COUNTERPOINT

AN OFFICIAL PUBLICATION OF THE PENNSYLVANIA DEFENSE INSTITUTE

An Association of Defense Lawyers and Insurance Claims Executives APRIL 2011

PENNSYLVANIA CONSIDERS AMENDMENTS TO RULES OF CIVIL PROCEDURE TO ADDRESS ELECTRONIC DISCOVERY

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I. INTRODUCTION

In the five years since the Federal Rules of Civil Procedure were amended to address e-discovery, federal courts have developed a complicated body of law that has confounded practitioners and jurists alike. Eschewing that complexity, Pennsylvania has essentially rejected much of the federal approach and now seeks to strike out on its own with a more streamlined and "proportional" approach to e-discovery.

The Civil Rules Committee of the Supreme Court of Pennsylvania is considering proposed amendments to Rules 4009.1, 4009.11, 4009.12, 4009.21, 4009.23 and 4011. These proposed amendments address the discovery of electronically stored information ("ESI") through Requests for Production of Documents directed to parties under Rule 4009.11 and through subpoenas directed to non-parties under Rule 4009.21. The proposed amendments also make clear that the limitations upon discovery contained in Rule 4011 apply to e-discovery practice.

Rather than develop a separate body of law to specifically address e-discovery, the proposed amendments direct that e-discovery practice shall be governed "by the same considerations that govern other discovery." In the introductory comment to the proposed amendments, the drafters leave no doubt as to their intention to distance Pennsylvania from the federal approach, expressly stating that e-discovery practice under the proposed amendments is deliberately designed not to mirror federal practice:

> The purpose of the comment is to provide guidance to the trial judge and counsel so that discovery disputes regarding electronically stored information are resolved pursuant to the general principles of Rule 4011, and not pursuant to the Federal Rules of Civil Procedure and the frequently intricate case law developing in federal courts.[1]

The language of the introductory comment demonstrates not merely a preference that e-discovery be controlled by well-established principles governing discovery under the Pennsylvania Rules of Civil Procedure, but also a disfavor for the current state of e-discovery practice in federal court.

The official explanatory comment to the proposed amendments mirrors the introductory comment's admonition against importation of federal e-discovery practice, providing "though the term 'electronically stored information' is used in these rules, there is no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information."[2] Rather,

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THE SUPREME COURT OPENS THE DOOR FOR THIRD PARTY RETALIATION CLAIMS FOR AGGRIEVED EMPLOYEES WITHIN THE "ZONE OF INTERESTS"

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The United States Supreme Court has ruled that a third party who fits the definition of a person aggrieved under Title VII may pursue a retaliation claim against an employer for an unlawful employment practice against another employee so long as the third party falls within the zone of interests protected by Title VII. *Thompson v. North American Stainless, L.P.*, 131 S. Ct. 863 (2011). The Court was asked to review the termination of an employee who was fired after the fiancé of the employee filed a charge of discrimination with the EEOC. While the Court did not categorically rule that all third party reprisals violate Title VII, the circumstances surrounding this employee's termination and his relationship to the individual that engaged in the protected activity of filing a charge of discrimination were sufficient for the Court to find that the anti-retaliation provisions of Title VII allowed this cause of action to proceed.

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like all discovery disputes that arise under the Pennsylvania Rules, resolution is based on Pennsylvania's "proportionality standard." According to the explanatory comment, the proportionality standard requires a court to consider:

> (i) the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (ii) the relevance of electronically stored information and its importance to the court's adjudication in the given case; (iii) the cost, burden, and delay that may be imposed on the parties to deal with electronically stored information; (iv) the ease of producing electronically stored information and whether substantially similar information is available with less burden; and (v) any other factors relevant under the circumstances.

Finally, the explanatory comment enumerates tools available for managing e-discovery, including use of search terms, cost sharing, data sampling and claw back provisions.

II. THE PROPOSED E-DISCOVERY AMENDMENTS

The main portion of the proposed amendments is contained in Rule 4009.1.[3] Amended Rule 4009.1 would provide:

> Production of Documents and Things. General Provisions.
>
> (a) Any party may serve a request upon a party pursuant to Rules 4009.11 and 4009.12 or a subpoena upon a person not a party pursuant to Rules 4009.21 through 4009.27 to produce and permit the requesting party, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and electronically stored information), or to inspect, copy, test or sample any tangible things or electronically stored information, which constitute or contain matters within the scope of Rules 4003.1 through 4003.6 inclusive and which are in the possession, custody or control of the party or person upon whom the request or subpoena is served; and may do so one or more times.
>
> (b) A party requesting electronically stored information may specify the format in which it is to be produced and a responding party or person not a party may object. If no format is specified by the requesting party, electronically stored information may be produced in the form in which it is ordinarily maintained or in a reasonably usable form.

The proposed amendments streamline Rule 4009.1's definition of ESI by removing language providing for discovery of "electronically created data, and other compilations of data from which information can be obtained, translated, if necessary, by the respondent party or person upon whom the request or subpoena is served through detection or recovery devices into reasonably usable form." This portion of the rule would be eliminated, and a single term, "electronically stored information," used in its place.

The proposal would also amend Rule 4009.11 to include a note that requests for ESI "should be as specific as possible" and that "[l]imitations as to time and scope are favored, as are agreements between the parties on production formats and other sources."

III. PRE-AMENDMENT E-DISCOVERY IN PENNSYLVANIA

Unlike in federal court, where opinions are being authored almost daily addressing e-discovery practice, Pennsylvania has a relative dearth of precedent discussing discovery of ESI. In fact, this author located just two reported cases that consider e-discovery under the Pennsylvania Rules of Civil Procedure.

In *Brooks v. Frattaroli, et. al.*[4], plaintiff brought breach of contract, fraud and consumer protection claims stemming from the purchase of a classic automobile. During discovery, plaintiff sought to have his expert inspect defendant's computer in order to copy the metadata, internet history, deleted files and stored files. Judge Bradford H. Charles of the Lebanon County Court of Common Pleas began his analysis by noting the absence of a rule or precedent addressing e-discovery in Pennsylvania. He contrasted the state of Pennsylvania law with the explosion of case law addressing discovery of ESI at the federal level. In the absence of Pennsylvania state court precedent, Judge Charles looked to recent Pennsylvania federal district court decisions before looking outside Pennsylvania's federal courts in search of applicable precedent (some of which pre-dated the 2006 amendments to the Federal Rules of Civil Procedure).

Based on his review of several federal court cases, Judge Charles identified a risk that discovery of ESI, although likely highly relevant, might also unduly infringe upon a litigant's privacy interests. "Somehow," he wrote, "the legal system must develop a balanced approach that uses the truth gathering potential of ESI without abusing a litigant's legitimate expectation of privacy." Developing his own five part

test to find the balance between "the potential usefulness and abusiveness of [plaintiff's] proffered ESI discovery," Judge Charles found that plaintiff had not made an adequate showing in order to obtain access to defendant's computer. He concluded with a sports metaphor, writing "[i]n order to obtain permission for this type of ESI discovery, a party must travel the length of a football field and into the end zone. While [plaintiff] may have driven into field goal range, he has not yet crossed the finish line."

Arguably, Judge Charles's decision is not consistent with Pennsylvania's liberal discovery rules, which do not generally require a special showing to obtain non-privileged, relevant information from an adversary in discovery. However, Judge Charles's decision recognized the particular concerns present in requests seeking production of ESI, concerns that are not necessarily present in discovery seeking production of paper documents. Presumably, the proposed amendments seek to strike the proper balance by expressly authorizing discovery of ESI and directing that e-discovery should be conducted in accord with general discovery practice.

A year after the decision in *Brooks*, Judge John H. Foradora of the Jefferson County Court of Common Pleas examined the discoverability of social media in the context of a personal injury case. In *McMillen v. Hummingbird Speedway, Inc.*[5], defendants sought to obtain plaintiff's username and password for the social media services to which he belonged. Defendants claimed this information was relevant to plaintiff's damages claims. Plaintiff, however, contended that the social media posts were confidential and not discoverable. Relying exclusively on Pennsylvania precedent in the area of traditional discovery practice, Judge Foradora determined that the social media information was discoverable. Pennsylvania does not recognize a social media privilege and does not generally limit discovery based on a party's contention that the materials sought are confidential. Judge Foradora determined that social networking sites, by their very nature, do not invite user privacy, but are designed for interaction with other users. Accordingly, he ordered the plaintiff not to delete any data from his social networking accounts and that defense counsel be given "read-only" access to the social media accounts, while the plaintiff's password would not be disclosed.

IV. EFFECT OF THE NEW AMENDMENTS

Leading up to the proposed amendments, Pennsylvania had little by way of precedent addressing discovery of ESI, a fact pointed out by Judge Charles in the *Brooks* case. The proposed amendments make clear that disputes concerning e-discovery should be resolved based on long established principles of proportionality and reasonableness. Courts should be reluctant to, and by the terms of the commentary to the proposed amendments should refrain from, examination of relevant federal case law to resolve e-discovery disputes. Nevertheless, as federal courts continue to publish opinions addressing a wide set of issues relative to e-discovery, it is likely that the federal rules will have some influence on Pennsylvania's e-discovery practice.

The amendment to Rule 4009.1 is principally a change in the description of what constitutes ESI. The proposed revisions to Rule 4009.11, however, are more significant. Amended Rule 4009.11 directs that requests for ESI be specific and narrowly tailored, incorporating reasonable limitations on the scope of the request and the time period at issue. Amended 4009.11 also states a preference for agreements between parties to resolve e-discovery disputes. The amended Rule 4009.11, and its directive concerning the drafting of requests for ESI, will likely be the most relevant provision for conducting e-discovery, as it provides the framework for propounding requests for ESI and for assembling a sufficient response.

V. BEST PRACTICES FOR E-DISCOVERY

While the proposed amendments direct that the principles governing e-discovery in federal court are not to be imported into Pennsylvania practice, parties may nevertheless benefit from best practices that have developed under the now five year-old e-discovery amendments to the Federal Rules of Civil Procedure. This includes effective meet and confer efforts, drafting specific requests for ESI, utilizing appropriate objections, cost-shifting, litigation hold notices to ensure data preservation and data sampling.

A. *Meet and Confer*

Effective meet and confer is vital to ensuring effective e-discovery practice. The language of amended rule 4009.1(b), permitting a party facing a request for ESI to object to the proposed form of production, presumably invites a meet and confer effort.

