employer both **possess** and **exercise** the power to control an employee's terms and conditions of employment. Rather, this decision permits a joint-employer determination where a putative joint employer possesses that authority, even when it does not exercise that authority. The NLRB interpreted this restatement as necessary in light of the changing landscape of the American workforce and as a preservation of the Board's long-standing view regarding joint-employer status, which had become muddled following decades of inconsistencies and narrower interpretations than initially intended.

Dating back to 1965, the NLRB and the courts used this "share or co-determine" formulation to decide in many cases that control over a worker's terms of employment, whether or not that control was exercised, was indicia of a joint-employer relationship. Over the last 30 years, however, the Board has introduced additional requirements that have collectively narrowed the joint-employer standard—focusing its attention on whether that control was actually exercised and requiring that the control be direct, immediate, and not "limited and routine." Using this restrictive approach, the Board has determined that a joint-employer relationship did not exist even in some cases where the contract between two parties expressly provided the putative employer with the power to dictate the terms and conditions of a worker's employment.

As this standard continued to narrow, the use of workers through staffing or subcontracting agencies increased dramatically. In its decision, the NLRB cited statistics noting that workers employed through temporary staffing agencies now make up two percent of the nation's workforce. Temporary workers are also now used in a larger variety of occupations, and the employment services industry is expected to become one of the largest and fastest growing industries over the next eight years. With this in mind, the Board considered that an ever-narrowing approach to defining joint employers risked failing the Board's responsibility of adapting the NLRA to the "changing patterns of industrial life."

Application of the new or restated rule requires considering whether an employment relationship exists pursuant to the NLRA and whether the putative joint employer possesses sufficient control over an employee's essential terms and conditions of employment to permit meaningful collective bargaining. In spite of even the best contract, a finding in the affirmative would, according to the new or restated standard, require unsuspecting companies and organizations that use temporary or contract workers to potentially recognize these workers as employees and to bargain with a union representing a group of these employees, should one form.

In *Browning-Ferris Industries (BFI) of California*, the decision that sparked this change, BFI contracted with a supplier firm (Leadpoint) to provide additional workers for its recycling facilities. The agreement between the two companies stated that Leadpoint was the sole employer of the workers it supplied. The arrangement provided for separate management, hiring and disciplinary procedures of these employees, among other important employment factors. However, BFI was able to influence each of these areas by requiring specified qualifications, determining wage caps and suggesting disciplinary measures to be taken against workers. In light of these

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Federal—Insurance Coverage

FEDERAL ABSTENTION IN SIXTH CIRCUIT DECLARATORY JUDGMENT COVERAGE LITIGATION

By David J. Oberly, Esq.*

KEY POINTS:

- The exercise of jurisdiction by district courts under the Federal Declaratory Judgment Act, 28 U.S.C § 2201 is not mandatory and "at times the better exercise of discretion favors abstention."
- The Sixth Circuit Court of Appeals has developed a non-exclusive, five-factor test to analyze the appropriateness of the exercise of its discretionary jurisdiction over federal requests for declaratory relief.
- Skilled insurers can utilize these principles of discretion and abstention to chart the course for their coverage disputes to be litigated in the forum of their choice, whether it be in state or federal court.

David J. Oberly

As the sophistication and complexity of insurance contracts continues to rise, disputes between insurers and their insureds regarding the existence and/or extent of coverage have become much more commonplace. While the majority of insurance coverage disputes are creatures of state law, the Federal Declaratory Judgment Act, 28 U.S.C § 2201, allows litigants to obtain a judicial determination in federal court regarding the rights and obligations owed by insurers to their insureds in coverage disputes. However, due to the "unique and substantial discretion in deciding whether to declare the rights of litigants" that has been afforded to district court judges, litigating a coverage action in a federal forum is anything but automatic. Rather, the availability of federal declaratory relief is significantly curtailed by the discretionary authority of the federal courts to turn down a lawsuit that is properly in its jurisdiction. Armed with an intricate understanding of this unique procedural aspect of the federal judicial system, insurers can utilize this significant leeway that district courts maintain to pick and choose the requests for declaratory relief that are added to their dockets to steer their coverage disputes directly to their forum of choice.

The Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction, *** any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." The Act is an enabling act, which confers discretion on the court rather than an absolute right upon the litigant. The Declaratory Judgment Act's textual commitment to discretion, and the breadth of leeway that the federal courts have always understood it to suggest, distinguish the declaratory judgment context from other areas of law in which concepts of discretion surface. Federal district courts have "unique and substantial discretion in deciding whether to declare the rights of litigants."

Importantly, with the Declaratory Judgment Act, Congress created an opportunity, not a duty, to grant relief to qualifying litigants. The exercise of jurisdiction under the Declaratory Judgment Act is not mandatory, and "at times the better exercise of discretion favors abstention." District courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. With that said, this discretion is not without its limits. Rather, "sound administration of the Declaratory Judgment Act calls for the exercise of judicial discretion, hardened by experience into rule."

The Sixth Circuit has identified five factors to guide the exercise of discretion. The factors, which come directly from *Moore's Federal Practice*, are intended to be helpful guidelines that summarize prior case law. District courts in the Sixth Circuit consider these five non-exclusive factors in the course of exercising their discretion. These factors—often called the *Grand Trunk* factors, after the case that introduced the list in the Sixth Circuit—are: (1) whether judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;" (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective.

The Sixth Circuit has often applied the first factor—settling the controversy—to declaratory judgment actions by insurance companies to determine policy liability with inconsistent results. One line of cases holds that this issue is limited to consideration of whether a declaratory relief action will settle the insurance coverage issue not being addressed in the underlying state court action. The other line of cases has required that the declaratory judgment action settle the underlying controversy in state court. Cases fit within one of the two categories based on two factors: (1) whether all parties are joined to both actions; and (2) whether the issues in the federal declaratory judgment action are also before the state

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A MESSAGE FROM THE EXECUTIVE COMMITTEE

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Two years ago, we were defending a large insurance carrier in a bad faith claim in federal court. On one occasion, general counsel for the insurance carrier called the defense attorney to discuss general counsel's availability to provide testimony in response to a court order. On another occasion, the federal judge handling the case called the defense attorney to discuss the potential deposition of the general counsel and in order to see whether general counsel's schedule could be accommodated. In neither case did the attorney initiate the phone call. In both cases the time entries were written off as "administrative" because they involved "scheduling." Given the position of the individuals initiating those phone calls, those write offs were nonsensical. However, fee write offs like that are routine.

The lawyer evaluates his services, in large part, by how well he or she has represented the client. I suspect that an auditor evaluates his performance by how strictly he has applied the case handling guidelines to the fees that he has audited. Over time, the auditor cannot help but become biased in favor of writing time off since that is the single most important thing the auditor does. The auditors also write off time entries that they view as vague, or they discount them to a lower fee structure. This then requires the attorney to redraft the time entry or to draft an appeal of the fees that have been written off. Often, the time and the cost of drafting that appeal is more costly than simply accepting the write off and moving on. We call it "death by one thousand nicks." It is costly; it is demoralizing; and it erodes the partnership that our clients claim to have with us.

Some carriers take pride in the fact that their auditors are "blind" to the underlying litigation or to the result obtained. In my opinion, the auditor being blind to the underlying litigation undermines the legitimacy of the audit. Several times within the last year, attorneys at this law firm have been asked to assume responsibility for trying a case one to two weeks before trial. They have done so. In one instance, the "blind" auditor assessed the billed attorney's fees as though the attorney had had the case from the first day that it was filed. The auditor discounted the attorney's time, suggesting that certain things that were done by the lawyer in the emergent circumstance "could have been done by a paralegal" and things that were done by a paralegal "could have been done by a secretary." The auditor questioned why the attorney was reviewing medical records when that task should have been done by a paralegal and so on. These fee reductions were made because the auditor was blind to the underlying fact that the lawyer had been asked to assume responsibility for the case on an emergent basis.

I continue to write about this topic because it is the single greatest frustration of lawyers working within the insurance defense industry, and that frustration is not unique to lawyers at this law firm. As a law firm, we are committed to continually reassessing how we do business and how our lawyers handle our cases. We do so out of a desire to continually improve the quality of our services and to make them more cost efficient. Unfortunately, the current insurance industry practice of assessing every individual time entry and contesting each one, no matter how minimal, if it does not contain certain magic words or if it does contain certain other magic words, requires us to spend more and more time on training our attorneys how to craft time entries. This is time that would be better spent improving the quality of the services that we perform. As I have said before, "There has to be a better way." ■

THE NLRB'S LATEST DECISION

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considerations, the Board found that BFI maintained control over the essential terms and conditions of these workers' employment and exercised that control both directly and indirectly, therefore, making BFI a joint employer with Leadpoint pursuant to the NLRA.

In its decision–which made the Board recognize the inherent challenges of navigating these multi-party employment relationships–the NLRB ultimately reiterated its duty to "encourage the practice and procedure of collective bargaining." The Board also boldly noted they are not responsible "to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace."

While courts are not bound by decisions of the NLRB, they often are greatly influenced by them. With this in mind, it is imperative that businesses that utilize staffing agencies and/or subcontractors seek legal assistance in navigating the increased complications of maintaining both their independence from temporary workers and a workplace that still accomplishes its intended goals. ■

FEDERAL ABSTENTION IN SIXTH CIRCUIT

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court. Declaratory judgment plaintiffs who join all relevant state parties to the federal action may be able to settle the controversy in federal court. Under this scenario, the declaratory judgment is able to resolve all controversies between the federal declaratory plaintiff/insurer, the state court plaintiff injured party and the state court defendant insured. This scenario favors the federal court obtaining jurisdiction where the state court, for its part, is unable to resolve the coverage controversy because the federal plaintiff/insurer is not a party to the state action. When, however, the declaratory plaintiff fails to join a relevant party to the federal

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Federal—Public Entity & Civil Rights

THE IDEA STATUTE OF LIMITATIONS (FINALLY!) EXPLAINED

By Christopher J. Conrad, Esq.*

KEY POINTS:

- Absent certain statutory exceptions, parents have two years from the date they knew or should have known of a violation of the IDEA to request a due process hearing through the filing of an administrative complaint, or they will be forever time-barred.
- If a complaint is timely filed, and liability is proven, the student whose rights were violated may be entitled to compensatory education and other equitable relief for the entire "period of deprivation." There is no two-year cap on the period of redress.

Christopher J. Conrad

In 2004, Congress reauthorized the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., a federal law intended to ensure that every child with special needs is afforded a free appropriate public education (commonly known as a FAPE). The IDEA ensures that right by mandating that public educational institutions—including school districts, intermediate units and public charter schools—identify, evaluate and effectively educate special needs children, or pay for their education elsewhere if they require specialized services that the public institution cannot provide. The statute broadly authorizes special education hearing officers and federal courts to provide equitable relief, including compensatory education, to children who have been deprived of a FAPE.

Prior to the 2004 reauthorization, the IDEA did not include a statute of limitations. Congress found this problematic, because parents could knowingly wait for many years to file a complaint, resulting in school districts often being surprised by claims involving students who were much older than when the issues giving rise to the claims first presented and, on occasion, involving students who had long since graduated, or moved away, from the district. Congress reasoned that waiting many years to bring actions on behalf of a child jeopardizes the child's education and creates distrust between parents and school districts.

Congress sought to remedy this concern in its 2004 reauthorization of the IDEA by adding a statute of limitations, now found at 20 U.S.C. §1415(f)(3)(C), which, in pertinent part, states: "A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint…" Thus, under the IDEA, parents generally must file their due process complaint within two years of the date they "knew or should have known" of the alleged violation (often referred to as the KOSHK date), except in limited circumstances when certain equitable tolling provisions built into the statute apply, or unless the governing state has an explicit time limitation for requesting a hearing, in which case state law governs.

While §1415(f)(3)(C) seems fairly straightforward on its face, as the language reads like a typical two-year statute of limitations found elsewhere under federal and state law, the intent of this limitations provision was muddied by another amendment appearing elsewhere in the IDEA as a result of the 2004 reauthorization. Section 1415(b), entitled "types of procedures," lists and briefly describes the procedures for commencing and conducting a due process hearing under the IDEA. Section 1415(b)(6)(B), as amended in 2004, states that the procedures discussed generally in §1415(b) afford "[a]n opportunity for any party to present a complaint… which sets forth an alleged violation that occurred not more than two years before the date the parent or public agency knew or should have know about the alleged action that forms the basis of the complaint…"

With the 2004 reauthorization, the complaint procedure described in §1415(b)(6)(B) came to parallel the statute of limitations set forth in §1415(f)(3)(C) in several key respects, including that both now describe a two-year time limit that depends on a reasonable discovery (KOSHK) date. Unlike §1415(f)(3)(C), however, the two-year limitations period stated in §1415(b)(6)(B) runs backward instead of forward from the KOSHK date. The Third Circuit noted recently in its precedential decision *G.L. v. Ligonier Valley School District Authority*, 2015 U.S.App. LEXIS 16776 (3d Cir. Sept. 22, 2015), "[t]he differences in the language of these provisions and the fact that they appear to move in opposite directions from the reasonable discovery date has given rise to confusion in the wake of the 2004 reenactment, with district courts within this Circuit interpreting them in a range of ways." The court pointed out that some district courts in the Circuit have construed the two provisions to limit redress to the two years preceding a complaint (a position often advanced in defense of public institutions), while others have interpreted the provisions to impose a filing deadline but not to limit the remedy for timely-filed claims, and while still others have embraced a "2+2" approach (*i.e.*, that the section provides a two-year window before the KOSHK date within which a parent may claim an IDEA violation occurred), essentially creating a four-year period of redress for a timely-filed claim (a position argued by many parents' attorneys).

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Federal—Securities and Investments Professional Liability

BONDS MAY BE THE NEXT WAVE OF FINRA CLAIMS

By Denis C. Dice, Esq.*

KEY POINTS:

- Bond suitability and misrepresentation claims are on the horizon.
- Proper client counseling and disclosure documentation will be critical to defend these claims.

Denis C. Dice

Interest rates have been at an all time low for approximately the last nine years. The Federal Reserve has artificially reduced interest rates in an effort to stimulate the economy and provide additional liquidity. In addition, the stock market has been in a bull market since March of 2009. This six-year bull market has resulted in significant appreciation in the value of stocks, and these favorable market conditions have resulted in the reduction of customer disputes filed at arbitration before FINRA. Currently, it is projected that FINRA arbitration claims will be about half the number of claims filed in 2009. Claims filed at FINRA for 2015 will be somewhere in the range of 3,000 to 3,500.

However, the zero interest rate environment we are currently experiencing will change within the next six months to a year. The Federal Reserve indicated that it intended to raise interest rates as early as September of 2015. The Federal Reserve plans to raise interest rates although the inflation rate is below a level that the Fed formerly believed would not necessitate a rise in interest rates. However, the rise in interest rates by the Federal Reserve will likewise cause the rise in interest rates in bonds. Not only corporate, but also municipal bond interest rates for new issue bonds, will increase relative to bonds that were issued in a lower interest rate environment.

Once the interest rate on new issue bonds increases, the value of bonds that have a lower interest rate decreases. The lower value of bonds paying a lower interest rate is caused by market forces where investors will pay less for a bond with a lower interest rate then could be otherwise obtained by purchasing a new issue bond. Therefore, the yield on a bond purchased in the secondary market at a discount to its par value will rise while the market value of the bond will decrease.

