COUNTERPOINT

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Somebody's Watching Me: Defending Data Breach Claims

By Robert J. Cosgrove and Adam J. Gomez[1], Philadelphia PA

I'm just an average man, with an average life; I work from nine to five; hey hell, I pay the price
All I want is to be left alone in my average home; But why do I always feel like I'm in the Twilight Zone?
Somebody's Watching Me (1984) – Rockwell

INTRODUCTION

It took 20 years for Rockwell to be prophetic, but privacy, the right to be left alone,[2] is everywhere in the news. Bar journals scream out on a daily basis the need for attorneys to understand the cybersecurity marketplace and one can't open a newspaper or turn on a television without news of the latest cyber-attack and resultant data breach of a Fortune 500 company. But, with all of this noise, we think it can be difficult for attorneys, insurers and claims professionals to fully appreciate just what's at stake and to understand just what to do about it. In this essay, we hope to explain what's involved in data breach claims and discuss some of the ways in which data breach claims can be litigated.

WHAT THE HECK IS PII?

Any discussion of data breach claims begins with the phrase "personally identifiable information" ("PII").[3] PII is basically information or data that allows an individual to be identified as a particular individual and not as simply part of a group. In the U.S., PII includes an individual's name, gender, contact information, date of birth, marital status and spoken languages. This U.S. definition is narrower than, for example, the definition of PII in the European Union, where PII includes data that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or data concerning sex or health life.

In the data privacy world, the entity that collects the data is called the "data collector." Once that PII is collected, the business, agency or entity that does something with the PII becomes the "data processor." A data processor can include a third-party entity that is given the PII by the "data collector" to make some use of. In the U.S., the "data collector" has the ultimate obligation both to ensure that PII is not wrongfully disseminated and to ensure that if a breach does occur steps be taken to control the breach. The overlooked reality of PII is that almost any database maintained by any business, agency or entity is going to include PII (even something as simple as the Pennsylvania Defense Institute's customer database or newsletter subscription list).

What then is a data breach? A data breach

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A Brave New World of Cyber War and Hacking Insurance: An Exploration into the Current State of Cyber Insurance

By Scott J. Tredwell[1] and Anthony Canale, McCormick & Priore, P.C., Philadelphia PA

In December of 2014 audiences across the United States were disappointed to learn that Sony Entertainment would not be releasing their controversial film "The Interview". Of course, we all know that Sony ultimately did release the film, but not before it was leaked to the public. It's a strange timeframe. The movie was advertised, withdrawn, leaked, and then released in select theaters amongst fear and hysteria. It's curious that all of this chaos was the result of several cyber attacks. Sony executives were likely screaming, in the words of Seth Rogen's character Aaron Rapoport: "They honey-potted us!" The attack on Sony consisted of threats to personal safety, stolen data, and the disclosure of many embarrassing email threads. It was later determined that the North Korean government was behind the whole debacle, and at that point Sony put "The Interview" back into theaters. A hacker working under the color of a foreign government complicates legal matters, but this incident again brought the damaging effects of a cyber attack

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is an incident wherein PII has been lost or subject to unauthorized acquisition, access, disclosure or destruction in a manner that compromises its security, confidentiality or integrity. We like to think of data breaches as rogue hackers breaking into a network under cover of darkness. But that's only one type of data breach. A data breach can occur if a smartphone, tablet or laptop (with, for example, medical records) is lost or even if medical records from a personal injury lawsuit are not properly shredded. If a data breach occurs (and subject to the specifics of local rules), the data collector must disclose the nature of the incident, the type of PII breached, any assistance the data collector is offering to recover the PII, the steps the individual can take to protect against the wrongful use of PII and a point of contact.[4]

WHY SHOULD I CARE?

There are three basic reasons why you need to understand this brave new world:

First, the amount of PII that exists has increased exponentially since 2000.[5] This makes sense when you consider that in 2000, the vast majority of Americans were still using dial-up internet services and the first iPhone was only released in June 2007. As our devices get smaller and faster and our ability to transmit the data through the internet or cell phones grows, the amount of PII collected and stored will only increase.

Second, no matter what efforts are taken, it is almost impossible to prevent a data breach.[6] Data breaches typically occur because of human error (e.g. a mislaid laptop) or a dedicated criminal attack. While you can take steps to minimize your exposure to a data breach (by, for example, creating a privacy program)[7], the reality is that you can no more guarantee that a data breach will not occur than you can eliminate the risk that a plaintiff will slip and fall on ice on even a well plowed driveway.

Third, over the last year, cyber cover has become the next "big" thing. Insurance companies are trying to understand and thereafter issue cyber coverage[8] and the plaintiff's bar is eyeing cyber litigation as its next asbestos.[9] Under such circumstances, failing to understand the risks of PII, data breaches and the potential theories of litigation would be a mistake.

HOW DO YOU MAKE A CASE?

How then do you make a case?[10] We are some time away from the establishment of the archetypal data privacy case, but an examination of recent decisions from throughout the country suggests certain trends in the ways plaintiffs present their claims to avoid their predecessors' pitfalls. More specifically, plaintiffs and their counsel have learned from a host of past dismissals that data privacy claims commonly suffer three legal deficiencies: (1) a lack of standing; (2) an unsuitable or inapplicable theory of recovery; and (3) an indefinite measure of damages. Additionally, at the same time as plaintiffs continue to creatively evolve and refine their claims to avoid these trappings, it appears that the explosion of data privacy litigation in terms of sheer volume has encouraged the courts to focus more on meritorious adjudication than technical compliance.

Standing

It comes as no surprise that the bulk of data privacy jurisprudence focuses on the question of whether victims of allegedly unlawful data collection practices or security breaches have standing to purse their claims in court. In the traditional sense, standing requires the plaintiff to demonstrate "that the challenged conduct has caused [him] *actual injury*."[11] However, in respect of data privacy claims, many plaintiffs commence suit under the auspices that the wrongful collection or dissemination of their private identifiable information *may* cause future harm to their finances or reputations. What plaintiffs usually fail to offer, however, is any evidence that these types of injuries are reasonably likely to occur, much less actually realized. Consequently, the defense of data privacy claims traditionally focused on the plaintiff's lack of standing, and this strategy was largely successful in securing dismissal of the action in that regard.[12]

Until relatively recently, a staple of the defense bar in challenging data privacy claims was found in the United States Court of Appeals for the Third Circuit's decision in *Reilly v. Ceridian Corporation* where the court affirmed dismissal of the plaintiffs' negligence and breach of contract claims on the basis that allegations of possible future injury at some indefinite time are legally insufficient to demonstrate standing.[13] In particular, the court in *Reilly* considered whether employees who had their personal identifiable information stolen after a security breach at a third-party payroll processing company could recover money damages for the chance that their PII could be used to later hijack their identities.[14] In ultimately dismissing the claims, *Reilly* explained that Article III standing requires an "injury-in-fact"; that is, "an invasion of a legally protected interest that is (a) concrete and particularized, *and* (b)

actual or imminent, not conjectural or hypothetical."[15] The court also added that the plaintiffs' claims failed in respect of standing where the breach of security did not create concrete damages "in both a qualitative and temporal sense" that could be "distinguished from merely abstract."[16]

But as unambiguous and ubiquitous as *Reilly* may have been for defense counsel, more recent, high profile litigation has markedly relaxed the "injury-in-fact" standard.[17] For example, the United States District Court for the Northern District of California's decision in *Claridge v. RockYou, Inc.* has become a polestar of sorts for victims of data privacy breaches insofar as the court accepted the argument that PII is a form of consideration exchanged with the defendant so as to facilitate the performance of other contract obligations.[18] In so holding, the court concluded that PII is "exchanged not only for defendant's products and services, but also in exchange for defendant's promise to employ commercially reasonable methods to safeguard the [information] that is exchanged."[19] As a result, the breach of PII constitutes the loss of "some ascertainable but unidentified value and/or property right inherent in the [personal identifiable information]" such that an "injury-in-fact" can be said to have occurred and standing vested in the plaintiffs.[20]

Further, and perhaps more irreverently, the applicability of *Reilly* was all but disregarded in the recent case of *In re. Sony Gaming Networks and Customer Date Security Breach Litigation* where the United States District Court for the Southern District of California elected to supplant the "injury-in-fact" requirement with a "credible threat" standard.[21] In that case, the plaintiffs' commenced suit against Sony when its gaming network was breached by international hackers.[22] Presenting their claims as a class, the plaintiffs argued that standing could be inferred from the fact that their PII was collected by Sony and then disclosed as a result of its negligence in securing the network.[23] Notwithstanding the plaintiffs' inability to demonstrate that any damage had actually occurred as a result of the disclosure of their PII, the court rejected the *Reilly* articulation and instead held that "a plaintiff need only allege a certainly impending injury that is fairly traceable to the defendant's purposed conduct" to withstand a challenge on standing.[24]

As the juxtaposition between *Reilly* and *Claridge* highlights, and the rapid transition to the court's reasoning in *In re. Sony* makes clear, at least some courts throughout the country have found that data privacy litigation is not merely old wine in a new bottle, but rather represents another example where the law must rapidly evolve to accommodate technology. Consequently, if the latter view continues to hold as data privacy concerns grow, it appears that attacks on standing may not be the best way to defend these types of claims.

Theories of Recovery

Recent case law suggests that data privacy claimants have abandoned novel case theories in favor of repurposing tried and true causes of action. For example, using the period of October through December 2013, an analysis of data-related class action lawsuits reveals that even though the majority of litigation concerning data privacy still arises out of federal legislation like the Telephone Consumer Protection Act and the Fair Credit Reporting Act, the most commonly pleaded state-law causes of action have shifted away from deception, unjust enrichment and breach of fiduciary duty to instead focus on standard conversion, breach of contract and negligence.[25]

In respect of the tort of conversion, most data privacy plaintiffs alleging damages as a result of improper data collection argue that the defendant has improvidently profited from use of unlawfully obtained PII. A prime, though unsuccessful[26] example of such claims is found in the case of *In re. iPhone Application Litigation* where a nationwide class of mobile device users brought suit against Apple alleging that, among other things, the company had surreptitiously collected PII like their geolocation data for sale to third-party affiliates.[27] The plaintiffs in *In re iPhone* alleged that their PII and geolocation data was "property capable of exclusive possession" that was inherently valuable to the extent that Apple could profit directly from its sale to third-party affiliates or use it to develop targeted advertisement.[28] Although ultimately unsuccessful in failing to establish this claim, the theory of conversion espoused by the plaintiffs in *In re iPhone* served as an early example of the cause of action in data privacy litigation that today's victims of unlawful data collection have increasingly turned to as a focal allegation.

In addition to conversion, breach of contract has presented itself as a prime theory of recovery in data privacy litigation because the plaintiff's agreement with the defendant obviates the need to establish the rights and responsibilities of the parties with respect to PII, generally. In fact, breach of contract is a uniquely hybrid theory of recovery in data privacy litigation – and therefore quite popular – because it allows the plaintiff to recover for both unsanctioned collection and involuntary disclosure. A seminal example of this hybrid theory was recently articulated in the case of *In re. Google, Inc. Privacy Policy Litigation* where a putative class of every Google account holder between August 2004 and February 2012 argued that Google had breached its privacy policy by implementing an initiative referred to as Emerald Sea.[29] According to the plaintiffs, Emerald Sea was designed to reinvent Google as a social-media advertising company by collecting data from individual Google apps in order to create cross-platform dossier of user data that would then allow third-party advertisers to tailor their advertisements to the specific consumer.[30] Unsurprisingly, Google account holders objected to this use of their PII insofar as Google's original privacy agreement did not provide for the collection of certain types of data by Google-apps, much less the compilation of that data across platforms for sale to unknown third-parties.[31] All told, the court in *In re. Google* ultimately held that these allegations were sufficient to plead a state-law cause of action for breach of contract, and allowed the plaintiffs' claims to survive into discovery.[32]

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Whereas conversion and breach of contract have become standard in unlawful data collection claims, plaintiffs concerned primarily with the consequences of data breaches and disclosure of PII may also turn to common law negligence as a theory of recovery. Generally speaking, data privacy plaintiffs who seek recovery on a theory of negligence assert that the defendant failed to exercise reasonable care in protecting the PII at issue, either by way of inadequate safeguards or lack of timely notification. However, without a uniform standard of care for the protection of PII[33], courts have been left to impart their own states' negligence regimes to hyper-technical questions surrounding the securitization of routers, networks, servers and cloud-based repositories. One such example of negligence at work in data privacy litigation can be found in the case of *In re. TJX Companies Retail Security Breach Litigation,* where the United States Court of Appeal for the First Circuit held that the plaintiffs sufficiently pleaded a *prima facie* case for negligence to the extent that the defendant's retail establishments failed to implement network security features in compliance with those required by the financial institutions that issued its customers' credit and debit cards.[34]

In light of the data surrounding recent privacy litigation, as well as the exemplar cases, it is apparent that plaintiffs claiming damage as a result of the collection or disclosure of their PII are increasingly interested in pursuing recovery under traditional legal theories. In the case of conversion, breach of contract and negligence, specifically, defendants and defense counsel alike must therefore not only be prepared to demonstrate how these legal concepts relate to the plaintiff's specific claims, but also articulate reasons why they are inconsistent with the current state of technology.

Forms of Damages

A corollary to the fact that plaintiffs initially had difficulties in establishing their standing because of indefinite or future injuries is the reality that, at least in some ways, the notion of traditional monetary damages does not fit with data privacy claims. More specifically, even though recent trends suggest that plaintiffs will be allowed to sue for data collection or data breach, they continue to struggle in demonstrating cognizable harm that can be satisfied with a certain specified sum. Of course, this has not necessarily stopped data privacy plaintiffs from pursuing compensatory damages, or even alleging that they should be redressed for unspecified harms or risks. However, those courts that have navigated these disputes and entertained the issue of damages through the initial pleadings phase have suggested that other forms of damages are appropriate in the context of data privacy litigation.

For starters, the United States Court of Appeals for the First Circuit has held plaintiffs may properly pursue so-called "mitigation expenses"; that is, those expenses that victims of data privacy issues incur in order to prevent or cure the adverse effects of having had their personal identifiable information disclosed.[35] In this respect, unsuccessful defendants can expect to reimburse their adversaries for the costs of fraudulent charges, credit monitoring or identity theft insurance.[36] Still, other courts have gone one step further in respect of damages to hold that the breach of privacy agreement may constitute effective rescission of the contract such that the plaintiff is entitled to reimbursement of any and all paid premiums or user fees.[37] Finally, plaintiffs exercising a private right of action under federal or state legislation may be entitled to costs, attorneys' fees or statutory damages on a case-by-case basis.

An appropriate understanding of damages is undoubtedly crucial to a sound defense no matter the nature of a case. But an appreciation of damages in the context of data privacy is arguably more important where many clients have not yet forayed into such litigation and may struggle to grasp their ultimate exposure. Moreover, effective advocacy for alternative dispute resolution or settlement demands competency with respect to the available forms of damages so as to best position clients to quickly and cost-effectively resolve highly public litigation that can often have far-reaching consequences beyond the courtroom.

CHANGES ON THE HORIZON?

The biggest challenge to cyber litigation in the US is that there is not a single privacy framework or law that controls the arena. Most federal action arises out of the Federal Trade Commission, but the scope of the FTC's powers are unclear.[38] Other federal statutes such as the Children's On-line Privacy Protection Act (COPA), Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM), Health Insurance Portability and Accountability Act (HIPA) and Family Educational Rights and Privacy Act, a/k/a the Buckley Amendment (FERPA) also have roles to play. On the local level, every state has taken a different approach to handling cyber claims and many states are considering redrafting their current cyber legislation.[39] The 100 pound gorilla in the corner is what the federal government is going to do and whether it is going to create new legislation that preempts the field. This appears to be the White House's intent as set forth in its recent publication C*onsumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*[40], but as of the writing of this piece it is a long way from a White House proposal to the creation of an actual bill that can pass both House and Senate.

CONCLUSION

I always feel like somebody's watching me
I want my privacy
Woh, I always feel like somebody's watching me
Who's playing tricks on me.

Somebody's Watching Me (1984) – Rockwell

In this modern age, where we transmit personally identifiable information almost nonstop, "somebody is [always] watching me." The challenge for lawyers, insurers and claims professionals is

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how to manage the unique challenges presented by PII. Few things in life are certain, but we think it is safe to say that where the opportunity to make money through litigation presents itself, plaintiffs (and their attorneys) will find ways to attempt to make it. The responsibility for minimizing the damage and ensuring that courts and juries do not overreach themselves rests with the defense bar.

ENDNOTES

[1]Robert J. Cosgrove, a CIPM/CIPP-US, is the managing partner of Wade Clark Mulcahy's Philadelphia office. Adam Gomez, a CIPP-EU, is an associate in WCM's Philadelphia office.

[2]"The right to be left alone—the most comprehensive of rights, and the right most valued by a free people." Supreme Court Justice Louis Brandeis, *Olmstead v. U.S.,* 277 U.S. 438 (1928).

[3]*See generally*, *U.S. Private-sector Privacy: Law and Practice for Information Privacy Professionals,* Peter P. Swire and Kenesa Ahmad.

[4]*See generally*, *Foundations of Information Privacy and Data Protection: A Survey of Global* Concepts, Laws and Practices, Peter P. Swire and Kenesa Ahmad.

[5]http://www.technologyreview.com/news/514351/has-big-data-made-anonymity-impossible/

[6]http://www.ey.com/Publication/vwLUAssets/EY*Data_Loss_Prevention/$FILE/EY_Data_Loss_Prevention.pdf*

[8]*See generally*, http://www.insurancejournal.com/news/national/2014/07/14/334442.htm.

[9]*See generally*, https://www.justice.org/membership/litigation-groups.

[10]For purposes of this essay, our focus is on plaintiff claims filed against a data collector. Obviously, government claims or enforcement actions that can arise from a data breach are even more prevalent than third-party claims. We will address these types of claims and how to respond to a data breach in a separate essay.

[11]Black's Law Dictionary (9th ed. 2009), available at Westlaw BLACKS (emphasis added).

[12]*See, e.g. Reilly v. Ceridian Corporation*, 664 F.3d 38 (3d Cir. 2011); *LaCourt v. Specific Media*, 2011 WL 1661532 (C.D. Cal. 2011); *In re. Science Applications International Corp. Backup Tape Data Theft Litigation*, 2014 WL 1858458 (D.C. 2014).

[13]*Reilly*, 664 F.3d at 42.

[14]*Id*. At 43.

[15]*Id*.

[16]*Id*.

