

COUNTERPOINT

AN OFFICIAL PUBLICATION OF THE PENNSYLVANIA DEFENSE INSTITUTE

An Association of Defense Lawyers and Insurance Claims Executives

DECEMBER 2012

WINNING ONE FOR THE GIPPER: THE LOOMING LEGAL THREATS TO AMERICAN FOOTBALL

By Paul F. Clark, Esquire, Robert J. Cosgrove, Esquire and Adam Gomez¹, Wade Clark Mulcahy, Philadelphia, PA

INTRODUCTION

Oh, it's a fine game, football - noble game. Originated in England in 1823... It moved to America where someone took advantage of a loophole in the rules and invented a little formation called the Flying Wedge. So many young men were maimed and killed by this clever maneuver that President Roosevelt - Theodore Roosevelt - had to call the colleges together and ask them to make the game less brutal. He was, of course, defeated in the next election.

“Trouble Along the Way” (1953) – Steve Williams (John Wayne)

Football has become, with all due apologies to baseball, America’s pastime. The Super Bowl is the biggest television event of the year and college homecomings are arranged around the “big game” against the ancient football rival before 100,000 plus screaming, adoring fans.

Yet, notwithstanding its popularity, football, as John Wayne made clear way back in 1953 (when football was far less popular), has a darker side – specifically the risk of catastrophic injury. Who can forget such iconic images as Joe Theisman, the Washington Redskins’ star

quarterback having his leg snapped in half by the New York Giants star line-backer Lawrence Taylor or Mike Utley, the Detroit Lions tackle giving the crowd a thumbs up as he was carted off the field a paraplegic? Who can ignore the reality of ESPN’s, the only network exclusively dedicated to sports related coverage, production of a popular segment dedi-

cated to brutal tackles appropriately entitled “Jacked Up?” And any movie junkie will tell you that a realistic football related movie will include lengthy images of players in the training room receiving painkiller injections or being taped just so they can get through the game.

continued on page 2

A MALPRACTICE INSURER’S PERSPECTIVE: AVOID CONFLICTS, AVOID CLAIMS

By Michelle Lore, Esquire, Minnesota Lawyers Mutual, Minneapolis, MN

A frequent complaint from clients asserting malpractice or ethical claims against an attorney is that the lawyer ignored a conflict of interest in the representation or failed to obtain the client’s consent to the conflict. Conflicts, which can be obvious or hidden, can arise from a variety of scenarios, including: defending more than one client in the same litigation, entering into business contracts with clients, or even by serving on a client’s board of directors.

Rule 1.7 of the Pennsylvania Rules of Professional Conduct prohibits lawyers from representing a client if the representation involves a concurrent conflict of interest; that is, if the representation of one client will be directly adverse to another client, or there is a significant risk that the representation will be materially limited by the lawyer’s responsibilities to another client, a former client, a third person or even by a personal interest of the lawyer. A “personal interest”

includes such things as an equity interest in a client’s business or a commercial relationship with a client’s business enterprise.

Avoiding conflicts claims requires risk management and practice management. First and foremost in conflict avoidance is regular use of a reliable conflicts checking system. The conflicts-of-interest database should be updated and searched every time a new client or new case comes in to the firm. When new parties are brought into a matter, the database should be checked again. For firms that frequently defend large corporations, this might be tricky. But with a comprehensive, properly maintained database, the process can be made much easier.

Establishing and maintaining a reliable system to catch potential conflicts of interest should be seen as an ongoing commitment to securing the trust of the firm’s clients. Generally, three things are

continued on page 11

On The Inside

- Pennsylvania Employment Law Update 14
- Workers' Compensation Update 16
- A Delve into 2012 21

We encourage comments from our readers

Write: Pennsylvania Defense Institute
P.O. Box 697
Camp Hill, PA 17001

Phone: 800-734-0737 FAX: 800-734-0732

Email: coled01@padeffense.org

Ralph E. Kates, Esq. Editor-in-Chief

Counterpoint has been designed by the Pennsylvania Defense Institute to inform members of developments in defense-related legislation, relevant and significant cases and court decisions, and any other information which is of interest to the membership.

Copyright © 2012, Pennsylvania Defense Institute

Winning One

continued from page 1

But the injuries we typically think of, and the ones Teddy Roosevelt was worried about, were visible injuries. They could be readily seen and their damage was readily apparent. The more dangerous trend in modern football is the rise of invisible injuries, specifically head trauma.

What's at stake in this new class of injuries? Not an election (although this is an election year), but rather the outcome of a rash of liability lawsuits that have been filed across the country. The potential for additional lawsuits (many of which arise out of events from many years ago) is a reality that must frighten educational institutions, sports leagues, physicians, coaches, trainers and their insurers alike. In this essay, we will explore some of the common issues involved in the rise of head trauma injuries and resulting litigation.

What is a Concussion?

In respect of sport-related head trauma, the main culprit is the concussion – a form of mild traumatic brain injury (MTBI)² – which is defined as “a complex pathophysiological process affecting the brain” and “induced by traumatic biomechanical forces.”³ Although no single definition dominates the field, concussions are characterized by five generally accepted features:

(a) the injured party suffers a direct blow to the head, face, neck, or elsewhere on the body where an impulsive

force is transmitted ultimately to the head;

(b) the blow results in the rapid onset of short-lived impairment of neurological functions that resolve spontaneously;

(c) the injured party's clinical symptoms largely reflect functional disturbances, not structural injuries or deformities;

(d) the injured party may or may not suffer a loss of consciousness (LOC), but if he or she does, the LOC typically resolves quickly; and

(e) neuroimaging of the injured party reveals standard structure without abnormalities.⁴

According to the consensus definition, concussions are precipitated by the application of biomechanical forces – most often rapid acceleration and deceleration – to the head and neck.⁵ When such forces are applied, the brain moves differently within its cerebrospinal fluid than does the skull.⁶ The different rates of movement cause the brain to rotate within the cranium and come into contact with the slower-moving skull.⁷ As a result, the impact damages the brain's neuronal membranes and leads to bruising.⁸

However, the physical trauma caused by the concussive blow pales in comparison to the cascade of events that takes place on the cellular level. The breach of the brain's protective membrane causes the cells to lose their ability to regulate ions. The resulting influx of neurotransmitters forces the brain's synapses to fire excessively, leading to cellular death by over-

stimulation and excitotoxic shock.

In an effort to reverse the damage, the brain's auto-regulatory mechanisms trigger a second chemical response that places the brain in a hypometabolic state. Here, the brain depresses neurological function by decreasing blood flow. Essentially, the brain slows itself down to counteract the effects of a concussive blow.

What Are the Signs of a Concussion?

Following a concussive blow, the brain's hypometabolic state persists for a period of up to four weeks.⁹ It is during this time that the brain's own neurological depression gives rise to the common effects or symptoms associated with a concussion. The symptoms can be physical, emotional, or neurological and include:

Physical

- Headaches;
- Vertigo;
- Sleep problems;
- Fatigue;
- Blurred vision;
- Nausea/vomiting;
- Light headedness; and
- Loss of consciousness.

Emotional

- Depression;
- Anxiety; and
- Irritability.

Neurological

- Lack of awareness;
- Memory failure;
- Slurred Speech;
- Confusion; and
- Disorientation.¹⁰

The symptoms may present themselves within minutes of the initial blow or weeks later while the brain continues to heal. Symptoms that linger and persist beyond the initial trauma ordinarily indicate that the individual is suffering from post-concussive or post-concussion syndrome.

The Diagnosis and Grading of Concussions

Although there is very little treatment for a concussion – much less a cure – physicians and researchers agree that early diagnosis and grading are paramount to effective management.

Various medical associations and research coalitions have propounded different diagnostic systems to help players, parents, coaches and health care professionals more readily diagnose concussions. At present, there are more than twenty-seven published guidelines that endeavor to help these individuals make critical concussion management decisions.¹¹ Chief among these metrics are three universally recognized and employed grading guidelines – the Cantu Guidelines, the AAN Standards, and the Colorado Medical Society Grading System for Concussions. In addition, emerging diagnostic techniques aim to facilitate the recognition and management of concussions with greater rapidity and less subjectivity.

*The Cantu Guidelines*¹²

Doctor Robert Cantu's¹³ initial set of concussion guidelines were drafted in 1986 and subsequently modified in 2001 for use on athletic sidelines after a player is suspected of sustaining a concussion. The original guidelines establish three levels of concussion, depending on the severity or duration of lost consciousness (LOC) and posttraumatic amnesia (PTA).

However, Cantu's current guidelines no longer focus solely on LOC or PTA, but rather emphasize other post-concussion symptoms such as headaches, fatigue, blurred vision, and confusion. Moreover, Cantu's current guidelines recognize that concussions may have lasting effects that speak to the injury's severity long after any LOC or PTA has faded. As a practical matter, Cantu argues that while the use of cognitive tests are helpful "first aid" in the diagnosis of concussions, a more feasible way to diagnose a concussion may include computer-administered minineuropsychological tests like ImPACT.¹⁴ The present guideline levels are:

- **Grade 1:** No loss of consciousness, posttraumatic amnesia or post-concussion signs or symptoms lasting less than 30 minutes;
- **Grade 2:** A loss of consciousness lasting less than 1 minute or post-traumatic amnesia, or post-concussion signs or symptoms lasting

longer than 30 minutes but less than 24 hours; and

- **Grade 3:** A loss of consciousness lasting more than 1 minute or post-traumatic amnesia lasting longer than 24 hours or post-concussion signs or symptoms lasting longer than 7 days.

*The AAN Standards*¹⁵

The American Academy of Neurology's (AAN) Quality Standards on the Management of Concussion in Sports are the guidelines used by the U.S. Centers for Disease Control and Prevention (CDC). They are similar to the Cantu guidelines, but focus more intently on immediate sideline diagnosis. Under the AAN Guidelines, coaches and team medical professionals are encouraged to concentrate on the instant impact of the concussive blow on the athlete as he or she is taken out of the game, as well as LOC and PTA. The AAN concussive levels are:

- **Grade 1:** Transient confusion (inattention or inability to maintain a coherent stream of thought and carry out goal-directed movements) and no loss of consciousness or concussion symptoms that resolve in less than 15 minutes;
- **Grade 2:** Transient confusion, no loss of consciousness, or concussion symptoms that last more than 15 minutes; or
- **Grade 3:** Any loss of consciousness.

