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Qualified Immunity for Non-Governmental Employees Performing Services for Government Entities

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In many legal circles, the United States Supreme Court's pronouncements regarding the Affordable Care Act, better known as "Obama Care", and the Arizona immigration law will undoubtedly be the two blockbuster decisions of the year. Those decisions, however, will not have a significant impact on the majority of attorneys who practice civil rights and employment law. Instead, the Supreme Court's decision in *Filarsky v. Delia*, 566 U.S. ___, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012), which was decided on April 17, 2012, will have a more significant impact on the practice of those attorneys. Indeed, that decision could also have personal importance to attorneys who are retained to provide representation to government entities in employment and other legal matters as part of their private practice.

In *Filarsky*, the United States Supreme Court held, in a unanimous decision, that a private attorney representing the government in the investigation of an employment issue had qualified immunity for civil rights claims filed against him under 42 U.S.C. §1983. *Filarsky* comes just fifteen years after the Supreme Court's decision in *Richardson v. McKnight*, 521 U.S. 399 (1997), in which the Supreme Court concluded that prison guards employed by a private company that contracted with the state to operate and manage a state correctional facility did not have qualified immunity in such cases. In this article, we attempt to address the inconsistencies between the *Filarsky* and *Richardson* decisions and address the potential for future problems in similar situations arising from these decisions.

In *Filarsky*, the Court addressed the specific question of "whether an individual hired by the government to do its work is prohibited from seeking [absolute or qualified] immunity, solely because he works for the government

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THERE IS NO BAD FAITH BECAUSE A THIRD PARTY CLAIMANT SAYS SO: WHY AN EXPRESSED WILLINGNESS TO SETTLE IS REQUIRED IN COMMON LAW BAD FAITH

By Chester F. Darlington, Esquire , Bennett, Bricklin and Saltzburg LLC, Philadelphia, PA

For decades, the required mandatory minimum bodily injury liability coverage for personal automobile insurance has been $15,000/$30,000. While this amount has not changed, over time inflation and other factors have increased the value of personal injuries while lessening the value of the insurance. Faced with the increasing inability to recover the full value of their clients' injuries from a minimum limits automobile liability policy, some attorneys who represent third party claimants try to convert the policy into an "unlimited" policy by creating a common law bad faith cause of action against the insurer. The attempt usually comes in the form of insincere demand letters and making time-limit demands that the insurer is incapable of accepting. The attorneys inundate the insurer with threatening demand letters which often contain over-the-top descriptions of the claimant's injuries, none of which has the insurer had an opportunity to investigate. If the insurer inadvertently failed to respond to just one letter and the claimant obtains an excess verdict against the defendant-insured, a bad faith excess claim is certain to follow. The claimant obtains an assignment from the insured of the insured's rights against the insurer in exchange for not executing

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Qualified Immunity

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on something other than a permanent or full-time basis." Slip op. at p.1. Delia was a firefighter who became ill after responding to a toxic spill. He subsequently missed three weeks of work pursuant to a doctor's order. In light of this extended absence from work, Delia came under suspicion and the City hired an investigation firm to conduct surveillance of him. During this surveillance, he was observed purchasing several rolls of fiberglass insulation. Since the City became concerned that Delia was missing work to perform household repairs instead of due to illness, the City also hired Filarsky, a private attorney, to interview Delia with respect to his conduct. Filarsky was an employment attorney, who had represented the City in employment matters in the past. Filarsky conducted an interview of Delia at which Delia's attorney and two fire department officials were present. Although Delia conceded that he purchased the building supplies, he denied using those supplies to do work on his home. Filarsky, with the approval of the fire department officials, then requested that Delia allow the fire department officials to enter Delia's home so that they could see the materials. When Delia initially refused that request, Filarsky got a written order from the fire chief directing Delia to produce the items. Delia's attorney objected to the order on the grounds that it would violate Delia's Fourth Amendment rights and threatened to file suit against everyone involved in the decision, including Filarsky. In light of the order, Delia proceeded to his home where he produced the insulation for inspection.

Subsequently, Delia brought suit against the City, the fire department, individual employees of the fire department, and Filarsky raising claims that they violated his Fourth and Fourteenth Amendment rights by ordering that he produce the building materials. The district court granted qualified immunity to all of the individuals in the case on the basis that they had not violated any clearly established constitutional right. Although affirming the determination as to individual fire department employees, the Court of Appeals for the Ninth Circuit, held that Filarsky was not entitled to qualified immunity because he was a private attorney and not a city employee.

On appeal, the Supreme Court reversed the decision of the Ninth Circuit and held that Filarksy was entitled to seek qualified immunity from the suit under §1983. In reaching that decision, the Supreme Court adopts a position that appears to conflict with the *Richardson* case.

In *Richardson v. McKnight*, 521 U.S. 399 (1997), an inmate brought suit against two employees who worked as prison guards for a private firm that managed a state correctional center. In that case, the inmate contended that his constitutional rights were violated by the actions of two private guards who placed "extremely tight physical restraints" on him in violation of his Eighth Amendment rights. The district court denied the motion to dismiss of the two prison guards on the basis that they were employed by a private company and could not raise qualified immunity as a defense. The Court of Appeals of the Sixth Circuit, in addressing the interlocutory appeal, affirmed and concluded that the individual defendants were not entitled to qualified immunity provided to governmental defendants. 88 F.3d 417 (6th Cir. 1996).

On appeal to the Supreme Court, the guards argued that since private prison guards perform the same type of work as publicly employed prison guards, they are entitled to a similar degree of immunity. The Supreme Court, however, distinguished those prison guards from public prison guards by looking "both to history and to the purposes that underlie government employee immunity." 521 U.S. at 404. In reviewing the history of privately employed correctional officers, the Court found "no conclusive evidence of an historical tradition of immunity for private parties carrying out these functions. Id. at 407. The Court's review of the purposes for immunity also convinced it that qualified immunity should not apply. For example, the Court provided this analysis:

> First, the most important special government immunity-producing concern – unwarranted timidity – is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a prison. Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to above a safer and a more effective job.

Id. at 409.

In addition, the Court addressed the concern that private firms will hire individuals who are "overly timid, insufficiently vigorous, unduly fearful, or 'non-arduous'" in the performance of their duties. *Id*. at 410. In a public employment setting, the Court suggested that applicable rules "may limit the incentives or the ability of individual departments of supervisors flexibility to reward or punish individual employees" for their actions toward inmates. *Id*. at 410-11. Accordingly, the Court inferred that privately employed prison guards are more likely to violate inmates' rights than publicly employed prison guards.

While concluding that immunity did not extend to these individuals, the Supreme Court did issue three caveats to

its ruling. First, the Court indicated that it was not determining the liability of those guards, only that they did not have immunity. Second, the Court stated that it was addressing the issue in the narrow context of the facts of that case in which "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government undertakes that task for profit and potentially in competition with other firms." *Id*. at 413. Significant to the holding in *Filarsky*, the Court pointed out that *Richardson* did not "involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id*. Finally, the Court also cautioned that it was not determining whether or not those same individuals could assert a special good faith defense to the claims.

In his dissenting opinion, in which he was joined by three other justices, Justice Scalia suggested that individual employees as well as prison management firms that performed the same duties as state–employed correction officials should be entitled to the same immunities. Specifically, Justice Scalia rejected the notion that employees in private prisons are more likely to violate prisoner's constitutional rights because they work in private, for-profit businesses unlike employees at government operated correctional facilities. Justice Scalia notes that if anything, employees at a privately managed correctional facility would have more motivation to avoid constitutional infractions since it would adversely affect the company's bottom line rather than government employed individuals whose civil rights damages would likely be paid by the government. *Id*. at 421-22.

Lower courts have primarily cited *Richardson* to deny qualified immunity to private individuals subjected to §1983 litigation. These cases often arise with respect to the denial of qualified immunity to private individuals acting under state law to provide medical or psychiatric health services. For example, in *Harrison v. Ash*, 539 F. 3d 510 (6th Cir. 2008), a §1983 suit was brought against a county jail for deliberate indifference in violation of the Eighth Amendment. The incident that gave rise to the case involved the death of a prisoner who allegedly died as a result of a severe asthma attack, even though he had complained of the condition to prison staff and repeatedly sought treatment over the course of several hours. *Id*. at 514, 515. The deliberate indifference involved the actions of the prison nurses, private employees contracted to work for the jail. The nurses allegedly failed to use the proper tools to diagnose an asthma attack and failed to alert a physician upon noticing symptoms of such an attack. *Id*. at 516.

Although the defendant nurses raised the defense of qualified immunity, the court used the "wisdom of Richardson" to hold that such immunity should not be extended to them. *Id*. at 524. The court followed the test established in *Richardson*, whereby qualified immunity is only granted to a private individual if such immunity is "firmly rooted" in history and is also supported by a valid policy rationale. *Id*. at 522 The court disregarded the argument that immunity had historically been afforded individuals such as the defendant nurses, finding no evidence to support the notion. *Id*. 522. The court also went on to find that a valid policy rationale as articulated in *Richardson* did not apply to the defendant nurses. The court found that allowing liability would not create "unwarranted timidity" among the nurses because market competition in the form of risking the loss of their contract would cause the nurses to work diligently and competently. *Id*. at 542. Additionally, the policy rationale of avoiding the deterrence of talented applicants to the position was inapplicable because, as a private employer, higher wages and better benefits could be given to attract such talented individuals. *Id*. Finally, since the nurses and their company were insured against lawsuits, the court concluded that no fear of lawsuits would exist to deter the vigorous performance of their jobs. *Id*. Accordingly, upon finding that neither prong of the *Richardson* test was satisfied, the court affirmed the trial court's rejection of the defendants' qualified immunity defense.

Another case, dealing with an involuntary commitment ordered by a private psychiatrist working on the state's behalf, also relied on *Richardson* to reject the applicability of qualified immunity. In *Jensen v. Lane County*, 222 F. 3d 570 (9th Cir. 2000), the plaintiff was arrested after an erratic outburst at his job and was subsequently evaluated by a private psychiatrist, contracted to work for the prison, who ordered the plaintiff's involuntary commitment. Over the course of several days, the psychiatrist and one of his peers, who also had a working contract with the prison, realized that the plaintiff's involuntary commitment had exceeded the duration of his mental illness. *Id*. at 573. The plaintiff was released, and shortly thereafter filed a § 1983 claim against the psychiatrists for committing him without due process of law.

Although the psychiatrists raised the defense of qualified immunity, the court determined that such immunity was not applicable in that case. Using the two-prong test established in *Richardson*, the court found that immunity had not historically been afforded contract psychiatrists such as the defendants. The only evidence of immunity for contract psychiatrists was a 1987 state statute that sheltered contract psychiatrists from liability due to involuntary commitments. *Id*. at 577. Without more evidence than a decade-old statute with scant legislative history, the court concluded that a "firmly rooted" history of immunity did not exist. *Id*. Additionally, since the defendants were privately insured and were driven to work diligently due to market competition, the court did not find that a policy reason existed to justify the extension of immunity. *Id*. at 578. *See, also: Tewksbury v. Dowling*, 169 F. Supp. 2d 103 (E.D.N.Y. 2001) (no historical support or policy rationale under *Richardson* to support granting qualified immunity to a contract psychiatrist who involuntarily committed the plaintiff in a § 1983 proceeding).

In §1983 claims other than medical or psychiatric cases, courts have also applied *Richardson*. In *Gregg v. Ham*, 2012 U.S. App. LEXIS 8696 (4th Cir. 2012), the plaintiff brought suit against a bounty hunter for Fourth Amendment violations in regards to an incident where he, along with local sheriff's deputies, entered the plaintiff's home and mistakenly confronted her about harboring a fugitive. The court found sufficient evidence that the bounty hunter was acting under state law, but using the *Richardson* two-prong test, the bounty hunter was not entitled to qualified immunity. *Id*. The court first explained that bounty hunters have historically been denied immunity and that several court decisions expressly "rejected the notion that bail bondsmen…perform

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Surveillance!

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a public function." *Id*. at 12. Further, the policy rationales in *Richardson* were inapplicable because bounty hunters actually compete with traditional government entities such as the sheriff, and they are motivated to do their job only because of a strong profit incentive. *Id*. at 13 - 14. Thus, using the *Richardson* test, the court affirmed the trial court's decision to reject a qualified immunity defense from the bounty hunter.

In *Kaufman v. PSPCA*, 766 F. Supp. 2d 555 (E.D. Pa. 2011), the district court refused to allow Humane Society law enforcement officers to raise a qualified immunity defense. In the case, the plaintiff raised a § 1983 claim based on a Fourth Amendment violation where the Humane Society police officers searched the plaintiff's property without first obtaining a warrant. *Id*. at 559-60. The court opined that qualified immunity could not be extended per *Richardson* because the defendants could not establish one of the required prongs of the test. Since Humane Societies and their enforcement officers simply did not exist at the time § 1983 was created, no history of immunity for such individuals existed. *Id*. at 564-65. The court noted that valid policy rationales applied to the defendants since no market competition existed, insurance coverage was not available for the PSPCA, and the officers had discretion which could expose them to liability and prevent them from vigorously completing their job. Nevertheless, since the policy rationales to justify immunity did not overcome the absence of an historical basis, the court found that qualified immunity did not apply.

Prior to *Filarsky*, few courts have attempted to distinguish *Richardson* and permit qualified immunity as a defense. In those cases in which the court has distinguished *Richardson*, the closeness of the relationship between the private individual and the government appears to make the primary difference.

In *McLean v. Jersey City*, 2009 U.S. Dist. LEXIS 121079 (D. N.J. 2009), plaintiff's § 1983 claim was based on an incident where a bounty hunter and several police detectives entered and searched the home without getting a proper warrant. Qualified immunity was granted to the police detectives, but the plaintiff argued that such immunity should not be extended to the bounty hunter who accompanied those detectives. The court rejected plaintiff's argument and allowed the bounty hunter to escape liability through qualified immunity. Although the court recognized the impact of *Richardson* on private individuals with respect to qualified immunity, the court dismissed the case as being distinguishable. *Id*. at *7. The court stated:

> After reviewing the evidence, this Court finds that Mikhaeil was acting under a close relationship of police officials. In holding that the prison guards in *Richardson* did not qualify for immunity, the Court emphasized that the guards had 'limited direct supervision by the government.' This case is distinguishable because Mikhaeil was under a more extensive relationship, and were closely related to the officers during the search.

Id. Accordingly, because of the close supervisory relationship between the bounty hunter and the police, the court found that *Richardson* was inapplicable and qualified immunity could be used as a defense by the bounty hunter.

Similarly, in *Chauncey v. Evans*, 2003 U.S. Dist. LEXIS 1954 (N.D. TX. 2003), a court allowed qualified immunity for two nurses who were not government employees, but were instead working at a prison via an exclusive full-time contract. The court distinguished the case from *Richardson* because it believed that decision was "'answered narrowly, in the context in which it arose and [did not] involved a private individual… acting under close official supervision.'" *Id*. at *4 - 5 (quoting *Richardson*, 521 U.S. at 399). Thus, since the court found that the nurses "performed their duties entirely within the context of the prison unit and acted under close official supervision," they were entitled to qualified immunity as a defense and *Richardson* was not "determinative." *Id*. at 6.