E-discovery should be addressed early in the litigation, possibly before any discovery is served. Among other topics, identification of likely custodians and data preservation should be discussed. Third parties should be included in the discussion if they are likely to be in possession of relevant ESI.

Parties should also consider entering into a stipulated protective order, which might place limitations upon the scope of e-discovery, or provide protections, such as a claw back provision, for ESI that is produced. Such techniques can provide greater protection for producing parties while minimizing cost.

B. *Develop Narrow, Specific Requests for ESI*

Requests for ESI should be narrow and specific. This is consistent with the proposed amendments and an efficient method to obtain ESI. Similarly, consideration should be given to the desired format of production before making a request.

C. *Utilize Specific Objections*

Objections to requests for ESI should be specific and tailored to the particular request. If complying with a request would be costly or time-consuming, the responding party should be prepared to demonstrate the burden involved with affidavits of document custodians and/or pricing estimates from e-discovery vendors who might manage the production and can provide an objective indication of the cost involved. Furthermore, a responding party should be sure to utilize objections based on claims of privilege or other well recognized discovery limitation. Simply because a request seeks discovery of ESI does not mean

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that long-standing limitations on discovery cease to apply.

D. *Cost Shifting*

Parties looking to obtain large quantities of ESI should consider taking on some of the cost of production. Doing so, the requesting party may be able to expedite the production or obtain a broader scope of documents than would otherwise be produced. A court may view a party's willingness to share in the cost of production as a sign of good faith if motion practice eventually becomes necessary. Cost shifting might also encourage use of an outside e-discovery vendor, a tactic which could improve the speed and efficiency with which ESI is gathered and help reduce complications in obtaining the relevant data in the requested format.

E. *Preservation of Data*

Federal courts have frequently addressed data preservation and imposed a variety of sanctions in response to preservation failures. In *McMillen*, the court specifically called upon the plaintiff to refrain from deleting any relevant ESI. It is clear that under federal or state rules, parties must take reasonable steps to safeguard potentially relevant ESI and, once the duty to preserve arises, should issue hold notices to key custodians directing them to preserve ESI. An effective litigation hold notice should be sent to all custodians who posses or control potentially relevant ESI and should describe the nature of the litigation, identify relevant ESI and advise the recipient that relevant ESI must be maintained. A party who fails to preserve ESI may be determined to have spoliated evidence, subjecting the spoliator to a range of potential sanctions, including fines and/or adverse inferences, among other things.

F. *Data Sampling*

Finally, where a request is broad or a disagreement arises as to how best to locate the requested ESI, data sampling is a valuable tool. Data sampling allows for a limited search of potentially relevant data. The results are reviewed and the parties can determine whether a more thorough search of the data is likely to lead to discovery of relevant ESI so as to warrant the time and expense of continued searches. Data sampling is an effective tool to keep costs in check, can prevent an unnecessary fishing expedition into streams of irrelevant data and can further demonstrate to a court the desire to work in good faith to resolve e-discovery disputes.

VI. CONCLUSION

The authors of the proposed e-discovery amendments to the Pennsylvania Rules of Civil Procedure have deliberately attempted to create an e-discovery practice independent of what they suggest is an overly complicated federal system. The proposed amendments are expected to be adopted, and only time will tell whether the proposed framework will allow Pennsylvania courts to circumvent some of the complexity of the federal rules.

Despite the directive of the authors of the proposed amendments that federal practice not be imported into Pennsylvania e-discovery, the plethora of guidance being offered by federal courts on a host of e-discovery issues makes it likely that federal practice will influence the outcome of disputes arising under an amended Pennsylvania Rule 4009.1. First and foremost, however, practitioners and jurists alike should rely upon the long held maxim that discovery under the Pennsylvania rules should be conducted in accordance with principles of reasonableness and proportionality - including in the realm of e-discovery.

ENDNOTES

[1]*See* Introductory Comments to Proposed Amendment, available at: http://www.aopc.org/NR/rdonlyres/61B0D4F4-F4A6-445B-8A6B-9169CC4BEF07/0/rec249civ.pdf.

[2]*Id.*

[3]*Id.*

[4]009 Pa. Dist. & Cnty. Dec. LEXIS 148 (Lebanon Cty. C.P. Oct. 5, 2009).

[5]2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Jefferson Cty. C.P. Sep. 9, 2010).

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Eric Thompson and his fiancé, Miriam Regalado were employees of North American Stainless (NAS). Regalado filed a charge of sex discrimination against NAS with the EEOC. Thompson was fired three weeks later. While NAS argued there were other reasons justifying termination, for purposes of this discussion, the Court basically concluded that if the facts alleged were true, then the firing of Thompson constituted unlawful retaliation. In reviewing the anti-retaliation provisions of Title VII, the Court re-visited its analysis in *Burlington N.&F.F.R. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006), wherein it concluded that the anti-retaliation provisions of Title VII prohibit employer action that might "dissuad[e] a reasonable worker from making or supporting a charge of discrimination." *Id*. at 68, 126 S. Ct. 2405. In *Thompson*, the employer (NAS) argued that applying the *Burlington* standard to third-party reprisals would place the employer at risk of suit if there was any connection between an employee who was terminated and a different employee who filed a charge of discrimination. The Court realized the potential for a slippery slope in this area and did not issue a categorical rule that any third-party reprisal violates Title VII. Moreover, the Court was reluctant to fix a class of relationships for which third-party reprisals would be considered unlawful. However, the Court felt that the close relationship of a fiancé, in light of the facts alleged, presented a sufficiently objective situation for the Court to conclude that the firing of Thompson could be considered unlawful retaliation.

Whether Petitioner Thompson fit within the class of persons "claiming to be aggrieved" as that phrase is used in Title VII was the more difficult issue for the

Court to analyze. 42 U.S.C. §2000(e)-5(f)(1). This analysis was not a simple review of whether the person suing had Article III standing, with an injury in fact caused by the conduct of a defendant (in this case, the employer). Rather, the Court felt that the "person aggrieved" characterization was best determined by whether the individual fell within the "zone of interests" sought to be protected by the statutory provision at issue. 131 S. Ct. at 870. Because Thompson was not considered an accidental victim of the employer's unlawful act, the Court believed he fell within the zone of interests protected by Title VII. Hurting Thompson was an unlawful act by the employer which punished the person who filed the charge of discrimination. Thompson, therefore, was considered a person aggrieved with standing to sue.

Justice Scalia delivered the opinion in which all other members of the Court joined except Justice Kagan, who took no part in consideration or decision of the case. Justice Ginsburg filed a concurring opinion in which Justice Breyer joined, briefly pointing out that the decision is in accordance with the portion of the EEOC, which prohibits retaliation against someone closely related to or associated with the person exercising statutory rights. The retaliation, therefore, against this closely associated individual should be actionable.

The *Thompson* decision alerts employers that they may be subject to claims by third parties to the extent that the action against those third parties could be said to be associated with, or in retaliation for, otherwise protected activity by someone within the zone of interests. Employers must be cautious when employing persons who are related or closely associated in the first instance, but when an employee in such a relationship or association engages in protected conduct, there is now greater potential for scrutiny of employer actions against the related or associated third party. While *Thompson* does not draw a line in the sand for all third-party related claims, employers must be cautious in their employment actions given this broadening of potential liability.

PENNSYLVANIA EMPLOYMENT LAW UPDATE

By Lee C. Durivage, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, PA

The Third Circuit Holds That The Plaintiff Failed To Establish A Retaliation Claim When His Employment Was Terminated One Month Following The Dismissal Of His Prior Discrimination Lawsuit.
Gladysiewski v. Allegheny Energy, 2010 U.S. App. LEXIS 19527 (3d. Cir. Sept. 20, 2010)

The plaintiff argued that his employment was terminated in retaliation for filing a prior administrative complaint and federal lawsuit against his employer, which alleged age discrimination. Specifically, the plaintiff filed his charge of discrimination and age discrimination lawsuit in 2005. On April 11, 2007, the employer's motion for summary judgment was granted, and the plaintiff's age discrimination lawsuit was dismissed. On May 15, 2007, the employee was terminated and, as a result, he filed a lawsuit alleging retaliation. In upholding the dismissal of the plaintiff's retaliation claim, the court expressly rejected the plaintiff's argument that the temporal proximity between his termination and the resolution of his first lawsuit was "unusually suggestive" and, therefore, supported a retaliation claim. Rather, the court reasoned that while there is some "proximity" between the dismissal of the lawsuit and the termination, courts typically measure temporal proximity from the date of filing rather than the date a lawsuit is resolved. Since the plaintiff's initial filing was more than two years prior to his termination, he could not demonstrate the temporal proximity required for a retaliation claim as a matter of law.

Discrimination Against An Individual For A Child's Interracial Relationship May Support A Claim Of Race Discrimination Under Title VII.
Young v. St. James Mgmt., LLC, 2010 U.S. Dist. LEXIS 115587 (E.D. Pa. Oct. 29, 2010)

The plaintiff alleged that his employment as a maintenance technician (and his lease in the apartment he rented from his employer) was terminated because his employer objected to the presence of his African American son together with the son's Caucasian girlfriend in the apartment building. In support of his claim that his employer's termination of his employment and apartment lease was a pretext for racial discrimination, the plaintiff alleged that members of management made comments reflecting their disapproval of his son being seen with a Caucasian female in the apartment building. In denying the employer's motion for summary judgment, the court determined that the plaintiff's claim constituted a reasonable application of the "individual's interracial association" doctrine pursuant to Title VII. Specifically, the court noted that the plaintiff's claim is logically consistent with the principles of Title VII in that, if he were Caucasian, his son would be Caucasian and his employer would not have had an issue with his son's relationship. As a result, it will ultimately be a question for the jury to determine whether the plaintiff's employment and lease were terminated because of his son's interracial relationship.

Plaintiff Failed To Demonstrate That Her Migraine Headaches, That Were Caused By Her Attempts To Comply With Her Employer's Hair Grooming Policy, Precluded Her From Performing A Broad Class Of Jobs To Support A Claim Under The Americans With Disabilities Act.
Rivera v. County of Monroe, 2010 U.S. Dist. LEXIS 115418 (M.D. Pa. Oct. 29, 2010)

The plaintiff alleged that her former employer discriminated against her and forced her to resign her position as a correctional officer, in violation of the Americans with Disabilities Act, by refusing to accommodate her inability to comply with the employer's hair grooming policy. Specifically, the plaintiff alleged that the policy, which required employees with long hair to tie their hair back, caused her to suffer debilitating migraine headaches when she attempted to work with her hair tied tightly. The court, however, rejected

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the plaintiff's disability discrimination claim, holding that she failed to provide evidence as to how she was precluded from a class of jobs or a broad range of jobs in various classes. In so holding, the court noted that she failed to provide evidence that she would be foreclosed from other jobs with the employer that did not require her to have contact with prisoners and failed to provide evidence that there were no law enforcement positions which have a more relaxed hair policy.