In administering the sideline evaluation, the AAN Guidelines suggest a three-pronged test designed to assess memory, concentration and orientation by:

Memory

- Asking the names of the teams in the prior contest, recalling three words and three objects at intervals of 0 and 5 minutes, questioning about recent newsworthy events and the details of the contest.

Concentration

- Asking the athlete to state in reverse orders the months of the year or the letters in the alphabet.

Orientation

- Asking the athlete about the time, place, person and situation.

*The Colorado Medical Society Grading System for Concussion*¹⁶

The third guideline published by the Colorado Medical Society's Guideline is arguably the simplest diagnostic test used in determining the extent to which an athlete may be concussed.¹⁷ The Colorado Guidelines have three concussive levels:

- **Grade 1:** Confusion with no amnesia or loss of consciousness;
- **Grade 2:** Confusion with amnesia but no loss of consciousness; and
- **Grade 3:** Loss of consciousness

Like the Cantu Guidelines and AAN Standards, the Colorado Medical Society emphasizes the importance of immediate sideline evaluations.

Emerging Diagnostic Techniques

As society's awareness and understanding of concussions have grown over the last decade, so too have the means of diagnosis and grading. In the Apple world in which we live, it should be no surprise that there are concussion iPhone/iPad applications. The first application, the Concussion Recognition and Response App ("CRR"), was developed by PAR in conjunction with doctors at the SCORE Concussion Department of the Children's Medical Center.¹⁸ The application was designed to provide parents and coaches with an interactive means to immediately and meaningfully screen athletes for concussions. CRR guides parents and coaches through a five-minute examination that concludes with a recommended course of action consistent with the athlete's symptoms.

The second application is another PAR offering named Concussion Assessment and Response-Sports Version (CARE-Sports Version).¹⁹ Whereas CRR is oriented towards providing concussion "first-aid" on the sidelines, CARE is designed to assist healthcare professionals in analyzing neurological function at a much deeper level. The application allows trainers and physicians to objectively assess, document, and share an athlete's recovery as the brain awakens from its hypometabolic state. Moreover, the CARE application suggests a unique

continued on page 4

Winning One

continued from page 3

“return to play” regiment consistent with the athlete’s post-concussion progress.

Though not as accessible as the world of smart phones and tablets, developments in the field of blood biomarkers may also lead to the more immediate and consistent diagnoses of concussions in athletes.²⁰ Although testing remains in its infancy, doctors may in the future be able to evaluate an athlete by comparing her pre-concussive blood sample to those drawn immediately after the cerebral trauma.²¹ Researchers at the Cleveland Clinic’s Concussion Center are on the cutting edge of concussion-related blood testing where increased levels of the S100B protein may indicate brain damage.²² According to the Clinic’s research, the presence of S100B in the blood is evidence that the brain’s protective barrier has been compromised.²³ If proved effective, biomarker testing would remove the subjectivity in concussion recognition and streamline diagnoses.

What Happens if There Are Multiple Concussions?

Researchers and physicians have begun to express greater concern for the long-term effects of multiple concussions (as opposed to the effects of a single or isolated concussion). Recently, studies have demonstrated that two medical conditions, Chronic Traumatic Encephalopathy (CTE) and Second Impact Syndrome (SIS), pose the greatest threat to athletes who have sustained multiple concussions throughout their careers. In addition, a recent study by the U.S. Centers for Disease Control has found that neurodegenerative mortality in general is higher amongst athletes who have suffered multiple concussions.

Chronic Traumatic Encephalopathy (CTE)

One of the most well-publicized and documented effects of an athlete who suffers multiple concussions, often from a premature “Return to Play”, is Chronic Traumatic Encephalopathy (CTE). CTE, previously known as “dementia pugilistica”, arises in at least 17% of athletes

who have suffered multiple concussions.²⁴ Studies have demonstrated that these athletes later develop large deposits of tau protein in their brains.²⁵ The accumulation of tau protein deforms the brain’s neurons leading to symptoms commonly associated with dementia and Alzheimer’s.²⁶ The disease manifests itself as a loss of memory, concentration and coordination and is accompanied by the steady onset of headaches.²⁷ As CTE progresses, neurological function decreases leading to poor judgment and overt dementia.²⁸ In the most severe cases, there are signs of physical impairment as well, including slower muscular movements, impeded speech and tremors.²⁹ The severity of the condition and its visible symptoms correlate to the length of time the athlete engaged in the sport and the number of concussions sustained while playing.³⁰

Second Impact Syndrome (SIS)

Unlike CTE where the disease stems from the aggregate impact of multiple concussions throughout an athlete’s career, Second Impact Syndrome (SIS) is a potentially debilitating condition arising out of multiple concussions within a short period of time. Second Impact Syndrome is therefore generally characterized by two distinct events—an initial head injury causing Post-Concussive Syndrome and a second head injury while the athlete is in that post-concussive state.³¹

Plainly, SIS is a risk associated with the brain’s auto-regulation of an initial concussive episode. Once in a hypometabolic state following the first concussion, the brain decreases blood flow, protein synthesis and oxidation so as to normalize the ion imbalance and stave off cellular death.³² Although the brain is ordinarily effective in this endeavor, the auto-regulation mechanisms leave the brain more vulnerable to secondary trauma. If, while in this hypometabolic state, an athlete is again concussed, the blow may result in death or serious injury regardless of its intensity (as compared to the first incident).³³ In effect, the second trauma incapacitates the brain’s auto-regulation mechanism and blood flow becomes uncontrollable.³⁴ As a result, the brain can rapidly swell, herniate, or hemorrhage leading in some cases to instant death.³⁵

ate, or hemorrhage leading in some cases to instant death.³⁵

The Net Impact

The bottom line to all of this is that recent studies by the U.S. Centers for Disease Control have concluded that professional athletes who suffer concussions throughout their careers are at significantly greater risk of dying from neurodegenerative diseases such as Alzheimer’s, Parkinson’s, and Amyotrophic Lateral Sclerosis (ALS).³⁶ Further, these studies have demonstrated that multiple concussions in athletes contribute to the increased prevalence of mild cognitive disorders and significant memory problems.³⁷ Also revealed was the inherent difference between speed and non-speed positions in professional contact sports where participants in the first class are more likely to experience concussions due to the momentum they generate prior to impact.³⁸ Despite the overwhelming evidence indicating an increased risk of neurodegeneration in concussed athletes, the CDC has not yet gone so far as to establish a cause-effect relationship between concussions and death.³⁹

What Are the Equipment and Other Issues Involved in Concussion Prevention?

Equipment

As a general matter, appropriate protective equipment helps prevent concussions by reducing the movement of the head on impact, thereby lowering the chances that the skull and brain will come into traumatic contact. Two relevant types of equipment are helmets and mouth guards. Helmets, if properly fitted, work by absorbing and diverting the kinetic energy of an impact away from the body, while mouth guards can also prevent concussions by reducing pressure from contact to the chin.

In the United States, the National Operating Committee on Standards for Athletic Equipment (NOCSAE) guidelines regulate helmet performance. These establish a standard method for measuring a helmet’s ability to absorb shock and endure repeated blows. New helmet technology attempts to diffuse the impact even further than older models by increasing

the distance between the helmet and the head and creating air turbulence within shock absorbers that limit the acceleration and deceleration of the head following a potentially concussive blow.⁴⁰

Mouth guards, in particular custom fit orthodontics and mouthpieces, have also demonstrated positive results with respect to reducing the amount of concussive force experienced by, again, limiting the application of acceleration and deceleration forces to the head area.⁴¹

An additional factor in this debate is the playing surface itself.⁴² Harder playing surfaces, when combined with bigger and faster athletes, contribute to this increase in speed that leads to greater acceleration and resultant collision forces. Harder playing surfaces also influence concussion rates where head-ground collisions are common.

Rules

Rule changes are also designed to prevent concussions. In professional football, NFL Rule 12, Article 9(b)(1) prohibits the forcible hitting of the defenseless player’s head or neck area.⁴³ NFL Article 9(b)(2) prohibits contact against a player who is in a defenseless posture – specifically by prohibiting the lowering of the head and making forcible contact with the top/crown or forehead/hairlines parts of the helmet against any part of the defenseless player’s body.⁴⁴ Similarly, NCAA football Rule 9, Section 1, Article II(a) prohibits the striking of an opponent’s helmet.⁴⁵ Rule 9, Section 1, Article III prohibits a player from targeting and initiating contact against an opponent with the crown (top) of his helmet.⁴⁶ Rule 9, Section 1, Article IV prohibits a player from targeting and initiating contact to the head or neck area of a defenseless opponent.⁴⁷

The trend is also apparent at the youth sport level where National Federation of State High School Associations (NFHS) Rule 2-20-1 prohibits the act of initiating contact with the helmet of an opponent.⁴⁸ Further, under Rule 9-4-3(i), illegal helmet-to-helmet contact against a defenseless opponent is strictly prohibited.⁴⁹ Pop Warner football too has issued new rules to limit contact drills to one-third of practice time and to ban full speed,

head on blocking and tackling drills in which players line up more than three yards apart.⁵⁰

How Do You Treat a Concussion?

Concussions are “treated” largely by the brain’s auto-regulation mechanisms. There is no affirmative treatment protocol for a concussion save rest and the elimination of contact that may concuss the brain again. Thus, concussion management and treatment in the athlete relies primarily on allowing appropriate rest and refraining from the introduction of physical strain and impact – hallmarks of the “Return to Play” progression.

What Types of Return to Play Policies Allow the Brain to Heal?

The experts concur that the most crucial element of an athlete’s recovery from a concussion is the “Return to Play” decision. According to Dr. Cantu, once a player has experienced an initial cerebral concussion, her chances of experiencing a second one are three to six times greater than an athlete who has never sustained a concussion. That figure is even greater when the previously concussed athlete returns to competition while still experiencing post-concussion symptoms/brain function. Accordingly, physicians, researchers, athletic associations and state legislatures alike have resolved to implement “Return to Play” policies that establish specific parameters governing the decision to clear athletes. Nevertheless, it remains problematic that the medical profession has admittedly refrained from establishing a bright line standard, instead maintaining that each “Return to Play” decision must be made on a case-by-case basis through a variety of available means.