The decreasing value of bonds sold on the secondary market creates risk to investors who own those bonds. Unless the bond defaults, however, it will continue to pay the interest rate through its maturity date, and the bond holder would continue to receive that interest. Upon the maturity date, the bond holder can sell the bond at the price for which it was purchased and suffer no losses. Unfortunately, investors often times decide to sell a bond when they see that its market value has declined. Investors may panic in the face of this bond value decline and lock in their losses, although they would not have incurred such losses if they continued to own it through maturity. Other investors may have a need for liquidity and decide that the bond needs to be sold in order to satisfy other income and/or expense needs. However, and for whatever reason, an investor may decide to sell bonds in a rising interest rate environment, and they will suffer losses in the event that the bond they own pays an interest rate less than what is available on new issue bonds.

Investors who incur these losses may decide that those losses are, in fact, the responsibility of the broker-dealer who recommended such bonds for their portfolio. For example, when the Fed announced that it would be raising interest rates in 2013, this created what was referred to as a "taper tantrum." The taper referred to the tapering of quantitative easing of the infusion of government funds and stimulus into the economy. Markets overreacted, causing yields to rise and the market value of bonds to dramatically decline. Upon seeing a decline in value of bonds which investors thought were conservative, many panicked, sold the bonds, locked in their losses and some decided to blame their broker-dealer for such losses.

Investors complained the bonds were overly risky and were "guaranteed" against losses. Investors claimed they were unaware of market risk associated with the ownership of these bonds and that they would never have purchased the bonds if they were aware of such risk.

Based upon these events that unfolded in 2013, it is very likely that the market value for bonds will dramatically decrease when the Fed, in fact, raises interest rates. Some customers will undoubtedly claim they were unaware of any such market risk associated with their bonds and may seek to lay blame for such loss at the feet of the broker-dealers.

In an effort to combat these inevitable claims, broker-dealers should warn their clients about the effect of rising interest rates on their bond portfolios. Broker-dealers should also review their clients' accounts for overconcentration of bonds and for suitability purposes. Broker-dealers need to be prepared to discuss strategies for the purchase of bonds when interest rates are on the rise. For example, clients can be counseled to purchase bonds with shorter maturities and also not to sell their bonds as the market value declines. Clients should be counseled that the bond will continue to pay the stated interest rate and that losses will only be incurred upon the sale of such bonds. Broker-dealers should also strive to document all such warnings and retain copies of all correspondence to clients outlining the risks associated with the ownership of bonds and strategies for dealing with declining market value for bonds.

Bond suitability and misrepresentation claims are on the horizon. Proper client counseling and disclosure documentation will be critical in the defense of these claims. ■

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Florida—General Liability

NAVIGATING THE UNCERTAIN WATERS OF FLORIDA PROPOSALS FOR SETTLEMENT

By Jessica L. Lanifero, Esq.*

KEY POINTS:

- Utmost care is needed when evaluating and preparing proposals for settlement.
- Failure to strictly comply with Florida Statute § 768.79 and Florida Rule of Civil Procedure § 1.442 may result in either an offer to settle with no consequence or an invalid proposal for settlement.

Jessica L. Lanifero

The jury has just returned a verdict in your favor. You find yourself tasked with evaluating a proposal for settlement you served months or even years ago. Now an important question arises: Is the proposal for settlement valid and enforceable? Given recent legal developments in Florida, the courts have taken great efforts to clear up any uncertainty to that answer.

WHAT IS A PROPOSAL FOR SETTLEMENT?

A proposal for settlement (PFS) is a vehicle under Florida law that can allow a party to recover reasonable attorneys' fees "in any civil action for damages." PFSs are governed under both Florida Statute § 768.79 and Florida Rule of Civil Procedure § 1.442. Defendants may file a PFS 90 days after suit is filed, and plaintiffs may file 90 days after the defendant is served. Both parties cannot serve a PFS later than 45 days from trial or the first day of the trial docket, whichever is earlier.

A PFS is deemed invalid if it seeks to resolve claims for equitable relief along with legal damages. *Diamond Aircraft Industries, Inc. v. Horowitch*, 107 So.3d 362 (Fla. 2013). Examples of equitable relief are specific performance or an injunction.

CONTENT AND FORM

A PFS may have the legal effect of triggering liability for an opponent's attorney's fees. To do so, the PFS must:

1. Name the party or parties making the proposal and to whom the proposal is being made;
2. Identify the claim(s) the proposal is attempting to resolve;
3. State with particularity any relevant conditions;
4. State the total amount of the proposal and all non-monetary terms of the proposal;
5. State the amount proposed to settle a claim for punitive damages, if any; and
6. State whether the proposal includes attorneys' fees and whether fees are part of the legal claim.

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IS THE AMOUNT OF THE OFFER CLEAR?

The recent legal holdings send a clear message: Failure to strictly comply with the plain language of the Florida Statute and the Florida Rules of Civil Procedure will result in an invalid PFS. Further, any deficiencies will be strictly construed against the drafter. *Hilton Hotels Corp. v. Anderson*, 153 So.3d 412 (Fla. 5th DCA Dec. 19, 2014).

The Fourth DCA recently held in *Government Employees Insurance Co. v. Ryan*, 165 So.3d 674 (Fla. 4th DCA Mar. 11, 2015), that a PFS was patently ambiguous and defective when the plaintiff filed a PFS to GEICO stating that the offer to settle "was in the total amount of one hundred thousand dollars ($50,000) inclusive of all fees."

The trial court held that, despite the conflicting amounts, both parties were aware that GEICO's policy had a $50,000 policy limit. Consequently, the PFS was sufficiently clear and not susceptible to more than one reasonable interpretation. The Fourth DCA reversed the trial court's ruling and found this inconsistency to be patently ambiguous and precluded an award for attorney's fees. *Practical Tip: a prudent attorney will have another individual review the PFS. This review should take place not only when they are received but, also, before they are served on a party*.

WAS THE PROPOSAL FOR SETTLEMENT MADE IN GOOD FAITH?

The amount of the PFS must not only be clear and specific, but it must be made in good faith. In determining whether a PFS was made in good faith, the court will use the valuable blueprint provided in Florida Statute § 768.79(7)(a) in evaluating a "good faith basis." The considerations enumerated in this statute include:

1. The then apparent merit or lack of merit in the claim;
2. The number and nature of offers made by the parties;
3. The closeness of questions of fact and law at issue;
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer;
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties; and
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

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FEDERAL ABSTENTION IN SIXTH CIRCUIT

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declaratory judgment action, the action cannot settle the controversy. In insurance coverage cases, this typically occurs when the declaratory plaintiff/insurer sues only the insured party, omitting the injured party. In that situation, any judgment in the federal court would not be binding as to the state court plaintiff and could not be res judicata in the state court action.

In *Western World Ins. Co. v. Hoey*, the Sixth Circuit was recently afforded the opportunity to resolve this split, but declined to do so. Rather, it held that district courts could follow either line of cases. The only guidance that the court provided was that "a district court would be wise to decline jurisdiction over a declaratory judgment action if it involved novel, unsettled, or complex issues of state law; if there were evidence of procedural fencing; or if the sought-after declaration would somehow be frivolous or purely advisory."

The second factor—clarifying the legal relations—is closely related to the first factor and is often considered in connection with it. If, under the first factor, the declaratory judgment will settle the controversy, it will also, almost of necessity, clarify the legal relations at issue. The question is slightly more complicated where the declaratory judgment action does not entirely settle the controversy. In the Sixth Circuit, as with the first factor, a split in precedent exists with respect to the second factor. The first line of cases holds that the district court's decision must only clarify the legal relationships presented in the declaratory judgment action. By contrast, the second line of cases holds that the district court's decision must clarify the legal relationships in the underlying state action.

The third factor—procedural fencing—is intended to preclude jurisdiction for declaratory plaintiffs who file their suits for the purpose of acquiring a favorable forum. The Sixth Circuit has instructed, however, that courts should be reluctant to impute an improper motive to a declaratory plaintiff when there is no supporting evidence in the record. At the same time, the Sixth Circuit has agreed with one district court's conclusion that, although there was no evidence of bad faith filing, because the state court had to consider the same issue raised in federal court, this indicated the declaratory plaintiff's attempt to obtain a favorable ruling in federal court rather than risk an unfavorable state court result.

The fourth factor—federal/state court friction—concerns whether the use of a declaratory action would increase friction between federal and state courts and improperly encroach upon state jurisdiction. To analyze this factor, the Sixth Circuit has delineated three sub-factors for consideration: (1) whether the underlying factual issues are important to an informed resolution of the case; (2) whether the state trial court is in a better position to evaluate those factual issues than the federal court; and (3) whether there is a close nexus between the underlying factual issues and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action.

Under the final factor—alternative remedies—the district court evaluates the alternative remedies available to the federal declaratory plaintiff. This factor asks whether there exists an alternative remedy that is better or more effective than the requested declaratory judgment. One of the alternative remedies available is to seek a declaratory judgment in state court. In this regard, the Sixth Circuit has noted its concern regarding declaratory judgments in federal court when the only question is one of state law and when there is no suggestion that the state court is not in a position to define its own law in a fair and impartial manner.

The Sixth Circuit has never indicated how these five *Grand Trunk* factors should be balanced. With that said, the Sixth Circuit has indicated that district courts should consider three guiding principles: efficiency, fairness and federalism. Courts have never assigned weights to the factors when considered in the abstract, and rightly so—the factors are not, of course, always equal. For example, a relatively efficient declaratory judgment (factors 1, 2 and 5) could very well be inappropriate if hearing the case would be unfair (factor 3) or would offend the bundle of principles generally labeled as "federalism." Instead, the relative weight of the underlying considerations of efficiency, fairness and federalism, as well as the five more targeted *Grand Trunk* factors, will depend on the facts of the case.

In the insurance context, district courts routinely adjudicate cases involving insurance carriers seeking a declaratory judgment in federal court regarding the scope of coverage when their insureds have been sued for alleged tort liability in state court. In this context, the Sixth Circuit has repeatedly held that declaratory judgment actions seeking an advance opinion on indemnity issues are seldom helpful in resolving an ongoing action in another court. While there is not a per se rule against exercising jurisdiction in actions involving insurance coverage questions and insurance contract interpretation, the potential danger of federal courts treading on states' efforts to regulate insurance companies has led the Sixth Circuit to hold on a number of occasions that a district court should have stayed or dismissed complaints as to their underlying state court lawsuits. However, if no significant or unique issues of state insurance law exist, state courts ostensibly have no greater interest in deciding the lawsuit than a federal court, as both courts are equally able to declare the rights and obligations of the parties under the insurance contract.

Insurers must remain cognizant of the ability of federal district courts to exercise their discretion and abstain from exercising jurisdiction over a declaratory judgment action, not only when it institutes litigation seeking a judicial determination as to the rights and obligations owed by it to its insured, but also when the insurer is on the receiving end of a request for declaratory relief filed against it by the insured. When pursuing a declaratory judgment in a federal forum, before filing suit or removing the action from state court, the insurer must ensure that the facts and circumstances of its coverage litigation fit within the contours of the five-factor *Grand Trunk* test such that a district court will likely find that the exercise of its discretionary jurisdiction is appropriate. Once that determination has been made, the insurer should devise a strategy to take advantage of the federal forum by focusing on framing its issues and claims in a manner that maximizes the likelihood of maintaining federal jurisdiction. On the flipside, when responding to a federal declaratory judgment action—whether it be the result of the insured's filing of a complaint or the removal of a pending state court action—an insurer who favors litigating the coverage lawsuit in state court should challenge the federal suit through the declaratory judgment abstention doctrine. Done properly, insurers can utilize these abstention principles to pave the way for coverage disputes to be litigated in the forum that increases the chances of obtaining a favorable outcome in a wide range of actions where declaratory relief is sought. ■

New Jersey—General Liability

WHERE THE SIDEWALK ENDS: A WARNING TO COMMUNITY ASSOCIATIONS IN NEW JERSEY

By Gregory D. Speier, Esq.*

KEY POINTS:

- In *Qian v. Toll Brothers*, the New Jersey Supreme Court held that common-interest community associations are not entitled to common-law immunity in slip and falls occurring on private sidewalks/roadways within the community.
- The court ruled that residential public sidewalk liability does not apply to falls occurring on a private sidewalk that is considered a common-element of the common-interest community.
- Community associations and their insurers must face potential increased liability exposure in light of *Qian*.

Gregory D. Speier

INTRODUCTION

In the recent decision of *Qian v. Toll Brothers*, 2015 N.J. LEXIS 825 (N.J. Aug. 12, 2015), the New Jersey Supreme Court held that community associations have a legal duty to keep their private sidewalks in a reasonably safe condition. This article will discuss the court's ruling and will provide recommendations to associations and their insurers on how best to transfer risk in light of the *Qian* decision.

THE *LUCHEJKO* DECISION

Pursuant to New Jersey common law, the crucial distinction to be made when analyzing liability in cases involving injuries occurring on **public** sidewalks is whether the sidewalk abuts **residential** or **commercial** property. As per New Jersey common law, a residential landowner owes no duty to pedestrians to keep the public sidewalk adjoining their premises free of ice and snow. On the other hand, commercial property owners have a non-delegable duty to maintain sidewalks abutting their property in reasonably good condition. Courts have held that such reasoning is consistent with public policy and notions of fairness, as commercial landowners have an ability to better protect against injury caused by dangerous sidewalks.

The question of whether a common-interest community is to be deemed "residential" or "commercial" was directly addressed in *Luchejko v. City of Hoboken*, 23 A.3d 912 (N.J. 2011), in which a pedestrian slipped on ice on a **public** sidewalk, which abutted both a public roadway and a residential condominium building. The court rejected the plaintiff's assertion that a homeowner's association was more of a commercial/organizational property and, instead, focused on the **residential use** of the property itself. In doing so, the court came to the conclusion that the association was "residential" in nature and, therefore, immune from suit as per New Jersey common law.

Due to the fact that the common-interest community in *Luchejko* was deemed "residential" and not "commercial," the decision was mistakenly read by some to mean that immunity would apply in all slip and falls occurring on sidewalks abutting, or within, association property. What the *Luchejko* decision failed to do, however, was address a common-interest community's duty to maintain a **private** sidewalk that fell within the **common elements** of the property. It was not until the *Qian* decision that the New Jersey Supreme Court addressed this issue head on. As explained below, the Supreme Court in *Qian* drew the distinction between **public** sidewalks that **abut** common-interest communities and **private** sidewalks that **fall within the common elements** of such communities.

RELEVANT FACTS OF *QIAN*

The Villas at Cranbury Brook (VCB) is a common-interest, "over fifty-five," community that is owned and controlled by the VCB Homeowners Association. Homeowners at VCB take title to only their dwelling units, while common areas, such as the sidewalks and the walkways, are owned by the Association. Likewise, homeowners at VCB are charged monthly assessments for maintenance of the common areas, including removal of ice and snow from the sidewalks.

To help maintain the community's property, the Association hired a landscape contractor. Pursuant to this contract, the landscape contractor was to remove ice and snow in accumulations of two inches or more from the community's roadways, parking areas, driveways and sidewalks. If less than two inches of ice or snow fell, the Association was required to direct the landscaper to remove same.