Finally, in *Tunget v. Smith*, 2010 U.S. Dist. LEXIS 26194 (C.D. Il. 2010), a § 1983 claim was brought against a private entity that housed and supervised sexually violent offenders upon their release from prison. The organization raised the defense of qualified immunity, but the plaintiff argued that *Richardson's* holding prevented such a defense. The court disagreed, and distinguished *Richardson* for two reasons. First, the court found that *Richardson* involved a situation (the management of prisoners) that had not been an exclusively governmental function throughout time, whereas the program for housing sexual predators is a new concept, purely public in its purpose, even though it is carried out by a private company. *Id*. at *22, 25. Second, the court found that the relationship between the entity and the government was far stronger than in *Richardson*, where the entity is subject to supervision by the government because it operates according to state enabling legislation. *Id*. at *23. In light of these differences, the court found qualified immunity was permissible.

In light of the decision in *Filarsky*, we must ask how courts will now address the application of qualified immunity to private individuals who provide services to government entities. *Filarsky* specifically distinguished *Richardson* on several bases reminding us that *Richardson* "was a self-consciously 'narrow' decision" and was limited to the particular circumstances of that case. Slip op. at *15. Furthermore, the Court explained that "[a]llowing suit under §1983 against private individuals assisting the government will substantially undermine an important reason immunity is accorded public employees in the first place." Slip op. at *13. Because government employees will often be protected from suit by some form of immunity, the Court was concerned that those private persons working along side them could be left holding the bag, "facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." Slip op. at *12. The Court suggested that individuals under those circumstances might not undertake government functions. In that regard, the Court made reference to Filarsky's 29 years of specialized experience in employment and labor law and in conducting investigations into such issues. Significantly, the City had no employees who had qualifications that matched those of Filarsky. Pointing to the need to attract talented individuals to provide services to the government, the Court expounded on the problem that could arise if such individuals who "do not depend on the government for their livelihood" are denied immunity since it is then "more likely that the most

talented candidates will decline public engagements." Slip op. at *12. Instead, the Court declared:

> Though not a public employee, Filarksy was retained by the City to assist in conducting an official investigation into potential wrong-doing. There is no dispute that government employees performing such work are entitled to seek the protection of qualified immunity. The Court of Appeals rejected Filarsky's claim to the protection afforded to [the fire department officials] solely because he was not a permanent, full-time employee of the City. The common law, however, did not draw such distinctions, and we see no justification for doing so under §1983."

Slip op. at *15.

Based on this analysis, attorneys should undoubtedly make the argument that the *Filarsky* decision applies to the actions of doctors, mental health experts and other health care professional who are retained by government entities to provide professional services whether on the basis of a contractual arrangement or on some formal basis. Those talented individuals provide services to the government that are no different from services provided by an attorney such as Filarsky. To deprive those individuals of immunity may have the impact of depriving the government of the services of such experienced practitioners. As a result of *Filarsky*, the decisions in *Harrison*, *Jensen*, *Gregg* and *Kaufman* would most likely be different with respect to the availability of immunity. On the other hand, no shortage of professionals willing to provide those services seems to have resulted from the ruling in *Richardson*. For that reason, an argument can be made that no reason exists to apply *Filarsky* at this time.

From a positive perspective, attorneys who are retained to represent municipalities in temporary or part-time capacities can proceed to represent their clients with the knowledge that they are entitled to qualified immunity if they have acted in a good faith belief that their actions were not unconstitutional.

Unfortunately, the *Filarsky* and *Richardson* decisions do not set clear boundaries as to when qualified immunity may or may not exist for private individuals engaged in serving a public entity. In her concurring opinion, Justice Sotomayor stated that while it appeared that qualified immunity would be extended to "modern-day special prosecutors and comparable individuals hired for their independence," other situations could occur that would warrant immunity. But she concluded that "[t]he point simply is that such cases should be decided as they arise, as is our longstanding practice in the field of immunity law." That pronouncement, however, does not assist attorneys in evaluating the merits of their defense. Accordingly, the lower courts will have to sort out these difficult situations in the future.

ENDNOTES

[1]The author acknowledges special thanks to Matthew Clayberger for his assistance in researching and preparing this article. Matthew is a third year law student at The Pennsylvania State University, Dickinson School of Law.

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on the judgment. The claimant then sues the insurer for common law bad faith seeking the amount of the excess verdict while his attorney uses the prior letters as evidence against the insurer. The door has been opened to potentially convert the minimum limits policy into an unlimited one.

A longstanding principle of Pennsylvania law that is designed to expose manufactured common law bad faith claims seeking the amount of the excess verdict is the requirement that the bad faith plaintiff must prove that the underlying claimant had an expressed willingness to settle within the defendant-insured's policy limits. If the claimant was never willing to settle within the insured's policy limits, the liability insurer cannot be liable for the amount of the excess verdict as a matter of law.

Some attorneys assert that a bad faith plaintiff is no longer required to prove that the underlying liability case could have been settled within the policy limits in order to recover the amount of the excess verdict. Their position is based on dicta in the unpublished decision by the Third Circuit in *Jurinko v. Medical Protective Company*, 305 Fed. Appx. 13 (3rd Cir. 2008). The attorneys assert that *Jurinko* changed the law and, as such, that Pennsylvania Standard Jury Instruction 13.31 is invalid. Standard jury instruction 13.31 provides, in pertinent part:

> Failure to offer policy limits does not evidence bad faith where there was no possibility of settlement within the policy limits. There must be an expressed willingness on the part of the third party, the plaintiff in the underlying litigation, at some point in time, to accept an offer of policy limits.

The *Jurinko*-based argument removes from scrutiny the liability claimant's settlement conduct (more specifically his attorney's conduct) during the underlying lawsuit. Since most common law bad faith plaintiffs were also the liability claimants in the underlying lawsuit, it is easy to see why many claimants' attorneys want to advance this argument. The position also seeks to erode the long-standing Pennsylvania prohibition against absolute liability bad faith and instead expands bad faith to situations in which the liability claimant "says so," usually because the claimant is not satisfied with the minimum insurance being carried by the defendant-insured.[1]

The assertion that a bad faith plaintiff is not required to prove an expressed willingness to settle in order to recover the amount of an excess verdict is flawed. This position conflicts with decades of Pennsylvania case law. It conflicts with the standard for determining common law bad faith damages stated in *Birth Center v. St. Paul Companies, Inc.*, 787 A.2d 376 (Pa. 2001). It conflicts with black-letter law regarding the scope and measure of damages in contract actions and fails to appreciate the realities of settlement negotiations. The position even conflicts with the *Jurinko* opinion itself.

I. Jurinko v. Medical Protective Company

In *Jurinko*, Mr. and Mrs. Jurinko sued two doctors for medical malpractice.

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Medical Protective insured the doctors under a $200,000 primary policy and the CAT Fund provided $1 million in excess coverage. At trial, the Jurinkos rejected a $650,000 offer and demanded $1.1 million. The case went to a verdict and the jury found the doctors liable in the amount of $2.5 million. After obtaining an assignment, the Jurinkos filed a bad faith action against Medical Protective. During the bad faith case, the defense attorney for the doctors testified that he was trying to "hold on" to the insurer's money in order to "scare" the CAT fund into paying additional monies toward settlement. There were also issues as to whether the attorney provided a conflict-free defense to both doctors.[2] The jury found that Medical Protective acted in bad faith and awarded $1.6 million in compensatory damages and $6.2 million in punitive damages. On appeal, Medical Protective asserted that there was no bad faith because there was no evidence of an expressed willingness by the Jurinkos to settle within the policy limits during the malpractice case. The Third Circuit rejected this argument, holding that the Jurinkos demonstrated an expressed willingness to settle within the policy limits because the $1.1 million demand was within the aggregate $1.2 million amount of coverage. The Third Circuit also found that Medical Protective's negotiating tactics and the improper joint defense of the doctors were sufficient evidence for the jury to conclude that there was bad faith.

In a footnote, the Third Circuit examined whether the Jurinkos were required to show that they were willing to settle the underlying case within the policy limits. The court stated that "we have found no Pennsylvania law that has explicitly required an 'express willingness' on the part of a plaintiff to settle within the policy limits, despite the language of the standard jury instruction." After examining the law of several states, the court stated "a bright-line rule requiring a demand within the policy limits does not appear to reflect Pennsylvania law or the realities of settlement negotiations." The court then stated that it was not deciding the specific issue as to whether a settlement offer within the policy limits was required:

> Here, we need not reach the question of whether Pennsylvania law imposes a bright-line rule, as the court instructed the jury that an expressed willingness to settle within the policy limits must be shown and the parties do not challenge the instruction.

305 Fed. Appx. at 22, n.6.

There are multiple reasons why it is incorrect to assert that a bad faith plaintiff is not required to prove that an expressed willingness to settle existed. First, the footnote at issue in the *Jurinko* decision is not only dicta, it is dicta from an unpublished decision. As such, any argument that the decision is authoritative or even persuasive is at best weak. Second, while the Third Circuit did state in the footnote its disapproval of requiring an expressed willingness to settle, it then retreated from that position and stated that it was not deciding the issue. Third, the Third Circuit's statement that there was no Pennsylvania case law that explicitly required an expressed willingness is incorrect. There are several Pennsylvania cases which have required an expressed willingness as a prerequisite for asserting a common law bad faith action seeking the amount of the excess verdict.

II. Pennsylvania Cases Supporting the Requirement of an Expressed Willingness to Settle

In *U.S. Fire Ins. Co. v. Royal Ins. Co.*, 759 F.2d 306 (3rd Cir. 1985), Royal insured a chemical manufacturer under a $250,000 primary policy and U.S. Fire was the manufacturer's excess insurer with a $5 million policy. A warehouse owner sued the manufacturer because a solvent it manufactured started a fire. On the first day of trial, the warehouse made a demand of $1.2 million. Both carriers rejected the demand and Royal offered $80,000. The warehouse rejected Royal's offer and demanded $800,000. Both carriers rejected the $800,000 demand and the case went to trial. After the close of the evidence, the trial judge stated that he thought that $400,000 would settle the case. U.S. Fire then demanded that Royal tender its policy limits so that it could settle for $400,000. Royal declined the demand, but agreed to the judge's proposal to $65,000-$750,000 high-low verdict, however, the warehouse demanded that the high-low be $100,000-$1 million. The jury returned a verdict against the manufacturer in the amount of $1 million. U.S. Fire then sued Royal for the $600,000 difference that U.S. Fire had to pay above the $400,000 amount that the judge thought would settle the case. The Third Circuit held that Royal did not act in bad faith because the warehouse's attorneys testified that a $400,000 offer would have been rejected.

In *Puritan Ins. Co. v. Canadian Universal Ins. Co., Ltd.*, 775 F.2d 76 (3rd Cir. 1985), Northwest was insured by Canadian under a primary liability policy with limits of $500,000 and by Puritan under a $5 million excess policy. Northwest was sued in a products liability action. Canadian did not make any settlement offers before trial contending that there was no liability. The claimant did not make any pre-trial demands. The jury entered a verdict against Northwest in the amount of $1.4 million. After settling the case, Puritan sued Canadian for bad faith and the $850,000 it expended above the primary policy's $500,000 limit. Puritan contended that the case could have settled before the verdict for $400,000. The trial court found that Canadian acted in bad faith. Among other things, the trial court held that Canadian had an obligation to initiate settlement negotiations, stating that "[t]his court determines that the Pennsylvania courts, if given the opportunity, would rule that in the context of insured versus insurer for wrongful failure to settle a demand by an injured party is not a prerequisite."[3] Canadian filed an appeal and the Third Circuit reversed. As an initial statement, the Third Circuit noted that the Pennsylvania state courts had rejected "automatic liability" for bad faith when an excess verdict was entered against the insured. The Third Circuit stated:

> [a]doption of an automatic liability rule would probably lead to the use of no limits policies as is common in Europe. Such a development might also be expected to lead to increased premiums.

775 F.2d 7 at 80 n.3.

The Third Circuit held that there was no bad faith by Canadian because there was a reasonable basis to assert no liability. Importantly, the Third Circuit rejected the trial court's holding that Canadian had a mandatory duty to initiate settlement negotiations when there was no demand:

> Nor do we agree that on this record Canadian had an affirmative duty to initiate settlement negotiations

> with Donahue. The same factors that militate against a finding of bad faith in refusing to settle are relevant in this instance as well. An insurance carrier may be required to broach settlement negotiations under some circumstances but this case does not present them.

775 F.2d at 82.

In *Builders Square, Inc. v. Saraco*, 1997 WL 3205 (E.D. Pa. 1997), *aff'd.*, 135 F.3d 763 (3rd Cir. 1997), National Union insured Builders Square under a $1 million policy. National Union rejected a policy limits demand of $1 million, however, the case later settled for $4.5 million with Builders Square contributing to the settlement. Builders Square sued National Union for bad faith because the settlement was in excess of the policy limits and the prior policy limits demand. The claimant's attorney testified that his policy limits demand was not sincere and it would not have settled the case if National Union had accepted it. The court held that there was no bad faith because the claimant was not willing to accept the policy limits:

> Thus, where a plaintiff alleges that an insurer breached its contractual duty of good faith by failing to settle within the terms of a policy, there must be evidence sufficient to show that such a settlement would not have been rejected. (Citation omitted).
>
> Plaintiff has failed to adduce evidence from which one reasonably can find that Ms. Sodano would have ever settled for an amount less than that which she ultimately accepted. Plaintiff thus has also failed to sustain a breach of duty of good faith claim against National Union.

Builders Square, Inc. v. Saraco, 1997 WL 3205, 7 (E.D. Pa. 1997).

In *Fassett v. Liberty Mut. Ins. Co*., 1987 WL 45067, 2-3 (E.D. Pa. 1987), Liberty Mutual was accused of bad faith for failing to settle a liability lawsuit. In ruling that the claimant's attorney's deposition was relevant in discovery, the court noted that the bad faith plaintiff must show that the underlying lawsuit could have settled within the policy limits, stating:

> In order to show that the insurer acted in bad faith in failing to settle within policy limits, Fassett will have to make a threshold showing that a legitimate opportunity to settle existed. (Citations omitted). Plaintiff must show by clear and convincing evidence that she would have agreed to settle her claims for less than the $1,500,000.00 policy limits and that Liberty Mutual acted in bad faith in failing to reach and/or accept such a settlement. It is extremely unlikely that Fassett will be able to meet her heavy burden of proof without the testimony of her attorney in that litigation.

In *LaRocca v. State Farm Mut. Auto. Ins. Co.*, 329 F.Supp. 163 (W.D. Pa. 1971), *aff'd.*, 474 F.2d 1338 (3rd Cir. 1973), LaRocca was insured by State Farm under an automobile policy with $50,000 liability limits and was sued for an automobile accident fatality. State Farm offered its policy limits and LaRocca contributed an additional $10,000 of personal money to a collective $60,000 settlement offer. The estate of the deceased rejected the offer and demanded $125,000. The jury entered a verdict against LaRocca in the amount of $198,210. LaRocca sued State Farm for bad faith. The court found that there was no bad faith claim because there was no evidence of any demand of settlement within the policy limits. The court also stated that the "Pennsylvania experience" as well as "the overwhelming result in all state and Federal jurisdictions" was to require that a demand existed at or below the policy limits as a prerequisite for finding bad faith. 329 F.Supp. at 169.