Notwithstanding the lack of a medical “bright-line”, however, there are three universally recognized “Return to Play” progressions each of which is predicated on the severity of the concussion and the athlete’s prior history of head trauma.

*The Cantu Guidelines*⁵¹

The Cantu Guidelines require consideration of three key factors in the creation of Return to Play programs:

- Concussion grade;
- The number of previous concussions; and
- Symptomology.

Although Cantu’s guidelines appear to pay greater deference to the grade and number of concussive events, all three considerations are given equal weight under the metric. The inclusion of objective and subjective standards for assessment reinforces a common principle in the field, namely, the individualized nature of all “Return to Play” decisions as made in the sound discretion of certified healthcare professionals.

Under the Cantu Chart, an athlete’s “Return to Play” period is a function of the number of concussions sustained and the severity of the most recent episode. Moreover, each “Return to Play” period is conditioned upon an asymptomatic examination conducted at least one week prior to any clearance. The “Return to Play” periods are defined specifically as follows:

# of Concussions	1st	2nd	3rd
Grade 1 (mild)	1 week	2 weeks	Terminate season
Grade 2 (moderate)	1 week	1 month	Terminate season
Grade 3 (severe)	1 month	Terminate season	NA

Of note is Cantu’s treatment of a third, severe concussion as grounds for the immediate cessation of all contact sports. Nevertheless, Cantu stresses that the decision is a wholly clinical one that depends on the observations and judgment of those physicians, trainers, and healthcare professionals charged with the athlete’s care.

*The AAN Standards*⁵²

The AAN Concussion Management Standards take a more liberal “Return to Play” approach than do the Cantu Guidelines. Under the AAN Standards, the first issue is whether the athlete can “Return to Play” on the same day as the incident – a consideration not contemplated under Cantu. The AAN suggests:

continued on page 6

Winning One

continued from page 5

Grade	Same Day?
Grade 1	Yes, if normal sideline assessment
Grade 2	No
Grade 3	No

However, in informing that decision as well as other “Return to Play” decisions, the AAN also focuses on the number of concussions, severity, and symptomology:

Grade	Time Until Return
Multiple Grade 1	1 week
Grade 2	1 week
Multiple Grade 2	2 weeks
Grade 3 with brief LOC	2 weeks
Grade 3 with prolonged LOC	2 weeks
Multiple Grade 3	1 month

Like the Cantu guidelines, the AAN Guidelines point out that “Return to Play” decisions are primarily driven by case-by-case clinical evaluations and should not be strictly governed by the above parameters.

*The Colorado Medical Society’s Guidelines*⁵³

In a similar vein as the Cantu Guidelines and AAN Standards, the Colorado Medical Society’s Guidelines focus on the number of concussions, the grade of the current episode, and the specific athlete’s symptomology:

Grade	First Concussion	Multiple
Grade 1	15 minutes	1 week
Grade 2	1 week	2 weeks
Grade 3 with brief LOC	1 month	6 months
Grade 3 with prolonged LOC	6 months	1 year

Athletic Association Policies

NFL

In 2009, the National Football League (“NFL”) and National Football League Players Association (“NFLPA”) developed a strict “Return to Play” policy in conjunction with various team doctors. The “Return to Play” initiative was driven by Congressional hearings on the prevalence of head injuries in professional football, as well as reports that nearly one in every five NFL players hid or downplayed the effects of a concussion. Accordingly, the League instituted

a multi-faceted procedure that first advises players not to return to competition if they show any signs or experience any symptoms of concussions – a direct response to criticism regarding the NFL’s previous policy that suggested removal only in the event of LOC. Second, the NFL’s 2009 “Return to Play” policy does not allow players to be considered for return to football activities until they (1) are fully asymptomatic, both at rest and after exertion, (2) have normal neurological evaluations and (3) have been cleared by both the team’s physician and an independent neurologist.⁵⁴ According to NFL commissioner Roger Goodell, the “Return to Play” progression is designed to reinforce the NFL’s commitment to address concussions in an increasingly cautious and conservative way.⁵⁵ The 2009 iteration of the NFL’s “Return to Play” policy was unveiled as the NFL’s first step towards advancing player safety through improved equipment, increased education, and rule changes.⁵⁶

NCAA

As one of the nation’s leading associations of interscholastic athletics, the NCAA implemented a concussion management plan of its own in 2012 that requires each member school to develop its own concussion protocols without regard to a specific sport.⁵⁷ Unlike the NFL and other professional sports associations, the NCAA has not issued a specific “Return to Play”, but instead prescribes broad guidelines that schools must implement with self-directed and detailed protocols. However, the mandate does require immediate removal from play or practice and evaluation by a medical staff member following potential concussions. It next ensures that the athlete cannot return to play for at least the remainder of that calendar day, and further demands that the athlete obtain medical clearance before engaging in any athletic activity.⁵⁸

The NFHS

Under the NFHS rules, athletes should not return to play on the same day that they experience a suspected concussion.⁵⁹ Any athlete suspected of suffering a concussion should be evaluated by medical personnel on that same day.⁶⁰

The athlete must be cleared by a medical professional before engaging in practice or competition.⁶¹ After returning to play, the recurrence of signs or symptoms should be monitored.⁶²

State ‘Return to Play’ Laws

Currently, more than 80% of U.S. states have adopted formal concussion legislation to establish and monitor concussion education, treatment and “Return to Play” issues.⁶³ Thirty-seven states and the District of Columbia have adopted legislation modeled after Washington’s “Lystedt Law.”⁶⁴ Illustrative examples include:

- New York’s SB 3953-A that provides:⁶⁵

No pupil shall engage in organized practice for or participate in any interscholastic sport on behalf of a school district or board of cooperative educational services, unless and until the person in parental relation to such pupil shall have signed and returned a statement attesting that he or she has received, read and understands the informational pamphlet . . .⁶⁶ [These] rules and regulations shall require the immediate removal from athletic activities of any pupil believed to have sustained or who has sustained a mild traumatic brain injury, the reporting of such injury to the department and an evaluation of such pupil pursuant to specified guidelines. In the event that there is any doubt as to whether a pupil has sustained a concussion, it shall be presumed that he or she has been so injured until proven otherwise.⁶⁷ No such pupil shall resume athletic activity until he or she shall have been symptom free for not less than twenty-four hours and has been evaluated by and received written and signed authorization from a physician trained in the evaluation and treatment of mild traumatic brain injuries.⁶⁸

- New Jersey’s AB 2743, that provides:⁶⁹

A student who participates in an interscholastic sports program and who sustains or is suspected of having sustained a concussion or other head injury while engaged in a sports competition or practice shall be immedi-

ately removed from the sports competition or practice.⁷⁰ A student-athlete who is removed from competition or practice shall not participate in further sports activity until he is evaluated by a physician or other licensed health-care provider trained in the evaluation and management of concussions and receives written clearance from a physician trained in the evaluation and management of concussions to return to competition or practice.⁷¹

- Pennsylvania's Safety in Youth Sports Act, that provides:⁷²

A student participating in or desiring to participate in an athletic activity and the student's parent or guardian shall each school year, prior to participation by the student in an athletic activity, sign and return to the student's school an acknowledgment of receipt and review of a concussion and traumatic brain injury information sheet developed under this subsection.⁷³ A student who, as determined by a game official, coach from the student's team, certified athletic trainer, licensed physician, licensed physical therapist or other official designated by the student's school entity, exhibits signs or symptoms of a concussion or traumatic brain injury while participating in an athletic activity shall be removed by the coach from participation at that time.⁷⁴ The student shall not return to participation until the student is evaluated and cleared for return to participation in writing by an appropriate medical professional.⁷⁵ In order to help determine whether a student is ready to return to play, the appropriate medical professional may consult any other licensed or certified medical professionals.⁷⁶

What Theories of Liability?⁷⁷

Although sport-related head injuries have only recently taken the media spotlight, concussions have long-since spawned a variety of litigation nationwide. Responding to different applications of tort law in the respective states, plaintiffs have averred numerous theories of liability intended to hold health-care professionals, schools, and product manufacturers responsible for concus-

sion-related injuries. The theories of the complaint generally sound in allegedly improper: "Return to Play", safety provisions, premises liability, informed consent, products liability, medical malpractice, and combination cases. The first six causes of action have been tested extensively by scholar-athletes injured in the high school and college ranks; where, by contrast, the combination cases relate primarily to the complex litigation currently ongoing in professional sports. Each category, though, illustrates how the seemingly innocuous aspects of sport might expose a defendant to significant liability.

Improper "Return to Play"

The first theory of liability, improper "Return to Play", is also the most common iteration of negligence in the context of sports-related concussions. Improper "Return to Play" can be further subdivided into three distinct claims; namely, the absence of a "Return to Play" protocol, the implementation of an improper "Return to Play" protocol, and the misapplication of a Return to Play protocol. The anatomy of a "poor protocol" case is most conspicuous in the New Jersey case of *Ryne Dougherty v. Montclair High School* (N.J. Super. Ct., Law Division 2008). In *Dougherty*, the plaintiff died in October of 2008 after suffering an on-the-field brain hemorrhage. *Dougherty* had suffered two concussions in the successive weeks leading up to the day he died but was allowed to play (on the day of his death) nonetheless. *Montclair High School* implemented an ImPACT test to assess *Dougherty's* recovery; however, the results of that cognitive test were voided due to a disruption during its administration. Experts suggest that notwithstanding the disruption, *Dougherty's* exam demonstrated objectively abnormal results. *Dougherty* was, however, cleared by his family physician, Dr. Michele Nitti. Presently, the case is pending in the New Jersey Superior Court in Essex County where trial is scheduled for April of 2013.