The Pennsylvania Supreme Court Holds That A Third-Party Agency Employer Is Not Entitled To The Domestic Services Exemption Of The Pennsylvania Minimum Wage Act And, Therefore, Must Pay Its Home Health Aides Overtime.
Bayada Nurses, Inc. v. Commonwealth of Pennsylvania, 2010 Pa. LEXIS 2585 (Pa. Nov. 17, 2010)

The Pennsylvania Supreme Court was required to determine whether a third-party agency employer qualifies for the domestic services exemption and, therefore, was exempt from paying its home health aides overtime. Domestic service is defined as "work in a private dwelling for an employer in his capacity as a householder" as distinguished from work in a private dwelling for such an employer in its pursuit of a trade, occupation, profession, enterprise or vocation." There, the Pennsylvania Department of Labor sought to audit the employer's payroll records to determine whether the employer was complying with the Pennsylvania Minimum Wage Act when it failed to pay its home health aides overtime. The Department took the position that the employer was not entitled to the domestic services exemption from overtime requirements. The employer, however, filed a petition with the Commonwealth Court in a complaint for declaratory judgment arguing, among other things, that it is a joint employer of the home health aides and that the aides are "under the total discretion and control of the client while performing services in the client's home." As a result, the employer asserted that it should be permitted to benefit from the overtime exemption.

The Pennsylvania Supreme Court, however, rejected the employer's argument. In so holding, the court expressly noted that "the plain and unambiguous statutory language of the Act sets forth two requirements to come within the domestic services exemption: (1) the worker must be providing domestic services in or about a private home; and (2) the employer must be of a particular capacity, i.e., an employer in whose home the work in being performed." As a result, the court stated that "the statute focuses on one type of employer— a householder." Since the employer must be a householder to satisfy the exemption from paying overtime wages to an employee—and the employer in this case is not a householder—it cannot benefit from the exemption under the Pennsylvania Minimum Wage Act, regardless of whether a joint-employer relationship can be established.

ZELEPPA – SUPERIOR COURT'S HALF ANSWER TO MEDICARE REIMBURSEMENT

By Stephen Bruderle, Esquire, Margolis, Edelstein, Philadelphia, PA

Defense counsel and insurers have long been obligated under the Medicare Secondary Payer Act (MSPA) to satisfy liens held by Medicare for payments made for treatment resulting from personal injury that is the subject of tort litigation. Typically counsel will obtain a recovery demand letter issued by Medicare to determine the amount of the lien thereby allowing counsel to confirm that the lien is subsequently satisfied. As the ultimate safeguard defense counsel and liability insurers have made a practice of naming Medicare as a payee on the settlement check along with the plaintiff. An alternative has been to pay the settlement or verdict into court pending notification from Medicare that all outstanding Medicare liens have been satisfied. On November 17, 2010 the Pennsylvania Superior Court ruled in *Zaleppa v. Seiwell,* 98 A.3rd 632 (Pa. Super. 2010) that there is no basis under federal or Pennsylvania law for doing so. *Zaleppa* arises out of a motor vehicle accident on October 16, 2006. Ms. Zaleppa was 69 years old at the time of the accident. Kristen Seiwell, the defendant, admitted liability and the case was tried on the issue of damages. The jury entered a verdict in the amount of $15,000 comprised of $5,000 for future medical expenses and $10,000 for past, present and future pain and suffering. Zaleppa did not exhaust her PIP benefits through her own automobile insurance. Therefore, she was prohibited from recovering past medical expenses pursuant to the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. Section1722.

After the verdict, Seiwell requested post-trial relief in the form of a court order allowing her to identify Medicare as a payee on the draft or in the alternative to pay the money into court pending confirmation from Medicare that the lien has been satisfied. The trial court denied that post-trial request and the Superior Court addressed the issue of whether the MSPA allows a private entity to assert the rights of the United States Government regarding a potential claim for reimbursement of a Medicare lien.

The court provided a worthwhile analysis of the defendant's, and her insurer's, obligations under the statute. Pursuant to the MSPA, Medicare may make payment if a primary plan has not made or cannot reasonably be expected to make prompt payment for medical services. However, where a private insurer is required to pay for the treatment for which Medicare has already paid, the MSPA requires that Medicare must be reimbursed. The federal regulations indicate that only a recovery demand letter from Medicare triggers the duty to reimburse Medicare. The Superior Court noted that "if an outstanding Medicare lien existed, we

recognize that either Zaleppa, as the 'entity that receive[d] payment from [the] primary plan[,]' or Seiwell and her insurer, as the primary plan, must reimburse Medicare."

In rejecting Seiwell's argument, the court found that her obligation to reimburse Medicare and Medicare's right to reimbursement are distinct. Under the statutory scheme, only the United States government is permitted to enforce its right to recovery. This can only happen after a demand letter has been issued. In addition, the federal appellate courts have consistently held that private parties are not authorized to act on behalf of the federal government. In the end, the court concluded that "the express language of the MSPA, bestowed only the United States government with the authority to recover outstanding conditional Medicare payments."

Seiwell argued that because she was obligated to make reimbursement to Medicare for its lien, she was likewise permitted to assert that lien in order to assure that it was properly satisfied. The court held that "only the United States Government is authorized to pursue its own right to reimbursement." Further this can only occur "after it has issued a recovery demand letter to that primary plan." Otherwise the reimbursement obligation has not yet been triggered. The court found it significant that Zaleppa was the beneficiary of a verdict against Seiwell and held that only payment in full by Seiwell to Zaleppa can properly satisfy the resulting judgment. Where the United States Government is not a party to the claim, the duties owed to Medicare "are irrelevant with respect to satisfying the judgment . . . ."

Lastly, the court concluded that the relief requested by Seiwell, if granted, would contravene the concept of a judgment. In order to satisfy the judgment, payment must be made in full to Zaleppa.. If Seiwell's request for relief was granted, then Zaleppa as plaintiff would be receiving less than the full amount of the judgment and the judgment could not be satisfied.

The most significant point about this decision is that there was no lien to satisfy. Plaintiff did not exhaust her PIP benefits and therefore, all medical bills were paid by plaintiff's own auto insurance. To the extent that the verdict included medical treatment, it included only future, not past medical treatment. Therefore, it was an easy decision by the Superior Court to rule that the plaintiff cannot be cut out of a portion of the verdict because of a lien that did not exist for treatment that plaintiff had not, and might never, receive. However, most cases involve actual liens for actual past treatment. Usually what is at issue is the amount of the lien and which bills had been satisfied while there is no dispute that a lien does in fact exist. Thus, in a case where treatment has been received, it should be argued that the *Zaleppa* decision is distinguishable and is limited to cases where there is no lien.

In addition, the Superior Court fails to see the bigger picture and the relevant obligations resulting from this statutory framework. The Superior Court held that the plaintiff is entitled to the full amount of her judgment and that to put Medicare's name on the check would prohibit satisfaction of the judgment. This overlooks the fact that the judgment is not solely the plaintiff's. She entered into a contractual agreement, as did the defendant. In addition, both parties are bound by the MSPA which states that the plaintiff is not the only entity who is entitled to recover and that the amount reimbursed to Medicare is directly related to satisfaction of the judgment itself. Medicare owns a piece of the judgment, yet the Superior Court cut them out of the loop. Most significant for the defense bar is that if the Medicare lien is not satisfied, it is the defendant and the defendant's insurer who typically have the deepest pocket from which Medicare would seek to recover. When interest and costs are added, the exposure to the defendant and the defendant's insurer can be substantial. Yet the Superior Court does not answer the question of what recourse is available for the defendant other than to hope that plaintiff does the right thing.

Nonetheless, the Superior Court has taken off the table a common remedy used by defendants and their insurers to protect themselves where the plaintiff does not properly satisfy a Medicare lien thereby exposing the defendant and the insurer to liability under the MSPA. Defense counsel should make prompt efforts to obtain a demand letter from Medicare and to have that letter updated in the time leading up to settlement. An alternative is to have the plaintiff agree to defend and indemnify the defendant and the defendant's insurer if the lien is not satisfied. This has limited value since it does not protect the defendant from Medicare. Rather, indemnification language in the release only gives defendant a remedy after it has already paid out to Medicare. Nor does an indemnification agreement protect against the possibility that the plaintiff or plaintiff's counsel is judgment proof. Other options include making the settlement agreement contingent upon satisfaction of any liens with the settlement money paid into a trust fund until that time.

MOTOR VEHICLE UPDATE – PART II

[Part I appeared in the November, 2010 issue of *Counterpoint*.]

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(n) Standing

In *American Millennium v. Dolan, et al*., 2007-08000-CA (Chester Cty.Ct.Com. Pl. 2009), the court held that an insurer did not have standing to bring a claim for declaratory relief seeking to declare the various rights and obligations of other insurers in connection with injuries sustained by its mutual insured. In that case, American Millennium defended Anthony Fissel in connection with a motor vehicle accident under a policy of insurance issued by American Millennium at the time Anthony Fissel purchased a new vehicle. Fissel had a policy of insurance through Nationwide Mutual Insurance Company for his other vehicles. His mother, Mae Belle Fissel, who co-signed for the new vehicle, maintained insurance coverage through Hartford Insurance Company. Shortly after the purchase of the new vehicle, Anthony Fissel was involved in a motor vehicle accident. Both Nationwide and Hartford declined coverage under their policies. Thereafter, American Millennium instituted suit seeking a declaration that Nationwide and Hartford were required to participate. The court determined that American Millennium lacked standing to bring the action because American Millennium was not a party to the contract of insurance issued by Nationwide or Hartford, nor was American Millennium in privity with any of the parties. Moreover, American Millennium failed to obtain an assignment of rights from Anthony and Mae Belle Fissel prior to instituting suit. Ultimately the court reasoned that, the issue of coverage under the policies is between the parties to the contract of insurance, and therefore, American Millennium could not obtain a declaration regarding a matter in which it does not hold a stake.