The assertion is also inconsistent with holdings from the Pennsylvania Supreme Court. In *King v. Automobile Underwriters, Inc.*, 187 A.2d 584, 585 (Pa. 1963) (*per curiam*), the Pennsylvania Supreme Court, in a very short opinion that did not state the facts of the case, held that bad faith did not exist because there was no opportunity to settle within the policy limits:

> As for the alleged willful refusal to settle, the court below resolving conflicting testimony specifically found that there was no opportunity and therefore no refusal to settle by appellee. Since this finding is amply supported by the record, we are not called upon in this case to re-examine the nature of the insurer's obligation in this regard.

In *Cowden v. Aetna Cas. & Sur. Co.*, 134 A.2d 223 (Pa. 1957), the court stated as follows:

> And, where there is little or, as in the instant case, no likelihood of a verdict or even a settlement within the limits of the policy's coverage, the separate interests of the parties are in effect substantially hostile. In such circumstances, it becomes all the more apparent that the insurer must act with the utmost good faith toward the insured in disposing of claims against the latter.
>
> * * *
>
> ...when there is little possibility of a verdict or settlement within the limits of the policy, the decision to expose the insured to personal pecuniary loss must be based on a bona fide belief by the insurer, predicated upon all of the circumstances of the case, that it has a good possibility of winning the suit.

134 A.2d at 228-229. Over forty years later, in *Birth Center v. St. Paul Companies, Inc.*, 787 A.2d 376 (Pa. 2001), the Pennsylvania Supreme Court stated as follows:

We affirm the decision of the Superior Court. Where an insurer refuses to settle a claim that could have been resolved within policy limits without "a bona fide belief…that it has a good possibility of winning," it breaches its contractual duty to act in good faith and its fiduciary duty to its insured. (Citation omitted).

787 A.2d at 379. As the above case law demonstrates, there certainly is Pennsylvania case law that has required an expressed willingness on the part of a claimant to settle within the policy limits in order for a common law bad faith claim that seeks the amount of an excess verdict to exist.[4]

III. Additional Conflicts with *Birth Center* and Black Letter Contract Law

The position that a bad faith plaintiff is not required to prove an expressed willingness to settle within the policy limits in order to recover the amount of the excess verdict conflicts with Pennsylvania black letter law regarding contracts as well as the holding in *Birth Center*. In *Birth Center*, the court stated that a *Cowden* common law bad faith cause of action was based in contract and that there must be a causal connection

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between the insurer's conduct and the entry of the excess verdict:

> The insured's liability for an excess verdict is a type of compensatory damage for which this court has allowed recovery. Therefore, when an insurer breaches its insurance contract by a bad faith refusal to settle a case, it is appropriate to require it to pay other damages that it knew or should have known the insured would incur because of the bad faith conduct.
>
> The dissent would hold that an insurer's bad faith refusal to settle a claim against its insured does not give rise to a contract cause of action. For the reasons set forth in this opinion, we respectfully disagree. However, we respond to point out that the characterization of the claim by the dissent has no bearing on the outcome of this particular case. Whether Birth Center's cause of action sounds in contract or in tort, the jury found by clear and convincing evidence that St. Paul acted in bad faith and that its actions were a substantial factor in bringing about harm to the Birth Center totaling $700,000.00 in compensatory damages. In appropriate circumstances, compensatory damages are available in both contract and tort causes of action. Indeed, generally, compensatory damages are easier to recover in tort actions than in contract actions. Consequently, in this case, which does not involve a statute of limitations issue, the dissent's assertion that the claim should sound in tort instead of contract is irrelevant.

787 A.2d at 388-389.[5] A few points from the holding are important to emphasize. First, the court required that there must be a causal connection between the insurer's bad faith conduct and the entry of the excess verdict ("...it is appropriate to require it to pay other damages that it knew or should have known the insured would incur because of the bad faith conduct" and "[St. Paul's] actions were a substantial factor in bringing about harm to the Birth Center totaling $700,000.00.") (the amount of the excess verdict). Second, the court recognized that the ability to recover damages in contract actions was difficult ("compensatory damages are easier to recover in tort actions than in contract actions."). Because the *Birth Center* court held that a common law bad faith action was a contract claim, the black letter standard of law for damages in contract actions is relevant. In order to recover damages for breach of contract under Pennsylvania law, a plaintiff must show a "causal connection" between the breach and the claimed loss. *Exton Drive-In, Inc. v. Home Indem. Co.*, 261 A.2d 219 (Pa. 1969). Furthermore, the only damages that are recoverable in contract actions are the damages that "were reasonably foreseeable and within the contemplation of the parties at the time they made the contract." *Ferrer v. Trustees of the Univ. of Pa.*, 825 A.2d 591, 610 (Pa. 2002).[6] Applying the *Birth Center* holding to the *Jurinko* footnote, if there was no expressed willingness on the part of the claimant to settle then there can never be a "causal connection" between the insurer's conduct and the entry of the excess verdict because the insurer could have done nothing more to have settled the case and to prevent the entry of an excess verdict. As such, if there was never an expressed willingness to settle, the insurer cannot be responsible in a subsequent common law bad faith action for the excess verdict.

In addition, if the insurer committed other acts during the claim that were in bad faith, but the case still could have never settled within the policy limits, those acts cannot support the award of the excess verdict amount. There is no connection between the insurer's conduct and the entry of the excess verdict because the insurer never had a chance to perform its potential contractual duty (*i.e.*, obtain a release by indemnifying the insured up to the amount of the policy limits).

IV. Opportunity for Manipulative Conduct

As further support for the position that there is no need to require an expressed willingness to settle in order to maintain a common law bad faith action, some attorneys cite the *Jurinko* footnote for the proposition that requiring an expressed willingness does not reflect the realities of settlement negotiations. However, this position overlooks the realities of settlement negotiations and manufactured bad faith claims. Some courts have recognized the nature of settlement negotiations and the fact that attorneys attempt to manufacture bad faith during settlement discussions. For example, in *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004) (Wells, J. dissenting), the dissent stated:

> I must also recognize that there are strategies which have developed in the pursuit of insurance claims which are employed to create bad faith claims against insurers when, after an objective, advised view of the insurer's claims handling, bad faith did not occur. This is a strategy which consists of setting artificial deadlines for claims payments and the withdrawal of settlement offers when the artificial deadline is not met. The goal of this strategy is to convert a policy purchased by the insured which has low limits of insurance into unlimited insurance coverage.

896 S.2d at 685. In *Cowden*, the court characterized the use of the claimant's demand letter in that case as "self-serving and threatening." 134 A.2d at 230. In *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 901 (Cal. 1985) (Kaus, J. concurring and dissenting), it was stated:

> The problem is not so much the theory of the bad faith cases, as its application. It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith.

Moreover, in *U.S. Fire Ins. Co. v. Royal Ins. Co.*, *supra*, the Third Circuit held that the insurer in that case did not have an obligation to initiate settlement discussions, and in so doing stated the following:

> Traditionally and logically, the impetus for settlement comes from the plaintiff. He is the one seeking recovery and therefore has the burden of stating just what it is that he wants. A feigned lack of interest in settlement by a defendant is a widely recognized negotiating ploy. We see no reason why use of this technique should excuse the plaintiff from stating his demand. * * * Clearly, settlement is a two-way street and is not limited to the defendant's insurance carrier.

775 F.2d at 82. If a bad faith plaintiff did not have to prove an expressed willingness to settle, the opportunity for lawsuit abuse and manipulation is obvious. A claimant who was not

concerned about the costs of trial would have little reason to accept a minimum limits policy offer. Instead, it would be in the claimant's interest to take the case to verdict and, after the entry of the excess verdict, threaten the insurer with a common law bad faith action unless the insurer paid an amount above the policy limits. The requirement of an expressed willingness serves as an important gatekeeper against manufactured common law bad faith claims. If a bad faith plaintiff argues that he does not have to prove an expressed willingness to settle, the insurer should respond by asserting that the plaintiff cannot recover the amount of the excess verdict. Bad faith does not exist when the claimant says so simply because of dissatisfaction with the insurance coverage of the tortfeasor.

ENDNOTES

[1]Showing an expressed willingness to settle is a prerequisite for maintaining a common law bad faith action. If the plaintiff can show an expressed willingness to settle within the policy limits, the plaintiff still has to prove that the insurer acted in bad faith by clear and convincing evidence under the following standard:

> ...when there is little possibility of a verdict or settlement within the limits of the policy, the decision to expose the insured to personal pecuniary loss must be based on a bona fide belief by the insurer, predicated upon all of the circumstances of the case, that it has a good possibility of winning the suit. While it is the insurer's right under the policy to make the decision as to whether a claim against the insured should be litigated or settled, it is not a right of the insurer to hazard the insured's financial well-being. Good faith requires that the chance of a finding of nonliability be real and substantial and that the decision to litigate be made honestly.

Cowden v. Aetna Cas. & Sur. Co., 134 A.2d 223, 228 (Pa. 1957). Moreover, Pennsylvania case law rejects the position that the mere entry of an excess verdict is "absolute" bad faith. *Shearer v. Reed*, 428 A.2d 635 (Pa. Super. 1981) (rejecting the "absolute liability" theory of bad faith that an insurer is automatically liable for the amount of an excess verdict from the sole fact that an excess verdict was entered against the insured).

[2]The attorney represented both doctors.

[3] 586 F. Supp. 84, 87 (E.D. Pa. 1984)

[4]A contrary case was *Standard Steel, LLC v. Nautilus Ins. Co.*, 2008 WL 4287156 (W.D. Pa. 2008), in which the court held that an expressed willingness is not required to obtain the amount of the excess verdict. However, the *Standard Steel* opinion omitted the above cases and overlooked the standards stated in *Cowden* and *Birth Center*.

[5]While the holding in *Birth Center* is controlling law, it is arguable that the majority opinion correctly classified the common law bad faith cause of action as a contract action. The dissent written by Justice Zappala and joined by Justice Castille asserted that a common law bad faith action was a tort action and not a contract action. 787 A.2d at 390-394. Justice Zappala's dissenting opinion sets forth the reasons why common law bad faith is a tort and not a contract action. In addition to the reasons stated in the dissent, the seminal common law bad faith action brought in *Cowden* was filed as a tort. Moreover, the leading commentary that existed when the *Cowden* case was decided classified the bad faith cause of action as a tort. Keaton, *Liability Insurance and Responsibility for Settlement*, 67 Harv.L.R. 1136 (1953). Also, the classification of common law bad faith as a contract action has been criticized as being incorrect. Steven S. Ashley, *Bad Faith Actions*, §§ 2:14, 6:10 (2nd Ed. West 1997).

[6]The legal and logical flaws in characterizing common law bad faith as a contract action as stated in *Birth Center* is further demonstrated when the contract standard for damages is applied to an excess verdict bad faith case. It was impossible for the parties to foresee a specific future lawsuit and a future excess verdict when they entered the policy. As such, it is technically impossible to recover the amount of an excess verdict when common law bad faith is considered as a contract action. The only way to recover the amount of the excess verdict is to consider a common law bad faith claim as a tort.

Should Attorneys Fees Incurred in a Statutory Bad Faith Claim Include Fees Incurred Solely in Pursuit of the Bad Faith Claim: Time to Revisit the *Polselli* Prediction?

By R. Bruce Morrison, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, PA

In 1990, the Pennsylvania legislature completed the backroom political compromise which overhauled our motor vehicle insurance statute, commonly referred to as "the MVFRL".[1] Included within provisions which re-wrote many of the auto insurance sections, and others dealing with Crimes Code and anti-fraud measures, the 1990 reform provisions referred to as "Act 6" also created a new statutory remedy for "bad faith" by an insurer toward its insured. Now, twenty-two years later, there remain many basic issues and questions which have never been presented to or finally decided by our state Supreme Court. For those issues and questions, while we may have some measure of on-point guidance from lower courts both state and federal, the issues remain very much alive to be litigated in the next case, and the one after that.

While it seemingly has not generated much active debate or discussion in recent years, one such issue which has never been considered or addressed by the Pennsylvania Supreme Court is the scope of attorneys fees recoverable by an insured in a bad faith case brought under the Pennsylvania statute.[2] More specifically, although that statute unquestionably gives the trial court the discretion to award a successful insured attorneys fees and costs, the question is whether such an award can or should include those attorneys fees incurred after the underlying insurance claim has been settled and paid, or even adjudicated and paid, such that the continued proceedings relate solely to the pursuit of the statutory bad faith claim itself.

Like many other issues that can arise in a bad faith case, the contexts out of which the issues emerged can vary significantly from case-to-case, and there is rarely a "one size fits all" answer that addresses every circumstance. In order to assess the issue in a realistic or practical sense, however, it is often helpful to posit the question in the context of a real life case or situation. For purposes of this discussion, then, let's use statutory bad faith claim emanating out of an insurer's alleged bad faith handling of an underlying claim for UIM benefits. Let us further assume that there were questions and issues involving the policy documents, and whether the insured had signed valid forms waiving the U-coverages, or waiving stacking, or electing lesser UM/UIM limits. Let us assume that the policy was procured through an independent insurance agency chosen by an insured but authorized and relied on by the insurer to collect and retain the appropriate applications and forms. The agency files are not perfect. Insofar as the claim itself, let us assume that the claimant was not the named insured,

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but a young adult with a recent military stint, some time spent in college and a sweetheart in the next county with whom he spends a good deal of time, but he is now seeking benefits under this parents' policy covering four vehicles, none of which were in the accident in question. Let us assume that the claimant suffered some form of back injury while in the service, and he claims an aggravation of that injury along with other new ones in the subject accident. I could ask you to further assume a subsequent accident 18 months after the one in question, but then this might sound too much like a real case, and we don't really need that here.

Faced with all of those questions and issues, assume it takes about 18 months to gather all of the necessary factual information, obtain the medical records, and have the parties' experts prepare their respective reports. As time has passed, claimant's counsel expresses increasing frustration over the time the process is taking, and over the legitimacy of some of the insurer's questions and positions. When efforts to get the claim into mediation bog down, claimant files suit against the insurer. The complaint contains two counts. The first alleges breach of contract over failure to pay the $1,200,000 in stacked UIM policy limits he claims to be available and owed. The second alleges a statutory bad faith claim under §8371, seeking punitive damages, interest at prime plus 3%, and attorneys fees and costs.

In the wake of the filing of the Complaint, mediation is actually scheduled. Although the mediator takes a passing shot at seeking a "global" resolution, it quickly becomes clear that the only possibility of any resolution will be limited to settling the underlying claim. With the thought that some resolution is better than none, the parties settle the underlying UIM claim only. Two weeks after the settlement check clears, claimant's counsel serves "bad faith" discovery and begins by demanding the entire un-redacted claims file, among other requests.

At this moment in time, the potential for variation in the parties' perspectives over where they are, and where they are headed, can be dramatic. Claimant will maintain and may believe that the insurer has treated "their own insured like the enemy", not accepting claimant's information at face value, challenging the insured to provide supportive documentation, and seeking out its own contrary information and opinions. The insurer will maintain and may believe that there is no coverage for the claim, or that the coverage is actually far less than claimed, that there were several open questions and issues which needed to be vetted and addressed, and that it ultimately made significant concessions on a number of disputed issues to achieve the settlement of the underlying claim.

In this setting, the issue of the claimant's counsel fees comes into stark relief. Irrespective of the time that it took to develop and present the underlying claim, claimant's counsel already took a contingent fee at a pre-agreed percentage. Now that the bad faith case has been filed and discovery is about to begin, the prospects for significant additional fees and costs being incurred, especially with electronic discovery, is obvious. Our issue is officially "teed up".