Safety Provisions

A similarly prevalent theory of liability is prosecution for the lack of adequate safety provisions as seen in the case of *Benson v. St. Stephen's Episcopal* (TX

2003) where the plaintiff, Will Benson, died two days after suffering a cerebral brain hemorrhage that occurred during the second quarter of a high school football game. Earlier in the game, Benson advised his coaches and staff that he felt "weird," but there was no medical staff on site. He was eventually escorted to the locker room where an ambulance was called but could not reach him due to the school's location in a remote part of Texas. The decision was made to call a LifeStar helicopter that took close to two hours to arrive. Though Benson later underwent surgery, he entered a vegetative state and was soon thereafter taken off of life support and died. *St. Stephen's* ultimately settled with Benson's estate for \$1 million and the Texas state legislature passed a law entitled "Will's Bill" requiring officials and coaches to be trained in emergency medical procedures.

Premises Liability

Plaintiffs have also averred standard premises liability claims in respect of concussion-related injuries. While this type of claim might, depending on the jurisdiction, sound in a "failure to warn" theory based on the common law distinction between invitee and licensee, many plaintiffs have deferred to a fact-based physical defect theory. The latter type of case is best represented by the (non-football) matter of *Jennifer Gill v. Tamalpais Union High School District* (CalApp.2008) where the plaintiff suffered a laceration to her face and apparent concussion when she ran into the unpadded support beam of a basketball hoop. Adding insult to injury, *Gill* later lost three teeth when her injuries caused her to lose consciousness and fall off the school's training room table. Ultimately, portions of *Gill's* suit was dismissed on grounds of immunity but was allowed to proceed in respect of the aforementioned premises claims. It is easy to imagine a similar claim being presented in a football lawsuit.

Informed Consent

The defendant's alleged failure to obtain informed consent is another popular theory of liability employed by plaintiffs seeking damages for their concussive

continued on page 8

Winning One

continued from page 7

injuries. For example, in the Missouri case of *Hunt v. Sunkett, et al.* (MO 2006), Hunt and a teammate were required to perform full contact tackle drills during their high school football practices without proper padding. The school's coach, Sunkett, demanded this manner of preparation and would scold his players for complaining of injuries. Hunt eventually suffered a broken collarbone during one of the practices and later collapsed on the sidelines due to a series of strokes and seizures that stemmed from an apparent concussion. In the lawsuit that followed, Hunt alleged that Sunkett ignored signs of a concussion and thus failed to provide material information to both Hunt and his parents. As a result of their ignorance of the team's practices, and their potentially adverse effects, the Hunts argued that they were unable to give informed consent.

Products Liability

Another popular theory of liability espoused in the context of concussion litigation is products liability. Claims sounding in products liability can often be subdivided into three discrete categories: defective design, defective reconditioning, and false advertising.

Regarding the defective design subcategory of product cases, the signature piece of litigation is *Edward Acuna v. Riddell, Inc.* (CA 2010). In this case, Acuna was playing in a high school football game when he suffered a direct hit to his helmet, stumbled to the sideline, and lost consciousness. School officials had him flown to the nearest trauma hospital where doctors performed emergency surgery to stop the swelling of his brain. Although this procedure saved his life, Acuna now suffers from severe nervous system dysfunction and partial paralysis. As a result, he has pressed a claim against helmet manufacturer Riddell, the official helmet of the NFL, claiming that it knew of a defect in the design that could have been fixed by a cheap, readily available alternative. The case has yet to reach disposition, but raises the specter of significant equipment-related litigation in the future.

The case of *Rodriguez v. Riddell, Inc.*, (5th Cir. 2001), on the other hand, addresses the practice of equipment recondition. In *Rodriguez*, the plaintiff lost consciousness and experienced seizures during a high school football scrimmage where he sustained at least twenty blows to the helmet.⁷⁸ He was later taken to the hospital where his injuries left him in a permanent vegetative state.⁷⁹ At trial, Rodriguez argued primarily that the helmets his school issued were improperly reconditioned by the manufacturer, Riddell.⁸⁰ More specifically, Rodriguez's attorneys believed that the helmet should have been retrofitted with newly designed foam that had since become standard in Riddell helmets.⁸¹ The Texas jury found for Rodriguez and awarded him more than \$11 million.⁸²

Though not exactly a product liability case, the class action lawsuit *Enriquez v. Easton Bell Sports & Riddell Sports Group* (S.D. Ca. 2012) claimed Riddell and Easton Bell fraudulently advertised the Riddell Revolution helmet as reducing concussion by 31% as compared to traditional helmets. The class representative, Enriquez, purchased these "revolutionary" helmets at a considerable expense and avers in the complaint that he and others like him were induced to do so by Riddell's baseless representation that a helmet could prevent concussions, when in fact the helmet provided no such protection.

Medical Malpractice

In addition to school officials and equipment manufacturers, plaintiffs have also pursued claims against their healthcare providers for medical malpractice. A good example of this theory in the context of concussion litigation is the case of *Adam Melka v. Orthopedic Associates* (WI 2006) where the plaintiff's family sued an independent orthopedic group contracted by the local high school to evaluate players suspected of suffering concussions. Under the arrangement, the orthopedic group was intended to monitor the concussed athlete's progression and advise on "Return to Play" decisions. In Melka's case, the young football player was cleared to return to play after having experienced a concussion just weeks earlier. In his first game

back, Melka suffered Second Impact Syndrome that caused his brain to swell intensely and required operative intervention. Notwithstanding Melka's argument that the orthopedic group was not trained in updated concussion standards, the verdict ultimately came back for the defense.

Combination Cases

In terms of complex concussion litigation, the case that is most in the news and perhaps best exemplifies use of multiple liability theories is *In re National Football League Players' Concussion Injury Litigation* (E.D.Pa. 2012). The lawsuit, filed on June 7, 2012, effectively consolidated 93 separate lawsuits filed throughout the country alleging that the NFL is liable to concussed former professional football players. Specifically, these former players have named the NFL and NFL Properties as defendants alleging that they: (a) failed to medically monitor concussions; (b) fraudulently concealed information regarding concussions; and (c) negligently misrepresented concussions to the players.⁸³ In addition, the players have named Riddell as a defendant and have claimed that it is liable on theories of: (a) strict liability for design defect; (b) strict liability for manufacturing defect; (c) failure to warn; and (d) negligence.⁸⁴ Finally, the former players have lodged a civil conspiracy claim against all three defendants claiming that there was a systematic attempt to conceal all the negative information regarding concussions that came to light following the NFL's creation of various committees designed to research and address the growing issue of head trauma in football.⁸⁵

One of the plaintiffs' primary theories is that the NFL has glorified the value of violence in the game at the expense of players' safety.⁸⁶ In support, the plaintiffs cite a series of NFL films that focus on the game's hardest impacts, as well as highlight segments that emphasize the game's violence.⁸⁷ The plaintiffs tie this theory into the concealment aspects of their case by suggesting that the NFL's mythologizing of violence resulted in increased revenues that were in turn protected by concealing the truth about concussion risks.⁸⁸

Moreover, the plaintiffs argue that the NFL is liable for their injuries on the basis that it created the Mild Traumatic Brain Injury Committee (MBTIC) in 1994 to study the effects of concussions and suggest rules and policies that would protect players from the same.⁸⁹ The plaintiffs use this committee's existence as evidence that the NFL assumed the role of player caretaker and therefore voluntarily created a duty of care.⁹⁰ The case is in jurisdictional limbo as the NFL has responded to the players' individual suits by arguing that the Collective Bargaining Agreement ("CBA") between the NFL and the NFLPA controls the issue as a labor dispute.⁹¹ According to the NFL, lawsuits like the class action case pending in the Eastern District of Pennsylvania are preempted by the CBA and include an arbitration clause.⁹² More specifically, the NFL argues that federal law preempts state law claims that require the interpretation of a collective bargaining agreement.⁹³ Further, these claims must be presented through the arbitration proceedings outlined by the CBA itself before vesting jurisdiction in the federal courts.⁹⁴ As of the draft of this essay, no decision on the NFL's response to the lawsuit has been made by the court.

There is also NCAA litigation that raises issues similar to the NFL lawsuit. In the case of *Adrian Arrington, Derek Owens, Mark Turner and Angela Palacios, individually and on behalf of other similarly situated v. National Collegiate Athletic Association*, two suits were consolidated to include all of the named plaintiffs as representatives of a putative class for those suffering from concussions in NCAA sports.⁹⁵ The "Corrected Consolidated Complaint" alleges that the NCAA turned a blind eye to concussion education, treatment and management in college sports while deriving astronomical revenues from their exhibition.⁹⁶ In particular, the lawsuit pleads four separate causes of action against the NCAA: (a) medical monitoring; (b) negligence; (c) fraudulent concealment; and (d) unjust enrichment.⁹⁷ Currently, the litigation is proceeding through initial discovery and the NCAA is likely to vigorously contest class certification with the court's decision coming early next year and trial to follow in the summer of 2013.⁹⁸

Conclusion

*Rock. Sometime when the team is up
against it and the breaks are beating the
boys, tell them to go out
there with all they've got
and win just one for the Gipper.
I don't know where I'll be then, Rock,
but I'll know about it and I'll be happy.*

"Knut Rockne: All American" (1940)
– George Gipp (Ronald Reagan)

There is, perhaps, no cliché better known in American sports than the old Ronald Reagan line to "win just one for the Gipper." Unfortunately, "winning one" for football in the United States will not be nearly as easy. The reality is that head trauma injuries are a real and dangerous concern. Their long tail suggests that today's pee wee football star could be the star plaintiff in the 2030 lawsuit. To avoid this potential, given the case of the current lawsuits, educational institutions and sports league's must update and rigorously adhere to formalized concussion procedures. These procedures and protocols must be informed by the latest research and clinical experience of the medical community. Manufacturers must continue their own research for ways to improve their equipment's ability to reduce, if not eliminate, the risk of concussion. While this will be no easy task in the age of volunteer coaches and tight budgets, it appears to us to be the only viable risk management strategy. In its absence, not only will a game not be won for the Gipper, but the very existence of football, itself, will be threatened.

ENDNOTES

¹Adam Gomez is a law clerk in WCM's Philadelphia office.

²This distinction is important as not every MTBI injury is a concussion, although some of the older medical literature treats concussions and MTBI as interchangeable. Further, the literature suggests that the carefree interchange of terms has contributed to a misinterpretation of concussions as being less severe than an MBTI thereby contributing to premature return to play decisions.