[17]*See e.g. In re. Sony Gaming Networks and Customer Data Security Breach Litigation*, 996 F.Supp.2d 942 (S.D. Cal. 2014); *Claridge v. RockYou, Inc.*, 785 F. Supp.2d 855 (N.D. Cal. 2014).

[18]*Claridge*, 785 F.Supp.2d at 860-861.

[19]*Id*.

[20]*Id*. At 865.

[21]*In re. Sony Gaming Networks and Customer Data Security Breach Litigation*, 996 F.Supp.2d at 962-963.

[22]*Id*. At 962-963.

[23]*Id.*

[24]*Id*. At 963.

[25]Shahin Rothermel & David Zetoony, *Managing Legal Risks: Trends in Data Privacy & Security Class Action Litigation*, February 2014.

[26]Though ultimately unsuccessful in sustaining their conversion claims, one cannot help but speculate that developments in California state law recognizing property interests in personal identifiable information would lead to a different result today.

[27]*In re. iPhone Application Litigation*, 844 F.Supp.2d 1040, 1050-1051 (N.D. Cal. 2012).

[28]*Id*. at 1052.

[29]*In re. Google, Inc. Privacy Policy Litigation*, 2014 WL 3707508 (N.D. Cal. 2014).

[30]*Id*. at 3-4.

[31]*Id*.

[32]*Id*.

[33]President Barack Obama has recently announced his intention to spearhead a federal data privacy framework that has at its heart a Consumer Privacy Bill of Rights. Putting to the side the fact that such a construct is some time in the making, the fact remains that federally standardizing data privacy will in some ways relieve plaintiffs of the burden to demonstrate a reasonable level of care in the industry of data management. *See White House Announces Federal Fata Privacy Framework as Additional Breaches Signal Litigation*, available at <http://blog.wcmlaw.com/2015/01/white-house-announces-federal-data-privacy-framework-as-additional-breaches-signal-litigation/>.

[34]*In re. TJX Companies Retail Security Breach Litigation*, 564 F.3d 489, 494 (1 Cir. 2009).

[35]*See Anderson v. Hannaford Brothers Co.*, 2011 WL 5007175 (1 Cir. 2011).

[36]*Id*.

[37]*See Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11 Cir. 2012).

[38]See*, http://www.thelegalintelligencer.com/id=1202719474359/Third-Circuit-Weighs-Novel-Cybersecurity-Case?slreturn=20150204064430*.

[39]*Compare*, New York's approach as set forth in *Financial Federalism: The Catalytic Role of State Regulators in a Post-Financial Crisis World*, Benjamin M. Lawsky, Superintendent of Financial Services for the State of New York, http://www.dfs.ny.gov/about/speeches_testimony/sp150225.htm with Pennsylvania's Breach of Personal Information Notification Act 73 P.S. §§ 2301, *et seq*.

[40]http://www.whitehouse.gov/sites/default/files/privacy-final.pdf

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into the limelight.

It is often the case that data stolen from large corporations, such as Sony, contains personal identifiable information that compromises thousands, if not millions, of everyday people's financial well-being. Hackers have taken the upper hand in the technology security struggle. Initially, victimized companies were forced to look to their commercial general liability policies (CGL) for coverage. Insurers have only recently begun to roll out specialized cyber liability policies to supplement the shortcomings of the traditional CGL policy. For those who are left looking for coverage under CGL policies, there are several problems. The body of law on applicable insurance coverage in this area is rapidly developing. Nonetheless, the recently decided matter of *Zurich v. Sony*[1] demonstrates that finding coverage under a CGL policy is still an uphill battle.

The cyber attacks surrounding Sony's "The Interview" are by no means the first bouts that the goliath corporation has had to endure in this Brave New World of Cyber Insurance. By way of background, Sony's "Play Station" system was previously hacked, leading to stolen personally identifiable information, such as credit card numbers.[3] Sony sought defense and indemnification for multiple class action suits brought by the aggrieved credit card holders. In response, Zurich filed a declaratory judgment action seeking a determination that it did not owe coverage, because Sony's alleged claims were the result of their own disclosure of private or confidential information.[4] The parties argued at great length in regards to the meaning of "disclosure." The presiding judge found that disclosure is an action taken by a party, and because Sony was illegally hacked, the disclosure of private and confidential information was not the result of any action or omission on the part of Sony.[5] Therefore, the court held that it would be rewriting the agreement between the parties if coverage could be triggered by the acts of third parties.[6]

Even if the *Sony* opinion is not well received throughout the country, insurance carriers, presumably not wanting to litigate the applicable

coverage issues, have now incorporated exclusions into CGL polices which seek to preclude coverage for cyber liability claims. For instance, ISO has implemented multiple exclusions to CGL policies crafted from ISO forms.[7] These exclusions aim to limit the exposure of the insurers to more traditional business related risks.[8] As an example, ISO Exclusion CG 21 07 05 14 excludes from coverage losses arising out of access to or disclosure of personal and confidential information.[9] Insureds who rely on CGL polices may therefore be left with little to no alternative coverage options.

Accordingly, to protect themselves from cyber liability claims, companies have been purchasing cyber liability policies at higher rates than ever before.[10] Such policies provide coverage for a variety of losses, expenses, claims, etc., including loss of digital assets, non-physical business interruption and extra expenses, cyber extortion threats, security event costs, network security and privacy liability coverages, employee privacy liability coverage, electronic media liability coverage, and cyber terrorism coverage.[11] Covered causes of loss include accidental damage or destruction, administrative or operational mistakes, computer crime, and computer attacks.[12] However, many smaller businesses are likely not to be able to afford the coverage that most accurately reflects their exposure. The issues surrounding the high cost and low availability of such policies are discussed below.

Cyber insurance is an expensive proposition for any organization seeking coverage.[13] It has been estimated that cyber-insurance products sell in the range of $10,000 to $35,000 per $1,000,000 of coverage.[14] However, in exchange for those premiums insureds can receive coverage in amounts that range from $20,000,000 to $50,000,000.[15] Insurers offer custom policy limits that can reach as high as $200,000,000 in coverage.[16] Smaller businesses may be exposed to a great amount of risk even though their client base is significantly smaller than a national retailer. If a small business is seeking broad coverage in the amount of two million dollars their premiums could be as high as $70,000 per annum. This is certainly not a cost most small businesses can afford. For that reason, those types of businesses will likely continue to rely on their current CGL policy.

A business entity without cyber liability coverage will be faced with a potentially financially crippling situation in the event a cyber-attack is found to be outside the scope of such an organization's CGL coverage. The estimated average cost per attack is $9.4 million dollars.[17] This figure includes the cost to resolve disputes arising from the data breach.[18] To put that number into perspective, a data breach can yield losses of approximately "$145.00 per compromised record."[19] In the United States, attacks have cost up to $246.00 per exposed document.[20] These figures do not take into consideration application of feasible remedies which courts have not yet had occasion to consider, such as costs for the victims' credit monitoring.[21] The application of such remedies will serve to make an already devastating financial loss even worse. That extensive loss is the same loss feared by the insurance industry, and that fear is based on a lack of actuarial certainty in the underwriting process. Currently, the actuarial certainty that guides premiums in other insurance pools has not yet been achieved in the cyber liability arena. Therefore, insurers are rightfully hesitant to write policies that are aimed exclusively at redressing the injuries suffered from a data breach. As evidenced by the premiums set out above, insurers who are willing to explore this novel risk class are doing so with extreme caution. This approach materializes in the form of massive premiums. However, there is some hope that the risk class can be served more effectively and at a more reasonable cost. Recently, Willis Re lunched a new analytics platform that purports to offer a solution to the current shortfalls of the cyber underwriting process.[22] Willis' "PRIMS-Re" system uses the most recent data available to "estimate the frequency of data breaches and the potential severity of insured losses arising from those events."[23] While the development of such a platform is surely well received news to the industry and its clients, the fact remains that the PRISM-Re system is novel and unproven. Until such time as the PRISM-Re system, or other systems, allows insurers to offer affordable and broad data breach coverage, insurers and insureds must both continue to operate within the current paradigm of uncertainty.

Boiled down to its most simple elements, the problem with cyber insurance is twofold: high costs associated with risk and an absence of reliable metrics by which to assess that risk. Neither of these elements is easily remedied. The high cost of a data breach should no longer be a foreign concept to any responsible small business owner, let alone a corporate director. The costs associated with the risk of a data breach are likely to remain high. New threats will emerge even as new technologies aimed at prevention develop. Regulations will continue to be implemented in an attempt to secure individual privacy. With regulatory schemes that require reporting of breaches comes a wave of class action suits.[24] Many leaders in the field are of the mindset that it is not a matter of if class actions will be brought, but rather a matter of how many actions will be brought.[25] The latter concern is currently being explored with some success as demonstrated by the release of Willis' PRISM-Re. This metric platform is likely to be followed by several other systems presented by other large insurance and risk analysis groups.

We live in a Brave New World of Cyber War. On one side of the battle there are large corporations willing, and able, to spend millions of dollars to protect consumer and other valuable data. On the other, slightly darker side hackers hatch schemes to break down the firewalls and pull off what is arguably the most valuable heist of all time. Who will emerge victorious remains to be seen. We can, however, be certain that the war has just begun, and that there are many tough battles ahead.

While this uncertainty remains, the wise elect to protect with insurance. Sony is likely no exception. Whether and to what extent Sony is able to recoup any losses from their latest security breach will likely depend on how much it and

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its insurers learned from their earlier experiences with cyber-terrorism.

Therefore, the risk class should be seeing some relief in the form of adjusted premium costs and more wide spread availability of coverage options. The costs associated with the risk of a data breach are likely to remain high. New threats will emerge even as new technologies aimed at prevention develop. Regulations will continue to be implemented in an attempt to secure individual privacy. Regulatory and system security measures aimed at curbing cyber risk are not likely to minimize potential liability such that specific cyber liability policies would become superfluous.

Going forward, the industry will be closely watching risk aggregation systems like PRISM-Re. These systems are in their infancy and will likely not be effective in measuring risk comprehensively for some time to come. These aggregation systems cannot be improved without new data to measure. Improvement of the systems will only be achieved through the purchase of specialty policies and the litigation of the same. Specifically tailored cyber liability policies should be a top priority for businesses that can afford the security such policies offer. In the wake of current litigation, it will likely become far more difficult to argue that data breaches fall under the traditional CGL policies. The purchase of cyber liability insurance will improve the metrics through which premiums are set while simultaneously giving insurers a vehicle to demand increased security measures on the front lines. Such demands will inevitability accelerate the development of prophylactic measures on the I.T. side of the battlefield. Therefore, in an effort not to be "honey potted", insurers must retain competent counsel to ensure that the policies they have issued continue to reflect the level of risk which they intended to insure.

ENDNOTES

[1]Scott J. Tredwell, Esq. is a Senior Shareholder of McCormick & Priore, P.C.

[2]*Zurich Amer. Ins. Co. v. Sony Corp.*, Index No. 651982/2011 (N.Y. Supr. Ct. Feb. 21, 2014).

[3]*Id.* at 31-32.

[4]*Id.* at 3-4.

[5]*Id.* at 72-73.

[6]*Id.* at 80.

[7]Insurance Law Journal, *ISO Comments on CGL Endorsements for Data Breach Liability Exclusions*, Ins. L.J., July 2014, at 2.

[8]*Id.*

[9]*Id.*

[10]Ponemon Institute, *Managing Cyber Security as a Business Risk: Cyber Insurance in the Digital Age*, Ponemon Institute (Aug. 2013), *available at* http://www.ponemon.org/blog/managing-cyber-security-as-a-business-risk-cyber-insurance-in-the-digital-age.

[11]AmWINS Grp., *What is Cyberliability?*, http://www.amwins.com/SiteCollectionDocuments/Client%20Advisories/Client_Advisory-What-Is-Cyberliability.pdf.

[12]*Id*.

[13]Ruperto P. Majuca et al., *The Evolution of Cyber-insurance*, Univ. of Ill. at Urbana-Champaign, at 7, http://arxiv.org/ftp/cs/papers/0601/0601020.pdf.

[14]L. D. Simmons II, A *Buyer's Guide to Cyber Insurance*, McGuire Woods, LLP. (Oct. 2, 2013), http://www.mondaq.com/unitedstates/x/267482/Insurance/A+Buyers+Guide+To+Cyber+Insurance. The evolving nature of the cyber-insurance market is easily identifiable through the comparison of a shift in premium rates between 2006 and 2013. In 2006 the cyber-insurance premiums were said to range from $5,000 to $60,000 per $1 Million of coverage. *See, supra n. 7* at 7. This can likely be attributed to the matured understanding of how to quantify the risk associated with the issuance of a cyber-insurance policy.

[15]Lawrence a. Gordon, martin p. loeb & tashfeen sohail, *A Framework for Using Insurance for Cyber-Risk Management*, Communications of the acm Mar. 2003, at 81, 83.

[16]*Id.* Gordon, Loeb, and Sohail also note that insureds wishing to accumulate larger sums of insurance for cyber related losses can purchase multiple products to reach their insurance needs until such time as the market has developed enough to allow for more accurate aggregation of risk. *Id.*

[17]Ponemon Institute, *supra* n. 10 at 7.

[18]*Id.*

[19]Tim Wilson, *Ponemon: Cost Of A Data Breach Rose To $3.5M In 2013,* Dark Reading (May 16, 2014) http://www.darkreading.com/attacks-breaches/ponemon-cost-of-a-data-breach-rose-to-$35m-in-2013/d/d-id/1251019.

[20]*Id.* Some professionals in the legal field believe the figure to be closer to $200 dollars, but the true value per document will surely depend on the facts of the case, and what types of documents were compromised. *See*, *Gina Passarella & David Gialanella*, *The Cost of Cybersecurity: Risks and Responses on the Rise*, The Legal Intelligencer, Feb. 17, 2015, http://www.thelegalintelligencer.com/id=1202717956494/The-Cost-of-Cybersecurity-Risks-and-Responses-on-the-Rise#ixzz3TFMdpqpQ.

[21]"In assessing whether credit monitoring services in the context of data breach cases are recoverable in negligence, courts have generally analogized to medical monitoring cases. . . ." *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 2014 WL 223677 (S.D. Cal. Jan. 21, 2014). Therefore, it is likely that states that allow for the recovery of cost for medical monitoring will allow for the recovery of the analogous cost of credit monitoring. *See, Id.* The Third Circuit, on the other hand, has found that Plaintiffs' who only assert potential future losses do not have standing in negligence and breach of contract actions. *See Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011).

[22]*Willis Re Launches Cyber Risk Modeling Tool-PRISM-Re*, Ins. J. (Feb. 03, 2015), http://www.insurancejournal.com/news/international/2015/02/03/356223.htm. The PRISM-Re system takes into account several factors to offer an individualized assessment of potential liability to a given insured. *Id*. The aggregation model can also predict the effects of a "'cyber hurricane' or 'cyber-tsunami'." *Id*. This combination of individualized and "big picture" assessment offers insurers much needed information to apply in the underwriting process while offering insureds the benefit of lower rates through increased predictability across the risk class.

[23]*Id.*

[24]*Gina Passarella & David Gialanella*, *The Cost of Cybersecurity: Risks and Responses on the Rise*, The Legal Intelligencer, Feb. 17, 2015, http://www.thelegalintelligencer.com/id=1202717956494/The-Cost-of-Cybersecurity-Risks-and-Responses-on-the-Rise#ixzz3TFMdpqpQ.

[25]*Id.*

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Tincher: The Death of *Azzarello*. The Birth of Hope Within Another Unworkable Construct. And a Proposal to Return Pennsylvania Product Liability Law to Simple, Easy to Apply Legal Principles

By Bill Ricci, Ricci, Tyrrell, Johnson & Grey and Tom Finarelli, Lavin, O'Neil, Cedrone and DiSipio, Philadelphia PA

In the few months since *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (2014) was decided, so much has been written about it that the page count of the commentary is approaching the page count of the opinion. Yet here we are adding to the page count. Why? Because we think the alternative proof of defect approach *Tincher* announces is an issue-creating step backward.

We also have something nice to say about *Tincher*, and not just that it is the most interesting 137 page[1] product liability opinion we've ever read. *Tincher* provides a basis for hope, because the court's insistence on allowing the law to develop, coupled with the demise of *Azzarello*,[2] presents an opportunity for Pennsylvania product liability law to return to a comprehensible, rational, and easy to apply set of legal principles. Our goal is to make both points, in several thousand fewer words.

THE HISTORY

As anyone reading this likely has a fair understanding of the topic, we will not waste words on a detailed discussion of the development of product liability law in Pennsylvania. Nor will we quote Hume on partitions of labor. If you are interested in either topic then pages 355 to 375 of the *Tincher* opinion are the place to go.

What we will do is tell you that in those pages you can find the single most important concept to be derived from the history of product liability. It is this: Product liability is negligence-based. The implied warranty cause of action mimicked by strict liability was a legal fiction, developed to protect consumers unable to prove negligence in manufacturing: "In the beginning, [the corrupt food and drink] decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. The various devices included . . . an implied representation that the food was fit for consumption because it was placed on the market . . ." Restatement, Second, of Torts § 402A, Comment *b* (quoted in *Tincher* at 358).

When later those same consumers were permitted to bring their product-related actions in tort, the courts continued the legal fiction. They had no need to. Product liability was not a new cause of action. It was a negligence cause of action, requiring proof of every element of a negligence cause of action – duty, breach, proximate cause, injury, and damages. The lone variation was in the proof required to establish breach. In a product liability action, that element can be established without proof of negligence on the part of the manufacturer.

Labeling product liability "strict liability" does not alter the logic of the underlying legal principle. To paraphrase *Azzarello*, strict liability is just a label, applied when for policy reasons proof of actual negligence is not required. The rationale for allowing recovery remains the same. Sale of a defective product represents a "breach of duties imposed by law as a matter of social policy." *Tincher* at 400, quoting *Ash v. Continental Insurance Co.*, 932 A.2d 877, 884 (Pa. 2007) (internal quotation marks omitted).

The duty breached is the same duty imposed on society as a whole: to act reasonably for the protection of others, because a reasonable manufacturer would not sell a defective product. A manufacturer proved to have done so is deemed to have committed the equivalent of a negligent act. In that respect, product liability truly does employ a hindsight test. It is negligence with the *scienter* element removed. *See, Bugosh v. I.U. North America, Inc.*, 971 A.2d 1228, 1238 (Pa. 2009), Saylor, J. dissenting (citing Owen, *Design Defects*, 73 Mo. L.Rev. at 353-360, summarizing the works of Deans Keaton and Wade).