On December 19, 2008, freezing rain caused the accumulation of ice on the sidewalks and streets of VCB. Approximately one and one-half inches of ice fell. At the Association's request, the landscape contractor salted the roadways of the community. The Association did not make a similar request for clearing the common sidewalks and walkways. Two days later, on December 21, 2008, additional freezing rain accumulated. The landscape contractor did not apply any salt to the roadways or the sidewalks of the community. It was on this date that the plaintiff slipped and fell on ice on a sidewalk within the VCB community, sustaining injuries.

At the trial level, summary judgment was granted to the Association and its management company based upon *Luchejko*. An appeal followed, and the Appellate Division affirmed the dismissal

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THE IDEA STATUTE OF LIMITATIONS

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The Third Circuit in *G.L. v. Ligonier Valley*, carefully considered each of these competing viewpoints and found that the limitations provision warranted further scrutiny, finding that the language of §1415(b)(6)(B) was not plain but, rather, ambiguous, and that "[t]he clearest way to demonstrate the ambiguity it has created in the statute… is through the diametrically opposed interpretations…" that have been adopted by different courts in the Circuit and, by extension, the varying interests of the special education bar. In reviewing the legislative history behind Congress's drafting of the 2004 reauthorization, the court reasoned that the inconsistent language in §1415(b)(6)(B) and §1415(f)(3)(C) reflected nothing more than a drafting error in the reauthorization process and that Congress actually intended the statute of limitations appearing in both sections to be one and the same. Thus, the court concluded that the two-year statute of limitations appearing in both sections, when read together, "functions in a traditional way, that is, as a filing deadline that runs from the date of reasonable discovery and not as a cap on a child's remedy for timely-filed claims that happen to date back more than two years before the complaint is filed." In so reasoning, the court held:

> [A]bsent one of the two statutory exceptions found in §1415(f)(3)(D), parents have two years from the date they knew or should have known of the violation to request a due process hearing through the filing of an administrative complaint and that, assuming parents timely file that complaint and liability is proven, Congress did not abrogate our longstanding precedent that "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." (citations omitted).

G.L. v. Ligonier Valley is a significant decision in special education law in that we now know unequivocally that the separate references to the limitations periods appearing in different sections of the 2004 IDEA reauthorization, while seemingly diametrically opposed on their face, actually mean the same thing. Thus, there is no question that parents and guardians must be vigilant and cannot sit on the rights they have as parents and guardians of children with special needs. If parents know, or have reason to know, that their school district violated their child's rights, in most circumstances they must file a complaint within two years of that KOSHK date or be forever time-barred. As attorneys representing school districts and other Local Educational Agencies (LEA), this remains a viable defense that must be raised in appropriate cases, which in many instances will require a hearing officer to consider evidence as to the timeliness of the claim before the substantive issues in dispute can be addressed.

On the other hand, we no longer have at our disposal the argument (embraced by several hearing officers and federal courts) that the period of redress is capped at two years from either the KOSHK date or, alternatively, from the date the complaint was actually filed. Instead, a student whose rights were violated is entitled to compensatory education for the entire "period of deprivation," no matter how many years the student's rights were violated, so long as the complaint is timely filed. Obviously, this exposes school districts and other LEAs to greater potential liability because hearing officers now unquestionably have complete authority and discretion to award multiple years' worth of compensatory education, if appropriate, not just two years' at most. School districts and other LEAs are well advised to be ever more vigilant in ensuring they are identifying and evaluating all students for whom they are responsible and who may be in need of special education and related services and delivering the FAPE to which they are entitled, as the failure to do so could be significant and costly. ■

NAVIGATING THE UNCERTAIN WATERS

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Utilizing the above statutory criteria, the Third DCA recently held in *Isais v. The HT Hackney Co*.,159 So.3d 1002 (Fla. 3d DCA Mar. 25, 2015), that three defendants' PFSs in the amount of $500 were made in good faith because the defendants had a reasonable basis to believe their exposure was nominal. In this case, Hackney filed suit against Isais, REW Dairy and Toni Gas, alleging that the defendants had not paid Hackney's invoices. In 2006, discovery in the case confirmed that all of Hackney's invoices issued to the defendants had, in fact, been paid. Based on Hackney's harmful concession, the Third DCA held that the defendants had an "objective reasonable basis" to file the $500 PFSs. *Practice Tip: At the time of serving, a nominal PFS memorialized the factors which support the modest offer*.

JOINT PROPOSALS FOR SETTLEMENT

On April 16, 2015, the Florida Supreme Court authored two important opinions on the issue of joint PFSs. The Supreme Court made it clear that statutory proposals for settlement must be apportioned and differentiated between the parties.

First, *Audiffred v. Arnold*, 161 So.3d 1274 (Fla. 2015) involved two separate claims arising from a motor vehicle accident between Audiffred and Arnold. Audiffred sought claims for her personal injuries and property damage, and her husband, Kimmons, asserted a loss of consortium claim. The plaintiff served a PFS upon the defendant, offering to dismiss both Audiffred's and Kimmons' claims in exchange for $17,500. The plaintiff's PFS was rejected by Arnold.

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On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Meg Kelly (Scranton, PA) obtained a defense verdict in a recent binding arbitration in Lackawanna County, Pennsylvania. The plaintiffs, an elderly couple in their 80s, were crossing the street from a parking lot to go to their daughter's home at dusk and in light rain. They claimed they looked both ways before crossing the street, did not see anything and began to cross. They were a few steps into their crossing when the defendant hit the husband with his minivan. The defendant admitted to going slightly over the speed limit. The husband was seriously injured, resulting in a month-long stay in a rehab hospital and alleged cognitive deficits. He has no recollection of the accident. The elderly wife, who cried at the arbitration to the point that she had to be escorted out of the room, testified that the defendant's vehicle appeared out of nowhere. The arbitrator rendered a defense verdict, assessing the plaintiffs 70 percent liability and the defendant 30 percent liability.

In another matter handled by **Meg**, she obtained a defense verdict in a binding arbitration in Wayne County, Pennsylvania. The plaintiff was crossing the street from a park when he was struck by the defendant's vehicle. He sustained, among other things, a head injury necessitating life flight. There was a liability dispute because the plaintiff's witnesses claimed he was in the crosswalk and our witnesses testified he was not in the crosswalk. The plaintiff had no memory of the accident. The arbitrator found no liability on the part of the defendant and found the sole cause of the accident was the plaintiff running or walking into the roadway without properly stopping and observing the traffic conditions.

Allison Krupp (Harrisburg, PA) obtained a defense verdict from a Philadelphia County arbitration panel in a case that arose from a rear-end motor vehicle accident in which the insured's nephew was operating the insured's vehicle without his knowledge or permission. The plaintiff filed suit against the insured, his nephew and the body shop where the vehicle was allegedly being kept immediately prior to the accident. The nephew was sued for negligence, and the insured and body shop were both sued for negligent entrustment. The principal issues with respect to the negligent entrustment claim against the insured centered on whether the nephew had been using the vehicle with the insured's knowledge and permission and, if so, whether the insured had reason to know that his nephew was unfit or incompetent to operate the vehicle on the date of loss. The panel of three arbitrators unanimously ruled in favor of the insured, finding that the plaintiff failed to establish negligent entrustment of the vehicle.

In a personal injury matter, **Robert Diehl** (Roseland, NJ) obtained an involuntary dismissal at the start of trial. The plaintiff was a passenger in a vehicle driven by the co-defendant driver who drove over the side of the road and crashed into a barn. Despite having been cited at the scene of the accident for failing to place the vehicle in park, the co-defendant driver testified at his deposition that he properly parked his car on the property abutting the road and that the accident was actually caused by a ground collapse beneath his vehicle. The plaintiff thereafter amended his complaint to name two additional defendants, including the property owner and our client, a separate individual who had previously entered into a contract to purchase the property but had not yet taken title. Bob previously moved for summary judgment on the plaintiff's failure to retain an expert, which was denied, as the court ruled that the plaintiff did not need an expert to offer his pure theory of a ground collapse to the jury. In his pretrial exchange, however, the plaintiff's counsel requested that the jury be charged with the duty of landowners and occupiers to inspect and warn. Bob responded by filing a motion in limine, arguing that this sought to charge the jury with a greater standard of care than the general negligence allegation of a ground collapse in the complaint, and that any duty to inspect and/or warn would have required expert testimony to offer the requisite standard of care. The court agreed. Plaintiff's counsel attempted to save this claim by arguing that the duty to inspect and warn was the only allegation he was seeking to offer at trial regarding the property, and that such a ruling would constitute a dismissal of his complaint as to the defendants with ownership interest in the property. The judge accepted this representation by plaintiff's counsel and dismissed the complaint with prejudice as to both our client and the co-defendant property owner.

After two years of protracted and significant litigation, **Rick Ravine** and **Ryan Burns** (Fort Lauderdale, FL) obtained a voluntary dismissal with prejudice for our client, a manufacturer of a truck-mounted crane, in a catastrophic brain injury case. The plaintiff was an operator of a crane who fell 10 feet head-first, sustaining a skull fracture and numerous fractures throughout his body, and enduring a lengthy coma. While he recovered to a functional level, he suffered from permanent cognitive impairments, permanent loss of working capacity, and numerous permanent physical impairments from his injuries. He developed neurogenic bladder dysfunction and had a workers' compensation lien of over $1 million. The plaintiff's expert claimed several standards violations regarding placement of handholds and the design of the ladder and platforms surrounding the operator's chair of the crane. The plaintiff elected to dismiss the case after being threatened with a motion for summary judgment on the issue of causation, as well as sanctions for fraud on the court following discovery of a statement made to his neurologist several

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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months after the accident describing the accident as being caused by the plaintiff tripping over a pipe used by his co-workers as an umbrella stand.

Jennie Philip (Doylestown, PA) won before a federal arbitration panel in the U.S. District Court for the Eastern District of Pennsylvania. Jennie represented the homeowners' insurance carrier in a claim for breach of contract. The plaintiffs claimed that a storm with strong winds "wracked" their 5,000 square foot home, causing interior water damage and structural defects. The plaintiffs made a claim for repairs in almost every room of their house, including a new roof, with damages in excess of $100,000. The plaintiffs presented testimony that the damage was "sudden and accidental" within the terms of the insurance policy. Jennie was able to establish, through testimony of expert witnesses, that the "destruction" claimed was related to the age of the home and original installation defects, which were not attributable to a wind/rain storm.

In an aggravated assault by motor vehicle trial held in the Court of Common Pleas of Lehigh County, Pennsylvania, **Kevin Hexstall** and **Mohamed Bakry** (Philadelphia, PA) obtained a defense verdict. Our client, employed as a truck driver, and while on the job and driving a tractor-trailer, was involved in a serious accident with a passenger vehicle. He was approaching a red traffic signal when he realized that he could not apply the brakes in time to stop the tractor-trailer without jack-knifing. He activated his air horn to notify other drivers at the intersection that he was unable to stop. There were two vehicles on either side of the intersection. One driver was a 19-year-old-female who proceeded into the intersection when her light turned green. Her vehicle was t-boned by our client's tractor-trailer as soon as she pulled into the intersection. She was in a coma for three weeks, was hospitalized for three months, and required extensive physical therapy to re-learn how to walk and talk. Our client was charged with aggravated assault by motor vehicle (a felony) and recklessly endangering another person (graded as a misdemeanor), along with traffic citations such as careless driving and reckless driving. The District Attorney's office refused to engage in any negotiations and made no plea offers. Kevin cross-examined the Commonwealth's fact witnesses and experts in an attempt to establish that our client's conduct did not constitute criminal behavior. Kevin argued in opening and closing statements that, while the evidence may have established that the accident was our client's fault, in order to convict a defendant of these charges, the Commonwealth must prove gross negligence or recklessness, and that they clearly failed to do so beyond a reasonable doubt. The jury deliberated for 20 minutes and rendered a verdict of not guilty on all counts.

HEALTH CARE DEPARTMENT

Bill Courtright and **Matt Keris** (Scranton, PA) received a demurrer dismissing a medical malpractice action in its entirety based on the "Two-Disease Rule." The case involved clear liability for lost breast biopsy samples by a hospital nurse. The complaint did not state that the plaintiff had breast cancer, and this remained the case during oral argument on preliminary objections. The plaintiff sought damages for the anxiety she suffered when she learned that her pathology samples were missing and for her "fear of cancer diagnosis." Her husband sought recovery for negligent infliction of emotional distress for being present with his wife when she learned the samples were lost and for observing her anxiety in not knowing whether she had breast cancer. The plaintiffs demanded $2.5 million to settle the case at the outset. The Monroe County judge properly held that the "Two-Disease Rule," originally stemming from asbestos litigation, was applicable in medical malpractice cases, but that the depression and anxiety the plaintiff and her husband suffered prior to a cancer diagnosis is not recoverable.

Steve Ryan and **Joe Hoynoski** (King of Prussia, PA) were victorious in a prostate cancer death case. The patient, after a two-year period of pain and suffering, died at 52, leaving behind five children and his wife. The patient allegedly requested early PSA monitoring, starting at age 45 instead of 50, because his father and grandfather had prostate cancer. Our client, his family doctor, secured levels at age 45 and 46 as part of the annual checkup for a baseline, with a plan to recheck at age 50. Both values were in normal range, but went from 1.9 to 3.4 (normal is 0.0-4.0). At age 50, the new level was 10.9, resulting in referral, surgery, radiation, androgen ablation and chemotherapy, all to no avail. Securing supportive standard of care testimony was proving very difficult, as the standard for PSA screening in 2005-2006, to the extent there was one, had not yet begun to change. Apparently, the decedent was advised each year that his "blood work" was normal, and he assumed that the annual PSA screening was included, per his understanding with the doctor. The plaintiff's allegation that the decedent believed there was an agreement to test annually (not evidenced in the office record) was circumstantially corroborated by his history to the specialist that his PSA had been normal "every year." Settlement authority at the full Mcare limit of $1 million was obtained, but the physician did not want to settle, despite a real exposure to his practice assets. The plaintiff agreed to a hi-low arbitration, which was heard by the Dispute Resolution Institute. A Prezi presentation created by Joe Hoynoski was used for our opening and closing, which was very effective. The widow, the doctor and one of the children testified live. Expert evidence was submitted on CVs and reports. The judge found there was negligence, but that it was not the factual cause of the harm and rendered an award in favor of the defendant.

Brooks Foland (Harrisburg, PA), with the assistance of paralegal **Arkie Simmers**, obtained a defense jury verdict in a nursing malpractice case in Berks County, Pennsylvania. The decedent, a 76-year-old woman, had chronic and longstanding lymphedema and suffered recurrent upper and lower extremity wounds. Home health nurses, our clients, provided care for these wounds, including new wounds that often emerged due to the fragility of the decedent's skin. The decedent also suffered from

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several co-morbidities including heart disease, COPD, emphysema and hypertension, and she was receiving Coumadin therapy. There were no signs or symptoms of infection during any of the four nursing visits in the home. Within 24 hours of the fourth visit, however, the decedent noticed increased swelling and redness in her right leg, as well as dizziness and fatigue. She was transported emergently to the local hospital and was treated for cellulitis of the right leg and a UTI, among other diagnoses. Her breathing rapidly deteriorated. She was intubated, placed on a ventilator and sedated; sepsis and multi-organ failure followed. The decedent's family made the decision to terminate life-sustaining measures after 10 days in the hospital. The Estate filed a negligence suit against the visiting nurse's association and the last two nurses who treated the decedent in her home. After four days of trial, the jury unanimously found the defendants not negligent.