³See THE 3RD INTERNATIONAL CONFERENCE ON CONCUSSION IN SPORT, CONSENSUS STATEMENT ON CONCUSSION IN SPORT (2008) available at http://bjsm.bmj.com/content/43/Suppl_1/i76.full.pdf+html; AMERICAN ACADEMY OF ORTHOPEDIC SURGEONS, CONCUSSION (MILD TRAUMATIC BRAIN INJURY) AND THE TEAM PHYSICIAN: A CONSENSUS STATEMENT (2011) available at <http://www6.aaos.org/news/>

PDFopen/PDFopen.cfm?page_url=http://www.aaos.org/about/papers/advistmt/1029.as.

⁴AMERICAN ACADEMY OF PEDIATRICS, SPORT-RELATED CONCUSSION IN CHILDREN AND ADOLESCENTS (2010) available at <http://pediatrics.aappublications.org/content/126/3/597.full.pdf+html?maxtoshow=&hits=10&RESULTFORMAT=&fulltext=concussions&searchid=1&FIRSTINDEX=0&volume=126&issue=3&resourcetype=HWCIT>.

⁵*Id.*

⁶CHRISTINE M. BAUGH, ROBERT C. CANTU, DANIEL H. DANESHVAR, CHRISTOPHER J. NOWINSKI, ANN C. MCKEE, ROBERT A. STERN, HELMETS AND MOUTH GUARDS: THE ROLE OF PERSONAL EQUIPMENT IN PREVENTING SPORT-RELATED CONCUSSIONS (2011) available at <http://www.bu.edu/cste/files/2011/07/Daneshvar-et-al.-Helmets-and-Mouth-Guards.-2011.pdf>.

⁷*Id.*

⁸*Id.*

⁹AMERICAN ACADEMY OF PEDIATRICS, SPORT-RELATED CONCUSSION IN CHILDREN AND ADOLESCENTS (2010) available at <http://pediatrics.aappublications.org/content/126/3/597.full.pdf+html?maxtoshow=&hits=10&RESULTFORMAT=&fulltext=concussion&searchid=1&FIRSTINDEX=0&volume=126&issue=3&resourcetype=HWCIT>.

¹⁰AMERICAN ACADEMY OF NEUROLOGY, PRACTICE PARAMETER: THE MANAGEMENT OF CONCUSSION IN SPORTS (1997) available at http://www.aan.com/professionals/practice/guidelines/pda/Concussion_sports.pdf.

¹¹AMERICAN ACADEMY OF PEDIATRICS, SPORT-RELATED CONCUSSION IN CHILDREN AND ADOLESCENTS (2010) available at <http://pediatrics.aappublications.org/content/126/3/597.full.pdf+html?maxtoshow=&hits=10&RESULTFORMAT=&fulltext=concussions&searchid=1&FIRSTINDEX=0&volume=126&issue=3&resourcetype=HWCIT>.

¹²See ROBERT C. CANTU, POSTTRAUMATIC RETROGRADE AND ANTEROGRADE AMNESIA: PATHOPHYSIOLOGY AND IMPLICATIONS IN GRADING AND SAFE RETURN TO PLAY (2001) available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC155413/pdf/attr_36_03_0244.pdf.

¹³Dr. Cantu is the Co-Director of the Center for the Study of Traumatic Encephalopathy at Boston University as well as the Chairman of Surgery at Emerson Hospital in Concord, Massachusetts. In addition to his medical practice and scholarship, Dr. Cantu has served as an expert witness in concussion litigation throughout the United States including *Plevretes v. LaSalle* (PA 2005) where a college football player brought suit against his university for injuries sustained when he experienced two concussions over a short period of time.

¹⁴*Id.* ImPACT is a computerized neurocognitive testing system that allows healthcare professionals to compare an athlete's post-concussion recovery with her baselines functionality as determined prior to the start of the season.

¹⁵AMERICAN ACADEMY OF NEUROLOGY, PRACTICE PARAMETER: THE MANAGEMENT OF CONCUSSION IN SPORTS (1997) available at http://www.aan.com/professionals/practice/guidelines/pda/Concussion_sports.pdf.

continued on page 10

Winning One

continued from page 9

¹⁶Kimberly G. Harmon, *Assessment and Management of Concussion in Sports*, <http://www.aafp.org/afp/1999/0901/p887.html> (last visited on September 7, 2012).

¹⁷*Id.*

¹⁸See Jean Rickerson, *Concussion App for Parents and Coaches*, <http://www.sportsconcussions.org/feature-stories-PAR-concussion-app.html> (last visited on September 7, 2012); The University of North Carolina at Chapel Hill, *Concussion? There's an App for That*, <http://www.unc.edu/spotlight/concussion-app> (last visited on September 7, 2012).

¹⁹See Rickerson, *supra*; The University of North Carolina, *supra*; Know Concussion, *New App Helps Athletic Trainers and Doctors Assess Concussions on the Field*, <http://www.knowconcussion.org/2012/02/16/new-app-helps-athletic-trainers-and-doctors-assess-concussions-on-the-field/> (last visited on September 7, 2012).

²⁰The Cleveland Clinic, *Cleveland Clinic Researchers Awarded NIH Grant to Study Concussion-Identifying Blood Test*, http://my.clevelandclinic.org/media_relations/library/2011/2011-09-15-cleveland-clinic-researchers-awarded-nih-grant-to-study-concussion-identifying-blood-test.aspx (last visited on September 7, 2012).

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴ANDREW E. BUDSON, ROBERT C. CANTU, BRANDON E. GAVETT, TESSA HEDLEY-WHYTE, CAROLINE A. KUBILUS, HYO-SOON LEE, CHRISTOPHER J. NOWINSKI, ANN C. MCKEE, VERONICA E. SANTINI, ROBERT A. STERN, CHRONIC TRAUMATIC ENCEPHALOPATHY IN ATHLETES: PROGRESSIVE TAUOPATHY FOLLOWING REPETITIVE HEAD INJURY (2009) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2945234/pdf/nihms131627.pdf>.

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹TAREG BEY, BRIAN OSTICK, SECOND IMPACT SYNDROME (2008) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2672291/pdf/0100006.pdf>.

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶SHERRY BARON, MISTY HEIN, EVERETT LEHMAN, NEURODEGENERATIVE CAUSES OF DEATH AMONG RETIRED NATIONAL FOOTBALL NFL PLAYERS (2012) available at <http://www.neurology.org/content/early/2012/09/05/WNL.0b013e31826daf50.full.pdf+html>.

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰See WILLIAM A. STARR, THE COMING WAVE OF CONCUSSION LITIGATION, 52 No. 8 DRI For Def. 50 (2010).

⁴¹CHRISTINE M. BAUGH, ROBERT C. CANTU, DANIEL H. DANESHVAR, CHRISTOPHER J. NOWINSKI, ANN C. MCKEE, ROBERT A. STERN, HELMETS AND MOUTH GUARDS: THE ROLE OF PERSONAL EQUIPMENT IN PREVENTING SPORT-RELATED CONCUSSIONS (2011) available at <http://www.bu.edu/cste/files/2011/07/Daneshvar-et-al.-Helmets-and-Mouth-Guards.-2011.pdf>.

⁴²*Id.*

⁴³THE OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL NFL, R. 12-9(b)(1) (2012).

⁴⁴THE OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL NFL, R. 12-9(b)(2) (2012). It is axiomatic that rules are only as effective as their implementation. Recently, the NFL's lockout of professional referees raised the question of whether these rules will actually contribute to player safety. Replacement referees demonstrated an inability to apply these provisions and may expose the NFL to further liability for failure to effectively enforce the rules.

⁴⁵2011 AND 2012 NCAA FOOTBALL RULES AND INTERPRETATIONS, R. 9-1(II)(a) (2012).

⁴⁶2011 AND 2012 NCAA FOOTBALL RULES AND INTERPRETATIONS, R. 9-1(II) (2012).

⁴⁷2011 AND 2012 NCAA FOOTBALL RULES AND INTERPRETATIONS, R. 9-1(IV) (2012).

⁴⁸2011 NFHS FOOTBALL RULES BOOK, R. 2-20(1) (2011).

⁴⁹2011 NFHS FOOTBALL RULES BOOK, R. 9-4(3)(i) (2011).

⁵⁰See Tom Farrey, *Pop Warner to Limit Practice Contact*, http://espn.go.com/espn/story/_id/8046203/pop-warner-toughens-safety-measures-limiting-contact-practice (last visited on Jun. 15, 2012).

⁵¹See ROBERT C. CANTU, POSTTRAUMATIC RETROGRADE AND ANTEROGRADE AMNESIA: PATHOPHYSIOLOGY AND IMPLICATIONS IN GRADING AND SAFE RETURN TO PLAY (2001) available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC155413/pdf/attr_36_03_0244.pdf.

⁵²AMERICAN ACADEMY OF NEUROLOGY, PRACTICE PARAMETER: THE MANAGEMENT OF CONCUSSION IN SPORTS (1997) available at http://www.aan.com/professionals/practice/guidelines/pda/Concussion_sports.pdf.

⁵³Kimberly G. Harmon, *Assessment and Management of Concussion in Sports*, <http://www.aafp.org/afp/1999/0901/p887.html> (last visited on September 7, 2012).

⁵⁴NATIONAL FOOTBALL NFL: HEAD NECK AND SPINE COMMITTEE, MEMORANDUM RE: CONCUSSION GUIDELINES (2011) available at <http://www.nfevolution.com/wordpress/wp-content/uploads/2012/08/NFL-Concussion-Guidelines.pdf>. The NFL is reconsidering its 2009 guidelines and has a standing committee that is meeting periodically on this issue.

⁵⁵See *NFL Changes Return to Play Rules*, <http://sports.espn.go.com/nfl/news/story?id=4707604> (last visited on September 13, 2012).

⁵⁶*Id.*

⁵⁷2011-2012 NCAA SPORTS MEDICINE HANDBOOK, GUIDELINE 2: CONCUSSION OR MILD TRAUMATIC BRAIN INJURY (MTBI) IN THE ATHLETE (2011) available at http://fs.ncaa.org/Docs/health_safety/2011_12_Sports_Medicine_Handbook.pdf. Assume NCAA issues broad guidelines and school must implement them with its own detailed protocols.