(o) Collateral Estoppel

In *Catroppa v. Carlton*, 2010 WL 1932422 (Pa. Super. 2010), the Pennsylvania Superior Court held that a tortfeasor was not bound by the damages determination made during an underinsured motorist arbitration between the plaintiff and his insurer. In that case, the defendant was involved in a motor vehicle accident with the plaintiff. The defendant was at fault. Following the accident, the plaintiff sought recovery of damages in tort from the defendant. At the same time, the plaintiff sought recovery of underinsured motorist benefits from her insurer, State Farm. The tort action was subsequently stayed. The claim for recovery of underinsured motorist benefits proceeded to arbitration wherein the arbitrators valued the plaintiff's injuries at $100,000.00. Thereafter, the plaintiff filed a motion for summary judgment in the tort action on the basis of damages and contending that the defendant was bound by the doctrine of collateral estoppel to the valuation attributed by the arbitrators. The court noted that in applying collateral estoppel, the following five factors must be met:

> (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

Id. at *2, quoting, *Incollingo v. Maurer,* 575 A.2d 939, 940 (Pa. Super. 1990). The Superior Court held that collateral estoppel did not apply because the defendant was not in privity with a party in the prior case. In this regard, the court reasoned that:

> This point becomes clear when one considers that privity requires "such an identification of interest of one person with another as to represent the same legal right." *Ammon v. McCloskey*, 440 Pa.Super. 251, 655 A.2d 549, 554 (1995). Ostensibly, the matter proceeded to arbitration on Appellee's UIM claim because she and State Farm disagreed as to the amount of damages recoverable under her UIM coverage. In this proceeding, State Farm had a contractual duty to Appellee to determine the *actual* amount of her damages as she was its insured. Yet as a practical business matter, State Farm's interest at the UIM proceeding was to pay as small an amount as possible on Appellee's UIM claim. Thus, since Appellant's liability coverage was for $50,000, State Farm would have sought to minimize any award of damages beyond this amount. While this interest coincided with Appellant's subsequent interest in the underlying litigation to minimize Appellee's damages, this coincidence of interest between State Farm and Appellant at the arbitration proceeding only extended to the limit of coverage under State Farm's policies, $100,000 ($50,000 on Appellee's UIM claim and $50,000 on Appellant's liability claim). To demonstrate that there was not a substantial identification of interests between State Farm and Appellant at the arbitration proceeding, one need only consider whose interests would have been harmed had the arbitrators determined that Appellee's damages were in excess of the limits of both State Farm policies. As the Amicus Brief of the Pennsylvania Defense Institute argues, if the damages had exceeded $100,000, it would have been Appellant that suffered, not State Farm.

Id. at *3.

(p) Notice Provisions

In *Vanderhoff v. Harleysville Ins. Co*., 2010 WL 2653247 (Pa. 2010), the Pennsylvania Supreme Court applied the longstanding *Brakeman* standard and held that an insurer cannot deny benefits based upon lack of notice unless it can demonstrate actual prejudice. In *Vanderhoff*, the plaintiff collided with the rear of a vehicle operated by Piontkowski that stopped abruptly after beginning to proceed to make a left turn. Vanderhoff contended that Piontkowski stopped abruptly to avoid hitting an unidentified car. Piontkowski denied the existence of the unidentified car. Vanderhoff did not mention the phantom vehicle when recounting the accident at the hospital, or in the statement he filed with his worker's compensation insurer. A phantom vehicle was not

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referenced in the original police report. Several months after the accident, when the plaintiff first saw the police report, he requested that the police report be amended to include the presence of the phantom vehicle. The request was denied. A claim for uninsured motorist benefits was not filed until eight months after the accident. The defendant filed a declaratory judgment action. The following question was on appeal before the Supreme Court:

> "Whether an insurance carrier should be required to prove prejudice relative to the late reporting to the carrier of an accident involving an unidentified vehicle when such accident was timely reported to law enforcement officials?"

The plaintiff argued that the insurer is required to show actual prejudice when denying a claim for a breach of the notice provision of the policy. The defendant argued that the Supreme Court's recent decision in *Foster* applied. The defendant argued that phantom vehicle uninsured motorist claims are fertile ground for fraud and the reason that the legislature included the §1702 requirement in the MVFRL's definition of uninsured motor vehicle, which did not reference the *Brakeman* demonstration of prejudice requirement prior to the denial of a claim, but instead incorporates the notice provision into the definition of an uninsured motor vehicle.

The Supreme Court noted that the decision in *Foster* required an injured insured to notify the police of an accident involving a "phantom vehicle" before being able to collect uninsured motorist benefits. Thus, *Foster* related to the importance of the police as a public and investigatory body, as distinguished from the private interest of an insurance company. Accordingly, the court held that the *Foster* decision did not overrule *Brakeman*, but instead, carefully distinguished it. The court ultimately held that the insurer must demonstrate prejudice due to the failure of an insured to notify the insurer of the phantom vehicle accident.

(q) Offsets

In *Tannenbaum v. Nationwide Ins. Co.*, 992 A.2d 859 (Pa. 2010), the Pennsylvania Supreme Court held that an underinsured motorist carrier is entitled to an offset to accommodate for the amounts recovered by the insured under a group plan or personal disability policy. In so holding, the court first held that §1722 of the MVFRL was not limited to health benefits, but instead, applied to the disability benefits received by the plaintiffs. The court further held that §1722 which provides, in relevant part: "[I]n any [UM/UIM] proceeding, . . . a person who is eligible to receive benefits under . . . any program, group contract, or other arrangement for payment of benefits . . .shall be precluded from recovering the amount of [such] benefits[.], evidences the legislature's intent to shift a substantial share of the liability for injuries from automobile insurance carriers to collateral source providers with the aim to reduce insurance premiums." (Emphasis added.) Thus, the court concluded that under the plain terms of the statute, §1722 of the MVFRL, recovery of underinsured motorist benefits may be offset by group/program/arrangement benefits, including disability benefits purchased by the insured so long as those benefits are not subject to subrogation.

(r) Credits

In *D'Adamo v. Erie Ins. Exch*., 2010 Pa. Super 77 (2010), the Pennsylvania Superior Court held that an insurer is entitled to a credit equal to the amount of the tortfeasor's liability limits, including, limits of liability available under an umbrella policy. The appellant argued that the insurer was entitled only to an offset for the limits of liability applicable under an automobile policy. However, the Superior Court reasoned that when defining a tortfeasor's underinsured status, the words, "available liability insurance" under both the MVFRL and the policy take into account the tortfeasor's motor vehicle insurance and personal umbrella policy limits. The court further noted that the use of the words motor vehicle in the MVFRL and the policy did not serve to limit available liability insurance to just motor vehicle policies. Thus, the insurer was entitled to credit totaling the liability limits under both the tortfeasor's automobile policy and the personal umbrella policy.

(s) Forum Selection Clause

In *O'Hara v. First Liberty Ins. Corp. d/b/a Liberty Mut. Ins. Grp*., 2009 Pa. Super. 214 (November 9, 2009), petition for reargument denied, December 30, 2009, the Superior Court upheld the validity and enforceability of a forum selection clause in a personal auto policy. In *O'Hara*, the forum selection clause at issue provided that the suit "must be brought in a court of competent jurisdiction in the county and state of your legal domicile at the time of the accident."

O'Hara resided in Delaware County and was involved in an accident in Delaware County. After receiving the full amount of liability coverage under the tortfeasor's insurance policy, O'Hara made a claim for UIM benefits under their policy issued by Liberty Mutual. Liberty Mutual denied the UIM claim. O'Hara filed suit for breach of contract against Liberty Mutual in Philadelphia County. Liberty Mutual's preliminary objections on the basis of improper venue were granted and the case was transferred to the Court of Common Pleas of Delaware County. The Superior Court enforced the forum selection clause reasoning that forum selection clauses are presumptively valid; the forum selection clause was "clear and unambiguous"; the forum selection clause did not impair any substantive right afforded by the MVFRL and further, O'Hara was unable to demonstrate that litigating their lawsuit in the county in which they live and where the accident occurred would "injure the public or be against the public good."

The Court of Common Pleas of Lackawanna County similarly enforced a forum selection clause containing identical language in *Kichline v. Erie Ins. Exch*., 2009 CIV 3052 (CCP Lackawanna County February 16, 2010) (Thomson, S.J.).

(t) Rescue Doctrine

In *Bole v. Erie Ins. Exch*., 2009 Pa. Super. 38 (February 27, 2009) the Superior Court discussed the application of the Rescue Doctrine in connection with an accident caused by an underinsured motorist. Bole suffered serious injuries while responding to call as a volunteer fireman in response to a serious automobile accident. The accident was caused by an underinsured motorist who was driving too fast during a rainstorm. A bridge on Bole's property collapsed during the same rainstorm and he was

injured after being thrown from the truck he was driving on the way to the accident. Bole was denied underinsured motorist benefits at an underinsured motorist arbitration. The arbitrators determined that his claim did not fall within the parameters of the Rescue Doctrine which provides that strict enforcement of principles of contributory negligence should not bar a person from collecting from a negligent party whose actions place someone at risk of imminent death or bodily harm. The doctrine requires that the rescuer show that his acts were reasonably appropriate and performed in the exercise of ordinary care. The court, noting that there was no transcript from the arbitration, remanded the matter for further consideration in light of its discussion regarding the Rescue Doctrine.

(u) Molding of Awards to Reflect UM/UIM Recovery

In *Pusl v. Means, et al*., 2009 Pa. Super. 192 (September 23, 2009), the Superior Court affirmed the trial court's molding of a personal injury award from $100,000.00 to $25,000.00 in order to account for the pre-trial UIM settlement. The court held that the trial court's molding was in accord with the policy of 75 Pa.C.S.A. §1722 prohibiting double recovery. The court further held that molding did not violate the collateral source rule and provide the tortfeasor with a windfall in the nature of a reduction of liability because the UIM insurer was still permitted to recover from the tortfeasor by way of subrogation.