Eric Grogan (Roseland, NJ) obtained a dismissal with prejudice as to our clients, a hospital and a resident, in an Essex County, New Jersey case. The plaintiff claimed that during an admission to the hospital to give birth, she received ten times the appropriate dose of anesthetic, which allegedly led to her being found unresponsive and foaming at the mouth. CPR was given over an extended time. The plaintiff claimed damages included one-sided weakness and visual changes, as well as alleged psychiatric injuries. The plaintiff served a Notice of Claim on the hospital, a public entity, which was untimely. She also failed to serve a Notice of Claim against the resident, claiming the doctor's name was illegible in the chart and that it was unclear whether the doctor was an independent contractor and, therefore, not subject to the Notice of Claim statute. The chart included a pre-printed section stating "Resident" where the illegible doctor's name was written, and the court determined that, regardless of the spelling of the doctor's name, the plaintiff was on notice that the alleged doctor was a resident and, therefore, an employee of the public entity hospital, and that a Notice of Claim was necessary to continue any claim against the doctor.

Candy Barr Heimbach and **Michelle Wilson** (Allentown, PA) obtained a defense verdict in a binding arbitration in Lehigh County, Pennsylvania. The plaintiff alleged negligence against a hospital and its alleged agent-radiologist in the interpretation of a mammogram, claiming that it caused a year's delay in the diagnosis of breast cancer, the need for additional treatment, and the resulting death of his wife, who was a nurse at the involved hospital. We presented defenses, including the lack of negligence in the interpretation of the films, the comparative negligence of the decedent in waiting to report a palpable lump in the intervening time and the aggressive nature of her particular disease process. The arbitrator found that the doctor was not negligent in his care of this patient.

In a medical negligence case against a general surgeon in the Summit County Court of Common Pleas of Ohio, **Stacy Delgros** (Cleveland, OH) obtained a unanimous defense verdict. Stacy's client was a general surgeon who performed a colostomy procedure on a 32-year-old woman due to a Grade 2 thermal injury to half the circumference of her anal canal that was caused by the laser removal of two external hemorrhoids by a family physician. Initially, the plaintiff and her husband sued only the family physician for causing the injury, but the family physician testified in his deposition that his laser was incapable of causing a thermal injury as it was a "cold laser." He testified that the plaintiff did not have a thermal injury, but had a fissure that only required a small repair procedure. In addition, the family physician hired a surgical expert to criticize Stacy's client for performing an unnecessary colostomy and for negligence in the technical performance of the colostomy, necessitating a revision procedure three days later. As a result, the plaintiffs amended their complaint to add Stacy's client. The plaintiffs' experts believed Stacy's client's description and characterization of the injury and did not criticize her client, unless it was proven that the patient did not have the injury described. The family physician's own expert strongly disagreed with the family physician that the laser could not cause a thermal injury, and the manufacturer's manual contained repeated warnings that the laser could cause thermal injury, particularly if used incorrectly. The plaintiff claimed to suffer from chronic rectal pain and dysfunction as a result of the injury she sustained during the hemorrhoid removal procedure. There was a great deal of conflict between Stacy's client and the family physician at trial, but the jury returned a unanimous defense verdict for Stacy's client and returned a majority defense verdict for the family physician.

PROFESSIONAL LIABILITY DEPARTMENT

Marty Schwartzberg (Melville, NY) obtained summary judgment and dismissal of all claims against our client, a prominent architectural and engineering firm. The case arose when the plaintiff, while on a sidewalk, was struck by a pipe that fell from 18 stories during the erection of pipe scaffolding around a building. The defense strategy focused on the architect's lack of an obligation for direction, supervision or control of the work, or for site safety. The court held that our client demonstrated its entitlement to summary judgment and that it had no duty to the plaintiff, nor to the other defendants, with respect to the scaffold construction and, therefore, could not have breached a duty that did not exist in the first place. The court further held that the contract between the building owner and the co-defendant restoration company established that our client had no responsibility over the means and method of construction, safety precautions at the site, or the acts or omissions of the contractor.

In a "junk fax" case under the TCPA, **Brigid Alford** and **Allison Krupp** (Harrisburg, PA) prevailed in the Philadelphia County Court of Common Pleas on a motion for class action certification. Following a class certification hearing in March, the judge issued an order and opinion denying the plaintiff's motion. The proposed nationwide class would have been comprised of over 15,000 claimants in a case where, had the class been certified and a decision on the merits been entered for the claimants, the statutory damages alone would have been a minimum of $500

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per claimant. During the evidentiary hearing, the court sustained the defendant's objection to the introduction of the plaintiff's expert report regarding the feasibility of the class certification process. In refusing to certify the class, the court found that the plaintiff failed to satisfy the requirements of numerosity/ascertainability, typicality, adequacy of representation and predominance. Of note is that, a few weeks prior to this decision, the court had certified the class in another TCPA case filed by the same plaintiff and the same plaintiff law firm.

Larry Berg and **Kara Pullman**, with the assistance of law clerk **Brielle Kovalchek** (Cherry Hill, NJ), obtained a no cause in an employment matter in Atlantic County, New Jersey. The plaintiff was a former employee of the defendant corporation and alleged she was subject to sexual harassment and a hostile work environment during her employment. The plaintiff, along with her sister, father and brother-in-law, were all employees of the defendant corporation at one point. The plaintiff and her sister have both alleged that the defendant owner of the company made suggestive remarks and touched them inappropriately. None of the plaintiff's allegations were supported by the testimony of her non-family-member co-workers. The plaintiff's retaliation claim was dismissed on summary judgment, and at trial, the jury unanimously found in favor of the defendants after deliberating for less than 30 minutes.

Dennis Dore, **Jessica Lanifero** and **Christopher Walsh**, with the assistance of paralegal **Bonnie Fay** (Jacksonville, FL), obtained a defense verdict in a bad faith matter in the Florida Northern District Court. The case involved allegations of third-party bad faith claims in connection with our client's refusal to tender policy limits without sufficient supporting medical documentation. After our client received an initial demand package containing chiropractic treatment records and an MRI report evidencing a traumatic left medial meniscal tear, no additional records were provided demonstrating a surgical recommendation, permanent impairment or ongoing treatment. The defendant made an initial offer and followed-up with a number of requests to plaintiff's counsel for additional records. Those requests were ignored, and suit was filed. Following a five-day trial, the jury deliberated and concluded that the plaintiff had failed to demonstrate that our client acted in bad faith in its handling of the plaintiff's claim and returned a defense verdict in the defendant's favor. The defense verdict represents a unique achievement in Florida where carriers rarely take bad faith cases to trial, and rarely win.

Ray Freudiger and **Matthew Hamm** (Cincinnati, OH) obtained summary judgment on three of four counts in a first-party bad faith/breach of contract action pending in the Stark County (Ohio) Court of Common Pleas. The plaintiff's lawsuit arose from the denial of a claim following a fire that destroyed his brand new, custom-built mobile home. The plaintiff asserted claims of unfair trade practices, breach of contract, bad faith and punitive damages against our client. The last settlement demand prior to the court's ruling was $500,000. Ray and Matt successfully argued that the claim was, at a minimum, fairly debatable and that the denial of coverage was premised upon a reasonable justification. The court agreed and dismissed the bad faith and punitive damages claims with prejudice. The court also agreed that the unfair trade practices claim was without support under Ohio law and dismissed that claim as well. Of note, the court's ruling came just six days prior to the scheduled start of trial. Upon receipt of the court's judgment entry, Ray was able to settle the remaining breach of contract claim for merely five percent of the plaintiff's last demand prior to the court's decision.

In this legal malpractice action, **Howard Mankoff** (Roseland, NJ) obtained a defense verdict. Our client represented the plaintiff in a commercial dispute concerning the ownership of a business and the distribution of profits from the business. The plaintiff thought he had agreed to settle with his former business partner for $1 million. When the agreement fell through, the plaintiff retained our client to represent him. Our client was eventually conflicted out of the case. The plaintiff claimed that when he obtained the file from our client, he learned for the first time that there had been a $400,000 settlement offer that our client allegedly never conveyed to the plaintiff. The plaintiff sued on several theories, including the failure to request equitable relief and not naming as a defendant the person who incorporated the business. Based on a summary judgment motion by Bob Diehl (Roseland, NJ), all theories, except the failure to convey the settlement offer, were dismissed before trial. After a four-day trial, the jury deliberated for 20 minutes before returning a defense verdict.

Joel Wertman (Philadelphia, PA) obtained a defense award at arbitration in Lehigh County Pennsylvania. Our client, an insurance agent, was alleged to have engaged in high-pressure sales tactics in the completion of a life insurance application. The plaintiff also alleged that she contacted our client to cancel the application the next day. The plaintiff argued that she believed the policy was cancelled; but it was not, and the carrier debited premium payments from her account for nearly six years without her knowledge. This matter was assigned to us the evening before the scheduled morning arbitration. As such, no discovery was conducted on behalf of the client, and we never saw the plaintiff's pre-hearing production until the arbitration commenced. Despite these obstacles, Joel was able to obtain a defense award.

In an excessive force case before a jury in the U.S. District Court for the Eastern District of Pennsylvania, **Christopher Boyle** (King of Prussia, PA) obtained a defense verdict for our client, a local police officer. Chris and his team managed to obtain a bifurcated trial, keeping out the plaintiff's damages claims, and the plaintiff never made it past the liability phase. The jury agreed that it would have been unlikely, if not impossible, for our officer, armed with an assault rifle, to pick up and assault the plaintiff in the manner he described. The jury was out for less than an hour, including lunch.

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In another matter handled by **Christopher Boyle**, he obtained the dismissal of our clients—a township, two police detectives, a fire chief and a fire marshal—on a motion to dismiss in federal court. The case involved a fire in the childhood home of the plaintiff. Her mother had just sold the home, apparently to the plaintiff's dismay, and the plaintiff was the last one seen in the room where the fire started. She was charged with arson and related offenses. Investigation of the scene revealed that the fire had been set by human hands, but the plaintiff was successful in obtaining an acquittal in state criminal court, arguing through the use of a nationally-renowned expert that electricians working in the home had sparked the blaze. In the federal action, the court agreed with us that the plaintiff had failed to establish a seizure as a matter of law, because she was never handcuffed or imprisoned, never had onerous travel restrictions placed on her, was subject to non-monetary bail conditions otherwise, and was essentially, "arrested by appointment."

David Henry (Orlando, FL) prevailed in a case where the claimant contended he was discriminated against on the basis of marital status. The employee was a custodian's assistant for our client, a church, and was living with an unmarried woman. The church contended this was a violation of their scriptural doctrine and terminated his employment. The claimant alleged his civil rights were violated and that he was discriminated against due to his living arrangements and marital status. The Florida Commission on Human Relations terminated the case and found no probable cause, holding that the church had a legitimate interest in enforcing its church doctrine. The claim was brought under state, federal and local law, which is significant because Orlando has its own civil rights ordinance.

Mark Kozlowski (Scranton, PA) obtained summary judgment in a civil rights case in the U.S. District Court for the Middle District of Pennsylvania. The plaintiff, the former Army JROTC instructor working in the school district, brought a civil rights action against the district after he was decertified by the Army JROTC Cadet Command and the district declined to renew his employment contract. The complaint alleged violations of Title VII of the Civil Rights Act, the Fifth and Fourteenth Amendments, and breach of contract. In ruling on a motion to dismiss, the court limited the action to breach of contract and Fourteenth Amendment procedure due process allegations. A motion for summary judgment was filed after discovery was completed. The court found that the evidence demonstrated that the process the plaintiff was afforded met constitutional requirements prior to his termination, *i.e.*, notice, an explanation of the detrimental effect of decertification and an opportunity to explain his side. Accordingly, the court granted judgment in favor of the defendants. The court declined to exercise supplemental jurisdiction over the state law breach of contract claim and dismissed it without prejudice.

James McGovern (Pittsburgh, PA) won a victory before the FINRA. In a matter venued in Chicago, Jamey succeeded on a motion to dismiss based upon FINRA's six-year eligibility rule. The investments at issue were made in 2004, but the claim was not filed for binding arbitration with FINRA until 2014. The applicable FINRA rule states that "[n]o claim shall be eligible for submission to arbitration...where six years have elapsed from the occurrence or event giving rise to the claim." However, FINRA does not provide a specific definition of "the occurrence or event giving rise to the claim." Investors' attorneys always argue that this event is not the date of the investment but, rather, some subsequent occurrence that tolls the six-year period until such time as the investor realizes financial harm. Defense attorneys argue that six-year period is triggered from the date of the investment. In this case, the panel of three arbitrators unanimously decided that the triggering event was the date of purchase and dismissed the case with prejudice.

In an appeal before the Third Circuit Court of Appeals, **Kim Boyer-Cohen** (Philadelphia, PA), **Tom Specht** (Scranton, PA) and **Sharon O'Donnell** (Harrisburg, PA) won a victory over a former school teacher who appealed a summary judgment ruling in favor of the school district. The teacher was fired for performance reasons but claimed she was fired in violation of the First Amendment's protection over free speech when she unwittingly allowed crude, profane and despicable comments she blogged about her students and colleagues to leak into the public realm. The Third Circuit affirmed the trial court's ruling that her speech wasn't protected, leaving no genuine issue of fact for deliberation by a jury.

In this environmental and toxic tort action, **Lila Wynne** and **Kevin Bright** (Cherry Hill, NJ) prevailed on an appeal before the New Jersey Supreme Court. Lila and Kevin represented the prior owner of a property where it was discovered that an underground storage tank had leaked and contaminated the soil and underground water of two adjacent properties. The plaintiffs sued for strict liability under the Spill Compensation and Control Act, the abnormally dangerous activities doctrine, negligence, trespass and nuisance. The plaintiffs sought damages for diminution in property value, bodily injury and emotional distress. Lila and Kevin obtained summary judgment at the trial court level, and the plaintiffs appealed. The trial court's decision was upheld by the Appellate Division. On appeal to the New Jersey Supreme Court, the plaintiffs argued that the trial court erred in dismissing the nuisance and trespass claims on the basis that the plaintiffs were not required to show that the defendant was negligent in any way if the claim is based on a continuing nuisance/trespass. The New Jersey Supreme Court disagreed with the plaintiffs' position, holding that, where the underlying intrusion was unintentional, the standard for nuisance and trespass requires the plaintiffs to show that the defendant's actions were negligent, at a minimum.

In a breach of contract claim, **Trish Monahan** (Pittsburgh, PA) obtained a defense verdict for her insurance carrier client in a jury trial. The plaintiffs alleged that our client had denied their property damage claim in bad faith. The bad faith claim was dismissed on summary judgment, and the contract and UTPCPL claims went to trial. A UTPCPL claim was dismissed during trial. The plaintiffs

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sought approximately $76,000 in damages to their rental property caused by their tenant having a dog, a violation of their lease agreement. The male dog had obviously soiled the carpets and caused other damage by lifting its leg. However, it was established during litigation that the plaintiffs knew the tenants had a Doberman Pincher in the house and did nothing about it. Our client denied the claim because of its policy exclusion, within the plaintiffs' all-risk policy, for damages caused by a domestic animal. It also based its denial upon the policy exclusion for wear, tear and marring. The plaintiffs' damages claim included replacing hardwood floors throughout the two-bedroom house, replacing carpeting and drywall, and biowashing and painting the entire house. However, the plaintiffs were able to subsequently rent the house after simply painting and replacing the carpeting. During trial, the plaintiffs expanded their claim to include basement flooding and destruction of bathroom fixtures in order to bolster their claim for vandalism, and in an attempt to avoid the policy exclusions. The jury was instructed that direct physical loss must be one resulting immediately and proximately from an occurrence. The jury found that the plaintiffs had not met their burden of proving direct physical loss, thus, it never got to the questions of whether our insurance carrier client had proved the applicability of the policy exclusions for damages caused by a domestic animal and wear, tear and marring.