⁵⁸*Id.*

⁵⁹NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, SUGGESTED GUIDELINES FOR MANAGEMENT OF CONCUSSION IN SPORTS (2011) available at <http://www.schsl.org/2010/concussion3-17-11.pdf>.

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.*

⁶³See *The Zackery Lystedt Law*, <http://www.nfevolution.com/article/The-Zackery-Lystedt-Law?ref=270> (last visited on June 16, 2012). The Washington state law that has come to serve as a model for concussion legislation is named after Zackery Lystedt who suffered a brain injury following his premature return to a middle school football game.

⁶⁴See *id.* The Lystedt Law has been championed by the NFL as embodying three tenants of model legislation; namely, education, immediate removal from play, and proper clearance.

⁶⁵N.Y. Educ. Law § 305(42)(a);

⁶⁶N.Y. Educ. Law § 305(42)(a)(i-ii).

⁶⁷N.Y. Educ. Law § 305 (42)(a)(iii).

⁶⁸*Id.*

⁶⁹N.J. Stat. Ann. 18A:40-41.1, et seq.

⁷⁰N.J. Stat. Ann. 18A:40-41.4.

⁷¹*Id.*

⁷²24 P.S. § 5321, et seq.

⁷³24 P.S. § 5323(a).

⁷⁴24 P.S. § 5323(c).

⁷⁵24 P.S. § 5323 (d).

⁷⁶*Id.*

⁷⁷See STUART J. GLASSMAN, BRADLEY D. HOLT, CONCUSSIONS AND STUDENT-ATHLETES: MEDICAL-LEGAL ISSUES IN CONCUSSION CARE & PHYSICIAN AND SCHOOL SYSTEM RISKS (2011) available at <http://www.nkms.com/uploadcache/1325263530-Concussions.pdf>.

⁷⁸*Rodriguez v. Riddell, Inc.*, 242 F.3d 567, 571 (5th Cir. 2001).

⁷⁹*Rodriguez*, 242 F.3d at 571.

⁸⁰*Id.* at 571-572

⁸¹*Id.*

⁸²*Id.* at 572. The Fifth Circuit, however, reversed and remanded the case based on the trial court's prejudicial behavior.

⁸³See *In re National Football Players' Concussion*

Injury Litigation, No. 2:12-md-02323-AB (E.D.Pa. filed June 7, 2012), PLAINTIFF'S MASTER ADMINISTRATIVE LONG-FORM COMPLAINT, pp. 53-74.

⁸⁴*Id.* at pp. 80-84.

⁸⁵*Id.* at p. 84.

⁸⁶*Id.* at p. 14.

⁸⁷*Id.*

⁸⁸*Id.* at p. 13.

⁸⁹*Id.* at p. 35.

⁹⁰*Id.*

⁹¹*See In re National Football Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB (E.D.Pa. filed June 7, 2012), DEFENDANT NFL AND NFL PROPERTIES' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ON PREEMPTION GROUNDS, p. 30.

⁹²*Id.*

⁹³*Id.* at 17.

⁹⁴*Id.*

⁹⁵*See Adrian Arrington, Derek Owens, Mark Turner and Angela Palacios, individually and*

on behalf of other similarly situated v. National Collegiate Athletic Association, No. 11-cv-06356 (N.D. Ill. filed November 21, 2011), CORRECTED CONSOLIDATED CLASS ACTION COMPLAINT.

⁹⁶*Id.* at p. 37 (using the University of Texas' \$300 million TV contract as an example).

⁹⁷*Id.* at pp. 33-37.

⁹⁸?????????? no footnote within text document.



A Malpractice Insurer's

continued from page 1

required: a complete, well-maintained list of names; a commitment to ensuring that the conflict-checking procedure will become part of the firm's routine; and, a requirement that all firm members are trained in the system.

The comment to Rule 1.7 makes it clear that lawyers should adopt "reasonable procedures, appropriate for the size and type of firm and practice," to determine the persons and issues involved in a particular client matter. Moreover, the comment notes that ignorance of a conflict caused by a failure to institute proper conflicts checking procedures will not excuse a violation of the rule.

The fact that a conflict is identified during the firm's review of a new matter doesn't automatically mean the representation is doomed. Instead, the rule allows the representation if: 1) the lawyer reasonably believes that he or she will still be able to provide competent and diligent representation to each client; 2) the representation does not involve a claim by one client against another client the lawyer represents in the same litigation; and, 3) each client gives informed consent. While the rule in Pennsylvania does not require client consent to a conflict to be in writing, it is strongly advised. In fact, Comment 20 to Rule 1.7 indicates that a written consent "tends to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing." Note that a client who has consented to a conflict may later revoke the consent and terminate the lawyer's

representation at any time.

A good conflict-checking system assists attorneys in locating, recognizing and properly dealing with a potential conflict of interest, thereby helping to avoid an ethical complaint and prevent an otherwise innocuous malpractice claim from looking much worse.

Joint Representation

Pennsylvania's ethical rules do not outright prohibit lawyers from simultaneously defending co-defendants in a legal matter. Generally, it is advisable to avoid it due to the potential for conflict situations to arise during the litigation. At a minimum, lawyers need to think carefully, analyzing all possible conflict scenarios, before agreeing to joint representation.

Absent an obvious conflict of interest, clients often resist the notion of separate counsel, for example, when both an employer and one of its employees are sued and they want to avoid the cost of two defense attorneys. In that case, as part of the process of obtaining informed consent, the lawyer should fully discuss the possible conflicts and the lack of confidentiality between the parties. The lawyer should also advise that he or she will have to withdraw if one client decides that some information material to the representation should be kept from the other. Finally, the lawyer should recommend that the clients seek independent counsel as to the joint representation. Only after determining that he or she will be able to provide competent and diligent representation to both clients, and after obtaining their informed consent, should the lawyer agree to the joint representation.

Not all conflicts are readily apparent at the outset of the litigation, however, and lawyers must be aware of the possibility that one could arise during the representation. As explained in the comments to Rule 1.7, a conflict may arise due to a substantial discrepancy in the co-defendants' testimony, incompatibility in their positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

According to Comment 4, if a conflict does arise and more than one client is involved, whether the lawyer may continue to represent *any* of the clients is determined both by the lawyer's ability to comply with duties owed to the clients and the lawyer's ability to adequately represent the clients. Withdrawal from representation of all or one of the clients may be necessary depending on the circumstances. Comment 5 indicates that if the lawyer determines that withdrawal is appropriate, the lawyer must seek court approval, if necessary, and take steps to minimize harm to the clients. Moreover, the lawyer must continue to protect the confidences of the client (or clients) he or she no longer represents.

A recent claim involving a Minnesota Lawyers Mutual insured exemplifies the necessity of withdrawing from joint representation if a conflict arises among co-defendants. In that case, a law firm agreed to defend a brokerage firm and one of its stockbrokers in a securities fraud action. As the litigation progressed, it became apparent that the employer desired to employ a tactic that the broker felt was harmful to his own

continued on page 12

A Malpractice Insurer's

continued from page 11

defense, specifically relating to the suitability of the investments recommended by the broker. The defense firm downplayed the potential harm to the employee and continued to represent both parties despite the employee's protests over the defense tactic. The broker eventually hired counsel to sue the employer as well as the law firm, alleging among other things, a conflict of interest.

It's important for lawyers to carefully consider whether they should represent more than one defendant in any matter. The ramifications of making the wrong decision can be severe, resulting not only in an ethical complaint, but a convoluted malpractice claim as well.

Business Entanglements

Rule 1.8 of the Pennsylvania Rules of Professional Conduct proscribes a broad range of conduct, much of which relates to attorney self-dealing, and gives fair warning to lawyers that getting involved with clients in any capacity other than legal advisor is dangerous. That includes activities such as investing in a client's business, accepting stock in lieu of fees or making loans to clients. While not strictly prohibited by the ethical rules, entering into any kind business deal with a client or acquiring an ownership interest that is adverse to a client is never a good idea. For those lawyers who decide that it's worth the risk, they must tread cautiously.

The rule identifies the circumstances under which a business transaction with a client may be acceptable. Essentially, the arrangement may pass muster if: 1) the terms of the transaction are fair and reasonable to the client and are fully disclosed in writing; 2) the client is advised in writing to seek the advice of independent counsel on the transaction; and, 3) the client gives informed, written consent to the essential terms of the transaction and the lawyer's role in the transaction.

The rationale behind the rule is clear. As the comment states, "[a] lawyer's legal skill and training, together with the

relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client."

If the transaction goes bad at some point, the lawyer's involvement in the deal is sure to be thoroughly scrutinized, and the lawyer may end up facing an ethics or malpractice claim by the client. Thus, lawyers are advised to follow the letter of the rule carefully. Unfortunately, while the requirements of the rule are straightforward and often achievable, many lawyers don't jump through the necessary hoops, mistakenly believing that their cordial, professional relationships with their clients are resistant to discord. The number of malpractice and ethical complaints resulting from attorney dealings with clients shatters this myth.

Rule 1.8 proscribes other questionable conduct by lawyers as well, including: providing financial assistance to a client, accepting compensation for representing a client from someone other than the client, and acquiring a proprietary interest in the subject matter of a client's litigation. With limited exceptions, these activities should be avoided, as in all of them the lawyer runs the risk of becoming embroiled in a conflict-of-interest situation.

Board Service

Involvement with corporate clients in any capacity other than as legal counsel is risky, and is best avoided. Clearly then, being asked by a corporate client to serve on its board of directors or as an officer puts an attorney in a precarious position. When asked to assume such a role, attorneys should provide full disclosure of the conflicts of interest and potential loss of attorney-client privilege. Often, that is enough to discourage a client's request, but if it isn't, the lawyer should consider declining the offer anyway. Many lawsuits are brought against officers and directors, and attorneys and their law firms run the risk of not being covered by their professional malpractice policies in most instances.