In a case where the underlying insurance claim has been settled and paid, or adjudicated and paid, and where the insured then pursues a statutory bad faith claim, should the attorneys fees recoverable under §8371 be limited to the fees incurred in pursuit of the insurance claim, or should they also include the additional attorneys fees incurred now in pursuit of the statutory bad faith claim? This author, not surprisingly, maintains that the fees recoverable under §8371 should be limited to those fees incurred pursuing the underlying claim, and should not include the fees incurred in the subsequent pursuit of the statutory bad faith claim alone.

Although there is precious little Pennsylvania case law that actually deals with this issue, it is not an entirely clean slate. Instead, for guidance, we have two opinions, dusty though they maybe, which come from the same case, the infamous *Polselli* case.

By way of brief background, the *Polselli* case originated in a contested first party fire loss claim under a homeowners insurance policy. At the time of the fire, which occurred on January 1, 1991, plaintiff Regina Polselli and her daughter lived in the Aldan, Pennsylvania home owned by her estranged husband, Rudolph Polselli. Also at the time of the fire, Rudolph Polselli was the sole named insured on the homeowners insurance policy issued by Nationwide. Rudolph and Regina Polselli were in the midst of divorce proceedings when the fire occurred and each submitted competing claims to the proceeds claimed under the policy. On March 4, 1991, a mere 61 days following the fire, Regina Polselli filed her lawsuit against Nationwide, asserting both her entitlement to benefits under the policy and a statutory bad faith claim pursuant to the brand new Pennsylvania bad faith statute, 42 Pa. C.S.A. §8371.

There had never been much dispute among the interested parties about the biggest portion of the fire claim, as the agreed upon proceeds for the building claim were put into escrow to be allocated in the Polselli's divorce proceedings. There were, however, a number of questions and issues surrounding the contents and ALE claims, and once the bad faith litigation was filed, a good deal of the parties' attention turned to that portion of the case. Shortly before the trial was scheduled to occur, the parties settled the contents and ALE claims, and Mrs. Polselli proceeded with the trial of her statutory bad faith claim. A quick check of Shepards for the *Polselli* case will give the long roadmap of the subsequent bad faith litigation, including multiple trips to the Third Circuit Court of Appeals on the "clear and convincing" burden of proof and then the issues surrounding attorneys fees.

Focusing here on the issue of attorney fees, it is significant to note that the trial court, per Judge Yohn, agreed with the insurer's position and limited his award of attorney fees to the fees incurred in pursuit of the underlying insurance claim. In *Polselli v. Nationwide,* 1995 U.S. Dist. LEXIS 17006 (E.D. Pa., Nov. 15, 1995), Judge Yohn wrote the following:

Defendant now argues for the first time that section 8371 allows for the award of attorney fees only with respect to those hours expended on the underlying insurance contract claim and not on the bad faith claim itself.

Section 8371 provides for the assessment of attorney fees if bad faith is found "in an action arising under an insurance policy." If a claim of bad faith were itself considered an action "arising under an insurance policy," or a component of such an action, then fees would be permissible for time dedicated to proving such unfair dealing. However, both

the Pennsylvania Superior Court and judges of this court have interpreted *section 8371* as creating a new, independent cause of action. *See, March v. Paradise Mut. Ins. Co., 435 Pa. Super. 597, 646 A.2d 1254, 1256 (Pa. Super. 1994), appeal denied, 656 A.2d 118 (Pa. 1995); Kauffman v. Aetna Casualty and Surety Co., 794 F. Supp. 137, 140 (E.D. Pa. 1992).* Therefore, the court agrees with defendant's position.

After further discussion achieved an amicable resolution on the number of hours devoted to pursuit of the contract claim, this "scope of fees" issue itself reached the Third Circuit Court of Appeals.

From the vaults of the "Department of War Stories Department," I can tell you that even this trip to the Third Circuit was memorable. After an unsuccessful attempt in the still rather new Third Circuit Mediation Program, we had a wonderfully spirited oral argument. At the conclusion of the oral argument, we were summoned close to the bench, where the panel requested that we return to mediation to "please" see if the issue could be settled. Obviously, and perhaps unfortunately, it was not.

In *Polselli v. Nationwide,* 126 F.23d 524 (3d Cir. 1997), the Third Circuit reversed Judge Yohn and concluded that insureds who prevailed on a Section 8371 bad faith claim could recover both the fees insured in pursuing the underlying insurance claim and those additional fees incurred pursuing the statutory bad faith claim itself.

In the Third Circuit's view, despite the fact the courts consistently note that a §8371 claim is a separate and independent claim from the underlying contractual claim for benefits, the bad faith action still fits somehow with the statutory framework of "[i]n an action arising under an insurance policy." It reconciled that view by first recognizing that there had to have been an underlying contract claim at some point, and because the duty of "good faith" which is being protected or enforced by the bad faith claim itself arises under the insurance contract (even though most courts would say that that duty of mutual good faith is implied by law). In this author's humble opinion, those rationalizations are unpersuasive.

The second reason for awarding fees offered by the Third Circuit was that such fees are a necessary component of compensation in order "to make the successful plaintiff completely whole". *id.,* 126 F.3d at 531. Although the court recognizes that §8371 "is not a traditional fee-shifting statute" where a successful party is automatically entitled to recover fees, the court relied on the axiom of "liberal construction" of statutes to achieve their objective and "promote justice". Again, the concept of awarding fees for the pursuit of fees seems to create a self-fulfilling cycle, promoting and prolonging litigation as opposed to incenting its resolution.

This author's views notwithstanding, the question remains: where does the *Polselli* case leave us?

First, we must keep in mind that the Third Circuit decision in *Polselli* is binding in the district courts in Pennsylvania, but not in the state courts. As the Third Circuit recognized, its role was simply to predict what it believed the Pennsylvania Supreme Court would do if that court were deciding the issue. *id.,* at 532.

Second, the Third Circuit's rationalization of the statutory language notwithstanding, the many cases which explicitly recognize that statutory bad faith claims under §8371 are, in fact, separate, independent and distinct from the underlying claim for contractual benefits (which underlying claim may or may not actually result in litigation) offer strong support for the view that that separate statutory claim is not "an action arising under an insurance policy".

Third, despite its express recognition that §8371 is not a fee-shifting statute, the Third Circuit's prediction runs counter to "the American rule" which is well settled here in Pennsylvania. Under that American rule, attorney fees are generally not recoverable, either as costs or damages, unless their recovery is expressly authorized by statute, court rule or some recognized exception. *Burnside v. State Farm*, 538 N.W. 2d 749, 751 (Mich. App., 1994); *Snyder v. Snyder,* 620 A.2d 1133, 1138 (Pa. 1993).

Fourth, there is nothing in the language of §8371 to suggest that it was meant to include reimbursement of the fees incurred seeking a bad faith recovery. Indeed, when one reads the statute in its entirety, it is respectfully suggested that it is designed to include both compensatory and punitive elements for an insurer's bad faith handling of an insurance claim. Where such bad faith handling has resulted in an unreasonable delay in paying the claim, the court may compensate the insured by awarding interest on the claim during that delay at an interest rate of prime plus 3%. Where that handling has forced an insured to retain counsel to recover the claim, and perhaps to file suit on the claim, the statute empowers the court to compensate the insured by assessing those court costs and attorney's fees on the insurer. Finally, in those instances where the court determines the insurer's conduct to have been so outrageous as to warrant punishment, the statute authorizes the court to award punitive damages for its handling of the claim.

In reading that statute, then, two important points emerge. The first is that each of the remedies is extra-contractual. They are not remedies provided for under the insurance policy itself but are instead created by that statute. Consequently, an action seeking damages under Section 8371 is not "an action arising under an insurance policy". The second is that each of the remedies, and indeed the statute itself, is directed toward the insurer's handling of the underlying insurance claim in dispute. In other words, it is meant to provide a remedy for any harm done by the bad faith conduct (including the potential imposition of punishment via punitive damages), not to fund the prosecution of the independent statutory claim. There is simply nothing contained in Section 8371 which suggests that where the disputed insurance claims have been settled, the insured may also seek to recover the attorneys fees incurred in the prosecution of the insured's extra-contractual statutory claim.

Fifth, limiting the recoverable fees to only those fees incurred in pursuing the underlying benefits is consistent with existing Pennsylvania law in two closely related areas of insurance law. In instances where a liability insurer has denied coverage for a third party liability claim against an insured, an insured who successfully brings or defends a declaratory judgment which establishes that the legal defense was owed is entitled to recover the underlying defense fees incurred as a measure of compensatory damages. At the same time, however, the successful insured is only entitled to recover the fees incurred litigating the coverage issue where the insured also establishes that the insurer's denial of coverage had no reasonable basis or was in bad faith. *See: Kiewit Eastern Co., Inc.*

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v. L. & R. Construction, 44 F. 3d 1994, 1205 (3d Cir. 1995); Kelmo Enterprises v. Commercial Union Ins. Co., 426 2d 680 (Pa. Super. 1981).

Similarly, in instances of withheld or disputed PIP benefits under the MVFRL, §1798 provides for an award of attorneys fees in addition to the benefits owed and interest "in the event an insurer is found to have acted with no reasonable foundation in refusing to pay the benefits."…75 Pa. C.S.A. §1798. In those instances, then, Pennsylvania allows for the recovery of attorneys fees incurred seeking coverage or benefits which were withheld or denied in bad faith, but does not provide a basis to further augment those fees thereafter.

Sixth, the majority of other states that have considered and decided this issue do not allow for reimbursement of the fees incurred pursuing the separate bad faith claim. Even in California, the law acknowledged in the Polselli opinion remains the prevailing view. *See: Brandt v. Superior Court of San Diego, 693 P. 2d 796 (Cal. 1985); echoed in Essex Ins. Co. v. Five Star Dye House, Inc.,* 137 P. 3d 192 (Cal. 2006).

Finally, and as a matter of public policy, the law has always favored resolution and settlement, as opposed to encouraging the proliferation of litigation. Awarding additional attorneys fees for the separate pursuit of alleged bad faith, where the underlying insurance claim has already been settled or otherwise closed, produces the opposite result. It encourages the pursuit of litigation about litigation. It actually rewards the over-litigating of the bad faith claim as the increasing billing by an insured's counsel becomes the engine that impels the litigation forward.

Perhaps, at the end of the day, the focus will have to return to the discretionary nature of an attorneys fee award, and having the court parse out an insured's fee claim to those fees which were truly necessary and productive in obtaining for the insured what he was entitled to, but not rewarding unnecessary litigation for the sake of litigation. Perhaps, it's about time.

ENDNOTES

[1]MVFRL is the acronym for the Motor Vehicle Financial Responsibility Law, codified at 75 Pa. C.S.A. §1701 *et seq.*

[2]For purposes of this discussion, let's place off to the side third party common law excess verdict bad faith claims brought under *Cowden v. Aetna,* 134 A2d. 223 (Pa. 1957), where historically there were no claims for attorneys fees or any other compensatory damages other than the excess verdict itself. At least there were no such claims until the cryptic final sentence in *Birth Center*.

VICARIOUS LIABILITY FOR PUNITIVE DAMAGES— IS IT TIME FOR LEGISLATIVE INTERVENTION?

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I. Introduction

Vicarious liability and punitive damages —two phrases that employers/principals, insurers, and defense counsel never want to hear. Together they form a unique exposure which has left the aforementioned stakeholders and courts navigating an unclear and potentially costly landscape. Pennsylvania public policy permits employers/principals to obtain insurance coverage for punitive damages where their liability is only vicarious. *Butterfield v. Giuntoli*, 670 A.2d 646 (Pa. Super. 1995), *appeal denied*, 683 A.2d 875 (Pa. 1996). Thus far, however, the circumstances under which such insurance coverage may be implicated have been unclear. A thorough review of the case law shows that Pennsylvania courts may be sending a mixed message as to exactly what approach to vicarious liability for punitive damages is followed in Pennsylvania.

Generally, courts across the nation fall into two camps with regard to vicarious liability for punitive damages—the less restrictive "scope of employment" rule and the more restrictive "complicity rule" embodied by the Restatement (Second) of Torts §909 (1979). *See: Briner v. Hyslop*, 337 N.W.2d 858, 861. (Ia. 1983). The scope of employment rule holds an employer vicariously liable for punitive damages "…whenever the employee's actions within the scope of employment make the employee liable." *Id*. In contrast, the complicity rule requires a measure of participation, expressly or impliedly, by the employer in the offending conduct. *Id*. The Restatement (Second) of Torts §909, Punitive Damages Against A Principal, more succinctly states the complicity rule as follows:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

As Comment b to Section 909 explains:

> The rule stated in this Section results from the reasons for awarding punitive damages, which make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously. It is, however, within the general spirit of the rule to make liable an employer who has recklessly employed or retained a servant or employee who was known to be vicious, if the harm resulted from that characteristic (See Illustration 1). Nor is it unjust that a person on whose account another has acted should be responsible for an outrageous act for which he otherwise would not be if, with full knowledge of the act and the way in which it was done, he ratifies it, or, in cases in which he would be liable for the act but not subject to punitive damages, he expresses approval of it. (See Illustration 2). In these cases, punitive damages are granted primarily because of the principal's own wrongful conduct. Although

there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions. (See Illustration 3).

Pennsylvania courts maintain that Pennsylvania adheres to the less restrictive scope of employment rule. *Dean Witter Reynolds, Inc. v. Genteel*, 346 Pa. Super. 336, 499 A.2d 637 (1985), *appeal denied*, 522 A.2d 1105 (Pa. 1987), 523 A.2d 346 (1987). The Superior Court's 1985 decision in *Dean Witter* is the most recent case in which a Pennsylvania appellate court has squarely analyzed Pennsylvania's adherence to the scope of employment rule. In that decision, the Superior Court was not swayed by Dean Witter's argument that the modern trend is toward the more restrictive complicity rule set forth in Section 909. *Id*. at 348-49, 643. The Superior Court traced Pennsylvania's adherence to the traditional, scope of employment rule back to 1886. *Lake Shore & Michigan Southern Ry. Co. v. Rosenzweig*, 113 Pa. 519, 6 A. 545 (1886); *Philadelphia Traction Co. v. Orbann*, 119 Pa. 37, 12 A. 816 (1888); *Funk v. Kerbaugh*, 222 Pa. 18, 70 A. 953 (1908); *Gerlach v. Pittsburgh Ry. Co.*, 94 Pa. Super. 121 (1928); *Hannigan v. S. Klein's Department Store*, 1 Pa. D. &C.3d 339 (1976), *aff'd per curiam*, 244 Pa. Super. 597, 371 A.2d 872 (1976); *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, 464 A.2d 1243 (1983). Based on these authorities, the Superior Court was not willing to stray from the scope of employment rule stating "…we are not convinced that this is the right time or court to abandon the traditional rule." Analysis of the cases cited within *Dean Witter*, however, reveals that, in practice, Pennsylvania may have already abandoned the traditional rule in favor of an approach that is closer to the complicity rule as set forth in Sections 909(a), (c), and (d)[2]. This mixed message provides uncertainty to employers and insurers and calls for legislative intervention to codify the circumstances under which employers/principals may be subject to punitive damages based on the acts of their employees and agents.