But labeling product liability strict liability did alter the perception of the cause of action, with unfortunate consequences. With product liability made to appear conceptually distinct from negligence, "rhetoric emerged not only to distinguish strict liability from its negligence roots, but also to excise negligence principles and terms (such as foreseeability) from strict liability theory." *Tincher* at 366. The result was "a focus in strict liability theory that ultimately turned upon a statutory construction-type analysis of the Second Restatement." *Id.* That, the court says, has "proven antithetical to the orderly evolution of our decisional law, one that must be responsive to new problems, perspectives, and consequences." *Id.*

With those issues in mind, we address the court's view of the first step in that orderly evolution, the court's holdings.

THE HOLDING(S)

The court lists four. The first is the headline grabber. *Azzarello* "is hereby overruled." *Tincher* at 335. Simple enough, though 41 pages later the court appears to add a qualification, limiting this holding "to the extent the pronouncements in *Azzarello* are in tension with the principles articulated in this Opinion." *Id.* at 376. The court offers no reason for that qualification, either there or in the five pages of "observations" that follow it. As we read them, those five pages contain not one word complimentary of *Azzarello*, which tells us "the pronouncements in *Azzarello*" are totally in tension with *Tincher.* We think it therefore safe to say we have heard the last of *Azzarello.*

Of the remaining three holdings, two require little discussion. Declining to adopt the Third Restatement is less a holding than it is a decision to put the issue on hold. It will arise again, in a different factual context, before a court with at least two new members. When and how it will be resolved is anyone's guess. Nor are trial judges again "relegated" to their "traditional role." *Tincher* at 335. They were never removed from that role. Limited to its

holding, as decisions should be, *Azzarello* changed the wording of permissible jury instructions, nothing more. And as will be explained, it is *Tincher* that casts trial judges in a new role, difficult to play, requiring them to analyze design complexity and to identify the ordinary consumer.

That leaves the most talked about holding. It begins unremarkably, the court concluding that a plaintiff pursuing a product liability claim "must prove that the product is in a 'defective condition.'" *Tincher* at 335. And it ends unremarkably, setting the twin production and persuasion burdens at "a preponderance of the evidence." *Id.* In between is anything but unremarkable, providing two alternative proof of defect tests, later described as "the ordinary consumer's expectations or . . . the risk-utility of a product." *Id.* at 401. Our view of that follows.

THE COMBINED TESTS

We begin with what we see as a fallacy in the court's analysis. The court's "New Strict Liability Construct" allows for the simultaneous pursuit of "a consumer expectations or risk-utility theory, or both." *Id.* at 406 (internal quotation marks omitted). Therein lies the problem, because neither of those is a theory. Strict liability is a theory. Consumer expectations and risk-utility are analytical tools, employed to determine whether the evidence establishes the facts necessary for recovery under a strict liability theory.[3]

So the court's new construct is not that a plaintiff may pursue one recovery under two separate legal theories. It is that a jury may make one factual determination by engaging in two separate analyses. Except what should be one factual determination may under the new construct turn out to be two factual determinations, and two inconsistent determinations at that, because a jury could find a defect under only one of those analyses, in effect concluding the product was simultaneously defective and non-defective.

The new construct is then a potentially illogical construct. And why a court would intentionally create a system that allows for inconsistent factual findings we are at a loss to explain, because it is also an unprecedented construct.

The court suggests it is not unprecedented, dismissing the criticism it no doubt anticipated in a single sentence: "Obviously, other examples of such decisional paradigms exist." *Id.* at 408 (citation omitted). Apparently not in tort law. Because in the thirteen months and four days that passed between oral argument and decision the number of other examples the court found in tort law would be zero. To find a similar decisional paradigm the court was forced to resort to a criminal statute.[4]

The analogy is less than perfect. Heat of passion and imperfect belief of self-defense are two different states of mind. If either is present when another's life is taken, the act of taking that life constitutes a breach of the statutory prohibition against voluntary manslaughter. There is by comparison only one condition that constitutes a breach of the common law duty in a product liability action based on a design defect - an unreasonably dangerous condition.

Assuming heat of passion and imperfect belief of self-defense are ever presented as alternative findings in the same criminal proceeding, the jury would be asked to decide breach of the statute by making two separate factual determinations. The jury would most certainly not be asked to make either of those determinations by employing two separate analyses. To the extent the new product liability construct might require juries to do just that it arrives on the scene lacking not just logical support. It also lacks legal support.

THE CONSUMER EXPECTATIONS TEST

The possibility of inconsistent jury findings is not the only challenge *Tincher* presents to trial judges. *Tincher* also leaves them with the decision on which test (or tests) the jury should employ, and the opinion provides little in the way of concrete guidance. Falling back on its professions of judicial modesty and a belief that the common law should develop incrementally, the court offers only vague generalities.

The consumer expectations test, for example, is said to be inapplicable in two situations. One is the product "whose danger is obvious or within the ordinary consumer's contemplation." *Id.* at 388. Why an individual injured while using a product that poses an obvious risk should be entitled to any recovery is unexplained, but *Tincher* appears to suggest that a judge making an obvious risk determination should allow the claim to proceed, instructing the jury to evaluate the product by engaging in a risk-utility analysis.

Likely more troublesome for trial judges will be the other situation. The consumer expectations test is said to fall short as a means to evaluate "a product whose danger is vague or outside the ordinary consumer's contemplation . . .." *Id.* We are not at all certain what a vague danger is, and the court's explanation is equally vague, describing it as "characteristic of products of relatively complex design." *Id.* (citation omitted). And with that picture of imprecision the court has created another issue, all but guaranteeing that in every case in which only one party prefers a risk-utility analysis, the trial judge will be faced with deciding a motion to have the product's design deemed relatively complex.

Those cases for which the consumer expectations test is found suitable also raise questions, among them who exactly is the test consumer, described within the space of a single page as the "average or ordinary consumer," the "ordinary consumer," and the "reasonable consumer?" *Id.* at 387. Among the "considerations relevant to assessing the reasonable consumer's expectations is "the identity of the user." *Id.* (citations omitted). If the product is one used by a narrow class of individuals, the test consumer would then be an "average" or "ordinary" or "reasonable" member of that class. But the jury might include no member of that class, and so would have no experience-based foundation for evaluating our hypothetical consumer's expectations.

That very real possibility creates a preliminary factual issue, and again the court offers no guidance on how to resolve it. Presumably the party favoring

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the consumer expectations test would attempt to fill the gap with evidence, relying perhaps on the user's stated expectations, on testimony by other users describing their expectations, or on opinions from self-proclaimed consumer expectations experts. The other party might object, offer evidence to the contrary, or both. And the trial judge would be at sea, trying to determine relevance, sufficiency, and how to instruct the jury.

The consumer expectations piece of the new construct thus leaves many questions unanswered. For that we can thank judicial modesty, the court's view that the common law should develop incrementally, and the role to be played by the bar in that process, advocating for principles applicable to a specific factual setting.[5] On to the risk utility piece.

THE RISK UTILITY TEST[6]

Based on a plain reading of *Tincher*, it is unclear how exactly the risk-utility test will be applied. In the beginning of its discussion the court identifies Pennsylvania as a jurisdiction that applies "a test balancing risks and utilities or, in economic terms, a cost-benefit analysis." *Tincher* at 389 (citations omitted). The pages that follow include a description of the test as one permitting a *post hoc* analysis of the manufacturer's conduct and, after a leap with no discernible logical connection, a recitation of the test's "theoretical and practical shortcomings." *Id.* at 390.

But neither in that discussion nor in its announcement of the "new construct" does the court endorse a specific set of considerations for a risk-utility test. We suspect the apparent reluctance to do so is again due to the court's belief in allowing the law to develop from case-specific application, and in this context we agree. If going forward the risk-utility test is to be part of the process in all but the few cases involving products of the simplest design, the factors to be taken into consideration in evaluating the product will vary, making a single, definitive, applicable-in-all cases list impossible to compile. So while judges might prefer an approved list from which to instruct the jury, leaving them to create their own list of factors tailored to the evidence in the case before them seems a more practical approach.

GOING FORWARD

Whatever our view of *Tincher,* the fact remains that there's a new construct in town, and we need to make the best of it. The dual approach it offers seemingly allows each side to pick the one that best suits its position. Counsel favoring the suitability of the consumer expectations test will argue against either the complexity of the product's design or the obvious nature of the risk, the two factors *Tincher* identifies as eliminating that test.

As counsel for the manufacturer you are more likely to find yourself on the other side of that issue, with opposing counsel arguing for consideration of consumer expectations. If the court were to accept the plaintiff's position, you could in theory have the jury instructed on both tests. *See, e.g., Mikolajczyk v. Ford*, 901 N.E.2d at 356 (finding error in refusing defendants' request for a risk utility instruction; though the plaintiff had "chosen her theory of liability (design defect) and her method of proof (consumer expectation). She may not choose defendants' theory of defense . . . or their method of proof (risk utility).").

That raises the possibility of a finding that the product was both defective and not defective, and *Tincher* does not say what verdict should then follow. The implication, given the court's use of the voluntary manslaughter example, is that the determination of defect would prevail. But as the court never acknowledges the possibility of inconsistent findings, it offers no logical support for that implication, leaving unresolved an issue of its own creation.[7]

Looking long term, the objective should be to be free of *Tincher*, we hope in far less time than it took to be free of *Azzarello.* That requires an alternative approach, and in the immediate future the Restatement Third is not a candidate for a one size fits all solution.

Where that leaves us is with some variation of the Restatement Second formulation. We happen to favor one in particular. Perhaps you're familiar with it. A defective condition is one that renders a product unreasonably dangerous.

Consider that for the twelve years following *Webb v. Zern*, 220 A.2d 853 (Pa. 1966) those words worked very well. They were only found unsuitable for juries in *Azzarello*, now overruled, on the basis of an assumption, now recognized as illogical. "Nor did the *Azzarello* Court explain the leap in logic necessary to extrapolate that every lay jury would relate reasonableness and other negligence terminology, when offered in a strict liability charge, to a 'heavier,' negligence-based burden of proof. Jury charges are generally delivered orally to ordinary citizens, and not by written transmission to be pored over by scholars or lawyers aware of other forms of liability not always at issue." *Tincher* at 377 (citation omitted).

Consider too that those words present an uncomplicated test. There is no preliminary issue of the ordinary consumer, or of his expectations. There is no list of factors to balance. And each of those two words is capable of being understood, without additional definition, by the ordinary citizens on the receiving end of jury instructions. The hypothetical reasonable/unreasonable person comparison is the one made in every negligence case. Even the consumer expectation test uses the word reasonable to define either the acceptable level of expectations or the nature of the ordinary consumer, and the risk in the risk-utility test is synonymous with danger.

Consider finally that the deservedly discredited *Azzarello* aside, we have yet to see a rational explanation for the abandonment of unreasonably dangerous. *Tincher* certainly provides none. If you sort through the 20 plus pages of justification for the new construct you instead see sentences like this one: "Essentially, strict liability is a theory that effectuates a further shift of the risk of harm onto the supplier than either negligence or breach of warranty theory by combining the balancing of interests inherent in those two causes of action." *Tincher* at 402.

No, it isn't. Strict liability is a theory that allows the risk of harm to be placed on the supplier when doing so satisfies the interests of a negligence cause of action, changing only the proof necessary to establish breach of duty. There is no balancing with the interests inherent in a breach of warranty action, because there are no such interests. Breach of warranty as a basis for a product liability claim was a legal fiction, created as a solution to the problem adoption of strict liability solved.

A product liability action's standard of proof need not reflect that "duality of purpose." *Tincher* at 402. It needs to reflect one purpose. It needs to permit recovery without proof of negligence, if and only if the product was supplied in a defective condition unreasonably dangerous to the user. Not that the court's "core insight" to the contrary is original. *Id.* It was "pioneered," perhaps coincidentally, perhaps not, in 1978, by the Supreme Court of California. *Id.*, citing *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). We need not remind you what happened the last time our Supreme Court looked to California for guidance in a product liability action.

The court's new construct, like *Azzarello* before it, is a far from acceptable result. The consumer expectation test, particularly if presented in combination with risk-utility, introduces needlessly complicating factors, and raises legal and evidentiary issues for which the court has provided little to no guidance.

Azzarello is dead. Restatement Second is alive. It permits recovery in the absence of fault when a product in a defective condition unreasonably dangerous to the user causes an injury. The job of the trial judge, as *Tincher* reminds us, is to explain the law in terms the jury understands. Defective condition and unreasonably dangerous are terms the jury understands. So long as the Third Restatement formulation lacks majority support, the simplest, most legally justifiable and rational solution is strict liability's original construct. Because as we learned from *Azzarello*, new is not necessarily better.

ENDNOTES

[1]The number 137 represents the number of pages in the opinion as distributed by the court. All other page references are to the opinion as published in the Atlantic Reporter.

[2]*Azzarello v. Black Brothers Co.,* 391 A.2d 1020 (Pa. 1978).

[3]*See Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 349 (Ill. 2008) ("The expression 'theory of the case' does not refer to the plaintiff's theory of liability. It refers, instead, to each party's framing of the issues and arguments in support of its position. It is, therefore, well established that while a plaintiff is entitled to an instruction setting out her own theory of the case, based on her theory of liability and her chosen method of proof, she may not unilaterally preclude the giving of a jury instruction that presents the defendant's theory of the case . . .").

[4]18 Pa.C.S. § 2503, listing "heat of passion" and "imperfect belief of self-defense" as criminal states of mind.

[5]The hands off approach has some merit, and it might seem less troublesome had the court remained consistent in its approach. But in turning to consumer expectations the court took the opposite approach, exhibiting no judicial modesty, ignoring the law's incremental development, and paying scant if any attention to the efforts of the bar. The result is just another unfortunate and *Azzarello*-like chapter in Pennsylvania's product liability history, the "integration . . . of an alternative, freestanding, skeletal consumer-expectations test . . . in the absence of essential advocacy to support a decision of this magnitude." *Id.*, Saylor, J. dissenting, at 411, n.1.

[6]Our use of the phrase chosen by the court is not to be taken as agreement with it. While utility may have some bearing on the particular design feature under attack, we believe risk benefit to be the more precise description. *See, e.g.*, *Tincher* at 338 (describing testimony by defense experts that "net benefits" of the chosen design provided "marked advantages over" the plaintiffs' proposed alternative).

[7]The issue has not been left unresolved everywhere. It was made a non-issue in *Mikolajczyk,* cited in *Tincher* as a source of the "considerations relevant to assessing the reasonable consumer's expectations." *Tincher* at 387 (citing *Mikolajczyk*, 901 N.E.2d at 336). Had the court read on it might have noticed that *Mikolajczyk* also discusses the formulation of the risk-utility test set forth in the Restatement Third. *Mikolajczyk*, 901 N.E.2d at 352. Adopting the Restatement formulation, under which consumer expectations is a factor, the Supreme Court of Illinois concluded that the jury should be instructed on the risk-utility test, and only on the risk-utility test, when the evidence was "sufficient to implicate [it]." *Id.* at 353.

Playing a Workers' Compensation Game: Accept the Challenge of Predicting the Judicial Outcomes of the Leading Cases of Employment Workers' Compensation Decisions in 2014

By Joseph E. Vaughan and Thomas R. Bond, O'Hagan LLC, Philadelphia PA

With considerable frequency in workers' compensation litigation, the question of whether the injured worker was in the course of his or her employment at the time of injury is at issue. During 2014, Pennsylvania's Commonwealth Court issued a number of opinions where this issue was present. The judicial reasoning reflected in these case dispositions provides us with important guideposts in dealing with matters involving the course of employment issue.

Rather than taking the more traditional approach in constructing case summaries, let's have a little fun with the topic at hand and see whether we can accurately predict case outcomes based upon the fact patterns of the most important course of employment cases decided by the court in 2014. The court's disposition of these cases will be revealed later in this article. Don't peek!

Fact Pattern No. 1: Management Employee Pursues Attempted Robbery Suspect After He Leaves Employer's Store

The decedent was employed by a Parkway Service Station. He was in a management position. On the date of his death, he arrived early at the employer's store at the request of a co- worker who had asked for his assistance in correcting a prior mistake made on the cash register.

While the decedent was at the coffee machine, an individual reached over the counter where a co-worker was standing and attempted to grab cash out of the cash register. The co-worker shouted

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Playing a Workers' Compensation Game

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and the thief ran out of the door, with the decedent and several other workers chasing after him.

The decedent pulled out his gun as he approached the fleeing suspect's vehicle and told him to stop. The suspect started driving away and, upon impact, the decedent's body was thrown onto the hood of the car for 20 to 25 feet, before falling off the hood and being run over.

Over the years, there had been many attacks and robberies at this location. The decedent and other employees at the store always carried a gun while working, and were never specifically told not to carry a gun at work. Employer handbooks prohibiting this activity were never distributed to the employees. About two years before this incident, the decedent used a firearm to stop an attempted robbery and he was not fired. Based upon these facts, would you conclude that the decedent was in the course of employment at the time of this incident?

Fact Pattern No. 2: Worker Sustains Stroke Falling on Employer's Premises Before Start Time

The claimant regularly arrived at work considerably earlier than his scheduled start time in order to avoid heavy traffic during the morning commute. Other employees, including the company's owner, similarly arrived early. The Workers' Compensation Judge (WCJ) found that claimant's typical arrival time was somewhere between 6:30 and 7:30 AM, and that his shift began at 8 AM.

On the date of injury, upon arrival at work around 6:30 AM, the claimant entered the office building where he worked in order to retrieve a clean uniform. After placing the uniform in his car, claimant fell on ice in employer's parking lot while returning to the office causing him to suffer a left-sided stroke from shoulder to foot. The precise time of the fall could not be established, but it was definitely before 6:40 AM.

What say you, course of employment, or not?

Fact Pattern No. 3: Worker Injured While Accessing a Parking Facility Where Her Parking Fees Were Partially Covered by Employer Subsidies

The claimant sustained injuries when she was accessing a parking facility where she maintained a parking space for which she partially paid, with the balance of the fee subsidized by her Employer through a parking program established for its employees.

In addition to the parking facility used by the claimant and some of her co-workers, the employer also subsidized another parking facility close to its location, as well as providing a subsidy program for employees using public bus transportation.

The parking facility where the claimant was injured was not open to the public. While the great majority of the parking spaces available were being used by employees of the employer, another company also made some of the remaining spaces available to its workers.

The claimant was not required by the employer to use this parking lot. Further, the employer had not caused this facility to be used by the claimant in the performance of her work duties.

It is also to be noted that the employer had no responsibility with respect to the custody, control, or maintenance of the parking facility.

The employer had connected a skywalk to its parking facility for the convenience of its workers.

Yea or nay as to whether the claimant was in the course of employment in this scenario?