Gary Kaplan and **Art Aranilla** (Wilmington, DE) obtained a motion for judgment on the pleadings before the U.S. District Court for the District of Delaware. In this alleged prison abuse matter, there were over 600 claims raised by 22 plaintiffs against 11 different defendants. Gary and Art represented two of them, a mental health service entity and its employee. The theories of liability against the defendants were numerous, arising under both federal and state law, including negligence, assault and battery, medical malpractice, deliberate indifference to serious medical needs, and civil rights conspiracy. Of the defendants' preliminary dispositive motions, Gary and Art's motion was the only one granted entirely. Gary and Art successfully showed that the plaintiffs had failed to state First Amendment retaliation claims or claims of intentional/negligent infliction of emotional distress. Notably, Chief Judge Stark's opinion incorporated the arguments in Gary's and Art's briefing, and dismissed their clients entirely from the matter.

In a breach of contract/Fourteenth Amendment Equal Protection matter, **Art Aranilla** (Wilmington, DE) obtained summary judgment for claims against four of five insureds and won the trial on issues against the remaining insured. The plaintiff alleged, among other things, that the remaining insured, the maintenance company for her 55+ community, routinely refused to cut her grass, trim her hedges and provide treatments for her lawn, as required. At trial, Art successfully showed that the plaintiff had chased the law care service personnel off her property when they came to provide services, that the maintenance company did as much as they could to provide services, and that the declaration and plan for the community prohibited the plaintiff's counterclaims for the maintenance fees.

Tom Walsh (Wilmington, DE) prevailed on a motion to dismiss before the Bankruptcy Court for the District of New Jersey. Our client was the loaner bank in an adversary proceeding wherein the plaintiff, as co-signer of pre-petition loans, asserted allegations of fraud in the inducement and equitable fraud against the debtor, the borrower, and the bank. Pre-petition, the plaintiff had filed a civil action in New Jersey Superior Court against the soon-to-be debtor and borrower. The state court action was subject to an automatic stay in accordance with Section 362 of the Bankruptcy Code. Post-petition, the plaintiff filed an adversary proceeding, claiming that the debtor and borrower duped him into believing that a second loan was merely a re-application for the first loan. The plaintiff further claimed that the bank committed fraud by way of material omissions in not providing the plaintiff with notice that the first loan had been disbursed. The plaintiff sought compensatory damages, as well as equitable relief via reformation to be removed as co-signer. Tom filed a motion and supporting brief to dismiss the claims for lack of subject matter jurisdiction, setting forth the two-prong analysis of the Bankruptcy Court's jurisdictional limitations and emphasizing the plaintiff's failure to meet his burden to invoke the court's jurisdiction under the "well-pleaded complaint" rule. At oral argument, the Bankruptcy Court agreed that the adversary proceeding did not meet the first three "core proceeding" categories of 28 U.S.C. §1334 as it did not "arise under" or "arising in" a case under Title 11. Tom successfully argued that, as to relief sought against the bank, the claims were not "non-core" under 28 U.S.C. §157 because they failed to meet "related to" jurisdiction, which requires that the relief sought, if granted, could have any conceivable effect upon the debtor's administration or implementation of the Plan of Reorganization. The court agreed that grant of relief as against the bank could have a conceivable effort upon the debtor, thus warranting dismissal.

WORKERS' COMPENSATION DEPARTMENT

Michele Punturi (Philadelphia, PA) received a favorable decision in the employer's termination petition, modification/suspension and the claimant's review petition. Significant to this decision was the Workers' Compensation Judge's finding that the testimony of our expert, a board certified orthopedic surgeon, was completely credible. The doctor had the opportunity to examine the claimant five times and to review all of the medical records and diagnostic study films. In particular, he noted that he reviewed studies that pre-dated and post-dated the work injury which showed extensive evidence of degenerative disc disease and degenerative changes. Further, the judge highlighted the cross-examination we presented of the plaintiff's expert, finding him to not be credible. The judge terminated the claimant's benefits and denied the claimant's review petition to expand the nature of injury. ■

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MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

Shane Haselbarth (Philadelphia, PA) obtained a judgment in the Court of Appeals for the Eleventh Circuit affirming the entry of judgment as a matter of law by the Middle District of Florida in favor of Marshall Dennehey's client, an employer with a health care plan governed by ERISA. The plaintiff sought statutory damages of up to $110 per day going back years, plus attorney's fees, against the employer and the co-defendant third-party administrator. The basis for the claim was that the plaintiff requested documents from both parties that were necessary to appeal the termination of her long-term disability benefits. Against the employer specifically, the plaintiff asserted it had a duty to amend historical plan documents to update its address (its headquarters had moved), as she relied on an old address to seek documents without success. The Eleventh Circuit flatly rejected the claim, holding that the District Court did not abuse its discretion in declining to award statutory penalties where the plaintiff not only had the document she later requested, but also had the means of knowing the proper address to which to send requests. *Smiley v. Hartford Life and Accident Insurance Company*, 610 Fed. Appx. 8, (11th Cir. Jul. 17, 2015).

Audrey Copeland (King of Prussia, PA) successfully appealed the District Court's denial of summary judgment on a qualified immunity issue to the Third Circuit, which reversed and ordered the entry of summary judgment for the defendant, a PE teacher. The plaintiff brought suit under a state created danger theory against a school district and one of its PE teachers for the alleged "delayed drowning" of a minor student, who had a seizure in his classroom approximately one hour after his gym class in the pool. On review, the court was required to accept the facts asserted by the plaintiff, although the defendant disputed the plaintiff's allegations that the student experienced any submersion under water or exhibited any signs of distress, was ordered into the pool after complaints of feeling unwell, or that the cause of death was secondary drowning. The court analyzed whether the law in this context was sufficiently well-established that it would have been apparent to a reasonable PE teacher "that failure to take action to assess a non-apparent condition that placed the student in mortal danger violated that student's constitutional right under the state-created-danger theory." The court observed that those cases finding colorable constitutional violations in school athletic settings involved "patently egregious and intentional misconduct," which was notably absent here. Therefore, the defendant teacher was entitled to qualified immunity because the student "did not have a clearly established constitutional right to dry-drowning-intervention protocols while participating in PE class." The court denied rehearing on September 22, 2015. *Spady v. Bethlehem Area School District*, 2015 U.S. App. LEXIS 15450 (3d Cir. Sept. 1, 2015).

Audrey also obtained the Pennsylvania Superior Court's affirmance of the denial of the plaintiff's post trial motions which challenged the defense verdict in a medical malpractice informed consent case. In *Shinal v. Toms*, 2015 Pa.Super. LEXIS 487 (Pa.Super. Aug. 25, 2015), the court found no error in the denial of the plaintiff's motions to strike certain prospective jurors for cause who had an indirect relationship with the defendant physician through non-party corporate entities. Based upon its independent review, the court found that none of the jurors had a sufficiently close relationship with the litigation participants such that prejudice should have been presumed and, therefore, refused to expand the range of relationships requiring a presumption of prejudice. The court also found no error in instructing the jury that it could consider information conveyed to the plaintiff by a qualified member of the physician's staff as evidence of informed consent.

In *Reppert v. WCAB (Reading Materials, Inc.)*, 2015 Pa. Commw. Unpub. LEXIS 550 (Pa. Commw. July 27, 2015), **Audrey** secured the Commonwealth Court's affirmance of the Workers' Compensation Appeal Board's decision that had affirmed the denial of a claim petition. The court held that, because the employer offered evidence disputing the claimant's medical evidence regarding loss of use of her forearm, a reasonable contest was presented. The court also affirmed the denial of the claimant's penalty petition, which claimed a unilateral cessation of payment for home care services, holding that the employer was not required to provide benefits for the non-medical home care services described.

Lauren Burnette recently prevailed on two significant appellate decisions. In the first case, *Jenson v. Pressler & Pressler & Midland Funding*, 2015 U.S. App. LEXIS 11188 (3d Cir. June 30, 2015), a case of first impression, the Third Circuit adopted a materiality requirement for claims of false, misleading and deceptive conduct against a debt collector under the Fair Debt Collection Practices Act. In a *per curiam* opinion, the Third Circuit decided that a claim premised on a false misstatement of information under the FDCPA must constitute a material misstatement to be actionable.

Lauren prevailed in *Mostofi v. Midland Funding, LLC, et al*, 117 A.3d 639 (Md.App. 2015) before the Court of Special Appeals of Maryland, where the court refused to adopt a "meaningful attorney involvement" requirement under the FDCPA. In a recent decision in the U.S. District Court for the District of New Jersey, *Bock v. Pressler & Pressler*, 30 F. Supp.3d 283 (D.N.J. 2014), the District Court crafted a "meaningful attorney involvement" requirement in the context of attorney letters under the FDCPA. The *Bock* decision is presently on appeal in the Third Circuit. The *Mostofi* court rejected a "meaningful attorney involvement" requirement under the FDCPA, refused to adopt *Bock*, and was critical of the holding in *Bock*. ■

** Prior Results Do Not Guarantee A Similar Outcome*

On The Pulse…

OTHER NOTABLE ACHIEVEMENTS*

Marshall Dennehey received the **"Distinguished Defense Firm Award"** at the annual meeting of the Pennsylvania Defense Institute (PDI). The inaugural award honors a civil defense firm devoted to professionalism, dedication to the practice of law, promotion of the highest ideals of justice in the community and service to the PDI.

Edward Radzik, shareholder in the Maritime Litigation Practice Group in our Manhattan office, has been named a fellow of the Litigation Counsel of America (LCA). The LCA is a trial lawyer honorary society composed of less than one-half of one percent of American lawyers. Fellows are selected based upon excellence and accomplishment in litigation, both at the trial and appellate levels, and superior ethical reputation.

Arthur "Terry" Lefco, professional liability attorney in our Philadelphia office, has been named the 2016 Legal Malpractice Law – Defendants "Lawyer of the Year" for Philadelphia by Best Lawyers in America©. Terry was additionally recognized by Best Lawyers in the areas of Commercial Litigation and Defendants' Professional Malpractice Law.

Bruce McKissock, Chair of the Aviation and Complex Litigation Practice Group in our Philadelphia office, has been named the 2016 Personal Injury Litigation – Defendants "Lawyer of the Year" for Philadelphia by Best Lawyers in America©. Bruce was additionally recognized by Best Lawyers in the area of Commercial Litigation.

Six attorneys from our New York offices have been recognized in the 2015 edition of *New York Metro Super Lawyers* magazine. Each year, no more than five percent of the lawyers in the state are selected as Super Lawyers and no more than 2.5 percent are selected for Super Lawyer Rising Stars. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. Our *2015 New York Metro Super Lawyers* include: **William Robert Connor, III**, **James Connors**, **Daniel McDermott** and **Edward Radzik**. Our *2015 New York Metro Super Lawyer Rising Stars* include: **Adam Calvert** and **Christopher DiCicco**.

James Cole, **Andrew Davitt**, **Eric Fitzgerald**, **Edward McGinn, Jr.** and **Matthew Schorr**, all shareholders, served as faculty at the Claims and Litigation Management Alliance's (CLM) annual Claims College. The Claims College is an educational experience designed to help educate and grow industry claims professionals and the industry. Each school within the college is comprised of three levels, and participants who successfully complete all levels in a particular school receive a CLM designation reflecting their education and commitment to the profession.

G. Mark Thompson, member of the Executive Committee and Board of Directors, was a featured presenter for the *Business Insurance*-sponsored webinar, "The Best Offense Is a Good Defense: Managing Liability Claims in Today's Litigious Environment." Mark and his co-presenter, Glenn Shapiro of Liberty Mutual Insurance, discussed how risk managers and brokers can partner with their insurance carriers to better manage liability claims.

Armand J. Della Porta, Jr. (Wilmington, DE) has been appointed Atlantic Regional Director of the Defense Research Institute (DRI), the country's leading organization of defense attorneys and in-house counsel. Armand, who served as the DRI's Delaware State Representative from 2010-13, began his three-year term on the organization's Board of Directors in October.

Timothy Ventura (Philadelphia, PA) and **David Henry** (Orlando, FL) presented the CPCU Society webinar, "Agent & Broker E&O - A New Lens for Viewing Exposures." The webinar addressed sources of insurance agent/broker E&O exposure, trends in E&O liability, legal defenses and claim resolution techniques, and agent and broker best practices.

Joseph Manning (Roseland, NJ) received an appointment by the Office of Attorney Ethics of The Supreme Court of New Jersey, as a member of the local District Fee Arbitration Committee. Since 1979, District Fee Arbitration Committees throughout New Jersey have been composed of both attorney volunteers and laypersons with the goal of resolving disputes over attorney fees via binding arbitration.

Claudia Costa (Roseland, NJ) spoke at ACI's 23rd National Conference on Employment Practices Liability Insurance in New York City. Claudia co-presented on the topic, "The Triangular Relationship of Carriers, Insureds, and Defense Counsel: Defending an EPL Claim, Litigation Guidelines and Billing, Settlement and Agendas, Coverage Issues, Cost Effective Ways to Work Together, Minimizing Ethical Issues, and More." She was joined by fellow panelists from Starr Companies, CNA , Hinshaw & Culbertson LLP, and Kaufman Dolowich & Voluck LLP. Additionally, **Claudia** was a featured speaker at the ExecuSummit 11th Annual National Employment Practices Liability Insurance conference. Claudia and her fellow panelists discussed, "Sexual Harassment and Assault: Educational Institutions, Private Employers, Title IX and Title VII."

Claudia and **Jonathan Kanov** (Fort Lauderdale, FL) were speakers at the Professional Liability Underwriting Society's annual PLUS Conference this year. **Claudia** participated in a panel discussion "Not So Harmless Not-For-Profits." **Jonathan**'s panel discussed "Real Estate E&O Trends."

On behalf of the Defense Research Institute, **Claudia Costa** co-presented "Hot Topics for Non-Profit D&O Liability" with Thomas Lookstein of the Starr Companies. This program discussed how directors and officers of non-profit organizations often overlook the potential that exists for lawsuits against them personally.

Jeffrey Rapattoni, co-chair of the Fraud/Special Investigation Practice Group in the Cherry Hill office, partnered with the National Association of Mutual Insurance Companies (NAMIC) to present a three-part webinar series on medical provider fraud. Designed for property/casualty insurance carriers, the webinars addressed strategies for dealing with medical fraud in the PIP and UM/BI environments and exploring solutions to the growing fraud problem. ■

** Prior Results Do Not Guarantee A Similar Outcome*

New Jersey—Premises Liability

NEW JERSEY SUPREME COURT REAFFIRMS LIMITATIONS OF "MODE OF OPERATION" DOCTRINE

By Gregory D. Speier, Esq.*

KEY POINTS:

- "Mode of Operation" doctrine may apply to accidents occurring beyond the area where the self-service activity takes place and may apply even without evidence of customer carelessness.
- Key to the doctrine's applicability is the nexus between self-service components of the defendant's business and the risk of injury where the accident occurred.
- For businesses employing a self-service business model, the entire business premises may be subject to "Mode of Operation" applicability.