(v) Damages Legally Entitled to Be Recovered

The Third Circuit in *Willett v. Allstate Insurance Company*, 2009 WL 5159763 (3d. Cir. Dec. 31, 2009), held that a statutory damages cap against the tortfeasor precluded recovery of underinsured motorist benefits where the total amount of damages recoverable under the statute have been paid, even though the plaintiff alleged damages in excess of the statutory limit. In that case, the decedent was involved in a motor vehicle accident in Maine. Under Maine law, the Estate was permitted to recover damages only for the reasonable medical expenses, funeral expense and loss of the love, comfort and society of the deceased, as well as, non-economic damages up to $400,000.00. Following receipt of that amount from the tortfeasor, the Estate sought recovery of additional damages from its UIM carrier, Allstate. Allstate denied benefits arguing that the Estate had already recovered all damages to which it was legally entitled, and therefore, there was no longer an underinsured motorist claim. In holding that the Estate was not entitled to further recovery, the court reasoned that the policy's language limiting recovery to damages that the decedent was "legally entitled" to recovery from the tortfeasor, clearly and unambiguously states that coverage depends upon the decedent's legal right to damages from the tortfeasor. Thus, if the decedent had no right to recover from the tortfeasor, the insurer has no responsibility under its policy. The fact that the decedent was domiciled in Pennsylvania did not permit the Estate to invoke Pennsylvania law to resolve the tortfeasor's liability in tort, nor defeat the damage limitation imposed by Maine law.

(w) Breach of Fiduciary Duty

In *Taylor v. Gov't Employees Ins. Co*., 2010 WL 1633384 (E.D.Pa. 2010) the Eastern District of Pennsylvania recognized that, in the context of insurance law, a claim for breach of fiduciary duty does not exist between an insurer and an insured. Accordingly, the court dismissed the portion of the complaint purporting to set forth a cause of action for breach of fiduciary duty. *See also, Fitzpatrick v. State Farm Ins. Co*., 2010 WL 2103954 (W.D.Pa. 2010) (where the court also struck a claim for recovery under the UTCPL where the plaintiff failed to allege any facts to support their claim, including what the alleged misrepresentations were, when they were made, by who, or that the misstatements were relied upon).

(x) Federal Court Jurisdiction

(1) Abstention

In *Farmers New Century Ins. Co. v. Lambert*, 2009 WL 211947 (M.D.Pa. 2009), the District Court for the Middle District of Pennsylvania exercised its discretion under the Declaratory Judgment Act, 28 U.S.C. §2201(a), to decline jurisdiction, even though the court had jurisdiction pursuant to the diversity jurisdiction statute, 28 U.S.C. §1332. 28 U.S.C. §2201(a) provides in part, "any court of the United States … may declare the rights and other legal relations of any interest party seeking such declaration…." (Emphasis added.) The court reasoned that its decision would turn on state law contract interpretation and would turn on well-settled principles of Pennsylvania law. The state court could easily answer those questions, and thus there was no reason for the federal court to entertain the case.

Other cases have held identically. In this regard, *see: Liberty Mut. Grp. v. Thomas*, 2010 WL 1131702 (E.D.Pa. 2010); *Leonard v. State Farm Mut. Auto. Ins. Co*., 2009 WL 3088425 (W.D.Pa. 2009); *Brethren Mut. Ins. Co. v. Rovito*, 2009 WL 2342862 (M.D. Pa. 2009) and *Amica Mut. Ins. Co. v. Boyd*, 2009 WL 790864 (E.D.Pa. 2009).

(2) Amount in Controversy

In *Lohr v. United Fin. Cas. Co*., 2009 WL 2634204 (W.D.Pa. 2009), the District Court for the Western District of Pennsylvania held that the defendant failed to prove, by a preponderance of the evidence, that the class action claims of the plaintiff exceeded the $5,000,000.00 jurisdictional requirement under the Class Action Fairness Act, 28 U.S.C. §1332(d)(2). In that case, the plaintiff filed a class action suit in the Court of Common Pleas of Fayette County on May 8, 2009, seeking a declaratory judgment holding the Household Exclusion in the defendant's policy unenforceable. The defendant removed the case to the Western District of Pennsylvania and filed a Motion to Stay pending the outcome of the Pennsylvania Supreme Court's decision in *Erie Ins. Exch. v. Baker*. The plaintiff filed a motion to remand. The district court held that a defendant seeking removal must prove by a preponderance of the evidence that it is more likely than not that the amount in controversy exceeds the statutory requirement. In remanding the matter to state court, the district court reasoned that the defendant failed to carry its burden.

In *Rosado v. Encompass Ins. Co*., 2010 WL 2431829 (E.D.Pa. 2010), the District Court for the Eastern District held that the amount in controversy at the time of removal is to be applied when considering whether the jurisdictional minimum amount in controversy is

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satisfied for the purposes of remand. In that case, the defendant timely removed the matter to federal court on the basis of diversity jurisdiction. The plaintiff filed a certification of damages stating that the amount in controversy did not exceed $75,000.00. The court held that the certification merely clarified the amount in controversy at the time of removal, and therefore, the defendant failed to carry its burden of demonstrating, by a preponderance of the evidence, facts that the jurisdictional amount in controversy had been met.

(3) Joinder After Removal

In Wabby v. State Farm Mut. Auto. Ins. Co., 2010 WL 1754754 (M.D.Pa. 2010) the District Court of the Middle District of Pennsylvania adopted and applied the Fifth Circuit's test for remand following removal. In that case, the plaintiff filed suit against State Farm seeking recovery of uninsured motorist benefits. State Farm timely removed the case to the Middle District of Pennsylvania. Thereafter, the plaintiff filed a motion pursuant to 28 U.S.C. § 1447(e) seeking to join the estate of the tortfeasor and filed a motion to remand to state court. The district court noted that the Third Circuit had yet to establish how a district court should apply Section 1447(e). The district court further adopted the Fifth Circuit's test which provides that:

> The district court should examine "[1] the extent to which the purpose of the amendment is to defeat federal jurisdiction, [2] whether plaintiff has been dilatory in asking for amendment, [3] whether plaintiff will be significantly injured if amendment is not allowed, and [4] any other factors bearing on the equities."

Id. at *2 [citations omitted]. After considering the above referenced factors, the court granted the plaintiff's motion and remanded the matter to state court.

POST *KOKEN* ISSUES

In 2005, the Pennsylvania Supreme Court held that automobile insurance carriers were not required to include arbitration clauses in their policies for the resolution of UM/UIM benefits claims in *Insurance Federation of Pennsylvania v. Commonwealth, Department of Insurance (Koken)*, 889 A.2d 550 (Pa. 2005).

To date there does not appear to be any appellate decisions providing guidance on the consolidation issue of whether the Uninsured/Underinsured claim should be litigated with the tort claim in a post-Koken case. The courts of common pleas across the Commonwealth are split on this issue with some favoring severance and others not.

(a) Denying Severance and Favoring Consolidation

In *Collins v. Zeiler and State Farm*, GD08-Civil-014817 (Alleg. Co. October 22, 2008)(Strassburger, J.), the Allegheny County Court of Common Pleas denied preliminary objections seeking to sever the claims.

In *Moyer v. Harrigan and Erie Ins. Exchange*, 2008-Civil-1684 (Lacka. Co. October 24, 2008)(Thomson, J.), the Lackawanna County Court of Common Pleas permitted the consolidation of the UIM claim and the claim against tortfeasor.

In *Jannone v. McCooey and State Farm*, 2320-2008-Civil (Pike Co. April 1, 2009)(Chelak, J.), the Pike County Court of Common Pleas denied the preliminary objections filed by the third party defendant-driver to the joinder of third party liability claim with the UIM claim under one caption or lawsuit. The court also noted that evidence of insurance may be introduced at trial for limited purposes in these types of consolidated cases.

In *Serulneck v. Kilian and Allstate*, 2008-Civil-2859 (Lehigh Co. April 7, 2009) (McGinley, J.), the Lehigh County Court of Common Pleas denied the motion of the tortfeasor defendant seeking a severance of the claims against him from the UIM claims that were set forth by the plaintiff under one caption. The court noted that the entire cause of action arises from the same set of facts, whether in tort or contract and that the defendant Allstate would be prejudiced if excluded in any litigation which assesses its liability.

In *Six v. Phillips and Nationwide Ins. Co*., 2009 WL 2418861 (Beaver Co. June 30, 2009)(Kwidis, J.), the Beaver County Court of Common Pleas rejected preliminary objections of the tortfeasor to join the third party claim and UIM claim under one caption ruling that evidence of insurance may be admitted for limited purposes. The court also cited that the UIM carriers agreed to resolve UIM disputes through litigation and therefore, should have anticipated that the third party's liability policy would be relevant to Nationwide's UIM liability.

In *Glushefski v. Sadowski and Erie Ins. Exchange*, 1189-Civil-2009 (Luz. Co. July 24, 2009)(Burke, J.), the Luzerne County Court of Common Pleas overruled preliminary objections by the tortfeasor defendant who sought to sever the third party claim from the consolidated UIM claim.

In *Gingrich v. Esurance and Susan Graci,* No. 08795-CV-2009 (C.P. Dauphin Nov. 2, 2009), the Dauphin County Court of Common Pleas denied the third party liability defendant's preliminary objections to a complaint which joined the negligence and UIM causes of action under one caption.

(b) Severance Appropriate

In *Weichey v. Marten and Allstate*, 2009 WL 4395727 (C.P. Butler Co., June 11, 2009) (J. Yeager), the Butler County Court of Common Pleas ruled to sever the UIM claim from the third party claim with the rationale that evidence of insurance was irrelevant, prejudicial and not admissible in negligence actions.

In *Baptiste v. Strobel and State Farm Mut. Auto. Ins. Co*., 2009 WL 3793590 (C.P. Butler Co., Nov. 5, 2009) (Horan, J.), the Butler County Court of Common Pleas permitted severance of the third party claims against the tortfeasor and the UIM claim to avoid the irrelevant and prejudicial issue of introducing evidence of insurance in the tort claim.

In *Megert v. Stambaugh, Erie Ins. Co. and The Hartford*, 2010 WL 231525 (C.P. Adams Co., Jan. 15, 2010) (Kuhn, P.J.), the Adams County Court of Common Pleas ruled in favor of the severance of the third party claims against the tortfeasor from the UIM claims asserted against the UIM carriers. The court noted that despite the fact that the action against all defendants is related to the alleged vehicular accident, the facts and law relevant to each cause of action are different. In this regard, the court reasoned that the cause of action against

the tortfeasor defendant will rest entirely on the law of negligence while the actions against the insurer will be based upon the applicability of the provisions of their contracts with the plaintiffs.

In *Grove v. Uffelman and Progressive Ins*. Co., 2009 WL 3815756, No. 2009-SU-2878-01 (C.P. York Co., Nov. 9, 2009), the York County Court of Common Pleas ordered a severance of the cases. The third party tortfeasor objected to the plaintiff's complaint on the grounds that the joinder was improper because the cases did not arise out of the same transaction and because the introduction of insurance issues would prejudice the defendant-driver. The court viewed the two claims as involving separate transactions, a tort claim based on negligence against the defendant-driver and a contract claim against the UIM carrier to enforce the plaintiff's rights under the policy.