Fact Pattern No. 4: Cable Technician Injured in an Accident on His Way to the Main Office of His Employer

The claimant worked as a cable technician for his employer and was responsible for installing cable and internet services in customers' homes or businesses during his workday.

The claimant was provided a company vehicle to travel from his home to his employer's main office where he would check in, pick up his assignments and equipment, and then proceed to the installation locations for that day. Claimant was not permitted to use the vehicle for any other purpose, and was not permitted to have passengers in the car.

The claimant was injured in single vehicle accident while traveling from his home to the employer's main office.

Generally speaking, employees traveling to and from their place of business are not considered to be in the course of employment. Do you think this general rule would apply in this particular situation?

Fact Pattern No. 5: **Restaurant Worker Bitten by Temperamental Dog on Employer's Premises**

On the date of injury, the claimant, a line cook, arrived at work and proceeded to review the specials for the day with the chef.

One of the claimant's co-workers stated that her father would be stopping by with her dog. Claimant went outside to have a cigarette after the dog had arrived at the restaurant. While on his smoke break, claimant had a conversation with the co-worker's father. He told the claimant that the dog had a tendency to "snap" at people. Despite this, the claimant proceeded to get permission to pet the dog. The claimant testified that, "he was not going to knowingly pet a mean dog or put himself knowingly in harm's way." He then put out his hand to see if the dog would be receptive. The claimant proceeded to pet the dog and let the dog lick his face. When the claimant went to stand up, however, the dog growled and bit claimant's lower lip.

The claimant and his co-workers were permitted by the employer to take smoke breaks while working. At the time of the dog bite incident, the claimant was in an area provided where his co-workers also smoked. The employer had supplied an ashtray tower for the use of the workers. The claimant was approximately three feet away from the ashtray tower, and was smoking a cigarette when he was bitten by the dog.

In reaching out to pet this dog despite being informed of its tendency to "snap" at people, was the claimant

taking himself out of the course of his employment? What do you think?

Fact Pattern No. 6: Claimant Injured While Traveling to a Regular Safety Meeting Into Which "Special Meeting" Content Had Been Incorporated

The employer held two types of safety meetings: monthly meetings and "stand-down" meetings. The monthly meetings were mandatory and held at the same time each month. The claimant admitted that attending the monthly meetings was part of his regular work duties. The "stand-down" meetings were only scheduled when serious accidents or fatalities occurred. They were not held frequently and were not generally posted on the employees' schedules.

On the date of injury, the claimant's supervisor had decided to consolidate a "stand-down" meeting and the regular, previously scheduled monthly safety meeting.

The claimant sustained a brain injury as a result of being involved in an automobile accident while traveling to his place of employment for this meeting.

Do you think the fact that the consolidation of the irregular, as-needed "stand-down" meeting with the regular monthly safety meeting brought the travel of the claimant to attend into the "special mission" exception to the "coming and going" rule?

Fact Pattern No. 7: **Mother Employed by Disabled Son Through a State-Funded Program Savagely Attacked by the Son**

Under a state-funded program the claimant was employed by her son (employer). Under the terms of this program, the claimant was to provide attendant care for her employer at her residence in exchange for an hourly wage. The claimant provided these services 64 hours a week. This care was rather encompassing, including assisting him with his transfers and providing personal care, providing assistance with bathing and dressing, doing laundry, preparing meals, and providing transportation. Under the terms of the state-funded program, the employer could request care from the claimant during evening or night time hours provided that the worker was awake when providing the care.

While sleeping in the residence she shared with her son, her son cut her throat with a butcher knife and inflicted three other stab wounds resulting in a number of serious bodily injuries.

The employer had significant health issues, including a history of drug abuse. Leading up to the formation of their employment relationship, the employer underwent an amputation of a leg and, upon being released from a rehabilitation center, he came to live with the claimant in her residence. The employer did not have a residence of his own.

The claimant testified that her employer informed her that, in rendering her services, the two of them would have to be together in the same place.

Was the claimant in the course of her employment when she was attacked even though she was asleep?

See How Well You Did in Predicating How the Commonwealth Court Ruled:

Fact Pattern No. 1: Management Employee Pursues Attempted Robbery Suspect After He Leaves Employer's Store

The Workers' Compensation Judge (WCJ) found that the decedent was in the course of employment at the time he sustained his fatal injuries.

The Workers' Compensation Appeal Board (WCAB), however, concluded that the decedent had abandoned his employment by pursuing the suspect and physically engaging him. The WCAB noted that a claimant's premeditated, deliberate, extreme and inherently high-risk actions are sufficient to remove him from the course and scope of employment.

The court found that the decedent had not abandoned the course of his employment by attempting to apprehend the fleeing suspect. In support of this conclusion, the court specifically noted the past practice of the employer permitting the decedent to not only carry a firearm, but to use it to thwart a robbery attempt in 2007, without consequence. Moreover, the facts of the case demonstrated that the decedent did not attempt to stop the thief from fleeing to further his own interests, but rather to further the interest of the employer.

Accordingly, the court held that the decedent's actions, while perhaps constituting an error in judgment, were not "so far removed" from, or "wholly foreign to" his job duties to be considered as an abandonment of the course of his employment. ***Walter Wetzel, deceased, c/o Walter Wetzel III v. WCAB (Parkway Service Station),*** **92 A.3d 130 (Pa. Cmwlth. Ct. 2014)**

Fact Pattern No. 2: Worker Sustains Stroke Falling on Employer's Premises Before Start Time

The WCJ found that, at the time of his accident, the decedent was in the course of his employment. The WCAB affirmed the WCJ's finding in this regard.

The court affirmed the WCJ's award of benefits, noting that there "is no bright-line test for assessing how long before the commencement of the scheduled workday is a reasonable time for an employee to be furthering his employer's interests." The court stated that, based on a myriad of case law on the subject, "the exact amount of time does not appear to be as important as the claimant's purpose or activities during that time." The court added that, once an employee is on an employer's premises, the physical act of arriving at or leaving their workstation is a necessary part of his employment, which definitely furthers the employer's interests. ***Ace Wirespring and Form Company v. Workers' Compensation Appeal Board (Walshesky),*** **93 A.2d 923 (Pa. Cmwlth Ct. 2014)**

Fact Pattern No. 3: Worker Injured While Accessing a Parking Facility Where Her Parking Fees Were Partially Covered by Employer Subsidies

The WCJ concluded that the claimant was within the course and scope of her employment with the employer at the time of her injury. The WCAB agreed with the WCJ that the area where claimant was injured could be considered an integral part of the employer's business.

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The court disagreed, noting that the claimant was not required by the employer to use this particular parking facility. Further, the employer had not caused this facility to be used by the claimant in the performance of her work duties. The court also noted that the employer had no responsibility with respect to the custody, control, or maintenance of the parking facility. The fact that the employer had connected a skywalk from its office building to the parking facility was considered by the court to constitute simply an added convenience to its workers. ***PPL v. Workers' Compensation Appeal Board (Kloss),*** **92 A.3d 1276 (Pa. Cmwlth. Ct. 2014)**

Fact Pattern No. 4: **Cable Technician Injured in Accident on His Way to Main Office of His Employer**

The WCJ concluded that the claimant was not acting in the course and scope of his employment at the time of this accident. The WCJ further found that there were no facts in the case indicating that claimant was on a special assignment for the employer, or that there were special circumstances such that the claimant was furthering the business or affairs of the employer on the date of injury

The Board affirmed the WCJ, noting that the claimant had the burden to prove that the accident took place during the course and scope of his employment and had failed to do so.

The court determined that the claimant was a traveling employee. The fact that his daily initial stop was at the employer's office was not dispositive. The court noted that claimant worked as a cable technician for his employer and traveled throughout his workday installing cable and Internet services in customers' homes or businesses. As a traveling employee, claimant was entitled to a presumption that he was working for the employer during the drive from his house to the employer's facility. In view of the fact that the employer did not present evidence sufficient to rebut the presumption, the court held that the claimant was injured during the course and scope of his employment. ***Dane R. Holler v. WCAB (Tri Wire Engineering Solutions, Inc.*)**, **No. 2209 C.D. 2014; Decided: August 22, 2014**

Fact Pattern No. 5: **Restaurant Worker Bitten by Temperamental Dog on Premises**

The WCJ concluded that the claimant had met his burden of proof and sufficiently established that he sustained an injury to his face while in the course and scope of his employment. The Board affirmed the WCJ.

In affirming these rulings, the court referred to the well-established law that "neither small temporary departures from work to administer to personal comforts or convenience, nor inconsequential or innocent departures break the course of employment." While the employer conceded that the smoke break constituted a temporary departure, it was argued that the claimant's decision to pet the dog and subsequent injury was much more than a temporary departure from work duties. The court did not agree, noting that the claimant did not actively disengage from his work to pet the dog. Instead his departure was characterized as a short cessation from work duties, and the act of petting the dog was an inconsequential departure from his work as a line cook. ***1912 Hoover House Restaurant v. Workers' Compensation Appeal Board (Soverns),*** **No. 309 C.D. 2014; Decided November 10, 2014**

Fact Pattern No. 6: Claimant Injured While Traveling to a Regular Safety Meeting Into Which a Special Meeting Content Had Been Incorporated

The WCJ concluded that the claimant was en route to a" stand-down" meeting and, therefore, in the course and scope of his employment when he was injured. Specifically, the WCJ found that the claimant met the "special mission" exception to the coming and going rule.

The WCAB determined that the WCJ erred in concluding that the claimant was in the course and scope of his employment at the time of his injury. Specifically, the WCAB determined that there was no substantial evidence to support the WCJ's finding that the claimant was in the course and scope of employment when he sustained his injuries.

The court held that the claimant was not on a special mission at the time of his accident. The evidence showed that he was required to attend the monthly safety meetings as part of his job duties. The employees were paid their hourly wages during these meetings and were required to arrive early to attend. The court concluded that the claimant was traveling to work for a mandatory, regularly scheduled meeting. The court commented that, even if the stand-down meeting had not been incorporated into the regular meeting, the claimant was still required to attend the mandatory monthly meeting. So the "coming and going" rule applied. ***Joseph Simko v. Workers' Compensation Appeal Board (United States Steel Corporation-Edgar Thomson Works)*****, 101 A.3d 1239 (Pa. Cmwlth. Ct. 2014)**

Fact Pattern No. 7: **Mother Employed by Son Through State-Funded Program Savagely Attacked by the Son**

The WCJ concluded that, based on the record taken as a whole, the claimant demonstrated that her employment with the employer required her to be on the employer's premises at the time she sustained her injuries.

The WCAB concluded that the claimant failed to sustain her burden of proving that she was required to be on the premises at the time of injury. The WCAB noted that the claimant had finished her work duties, but remained on the premises (in her home) after her work for her employer/son was finished. She then went to sleep. The Board considered her sleeping to be a course of "recreation" separate and distinct from the duties of her employment.

The court concluded, as a matter of law, that the claimant established that she was practically required by the nature of her employment to live with the employer; that she was injured on premises occupied by the employer, or where employer's business or affairs were being carried on; and that her

injuries were caused by the operation of the employer's business or affairs.

Further, the court commented that, by sleeping in the residence, claimant provided a direct benefit to the employer because she was readily available to render attendant care when she awoke.

The court also took note of the fact that evidence surrounding the attack was inconclusive as to why or for what reason the employer assaulted the claimant; the "personal animus" defense could not be proven to apply.

The court discussed the fact that a claimant on premises is presumed to be covered under the Act. The court stated that, given this presumption, it must be assumed, as a matter of law, that the assault occurring on the employer's premises involved the employer's business or affairs. ***Laura O'Rourke v. WCAB (Gartland),* 83 A.3d 1125 (Pa. Cmwlth Ct. 2014)**

CONCLUSION:
Hopefully, you "aced" this quiz. It is to be noted, however, that, as these cases reflect, the same set of facts can be examined by adjudicators who arrive at markedly different findings and conclusions regarding course of employment issues.

Gone Fishin': Discovery of Prior Claims and Conduct in Bad Faith and Extra-Contractual Litigation

By C. Scott Rybny and Daniel L. Petrilli, Timoney Knox, LLP, Fort Washington, PA

Defending insurers against bad faith and extra-contractual claims often requires practitioners to oppose overly broad discovery. Even outside the context of class action litigation, individual plaintiffs typically seek information involving prior bad faith claims, or other alleged instances of bad faith conduct involving insurers. Not surprisingly, these requests often span decades, and may encompass claims information pertaining to activities across multiple states. Costs and judicial economy aside, rarely do such requests share any demonstrable relationship to the individual plaintiff's particular claim. Highlighting this actuality, the American Association for Justice presented a seminar at its 2007 Mid-Year Convention entitled "*Coming Up With Evidence Out of the Blue – Creative Bad Faith Discovery*"[1]. Fishing is quickly becoming standard discovery. How counsel respond to these requests will undoubtedly determine the outcome.

Historically, Pennsylvania courts have discouraged the production of information involving prior bad faith claims, or other alleged instances of bad faith conduct involving insurers. Notwithstanding the current state of the law, claimants are starting to pursue this discovery with renewed vigor using the 2013 decision in *Lillibridge v. Nautilus Ins. Co*., 2013 U.S. Dist. LEXIS 63398 (D.S.D. May 3, 2013) as a template. In this article, we will explore the *Lillibridge* decision in relation to those Pennsylvania court decisions on the discoverability of prior claims along with the dangers associated with this type of discovery.

Lillibridge illustrates the dangers and pitfalls insurers face during the discovery process. *Lillibridge* arose out of a first-party property insurance claim for hail damage to the policyholders' roof. In the ensuing bad faith litigation, the policyholders sought documentation relating to Nautilus's prior litigation involving denials of property claims. The insurer objected to this discovery, generally claiming it was irrelevant, overly broad, unduly burdensome and expensive. The court rejected these objections, finding them to be little more than "broad, boilerplate or conclusory objections." In so doing, it ordered the production of the insurer's complete litigation history, all prior bad faith lawsuits, all prior employee deposition transcripts, loss ratio and cost containment/profit maximization directives, among other broad categories of records. *Id*. The court reached this decision notwithstanding *State Farm Mut. Aut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) and the Supreme Court's analysis of the relevance, probative value and admissibility of information from other claims.

While Pennsylvania's appellate courts have not yet ruled on the discoverability of prior claim information, this issue has been addressed by our federal courts and resulted in a split of authority. Among the cases that limited or otherwise prohibited the production of prior bad faith claims and related materials include *Kaufman v. Nationwide Mut. Ins. Co.*, 1997 U.S. Dist. LEXIS 18530 (E.D. Pa. Nov. 12, 1997), *Dombach v. Allstate Ins. Co.*, 1998 U.S. Dist. LEXIS 15611 (E.D. Pa. Oct. 7, 1998) and *Mann v. UNUM Life Ins. Co. of Am*., 2003 U.S. Dist. LEXIS 23993 (E.D. Pa. Nov. 25, 2003).

In *Saldi v. Paul Revere Life Ins. Co*., 224 F.R.D. 169 (E.D. Pa. 2006), however, the Eastern District ordered the disclosure of prior bad faith claims. *Id*. at 197. The discovery was limited to matters only within the Commonwealth of Pennsylvania during the time period complained of in the policyholder's underlying complaint. *Id*. Instead of relying upon the allegations contained in the pleadings or a bald discovery request, Saldi actually proffered evidence which included third-party litigation materials allowing the court to find a nexus with the underlying claim. *Id*. Following *Saldi*, the requirement of a prima facie showing has been followed in the United States District Court cases *Pepsi Cola Metro. Bottling Co. v. Ins. Co. of N. Am*.,

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2011 U.S. Dist. LEXIS 154639 (E.D. Pa. 2011) and *Allied World Assur. Co. (U.S.) v. Lincoln Gen. Ins. Co*., 2012 US Dist. LEXIS 12883 (M.D. Pa. Feb. 2, 2012).

With this developing area of case law, general, boilerplate discovery objections may no longer suffice to combat discovery requests involving prior claims information. Simply claiming that "discovery sought is overly broad, burdensome, oppressive, vague or irrelevant is 'not adequate **to** voice a successful objection.'" *Northern v. City of Phila.*, 2000 U.S. Dist. LEXIS 4278, 2000 WL 355526, at *2 (quoting *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982)). This is particularly important given attempts by bad faith advocates to extend bad faith claims to actions during the pendency of litigation. *See Morrissey v. State Farm Fire & Cas. Co*., 2014 U.S. Dist. LEXIS 174998, * 17 (E.D. Pa. Dec. 18, 2014).

In closing, the pursuit of other claim discovery is once again on the rise. As a result, insurers and their representatives must be vigilant when addressing discovery of other prior claims, objections lodged in response thereto, as well as the potential ramifications of adverse court rulings on this issue.

ENDNOTE

[1]http://merlinlawgroup.com/sites/merlinlawgroup/resources/file/papers_presentations/coming%20up%20with%20evidence.pdf.

Can Bad Faith Exist In a Contractual Vacuum?

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

Aristotle stated that nature abhors a vacuum. Obviously the law, and in particular bad faith law, does not follow what is natural or necessarily logical. In insurance bad faith cases claimants have asserted that bad faith can exist in a contractual vacuum. Insureds have asserted that bad faith can exist when the insurer did not breach the insurance policy, when there is no coverage, or even when there is no insurance policy. Despite these assertions, bad faith cannot exist in a contractual vacuum. The existence of an insurance policy, a contract claim and insurance coverage are prerequisites to assert bad faith. This is because bad faith arises from the insurance policy and the alleged failure of the insurer to perform an express contractual obligation contained in the policy. If there was no policy, no contract claim and no coverage there can be no bad faith.