II. The Origins of the Scope of Employment Rule

"The corporation is liable for exemplary damages for the act of its servants, done within the scope of his authority, under circumstances which would give such right to the plaintiff as against the servant were the suit against him instead of the corporation." *Lake Shore & Michigan Southern Ry. Co.*, 113 Pa. at 544, 6 A. at 553. The Supreme Court's pronouncement in *Lake Shore* has been the anchor upon which subsequent courts have adhered to the scope of employment rule. Two years later in 1888 the Supreme Court first acknowledged the harshness of the rule stating "…the plainest principles of justice require that great caution should be observed in its application." *Phila. Traction Co.*, 119 Pa. at 44, 12 A. at 819. In 1908, the Supreme Court again noted that "[t]oo great caution cannot be exercised in permitting the recovery of punitive damages for the willful or reckless act of a servant not authorized or approved by the master." *Funk v. Kerbaugh*, 222 Pa. at 19, 70 A. at 954. The Supreme Court has not explicitly spoken on the matter of vicarious liability for punitive damages since 1908 leaving courts to ponder how to apply the scope of employment rule with the greatest of caution. The Third Circuit has interpreted the Supreme Court's guidance as meaning that "…the conduct of the agent who inflicts the injury complained of must be rather clearly outrageous to justify the vicarious imposition of exemplary damages upon the principal." *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846, 852 (3d Cir. 1964). The Third Circuit's attempt to reconcile the Supreme Court's stance only creates the equally amorphous standard of "clearly outrageous".

III. Scope of Employment Rule + Great Caution = Complicity Rule?

A review of the decisions in which employers and principals were held vicariously liable for punitive damages shows that despite expressly adhering to the scope of employment rule, the circumstances under which punitive damages have been vicariously imposed are actually similar to the complicity rule set forth in Section 909(a), (c), and (d). That is, the application of the scope of employment rule with great caution is effectively the complicity rule.

Acknowledging Pennsylvania's adherence to a rule most similar to Section 909(a), (c), and (d) would not require a wholesale shift in our jurisprudence. To be sure, since the complicity rule is more restrictive than the scope of employment rule, if an employer/principal is not vicariously liable for punitive damages under the scope of employment rule, then the employer/principal would not be vicariously liable for punitive damages under the complicity rule. Therefore, the Supreme Court's decision in *Philadelphia Traction Co.*[3], *supra*, the Superior Court's decision in *Gerlach*[4], *supra*, and the Third Circuit's decision in *Skeels*[5], *supra*, would remain undisturbed.

Turning to the Supreme Court's decisions in which punitive damages were vicariously imposed, in *Lake Shore & Michigan Southern Ry. Co.*, a railroad conductor threw a ticketed passenger off a train in a dangerous area because the passenger's ticket was not the correct type of ticket for that particular train. 113 Pa. at 535-36, 6 A. at 546-47. The conductor explicitly stated to the passenger that he was obeying his orders. *Id*. at 535, 546. Under these circumstances it appears that even under Section 909(a) punitive damages would be imposed upon the employer because it authorized the conduct of the conductor. Likewise, in *Funk v. Kerbaugh*, the Supreme Court explicitly noted that "…the acts complained of were done by direction of the defendant's superintendent after notice and with full knowledge of the damage they were doing the plaintiff's property." 22 Pa. at 19, 70 A. at 954. Section 909(a), (c), and (d) would lead to the same result.

Similarly, the Superior Court's decisions imposing punitive damages vicariously would lead to the same result had Section 909 been applied. In *Delahanty*, the court upheld an award of punitive damages against a bank where it was determined that a bank vice-president and other managerial agents stole a customer's idea for a business and then directly competed against him. 318 Pa. Super. at 132-33, 464 A.2d at 1264-65. Section 909(a), (c), and (d) would lead to the same result. In *Dean Witter*, an account representative of the employer engaged in a churning scheme. 346 Pa. Super. at 343, 499 A.2d at 640. Although there are few details, the Superior Court noted that punitive damages were awarded based not only on the conduct

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Vicarious Liability

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of the account representative but also because there was testimony that other persons and departments within the employer were involved in the offending conduct. *Id*. at 348, 643. It appears that the result in *Dean Witter* would be the same under Section 909(a) or (d) due to the participation of the employer in the offending conduct. Finally, in *Hannigan*, the Superior Court affirmed without opinion the decision of the Court of Common Pleas of Philadelphia which upheld a jury's verdict imposing punitive damages on a department store for the conduct of one of its loss prevention officers. 1 Pa D. &C.3d 339 (C.P. Phila. 1976). The loss prevention officer stopped a patron in a parking lot at night who he mistakenly believed to have committed a theft and required her to return to the store. *Id*. at 348-49. The opinion does not address the department store's procedures with regard to suspected thefts, but it is conceivable that punitive damages could be imposed against the employer pursuant to Section 909(a).

IV. The Need for Legislative Intervention

The above-cited cases demonstrate that the Restatement (Second) of Torts §909(a), (c), and (d) embodies the spirit of Pennsylvania's jurisprudence. The Superior Court has indicated that it is not the right court to abandon the traditional rule in favor of Section 909. *Dean Witter*, *supra*. As noted above, however, the Supreme Court has not squarely addressed the issue since 1908. The principles embodied in Section 909 first appeared thirty years after the Supreme Court's decision in *Funk v. Kerbaugh*. *See* Rest. Torts §909 (1939). Therefore, the Supreme Court has never had the opportunity to analyze and adopt or reject Section 909.

Section 909(a), (c), and (d) better defines the circumstances under which vicarious liability for punitive damages may be imposed. It provides courts with a standard that is easier to apply and employers and insurers with greater certainty. At least one court has explicitly applied Section 909 in the context of ruling on preliminary objections. *Brace v. Shears*, 12 Pa. D. &C.5th 166 (C.P. Centre 2010). Legislatures in several states have taken to codify Section 909 both in whole and in part. *See e.g*. Ky. Rev. Stat. Ann. §411.184(3); Alaska Stat. §09.17.020(k); West's Ann. Cal. Civ. Code §3294; Nev. Rev. Stat. §42.007; Minn. Stat. Ann. §549.20. Further, Pennsylvania has already taken legislative action to limit exposure for punitive damages in the context of medical malpractice. 40 P.S. §1303.505(c)[6]. Accordingly, legislative codification of Section 909(a), (c), and (d) will align Pennsylvania with modern trends without disturbing its jurisprudence.

V. Conclusion

Pennsylvania's current approach to vicarious liability for punitive damages does not provide employers/principals or insurers with any sort of clarity or certainty as to the circumstances under which such damages may be imposed. The Supreme Court directs courts to apply the scope of employment rule with great caution. Yet, the Supreme Court's pronouncement is more than 100 years old and pre-dates the advent of the complicity rule set forth in Restatement (Second) of Torts §909. The case law demonstrates that Section 909(a), (c), and (d) is nearly identical to the scope of employment rule exercised with great caution. Section 909(a), (c), and (d) simply provides a clearer, more precise expression of Pennsylvania's approach. The *Dean Witter* court made clear that the Superior Court will not take action to stray from the scope of employment rule and will instead defer to the Supreme Court. Given the rarity with which this particular issue has been reviewed by the Supreme Court, let alone the Superior Court, legislative intervention is necessary to provide employers/principals and insurers with certainty. Other states have taken legislative action to codify Section 909 and tailor it to their specific needs and policies and the Pennsylvania Legislature has expressed its willingness in other areas of the law to codify the circumstances under which punitive damages may be vicariously imposed. Therefore, the time is ripe to seek to codify Section 909(a), (c), and (d) as the law of Pennsylvania on the vicarious liability of employers/principals for punitive damages.

ENDNOTES

[1]Special thanks to Charles E. Wasilefski, Esquire.

[2]Section 908(b) is omitted from the scope of this article because it encompasses liability which is more often characterized as direct. *See e.g. Santillian v. Sharmouj*, 289 Fed. Appx. 491 (3d Cir. 2008)(applying Virgin Islands law); *Montgomery Ward and Co. v. Marvin Riggs Co*., 584 S.W.2d 863 (Tex. Civ. App. 1979). Nonetheless, Pennsylvania does allow for recovery of punitive damages directly against employers/principals pursuant to Restatement (Second) Torts §317(c) (1965). *Hutchison ex rel. Hutchison v. Luddy*, 582 Pa. 114, 870 A.2d 766 (2005).

[3]*Held*, the trial court erred in instructing the jury on punitive damages where there was insufficient evidence that a train conductor pushing a boy on the arm and off of a train acted willfully or wantonly or with reckless indifference to the consequences.

[4]*Held*, the trial court erred in instructing the jury on punitive damages where there was insufficient evidence that a train conductor's failure to intervene in an assault on a passenger by another passenger was done willfully or wantonly or with reckless and conscious indifference to the plaintiff's rights.

[5]Held, jury award of punitive damages was not supported by the evidence where actions of employees of lending agency in seizing plaintiff's stock in trade were not clearly outrageous.

[6]"(c) Vicarious liability**.** Punitive damages shall not be awarded against a health care provider who is only vicariously liable for the actions of its agent that caused the injury unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the award of punitive damages."

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RESERVING 101: AN INTRODUCTION FOR DEFENSE ATTORNEYS AND ADJUSTERS

By Frank Chmielewski, JD, CPCU, ARe, RPLU, The Institutes, Malvern, PA*

Insurance transfers the uncertainty of consequences from potential losses from the insured to the insurer, in the form of a promise from the insurer to pay covered claims. Individual case or claim reserves are estimates of the ultimate cost of a claim, whether by settlement or verdict, based on an evaluation of what is known about a claim regarding probable liability (for third-party claims) and damages.

Most defense attorneys and claim representatives become adept at evaluation after some experience. There are a number of techniques for evaluating a claim (individual case and roundtable are two methods). I will not go into them here. The Associate in Claims courses offered by The Institutes, my employer, would be a good place for a rookie to gain knowledge on evaluation methods.

The bottom line is that claim personnel must make their best estimate of a claim's value when setting a reserve. The evaluation must be transferred into a claim reserve. Even though payment may occur years after a reserve is set, the reserve figure does not get discounted or reduced to present value.

Each insurer has its own guidelines as to timing of setting reserves on claims, often dictated by the frequency and severity of its typical claims. A claim representative may have to set a reserve when the claim is opened, or sometimes, software provides the initial value based on some formula that considers the historic value of the company's claims and other information. Then, it might be that the reserve has to be reconsidered every thirty days. For large value claims, such as in professional liability, it might be that an initial reserve has to be set at fourteen days and the final reserve set within six months, meaning that if practicable, the claim investigation must be completed within a half-year. All guidelines say that reserves are not written in stone and adjustments are permitted as new information, such as medical records describing a deteriorating medical condition, is received.

It would be a good bet that a claim department's reserve timing requirements are reflected in the litigation management guidelines sent to defense counsel. If the insurer wants all discovery completed within five months, where practicable, it is probably trying to meet a six-month final reserve deadline.

Which brings me to the biggest pet peeve of claim personnel universally: they do not like surprises! They do not want to be in the position of changing a claim evaluation two years into a claim based on information that could have been obtained fifteen months earlier. A defense attorney who waits until the day before an arbitration to send an evaluation and recommendation that is higher than originally contemplated will not be getting much new work. An adjuster who lets material for review sit for months and then asks for a large reserve change may be forced to look for another job.

It is hard to keep up with review and evaluation in this era where everyone is overworked. The problem with untimely reserve changes, though, is that it invariably leads to stairstepping, that is, the creeping upward of a case reserve when a proper one could have been set earlier. Stairstepping interferes with timely reserve setting; it does not go unnoticed by an insurer's actuaries.

Some insurers set separate reserves for losses and for expenses. Insurers that have a lot of similar claims, such as motor vehicle losses, may use a computer program to set an expense reserve based on historical averages. For claims such as professional liability, where expenses can be huge in comparison to a loss payment, the expense reserve is often individually set for each claim.

Insurers divide expenses into categories of Loss Adjustment Expense (LAE). The Allocated Loss Adjustment Expense (ALAE) reserve includes the expenses that can be associated with a particular claim. Recently, the term has been changed to Defense and Cost Containment (DCC) reserve. Unallocated Loss Adjustment Expense (ULAE), a term that has recently been changed to Adjusting and Other (AO) expense reserve, essentially accounts for overhead in the claim department and is not individually set by claim personnel.

Reserves consist of more than individual case or claim reserves, as they also include reserves for Incurred But Not Reported (IBNR) claims. These may also be called bulk reserves.

IBNR includes just what it sounds like it does, that is, losses that have occurred but for a multitude of reasons have not been reported to the insurer yet. An example would be a medical malpractice claim involving a minor that is subject to a long statute of limitations period. IBNR also includes projections to account for claims that were inadequately reserved and reserves for losses that had been closed and then reopened (common in workers compensation). Typically, as claims get older and a claim representative's investigation becomes more complete, there should be fewer reserve changes. Actuaries have various methods of estimating this loss development, such as the use of "loss triangles," which is a study unto itself.

Practice Tip: When speaking with claim people, be careful you understand how a particular term is being used, as there is not always uniformity in definitions from insurer to insurer

Claim reserves are invested in treasury bonds and other liquid and low risk investments. If claim reserves prove to be inadequate, insurers must move money from surplus into reserves. Surplus (which is assets minus liabilities including reserves) may be invested in riskier financial vehicles than reserves. Surplus serves as a cushion to ensure that claims are paid. Insurers want to avoid dipping into surplus to bolster reserves as much as possible.

When setting reserves, claim personnel do not take into account any claim recoveries, such as through reinsurance or subrogation. Those factors are left for the actuaries to consider.

Reserves are monitored by insurance regulators to assess insurance company solvency. Underwriters have an interest in reserve adequacy of an insurer because if reserves are generally too low, premiums will tend to be too low; if they are too high, premiums will tend to be too high and market share will suffer. If reserves are out of kilter, almost every

other aspect of an insurance company's financials could be out of kilter.

The above explanation of claim reserves barely scratches the surface of the subject, particularly from the standpoint of actuaries. The takeaway for defense attorneys and claim personnel, however, is to do your best to evaluate claims properly and in a timely fashion. An insurer's ability to fulfill the promise offered by insurance depends on it.

*The opinions expressed in this article are those of the author and do not necessarily reflect the views of his employer, The Institutes, or its affiliates.

MASS TORTS 2.0: THE ONGOING CHANGES IN THE PHILADELPHIA MASS TORTS PROGRAM

By Wesley R. Payne, Esquire and Christopher E. Ballod, Esquire, White & Williams, Philadelphia, PA

By now everyone is familiar with the way Apple launches every new iPhone or iPad: it is the "most amazing iDevice yet," no matter how incremental the changes actually are. Of course, closer examination and hands-on use reveals that the amazing new device offers some improvements, some uncomfortable changes, and a lot of work in progress. In this way, the Philadelphia Court of Common Pleas Mass Torts Program is feeling a lot like Cupertino.

Upon the appointment of the Honorable John W. Herron as the Administrative Judge of the Trial Division of the Court of Common Pleas of the First Judicial District in November, 2011, the Mass Torts Program entered into an evaluative research and development phase. Some of the major changes introduced as part of the evaluation process at the beginning of the year via the court's interim protocol regulation of February, 2012 will continue for the foreseeable future: reverse bifurcation, a staple of the Program, is gone; a mediation protocol is in place; stricter grouping protocols are being enforced, and cases are being grouped for trial with an eye toward fostering resolution. However, other interim changes have been scrapped for a return to the previous model: cases can receive expedited listings when there is a prognosis of imminent death, and the restrictions on out of state counsel and discovery have been largely rolled back.