BAD FAITH IN UM/UIM CLAIMS

(a) Generally

In *Johnson v. Progressive Ins. Co*., 2009 PA Super 255 (December 28, 2009), the Superior Court affirmed the grant of summary judgment in favor of Progressive on appellant's bad faith claim. In *Johnson*, the appellant contended that Progressive acted in bad faith in connection with the handling of its UIM claim. The Superior Court held that Progressive performed a good faith investigation into the facts by timely seeking medical records, wage statements and appellant's statement under oath, and by obtaining an independent medical examination. The request for an IME was reasonable given contradicting notations in medical records indicating that appellant's surgery was successful and he was improving. Additionally, Progressive made an offer that was slightly less than half of the eventual award. It promptly communicated with the claimant, made no misrepresentations, and did not act in a dilatory manner. Progressive never denied benefits. It only disputed the amount thereof. The dispute, however, was reasonable based upon the IME and an expert witness report indicating that the Appellant's injuries had resolved. Evidence that the offer was less than Progressive's reserves was also not evidence of bad faith.

Other facts-specific cases involving a finding that the insurer's conduct was not bad faith include *Spinelli v. State Farm Mut. Auto Ins. Co.*, 2009 WL 723399 (E.D.Pa. 2009); *Nia Learning Ctr., Inc. v. Empire Fire & Marine Ins. Co*., 2009 WL 3245424 (E.D.Pa. 2009); *Ingraham v. Geico Ins. Co*., 2009 WL 793047 (W.D.Pa. 2009); C*rawford v. Allstate Ins. Co*., 2009 WL 2778796 (E.D.Pa. 2009); *Brown v. Great Northern Ins. Co*., 2009 WL 453218 (M.D.Pa. 2009).

In *Bukofski v. USAA Cas. Ins. Co*., 2009 WL 1609402 (M.D.Pa. 2009), the District Court for the Middle District of Pennsylvania granted in part, and denied in part the defendant's motion to dismiss in connection with the plaintiff's ten count complaint seeking damages for alleged bad faith conduct in the handling of the plaintiff's claim for first party benefits and underinsured motorist benefits. The district court dismissed the plaintiff's cause of action for the defendant's alleged failure to comply with the duty of good faith and fair dealing because that claim merged with the plaintiff's separate claim for breach of contract. Likewise, the district court dismissed the plaintiff's cause of action for breach of fiduciary duty noting that any fiduciary relationship existing between the parties is based upon the insurance contract, and thus, this cause of action was redundant of the breach of contract claim, and also, Pennsylvania law does not recognize separate causes of action for breach of fiduciary duty in this context. The district court also dismissed the cause of action for negligence finding that the parties' relationship was governed by contract, and thus, a separate tort action in negligence was barred by the "gist of the action doctrine." Finally, the district court dismissed the plaintiff's cause of action for negligent infliction of emotional distress reasoning that the Pennsylvania Supreme Court has expressly refused to adopt the approach that would follow for recovery of emotional distress.

See also, Gidley v. Allstate Ins. Co., 2009 WL 3199599 (E.D.Pa. 2009) (holding that the plaintiff's claim for breach of a duty of good faith and fair dealing was subsumed by plaintiff's claims for breach of contract and bad faith; and that, the plaintiff could not sustain a claim under the Unfair Trade Practices and Consumer Protection Law, 73 Pa.Stat. §201-1, et seq., where the plaintiff failed to specify which unfair method of competition or unfair and deceptive act the defendant allegedly committed, and further, the plaintiff failed to allege they justifiably relied on any statements or that their reliance was the cause of their alleged injuries.)

In *Amica Mut. Ins. Co. v. Fogel,* 2010 WL 3025179 (M.D.Pa. 2010), the District Court for the Middle District of Pennsylvania granted the insurer's motion for summary judgment in connection with the alleged bad faith claims handling. In that case, the insureds claimed that the insurer did not conduct an adequate investigation of their claims. In support of this contention, it was alleged that the insurer spent just over three weeks investigating the claims; and the insurer took the position that New Jersey law governed the policy. The court noted that on summary judgment the burden is on the insured to demonstrate by clear and convincing evidence that the insurer acted in bad faith. In holding in favor of the insurer, the court noted that the existence of questions regarding the proper application of law, and the fact that there were judicial decisions that considered these legal questions with mixed results substantially undermined the insureds' claim. In this regard, the court noted that an incorrect analysis of the law is insufficient to sustain a claim for bad faith. The court also applied the *Griffith* analysis in determining that the law of New Jersey was applicable.

(b) Severance of Bad Faith and UIM Claims

The Superior Court in *Gunn v. Auto. Ins. Co. of Hartford, CT*, 2009 Pa. Super. 70 (April 15, 2009) held that an order of the trial court severing the trial of the bad faith claim and UIM claim but allowing discovery of the two claims to proceed simultaneously was not reviewable under Pa.R.A.P. 313 as a collateral order. The court reasoned that although the first prong of Pa.R.A.P 313 was satisfied, the Appellant failed to demonstrate the second element was satisfied, that a right involved was too important to be denied review. In this regard, the court noted that the claims of bad faith were specific to the particular case at hand, and not a policy or practice of bad faith, and thus, the trial court's decision not to stay the bad faith proceeding did not go beyond

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the particular litigation at hand or implicate a right deeply rooted in public policy. Finally, the court reasoned that the third prong of Pa.R.A.P. was not satisfied because the Appellants claims of potential disclosure of privileged information were speculative and could be resolved at the trial court level through protective orders. Further, the court noted that the concern of the insurer that time and resources might be wasted in preparing for litigation of the bad faith claim were not sufficiently compelling to overcome the requirements of Pa.R.A.P. 313.

(c) Statute of Limitations

In *Sikora v. State Farm Ins. Co*., 2009 WL 2411781 (W.D.Pa. 2009) the District Court for the Western District of Pennsylvania held that the plaintiff's claim for underinsured motorist benefits began to accrue when the insurer first sent a letter providing definite notice of refusal to indemnify, and thus, the plaintiff's suit filed more than two years later was dismissed as a violation of the statute of limitation applicable to the Pennsylvania Bad Faith Statute, 42 Pa.C.S.A. §8371. The plaintiff argued that a subsequent letter sent to his attorney two years after the original denial acted as the "official denial". However, the court reasoned that the insurer provided definitive notice in its first letter that it was denying coverage and no reasonable jury could agree with the plaintiff's claim that the "official denial" came two year later.

(d) Emotional Distress

In Amitia v. Nationwide Mut. Ins. Co., 2009 WL 111578 (M.D.Pa. 2009), the District Court for the Middle District of Pennsylvania held it would be immature to dismiss the plaintiff's claim for breach of contract which sought damages for emotional distress. The defendant argued that there could be no claim for breach of contract because it paid the benefits under the insurance contract in full. However, the court, noting the general rule that if an insurance company pays the proceeds, there can be no breach of contract, stated that plaintiffs were seeking compensation for the emotional distress caused by the delayed payment. In this regard, the court stated that emotional distress damages are recoverable under a breach of contract where the breach is of such a kind to cause emotional distress.

(e) Jurisdictional Amount for Diversity of Citizenship

In *Denicola v. Progressive Direct Ins. Co*., 2009 WL 1684640 (M.D.Pa. 2009), the District Court for the Middle District of Pennsylvania held that the defendant could meet the jurisdictional requirement for diversity jurisdiction in an action under the Pennsylvania Bad Faith Statute, 42 Pa.C.S.A. §8371, by including interest, attorney fees and punitive damages, as these damages are recoverable under the Bad Faith Statute. *See also, Friel v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 3719452 (W.D.Pa. 2009).

(f) Choice of Law

In *Godfry v. State Farm Mut. Ins. Co*., 2009 WL 564636 (E.D.Pa. 2009), the district court held that under the Pennsylvania choice of law analysis, the law of Pennsylvania applied to the plaintiff's claims of statutory bad faith. In that case, the plaintiff, a Pennsylvania resident, was injured while riding as a passenger in a vehicle being operated by Randall Neil. The accident occurred in Delaware. The vehicle was owned by a Delaware resident. The other vehicle involved in the accident was uninsured. Accordingly, following the accident, the plaintiff submitted a claim to State Farm, the insurer for the Neil vehicle, for the recovery of uninsured motorist benefits. The uninsured motorist claim was handled by State Farm's claim representatives in Delaware. The parties were unable to settle and thus, the plaintiff commenced a civil action against State Farm in the Philadelphia County Court of Common Pleas. The plaintiff asserted that during the trial, State Farm's medical expert committed perjury and that State Farm knew or should have known that its doctor committed perjury because his deception was apparent from his prior deposition testimony. Despite a jury verdict in his favor, the plaintiff filed a claim against State Farm arguing that State Farm's failure to fairly and reasonably settle the state court action and knowing use of perjured testimony was bad faith. Accordingly, claims for bad faith pursuant to the Pennsylvania Bad Faith Statute, 75 Pa.C.S.A. §8371, as well as common law bad faith under Delaware law were asserted in a new lawsuit.

The action was subsequently removed on the grounds of diversity jurisdiction. Thereafter, State Farm filed a motion to dismiss the Pennsylvania claims, as well as, a motion to transfer venue to Delaware. In deciding the motions, the district court applied the interest/contacts choice of law approach espoused by the Pennsylvania Supreme Court in *Griffith v. United Airlines, Inc.*, 203 A.2d 796, 805 (Pa. 1964). The district court found that a true conflict existed between the laws of Delaware and Pennsylvania. In this regard, the district court noted that each jurisdiction provided a remedy for claims of bad faith against an insurer, but that Pennsylvania provided a greater remedy for recovery of damages for an insurer's bad faith conduct. Additionally, the district court determined that each state had an interest in enforcing its law. Accordingly, the district court examined the relevant contacts of each state. In this regard, the district court found that Pennsylvania had more contacts, both quantitatively and qualitatively. In determining which state had a greater interest in enforcing its law, the district court determined that Pennsylvania had a greater interest because the plaintiff was a Pennsylvania resident, State Farm's claim representatives reached into Pennsylvania to administer the claim, and several other alleged acts constituting bad faith occurred in Pennsylvania. Thus, after applying the Pennsylvania interests/contacts analysis, the district court determined that Pennsylvania law applied.