Insureds have asserted bad faith in a contractual vacuum in several factual scenarios. The first scenario is where the policy was cancelled, but the insurer took steps in adjusting the claim. The second situation is where the contract claim was precluded by the policy itself, for example, when the insured impermissibly filed suit after the expiration of the policy's suit limitation clause. Third is where the insurer defended an insured under a reservation of rights and it was later adjudicated that there was no coverage. The fourth situation is where the court or jury determined that the insurer did not breach the policy, but the insured continued to proceed with a bad faith cause of action. Fifth is where the insured filed suit initially asserting a contract claim with a bad faith cause of action, however, the insured later withdrew the contract claim and continued to pursue the bad faith cause of action.[1]

The two cases most often cited for the proposition that bad faith can exist without a valid contract claim are *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.,* 244 F. Appx. 424 (3rd Cir. 2007), (a non-published Third Circuit case) and *March v. Paradise Mut. Ins. Co.,* 646 A.2d 1254 (Pa. Super. 1994) (a decision issued in the very early days of the bad faith statute). In *Gallatin Fuels*, Westchester insured mining equipment and Gallatin Fuels was a loss payee on the policy for the equipment. The equipment was damaged and Gallatin Fuels asserted a claim. Unbeknown to Westchester, the premium finance company who paid the premium on the policy had cancelled the policy and Westchester handled the claim unaware of the cancellation. Westchester eventually learned of the policy cancellation and denied coverage after handling the claim for a period of time. Gallatin Fuels filed a lawsuit asserting breach of contract and bad faith. Westchester asserted that there was no bad faith because the policy was cancelled before the loss. On appeal, the Third Circuit held that the policy was indeed cancelled and there was no breach of contract, however, the court found that Westchester acted in bad faith even though the policy was cancelled. The Third Circuit upheld a punitive damage award of $4.5 million and an attorney's fee claim of $1.1 million where there was no policy citing Westchester's: 1) not responding to several communications over a six month period during part of the claim, 2) not providing updates on the claim every 45 days, 3) not providing enough assistance to Gallatin Fuels in completing a proof of loss, and 4) issuing a vague rejection letter to the proof of loss. The court also stated that Westchester misrepresented the terms of the policy, dragged its feet in the investigation of the claim and hid information from Gallatin Fuels in addition to shifting its basis for denying the claim.[2]

There are several problems with the position that bad faith can exist in the absence of a policy. First, it does not consider the express language of the bad faith statute. The bad faith statute provides textual support for the position that a viable contact claim (and policy) is required to assert bad faith. Pennsylvania's Bad Faith Statute, 42 Pa. C.S.A. § 8371, states as follows (emphasis added):

> Section 8371. Actions on insurance policies

> *In an action arising under an insurance policy*, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) *Award interest on the amount of the claim from the date the claim was made* by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

The words "[i]n an action arising under an insurance policy" contained in the statute are significant. These words show that there must be a predicate claim, that being, an underlying claim that seeks benefits under the policy (*i.e.* "An action arising under an insurance policy."). In the absence of an underlying claim for policy benefits there is no cause of action under the bad faith statute because nothing arises under an insurance policy. Further, the title of the statute itself, "Actions on insurance policies," contemplates that there must be a predicate claim for insurance policy benefits. The title is not, for example "actions involving insurance policies." The statute's title expressly and specifically uses the word "on" rather than more general words such as "involving" or "regarding."

There is other textual support in the bad faith statute that a predicate contract claim is required. In addition to attorney's fees, costs and punitive damages, the statute also contains the remedy of enhanced interest "on the amount of the claim from the date the claim was made." Obviously, interest cannot be awarded when there is no contract claim.

Another problem with asserting bad faith without a contract claim or policy is that it overlooks where the insurer's duty of good faith arises from. The insurer's duty of good faith which underlies the cause of action for bad faith is implied from the insurance policy and the insurer's express obligations stated in the policy. If there was no insurance policy, no coverage or the insurer did not breach the policy, there can be no bad faith because the insurer did not fail to perform an express obligation under the policy.[3]

While *Gallatin Fuels* holds to the contrary, numerous other cases have held that in order to pursue a cause of action for bad faith that there must be a predicate contract claim. A seminal case in this regard is *Polselli v. Nationwide Mut. Fire Ins. Co.,* 126 F. 3d 524 (3rd Cir. 1997). Pollselli's home was destroyed by a fire. Nationwide did not pay the claim and Polselli then filed a lawsuit asserting breach of contract and bad faith. Near the start of the trial, Nationwide paid the contract claim. The case then proceeded to trial on the bad faith claim only. The jury found that Nationwide acted in bad faith and awarded $90,000 in punitive damages. Polselli subsequently filed a petition for costs and attorneys fees. Nationwide challenged parts of the attorney fee claim asserting that only hours expended on the underlying insurance contract were recoverable. Nationwide asserted that the attorney's fees spent at trial was not recoverable because it paid the contract claim at the start of the trial. The court disagreed with Nationwide citing three reasons: 1) the bad faith cause of action depended on the existence of a predicate contract cause of action, 2) the bad faith cause of action enabled an insured to enforce the contractual duty of good faith, and 3) assessment of the attorney's fees was required to make the insured whole. Importantly, the court stated that a predicate claim for policy benefits was required for the plaintiff to assert bad faith, stating the following (emphasis added):

> Initially, we observe that under the plain language of the statute, it is reasonably clear that a section 8371 claim may not be the sole claim of an insured. Section 8371 provides that "[i] n an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions..." 42 Pa. Cons. Stat. Ann §8371. This language implies that a determination of bad faith is merely an additional finding to be made in a predicate action arising under an insurance policy. Absent a predicate action to enforce some right under an insurance policy, an insured may not sue an insurer for bad faith conduct in the abstract.
>
> In *Winterberg*, the district court concluded that the bad faith claim must be related to at least one other colorable claim over which the court has jurisdiction." *Winterberg v. CNA Insurance Co.,* 868 F. Supp. 713, 722 (E.D.Pa. 1994), *aff'd,* 72 F.3d 318 (3d Cir. 1995). The court reasoned that "[h]ad the legislature wanted to allow a person wronged by his or her insurance company to sue directly, and *only*, under [section] 8371, surely it would not have used the language it did." *Id.* at 722 n. 13 (emphasis in original). We agree. *Instead of creating a cause of action for bad faith conduct that can exist in a vacuum, the Pennsylvania legislature provided an insured with additional remedies upon a finding of bad faith made in a predicate action under an insurance policy.*

126 F.3d at 530. The court stated that Polselli had a valid contract claim, which settled at the start of the trial. As such she was permitted to proceed to trial on the bad faith claim alone.

Other cases have held that a predicate contract claim is required in order to assert bad faith. *Continental Ins. Co. v. Alperin*, 1998 WL 212767 (E.D. Pa. 1998); *Palucis v. Continental Ins. Co.,* 1998 WL 474108 (E.D. Pa. 1998); *MP III Holdings, Inc. v. Hartford Cas. Ins. Co.,* 2011 WL 2604736 (E.D. Pa. 2011); *United States Fire Ins. Co. V. Kelman Bottle,* 2012 WL 150747 (E.D. Pa. 2012*), affirmed in part on other grounds and reversed in part on other grounds*, 538 Fed. Appx. 175 (3rd Cir. 2013); and *Pizzini v. American Int'l Specialty Lines Ins. Co.,* 107 Fed. Appx. 266 (3rd Cir. 2004).

The second case commonly asserted for the position that bad faith can exist in a vacuum is *March v. Paradise Mut. Ins. Co.,* 646 A.2d 1254 (Pa. Super. 1994). In *March*, the court held that bad faith was an "independent" and "separate" cause of action from the contract claim. While it is

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certainly true that *March* holds that bad faith is an "independent" cause of action, the facts and circumstances in *March* make the holding highly distinguishable and inapplicable to all but the few cases involving contractual suit limitation periods. Moreover, numerous cases have noted the limited applicability of *March*. Despite these important distinctions, the holding in *March* has been widely used as support to assert bad faith in the absence of a contract claim.

In *March*, the insured sued her insurance company for breach of contract and bad faith regarding a homeowners claim regarding an unpaid wind damage claim. The insurance policy, like most homeowners policies, contained a one year suit limitation provision which mandated that any lawsuit against the insurance company must be filed within one year from the date of loss. The insured failed to file the lawsuit within one year and the trial court granted the insurer's motion for summary judgment dismissing the entire lawsuit based on the affirmative defense of the statute of limitations. On appeal, the insured argued that the bad faith cause of action was not subject to the suit limitation period in the policy and that only the breach of contract action was subject to the suit limitation period. The Superior Court agreed with the insured and held that the bad faith action was independent of the breach of contact action. The breach of contract action remained dismissed, however, the bad faith cause of action was reinstated. 646 A.2d 1257. Several points from *March* should be noted. The plaintiff asserted a predicate claim for policy benefits and a breach of contract action in the nature of compensation for wind damage, but she failed to comply with the policy's suit limitation provision. While the court held that bad faith was an "independent" cause of action, the plaintiff still had an underlying predicate claim for policy benefits before her own conduct waived that claim. This distinction limits the *March* holding to suit limitations cases. This was discussed in *Winterberg v. CNA Ins. Co.,* 868 F. Supp. 713, 722-723 (E.D. Pa. 1994), *aff'd*, 72 F. 3d 318 (3d Cir. 1995) as follows:

> ... the courts have held that success on a bad faith claim under §8371 does not depend on the success of the underlying insurance benefits claim. [*March v. Paradise Mut. Ins. Co.,* 646 A.2d 1254 (Pa. Super. 1994)] (Bad faith claim is not affected by the one-year limitations period in the insurance contract); *accord Margolies v. State Farm Fire & Cas. Co*, 810 f. Supp. 637 (E.D. Pa. 1992); *Boring v. Erie Ins. Group,* 434 Pa. Super. 40, 641 A.2d 1189 (1994) (dismissal of appellant's § 8371 claim was instantly appealable even though insurance coverage claim had not yet been decided); *Kauffman v. Aetna Cas. & Sur. Co.,* 794 F. Supp. 137, 140 (E.D. Pa. 1992) (§8371 does not "merely allow [ ] a court to provide an additional remedy"). Rather, they have found that §8371 establishes a separate and independent cause of action. *See, e.g., Margolies*, 810 F. Supp. At 642; *March,* 646 A.2d at 1256-57.=
>
> However, it is unlikely that "separate and independent" means that a claim of bad faith may be brought even if the court has no *jurisdiction* to hear the other causes of action. In other words, the bad faith claim under §8371 must be related to at least one other colorable claim over which the court has jurisdiction. FN13 It is one thing to dismiss an insurance contract claim because of a statute of limitations problem, but nevertheless proceed with the bad faith claim. It is quite another thing to dismiss a group of claims because the court is forbidden by statute to judge such claims, but nevertheless proceed with the bad faith claim. Whatever might be the boundaries of "in an action arising under an insurance policy", allowing plaintiffs here to proceed alone with a bad faith claim would be overstepping them.
>
> FN13. Under the plain language of the statute, it seems reasonably clear that a §8371 claim may not be the sole claim of a plaintiff. Though the issue has not been addressed directly by the courts, the Superior Court in *March* implied that a § 8371 claim must be accompanied by some other claim: "*While section 8371 provides relief only in actions 'arising under' an insurance policy,* the statute does not indicate that success on the bad faith claim is reliant upon the success of the contract claim." 646 A.2d at 1256 (emphasis added). *See also Kauffman,* 794 F. Supp. at 140 (bad faith need not have occurred during pendency of an action). Had the legislature wanted to allow a person wronged by his or her insurance company to sue directly, and *only,* under § 8371, surely it would not have used the language it did.

Another case which discussed limited applicability of *March* to suit limitation cases was *Messina v. Liberty Mut. Ins. Co.,* 1996 WL 368991, 4 (E.D. Pa. 1996). The court explained why a predicate claim was required to assert a cause of action for bad faith even though bad faith was an "independent" action, stating the following:

> Messina argues that under *March v. Paradise Mut. Ins. Co.,* 646 A.2d 1254 (Pa.Super.Ct.1994), *appeal denied*, 656 A.2d 118 (Pa. 1995), the viability of her §8371 claim does not depend on the success of her underlying claim for coverage. In *March*, the court stated than "an insured's claim for bad faith brought pursuant to section 8371 is independent of the resolution of the underlying contract claim." *Id.* at 1257. *See also Margolies v. State Farm Fire & Casualty Co.,* 810 F.Supp. 637, 641-42 (E.D.Pa. 1992), (§8371 claim survives even though statute of limitations has run on contract claim).
>
> The distinction drawn by the *March* court between a claim for coverage under the policy and a bad faith denial of coverage claim does not apply in the instant matter. In *March*, a procedural defect, the expiration of a limitations period, led to the lower court's dismissal of the underlying contract claim. The *March* court did not have occasion to consider the merits of the contract claim. Thus, the *March* court's conclusions regarding the independence of the insured's

> §8371 claim merely established that failure of a claim for coverage does not render the accompanying bad faith claim invalid *per se*. Messina's contract claim, however, did not fail for procedural reasons; the arbiters made a substantive determination that Messina did not have coverage under the policy. Accordingly, the court's decision to strike down Messina's bad faith claim, to the extent that it constitutes a denial of coverage claim, is not an unthinking, reflexive response to the failure of her coverage claim. On the contrary, logic compels the court to conclude that the absence of a duty on the part of Liberty to cover Messina's non-economic losses, precludes a finding that Liberty breached this duty in bad faith.

Messina v. Liberty Mut. Ins. Co., 1996 WL 368991, 4 (E.D. Pa. 1996).

The requirement for a predicate contract claim where insurance benefits are claimed is also supported by the seminal case of *Terletsky v. Prudential Property and Cas. Ins. Co.,* 649 A. 2d 680, 688 (Pa. Super. 1994), which defined bad faith as frivolous or unfounded failure to *pay* a claim, stating the following:

> In the insurance context, the term bad faith has acquired a particular meaning:
>
> > *Insurance.* "Bad faith" on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer *for failure to pay a claim*, such conduct imports a dishonest purpose and means a breach of a known duty (*i.e.,* good faith and fair dealing), through some motive of self-interest or ill will'; mere negligence or bad judgment is not bad faith. Black's Law Dictionary 139 (6th ed. 1990 (citations omitted).

(Emphasis added). If there is no obligation to *pay* a contract claim, let alone even a claim in the first instance, there can be no bad faith.

Most claims asserting that bad faith can exist without a breach of the policy by the insurer conflict with black letter tort law. Where there is no contract claim there also can be no bad faith cause of action because the insured does not have any actual harm. The Pennsylvania Supreme Court has held that Pennsylvania's Bad Faith Statute, 42 Pa. C.S.A. § 8371, is a statutory tort cause of action. *Ash v. Continental Ins. Co.,* 932 A.2d 877 (Pa. 2007). It is black-letter law that to constitute a tort there must be damages. *Kirby v. Carlisle,* 116 A.2d 220, 221 (Pa. Super. 1955). As stated in *Magar v. Lifetime, Inc.,* 144 A.2d 747, 748 (Pa. Super. 1958), damages cannot be presumed:

> Damages are never presumed; the plaintiff must establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule. *Rice v. Hill,* 315 Pa. 166, 172, 172 A.289, 291; Maxwell v. *Schaefer,* 381 Pa. 13, 21, 112 A.2d 69. Where a claim is for pecuniary damages the evidence must fix the actual loss with reasonable precision through witnesses with knowledge of the facts. *Forrest v. Buchanan,* 203 Pa. 454, 53 A.267.

This black-letter element of tort law also applies to bad faith causes of action. Multiple courts have held that harm is a necessary element to sustain a bad faith cause of action. *Quaciari v. Allstate Ins., Co.,* 998 F. Supp. 578, 584 n.9 (E.D. Pa. 198) ("[h]arm is an essential element of a bad faith claim."); *Kubrick v. Allstate Ins. Co.,* 2004 WL 45489 (E.D. Pa. 2004), *affirmed,* 121 F.Appx. 447 (3rd Cir. 2005) ("[m]oreover, Plaintiffs have failed to demonstrate any harm to the Estate arising from [Allstate's conduct], and harm is an essential element of a bad faith claim (citation omitted)."); *Quaciari v. Allstate Ins. Co*., 998 F. Supp. 578, 584 (E.D. Pa. 1998) ("[p] laintiff's argument fails for several reasons. As an initial matter, plaintiff has not come forward with evidence of harm flowing from Allstate's change in position"); *Ravindran v. Harleysville Ins. Co.,* 65 D. &C. 4th 338, 352 (Phila. Co. 2002), *affirmed*¸ 839 A.2d 1170 (Pa. Super, 2003), *appeal denied*¸ 882 A.2d 479 (Pa. 2005) ("proof of harm is an essential element of [bad faith]."); *Baylock v. Allstate Ins. Co.,* 2008 WL 80056, 13 (M.D. Pa. 2008); *Kosierowski v. Allstate Ins. Co.,* 51 F. Supp. 2d 583, 595 (E.D. Pa. 1999) ("The difficulty in the present case is that the plaintiff has no information to demonstrate that such offending practices had any effect on her case.").

The case of *Builders Square, Inc. v. Saraco,* 1997 WL 3205 (E.D. Pa. 1997) is particularly instructive on the issue of the need for there to be actual harm from the denial of a contract benefits for bad faith to exist. The claimant asserted a liability claim against Builder's Square. National Union Fire Insurance Company insured Builder's Square's under a policy with a $1 million limit of liability. National Union was sued by Builder's Square for statutory bad faith for not settling the case within the policy limits, however, the evidence showed that the claimant would not settle for an amount below $4.25 million. The court dismissed Builder's Square's bad faith cause of action on summary judgment. In doing so the court held that Builder's Square must show that it sustained damages as a result of the insurer's conduct in breach of the policy. 1997 WL 3205, 7. The court dismissed Builder's Square's bad faith cause of action because it did not sustain any damages as a result of the insurer's conduct and that bad faith cannot exist in a vacuum, holding as follows:

> While §8371 provides an independent cause of action, no court has held that a plaintiff may sustain a §8371 claim in the absence of proof of loss or damages from the bad faith conduct. *See, e.g., Greater New York Insurance Co. v. North River Insurance Co.,* 872 F. Supp. at 1405 (plaintiff in underlying action willing to settle before trial for policy limits). *There is no persuasive authority which suggests that the legislature intended to provide a private cause of action to punish bad faith conduct in a vacuum and to confer standing upon parties who could not demonstrate that they suffered some loss as a proximate result of such conduct. See Polselli,* 23 F. 3d at 751 (legislature presumed not to intend changes in basic principles of existing law when enacting legislation absent express articulation of such

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Can Bad Faith Exist?

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> change). As noted, plaintiff has failed to present evidence from which one could reasonable conclude that Ms. Sodano would have ever settled her claim for less than she did.

1997 WL 3205, 7 (E.D. Pa. 1997) (emphasis added). The need to show actual harm from the insurer's conduct is also supported by the legal proposition that "the plaintiff in a bad faith claim must show that the outcome of the case would have been different if the insurer had done what the insured wanted done." *Baylock v. Allstate Ins. Co.,* 2008 WL 80056, 13 (M.D. Pa. 2008), *citing Zappile v. AMEX Assurance Co.,* 928 A.2d 251, 262 (Pa. Super. 2007); *Miezejewski v. Affinity_Auto Ins. Co.,* 2014 WL 241966, 5 (M.D. Pa. 2014); *Quaciari v. Allstate Ins. Co.,* 998 F. Supp. 578, 584 (E.D. Pa. 1998) ("[p]laintiff's argument fails for several reasons. As an initial matter, plaintiff has not come forward with evidence of harm flowing from Allstate's change in position"). If there is no breach of the policy, there is nothing that could have been done differently. If the insurer did not breach the policy and if there was nothing under the policy that the insured was deprived of, bad faith is just being asserted for the sake of asserting bad faith. It also challenges logic to find that the insurer committed bad faith when it did not even breach the policy. To find an insurer in bad faith and award punitive damages (which the case law holds is the civil version of a criminal sanction) when the insurer did not even breach the policy is illogical and perhaps even a violation of the insurer's due process rights.