When outside counsel accepts an offer to become an officer-director from a corporate client, which is sometimes done just to retain the client, the attorney's independence is diminished. While the Pennsylvania Rules of Professional Conduct do not specifically prohibit lawyers from simultaneously acting as legal counsel and serving as officers or directors on behalf of corporate clients, several rules, including 1.7, 1.8 and 1.13, do proscribe involvement with clients that will jeopardize a lawyer's duties of loyalty, confidentiality, communication and competency.

It's also a good idea for law firms to establish policies and procedures with respect to attorneys serving as officers, directors or employees of any outside for-profit or not-for-profit business enterprise. If a firm is going to allow such activities, at a minimum, it should require the attorney to procure directors and officers liability insurance, and prohibit the attorney from providing legal services to the business enterprise. The firm should also refrain from providing legal services to the business entity employing the attorney. If legal services are provided by the firm, the attorney should be prohibited from supervising those services.

Conflict questions such as these—whether to represent a particular client or multiple clients, whether to continue joint representation when a potential conflict arises, whether to go into business with a client or serve on a client board—are not always easily answered. The best idea is for firms to designate a conflicts or ethics partner—or for a larger firm, a committee of three partners—to be responsible for deciding whether the firm can accept the new client or client matter; and, if so, on what terms. In some cases, it may be prudent to engage outside assistance in resolving conflict questions because the lawyer or firm may be too close to the situation to be impartial. In that way, the decision can be made objectively without regard to business considerations.





THE QUALITY ADVANTAGE

Court Reporting | Legal Videography | Litigation Support | Online Deposition Calendar

NETWORK

DEPOSITION SERVICES

Pittsburgh Conference Facility
Suite 1101, Gulf Tower
707 Grant Street
Pittsburgh, PA 15219
412-281-7908
Fax 412-291-1766

Erie Office
2800 West 21st Street
Erie, PA 16506
866-565-1929
Fax 866-808-0349

Harrisburg Office
2000 Linglestown Road
Suite 102
Harrisburg, PA 17110
717-901-0955
Fax 866-808-0349

Johnstown Office
1407 Eisenhower Blvd.
Suite 103 B, Richland Square II
Johnstown, PA 15904
814-266-2042
Fax 866-808-0349

Greensburg Office
129 North Pennsylvania Ave.
Greensburg, PA 15601
412-281-7908
Fax 412-291-1766

866-565-1929

www.ndsreporting.com

PENNSYLVANIA EMPLOYMENT LAW UPDATE

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

The Supreme Court holds that sovereign immunity mandated dismissal of an employee's claim under the FMLA's "self-care" provision against a state.

Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327 (March 20, 2012)

In a 5 to 4 decision, the Supreme Court determined that the FMLA's "self-care" provision did not apply to the states because Congress failed to properly abrogate the state's Eleventh Amendment immunity when it enacted the "self-care" provision of FMLA.

The plaintiff filed a lawsuit against his former employer, an instrumentality of the state of Maryland, after he requested sick leave under the FMLA's "self-care" provision and was informed that he would be terminated if he did not resign his employment. In rejecting the plaintiff's claims for damages against the state, the Supreme Court found that while the FMLA (and, in particular, the "self-care" provision) expressly stated that it applies to "public agenc[ies]," including the states, Congress failed to properly abrogate the states' immunity in accordance with Section 5 of the Fourteenth Amendment. In so holding, the Supreme Court stated that Congress must tailor legislation under Section 5 "to remedy or prevent conduct transgressing the Fourteenth Amendment's substantive provisions."

For instance, when Congress enacted the FMLA (and, in particular, the "family leave" provision), it relied on evidence that states had facially discriminatory leave policies that provided longer leaves to women than men and/or administered neutral family-leave policies in gender-biased ways, which Congress found to be a "pervasive sex-role stereotype that caring for family members is women's work." While the Supreme Court did note that Congress properly abrogated states' immunity if they violated the FMLA's "family leave" requirements, the "same could not be said for requiring the states to give all employees the

opportunity to take self-care leave." In particular, the Court reasoned that the "self-care" provision lacks "evidence of a pattern of state constitutional violation accompanied by a remedy drawn in narrow terms to address or prevent those violations" and, accordingly, states are not liable for damages if that provision of the FMLA is violated.

Pharmaceutical sales representatives are exempt from overtime under the Fair Labor Standards Act pursuant to the "outside salesmen" exemption.

Christopher v. SmithKline Beecham Corp., 2012 U.S. LEXIS 4657 (June 18, 2012)

In a 5 - 4 decision, the Supreme Court found that pharmaceutical sales representatives, whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases, qualify as "outside salesmen" under the Department of Labor's regulations under the FLSA.

The employees spent an average of 40 hours per week calling on physicians in the field and an additional 10 to 20 hours per week attending events, reviewing product information and responding to phone calls and emails outside of their regular business hours. The employees were not paid overtime for working in excess of 40 hours per week but did receive compensation in the amount of \$76,000 and \$72,000 a year respectively.

The Department of Labor, which submitted an amicus brief on behalf of the employees, stated that the pharmaceutical representatives were not "outside salesmen" because an "employee does not make a 'sale' for purposes of the 'outside salesman' exemption unless he actually transfers title to the property at issue" and pharmaceutical representatives only obtain commitments from physicians. The Supreme Court, however, rejected the Department of Labor's position, noting that the pharmaceutical industry had little reason until 2009 to suspect

that its longstanding practice of treating representatives as exempt outside salesman was incorrect. In particular, the Supreme Court noted that there are more than 90,000 pharmaceutical representatives in the United States, the nature of their work has not materially changed for decades and that, despite this, the Department of Labor never initiated an enforcement action with respect to these representatives and never otherwise suggested that the industry was acting unlawfully. Moreover, the Supreme Court determined that the use of the phrase "other disposition" in the Fair Labor Standards Act, along with a list of transactions that preceded that word, indicated "an attempt to accommodate industry-by-industry variation in methods of selling commodities."

Third Circuit holds that an employer's policy precluding traveling while an employee on FMLA leave is appropriate and no violation of the FMLA occurs when that policy is enforced.

Pellegrino v. Comm. Workers of Am., 2012 U.S. App. LEXIS 7902 (3d. Cir. April 19, 2012)

The Third Circuit upheld summary judgment in favor of an employer in an employee's claim that the employer interfered with her rights under the FMLA.

The employee was granted FMLA leave of at least four weeks in connection with her surgery. Two weeks following the surgery, the employee traveled to Mexico for one week and failed to notify her employer of the trip. The paid leave policy of the employer, however, required that employees "remain in the immediate vicinity of their home during the period of such a paid leave." Upon learning of the trip, the employee was terminated for violation of the employer's sick leave policy. In affirming the dismissal of the employee's lawsuit, the Third Circuit found that the employer did not violate the FMLA. In so holding, the Third Circuit stated the employer's sick leave policy merely set forth the obligations of

employees who are on leave, regardless of whether the leave was pursuant to the FMLA and “[n]othing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave.” Accordingly, since the employer’s sick leave policy was not inconsistent with the FMLA, the employer did not interfere with the rights under the FMLA simply by enforcing its policies.

Of course, as a practical matter, employers must be certain that their leave policies are enforced uniformly to all employees. In particular, this case could have resulted in a different outcome if the employee was able to demonstrate that the employer failed to enforce the same leave policy against those who did not request (or receive) FMLA.

Third Circuit holds that employee failed to demonstrate causal connection between initiation of workers’ compensation claim and termination because the record was clear he was terminated for failing to immediately report work-related injury.

Spring v. Sealed Air Corp., 2012 U.S. App. LEXIS 7902 (3d. Cir. May 29, 2012)

The employee alleged that he was wrongfully terminated in violation of Pennsylvania common law in retaliation for filing a workers’ compensation claim.

The employee was injured on November 26 and missed work for a number of days thereafter. He did not, however, inform the employer that he injured himself at work until December 3. The employer’s policy required that “all injuries, no matter how minor, must be immediately reported to the Department Supervisor.” Since the employee failed to report his work-related injury “immediately” and because he had prior disciplinary warnings (including for safety issues), he was suspended pending an investigation, and his employment was ultimately terminated. In holding that the plaintiff’s wrongful termination claim failed as a matter of law, the Third Circuit stated that “the record makes clear that [the employee] was suspended and ultimately terminated

not for seeking workers’ compensation, but for failing to immediately report a workplace injury and for a history of safety issues.” In so holding, the Third Circuit rejected the plaintiff’s argument that the termination was retaliatory in light of the fact that a Pennsylvania statute provides employees with up to 120 days to report a work-related injury to initiate a workers’ compensation claim. In particular, the Third Circuit reasoned that the Pennsylvania statute did not “forbid an employer to require that injuries be reported more quickly as part of the employer’s safety policies.”

The Third Circuit holds that an employee failed to demonstrate an inference of age discrimination where his alleged comparator performed different job functions and was not, as a result, similarly situated.

Robinson v. City of Philadelphia, 2012 U.S. App. LEXIS 14381 (July 13, 2012)

The Third Circuit upheld dismissal of the employee’s age discrimination claim, holding that he could not set forth a *prima facie* case of age discrimination. The employee was a 53-year-old doctor who was employed as the City’s Deputy Health Commissioner for Health Promotion. In 2008, the mayor directed that the Commissioner of the Department of Health freeze hiring and cut his budget for the department. Two days following the announcement of the hiring freeze, the Commissioner sought permission to hire a doctor (who was 31 years old) for the new position of Director of Policy and Planning. Several months later, the employee was laid off due to the budget cuts and alleged that his layoff was due to his age.

In upholding the dismissal of the employee’s age discrimination claim, the Third Circuit held that the employee and the newly hired Director of Policy and Planning were not similarly situated to support an inference of age discrimination under the ADEA. In so holding, the Third Circuit expressly noted that the factual record “does not support a claim [that the employee and the Director of Policy and Planning performed the same job duties].” To the contrary, the Third Circuit noted that the employee spent more than half of his working time

performing disability determinations on City employees and conducting drug and alcohol testing, whereas the Director of Policy and Planning was hired to reform the Department’s approach to policy. In particular, the Director of Policy and Planning’s “responsibilities consisted of manipulating data for public health analysis, interpreting data on health systems, generating such data, and expressing public health concerns in the context of grant proposals and public health assessments.” Since the two doctors “were not similarly situated in all relevant respects, including in job functions..., [the employee] could not have established an inference of discrimination based on age.”