Gregory D. Speier

In a significant ruling that will impact how premises liability cases are litigated throughout the state, the New Jersey Supreme Court, on September 28, 2015, unanimously reaffirmed the limitations of "Mode of Operation" applicability. In *Prioleau v. Kentucky Fried Chicken*, 2015 N.J. LEXIS 957 (N.J. Sept. 28, 2015), the plaintiff slipped and fall near a bathroom within KFC. The area where the accident occurred had no relationship to any self-service component of KFC's business, and the doctrine did not apply.

In the typical slip-and-fall case, the plaintiff is required to prove that the defendant had actual or constructive notice of the condition which allegedly caused the accident. In other words, a plaintiff must prove that the business knew, or should have known, of the condition(s) which caused the plaintiff's fall.

However, in Mode of Operation cases, the plaintiff is relieved of the burden of proving notice and is entitled to an inference of negligence against the business in situations where it is established that the manner in which a business operates creates the hazard. The burden then shifts to the defendant, who may avoid liability only by showing that it acted reasonably and prudently in light of the risk of injury the operation entailed. Clearly, in Mode of Operation cases, the plaintiff has the upper hand.

In *Prioleau v. Kentucky Fried Chicken*, the New Jersey Supreme Court answered the question of when Mode of Operation should, or should not, apply to a particular case. In *Prioleau*, the plaintiff slipped and fell on a wet floor on her way to the bathroom within KFC. The plaintiff alleged that the dangerous condition was caused by employees tracking grease onto the floor from the kitchen, which mixed with rain water that was brought into the restaurant from outside. The plaintiff argued that the jury should be instructed on Mode of Operation due to the fact that the "operation" of KFC permitted employees to track grease onto the floor. The trial judge agreed and instructed the jury on Mode of Operation. The jury came back with a verdict in favor of the plaintiff. On appeal, KFC argued that Mode of Operation did not apply and that giving the charge to the jury constituted reversible error. The Appellate Division agreed with KFC, but due to a dissenting opinion, the matter was appealed to the New Jersey Supreme Court.

In its decision, the New Jersey Supreme Court ordered a new trial on the issue of liability. It ruled that Mode of Operation application: (1) is limited to businesses engaged in a "customer self-service" business model; (2) only applies to areas affected by a business's self-service operations, which may extend beyond the areas traditionally associated with self-service activities (the court gave the examples of applying Mode of Operation beyond the produce aisle of supermarkets and beyond the area of a mall's food court); and (3) does not require only customer mishandling, as the condition may be created by employee mishandling or the inherent qualities of the merchandise itself (think loose grapes in a vented bag).

Applying these principles to the *Prioleau* case, the court held that the location where the plaintiff's slip and fall occurred, near the bathroom within KFC, had no relationship to any self-service component of KFC's business. In that regard, the court held that the jury instruction on Mode of Operation was given in error, thus, requiring a new trial on the issue of liability. ■

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Ohio—General Liability

A (NOT-SO) SIGNIFICANT CHANGE IN OHIO SUBROGATION LAW

By Matthew Hamm, Esq.*

KEY POINTS:

- O.R.C. § 2323.44 went into effect on September 28, 2015.
- The statute codifies the "Made Whole" doctrine in Ohio and applies regardless of policy language to the contrary.
- Be aware of attempts by those who seek to overstate the implications of this statute during settlement negotiations.

Matthew Hamm

For those practicing in the realm of personal injury litigation, dealing with subrogation interests is simply a fact of life. Accordingly, changes in this area of law should be closely monitored and understood by both counsel defending injury claims as well as claims professionals adjusting and settling such claims.

On September 28, 2015, O.R.C. § 2323.44 went into effect in Ohio. Many have suggested this statute reflects a substantial change in long-standing Ohio subrogation law. In essence, the statute codifies the "Made Whole" doctrine in Ohio. The position of this article is to suggest that the statute will ultimately have little practical effect upon the litigation and settlement of personal injury claims within Ohio.

LEGISLATIVE BACKGROUND

This new law was included as an amendment to a state budget bill. There has been some criticism as to how this amendment was included within the bill, as it was introduced at the eleventh hour and just before the bill was set to be approved. It is anticipated there may be challenges to the statute's constitutionality.

Governor John Kasich used his line-item veto to eliminate various provisions within the original amendment. Notably, his veto struck provisions that would have codified the "common fund" rule, which requires insurers to share in a portion of the fees, expenses and court costs incurred by the injured party and their attorney in pursuing a claim. The veto also struck language that would have provided that the "tort action and any settlement of the tort action shall be controlled solely by the injured party." These clearly plaintiff-orientated provisions were stricken, and the statute was stripped of some of its reach via the Governor's veto.

IMPORTANT STATUTORY PROVISIONS

In relevant part, O.R.C. § 2323.44 provides: "Notwithstanding any contract or statutory provision to the contrary, the rights of a subrogee * * * shall be subject to" additional enumerated conditions. O.R.C. § 2323.44(B)(1) states that, if less than the full value of the tort action is recovered, the subrogee's claim "shall be diminished in the same proportion as the injured party's interest is diminished."

Additionally, O.R.C. § 2323.44(B)(2) provides that "[i]f a dispute regarding the distribution of the recovery in the tort action arises, either party may file an action * * * to resolve the issue of the distribution of the recovery." This provision expressly includes a right of action in the event the parties cannot agree upon the distribution of funds recovered in the action.

BRIEF HISTORY OF OHIO SUBROGATION LAW

Ohio courts have long enforced the "Made Whole" doctrine, *see*, *Newcomb v. Cincinnati Ins. Co*., 22 Ohio St. 382 (Ohio 1872); *Peterson v. Ohio Farmers Ins. Co*., 191 N.E.2d 157 (Ohio 1963), which provides that an insurer's subrogation interest will not be given priority where doing so will result in less than a full recovery to the insured. Also known as the "Full Compensation Rule" or the "Make Whole Rule," the doctrine only applies to an "insured" who has not been made whole. *Allen v. Binckett*, 5th Dist. Muskingum No. CT2008-0027, 2009-Ohio-2969; *Burris v. State Farm Fire & Cas. Co*., 10th Dist. Franklin No. 08AP-1113, 2009-Ohio-5123 (explaining if the insured signs a release with the tortfeasor and settles its case for less than policy limits, Ohio courts view this as some evidence tending to prove the insured was fully compensated for its damages.).

Historically, the "Made Whole" doctrine could be disclaimed by insurance policy or plan language. *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 814 N.E.2d 1210 (Ohio 2004). In the case of a clear and unambiguous contractual provision, an insurer was able to enforce its right of subrogation even if the claimant may not receive full compensation to cover his or her losses.

LIKELY OUTCOMES

In effect, this new law provides that if a claimant receives less than the full value of his or her claim, a subrogated entity's interest will be reduced by the same proportional amount, irrespective of contractual language. The statute will impact both health insurance carriers and insurers offering medical payments coverage under automobile and/or homeowner's policies.

As many who practice in this area are well aware, insurers are often willing to negotiate down their health insurance and med-pay interests. This is a common practice in light of the economic realities implicit in settling many personal injury claims. This new statute will now *require* insurers to reduce their interests if the claimant does not receive the full value of his or her claim.

This begs the question as to what constitutes the full value of a claim. A determination in this regard is far from an exact science and is rarely ascertained unless a lawsuit proceeds to trial. In that instance, the jury's award will be the full value of the claim. If the

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Pennsylvania—Asbestos Litigation

STERLING SIGNALS TOUGHER SCRUTINY OF CO-WORKER TESTIMONY

By Robyn A. Shelton, Esq.*

KEY POINTS:

- *Sterling* reinforces that even claims of direct exposure do not meet Pennsylvania's standard without evidence of frequent and regular contact with the defendant's product.
- Co-worker testimony that does not relate to the plaintiff's work experience fails to satisfy the frequency, regularity and proximity requirements under *Eckenrod*.

Robyn A. Shelton

In *Sterling v. P&H Mining Equipment, Inc.*, 113 A.3d 1277 (Pa.Super. 2015), the Pennsylvania Superior Court upheld summary judgment for the defendant, a crane manufacturer, in an asbestos claim where the plaintiff relied partly on co-worker testimony. In this case before the Court of Common Pleas, Philadelphia County, Mr. Sterling had claimed that his lung cancer was caused by asbestos exposure from his career in the steel industry. He had worked from 1952 to 1979 at various jobs for Bethlehem Steel, including as a crane operator. Mr. Sterling alleged that he inhaled asbestos dust created by brakes on the cranes, including those made by the defendant, P&H Mining Equipment, Inc.

PLAINTIFF'S CLAIMS OF DIRECT EXPOSURE NOT ENOUGH TO MEET PENNSYLVANIA STANDARD

Mr. Sterling argued that he frequently worked in the vicinity of P&H cranes and that he and his co-workers often saw dust emanating from the brakes. Mr. Sterling sometimes helped the repairmen who carried out maintenance on crane brakes.

In addition, Mr. Sterling offered testimony from four co-workers who had testified in their own cases about exposure to dust from crane brakes. Mr. Gaugler testified that he personally helped change brakes as a chain man and in other roles. Mr. Carl oiled and greased cranes as a chain man and directly observed crane brakes in the process. Mr. Wagner worked with crane brakes and crane wiring as a motor inspector. Mr. Weiss testified that he inhaled brake dust from cranes while tearing out crane trolleys.

As such, all four alleged that they worked directly on brakes in a variety of jobs. All four discussed dust created in the process. Yet none of their testimony reflected on Mr. Sterling's allegations regarding P&H cranes.

In upholding the trial court's grant of summary judgment for the defendant, the Superior Court agreed that the evidence failed to satisfy Pennsylvania's requirement that the plaintiff in an asbestos case show frequent, regular and proximate contact with an asbestos-containing product made by the defendant. In particular, the court noted, "Mr. Sterling did not testify to any information as the nature of the dust, how far he was from the dust, whether he inhaled the dust, or whether the dust he observed contained asbestos."

PARALLEL TESTIMONY DOES NOT SHED LIGHT ON PLAINTIFF'S CASE

The court also explained why the co-workers' testimony failed to make up for any deficiencies in Mr. Sterling's case. For starters, the court observed that the four co-workers' testimony related solely to their own alleged exposures, without any connection between them and Mr. Sterling's experience.

Even if the court assumed that the others were exposed to brake dust from cranes, the court concluded that "there was still no basis to infer [that] Mr. Sterling was similarly exposed[,]" especially where Mr. Sterling did not testify to working directly on crane brakes or crane wiring, as the four co-workers had done.

As the court summed it up: "[T]he testimony of other former Bethlehem Steel employees provided no information regarding the frequency, regularity or proximity of Appellant Mr. Sterling's own alleged exposure to asbestos in P&H products." The case, decided April 17, 2015, signals that pure "parallel" testimony of a co-worker's alleged exposures is not sufficient to bolster a plaintiff's case where there is no connection to the plaintiff.

In Mr. Sterling's case, the Superior Court was unwilling to assume that his co-workers' testimony regarding brake dust applied to Mr. Sterling's experience. Perhaps equally important was the fact that Mr. Sterling testified that he mainly worked on cranes made by other manufacturers. In addition, Mr. Sterling acknowledged that there were many sources of dust in the "beam yard" where he worked. Nonetheless, the court appeared to seek a definite nexus between his co-workers' testimony and the plaintiff, noting at one point that "Mr. Sterling's name was never mentioned by the four witnesses." ■

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Pennsylvania—Insurance Coverage/Bad Faith

A NOT SO SCARY *WOLF(E)*

By Cristin A. Cavanaugh, Esq.*

KEY POINTS:

- Pennsylvania law prohibits insurers from providing coverage for directly imposed punitive damages.
- Punitive damages awarded in the underlying case are not properly considered compensable damages in a breach of contract or statutory bad faith case.
- An insurer has no duty to consider the potential for the jury to return a verdict for punitive damages when it is negotiating a settlement of the case.
- A statutory bad faith claim may proceed even where the insured has alleged no compensatory damages resulting from that conduct.

Cristin A. Cavanaugh

In the recent decision of *Wolfe v. Allstate Prop. & Cas. Ins. Co*., 790 F.3d 487 (3d Cir. 2015), the Third Circuit held that punitive damages awarded against an insured in a personal injury suit are not recoverable in a later breach of contract or bad faith suit against the insurer. The *Wolfe* case arose out of a motor vehicle accident where the intoxicated tortfeasor rear-ended the plaintiff. The tortfeasor was insured by Allstate. The policy provided liability coverage up to $50,000 and required Allstate to provide the tortfeasor a defense. However, the policy expressly excluded coverage for punitive damages.

The plaintiff made an initial settlement demand to Allstate of $25,000. Allstate responded with a counteroffer of $1,200. Neither party moved from those numbers. The plaintiff filed suit against the tortfeasor. As the original underlying personal injury complaint did not indicate the extent of damages in excess of $50,000, Allstate notified the tortfeasor of the possibility of personal liability in excess of the policy limits. Subsequently, the plaintiff learned of the tortfeasor's intoxication and amended the complaint to add a claim for punitive damages. Allstate wrote to the tortfeasor about the potential for punitive damages and indicated that those damages were not covered under his policy.

During pretrial settlement conferences, two separate judges placed a settlement value of $7,500 on the compensatory damages portion of the case. Following trial, the plaintiff indicated that he would have settled the case for $7,500, although he never communicated this willingness to Allstate. Prior to trial, the plaintiff did not move from $25,000, and Allstate did not move from $1,200. The case went to trial, and the jury awarded the plaintiff $15,000 in compensatory damages and $50,000 in punitive damages. Allstate paid the $15,000 compensatory damages award, but not the $50,000 punitive damages award.

The tortfeasor assigned his rights against Allstate to the plaintiff, who, in the tortfeasor's shoes, sued Allstate alleging breach of contract, bad faith conduct under Pennsylvania's bad faith statute, 42 Pa. Cons. Stat. §8371, and violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. Allstate filed two pretrial motions. The District Court denied both motions and returned a verdict in favor of the plaintiff. Allstate appealed.

There were two issues before the Third Circuit on appeal. First, did the District Court err by permitting the plaintiff to introduce the punitive damages award from the underlying lawsuit as evidence of damages? Second, did the District Court err by denying Allstate's motion for summary judgment and holding that Allstate had no duty to consider the potential for punitive damages when valuing the compensatory claim, since the compensatory damages award was within the policy limits, which Allstate paid to the plaintiff in full?

The Third Circuit held that, since "Pennsylvania law prohibits insurers from providing coverage for punitive damages in order to ensure that tortfeasors are directly punished, the court held that Allstate cannot be held responsible for punitive damages incurred in the underlying lawsuit." The court held, "To hold otherwise would shift the burden of the punitive damages to the insurer, in clear contradiction of Pennsylvania public policy." The court looked for support from the highest courts in California, Colorado and New York, which had also similarly held that an insured cannot shift to the insurance company its responsibility for punitive damages in a later case alleging bad faith for failure to settle by the insurer.