So while nature may abhor a vacuum, experience shows that the same does not necessarily apply to bad faith law. It is submitted that while the case law states that bad faith is a separate and independent cause of action, bad faith cannot exist in a vacuum without a predicate contract claim, insurance coverage and a valid policy.

ENDNOTES

[1]This situation should not be confused with the situation where the insured asserts a breach of contract claim and a bad faith claim and the insurer later settles or pays the contract claim during the litigation or before trial. In this situation the bad faith claim, depending on the facts of the case, could still be viable regarding the insurer's conduct up through the time of the contract payment.

[2]Notably, five years after its holding in *Gallatin Fuels*, the Third Circuit distinguished, limited and arguably walked back its holding in *Gallatin Fuels* in the case of *Post v. St. Paul Travelers Ins. Co.,* 691 F. 3d. 500, 524-525 (3rd Cir. 2012). In *Post,* the insured, citing *Gallatin Fuels*, asserted that bad faith could exist even if the court found that the insurer correctly denied liability coverage. After finding that there was no coverage, the Third Circuit declined to find bad faith, stating the following: "With his primary bad faith argument foreclosed by our (and the District Court's) conclusion that Travelers had a reasonable basis for declining coverage, Post asserts that Travelers engaged in bad faith conduct by, among other things, ignoring communications from the insured, violating its own policies and procedures, agreeing to pay for defense counsel for Post & Schell but not him, and keeping crucial information from Anesh as he made his coverage determination. This mishandling of his claim, Post contends, is a basis for finding bad faith, irrespective of the final decision on the issue of coverage. In support of his contention, Post principally relied on our non-precedential case of *Gallatin Fuels, Inc. v.* Westchester Fire Insurance Co., which he cites for the proposition that "a finding that the insure[r] did not ultimately have a duty to cover the plaintiff's claim does not per se make the insure[r]'s actions reasonable." 244 Fed. Appx. at 435. While that statement is no doubt true, Post's reliance *on Gallatin Fuels* is misplaced. As explained above, while under Pennsylvania law bad faith may extend to an insurer's investigation and other conduct in handling the claim, that conduct must "import a dishonest purpose." *Brown v. Progressive Ins. Co.,* 860 A.2d 493, 501 (Pa.Super.Ct.2004) (citation and internal quotation marks omitted). Invariably, this requires that the insurer lack a reasonable basis for denying coverage, as mere negligence or aggressive protection of an insurer's interests is not bad faith. *See Frog, Switch & Mfg.,* 193 F.3d at 751 n. 9 (explaining that "mere negligence or bad judgment does not constitute bad faith"); *O'Donnell,* 734 A.2d at 910 (explaining that an insurer may "aggressively investigate and protect its interests"). After discussing the numerous instances of improper claim handling by Westchester in *Gallatin Fuels* and that the *Gallatin Fuels* court conceded that finding an insurer liable for bad faith in the absence of coverage is "exceedingly rare," the Third Circuit in *Post* stated: "That is not the case here, where Post assails largely benign claims-handling conduct - conduct that certainly does not "import a dishonest purpose" - simply because he disagrees with Travelers' decision to deny coverage on the plausible basis that the sanctions exclusion precluded coverage." Thus, *Gallatin Fuels* would not be helpful to Post's case even were it precedential. *See generally* 3d Cir. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing."

[3]Since there was no policy, no contract claim and no insurer-insured relationship, the potential causes of action for the plaintiff in *Gallatin Fuels* were negligent misrepresentation and fraud, however, it appears that these causes of action were not pled.

Excessive Force in the Context of the Display of a Firearm: A Case Study

By Paul D. Krepps, Marshall, Dennhey, Warner, Coleman & Goggin, Pittsburgh, PA

Issues involving law enforcement come and go over time, but the issue of the use of force involving a firearm seems to be a constant and is no more newsworthy than a police officer's use of a firearm in the context of deadly force. In *Graham v. Connor*, 490 U.S. 386 (1989), the United State Supreme Court provided the test for excessive force that has been applied in all use of force contexts. In the case discussed in this article, the federal court was called upon to address a use of force issue that occurs in a relatively common situation where an officer displays his firearm in a threatening manner. The Third Circuit's decision in *Stiegel v. Peters Township*, No. 14-1631, 2014 U.S. App. LEXIS 23116 (3d Cir., Dec. 9, 2014), provides law enforcement with some guidance in determining when such conduct constitutes excessive force under the Fourth Amendment. The Third Circuit's decision recognized that a number of circuit courts have addressed this issue and held that displaying a firearm can constitute excessive force where, for example, the weapons are pointed at children—*Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2002), *Holland v. Harrington*,

268 F.3d 1179 (10th Cir. 2001) and *McDonald v. Haskins*, 966 F.2d 292 (7th Cir. 1992). The Third Circuit also cited to circuit court cases finding excessive force in cases involving adults where those adults posed no threat to the safety of the officer—*Baird v. Renbarger*, 576 F.3d 340 (7th Cir. 2009), *Robinson v. Solano Cty.*, 278 F.3d 1007 (9th Cir. 2002) and *Baker v. Monroe Twp.*, 50 F.3d 1186 (3d Cir. 1995).

In the *Stiegel* case, the Third Circuit had to determine whether an officer's pointing of a service weapon at two hunters legally hunting on private property constituted excessive force. The situation developed on January 30, 2012, when a municipal police sergeant was on a lunch break at his residence in a secluded area just over the boundary of his municipality. The sergeant received a radio call of domestic violence, which cut short his lunch break. As he left his residence the headlights of his police car illuminated a pick-up truck several hundred yards away, parked on the side of a desolate, dead-end roadway. The sergeant was aware that this was an area where crimes had been committed in the past and, because several other police cars were responding to the domestic call, the sergeant decided to take a few moments and check out the pick-up truck before proceeding to the domestic.

PLAINTIFF'S VERSION OF THE EVENTS

Plaintiff and his friend were fox hunting at 11:30 p.m. Plaintiff was approximately 150 yards off the roadway in a field. His friend was sitting on the edge of the road, facing a different direction. They were both armed with shotguns.

Off in the distance, plaintiff noticed headlights coming down the roadway and the vehicle stopped beside his pick-up truck. He could hear voices and he saw his friend walking towards the police car. Moments later, a voice yelled for him to put down his shotgun and walk towards the car. Plaintiff did as he was instructed even though he claimed that he was in fear of his life.

Plaintiff further claimed that he was blinded by the flashlight, but that when he got close enough he realized that the person was a police officer. The officer ordered him to produce his driver's license and asked what he was doing. Plaintiff and his friend explained that they were hunting. The officer questioned the legality of hunting in the middle of the night. Plaintiff was incredulous that the officer was not fully versed in hunting laws and thus apparently did not realize that they were engaged in a legal activity. The sergeant recognized plaintiff's last name as one of the individuals who were permitted to hunt on that particular property. The officer returned the identification to plaintiff and his friend and proceeded on his way. After the officer left, plaintiff's friend advised him that the officer had threatened to shoot him if he did not put his shotgun down.

SERGEANT'S VERSION OF THE EVENTS

As the sergeant approached the pick-up truck, his headlights illuminated an individual, plaintiff's friend, seated on the side of the roadway several yards in front of the pick-up truck. He was armed with a shotgun across his lap and was dressed in camouflaged clothing. The sergeant stopped his patrol vehicle. Upon exiting, he directed the individual to put his shotgun down and approach the police car.

Instead of putting the shotgun on the ground, the individual stood with the shotgun in his right hand, holding the gun out to his side. The sergeant responded by advising the individual in a harsh and possibly profane manner that if he did not put the shotgun down that he would get shot. The sergeant also drew his service weapon and pointed it at the individual as he was ordering him to put the shotgun down.

The individual put the gun down and walked towards the police car. The sergeant asked him what he was doing and the individual explained that "we" are hunting. The sergeant asked if anyone else was present and the individual pointed to a field to his left. The sergeant looked out across the field. In silhouette he could see a second individual, the plaintiff, who was obviously also holding a shotgun. The sergeant, still holding his service weapon, yelled for the individual in the field to put his shotgun down and walk towards the road, all the while training his flashlight on the individual.

As the plaintiff approached the police car and the sergeant saw him put his shotgun down, the sergeant re-holstered his weapon. Both individuals came to the police car and provided their identification to the sergeant. The sergeant recognized plaintiff's name as someone who was permitted to hunt on the property. They explained that it is permissible under Pennsylvania's game laws to fox hunt during night hours. Because the area where they were hunting was actually outside the sergeant's jurisdiction, the sergeant made note of their identification, returned their licenses to them and proceeded to the domestic call. The entire incident lasted between five and ten minutes.

THE COMPLAINT

Plaintiff filed a federal civil rights lawsuit against both the sergeant and his municipality. Plaintiff brought claims in count I under 42 U.S.C. §1983 alleging that the sergeant unlawfully detained him and utilized excessive force during the incident. In count II plaintiff alleged that the township was also liable for the sergeant's conduct under 42 U.S.C. § 1983 because it had a policy, custom, or practice of condoning such behavior. Count III of the complaint was brought pursuant to 42 U.S.C. §1985 and alleged that a conspiracy existed between the township and the sergeant to deny plaintiff's right to challenge the sergeant's conduct. This count was voluntarily withdrawn.

LITIGATION

Plaintiff engaged in discovery in support of counts I and II of his complaint. After exchanging written discovery, numerous depositions were taken, including the depositions of several police officers who alleged that the sergeant had a history of altering weapons in violation of department policy and in using excessive force. However, none of the officers who testified against the sergeant had any firsthand knowledge of any of these incidents. Furthermore, none of the officers had any firsthand knowledge

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as to the outcome of any internal investigations relating to the sergeant. The sergeant's personnel file did not contain any history of substantiated complaints of excessive force, but it did establish a significant level of training, including with respect to the permissible use of force. The sergeant was one of the department's training officers.

At the conclusion of discovery, defendants moved for summary judgment on the basis that the officer was justified in conducting a *Terry* stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Defendants further argued that it was reasonable under the circumstances for the sergeant to draw his service weapon in the face of two individuals who obviously were more heavily armed than he was upon his arrival at the scene of the incident.

The District Court granted summary judgment as to the sergeant, determining that the sergeant did not violate plaintiff's constitutional rights. Because there were no underlying constitutional violations, the court also dismissed the claim against the township. Plaintiff's thereafter appealed the dismissal to the Third Circuit Court of Appeals. The Third Circuit affirmed.

THIRD CIRCUIT ANALYSIS

The Third Circuit's analysis begins with recognition that the sergeant engaged in an investigatory stop, commonly known as a *Terry* stop. The court necessarily found that the interaction between plaintiff, his friend and the sergeant constituted a seizure under the Fourth Amendment. Noting that *Terry* stops must be justified by reasonable suspicion, which is analyzed under the totality of the circumstances, the court reiterated that the police officer must be able to "point to specific and articulable facts, which, taken to together with rational inferences from those facts, reasonably warrant the seizure." *Stiegel*, 2014 U.S. App. LEXIS 23116 at *8, *citing Terry*, 392 U.S. at 21. Defendants did not contest that a seizure occurred. Plaintiff contended that the interaction rose to the level of a "defacto" arrest and thus the appropriate standard was probable cause because the sergeant displayed his service weapon. The Third Circuit rejected plaintiff's contention, concluding that "[t]here is no bright line rule establishing that an officer's display of his service weapon automatically elevates an investigatory stop into an arrest." *Stiegel*, 2014 U.S. App. LEXIS 23116 at *9.

As a threshold matter then, the Third Circuit determined that the sergeant had reasonable suspicion to engage in a *Terry* stop with plaintiff and his friend. The court identified the abundant circumstances justifying the *Terry* stop as follows:

- The sergeant saw a single vehicle parked in a strange and questionable position several hundred yards from any houses around 11:00 p.m.;
- The vehicle was on an unlit dead end road in an area where he had encountered criminal activity in the past;
- The vehicle was in an area where vehicles do not commonly park at night;
- Upon approaching the vehicle, the sergeant observed an individual in possession of a shotgun;
- That individual did not immediately comply with the sergeant's request to place his weapon on the ground; and,
- After the individual indicated that he was not alone in the area, the sergeant discovered plaintiff, a second armed individual.

Id. at *10-*11.

The court next addressed the officer's use of force by recognizing that *Graham v. Connor*, *supra*, provided the appropriate analytical framework. The evaluation of such a claim must employ objective reasonableness. This, in turn, required the court to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Stiegel*, 2014 U.S. App. LEXIS 23116 at *11, *quoting Graham v. Connor*, 490 U.S. at 396.

The Third Circuit articulated the three factors set forth in *Graham* that are used as guideposts to determine whether the use of force is excessive in a given case: (1) the severity of the crime at issue; (2) whether the suspect poses an imminent threat to the safety of the police officer or others in the vicinity; and (3) whether the suspect attempts to resist arrest or flee the scene. *Stiegel*, 2014 U.S. App. LEXIS 23116 at *11, *citing Graham v. Connor*. Referencing its earlier ruling in *Sharrar v. Felsing*, 128 F.3d 810 (3d Cir. 1997), the Third Circuit outlined several other factors relevant to the excessive force issue, including "the possibility that the person subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed and the number of persons with whom the police officer must contend at one time." *Id.* *12, *quoting Sharrar*, 128 F.3d at 822. The additional *Sharrar* factors played a key role in the court's ruling.

In analyzing plaintiff's excessive force claim, the Third Circuit acknowledged that there are a number of decisions from various circuit courts finding that an officer was justified in displaying a service weapon, but that there are also cases holding that the display of a firearm constituted excessive force. Specifically, the court noted that "[s]everal circuits (the Third and Eleventh) have held that it is not a constitutional violation for a police officer to point a gun at an individual who poses a reasonable threat of danger or violence to police." *Id.* at *12. The court also cited to a number of decisions from the Seventh, Ninth and Tenth Circuits, all of which held that it was a constitutional violation for a police officer to point a gun at an individual who does not pose a reasonable threat of danger or violence—but these cases involved children. *Id.* at *13-*14. But other decisions from the Third, Seventh and Ninth Circuits, along with the United States District Court for the Eastern District of Wisconsin, found excessive force where officers trained their guns on compliant adults who posed no threat to the safety of the police. *Id.* at *14.

Applying the *Graham* and *Sharrar* factors, the Third Circuit concluded that

the sergeant's use of his service weapon did not constitute excessive force, and that the sergeant was "justified in temporarily unholstering his weapon and training it on both men while he assessed and gained control over the situation." *Id.* at *17.

Significantly, the Third Circuit first noted that "the government has a *strong interest* in insuring that police are not forced to subject themselves to unreasonable danger while carrying out their duties." *Id.* at *15 (emphasis added). The court went on to determine that although the record could not conclusively show that a crime was afoot so as to satisfy the first *Graham* factor, the second and third *Graham* factors weighed in favor of the use of force given that the sergeant was outnumbered by two individuals with shotguns, one of whom did not immediately comply with the sergeant's request to put his weapon down. *Id.* The Third Circuit also concluded that the additional *Sharrar* factors compelled a finding that the sergeant's use of his service weapon was justified. For example, the court reasoned that from the sergeant's perspective there was a possibility that plaintiff and his friend were dangerous given that the sergeant came across them late at night in a remote area associated with criminal activity. Also, the duration of the incident totaled only five to ten minutes, plaintiff and his friend were both armed, and the sergeant was outnumbered. *Id.* at *16.

Ultimately, the Third Circuit recognized the situation for what it was—a police officer suddenly and unexpectedly facing two heavily armed individuals while alone in a remote area in the middle of the night. The court viewed the case from the officer's perspective, which is required under *Graham*. This ruling drives home the point that the government has a "strong interest" in insuring that police officers are not forced to subject themselves to unreasonable danger. Because the Third Circuit found as a matter of law that Sergeant Collins did not violate plaintiff's rights, it dismissed the claims against the township without further analysis.

CONCLUSION

The *Stiegel* decision highlights that drawing a weapon and pointing it at an individual can, in and of itself, constitute excessive force. Police officers who engage in this type of conduct must be prepared to articulate the *Graham* factors cited in the decision, as well as any other factors that may have existed, in support of the officer's conduct. After demonstrating the existence of these factors, courts must analyze them from the officer's perspective because of the recognition of the hazards that law enforcement officers face and how quickly those circumstances can evolve.

Pennsylvania Employment Law Update

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

The United States Supreme Court holds that time spent undergoing post-shift security screenings was not compensable under the Fair Labor Standards Act.

Integrity Staffing Solutions, Inc. v. Busk, 2014 U.S. LEXIS 8293 (Dec. 9, 2014)

A class of plaintiffs, who were tasked to retrieve items from warehouse shelves and package them for shipment to Amazon.com, customers filed this lawsuit, alleging that they were not paid for the time it took to undergo post-shift security screenings mandated by their employer. The plaintiffs alleged that the average time it took to get through the security screenings was 25 minutes and that the failure to compensate them for this time violated the Fair Labor Standards Act, as the screenings were solely for the benefit of the employer. The Supreme Court, however, rejected these claims and held that these screenings were not compensable under the Fair Labor Standards Act. In particular, the Supreme Court determined that "an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." As waiting to undergo security screenings and actually undergoing those screenings were not related to the employees' actual job responsibilities (*i.e.*, retrieving items from shelves and packaging them for delivery), the tasks were not compensable. This opinion demonstrates the importance for employers to methodically analyze their pay practices to determine whether there are certain tasks for which they are not compensating their employees and to confirm that such practices meet the requirements of the Fair Labor Standards Act.

Plaintiff has standing to maintain claims for disability discrimination against grocery stores despite the fact that he never visited many of the stores.