This article will examine the changes over the past six months and what may lie ahead.

Better by Design.

According to General Court Regulation No. 2012-01, the 2006 – 2011 Mass Torts Program was not as user-friendly as the program was envisioned to be. The program had slipped out of compliance with the ABA case disposition standards, with the asbestos program supposedly leading the downhill charge. While the case disposition rate had remained largely unchanged since 2006 with an average disposition of 244 cases per year, the number of filings had, in the court's words, "soared." New filings had created a 143% increase in the court's inventory. The disconnect between the disposition rate and the increase in filings meant that, between 2007 and 2011, 82.2% of the asbestos cases were resolved in three years, one year over the ABA's recommended two-year disposition. The remaining 17.8% took even longer than three years to reach resolution. The court was convinced that the program, innovatively designed more than three decades ago to expedite the resolution of cases and end the backlogs of the past, was not meeting the "needs of the citizens of the Commonwealth for prompt and fair resolution of these claims" because the program had become bogged down with the filing of out-of-state claimants, many of whom had never stepped foot into the Commonwealth. In short, the court was concerned that the Philadelphia Mass Tort Programs had become the dumping ground or preferred venue of national mass tort firms because of its innovative and expedited trial proceedings.

Accordingly, the court took action. After a two and a half month comment period, in which the plaintiff and defense bars were invited to provide input into ways to resolve the issue, the court designed a solution based on the comments received from all interested parties. The changes were set out in the court's interim protocols of February 15, 2012. There would be new management: Judge Arnold New was to join Judge Sandra Mazer Moss as Co-Coordinating Judge until Judge Moss assumed senior status on December 31, 2012. Reverse bifurcation was finished except upon agreement of all counsel on a case-by-case basis. Punitive damages were deferred for all mass tort cases. This change brought the pharmaceutical cases in line with the existing asbestos practice. The court also ended the practice of expedited trial listings for terminal plaintiffs "unless otherwise agreed by a majority of the defendants." On this point, the court tied future adaptation to future performance: if the Mass Torts Program achieved "80% of all asbestos cases resolved in 24-25 months," then expedited listings could be reinstated for "plaintiffs with Pennsylvania exposures only."

Indeed, a major goal of the court's order was reducing the number of filings by out of state litigants that did not have any contacts with Pennsylvania and which inevitably delayed the resolution of cases of Commonwealth residents. In addition to limiting expedited trial listings to plaintiffs with no contacts with the Commonwealth for the foreseeable future, the court limited *pro hac vice* counsel to two trials per year. All discovery was to occur in Philadelphia unless defense counsel agreed otherwise or the plaintiff made a showing of "exigent circumstances." The court ordered that a plaintiff's firm's trial group had to contain no fewer than eight and no more than ten cases, and must meet certain other enumerated criteria, in order to obtain a trial listing. As a matter of fairness and to prevent jury confusion, cases from different plaintiff's firms could no longer be grouped together, nor could plaintiff's cases with different diseases, pursuant to the 'separate disease rule', be placed in the same group. An additional refinement of the single disease rule prohibits peritoneal (abdominal) mesothelioma cases from being grouped with pleural (lung) mesothelioma cases. The rationale being that peritoneal

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mesothelioma and pleural mesothelioma are different disease processes requiring different proofs.

In the event that a trial group did reach the minimum eight required cases, the Coordinating Judge would only list the three cases identified by plaintiff's counsel for trial with the other five to seven being relisted if they could not be settled. The overhauled trial grouping protocol also made it more difficult for out-of-state plaintiff's attorneys who would commonly have only a few cases in each disease category to meet the requirements of a trial group, thus having the effect of discouraging filings by plaintiffs with no contacts with the Commonwealth.

Finally, as a corollary to the change in trial grouping, the court "urged" that the parties seek mediation from one of the former judges listed by name in the body of the order. If the plaintiff's firms failed to heed the court's urging to participate in good faith mediation, their group could lose its trial listing. If the defense firms likewise failed to mediate the cases, they could see "an increase in the maximum of three cases consolidated for trial."

With the new operating system installed in the new and improved Mass Torts Program, the court closed the order by stating that it would revisit the changes in November of 2012.

Revolutionary?

On June 18, 2012, the court amended the protocols adapting to the reports from the first three months under the new system. Based on the number of filings in first five months of 2012, the court projected a 60% reduction over the filings from the previous year. According to the June 18th order and report, filings by out-of-state claimants were down 3% in the pharmaceutical program and 1% in the asbestos program. The court noted an increase in "settlement activity" which it attributed to the mediation program. The court also observed that the adoption of discovery rules written with input from the bar resulted in a decrease in discovery disputes.

Purportedly as a result of these observations, the court then rolled back some of the changes put in place just four months earlier. Punitive damages are no longer deferred in pharmaceutical cases. Punitive damages claims in pharmaceutical cases may now be tried if the Coordinating Judge finds that "there are requisite proofs to support the claim going to trial." However, punitive damages are still deferred in asbestos cases.

Major components of the February protocols that were aimed at limiting filings by out-of-state claimants have also been diminished. Expedited listings are restored for all plaintiffs so long as there is a prognosis of imminent death. Also the requirement that the program reach a disposition rate of 80% of cases within 24 – 25 months has been removed. This remains an aspirational goal of the court but the approach has been to address resolution through stricter case management, mediations and settlements, all of which have been successful at resolving cases and preventing any additional backlog thus far.

Discovery must still take place in Philadelphia, but new exceptions are built into the rule for each Mass Tort Program. In asbestos cases, counsel may notice depositions outside of Philadelphia if video or telephone conferencing is available at no expense to the other parties. This is largely how depositions proceeded prior to the February protocols. In pharmaceutical cases plaintiffs must either obtain the agreement of all parties or file a motion for leave to hold the deposition outside of Philadelphia. The motion will be granted upon a demonstration of "good cause." Again, cooperation of counsel has improved the discovery process and fewer motions are being heard.

The court also loosened the restriction on the number of trials *pro hac vice* counsel may participate in. Instead of two trials per year, counsel are now limited to four trials. This restriction only applies to actual trials and does not affect counsel's unfettered ability to participate in pre-trial proceedings. Accordingly, selecting to try cases that require a trial for resolution will not prejudice national counsel for plaintiffs and defendants. Further, in the asbestos program the size and protocols with respect to the trial grouping were maintained and the new version of the single disease rule, even with respect to mesothelioma cases, was retained as well.

Finally, the June order reported that another trial judge will be added to the Mass Torts Program in the fall. With the earlier addition of Judge New, this makes two additions to the Mass Torts judicial pool since the beginning of 2012. By adding additional judicial resources, the court hopes to aggressively reduce the backlog.

Mass Torts 2.0 and Beyond

Like any updated operating system, the changed Mass Torts Program has bugs that must be worked out. It is difficult to see a relation between the initial reasoning for the changes introduced by the February protocols and the amended protocols of June 18th. In February the court identified the problem as a dramatic increase in filings without a corresponding increase in the disposition rate. It further attributed many of the increased filings and backlog in the court to the influx of filings from plaintiffs with no contact with the Commonwealth. In June the court was silent as to increasing its disposition rates. Despite encouraging data relating to the decrease in the projected case filings for 2012, the decrease in filings by out-of-state plaintiffs over the last four months is only 4%. If the numbers and the court's projections bear out, there will still need to be an additional decrease in the number of filings by plaintiff's without any contacts with Pennsylvania or particularly Philadelphia County. Additionally, the court has considered and granted a number of venue motions. However, these motions have only been granted when the other county is a proper venue, has an asbestos program, and trial would not be delayed.

After the court saw a decline in the filings by out-of-state plaintiffs and the slowing of filings by plaintiffs with no contacts with Philadelphia, it seems to have concluded this trend would continue. The court in its June amendments to the protocols essentially rolled back restrictions on filings. It would appear that the court anticipates that its grouping protocols are sufficient to address the issue of being a dumping ground for mass tort cases.

If filings by out-of-state plaintiffs or plaintiff's with no contact with Philadelphia County are controlled by the grouping protocols, then what is left with respect to addressing the backlog issue? The court's June order indicates that it is the sheer volume of the cases. This is implied by the emphasis on the

projected 60% reduction in filings, the addition of another trial judge, and the fact that the mediation protocols and trial grouping methodology remain untouched by the June amendments. Additionally, although the court is hopeful that mediation will continue to reduce the need to use additional judicial resources, the court has left itself the option to reinstate the prior restrictions if the mediation process does not continue to produce results.

Whether or not mediation or any other protocol remains a facet of the Mass Torts Program, the court appears to be dedicated to the very difficult task of making the system not only efficient, but also fair to all of the participants. While there are sure to be more changes before the program is a smooth, user-friendly operating system, the court continues to develop innovative ways to address the issues of the program, retain those portions of the program which are efficient and keep the bar involved as an integral part of its efforts.

WITHOUT A FLOOR THERE IS ONLY A CEILING
Why Defense Counsel Must Offer Affirmative Economic Damages Testimony in Pennsylvania

By Chad Staller, J.D., M.B.A., M.A.C., A.V.A, Center For Forensic Economic Studies, Philadelphia, PA

A frequent conversation I have with defense clients is whether or not the defense should put up an affirmative economic damages number at trial. Defense clients frequently express concern over whether providing a number sets a floor to economic damages and whether the jury will interpret the defense damages figures as an admission of liability. A review of relevant case law and empirical evidence supports my long held belief that in most catastrophic economic damages cases best practices dictate that the defense should present affirmative damages testimony. If this proposition is too radical for your practice, at the very least, you must carefully consider and respond to each aspect of the plaintiff's damages claim, even if you elect not to present your own evidence on damages.

The classic case on this topic is *Texaco, Inc. v. Pennzoil Co*., 729 S.W.2d 768 (Tex. App. 1987). In *Texaco*, Joe Jamail, attorney for Pennzoil Co., won the largest jury verdict in history -- $10.53 billion. The flamboyant trial attorney argued that Texaco wrongfully interfered with Pennzoil's agreement to acquire Getty Oil. A number of factors contributed to the stupendous -- and, many say, unwarranted -- award, but Texaco's defense counsel was mainly faulted for failing to address the issue of damages. Throughout the four month trial, Texaco never once presented evidence to counter Pennzoil's damages claim, nor did it strongly object to the numbers presented to the jury by Pennzoil's two economists. Ever since this decision, the *Texaco* case has served as a stark warning to defense counsel: not proffering evidence on damages is like taking a spin of the Roulette wheel. Unlike casinos where chance is an essential element of the environment (and part of the entertainment value), there is no room for chance in the courtroom environment or in the jury deliberation room.

One big reason why the defense should present a clear alternative to the plaintiff's damages claim has to do with a psychological phenomenon known as anchoring. Anchoring is a cognitive bias which explains the human tendency to subconsciously apply a recently observed number or value to a possibly unrelated question. Nobel Prize winning psychologist Daniel Kahneman and his colleague Amos Tversky designed a famous experiment demonstrating this tendency. They rigged a 100-number wheel of fortune to stop only on 10. They spun the wheel for an audience. They repeated the spin before a different audience, but this time the wheel was rigged to stop at 65. They then asked both groups to guess how many African countries were members of the United Nations. The group that observed the wheel stopping on 10 tended to guess around 25 percent; among the group that saw the wheel stop at 65, almost all guesses were close to 45 percent. There was an undeniably significant correlation between the number each group was exposed to and the guesses made by members of each group. Many similar experiments have confirmed the phenomenon of anchoring bias.

Jury consultants have observed that anchoring bias is a powerful force in the jury room. When asked if defense counsel should present its own damages testimony at trial, Arthur H. Patterson, Ph.D., a Senior Vice President at the jury consulting firm DecisionQuest, said, "absolutely and unequivocally, otherwise the only number the jury has is from the plaintiff." In the absence of an alternate anchor provided by the defense, the plaintiff's numbers will be regarded with more weight from the jury than had the defense proffered and countered with their own damages presentation.

The importance of a strong defense argument on damages was empirically substantiated in a study of 1,000 cases reported in the May 1991 issue of the Journal of Legal Economics. The study showed that the defense benefits overwhelmingly by retaining an economic expert. The absence of testimony from a defense economist when the plaintiff put on a damages expert resulted in awards that were, on average, four times higher than where there was testimony from both sides.

Not mounting a strong defense on damages is especially dangerous in Pennsylvania. The appellate courts have made it abundantly clear that the defense has an obligation to present a coherent and comprehensive damages argument, or face retrial in the event of a verdict favorable to the defense that bears no obvious relation to the damages evidence offered by the plaintiff.

In the wrongful-death action *Schroth v. Karounos,* No. 1012 EDA 20210, Pa. Superior Court, Nov. 10, 2010 (a memorandum opinion), the defendant neglected to dispute the plaintiff's claim for $695,000 in lost household services, paving the way for a new trial on damages. At the original trial,

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Without a Floor

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the plaintiff's economist valued the decedent's lost earning capacity at $509,000, but also offered an alternative scenario that assumed the decedent would not work and would remain at home. Under the alternative scenario, the plaintiff economist testified that the damages for the loss of her household services would be $695,000. The defendant did not offer counter testimony nor did the defense counsel cross-examine the plaintiff's economist on the issue of household services. The defense's cross examination of the economist focused on the probability of the decedent completing college – a peripheral issue that did not adequately challenge the plaintiff's evidence.

The jury awarded $75,000 for past medical expenses under the survival claim, and nothing to the decedent's husband for lost household services under the wrongful-death claim. Plaintiffs argued that the verdict was inadequate, and requested a new trial on damages. The trial court refused to order the new trial, and the plaintiffs appealed. The Superior Court held that the verdict was inadequate. "[T]he jury is not free to disregard proven damages," the court held in ordering a new trial on damages.

In a similar case, *Kiser v. Schulte,* 648 A.2d 1 (Pa. 1994), the Pennsylvania Supreme Court held that a jury verdict of $25,000 for wrongful-death and survival claims was so low as to be "shocking" and upheld an order for a new trial on damages because the defense had not offered any contrary testimony or opposing argument.

The plaintiff's expert economist in *Kiser* testified that the decedent, an 18-year-old woman, would have earned $792,352 as a high-school graduate throughout her lifetime. After adding fringe benefits and household services and subtracting personal maintenance, which he estimated would be 40 percent of income, the plaintiff's economist opined that the total damages for the claim were $571,659. The economist also proffered a second estimate, which factored in the decedent obtaining a college degree, and increased the net economic loss to a total of $756,081. In addition, under the wrongful death claim, the expert put loss of services to the Kiser family at $11,862 to $18,980.

On cross examination, at the request of defense counsel, the plaintiff's economist calculated damages assuming the decedent's earnings would be commensurate with those of a high school graduate and that the decedent would have taken some time off from the work force to raise a family, while also assuming a 70 percent maintenance rate. Under that scenario, the plaintiff's economist determined that the damages would be $232,400.

The Supreme Court concluded that though it is plausible that the $25,000 award represented an award for funeral costs and loss of services, such would be an award under the wrongful-death claim (loss to family members) and would ignore the survival claim (loss to the decedent's estate). Under the survival claim, the decedent's estate is entitled to receive her lost future earning capacity, minus personal maintenance. The Supreme Court held that even assuming the jury intended for part of the $25,000 award to go toward the survival claim, the award would be inadequate in that it would have no basis in trial testimony.