According to the Third Circuit, since the $50,000 punitive damages award was not a compensable item of damages in the case, the District Court erred in allowing evidence of the award to be presented to the jury. The court concluded that punitive damages awarded in the underlying case were not properly considered compensable damages in the plaintiff's breach of contract claim.

The Third Circuit found that an insurer has no duty to consider the potential for the jury to return a verdict for punitive damages when it is negotiating settlement of a case. To impose that duty would be tantamount to making the insurer responsible for those damages, which is against public policy. That court also held that Allstate was entitled to a new trial, at which the plaintiff would not be allowed to introduce evidence relating to the $50,000 in punitive damages award, although the plaintiff would be allowed to seek compensatory damages based on injury other than the $50,000 punitive damages award.

The Third Circuit also held that the District Court correctly denied Allstate's summary judgment motion on both the breach of contract and statutory bad faith counts, finding that removing the $50,000 punitive

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Pennsylvania—Insurance Coverage & Bad Faith

DOES PENNSYLVANIA'S ACT 86 REQUIRE AN INSURER TO PROVIDE NOTICE TO AN INSURED BEFORE POLICY EXPIRATION?

By Jane E. Kane, Esq.*

KEY POINTS:

- Pennsylvania's Act 86 was enacted in response to indiscriminate cancellation of commercial liability insurance policies and requires insurers to provide 60 days' notice in advance of canceling or non-renewing policies.
- Act 86 does not require insurers to provide notice of cancellation or non-renewal before commercial property insurance policies expire on their own terms.
- To retain commercial property insurance coverage, an insured has an obligation to timely renew the policy.

Jane E. Kane

Recently, the Philadelphia Court of Common Pleas granted summary judgment to an insurer and its agent in an action by a former insured seeking coverage for a fire loss under a commercial property insurance policy because the policy expired before the loss occurred, and the policy was not renewed. The court also held that the insurer had no obligation to provide notice under 40 P.S. §3403 because the insurer did not seek to cancel the policy in the middle of the term or non-renew the policy at the end of the term. Rather, the policy expired on its own accord at the end of the stated policy period.

In *Get Busy Living Solutions, LLC v. Main Line Insurance Office, LLC*, 2015 Phila. Ct. Com. Pl. LEXIS 33 (C.P. Phila. April 22, 2015), the plaintiffs, investment property owners, secured various insurance policies through their principal, Algernong Allen. For years before December 24, 2012, Allen had a business relationship with an insurance agent, Christopher Oidtman, who was associated with the insurance broker, Main Line Insurance.

When Allen first obtained insurance through Oidtman, Allen gave Oidtman a check on "December 24." Thereafter, the terms for the policies Oidtman obtained for Allen covering the plaintiffs' investment properties commenced on December 24 and expired on December 24 of the following year.

In dispute in the case was a commercial property insurance policy Landmark American Insurance Company issued, through its general agent USG, to the plaintiffs covering their bar in Philadelphia. The effective policy dates were December 24, 2011, to December 24, 2012, at 12:01 a.m. Eastern Standard Time.

On November 28, 2012, Landmark, through USG, sent Main Line a renewal quote for the policy covering the bar at the same price and on the same terms as the then current policy. However, Allen and Oidtman did not immediately undertake efforts to renew the policy but, instead, secured quotes from other carriers.

On December 21, 2012, Oidtman sent Allen a text message asking whether Allen wanted to renew the policy. On December 24, 2012, at 7:21 a.m., after the Landmark policy expired, Allen responded by text, "Yes."

On December 24, 2012, at 1:00 p.m. there was a fire at the bar. On December 26, Oidtman attempted to bind coverage for the policy. The plaintiffs sought coverage from Landmark for their losses, but Landmark denied coverage because the policy had expired prior to the loss.

The plaintiffs sued Landmark and USG, claiming they failed to comply with the cancellation and non-renewal notice requirements of 40 P.S. § 3403. This statute is part of what is known as Act 86 (40 P.S. §§ 3401, et seq.), which requires insurers to provide 60 days' written notice in advance of midterm cancellations or policy non-renewals.

The plaintiffs also claimed that Landmark and USG breached the provisions of the policy because they agreed to provide insurance until and unless non-renewal or cancellation, according to the policy and governing law. The plaintiffs claimed that the policy required 60 days' notice of cancellation or non-renewal before the policy was canceled or not renewed.

The parties filed summary judgment motions. In their summary judgment motion, Landmark and USG contended that the plaintiffs' coverage had expired and that prior notice of non-renewal or cancellation was not required because the policy had expired. The court agreed.

The court noted that Pennsylvania's Act 86 was enacted in response to indiscriminate cancellation of commercial insurance policies. Act 86 requires that insurers provide written notice to insureds 60 days in advance of midterm cancellations or non-renewals. Without this notice, coverage remains in effect for the insured.

Here, the statutory contractual notice requirements did not apply because Landmark neither sought to cancel coverage in the middle of the policy nor non-renew the policy at the end of the policy term. The policy expired on its own terms, and coverage was properly denied. ■

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WHERE THE SIDEWALK ENDS

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based also upon *Luchejko*. At the same time, however, the Appellate Division recognized that the facts of *Luchejko* differed from the facts presented in *Qian*. In its decision, the Appellate Division commented that, if a private residential community is to be treated differently with respect to ice and snow removal on interior sidewalks than from abutting sidewalks, it was the Supreme Court's function to make such a distinction.

The Supreme Court in *Qian* accepted the challenge and distinguished the facts before it from that of *Luchejko*. It noted that:

- In *Luchejko*, the fall occurred on a **public** sidewalk that abutted a condominium building on one side and a public roadway on the other, which was under the control of the municipality; while in *Qian*, the accident occurred on a **private** sidewalk within VCB that was under the control of VCB, which had not been dedicated to the municipality.
- In *Luchejko*, the governing documents of the association did not impose a duty to clear the public sidewalk of ice and snow; while in *Qian*, the Public Offering Statement, Certificate of Incorporation, master deed and bylaws placed the responsibility upon the Association to clear ice and snow from the private sidewalks.
- In *Luchejko*, the sidewalk was not part of the "common elements" of the homeowner's association; while in *Qian*, VCB's governing documents specifically deemed the private sidewalks to be "common elements."
- In *Luchejko*, the association did not collect fees from condominium owners for the purpose of maintaining the public sidewalk in a safe condition; while in *Qian*, the Association collected maintenance fees to ensure all common property, including the private sidewalks, would be reasonably safe.
- In *Luchejko*, the association was not required to carry liability insurance covering the public sidewalk; while in *Qian*, the Association was required by its bylaws to secure liability insurance covering the private sidewalks.
- In *Luchejko*, the public had the right of way on the sidewalk; while in *Qian*, the general public did not have an easement to use the private sidewalks and walkways.

Based upon these distinctions, the Supreme Court in *Qian* chose **not** to apply **public** sidewalk jurisprudence at all. Rather, the *Qian* court viewed the case before it as one similar to a plaintiff suffering injury on a **private** walkway leading to the front door of a house that is controlled by the property owner. According to the court, it is who **owns or controls** the sidewalk, **not** who uses it, that is the key distinguishing point between a public and private sidewalk. The court viewed the sidewalk as "private" because nothing in the record suggested that the municipality had control or responsibility over the interior walkways of VCB. Accordingly, the Supreme Court held that the Association had a duty to keep their **private** walkways on the property reasonably safe, just as a private homeowner would have a duty to keep his/her private walkways reasonably safe.

The court also examined N.J.S.A. 2A:62A-13, which provides that a homeowners association will not be liable in any civil action brought by, or on behalf of, a unit owner to respond in damages as a result of bodily injury to the unit owner occurring on the premises, unless the injuries are caused by willful, wanton or grossly negligent acts or omissions. According to the *Qian* court, the legislature conferred this limited immunity because it believed that the private sidewalks of a common-interest community were, in fact, subject to tort liability. Likewise, VCB's bylaws provide language that mirrors the aforesaid sections of statute.

As applied to the *Qian* decision, the plaintiff, Cuiyun Qian, was **not** the owner of the unit. Rather, the plaintiff's son was listed as the owner on the deed. The Supreme Court in *Qian* chose not to address whether the plaintiff should be deemed a unit owner for purposes of the immunity provisions and ruled that this issue must be explored on remand.

CONCLUSION

The *Qian* court made clear that residential public sidewalk immunity does not apply in a case relating to injuries sustained on a sidewalk privately owned by a common-interest community. Associations and their management companies must now exercise reasonable care to protect those entering upon the private sidewalks and roadways of the community. This duty is owed to known and even unexpected visitors.

The lessons from *Qian* are threefold. In order to best protect your association, the contracts that your management company enters into with your snow removal contractor must provide for: (1) indemnification; (2) additional insured coverage; and (3) terms that call for ice and snow removal, and anticipatory precipitation services, regardless of the accumulation amount. ■

Pennsylvania—Product Liability

TINCHER—ONE YEAR LATER

By Vlada Tasich, Esq.*

KEY POINTS:

- *Tincher v. Omego Flex* left the future of Pennsylvania product liability law in limbo.
- "Targeted advocacy" since *Tincher* has yielded positive gains for defendants.
- Pennsylvania strict liability law is in a better place, but keep thinking happy thoughts.

Vlada Tasich

On November 19, 2014, the Pennsylvania Supreme Court issued its long awaited ruling in *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014) and finally resolved the longstanding speculation about whether the Commonwealth would adopt the Third Restatement approach to strict product liability law. While the court declined to embrace the Third Restatement, which left much of the legal community stunned, the decision nevertheless significantly changed the legal framework for such matters and also injected great uncertainty into future cases.

For over 30 years before *Tincher*, Pennsylvania's strict product liability law endured a tortured existence under the *Azzarello v. Black Bros. Co*., 391 A.2d 1020 (Pa. 1978) decision, which introduced an unnatural separation between negligence concepts and strict liability principles under Section 402A of the Second Restatement of Torts. Although Section 402A itself characterized a defective product as one being "unreasonably dangerous," the court deemed notions of "reasonableness" of a defendant's conduct in the design and manufacture of a product irrelevant to the question of defect, which it sought to isolate for the jury. To effect this conceptual barrier, the court took on a gatekeeping function and decided when a product was "unreasonably dangerous" as a matter of law and left it to the jury to determine the factual question of defect. Defendants suffered under *Azzarello* as they were routinely prohibited from defending claims that products were unsafe by demonstrating, for example, that they complied with applicable industry standards or complied with the state of the art at the time of manufacture. A plaintiff's comparative fault was also considered irrelevant as it, too, was evidence of conduct and, therefore, represented an impermissible commingling of negligence principles.

Tincher expressly overruled *Azzarello* and did away with its artificial dichotomy, recognizing that product liability law could trace its roots to negligence principles. The Supreme Court in *Tincher* also ushered in two new standards under which a plaintiff could establish that a product was defective: the consumer expectations test and the risk-utility test.

Under the consumer expectations test, a product is in a defective condition if, upon normal use, it is dangerous beyond the reasonable consumer's contemplations. This test focuses on whether the product carries a surprise element of danger.

In contrast, under the risk-utility test, a product is considered defective when the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. The risk-utility analysis can take into account a number of factors. These factors, which implicitly have been adopted by the court and are referred to as the "Wade" factors, include:

1. the usefulness and desirability of the product—its utility to the user and to the public as a whole;
2. the safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury;
3. the availability of a substitute product which would meet the same need and not be as unsafe;
4. the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
5. the user's ability to avoid danger by the exercise of care and the use of the product;
6. the user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and
5. the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

The court recognized that, by adopting these alternative liability standards, what had once been settled law under *Azzarello* was no longer so, and cited to the impact of its decision on, among other things, the availability of negligence-derived defenses. But the resolution of such considerations was left to future cases where the common law could develop "within the proper factual contexts against the background of targeted advocacy."

So where are we now, one year later?

Various courts in Pennsylvania have begun to issue rulings in the aftermath of *Tincher*, with the majority so far coming from the federal bench. Some of these decisions have endorsed propositions that have been positive for defendants. Initially, *Tincher* may be retroactively applied in pending matters. *DeJesus v. Knight Indus. & Assoc., Inc*., 599 Fed. Appx. 454 (3d Cir. 2015); *Nathan v. Techtronic Indus. North America, Inc.*, 2015 U.S.Dist. LEXIS 18835

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NAVIGATING THE UNCERTAIN WATERS

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The jury entered a verdict in favor of Audiffred in the amount of $26,055.54; however, no award was made in Kimmons' favor. The plaintiff moved for attorney's fees, and Arnold asserted that the PFS was defective because it failed to apportion the settlement amount to each plaintiff. The trial court denied Arnold's motion to strike. The First DCA reversed. The Florida Supreme Court granted review based on conflicting opinions from the Third, Fourth and Fifth Districts. The Supreme Court held that, although Audiffred alleged that the intent of the proposal was for Kimmons not to receive any portion of the settlement amount for his consortium claim, the actual language of the PFS did not convey this position. Consequently, based on the ambiguity of apportionment of the settlement amount against the pending claims, the proposal was ambiguous and "the offer lacked sufficient clarity to permit Arnold to reach an informed decision with regard to the settlement amount against the pending claims by Audiffred and Kimmons."

In the second important opinion, *Pratt v. Weiss*, 161 So.3d 1268 (Fla. 2015), the Supreme Court quashed a Fourth District opinion that upheld an award of attorney's fees to the defendants, FMC Hospital LTD and FMC Medical, Inc. The Fourth DCA held that the defendants represented a single hospital entity, and, therefore, it was unnecessary to apportion their offer of settlement.

The Supreme Court disagreed and held that the amended complaint not only treated FMC Hospital and FMC Medical as separate defendants, the complaint alleged both active and vicarious liability as to these distinct defendants.

Notably, within both the *Audiffred* and *Pratt* opinions, the Supreme Court acknowledged the 2011 amendment to Rule 1.442, which creates an exception to the apportionment requirement where the party is alleged to be solely, vicariously, constructively, derivatively or technically liable. However, the court held this section inapplicable to these cases. *Practice Tip: If a proposal for settlement will resolve claims against more than one party, the offer must be apportioned.*

The lesson to take away from the recent legal developments regarding PFSs is that the utmost care is needed when evaluating and preparing them. The consequences for failing to strictly comply with Florida Statute § 768.79 and Florida Rule of Civil Procedure § 1.442 may result in an offer to settle with no consequence or an invalid PFS. Perhaps the courts will continue to increase clarity on a definitive manner for preparing a PFS so that it can finally serve its proper purpose to efficiently and effectively dispose of cases that should never see the inside of a courtroom. ■

A NOT SO SCARY *WOLF(E)*

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damages award from the damages sought for these claims did not require entry of judgment in favor of Allstate. Under Pennsylvania law, "if a plaintiff is able to prove a breach of contract but can show no damages flowing from the breach, the plaintiff is nonetheless entitled to recover nominal damages." The court held that, "[e]ven without compensatory damages, an insurer can be liable for nominal damages for violating its contractual duty of good faith by failing to settle."

To recover under statutory bad faith, 42 Pa.C.S.A. §8371, a plaintiff must show by clear and convincing evidence that the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew or recklessly disregarded is lack of reasonable basis in denying the claim. The Third Circuit held that the removal of the $50,000 as "compensatory damages" did not require summary judgment in favor of Allstate on the bad faith claim under Section 8371. The "policy behind Section 8371, deterring insurance companies from engaging in bad faith practices, is furthered by allowing a statutory bad faith claim to proceed even where the insured has alleged no compensatory damages resulting from that conduct." The court further held that "removal of the $50,000 punitive damages award as damages in this suit has no bearing on the damages that can be awarded under the statutory bad faith claim. Therefore, Wolfe does not need compensatory damages to succeed on his statutory bad faith claim, which only permits recovery of punitive damages, interest and costs."