Mielo v. Giant Eagle, Inc., 2014 U.S. Dist. LEXIS 167706 (W.D. Pa. Dec. 3, 2014)

The plaintiff asserted claims on behalf of a class of disabled patrons of a grocery store chain, alleging that architectural barriers existed in the parking lots of the stores, a violation of the Americans with Disabilities Act and which prohibited him from using the stores. The store filed a motion to dismiss the plaintiff's claims, arguing that the plaintiff admitted that he never visited many of the stores at issue and there was nothing in the complaint other than a generalized statement that he intended to visit the stores in the future. As a result, the stores argued that the plaintiff did not have standing to sue the stores that he failed to visit. The court, however, rejected this argument and found that the plaintiff did not have to visit the stores to establish standing. In so holding, the court reasoned that this argument was an issue for class certification and "goes to plaintiff's

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ability to serve as a class representative, which is not ripe for disposition at this time." The court's opinion demonstrates the need for companies that offer public accommodations to audit their facilities to make sure that they are fully in compliance with the Americans with Disabilities Act. Indeed, the federal courts in Pennsylvania are seeing a large increase in the number of "public accommodation" claims by patrons—many of whom are professional "testers."

Third Circuit finds that docking plaintiff's pay was not an adverse employment action to support a claim for retaliation.

Deans v. Kennedy House, Inc., 2014 U.S. App. LEXIS 19623 (3d. Cir. Oct. 10, 2014)

Plaintiff asserted that he was provided with a verbal warning, a written warning and was docked 15 minutes of pay in retaliation for "not fitting into a traditional male role as [the] breadwinner" for his family. The Third Circuit, in affirming summary judgment in favor of the employer, rejected plaintiff's claims of retaliation. In so holding, the court noted that the warnings did not rise to the level of an adverse employment action, noting that "the warnings would remain in his file only temporarily and did not 'effect a material change in the terms and conditions of his employment.'" The Third Circuit also determined that "the 15 minutes of docked pay [was] simply too 'negligible' to qualify as an adverse employment action, especially given that [plaintiff] presented no evidence that this loss of income affected his well-being." This decision demonstrates that while plaintiffs will attempt to argue that many disciplinary steps are "adverse employment actions," employers can and should argue that they are not adverse employment actions, particularly when it does not result in a demotion or the termination of employment.

Third Circuit holds that plaintiff's assertion that she failed to receive an FMLA notice created a question of fact on an FMLA interference claim.

Lupyan v. Corinthian Colleges, Inc., 761 F.3d 314 (3d. Cir. Aug. 5, 2014)

Plaintiff asserted that her former employer failed to comply with the FMLA when it did not provide her with the notice of her rights under the FMLA. The employer contested plaintiff's contentions and asserted that it did, in fact, send plaintiff the notice of her rights under the FMLA. The employer further argued that it was presumed that she received the notice pursuant to the "Mailbox Rule." The Third Circuit, however, determined that plaintiff rebutted the presumption set forth in the "Mailbox Rule" by providing an affidavit that she never received the FMLA notice. In so holding, the Third Circuit reasoned that "[i]n this age of computerized communications and handheld devices, it is certainly not expecting too much to require businesses that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice." This opinion confirms the importance of obtaining the employee's acknowledgement of receipt for FMLA notices (and other employment documents); otherwise, plaintiffs and their attorneys will argue that it is up to a jury to determine whether they received these documents or not.

The court finds that plaintiff's Section 1981 retaliation claim failed when he was unable to demonstrate an underlying race discrimination claim.

Ellis v. Budget Maintenance, Inc., 2014 U.S. Dist. LEXIS 79900 (E.D. Pa. June 12, 2014)

Plaintiff alleged that he complained that four swastikas were graffitied on the wall of a janitor's closet at a client's location and that his employment was terminated in retaliation for his complaint. The court, however, rejected plaintiff's claims and determined that a prior decision in the Third Circuit mandates that in "a retaliation case [under Section 1981], a plaintiff must demonstrate that there has been an underlying section 1981 violation." In so holding, the court rejected the plaintiff's argument that every other circuit court has determined that there is no need for demonstrating an underlying discrimination claim in order to establish a retaliation claim. The court further rejected plaintiff's arguments that the Third Circuit's Model Jury Instruction for section 1981 claims do not provide the requirement for demonstrating an underlying violation of section 1981—reasoning that the Model Jury Instructions are not binding on the court and that the Third Circuit's prior decision controls the claims in the case. As many plaintiffs' attorneys are now skipping the administrative process (for Title VII claims) altogether and relying on the four-year statute of limitations available for section 1981 claims, this decision should be used by employers in order to defend section 1981 retaliation claims.

The Pennsylvania Supreme Court affirms decision to uphold $187 million judgment in favor of employees who were allegedly forced to work off the clock and skip breaks.

Braun v. Wal-Mart Stores, Inc., 2014 Pa. LEXIS 3324 (Pa. Dec. 15, 2014)

The Pennsylvania Supreme Court affirmed a decision upholding a jury verdict and award in favor of a class of Wal-Mart employees who were allegedly forced to work through their break periods in violation of the company's policy. Specifically, the class of plaintiffs alleged, *inter alia*, that the company violated the Pennsylvania Wage Payment and Collection Law because it failed to compensate them for rest breaks and off-the-clock work as mandated in its policies. Specifically, the policies required it to pay "for non-working time on rest breaks," and that "[i]t is against Wal-Mart policy for any Associate to perform work without being paid." Following a 32-day jury trial, the jury found in favor of the class of employees and judgment was entered in their favor.

On appeal to the Superior Court, the employer argued, among other things, that the "rest periods are not 'wages, wage supplements, or fringe benefits'" within the meaning of the Pennsylvania Wage Payment and Collection Law. In upholding the judgment, the court

initially noted that it was undisputed that the policies were disseminated to employees and that employees received handbooks at orientation which contained the promise of certain benefits, including benefits relating to rest breaks. As a result and based upon the plaintiffs' testimony that they relied on the representations contained in the handbook to continue working, the court noted that the provisions concerning getting paid for rest breaks could constitute a "unilateral contract" that the employees accepted by continuing to work there.

After being unsuccessful in the Superior Court, the employer argued to the Pennsylvania Supreme Court that they were subjected to a "trial by formula" (which had previously been rejected by the United States Supreme Court) and that the plaintiffs' evidence was insufficient to warrant class certification altogether—in that there was no evidence that the representative plaintiffs' claims were common to the prospective class members as a whole. The Pennsylvania Supreme Court, however, rejected these argument and found that there was ample evidence that the employer failed to compensate employees in accordance with its own written policies and that the method of computing the damages (assessed through a computation of the average rate of an employee's pay multiplied by the number of hours for which pay should been received but was not) was proper and appropriate.

This opinion makes clear that employers (particularly employers with multiple locations) must immediately review their policies (handbook or otherwise) regarding breaks and modify them in order to avoid the "contractual liability" claims that Wal-Mart faced in *Braun*. Indeed, the fact that plaintiff's counsel was able to obtain a verdict (affirmed twice on appeal) of close to $200 million through what Justice Saylor characterized as "gross generalizations and assumptions" should serve as ample warning to employers of future claims on these issues if they do not take a hard look at their employment policies and procedures.

The Pennsylvania Commonwealth Court confirms that retaliation for requesting workers' compensation benefits from an employer may support a wrongful discharge claim under Pennsylvania common law.

Owens v. Lehigh Valley Hospital, 2014 Pa. Commw. LEXIS 529 (Pa. Commw. Nov. 7, 2014)

The Pennsylvania Commonwealth Court reversed a decision sustaining an employer's preliminary objections, holding that a cause of action exists under Pennsylvania common law for wrongful discharge of an employee who requests workers' compensation benefits from an employer (but who has not filed a formal claim petition with the Workers' Compensation Bureau). The plaintiff alleged that she was terminated after she advised her employer of a work-related injury and the employer paid the claim (rather than her filing a claim petition with the Workers' Compensation Bureau). Following her termination, the plaintiff filed her lawsuit, alleging that she was wrongfully discharged in violation of Pennsylvania common law. The employer, however, argued that because the plaintiff never filed a claim petition, her claims failed as a matter of law. The Commonwealth Court, however, determined that "a cause of action exists under Pennsylvania common law for wrongful discharge of an employee who files a claim for workers' compensation benefits with an employer but has not filed a claim petition with the Bureau." In so holding, the court reasoned that rejecting claims for wrongful discharge where an employer voluntarily compensates a plaintiff for their workers' compensation injuries would undermine the Workers' Compensation Act if the employer could simply discharge those employees. Although the holding provided by the court is broad, its reasoning left open the question as to whether an employee's report of an alleged injury would be a sufficiently "protected activity" to support a claim for wrongful discharge. Considering that plaintiffs' attorneys rely primarily on these informal reports of an alleged injury to support such a claim, it is anticipated that the Pennsylvania courts will hold that such an allegation would be sufficient to get a lawsuit through the initial pleadings.

Pennsylvania Superior Court holds that there is no right to a jury trial under the Pennsylvania Whistleblower Law.

Bensinger v. University of Pittsburgh Med. Ctr., 98 A.3d 672 (Pa. Super. Ct. Aug. 19, 2014)

The plaintiff appealed the court's decision striking the plaintiff's request for a jury trial on his claims under the Pennsylvania Whistleblower Law following a bench trial that resulted in a verdict in favor of the plaintiff's former employer. Specifically, the plaintiff argued that he was entitled to a jury trial pursuant to the statute and, if not, the Pennsylvania Constitution afforded him the right to a jury trial. The Pennsylvania Superior Court, however, rejected the plaintiff's arguments and confirmed that there was no right to a jury trial under the Pennsylvania Whistleblower Law. In so holding, the court noted that the Pennsylvania Whistleblower Law makes no mention of a "jury"; rather, it refers to the relief that can be awarded by "the court" on four occasions in the statute. The court further noted that the Pennsylvania Supreme Court has found that there was no right to a jury trial under the Pennsylvania Human Relations Act, which used similar language concerning the remedies available under that Act. Moreover, the court also determined that the Pennsylvania Constitution did not provide to a right to a jury trial for claims under the Pennsylvania Whistleblower Law, reasoning that such a claim did not exist at common law.

Pennsylvania Workers' Compensation Update

By Francis X. Wickersham, Esquire Marshall Dennehey Warner Coleman & Goggin, King of Prussia, PA

A claimant who has returned to regular-duty work with restrictions is entitled to a presumption of causation when filing a reinstatement petition; a reinstatement of benefits is warranted even in a case of discharge from employment, unless the employer can establish the claimant committed bad faith.

Thomas Dougherty v. WCAB (QVC, Inc.); 386 C.D. 2014; filed October 14, 2014; Judge Simpson

The claimant worked for the employer as a video producer. He suffered an injury to his Achilles tendon in January of 2009 and returned to his pre-injury job in June of 2009 with restrictions. In April of 2010, the employer eliminated the claimant's position, and the claimant was transferred to another position without a loss in pay. The new job was less physically demanding. Approximately one year later, the claimant was discharged for unsatisfactory work performance. The claimant then filed a petition to reinstate his benefits.

The Workers' Compensation Judge dismissed the claimant's reinstatement petition, finding that the testimony did not establish that the claimant's earning power was adversely affected by his disability. The claimant appealed to the Workers' Compensation Appeal Board (Board), which affirmed, reasoning that the claimant was not entitled to a presumption that his loss of earnings was caused by his work injury.

On appeal to the Commonwealth Court, the claimant argued that both the judge and the Board erred in concluding that he was not entitled to a presumption that his loss of earnings was due to his injury since he originally returned to his pre-injury job with restrictions. The court pointed out that this scenario is distinguishable from one in which a claimant returns to his pre-injury position without restrictions and is then laid off, in which case, a claimant must affirmatively establish the work injury that caused the loss of earnings. The court held that, based on the judge's findings, the claimant returned to his pre-injury job with restrictions and that his injury continued. Therefore, the claimant was entitled to a presumption of causation. The judge did not afford the claimant a presumption of causation but, rather, concluded that the claimant did not sustain his burden, which the court found misplaced. Therefore, the court vacated the decision and remanded the case to the judge to apply the presumption. The court also noted that when a claimant is terminated from a modified or light-duty position, a loss of earnings is presumed to relate to the work injury. The employer must then show that the claimant committed bad faith or misconduct.

A claimant is not entitled to an award of benefits for injuries sustained in a motor vehicle accident that occurred while the claimant was driving to work to attend an employer meeting.

Joseph Simko v. WCAB (United States Steel Corp.-Edgar Thomson Works); 829 C.D. 2014; filed October 17, 2014; Senior Judge Friedman

The claimant filed a claim petition alleging that he sustained a brain injury as a result of an automobile accident while commuting to the employer's premises for a meeting. The claimant had worked for the employer for 15 years. The employer held two types of safety meetings: monthly safety meetings and stand down meetings. The monthly safety meetings were held on a consistent basis. The stand down meetings were held when serious accidents or fatalities occurred and were more infrequent than the monthly meetings. The claimant admitted that the meetings were part of his regular work duties.

The claimant sustained his injuries while commuting to what was a dual meeting, meaning that the stand down meeting was incorporated into the scheduled monthly safety meeting.

The Workers' Compensation Judge issued an interlocutory order concluding that the claimant was in the course and scope of his employment when he was injured, finding that the claimant met the "special mission" exception to the coming and going rule. On appeal, the Appeal Board reversed, concluding that the claimant was not in the course and scope of his employment at the time of his injury.

The Commonwealth Court affirmed the Board. They disagreed with the claimant's argument that he was on a special mission since the employer replaced the monthly safety meeting with a stand down meeting, which the claimant described as more compulsory. The court also rejected the claimant's argument that the "special circumstances" exception to the coming and going rule applied, finding that commuting to work early for a stand down meeting and work place safety meeting was not in furtherance of the employer's safety goals.

Evidence from a claimant contesting an employer' s impairment rating evaluation (IRE) must be competent evidence of a similar character.

Commonwealth of Pennsylvania / DEW/Loysville Youth Center v. WCAB (Slessler); 99 C.D. 2014; filed October 30, 2014; Judge Brobson

Following the claimant's work injury, the employer filed a modification petition based on the results of an IRE. In opposition to the testimony given by the employer's IRE physician, the claimant offered into evidence the deposition testimony of a psychologist who said that he was familiar with the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) but was not certified to perform IREs, was not licensed to practice medicine, and was not certified by any American medical or osteopathic board. Over the employer's objection, the testimony of the psychologist was received into evidence. The Workers' Compensation Judge dismissed the employer's modification petition, concluding that the testimony of the IRE physician was incompetent based on his

own observation that the IRE physician did not demonstrate that he considered all relevant guidelines and tables in the AMA Guides. The judge also concluded, however, that the claimant failed to establish that his impairment rating was between 53% and 58%, as per the testimony of his psychologist. The Board affirmed the judge's dismissal of the employer's modification petition.

On appeal to the Commonwealth Court, the employer argued that the judge erred in concluding that the IRE physician did not provide competent testimony. The employer further argued that if the IRE physician's opinion was competent, then the judge erred in relying upon the opinion of the claimant's psychologist to refute the IRE physician's opinion since the psychologist's opinion was not competent. The court found that the judge erred, as a matter of law, in finding that the IRE physician's opinion was not competent since the judge based this decision on his own understanding of the means in which the IRE physician applied the AMA Guides to the facts and not on the IRE physician's alleged lack of understanding of the facts of the claimant's condition The court further held that the judge and the Board erred in concluding that the testimony of a non-medical expert regarding the rating of the claimant's condition was competent for the purpose of rebutting the IRE of evidence submitted by the employer. The court concluded that where the claimant seeks to rebut competent IRE evidence, the General Assembly intended that evidence of a similar character be presented—i.e., evidence of rating evaluations performed by those persons the General Assembly has deemed qualified to engage in rating evaluations. Therefore, the court remanded the case to the Workers' Compensation Judge with instructions to not consider the testimony of the claimant's psychologist and to issue new findings regarding the IRE physician's credibility and competency.

Facial injuries sustained by a claimant from a dog bite that occurred while the claimant was on a smoke break are compensable.

1912 Hoover House Restaurant v. WCAB (Soverns); 309 C.D. 2014; filed November 10, 2014; Judge Cohn Jubelirer

The claimant worked for the employer one night a week as a line cook. One of the claimant's co-workers said that her father would be stopping by with her dog. After the dog had arrived, the claimant went outside to have a cigarette. While on a smoke break, the claimant had a conversation with the co-worker's father. The claimant petted the dog and allowed the dog to lick his face. When the claimant stood up, the dog growled and bit his lower lip.

The claimant was permitted to take smoke breaks and was in an approved area for smoking. The employer supplied an ashtray tower for their employees' use. The claimant was actually smoking a cigarette when he was bitten by the dog.

The claimant filed a claim petition for disfigurement benefits. The employer contested the petition by denying that the claimant was in the course and scope of employment at the time of the injuries. The Workers' Compensation Judge granted the claimant's petition and concluded that the claimant was in the course and scope of employment at the time of the dog bite. The Workers' Compensation Appeal Board affirmed on appeal.

The Commonwealth Court also held that the claimant was in the course and scope of employment. They disagreed with the employer's argument that the injuries occurred while the claimant was actively disengaged from his work. The court rejected the position taken by the employer that, while smoking a cigarette was a temporary departure from work, the act of petting the dog was an active disengagement from employment. According to the court, this was not a pronounced departure from his work.

Heart and Lung benefits paid to a claimant by an employer are not actually workers' compensation benefits and are not subject to subrogation against a third-party recovery arising from a motor vehicle accident.

James Stermel v. WCAB (City of Philadelphia); 2121 C.D. 2013; filed November 13, 2014; Judge Leavitt

The claimant, a police officer, had pulled over a motorist for speeding, and while sitting in his cruiser, he was rear-ended by an intoxicated driver and sustained a low back injury. The claimant missed 21 weeks of work. The employer acknowledged the claim by a Notice of Compensation Payable (NCP). The NCP stated that the employer was paying Heart and Lung benefits (full salary) in lieu of workers' compensation benefits. The claimant later settled a third-party claim against the driver who hit his cruiser, as well as against the tavern that served the driver alcohol when he was visibly intoxicated.

The employer filed a petition to review compensation benefit offset, seeking subrogation against the third-party recovery. The claimant challenged this petition, arguing that, because he was a government employee and enjoyed immunity from the subrogation claim, his Heart and Lung benefits are not subject to subrogation under §25 (b) of Act 44 and (2) under §23 of Act 44. The Workers' Compensation Judge granted the employer's petition.

However, the Appeal Board reversed, concluding that there was no right to subrogation against a motor vehicle tort recovery for benefits paid under the Heart and Lung Act. The employer then requested re-hearing, and thereafter, the Board concluded that the employer was entitled to subrogation.

The Commonwealth Court, however, reversed the Board and granted the claimant's appeal. Citing the Supreme Court case of *Oliver v. City of Pittsburgh*, 11 A.3d 960, the court held that there was no right of subrogation for Heart and Lung benefits paid to victims of motor vehicle accidents. According to the court, the NCP, which was issued unilaterally by the employer, did not transform Heart and Lung benefits into workers' compensation benefits. The court viewed the benefits as separate and subject to different statutory regimes.