In yet another case, *Rettger v. UPMC Shadyside*, 991 A.2d 915 (Pa. Super. 2010), the Superior Court held that while cross examination of the plaintiff's economist may have placed some of the economist's assumptions in doubt, the cross examination did not adequately address the issues of the decedent's worklife expectancy or earning capacity, and therefore the award of no damages was contradictory to the evidence. The plaintiff's claims were based on economic testimony assuming the decedent would become an accountant. The only contrary testimony was cross examination by the defense focused on the fact that the decedent's eyesight was poor, an issue that the Superior Court noted, would have little impact on his earning capacity as an accountant. Cross examination on peripheral damages issues left the plaintiff's main claims "uncontroverted," and Pennsylvania law requires that the jury award reasonably reflect the proven damages or be deemed inadequate. Thus, the court upheld the lower court's ruling "that the jury's award of zero damages bears no reasonable relationship to the loss actually sustained."

Rettger was retried on the issue of damages. According to the plaintiff's attorney, Paul Lagnese of Berger & Lagnese, at the second trial, the defense did not present testimony from an economist, nor did it offer other witnesses on damages. The retrial resulted in a ten million dollar verdict.

As a practicing forensic economist my opinion might be perceived as being biased on the issue of whether the defense should present evidence on economic damages. However, the above review of juror psychology, the empirical evidence of the effects of expert testimony on damages awards, and the Pennsylvania case law granting retrial on damages, demonstrates that not mounting a strong defense of damages claims is dangerous and could result in either retrial or an unwarranted award. Do not leave your damages presentation at trial up to chance.

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AFTER *COVELL*, WITHER THE "HEEDING PRESUMPTION"?

By Andreas Ringstad, Esquire, Lavin, O'Neil, Ricci, Cedrone & DiSipio, Philadelphia, PA

With the Restatement (Third) of Torts now applicable to diversity cases in the Third Circuit, an unfortunate offshoot of the Restatement (Second) – the "heeding presumption" – is ripe for reassessment. Rooted in Comment *j* of § 402A, the presumption was first predicted by *Pavlik v. Lane Ltd./Tobacco Exporters Int'l,* 135 F.3d 876 (3rd Cir. 1998). The Pennsylvania Superior Court adopted the presumption, but only for workplace asbestos exposure cases. *Coward v. Owens-Corning Fiberglass Corp.,* 729 A.2d 614 (Pa. 1999). That limitation notwithstanding, Third Circuit courts have applied the presumption in a broad range of products cases. *See e.g. Shouey v. Duck Head Apparel Co., Inc.,* 49 F. Supp. 2d 413 (M.D. Pa. 1999). I argue that *Pavlik* should be abandoned, and federal courts should either reject the presumption entirely, or restrict the applicability of the presumption as Pennsylvania appellate courts have done.

The heeding presumption

The heeding presumption states that, had an adequate warning been given about a product's risk of harm, the user would have read, understood, and heeded the warning in order to minimize or avoid injury. The heeding presumption is rebuttable. The burden of proof for proximate cause is thus shifted to the defendant. Rebuttal evidence might be of the user's knowledge of the risk, or his incapacity or impairment.

The presumption is justified on the policy ground that it increases product safety by encouraging manufacturers to be aware of any risks a product may carry, to minimize those risks, and of course, to warn. *See e.g. Coffman v. Keene Corp.,* 628 A.2d 710, 718 (N.J. 1993); *see also* Carrie A. Daniel, *Guide to Defeating the Heeding Presumption in Failure-to-Warn Cases,* 70 Def. Couns. J. 250, 253 (April 2003). The presumption gives added force to the duty to warn by lessening the plaintiff's burden of proof. The presumption suggests that product users are rational, observant of warnings, and highly risk averse.

The Third Circuit's heeding presumption under Pennsylvania law

The presumption first appeared in Pennsylvania law by way of the Third Circuit's prediction in *Pavlik v. Lane Ltd./Tobacco Exporters Int'l.,* 135 F.3d 876 (3rd Cir. 1998). Stephen Pavlik died huffing butane. A Zeus brand butane canister was found near his body. Quite sensibly, the canister warned: "DO NOT BREATHE SPRAY." Other butane canisters found nearby gave a specific anti-huffing warning. Stephen's mother may also have warned him against huffing. Nonetheless, plaintiff alleged Stephen's death was caused by the Zeus can's failure to warn specifically of the extreme hazards of huffing.

The Third Circuit predicted that under Pennsylvania law, plaintiff would be entitled to a heeding presumption. The court pointed to Comment *j* of § 402A, the final sentence of which provides that "[w]here a warning is given, the seller may reasonably assume that it will be read and heeded." According to the Third Circuit, it "follow[ed] logically" that it should be presumed the user "would have read and heeded an adequate warning had one been given by the manufacturer." The court also stated:

> "Since the very idea of imposing strict liability for the failure to warn is premised on the belief that the presence or absence of an adequate warning label will affect the conduct of a product user, it would be illogical, and contrary to the basic policy of § 402A, to accept that a product sold without an adequate warning is in a 'defective condition' . . . while simultaneously rejecting the presumption that the user would have heeded the warning had it been given." 135 F.3d at 883.

Pavlik also noted the "plain statement" of the Pennsylvania Supreme Court in *Davis v. Berwind Corp.,* 690 A.2d 186, 190 (Pa. 1997), that "the law presumes that warnings will be obeyed."

In adopting the presumption, the Third Circuit did not break new jurisprudential ground. Nearly three decades earlier, the Supreme Court of Texas endorsed the presumption in *Technical Chemical Co. v. Jacobs,* 480 S.W.2d 602 (Tex. 1972). More recently, the New Jersey Supreme Court had adopted the presumption *Coffman v. Keene,* 628 A.2d 710 (N.J. 1993), which the *Pavlik* court cited extensively.

Pavlik's reasoning was frail. Comment *j* to § 402A was not intended to recognize or create a heeding presumption. Contextual and historical analysis reveals that Comment *j* was intended to address unavoidably dangerous products, the risks of which could not be designed away. *See* David G. Owen, *The Puzzle of Comment j,* 55 Hastings L.J. 1377 (2004). The final sentence of Comment *j* assured manufacturers of such products that liability would attach only for failure to warn. Attribution of the heeding presumption to Comment *j* is plainly wrong.

Even ignoring that misreading, it is illogical to suggest, as *Pavlik* did, that Comment *j* gives manufacturers any unfair advantage. If a warning is adequate, a failure-to-warn claim fails. The manufacturer has met its duty, and there can be no liability.

Pavlik also proceeded on the dubious assumption that people are rational, observant of warnings, and highly risk averse. That assumption lacks empirical support, and common experience suggests it is wrong. Coffman finessed this point by reference to an "artificial presumption" (a charitable turn of phrase) grounded in public policy. Pavlik offered no Pennsylvania law permitting such a presumption.

Pennsylvania's heeding presumption

Shortly after *Pavlik*, the Pennsylvania Superior Court addressed the heeding presumption in *Coward v. Owens-Corning Fiberglass Corp,* in which plaintiffs alleged that workplace asbestos exposure caused their cancers. 729 A.2d 614 (Pa. Super. 1999). Quoting *Phillips v. A-Best Products Co.,* 665 A.2d 1167 (Pa. 1995), the Superior Court noted that, in general, a plaintiff asserting a failure-to-warn claim "must demonstrate that the user of the product would have avoided the risk had he or she been warned of it by the seller." But the court found that in toxic tort cases, that burden was inconsistent with the objectives of Section 402A: a plaintiff known to be injured by a product might be barred from recovery, and a manufacturer might have no incentive to correct a defective warning. The court found it particularly troubling that the plaintiffs were exposed in the workplace "under circumstances that provided them no meaningful choice of whether to avoid exposure." *Coward*

announced the presumption's adoption in sweeping language: "[W]e now hold that in cases where warning or instructions are required to make a product non-defective and a warning has not been given, the plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning, and that the defendant, in order to rebut that presumption, must produce evidence that such a warning would not have been heeded."

Subsequent Pennsylvania opinions have not applied the presumption beyond workplace asbestos exposure cases. *Viguers v. Philip Morris USA, Inc.,* 837 A.2d 534 (Pa. Super. 2003) (cigarettes); *Moroney v. General Motors Corp.,* 850 A.2d 585 (Pa. Super. 2004), *allocatur denied* 862 A.2d 1256 (2004) (automobile lock system); *Goldstein v. Phillip Morris USA, Inc.,* 854 A.2d 585 (Pa.Super. 2004) (cigarettes); *Gronniger v. Am. Home Prods. Corp.,* 2005 WL 3766685 (Phila. C.C.P. 2005) (pharmaceutical). In the one other opinion where the presumption has been applied – like *Coward*, a workplace asbestos exposure case – the Superior Court simply followed *Coward* without elaboration. *Lonasco v. A-Best Products Co.,* 757 A.2d 367 (Pa. Super. 2000). Neither Coward nor Lonasco mention any warning being given at all, suggesting a further limitation on the presumption's application.

Federal courts and the heeding presumption, post-Coward

Notwithstanding this limitation, federal courts have applied the presumption regardless of whether product use was voluntary. For example, in *Shouey v. Duck Head Apparel Co., Inc.,* plaintiff sued a t-shirt manufacturer's successor-in-interest, alleging failure to warn of the t-shirt's flammability. 49 F. Supp.2d 413 (M.D. Pa. 1999). The court cited *Pavlik*, to which it was bound, and characterized Coward as "demonstrat[ing] that there has been no intervening change in Pennsylvania law which would undermine Pavlik." Applying the heeding presumption would serve what the Shouey court perceived as the primary purposes of Pennsylvania strict liability products law: "easing the plaintiff's burden of proof" and "encouraging manufacturers to provide safe products." The court found the heeding presumption so well-suited to these purposes that it concluded that "when a claim of *negligence* is premised on a failure to provide warnings concerning an allegedly dangerous product, the Pennsylvania courts would hold that the heeding presumption will apply with the same force as when the claim is based in strict products liability." (emph. added); *see also Colegrove v. Cameron Machine Co.,* 172 F. Supp.2d 611 (W.D. Pa. 2001) (paper winding machine); *Fisher v. Walsh Parts & Service Co., Inc.,* 277 F. Supp.2d 496 (E.D. Pa. 2003) (mechanical power press).

Pavlik still echoes through the Third Circuit. *See Schrim v. Campbell Soup Co.,* 2007 WL 2345288 (W.D. Pa.); *Facciponte v. Briggs & Stratton,* 2011 WL 614761 (M.D. Pa.). In *Facciponte,* the most recent opinion citing *Pavlik,* the court did not overtly refer to the presumption, although it denied summary judgment for a generator manufacturer in part because of an issue of fact as to the decedents' knowledge of the risk of carbon monoxide poisoning. Presumably, this was an attempt by defendants to rebut the heeding presumption.

The heeding presumption post-*Covell*

Covell has been much discussed, and no in-depth explication is required here. Suffice it to say that a federal court following *Covell* will now apply the Restatement (Third) to strict product liability claims in diversity suits under Pennsylvania law. The question is whether *Pavlik's* heeding presumption should survive that change. It should not.

To begin with, the textual basis for the heeding presumption – § 402A's Comment *j* –does not exist in the Restatement (Third). *See* Comment *i*. In fact, Comment *j's* oft-cited sentence about the heeding presumption is referred to in the § 2's Reporters' Notes, Comment *l* as "unfortunate language." And although the Restatement (Third) does not reject the heeding presumption by name, Comment *a* to the Reporters' Note to § 15 states:

> *Requirement of causal connection between defect and harm.* The basic rules governing causation in products liability litigation are the same as those governing tort law generally. It is unnecessary, therefore, to draft a set of causation standards limited in application to products liability; the prevailing rules and principles of causation may be applied in products litigation. Defect-related increases in harm are sufficiently unique to the products liability field to warrant separate, special treatment. See § 16(c). Otherwise, the general rules governing causation in tort law should suffice.

The heeding presumption, of course, subverts the basic rules of tort causation, and should be disapproved of under the Restatement (Third).

There are at least two philosophical bases under the Restatement (Third) for rejecting the heeding presumption. First, the Restatement (Third) deemphasizes warnings as a means to achieve consumer safety. Comment *l* to the Reporters' Notes to § 2 favorably cites Professor Latin's position that "warnings should only be used as a supplement to a design that already embodies reasonable safety and not as a substitute for it." If so, courts should not subsidize warning claims by reducing the burden on plaintiffs to show proximate cause, because from a policy perspective doing so will send plaintiffs' attorneys barking up the wrong tree. Second, the Restatement (Third) recognizes that it is possible to over-warn about a product's risks. Comment *i* states that "[p]roduct warnings and instructions can rarely communicate all potentially relevant information," and that the appropriate level of detail in a warning should be determined contextually, with reference to the cognitive limitations and varied backgrounds of expected users. This suggests that the law should encourage thoughtful, realistic product warnings. To the contrary, the heeding presumption places the burden on manufacturers to warn against all conceivable dangers, regardless of what the manufacturer may perceive to be the usual consumer calculus of use, because under the heeding presumption the plaintiff gets a free pass on causation where a warning was not supplied. Thus, the heeding presumption is incompatible with the Restatement (Third).

Apart from its inconsistency with the Restatement (Third), there are constitutional and procedural arguments for abandoning *Pavlik*. These arguments must be offered here with more than a trace of irony, given the Third Circuit's apparent disregard of them in *Covell.* The commonsensical formulation would be: *Pavlik* should be abandoned because its version of the heeding presumption, developed in a flawed prediction 15 years ago and before our state courts had spoken on the subject, is very different

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After *Covell*

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from the presumption as it has actually developed under Pennsylvania law. A loftier formulation – beyond the scope of this article – would invoke federalism, basic principles of fairness, and concerns about forum shopping, and would repeatedly name a Great Lake bordering our Commonwealth. It might also point out – with some puzzlement why the case law has not addressed this – that Federal Rule of Evidence 302 mandates that "[i]n civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law."

If *Pavlik* is abandoned, the question remains whether Pennsylvania's heeding presumption will survive under the Restatement (Third). For the same reasons cited for the *Pavlik* presumption, the Pennsylvania presumption is at odds with the Restatement (Third). Thus, Third Circuit courts will find themselves either 1) following the presumption despite its dissonance with the Restatement (Third), or 2) rejecting the presumption, thereby ignoring statutory and Supreme Court law (again, relating to that most proximate Great Lake). Given that the Pennsylvania heeding presumption applies so narrowly, the former option seems much more palatable. Thus, the federal courts should abandon *Pavlik's* broad heeding presumption in favor of a presumption that applies only in the narrow circumstances contemplated by *Coward*.

PENNSYLVANIA EMPLOYMENT LAW UPDATE

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

Third Circuit holds that an employer's consistent use of efficiency ratings as a basis for determining which employees would be laid off mandated dismissal of plaintiff's claims of reverse race discrimination and retaliation.