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TOO LOKO? SAFETY OF CAFFEINATED ALCOHOLIC BEVERAGES COMES INTO QUESTION

FDA Issues Warning Letters to Manufacturers of Popular Products Four Loko and Joose

By John J. Richardson, Esquire and Nicholas J. Godfrey, Esquire, Dinsmore & Shohl, Pittsburgh, PA

On November 18, 2010, the Food and Drug Administration (FDA) issued Warning Letters to Phusion Projects, LLC (Phusion), United Brands Company, Inc. (United), Charge Beverages Corporation (Charge), and New Century Brewing Company, LLC (New Century Brewing), alerting the companies that their pre-packaged caffeinated alcoholic products are adulterated beverages in violation of § 402(a)(2)(C) of the Federal Food Drug and Cosmetic Act (the Act).

In recent months, these beverages have come under intense scrutiny from the media and legislators at the local, state and federal levels of government because of the cheap and allegedly dangerous high that detractors say they provide to college students and young adults. Sold in attractive, single-serve cans and available in a variety of fruity flavors, these products mix caffeine and up to 12% alcohol by volume, or the alcoholic equivalent of four to five cans of beer, per serving package. Although not new to the market (MillerCoors and Anheuser-Busch previously pulled similar products in 2008 after pressure from state governments), efforts to ban these products increased again this fall after Phusion Projects' popular Four Loko product was implicated in a number of recent accidents and the deaths of at least five individuals, four of whom were under the legal drinking age of 21.

As concerns about the dangerous effects of combining caffeine with alcohol grew, the affected manufacturers attempted to quell the negative publicity that their products were receiving by claiming that they were no different than typical drinks served at bars, such as Red Bull and vodkas or rum and colas. Phusion also pointed out that flavored alcoholic beverages already exist on the market in the form of bubblegum, raspberry and blueberry vodkas, all of which contain several times the alcohol by volume of a can of Four Loko. Likewise, United maintained that its "Joose" product contains only half the caffeine quantity of a Red Bull or Monster energy drink, and less caffeine per ounce than found in a can of carbonated cola. Additionally, both Phusion and United cited aggressive "responsible drinking policies" aimed at promoting safe and legal consumption of their products to retailers and consumers alike.

Officials countered by claiming that the combination of the companies' extreme marketing campaigns, attractive packaging, fruity flavors, and low prices (Four Loko sells for approximately $2.50 per can) make the products overly attractive to young, inexperienced, and potentially underage drinkers. A number of colleges and universities across the nation warned their students to avoid the products. Several states, including Washington, Utah, Michigan, Oregon and New York, went a step further by banning the products outright, citing concerns that the products are marketed specifically to young adults and college students, whom they claim are especially susceptible to the adverse health effects associated with consumption of the products. Meanwhile, federal government officials, led by Senator Charles E. Schumer (D-NY) began pushing for a national ban on the products, which Schumer referred to as "toxic brews."

The FDA began the process of instituting a ban by issuing Warning Letters to the four companies, citing violations of the Federal Food, Drug and Cosmetic Act. Specifically, the agency found that the direct, purposeful addition of caffeine into alcoholic beverages violated § 402(a)(2)(C)'s prohibition against the manufacture and production of adulterated food products, or those containing unsafe food additives. Under § 409 of the Act, a food additive is considered to be unsafe unless it is the subject of prior approval, has generally been recognized as safe (GRAS) by a consensus of qualified experts, or a regulation is in effect that prescribes the conditions under which the additive may be safely used. According to the Warning Letters, the FDA was not aware of any information to establish that caffeine added directly to alcoholic beverages is the subject of a prior sanction or that it had been generally recognized as safe. Similarly, there is no regulation in effect authorizing the use of caffeine as a direct addition to alcoholic beverages.

While Warning Letters do not constitute official agency action nor require responsive action on the part of affected companies or individuals, they are generally seen as an integral part of the process to remove dangerous products from the market. The FDA issues Warning Letters to provide notice of alleged violations of the Federal Food, Drug and Cosmetic Act with the expectation that affected companies will take voluntary action to correct any alleged violations. The FDA also uses the Warning Letter as its chief means of establishing prior notice of such violations, and will later cite to receipt of a Warning Letter to enhance its position in enforcement actions taken against companies who do not take prompt steps to come into compliance with the violations outlined in Warning Letters. Under the Act, such companies face the risk of subjecting themselves to punishment such as product seizure or court ordered injunctions against future manufacture of the product.

In response to the Warning Letters, all four companies took the steps necessary to avoid any such enforcement action by the FDA. Phusion and United informed the agency that they had ceased shipping their caffeinated alcoholic beverages and expected to have remaining products off retail shelves by December 13, 2010. While New Century has argued that its product was unfairly included in the FDA's crackdown, it too has ceased manufacture for the time being. Charge also advised the FDA that it had ceased manufacture of its affected products. Interestingly, Phusion has begun to manufacture new versions of its product without caffeine, while Charge has continued to market its already existing non-caffeinated alcoholic beverages.

While it may seem that the letters were a knee-jerk reaction by the FDA to the pressures created by the national attention given to the issue, the Warning Letters were actually the culmination of

a nearly year-long agency investigation into the safety of caffeinated alcoholic beverages. The FDA had sent letters to the four companies, along with more than 20 other manufacturers of similar products on November 12, 2009, directing them that the agency would take action to remove the products from the marketplace unless the companies could provide evidence that the products were either subject to prior approval or had been generally recognized as safe.

Although Phusion, United and New Century responded to the initial agency letter, the FDA pressed forward with the issuance of the Warning Letters, maintaining that it still had serious safety concerns about the addition of caffeine into alcoholic beverages. While the FDA noted that the companies had attempted to undermine the reliability of some of the studies into the safety of caffeine added directly to alcohol, the agency maintained that the doubt raised by the studies as a whole was sufficient to raise legitimate safety concerns to which the agency response was necessary.

The FDA also acknowledged that all four companies had applied for and received a Certification/Exemption of Label/ Bottle Approval from the Alcohol and Tobacco Tax Bureau (TTB), and in their applications had informed the TTB that their products would contain caffeine. Such approvals, however, do not absolve the companies of their responsibility to comply with the provisions of the Food, Drug and Cosmetic Act.

While the Warning Letters do raise the possibility of future research being necessary in order to fully understand the negative consequences of the addition of caffeine to alcoholic beverages, compliance with the agency's interpretation of the Act provides the companies with time to determine whether it is fiscally advisable and/ or responsible to participate in such research. Compliance also gives the companies the opportunity to determine whether they can remain economically successful and viable through the sale and marketing of non-caffeinated alcoholic beverages, which could render participation in future research unnecessary.

As evidenced by the issuance of the initial letters in November 2009 and the follow-up Warning Letters issued in November 2010, it is FDA policy to work with affected individuals and companies to allow them to bring their products into compliance with the Act. Therefore, when notified by the FDA of potential violations of the Act, it is advisable for the affected industry to engage either inside or outside counsel in order to formulate a timely and effective plan for responding to FDA communications.

The myriad of legal and public relations issues presented by this matter may seem overwhelming. Not only must the affected companies deal with federal regulatory compliance issues and negative media attention, Phusion has been named in a number of recent lawsuits which claim that the caffeine in their products desensitizes drinkers to the symptoms of intoxication, thus increasing the possibility of physical injuries and death.

Companies faced with impending and/ or potential enforcement action from Federal agencies should consult counsel experienced in dealing with regulatory compliance issues. Action taken by federal agencies increases public awareness of the issue and attracts the attention of the plaintiff's bar, increasing the likelihood of future lawsuits. Accordingly, such counsel should also be familiar with and prepared to defend complex product liability suits.

In dealing with alleged violations of federal regulatory laws, affected industry must take prompt and effective remedial and preventive action. Not only is such action crucial to the continued success and viability of the affected companies, it demonstrates to the responsible agencies that the companies are taking their obligations to comply with applicable federal law seriously. Affected companies and individuals should be aware that changes in company policy and/or practice may be necessary in order to avoid further enforcement action and to ensure future compliance. Companies should not be deterred from making such changes because of the potential negative implications that such changes could have on the defense of pending and potential lawsuits. Due to public policy considerations, evidence of voluntary, subsequent remedial measures, such as the responsive action taken by Phusion, United, Charge and New Century, is generally not admissible in litigation to prove negligence or culpable conduct.

Specific to this issue, the affected companies may want to examine the feasibility of participating in future research and/or studies to determine whether caffeine may be safely added to alcoholic beverages. However, the companies will want to ensure that communications and debate with the FDA regarding such research be relevant, on point, and supported by scientific research and studies that have been conducted or endorsed by well-qualified and knowledgeable experts.

CONCLUSION

Companies that become subject to FDA investigations should not attempt to deal with the agency on their own. Because of the complex nature of the legal and public relations issues involved, the assistance of counsel experienced in handling regulatory compliance issues and products liability cases is highly advisable in order to ensure that affected companies and individuals are taking proper remedial and responsive action to minimize the negative effects that such cases can have on a company's continued commercial success and viability.

WORKERS' COMPENSATION UPDATE

By Francis X. Wickersham, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, King of Prussia, PA and G. Jay Habas, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Erie, PA

The Court Invalidates the Results of an IRE Because the IRE Physician Did Not Use the Most Recent Edition of the AMA Guides.
John Stanish v. W.C.A.B. (James J. Anderson Construction Company); 1870 C.D. 2009; filed December 7, 2010; by Senior Judge Flaherty

Following the claimant's work injury, the employer requested an impairment rating examination (IRE) within the time frame that would allow the employer to obtain self-executing relief. The results of the evaluation were that the claimant had a 13% impairment, and the employer issued form LIBC-764, changing the claimant's status from total disability to partial disability. The claimant challenged the IRE by filing a modification petition and arguing that the IRE was not valid since the 5th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides) was used and not the most recent 6th Edition.

The WCJ denied the claimant's petition, concluding that the IRE physician used the 5th Edition of the AMA Guides because the Bureau informed all IRE physicians that the 5th and 6th Editions would be accepted until August 31, 2008. In addition, the WCJ concluded that the claimant failed to present evidence to support a finding that his impairment rating was equal to or greater than 50%. The Workers' Compensation Appeal Board affirmed.

The Commonwealth Court vacated the WCJ's decision, holding that §306 (a.2) (1) mandated that the degree of impairment be determined based upon an evaluation pursuant to the most recent edition of the AMA Guides. While the court considered the Bureau's decision to phase in the use of the newest edition of the AMA Guides as reasonable, they nevertheless found it inconsistent with the Act. The court directed the WCJ to allow the employer to have the claimant submit to a new IRE for calculation of impairment under the most recent edition of the AMA Guides. The court also indicated that the employer would still have the right to self-executing relief since they acted in reliance on the Bureau's directive in scheduling the first IRE.