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Benefits for multiple specific losses arising from the same injury are to be paid consecutively.

Jacqueline Fields v. WCAB (City of Philadelphia); 42 C.D. 2014; filed November 14, 2014; Judge Ledbetter

The claimant sustained injuries to her left shoulder, arm, wrist and hand while restraining an inmate in the course and scope of her employment as a prison guard. Pursuant to a Workers' Compensation Judge's decision, the claimant was awarded total disability benefits. Later, pursuant to a Judge's additional decision, other work-related injuries were added.

A subsequent claim petition for specific loss of the left arm was granted. The Judge ordered that the claimant would continue to receive total indemnity benefits while totally disabled and then receive the specific loss award. Later, another petition was granted for the loss of use of both legs. The Judge ruled that the employer was entitled to a credit for disability benefits paid through the date of the Judge's decision. After an appeal to the Appeal Board, the claimant filed a penalty petition, alleging that the employer violated the Act by unilaterally reducing her payments. Previously, the employer was paying the claimant specific loss benefits concurrently with her wage loss benefits in the weekly amount of $1,351.77. Later, it switched her weekly benefit payments to a total disability rate of $450.59 per week.

The Judge dismissed the penalty petition, concluding that, where there are multiple specific losses arising from the same injury, the claimant could elect to receive specific loss benefits rather than indemnity benefits, but could not receive multiple awards of specific loss benefits concurrently. The Judge also concluded that the employer was required to pay 1,210 weeks of specific loss benefits plus the healing period in weekly, consecutive installments. The Appeal Board agreed with the dismissal of the penalty petition, but split on the issue of whether specific loss benefits should be paid consecutively or concurrently.

The Commonwealth Court held that, while a claimant can choose to receive specific loss benefits rather than total disability benefits, the specific loss benefits must be paid consecutively under §306 (c) (21) of the Act. The court also rejected the claimant's argument that §306 (c) (23) gives the Board discretion to determine that the best option for severely injured claimants is concurrent payments. According to the court, this was an argument that was, in reality, an attempt by the claimant to perform a "back door commutation request" or a request to accelerate the payment of benefits.

The Uninsured Employer Guarantee Fund is not obligated to pay unreasonable contest attorneys fees assessed against an employer.

Kris Trautman v. WCAB (Blystone Tree Service and Pennsylvania Uninsured Employer Guarantee Fund); 328 C.D. 2014; filed November 14, 2014; Judge Brobson

The claimant worked for the employer as a tree climber. He sustained serious injuries after falling approximately 25 feet from a tree. The claimant filed a claim petition against the employer and, thereafter, a petition against the Uninsured Employers Guarantee Fund (UEGF) because the employer did not have workers' compensation insurance.

The Workers' Compensation Judge granted the claimant's petition and, in doing so, found that the employer did not present a reasonable basis for contest. The Judge awarded counsel fees for unreasonable contest against the employer. The Judge also rejected an argument made by the claimant that the fees should be paid by the UEGF. The claimant appealed to the Appeal Board, and they affirmed.

The Commonwealth Court agreed with the Judge and the Board, affirming the decision not to order the UEGF to pay unreasonable contest counsel fees. According to the court, the clear language of §1601 of the Act specifies that the UEGF is not subject to unreasonable contest counsel fees.

Commonwealth Court holds that substantial evidence did not support a Judge's decision finding that a psychiatric injury was caused by abnormal work conditions because there was no expert testimony specifically delineating a cause of injury or proving that the injury was anything more than a subjective reaction to normal working conditions.

Frog, Switch & Manufacturing Company v. WCAB (Johnson); 149 C.D. 2014; filed December 4, 2014; Judge Covey

The claimant's claim petition alleged that she sustained atypical depression causally related to abnormal working conditions. The employer fabricates steel products, and the claimant's job as a "rover" required her to operate over-head cranes. She was one of two females and the only African American female in a work force of 200 employees. The claimant alleged that she was subjected to three separate workplace incidents that amounted to sexual and racial harassment. The Workers' Compensation Judge granted her claim petition, and the Appeal Board affirmed.

The employer appealed to the Commonwealth Court and argued that the Judge's decision was not supported by substantial evidence. The court agreed and granted the employer's appeal. The court noted that, for example, the Judge found the testimony of the claimant's treating psychologist to be "credible," yet, the treating psychologist did not testify. Rather, a letter from the psychologist and his progress notes were admitted into evidence. Moreover, the letter and notes did not reference a specific incident the claimant alleged to have occurred in her claim petition but, instead, indicated that a diagnosis of depression was being given for stressful and overwhelming work conditions. According to the court, there was not substantial evidence to support a finding of psychic injury caused by the claimant's reaction to abnormal work conditions where there is no expert testimony proving that the injury was anything more than subjective reaction to a normal working conditions.

Rehabilitating properties for resale with construction work was a regular part of the employer's business; therefore, they are claimant's statutory employer under §302 (a) of the Act.

Zwick v. WCAB (Popchocoj); 428 C.D. 2014 and 429 C.D. 2014; filed December 11, 2014; Senior Judge Friedman

The claimant filed a claim petition alleging he injured his right hand while doing construction work for Defendant A. As a result of the injuries, the claimant underwent amputations of his right pinky finger and right thumb. Later, the claimant filed a claim petition for benefits from the Uninsured Employers Guarantee Fund (Fund). The Fund then filed a petition to join Defendant B as an additional defendant. The Workers' Compensation Judge (Judge) granted the claim petitions, concluding that Defendant A was primarily liable and the Fund secondarily liable for payment of the claimant's benefits. The joinder petition was dismissed.

At the Judge level, Defendant A testified that he was self-employed and working for Defendant B at the time of the work accident. The claimant was hired to perform construction work. Defendant B would tell Defendant A what to do, and Defendant A would then tell the claimant what to do. Defendant B would also provide money to Defendant A, who would pay the claimant. Defendant B testified that he was a licensed realtor and investor who did construction rehabilitation work on residential properties. Defendant B did not own the property in question, but was fixing it up for resale.

On appeal, the Workers' Compensation Appeal Board (WCAB) affirmed and reversed in part. The WCAB affirmed the award of benefits, but disagreed with the Judge's finding that Defendant B was not a statutory employer. The WCAB concluded that Defendant A remained primarily liable for payment of workers' compensation benefits, but Defendant B was secondarily liable as a statutory employer and, in the event of a default, the Fund would remain secondarily liable.

Defendant B appealed to the Commonwealth Court, but the court affirmed the WCAB. Defendant B argued on appeal that the WCAB should have applied §302 (b) of the Act, not §302 (a), because under §302 (b), Defendant B would not be a statutory employer since he neither occupied nor controlled the property at the time of the claimant's injury. The court rejected this argument, noting that a workers' compensation claimant must satisfy criteria set forth in either §302 (a) *or* §302 (b) of the Act in order to hold an entity liable as a statutory employer. The court found that §302 (a) did apply, holding that the work the claimant performed at the time of injury was a regular part of Defendant B's business since Defendant B testified that constructional rehabilitation work was a part of his business. Defendant B additionally testified that he was "essentially" the general contractor on the job.

Commonwealth Court reverses a prior decision and holds that the robbery of a liquor store clerk at gunpoint was an abnormal working condition and, therefore, a compensable psychiatric injury.

PA Liquor Control Board v. WCAB (Kochanowicz); 760 C.D. 2010; filed December 30, 2014; Judge Cohn Jubelirer

The claimant was working as the general manager of a liquor store when an armed robbery occurred. With a gun held to his head, the claimant was instructed to remove money from a safe and place it in a backpack. At the direction of the gunman, the claimant opened the back emergency exit door while the gunman checked for bystanders. The claimant and a co-worker were tied to a chair with duct tape. After the gunman left, the claimant was able to extricate himself and call the police. The claimant filed a claim petition for psychiatric injuries and testified that, in over 30 years with the employer, he was never a victim of an armed robbery by a masked gunman who put a gun to his head. The employer presented evidence that the claimant and other employees received training on work place violence, including robberies. Evidence was also presented on the number of robberies that had occurred at surrounding liquor stores.

The Workers' Compensation Judge granted the claim petition, concluding that the claimant met his burden of proving that he was subjected to abnormal working conditions. The Workers' Compensation Appeal Board affirmed. However, the Commonwealth Court reversed (*See, PA Liquor Control v. WCAB (Kochanowicz)*, 29 A.3rd 105 (Pa. Cmwlth. 2011). In doing so, the court noted that the employer provided the claimant with training specifically related to robberies and theft, and that there was evidence of the frequency of robberies in the employer's stores. The court concluded that the claimant could have anticipated being robbed at gunpoint at work and, therefore, that this was a normal condition of his employment.

The Pennsylvania Supreme Court, however, granted the claimant's appeal of the Commonwealth Court's decision and vacated their order. On remand, the Commonwealth Court held that the findings in the Judge's decision described a singular, extraordinary event occurring during the claimant's work shift that caused his Post-Traumatic Stress Disorder which, therefore, supported the Judge's legal conclusion that the specific armed robbery was **not** a normal working condition. In reversing themselves, the court was guided by the Supreme Court's decision in *Payes v. WCAB (Commonwealth of Pennsylvania State Police)*, 79 A.3d 543 (PA 2013), wherein the Supreme Court held that psychiatric injury cases are "highly fact sensitive" and that the abnormal working conditions analysis does not end when it is established that a claimant generically belongs to a profession that involves a certain level of stress. In that case, the Supreme Court also held that an extraordinarily unusual and distressing single work event experienced by the claimant constitutes an abnormal working condition as a matter of law.

A former counsel is not entitled to an equitable apportionment of attorney's fees awarded to current counsel in a

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compromise and release agreement.

Anthony Mayo v. WCAB (Goodman Distribution, Inc.); 683 C.D. 2014; filed January 8, 2015; Judge Simpson

This case involves a fee dispute between a claimant's former attorney and the attorney who represented him in a settlement and earned a 20% fee from a C&R approved by a Workers' Compensation Judge. The claimant's former counsel represented the claimant in a claim petition that was granted. In February 2012, about a year and a half after the decision granting the claim petition, the employer filed a petition for approval of a compromise and release agreement. Prior to the C&R hearing before the Judge, the claimant discharged his former counsel and entered into a fee agreement with his current counsel. In April of 2012, the Judge issued an interlocutory order approving the C&R agreement but declining to address former counsel's challenge concerning the attorney's fee. Former counsel was seeking an equitable apportion of the C&R attorney's fee and took the position that the attorney's fee for the claimant's C&R attorney should be based on *quantum meruit*.

The Judge issued a decision upholding as valid the claimant's fee agreement with his C&R attorney. The claimant's prior attorney appealed to the Workers' Compensation Appeal Board, which affirmed.

The Commonwealth Court affirmed the WCAB and dismissed the appeal of the claimant's prior counsel. The court noted that the Judge has authority to determine what constitutes a reasonable attorney's fee. It additionally noted that former counsel received a 20% fee from the date of the February 2009 injury through the date of the March 2012 C&R hearing. In fact, former counsel continued to receive his 20% fee even though the claimant discharged him two to four months prior to the C&R hearing. Former counsel additionally acknowledged that his law firm did not obtain a settlement offer from the employer while representing the claimant.

A finding of maximum medical improvement by an IRE physician, even with the possibility of future surgery, does not render the IRE invalid.

Nicole Neff v. WCAB (Pennsylvania Game Commission); 130 C.D. 2014; filed January 8, 2015; Judge Brobson

The claimant sustained an injury in February of 2004. The injury was originally acknowledged as a right wrist carpal tunnel syndrome. Later, by petition to review, the injury was expanded to include a chronic lateral epicondylitis of the right elbow. Subsequently, the parties entered into a compromise and release agreement settling all benefits payable to the claimant for the right carpal tunnel injury, but continuing the employer's liability for the right elbow injury. The employer later filed a modification petition based on the results of an IRE performed, which resulted in a determination that the claimant has reached maximum medical improvement (MMI) and suffered a whole person impairment rating of 1%. The Workers' Compensation Judge granted the petition. The claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

The claimant then appealed to the Commonwealth Court and argued that the employer's modification petition was based on an invalid IRE. According to the claimant, the IRE was premature and not valid as a matter of law because there was a reasonable potential for the claimant to undergo future surgery that could cause a change in her condition. The Commonwealth Court, however, rejected this argument and dismissed the claimant's appeal. The court held that the IRE physician unequivocally and repeatedly opined that the claimant had reached MMI, regardless of whether surgery was going to be performed in the future. According to the court, the IRE physician's testimony as a whole established that the claimant was at MMI and this testimony was accepted by the Judge in granting the employer's modification petition.

The Bureau's Medical Fee Review Section lacks jurisdiction to determine whether an entity is a provider of medical services or simply a billing agency and to consider provider's fee review petitions.

Physical Therapy Institute, Inc., v. Bureau of Workers' Compensation Fee Review Hearing Office (Selective Insurance Company of SC); 71 C.D. 2014; filed January 16, 2015; by Judge Leavitt

In this case, the insurer asserted that it did not have liability for medical bills issued by an entity that was not the provider of medical treatment to a claimant. The entity, PTI, filed five separate fee review applications requesting review of the amount of payment. The Bureau's Medical Fee Review Section ordered full payment on all but one of the invoices, plus 10% interest. The insurer then filed a request for hearing to contest the Fee Review Determinations. The insurer took the position that PTI was not entitled to payment because it did not provide the services for which it was billing. The insurer took the claimant's deposition, and he testified that he received physical therapy at a facility called "THE pt GROUP." The claimant said that he never heard of PTI.

Before the parties finished their case before the Fee Review hearing officer, the Commonwealth Court issued its decision in *Selective Insurance Company of America v. Bureau of Workers' Compensation Fee Review Hearing Office (The Physical Therapy Institute)*, 86 A.3d, 300 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 96 A.3d. 1030 (Pa. 2014), involving the same parties and nearly identical facts. In that case, the court held that the Bureau lacked jurisdiction to determine whether an entity was a provider of medical services or simply a billing agency. According to the court, this was an issue that must be decided by a Workers' Compensation Judge. The court also held that the Bureau's Medical Fee Review Section lacked jurisdiction to consider PTI's Fee Review Petitions in the first instance and, therefore, vacated the Fee Review Determinations. Thus, in the underlying case, the hearing officer dismissed the insurer's hearing request for lack of jurisdiction and vacated the

Fee Review Determinations. PTI then appealed to the Commonwealth Court.

The Commonwealth Court held that the hearing officer correctly vacated the Fee Review Determinations based on the holding in *Selective Insurance*. According to the court, although a provider's only remedy for non-payment of an invoice is a Fee Review Petition under the Act, this does not mean that PTI lacked any recourse. A claimant can file a petition to establish the insurer's liability to PTI through a Review or Penalty Petition. Should PTI be adjudicated the provider, it can re-bill the insurer and proceed to Fee Review if an issue arises involving the amount or timeliness of payment.

Claimant was not entitled to an award of partial disability benefits after returning to work because she was earning less than her pre-injury wage due to economic conditions and not her work injury.

Janice Donahay v. WCAB (Skills of Central PA, Inc.); 869 C.D. 2014; filed February 4, 2015; by Judge Leavitt

The claimant sustained a work-related injury and received payment of temporary total disability benefits. She then returned to work, with restrictions, earning less than her per-injury average weekly wage. Pursuant to a Supplemental Agreement, the claimant was paid partial disability benefits. Later, the employer filed a petition to terminate the claimant's workers' compensation benefits and in the alternative, sought a suspension of benefits, alleging that, even if the claimant was not fully recovered, she was fully capable of doing her pre-injury job.

In litigating the petitions before the Workers' Compensation Judge, the claimant said that her hourly wage was higher than when she was injured. She also said that she set her own work schedule because her treating physician limited her to working no more than 45 hours per week. The claimant also said that, due to funding cuts, the employer limited the amount of overtime available to all employees. The employer also testified to significant funding cuts that occurred after the claimant's work injury, requiring limits to be imposed on overtime hours. The judge denied the termination petition but suspended the claimant's disability benefits, concluding that the employer met its burden of proving that the claimant's work injury was not causing a loss of earning power. The claimant appealed to the Workers' Compensation Appeal Board, and they affirmed.

On appeal to the Commonwealth Court, the claimant argued that, because she suffered a loss of wages after returning to work and was under physical restrictions, her disability benefits should not have been suspended. The Commonwealth Court disagreed and held that, if a reduction in earnings is not tied to a loss of earning power attributable to the work injury, no disability benefits are due. The court noted that the claimant earned a higher hourly wage post injury, was not limited in the number of overtime hours she could work, and her loss of earnings resulted from the addition of staff and limitations on overtime for all employees because of funding cuts, not the work injury.

A Workers' Compensation Judge's rejection of an impairment rating given by an IRE physician must be supported by substantial competent evidence.

IA Construction Corporation and Liberty Mutual Insurance Company v. WCAB (Rhodes); 2151 C.D. 2013; filed February 19, 2015; by Judge Brobson

In this case, the claimant was awarded benefits after a Workers' Compensation Judge granted a claim petition, finding that the claimant sustained a traumatic brain injury with organic affective changes and persistent cognitive problems, memory impairment, post-traumatic headaches, post-traumatic vertigo or impaired balance, and musculoskeletal or myofascial neck and back injuries. The employer later filed a modification petition based on the results of an IRE performed on the claimant, resulting in a 34% impairment rating.

A Workers' Compensation Judge denied the modification petition. In doing so, the judge rejected the impairment rating, finding that only three of the recognized injuries were rated and that several other injuries were lumped together into three categories that were rated. The judge concluded that the IRE physician did not address all of the diagnoses that should have been considered part of the work injury. The judge also noted that a significant portion of the rating was due to cognitive impairment exhibited from the traumatic brain injury and that the rating for traumatic brain injury was mainly based on records reviewed rather than an examination. The judge also questioned the qualifications of the IRE physician, since the physician was a physical medicine and pain management specialist, and there was no indication the physician treated traumatic brain injuries on a consistent basis.

The employer appealed to the Workers' Compensation Appeal Board, and they affirmed. However, the Commonwealth Court reversed. The court agreed with the employer that the IRE was performed in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). Overall, the Court found that the reasons for the judge's rejection of the IRE physician's opinion did not have any basis in the evidentiary record. The judge did not cite any provisions of the AMA Guides or other evidence in support of her reasoning that the IRE physician miscategorized or improperly grouped the claimant's injuries or that he improperly calculated the claimant's impairment rating. Furthermore, the claimant did not elicit any evidence that could support the reasoning. Thus, the court granted employer's appeal and reversed the decisions of the judge and the Board.

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