Stites v. Alan Ritchey, Inc., 2012 U.S. App. LEXIS 1286 (3d. Cir. January 23, 2012)

The Third Circuit upheld summary judgment in favor of an employer in three employees' claims of reverse race discrimination and retaliation. The plaintiffs alleged that Asian employees were treated more favorably than non-Asian employees and that the plaintiffs' terminations were the result of race discrimination. In upholding the dismissal of their claims, the Third Circuit noted that the employer used a software program that calculated an individual employee's efficiency rating based on the number of items serviced by that employee in a given time period. As a result, when the company initiated reductions in force—which were necessitated by a steady decline in the volume of work at its facility—it conducted a "Reduction in Workforce Analysis," which ranked the employees based on their efficiency ratings, regardless of race. In holding that the employees failed to demonstrate that the employer's reason for their terminations was a pretext for racial discrimination, the court reasoned that during each reduction in force, both Asian and non-Asian employees were laid off, an Asian employee was likewise laid off for low efficiency ratings within three weeks of the alleged adverse employment decision at issue in the lawsuit. The employees admitted that they could not dispute the efficiency ratings at issue. In addition, in upholding dismissal of the plaintiffs' retaliation claims, the court noted that the employees complained several times over the years and, as a result, the complaint prior to the layoff was "merely coincidental."

Third Circuit holds that the district court erred in denying plaintiff prejudgment interest and refusing to modify the verdict to reflect negative tax consequences in an age discrimination case.

Marcus v. PQ Corp., 2012 U.S. App. LEXIS 1136 (3d. Cir. January 19, 2012)

The employees prevailed at trial and were, collectively, awarded approximately $2 million in monetary damages. Following the trial, the employer appealed the jury's finding, and the employees appealed the court's denial of prejudgment interest and the court's failure to mold the verdict to compensate the employees for their increased tax burden as a result of a lump sum award. The Third Circuit upheld the verdict in favor of the employees, holding that "[w]hile some language in the instructions, read in isolation, strayed from the stringent but-for standard" for proving an age discrimination claim, as articulated by the Supreme Court in *Gross v. FLB Financial Services, Inc.*, the court mentioned "but for" or "because of" no fewer than four times, and the instructions as a whole correctly stated the burden of proof. The Third Circuit further found that the district court erred in not awarding prejudgment interest or compensation for negative tax consequences. In so holding, the Third Circuit stated the district court "failed to recognize the presumption in favor of prejudgment interest and offer a valid reason for departing from it." Similarly, the Third Circuit noted that they "reach[ed] a similar conclusion with respect to the issue of negative tax consequences, even though there is no presumption in favor of an adjustment to account for them, because the district court did not acknowledge the differing interests in compensation and punishment."

District court dismisses teacher's claims of race and national origin discrimination following the school's non-renewal of her employment contract.

Garcia v. Mariana Bracetti Academy Charter School, 2012 U.S. Dist. LEXIS 29286 (E.D. Pa. March 6, 2012)

The district court granted a charter school's motion for summary judgment on a former teacher's claims of race and national origin discrimination, harassment and retaliation. Specifically, the employee alleged that the school's principal harassed her and caused her not to receive a new employment contract following the academic school year. In addition, the employee alleged that she complained to community officials regarding the alleged discrimination and that her employment was terminated in retaliation for making those complaints. The court, however, disagreed with the employee's contentions and held that the "plaintiff has not provided

any evidence from which a fact finder might reasonably disbelieve defendant's articulated reasons for not renewing the employment contract; actually, plaintiff admits to most of the actions upon which defendant based its decision." In so holding, the court rejected the employee's proffered affidavit from a former employee, which certified that he heard the school's principal make a derogatory comment about the plaintiff, reasoning that the affidavit makes no indication when the comment was made or whether the comment was in any way related to the alleged employment decision. Moreover, the court expressly noted that it was the school's chief executive officer who made the decision to not offer the plaintiff a renewed employment contract based on an independent assessment of the employee's work performance. The court, likewise, rejected the employee's retaliation claim. In so holding, the court reasoned that her alleged complaints to public officials did not constitute "protected activities" under Title VII and, even if they did, "[s]he does not provide any evidence, aside from her baseless suspicion, that anyone involved in the decision not to renew her contract was aware of plaintiff's complaints to public officials."

Pennsylvania Commonwealth Court holds that there is no cause of action for non-workplace alleged sexual harassment pursuant to the Pennsylvania Human Relations Act.

Oravitz v. Saxonburg Borough, 32 A.3d 891 (Pa. Commw. December 31, 2011)

The Commonwealth Court reviewed a decision from a lower court that sustained the defendant's preliminary objections and dismissed the plaintiff's complaint. The plaintiff filed a complaint with the Pennsylvania Human Relations Commission after a police officer began harassing her by driving by her house and calling her during the middle of the night. When the plaintiff complained to the borough, the complaints were assigned to the officer alleged to have harassed her. After the plaintiff was provided with a right-to-sue letter, she initiated the action in court. In response, the defendant filed preliminary objections, arguing that there was no cause of action for non-workplace sexual harassment pursuant to the Pennsylvania Human Relations Act. In upholding the dismissal of the plaintiff's claim, the court noted that Pennsylvania courts may use federal court decisions interpreting parallel federal statutes as persuasive authority and that the public accommodations provision of Title VII has not been interpreted as applying to sexual harassment or sexual discrimination claims. In addition, the court reasoned that if the General Assembly intended for discrimination, based on sex, to include non-workplace sexual harassment in the context of public accommodation, it could have included specific language in the Act.

WORKERS' COMPENSATION UPDATE

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

Petition to reinstate total temporary disability benefits must be filed within 500 weeks of suspension.

Palaschak v. WCAB (US Airways); No. 1699 C.D. 2010 (Pa. Commw. filed January 23, 2012); opinion by Judge Leavitt

The claimant's total disability benefits from a 1992 work-related neck injury were suspended on February 5, 1996, following his return to work in a full-time position which paid wages equal to or greater than his pre-injury wages. He continued to work for the employer until March 2006, when he was placed on restrictions that the employer could not accommodate.

The claimant thereafter filed a reinstatement petition, alleging that his work injury caused a loss of earnings, along with a modification claim petition. The judge denied these petitions, finding that they were time-barred since they were filed more than 500 weeks after benefits were suspended.

On appeal, the claimant argued that there is no time bar to seeking total disability benefits under § 413(a) of the Act. The court disagreed, finding that this provision specifies that where compensation benefits have been suspended because the employee's earnings are equal to or greater than the pre-injury wage, reinstatement of benefits must be sought during the time period for which partial disability benefits are payable, which is 500 weeks. A different time period applies under § 413(a) where benefits are modified, as in that situation the claimant has three years from the last payment of compensation to file a reinstatement petition. Although the court acknowledged that there may be no sound policy justification for the 500-week limitation on further claims in the case of suspension and not modification, nonetheless, it held that the plain language of the statute and long-standing case precedent must be followed.

The claimant further contended that, since he was limited to performing a light-duty job during the ten years of employment post-injury, he should have three years to seek reinstatement. The court rejected this argument, noting that the Act speaks only to the amount of wage loss benefits, not the type of work performed.

Suspension of benefits based upon a claimant's withdrawal from the workforce requires proof of intent to not return to work. An application for a disability pension and a failure to look for work is insufficient proof of intent.

City of Pittsburgh v. WCAB (Marinack); No. 100 C.D. 2011 (Pa. Commw. filed February 7, 2012); opinion by Judge Leavitt

The claimant, a firefighter who sustained a work-related torn rotator cuff, an aggravation of lumbar disc disease and a psychological adjustment disorder, was fired from his job when he failed to disclose that he was earning wages in construction while collecting disability compensation. The employer filed a suspension petition on the basis that the claimant had removed himself from the workforce, citing his application for a

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disability pension, which was denied due to his firing and his lack of effort to find a job.

The judge granted the employer's petition on this basis. The Board reversed, and the Commonwealth Court agreed. The court emphasized that it is the employer's burden of proving that a claimant has withdrawn from the workforce. To meet this burden there is no presumption of such withdrawal when a claimant applies for or collects a disability pension, whereas there is a presumption when a claimant accepts a retirement pension. The employer failed to meet, according to the court, the difficult burden of proving intent to withdraw from the workforce, which must be established before any consideration of the failure to look for another job. In this case, the court held that the employer did not show that, under the totality of circumstances, the claimant had withdrawn from the workforce.

The three-year limitations period to correct an NCP bars the claimant from seeking to add PTSD as an original work injury. Doctrine of equitable estoppel does not toll statute of limitations without proof of fraud or misrepresentation. However, the claimant may assert an aggravation of pre-existing PTSD upon proof of injury caused by abnormal working conditions.

Dillinger v. WCAB (Port Authority of Allegheny County); No. 770 C.D. 2011 (Pa. Commw. filed March 1, 2012); opinion by Senior Judge Freedman

The claimant sustained a left shoulder strain when assaulted by a passenger on a port authority bus she drove for the employer. The claimant treated with a social worker for emotional complaints as a result of the assault, as well as continuing issues with abusive passengers. The employer paid for this treatment but did not acknowledge a mental health injury. The claimant ultimately signed a final receipt and supplemental agreement suspending her benefits. More than three years later, she filed a petition to review compensation benefits, alleging she suffered PTSD due to her original work injury. A claim petition was also filed, alleging an aggravation of PTSD due to continued interaction with the public as a bus driver for the employer.

The judge found the claimant established that she suffered PTSD as a result of her original work injury, which was exacerbated by her ongoing job duties. In particular, the judge acknowledged the claimant's fear that the assailant from the original incident had now been released from prison and had made threats against her. The judge concluded PTSD existed from the outset of the work injury and should have been listed on the NCP. The alternative claim petition was dismissed as moot.

On appeal to the Appeal Board, the judge's decision was reversed on the basis that the review petition was untimely, having been filed outside the three-year statute of limitations. The Commonwealth Court affirmed the decision of the Appeal Board, finding that under *Fitzgibbons v. WCAB*, 999 A.2d 659 (Pa. Cmwlth. 2011), a party must file a petition to correct the NCP within three years of the most recent payment of compensation. Since the claimant had clearly failed to file the review petition within the indicated time period, the review petition was untimely. The court also rejected the argument that, since the claimant had simultaneously filed a reinstatement petition as to her shoulder injury, this petition extended the time within which to seek review. This argument was rejected because the reinstatement petition, too, was not filed within three years of the last payment of benefits. The doctrine of equitable estoppel also did not apply to toll the statute of limitations since the claimant did not allege fraud on the part of the employer.

The Commonwealth Court did hold, however, that the Appeal Board erred in denying the cross-appeal of the judge's decision, which had found that the claim petition seeking aggravation of PTSD was moot. The court held that a claimant with a pre-existing injury is entitled to benefits by showing that the injury has been aggravated by a working condition. The court remanded this issue back to the judge to determine whether the claimant's PTSD was caused by abnormal working conditions as required to establish a psychic injury.

The judge's rejection of URO is upheld based on a finding that further chiropractic treatment was not reasonable and necessary where the claimant had 450 sessions over three years with no improvement in and actual worsening of pain complaints. The court decided that a medical doctor is competent to judge chiropractic treatment.

Leca v. WCAB (Philadelphia School District); No. 679 C.D. 2011 (Pa. Commw. filed March 7, 2012); opinion by Judge McCullough

The claimant, a school police officer, injured his low back while trying to break up a fight. The employer accepted liability for the injury. Three-and-a-half years later, and following 450 chiropractic sessions, the employer filed a utilization review request to determine the reasonableness and necessity of ongoing chiropractic treatment. The utilization review found in favor of the claimant, and the employer appealed.

Before the judge, the employer offered medical evidence from orthopedic surgeons about the claimant's extensive degenerative disc disease, lumbar stenosis and radiculopathies, resulting in constant pain and numbness, despite ongoing, six-days-a-week chiropractic treatment that did not result in any overall improvement in the claimant's pain complaints. In granting the employer's petition, the judge found the medical reports of the orthopedic doctors credible and persuasive, citing to their qualifications and opportunity to physically examine the claimant.

The claimant challenged this decision, first arguing that the judge erred as the employer's experts did not evaluate the chiropractic treatment under review. The court rejected this point, finding that the chiropractic treatment was repetitive and ongoing and that the experts reviewed numerous records indicating that such treatment did not result in increased function or decreased pain. Moreover, under Section 306(f.1)(6) of the Act, prospective utilization review of treatment is appropriate.

The claimant also contended that the orthopedic experts' opinions should not be considered because they were not of the same discipline as the provider under review, as required by Section 306 (f.1)(6)(i) of the Act. In the court's opinion, that section applies only to the initial utilization review by the UR organization and not a challenge to the

UR decision. Instead, as long as the physician is competent to testify in the area of medicine under review, a judge may consider such evidence.

Pennsylvania Supreme Court concludes that the word "compensation," as used in Section 314 (a), does not per se include payment of medical benefits.

Giant Eagle, Inc. v. WCAB (Givner); No. 14 WAP 2010; decided March 13, 2012; opinion by Justice McCaffery

The claimant sustained a work injury and began receiving wage loss benefits. Later, the employer filed a suspension petition, alleging the claimant failed to attend the physical examination it scheduled. The petition was granted by a WCJ, and the claimant was ordered to attend the physical examination. The employer also stated that if the claimant failed to attend the examination without good cause, the failure could result in a suspension of his benefits.

The claimant violated the order and did not attend the examination. The employer filed another petition, requesting a suspension of the claimant's benefits. The judge granted the petition, and a suspension of wage loss benefits was ordered. Arguing that medical expenses should have been suspended as well, the employer appealed to the Workers' Compensation Appeal Board. The Appeal Board dismissed the appeal, concluding that medical expenses are considered compensation under the Act when an employer has not yet been determined to be liable but are not considered compensation when liability has already been established.

The Commonwealth Court affirmed. However, it also held that a judge could, within his or her discretion, suspend both medical and wage loss benefits pursuant to § 314 (a).

The Supreme Court held that, under proper circumstances, compensation under § 314 (a) may include medical benefits as well as wage loss benefits. The court viewed § 314 (a) as a discretionary mechanism to order a claimant to attend a physical examination or expert interview. The court, in analyzing § 314 (a) within its proper context, exploring its plain language and applying principles of statutory construction, concluded that the term "compensation" as used in § 314 (a) need not always include medical benefits or, for that matter, wage loss benefits.

Claimant is not entitled to automatic resumption of temporary total disability benefits due to the end of a light-duty funded employment job if claimant already received maximum 500 weeks of partial disability benefits for the work injury.

Michael Sladisky v. WCAB (Allegheny Ludlum Corp.); 67 C.D. 2011; filed May 15, 2012; opinion by Judge Leavitt

The claimant sought a reinstatement of temporary total disability benefits because the light-duty job he was working ended. The employer had funded this job. Eventually, the claimant was laid off when the employer could no longer fund the position. Thereafter, the claimant filed a petition seeking a reinstatement of temporary total disability benefits.

Although the claimant had already received 500 weeks of partial disability benefits, the WCJ granted the reinstatement petition, concluding that, because the claimant was working a funded employment job, he was not required to show that his physical condition had worsened. Although the claimant admitted that he was physically able to perform the job, the judge concluded there should be an exception because the claimant was working in a funded employment position.

The Workers' Compensation Appeal Board reversed and held that the fact that the claimant was working a funded employment job was immaterial. According to the Board, because 500 weeks of partial disability benefits had already been exhausted, the claimant's burden of proof was to show a worsening of his medical condition, which he failed to do.

The Commonwealth Court agreed and affirmed the Board's decision. The court rejected the claimant's argument that claimants working a funded employment job should automatically be eligible for total disability benefits upon elimination of the job. The court stated that there was nothing untoward about funded employment, that it was a legitimate way to bring an injured claimant back to work and reduce his disability from total to partial.

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