Although the Claimant's Petition to Review Was Not Filed Within Three Years of the Last Payment of Compensation, the Employer's Petition to Terminate Benefits Was. Therefore, the WCJ Did Not Err in Expanding the Claimant's Injuries.
Pizza Hut, Inc. v. W.C.A.B. (Mahalick); 996 C.D. 2010; filed January 20, 2011; by Senior Judge Friedman

The claimant sustained a work-related injury on January 31, 2003. Thereafter, the claimant received workers' compensation benefits pursuant to a notice of compensation payable (NCP) issued by the employer. The NCP described the work injury as a strain/sprain of the lower back. The claimant's benefits were later suspended as of March 26, 2003, based on a return to work at that time.

The employer then filed a petition to terminate the claimant's benefits. The claimant filed a review petition on December 16, 2006, seeking to amend the description of the work injury to include "lower back bulging discs and facet arthropathy."

The WCJ granted the claimant's review petition, and the Appeal Board affirmed. The employer then appealed to the Commonwealth Court, arguing that the claimant's review petition was time barred under Section 413 of the Act and the case of *Fitzgibbons v. W.C.A.B. (City of Philadelphia)*, 999 A.2d 659 (Pa. Cmwlth. 2010) since it was not filed within three years of the last payment of compensation.

The Commonwealth Court, however, rejected the employer's argument and upheld the decisions issued below. The court held that, although the claimant did not file her petition until December 16, 2006, more than three years from the most recent payment of compensation, the employer filed the termination petition within the three-year period under §413 and that under the Supreme Court's holding in *Cinram Manufacturing, Inc. v. W.C.A.B. (Hill)*, 601 Pa. 524, 975 A.2d 577 (2009), a WCJ may correct an NCP during a termination proceeding under §413 of the Act without the claimant filing a separate petition to support a corrective amendment.

A Report Issued by the Employer's Medical Expert That Contained a Critical Typographical Error Is Not Competent Evidence to Support a WCJ's Expansion of the Claimant's Injuries.
City of Pittsburgh and UPMC Benefit Management Services, Inc. v. W.C.A.B. (Wilson); 235 C.D. 2010; filed January 20, 2011; by Judge Leavitt

Following the claimant's work injury, the employer filed a petition to terminate the claimant's benefits. The claimant challenged the petition and also filed a review petition, seeking to expand the nature of the work injury to include aggravation of a pre-existing degenerative cervical condition.

During litigation, the employer conducted the deposition of their medical expert, who gave the diagnosis of thoracic and cervical strain, superimposed on spondylosis. The employer's expert explained that by "superimposed" he meant that it existed in the same area of the body as the cervical strain. It was the expert's opinion that the claimant was fully recovered from her work injury and that the work injury did not cause an aggravation of pre-existing cervical disc disease. However, on cross-examination, the employer's doctor did admit that a report he issued following his IME stated, "I do feel that this work injury caused an aggravation of the pre-existing degenerative condition."

The employer's expert testified that this was a typographical error and that the report should have read, "I do ***not*** feel that the . . . injury caused an aggravation . . .." He, therefore, issued a corrected report after the typo was brought to his attention by employer's counsel.

The WCJ granted the review petition based on the employer's expert's first report diagnosing a cervical strain superimposed on a pre-existing condition, the report which contained

the typographical error. The Appeal Board affirmed. The employer appealed to the Commonwealth Court, arguing that there was not competent evidence to support the finding that the claimant suffered an aggravation of her cervical disease.

The Commonwealth Court agreed and reversed the WCJ's decision. The court concluded that the WCJ relied upon a typographical error, which could not be competent evidence. The court noted that reading the IME report in its entirety made it clear that the expert never expressed an opinion that the claimant suffered an aggravation. The court concluded that there was overwhelming evidence that the expert's true opinion was that the claimant did not suffer an aggravation and that the WCJ's focus on one sentence, and refusal to accept the correction, was capricious and impermissible.

An Employer Is Not Precluded from Seeking a Termination or Suspension of Benefits on a Date Prior to the Date of the Notice of Compensation Payable.
City of Philadelphia v. W.C.A.B.. (Butler); No. 1245 CD 2009; (Pa. Cmwlth. December 16, 2010); Judge Leavitt for En Banc Court

The claimant was injured in a car accident while working as a probation officer. She began treating with a panel chiropractor, who subsequently found her to be fully recovered from the work-related strains and sprains as of October 19, 1995. However, the claimant continued to complain of head and back pain, so the panel physician arranged for a second opinion, which also concurred that the claimant was fully recovered. The employer issued a notice of compensation payable on November 7, 1995, listing the accepted injuries as bruises to the head, back and neck.

The employer filed a petition to terminate and, in the alternative, a suspension petition since the claimant received salary in lieu of compensation benefits. The WCJ found that the claimant was fully recovered as of October 20, 1995, and granted the termination petition. The suspension petition was dismissed as moot. The claimant appealed, and after a remand to correct a procedural matter, the Appeal Board affirmed.

The Commonwealth Court reversed, finding that the employer had to prove full recovery after the date the NCP was issued, not before, based on a sentence in the case of *Beisel v. W.C.A.B. (John Wannamaker, Inc.)*, 465 A.2d 969 (Pa. 1983) that stated, "The employer has the burden of showing the claimant's disability has changed after the date of the agreement or notice of compensation payable." The court also remanded the case for a decision on the suspension petition.

On remand, the WCJ granted a suspension as of the date that the employer offered the claimant a position within her pre-injury wages following the treating physician's clearance for work in September 2007. The claimant appealed, and the Appeal Board reversed on the basis that the employer was required to show that the claimant's physical condition improved after the issuance of an NCP, even though the effective date of the suspension postdated the issuance of the NCP.

The Commonwealth Court addressed the issue of how the date of the NCP affects the employer's ability to terminate or suspend benefits. The court first noted that the NCP did not identify a starting date of compensation or that the claimant was unable to work when the NCP was issued. Of significance, the court held that preventing an employer from proving a full recovery prior to the date an NCP is issued will discourage employers from issuing NCPs and lead claimants to file claim petitions. Since the employer proved that the claimant had recovered from the work-related injury identified in the NCP, it was entitled to a termination of benefits as of that date, regardless of the date the NCP was issued. The majority disagreed that the single sentence in *Beisel* requires that a termination or suspension could only be obtained after the date of the NCP, noting that the holding in *Beisel* was limited to an employer bound by the contents of the NCP.

A State Police Officer Involved in the Horrific Death Scene Investigation of an Infant Failed to Establish Abnormal Working Conditions in Order to State a Claim for Psychological Injury.
Washington v. W.C.A.B. (Commonwealth of Pennsylvania); No. 476 CD 2010; (January 5, 2011); Senior Judge Kelly

The claimant, an investigator for the Pennsylvania State Police, was involved in homicide investigations by providing forensic and photographic services. One case he investigated ("Baby Jane Doe") involved a baby girl found in a plastic bag near a one-room school house who had been burned with her throat cut. The claimant photographed the remains at the crime scene and also attended and photographed the autopsy. The claimant stopped working for the employer some time later, claiming he developed post traumatic stress disorder as a result of his investigation in the Baby Jane Doe case. He testified that following that investigation, he would cry and suffer nightmares and tried to commit suicide. After hearing testimony on whether the activities of an investigator involved abnormal working conditions, the WCJ denied the claim petition, finding that the claimant's activities at the Baby Jane Doe investigation were normal, routine activities related to his job and drawn precisely from the job description.

After the WCJ's decision was affirmed by the Appeal Board, the Commonwealth Court confirmed that the burden of proof in a psychological injury claim not stemming from a physical injury is that the injury was more than a subjective reaction to normal working conditions. The court reviewed the established law that the job of a police officer is one that is inherently highly stressful. In affirming the WCJ's decision, the court noted that the findings that the claimant's investigations in the Baby Jane Doe case were not abnormal or out of the ordinary for a forensic services investigator were supported by substantial evidence. In so holding, the court also rejected the claim of an aggravation of a pre-existing mental disorder, including depression, as the claimant was still required to demonstrate that his posttraumatic stress disorder was more than a subjective reaction to normal working conditions.

Minimal Findings Identifying the Basis of a WCJ's Decision on the Credibility of a Treating Physician and a Claimant's Disability Are Sufficient to Uphold a Claim Petition.
Shannopin Mining Company v. W.C.A.B. (Sereg), No. 1185 CD 2010 (Pa. Cmwlth. January 6, 2011); Opinion by Judge Butler

The claimant, who received 500 weeks

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Workers' Compensation

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of partial disability benefits for coal workers' pneumoconiosis, petitioned for total disability benefits, which were granted by the WCJ on the basis of the claimant's medical evidence. On appeal, the employer argued that the WCJ did not issue a reasoned decision and that the claimant had voluntarily removed himself from the work force by retiring.

The Commonwealth Court dismissed the argument involving a reasoned decision, finding that the WCJ – after several remands – cited the results of a treadmill test in concluding that there was an objective basis for crediting the treating physician's testimony and noted that the WCJ had appropriately considered the employer's medical testimony. Without directly addressing the voluntary retirement issue, the WCJ found that the claimant was totally disabled from his employment when he retired, which the court found sufficient.

A Fee Review petition Is Held to Be Timely When Filed Within 90 Days of Billing Date.
Fidelity & Guaranty Insurance Company v. Bureau of Workers' Compensation (Community Medical Center); No. 1766 CD; filed October 29, 2010; by Judge Brobson

The claimant's treating physician disputed the insurer's payment of services by filing an application for fee review under section 306(f.1) (5) of the Act 85 days after the original billing date. The Bureau granted the fee petition. The insurer requested a de novo hearing, and the Hearing Officer found that the fee application was timely filed within 90 days. On appeal, the insurer argued that the provider failed to file its application within 30 days of the disputed treatment as provided by the Act and that the 90-day period specified in the regulations improperly extends the filing period.

The court held that the statute allows a provider to file an application for fee review within the 30 days following a dispute notification or, alternatively, within the 90-day time period following the original billing date of treatment. Further, the court noted that a provider still has 30 days following the insurer's notification of the denial of a resubmitted bill to file an application for fee review. The court found that the Bureau regulations involving fee review properly interpret and are consistent with the Act.

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