Apparently, no party to the case raised the question of whether §8371 statutory bad faith should apply to an excess verdict bad faith claim. A very good argument can be made that §8371 statutory bad faith should not be applicable to this type of bad faith claim essentially because there was already a remedy created by the Pennsylvania Supreme Court in *Cowden v. Aetna Cas. & Sur. Co.*, 134 A.2d 223, 227 (Pa. 1957). But trust that this will be a topic for another article. ■

Pennsylvania—Workers' Compensation

IMMUNITY FROM TESTIMONY UNDER THE WORKERS' COMPENSATION ACT

By Robin M. Romano, Esq.*

KEY POINTS:

- A peer review doctor may be immune from testifying under the Pennsylvania Workers' Compensation Act, Section 306(f)(2)(5).
- Witness immunity under the Pennsylvania Workers' Compensation Act extends to Bureau employees, including nurse fee review auditors.
- Insurers and employers may experience increased litigation costs under Section 306(f)(2) (5) of the Act.

Robin M. Romano

As a rule of thumb, all parties and witnesses to a Pennsylvania workers' compensation action can testify. There are, however, certain circumstances where a potential witness may possess immunity from testifying under the Act. Presumably, Section 306(f)(2)(5) provides this protection:

> A person participating in utilization review, quality assurance or peer review activities, pursuant to this section, shall not be examined as to any communication made in the course of such activities or the findings thereof, nor shall any person be subject to an action for civil damages for actions taken or statements made in good faith.

The reasoning behind this immunity appears to have a sound basis, in that those performing Utilization Reviews, quality assurance and peer review activities, as employees of the Bureau of Workers' Compensation or at the behest of the Bureau, should be safeguarded against cross-examination of defense counsel to ensure impartiality.

Recently, some Workers' Compensation Judges have, although admittedly infrequently, invoked this section to prohibit defense counsel's plan to depose a peer review doctor from testifying in connection with a Utilization Review Petition. It is arguably a violation of the defendant's due process when a judge employs this section of the Act, because it prevents the party with the burden of proof from presenting evidence to support their case, while a claimant's treating physician is not held to the same standard and may testify to the reasonableness and necessity of the treatment rendered to his patient.

In addition, a judge's refusal to allow defense counsel to present the deposition of a peer review physician who has rendered a favorable UR Determination in support of its case has a very real impact on the cost of litigation. Defendants already incur extra costs when filing review petitions from Utilization Review Determinations rendered in favor of the treating physicians. When a defendant chooses to appeal an unfavorable Utilization Review Determination, it must be prepared to move forward with evidence to support its burden of proof with regard to that review petition at the judge level at the first hearing. What this means, practically speaking, is that defendants must secure either an independent medical evaluation or, at least, a records review by an independent medical examination physician prior to the first hearing on that Utilization Review Petition. This, of course, translates into an extra expense for the defendant. Should it become common practice among judges to prohibit a peer review doctor's testimony at the *de novo* hearing level, a defendant will be forced to always obtain an independent medical evaluation and produce that doctor's testimony at the *de novo* level as well.

Moreover, why should physicians and other practitioners of like specialty who are performing peer reviews pursuant to Utilization Review requests be subject to Section 306(f)(2)(5) of the Act? These practitioners are not employees of the Bureau. In fact, one legal treatise, *Workers' Compensation Law and Practice*, Torrey Greenberg, mentions in its commentary at Section 9:136, that the immunity provided under Section 306(f)(2)(5) of the Act applies "only to those involved in utilization review, quality assurance and peer review activities in the context of coordinated care. Accordingly, nothing in the Act provides that a Utilization Review peer at a second-step UR Petition may not be subject to cross-examination."

Litigating prospective Utilization Reviews under Section 306(f)(2)(5) may have other far-reaching consequences in the Utilization Review arena. This can occur, for example, when a claimant files a prospective Utilization Review Request seeking a determination as to whether a particular treatment is reasonable and necessary. Prospective Utilization Reviews are governed by Bureau Regulation 127.404(c), which states:

> If an employee files a request for a UR of treatment, the Bureau will confirm whether the insurer is liable for the underlying alleged injury. The Bureau will process the UR Request only when workers' compensation liability for the underlying injury has been accepted or determined.

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Pennsylvania—Workers' Compensation

THE ART OF THE DEAL: TIPS FOR SUCCESSFUL MEDIATION IN PENNSYLVANIA WORKERS' COMPENSATION CASES

By Lori O. Strauss, Esq.*

KEY POINTS:

- Mediation in workers' compensation cases eliminates the uncertainty of an outcome determined by a judge.
- Several strategies can help to ensure a successful mediation.

Lori O. Strauss

In 2006, an amendment to the Pennsylvania Workers' Compensation Act created a mandatory mediation system. This followed an overall trend in the legal profession to attempt to resolve conflicts through alternative dispute resolution, thereby eliminating the uncertainty of the outcome determined by a judge. In many cases, mediation holds down legal costs, including expert fees and attorney's fees.

The mandatory mediation system requires that the judge establish a mediation date at the first hearing of each case. The parties cannot control the assignment of the mediator. Some judges are excellent mediators who have embraced the concept that they can play an effective, helpful role in a process that bears no resemblance to litigation.

In addition to mandatory mediation, the parties can agree to a voluntary mediation, thereby ensuring the choice of the mediator and the time of the mediation in the litigation process. Nothing precludes the parties from attending both a voluntary and mandatory mediation, although it is rare that parties will attend both mediations. In some situations, the mandatory mediation is held too early in the process or the parties cannot reach a resolution. So, the judge will agree to conduct a second mediation in a voluntary mediation setting. This allows the same judge to serve as the mandatory mediator and follow up in the second voluntary mediation setting.

The following are tips and strategies to ensure successful mediations:

1. Submit an informative, confidential Mediation Memorandum – Each party must provide the mediator with a Confidential Mediation Memorandum that succinctly educates the mediator about the nature of the case, the key issues, and both the strengths and weaknesses of the case. The memorandum should also discuss the average weekly wage and compensation rate; the amount of any back-due benefits that may be owed; the overall case value; and the status of negotiations. Some mediators look favorably upon at least one offer being made prior to the mandatory or voluntary mediation. This information, along with authority, should also be included in the memorandum.
2. Outstanding Medical Bills – Especially in a Claim Petition setting, the amount of all outstanding medical bills, and the respective providers associated with those bills, should be requested by the defense attorney and provided by claimant's counsel. In order to reach a full Compromise and Release, medicals are often paid. If the amount of those medicals is exceedingly high, it can break the deal. If the parties are aware of the amount of the outstanding bills, the claimant's attorney can sometimes contact the doctor(s) to negotiate down the bills. Often, it is one provider, in particular, who has an extremely high balance of outstanding bills, and the claimant's attorney can serve as an important negotiator with the doctor's office to negotiate the bills down. Do not blindly agree to pay any and all outstanding medicals without knowing what they are. Similarly, there should be discussion as to whether there are any outstanding out-of-pocket expenses alleged by the claimant.
3. Projected Cost of Future Medical – In a case where benefits are already being paid, it is especially helpful for the defense attorney to know the amount that was paid in medicals for the past three years with a breakdown year by year. Assuming that medical payments have decreased, that fact can be utilized in valuing the case in terms of projected costs of future medical and the amount of the overall settlement.
4. Medicare Set-Aside Issues – The parties must be aware of whether a Medicare set-aside is required. If it is necessary to have a set-aside, assuming the evidence supports a termination of benefits, an indemnity-only settlement can be agreed upon, and the parties can then go to decision on a Termination Petition.
5. Participation of Employer's Representative – It is helpful to have the employer's representative attend the mediation, either in person or by phone. Most judges look very favorably upon the participation of an employer's representative. The mediation is a great opportunity for the employer to express to the mediator some of his/her feelings and concerns. The claimant is always present and has that opportunity. Some of the most successful mediations are those attended by the employer's representative. This attendance indicates to the claimant and the mediating judge how important the case is to the employer. I personally encourage clients to be part of the process and to attend the mediation.

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A (NOT-SO) SIGNIFICANT CHANGE

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claimant receives less than the award rendered by the jury due to his or her own comparative negligence, joint liability of other parties or the inability to collect from a party, the subrogated carrier's health insurance or med-pay interest will be reduced by the same proportional amount.

In most cases, the practical implication of this new law will be that it will merely serve as a negotiation tool for claimants and their attorneys. For claims that are either pre-suit or in litigation (but before trial), the statute will likely be used as a tactic to convince subrogated carriers to reduce or waive their claims.

Again, O.R.C. § 2323.44(B) took effect on September 28, 2015. The statute does not state whether it applies to cases filed after that date, claims arising after that date or to cases not settled as of that date. It is anticipated, however, that Ohio courts will apply the statute to all subrogation claims in which payment was made on or after September 28, 2015.

In sum, attorneys and claims professionals working on personal injury claims in Ohio should be aware of this new law and what it means to the claims they are handling. Knowledge of the statute's implications—and its limitations—will prevent claimants and/or their attorneys from using the law to gain an unwarranted advantage in settlement negotiations. ■

TINCHER—ONE YEAR LATER

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(M.D. Pa. Feb. 17, 2015); *Amato v. Bell & Gossett*, 116 A.3d 607 (Pa.Super. 2015). It has also been recognized that the Pennsylvania Supreme Court rejected outright the forced separation of strict liability and negligence principles under *Azzarello*, and that a jury must now be instructed that they will be required to determine if a product was "unreasonably dangerous." *Amato*. The cost and feasibility of a safer alternative design has been found to be probative of whether a product is defective under Pennsylvania's newly adopted risk-utility test, and we can expect the Wade factors overall to have a place in that analysis. *Nathan*; *Capece v. Hess Maschinenfabrik GmbH & Co. KG*, 2015 U.S.Dist. LEXIS 35145 (M.D. Pa. Mar. 20, 2015). Defendants may also be able to raise the state-of-the-art defense and receive a corresponding jury instruction in the appropriate circumstances. *Amato*. The liability standards established for design defect cases have been extended to warnings claims as well. *Amato*; *Williams v. U-Haul Int'l Inc.*, 2015 U.S.Dist. LEXIS 4486 (E.D. Pa. Jan. 14, 2015).

However, courts have also concluded that the *Tincher* decision does not affect the manner in which courts should approach manufacturing defect claims, which are often more straightforward than design claims. *Dalton v. McCourt Elec. LLC*, 2015 U.S. Dist. LEXIS 102269 (E.D. Pa. Aug. 5, 2015). In such matters, a plaintiff will not necessarily be required to go through the rigors of a risk balancing analysis to prove that a product was defective. Further, defense evidence that a product has historically not experienced the alleged defective condition or been subject to such claims may be deemed irrelevant to the question of whether a specific product was defectively manufactured. *Dalton*.

As may also have been expected, given the language of *Tincher*, we have yet to see a successful contested summary judgment bid, as the question of defect is a fact question within the domain of the jury to decide, except in only the clearest of circumstances where reasonable minds cannot disagree. *Lewis v. Lycoming*, 2015 U.S.Dist. LEXIS 69731 (E.D. Pa. May 29, 2015); *Nathan*. Defendants have also been reminded that the focus of strict liability in Pennsylvania remains the condition of the product and not the defendant's conduct. *Nathan*.

Lastly, it appears *Tincher* left untouched the strict liability exclusion for prescription medical products. *Krammes v. Zimmer, Inc.*, 2015 U.S.Dist. LEXIS 96954 (M.D. Pa. July 24, 2015). And it did not disturb the elements of a crashworthiness claim under prior Pennsylvania case law. *Parr v. Ford Motor Co.*, 109 A.3d 682 (Pa.Super. 2014).

So where are we now? Likely in a better place … at least for the moment. ■

THE ART OF THE DEAL

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6. Third-Party Case – Be aware as to whether there is a third-party action, and try to have a handle on the strength of that third-party action. As part of the negotiations, you can choose to waive all or part of a lien. It is much easier to include this as part of the overall negotiation if the same attorney represents the claimant in the third-party case and the workers' compensation case.
7. Other Benefits – Be aware of whether the claimant has received other benefits, such as unemployment compensation benefits; short-term/long-term disability benefits; sickness and accident benefits, etc. A credit is asserted with respect to unemployment compensation benefits, and to the extent that the employer funded the short-term disability/ long-term disability benefits, a credit is taken with respect to those benefits. This information should be utilized as part of the negotiation process.

Mediations represent a useful tool in saving the insured time and money. It can lead to an end to the uncertainty of litigation, and it is an excellent form of dispute resolution. In the words of Abraham Lincoln, "A good settlement is better than a good lawsuit." Mediation should result in both parties feeling that they have some control over their own destiny. ■

IMMUNITY FROM TESTIMONY

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Pursuant to this regulation, the Bureau must first ascertain whether the desired treatment is work related by sending a copy of the employee's request for a prospective Utilization Review to the insurer, together with a written notice asking the insurer whether it will accept payment for the treatment or deny payment for the treatment. The insurer is then to respond, in writing, to the Bureau's notice within seven days of the receipt of notice, advising the Bureau if the treatment in question is work related.

Recently, I handled a case where the claimant filed a prospective Utilization Review for surgery that she desired. The prospective Utilization Review Determination was rendered in favor of the employee. The insurer already had an opinion from their IME doctor that the surgery, although reasonable, was not work related. Thus, the defendant filed a petition to review, which was objected to by claimant's counsel, given counsel's reliance on Section 127.404. The adjuster, however, confirmed that he had no record of anyone from the Bureau contacting him about the claimant's prospective Utilization Review Request for the desired surgery. Defense counsel's attempts to subpoena the individual at the Bureau who would have been responsible for contacting the carrier in this instance were unsuccessful. Fortunately, the judge overruled the claimant's objection to the defendant's petition to review, in part because he acknowledged the impossibility of securing testimony from a Bureau employee pursuant to the immunity granted by Section 306(f)(2)(5).

Finally, Section 306(f)(2)(5) also extends to Fee Reviews. At the Bureau level, when a provider files a Fee Review Application, nurse auditors at the Bureau perform Fee Reviews. These individuals are also immune to subpoenas, and, thus, testimony with regard to how they make their determinations to approve or disapprove downcoding or crosscoding by a carrier are not subject to examination. Arguably, the nurse auditors' determinations should be protected to ensure a truly independent process. However, one can also make the argument that there should be, at least, some written explanation rendered as to how the nurse auditors reached their conclusions and that this written explanation be available to all parties and permitted to be submitted into the record, with the option to subpoena an auditor's testimony for direct and cross examination. This would ensure some kind of accountability at the Bureau level; that the auditors are rendering determinations consistent with the coding guidelines.

In conclusion, while the Pennsylvania Department of Labor and Industry seems to want to safeguard peer review medical experts and Bureau employees from the prospect of testifying in order to maintain their impartiality, it is important for insurers and employers to make certain that the Bureau is aware that this immunity translates directly into increased costs for defendants and, in some cases, provides the claimant with an unfair evidentiary advantage over the defendant. ■

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