Significantly, the Third Circuit also found that the employee could not sustain his age discrimination claim through his allegations that another, younger doctor (who was 46 years old) was treated more favorably. In rejecting the employee’s argument, the Third Circuit noted that “age differences of less than ten years are not significant enough to make out the fourth part of the age discrimination, *prima facie* case.”

An employee’s purported back injury failed to qualify as an actual disability pursuant to the Americans with Disabilities Amendments Act.

Poper v. SCA Americas, Inc., 2012 U.S. Dist. LEXIS 113653 (Aug. 13, 2012)

The court determined that a former employee’s purported back problem was not an actual disability under the ADA because the employee failed to “put forth evidence showing that his back problems constituted impairment substantially limiting a major life activity.” While the court expressly noted that “[i]n the wake of the ADA Amendments Act of 2008 (“ADAAA”), it is now easier for a plaintiff to prove that he or she has a ‘disability’ within the meaning of the ADA,” it held that the employee failed to sustain his burden of establishing that he had an “actual disability” under the ADAAA. In particular, the court reasoned that the while the employee had a long history of back problems, the only evidence of limitation with respect to the back problems consisted

continued on page 16

PA Employment

continued from page 15

of pain following a car accident. Notably, the court found that the medical records from the emergency room immediately following the car accident reported “general back pain” but that the employee’s medical records approximately two weeks later make no mention of “back pain” or how the purported back pain substantially limited a major life activity. Accordingly, the court dismissed the employee’s disability discrimination claim, noting that “[t] he proffered evidence would not allow a reasonable juror to conclude that [the employee’s] limitations were anything more than temporary impairments.”

Employee failed to establish a causal connection between his FMLA request and his termination from employment where compelling evidence that the employee engaged in a terminable offense severed any purported causal chain for purposes of his FMLA retaliation claim.

Calero v. Cardone Indus., Inc., 2012 U.S. Dist. LEXIS 91173 (E.D. Pa. June 29, 2012)

The employee alleged that he was terminated in retaliation for requesting FMLA leave, namely, that he requested and was “on” intermittent FMLA leave and was terminated two weeks following his leave request. There, on the day the employee was terminated, he failed to “punch-in” to work and advised his supervisor that he arrived to work 15 minutes prior to his shift beginning. As a result, the supervisor contacted the human resources department to obtain a “leader’s excuse” to correct the employee’s arrival time. However, the human resources department requested that the supervisor speak to the employee’s co-workers to determine the employee’s arrival time. Following the supervisor’s investigation and the human resource director’s separate investigation, it was determined that the employee falsified his arrival time on that day. Accordingly, the employee’s employment was terminated.

The employee filed a lawsuit, alleging his termination was retaliation for requesting FMLA leave and that his supervisor harbored discriminatory *animus* against him for taking leave. The court, however, disagreed with the

employee and dismissed his claims. Specifically, the court expressly noted that the two-week gap between the employee’s FMLA request and his termination was insufficient to establish a causal connection between the two. In addition, the court expressly noted that, between the time the employee requested leave and the time when his employment was terminated, “compelling evidence surfaced” to suggest that he lied about his arrival time on the date of his termination and the “Third Circuit has recognized that a significant event arising between the time when a plaintiff engages in protected activity and his or her termination can sever the causal chain.” Finally, the court found it notable that the individual who made the decision to terminate the employee’s employment was unaware of his prior request for FMLA and that the employee’s argument that the supervisor “acted as the ‘cat’s paw’ to influence the termination...falls flat.”



WORKERS' COMPENSATION UPDATE

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

The Commonwealth Court holds that a claimant’s use of Fentanyl lozenges for treatment of chronic pain was not reasonable and necessary due to the highly addictive nature of the medication and because it had not been approved for use in connection with the claimant’s condition.

Bedford Somerset MHMR v. WCAB (Turner); No. 1997 C.D. 2011; filed September 5, 2012; Opinion by Judge Simpson

The claimant injured her back in 1987 and thereafter underwent two surgical procedures which failed, leaving her with chronic pain syndrome, neuropathy, osteomyelitis and spinal stenosis. Over a course of 20 years, the claimant tried at least 12 different pain medications,

which she either could not tolerate or did not control the pain. Among the pain medications she tried included non-steroidals, which caused severe burning in her stomach; Oxycontin, Oxycodone and MS Contin, all of which gave her severe headaches, vomiting and gastrointestinal problems; and Morphine, to which she was allergic. Her physician of 15 years finally developed a medication regimen that did alleviate the crushing and burning pain, which she described as a “lifesaver.” This pain management included a 125 mg Fentanyl patch (later increased to 200 mg), which is a long-acting opioid-type medicine, and 600 mg Fentanyl lozenges four times a day for breakthrough pain.

The employer requested utilization

review of the claimant’s Fentanyl use and the ongoing office visits. The UR physician determined that the office visits and Fentanyl patch were reasonable and necessary medical treatment but that the Fentanyl lozenge was not because that medication was only approved for pain associated with cancer due to its highly addictive nature. On review of the UR Determination, the WCJ found in favor of the employer. The judge based this decision on evidence that the reason the lozenges were only approved for cancer treatment was because of their addictive nature, as shown by what the judge found to be the claimant’s significantly increased use. The judge also relied on the admission by the claimant’s physician that, if it was found that the

Fentanyl lozenges were not reasonable and necessary, an alternative medication/treatment plan could be developed with help from a pain specialist.

The Workers' Compensation Appeal Board reversed the judge, concluding that the employer had not met their burden since the claimant credibly testified that in 20 some years, the Fentanyl program was the only thing that she could tolerate that would provide her with the pain relief she needed.

The employer appealed the Board's decision to the Commonwealth Court, arguing that the evidence accepted by the judge showed that the Fentanyl lozenges were not reasonable and necessary treatment for the claimant's pain because of their confirmed addictive nature and that an alternative treatment plan could be devised for the claimant. The claimant argued that the judge's decision defied the long-established principle that medical treatment that is palliative in nature and manages a claimant's pain is reasonable and necessary.

In rejecting this argument and reversing the Board, the Commonwealth Court noted that the judge did not deem the claimant's use of the Fentanyl lozenges to be unreasonable and unnecessary merely because they were palliative. Rather, the Court concluded that the judge relied upon the evidence of the highly addictive nature of the lozenges, as demonstrated by the claimant's increased usage of them.

An actuarial methodology used by the state employees' retirement system is legally sufficient to establish employer's entitlement to an offset/credit in accordance with Section 204 (a) of the Act.

Harry Marnie v. WCAB (Commonwealth of PA / Dept. of Attorney General); 1583 C.D. 2011; filed June 7, 2012; by Judge Cohn Jubelirer

Following the claimant's work injury, he began receiving workers' compensation benefits. Later, he began receiving a pension from the State Employees Retirement System (SERS). The employer then notified the claimant via a notice of offset that it would reduce his benefits by the amount of SERS benefits attributable to the employer.

The claimant filed a review petition challenging the employer's offset. In support of his petition, the claimant presented testimony from an actuary. The employer presented testimony from a benefits coordinator and their own actuary. The WCJ credited the testimony of the employer's witnesses and held that the employer met its burden of establishing its entitlement to an offset. The claimant appealed to the Appeal Board (Board), which agreed that the employer was entitled to an offset, but also concluded that the judge erred in fully accepting the employer's actuarial evidence. The Board remanded the matter to the judge, the actuarial witnesses testified again and the judge again denied the claimant's review petition. The Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that the formula used by the employer inaccurately attributed funds to the employer that should have been attributed to the claimant in determining the amount of the offset. According to the claimant, the employer's failure to exclude retained investment returns from its offset calculations impermissibly credited the employer with contributions, a violation of §204 (a) of the Workers' Compensation Act (Act). The claimant maintained that the employer's actuarial evidence was neither competent nor legally sufficient. The Commonwealth Court rejected this argument and dismissed the claimant's appeal. Citing the Pennsylvania Supreme Court's decision in *Department of Public Welfare v. WCAB (Harvey)*, 605 PA 636, 993 A.2d 270 (2010), the court held that §204 (a) does not explicitly require an employer to prove the amount of its actual contributions. The court also noted that the judge accepted the testimony of the employer's actuarial witness as more credible than the testimony given by the claimant's actuarial witness. In sum, the court concluded that the employer's actuarial testimony was legally sufficient and provided substantial, competent evidence to support the judge's decision in favor of an offset.

A claim petition is properly dismissed when the employer met its burden of proving that injuries resulted from the

claimant's violation of positive work orders.

Ryan Miller v. WCAB (Millard Refrigerated Services and Sentry Claims Services); 2306 C.D. 2011; filed June 22, 2012; by Senior Judge Friedman

The claimant worked for the employer driving a pallet jack. On the date of injury, the claimant worked the second shift from 4 p.m. to 12:30 a.m. and was told by a supervisor that he needed to stay until 1:30 a.m. The claimant finished working at 12:58 a.m. but didn't leave. Instead, he jumped on a forklift and drove it around before driving it to the punch-out area. While doing so, he crashed into a pole and crushed his foot, which had been sticking out of the forklift. The claimant said that he drove the forklift because it was fun and admitted that he was not authorized, nor certified, to operate it. The claimant also said that it was common practice for employees to drive the forklifts for fun and their supervisors said nothing about it.

However, the employer presented testimony from a supervisor who made it very clear that he hired the claimant to run the pallet jack, not the forklift, and who said that the claimant had been told specifically not to use other equipment unless he was certified to do so. The WCJ found this witness's testimony to be credible and dismissed the claim petition, finding that the employer met its burden of proving that the claimant's injury was caused by a violation of several work rules. The Board affirmed.

The Commonwealth Court dismissed the claimant's appeal, agreeing with the judge and the Board that the employer met its burden of proving that the claimant violated a positive work order and that the violation removed the claimant from the course and scope of his employment. The court found the claimant's appeal to be nothing more than an argument that the judge should have believed his version of events instead of the employer's and considered it to be an impermissible attack on the judge's credibility determinations.

The executive officer of a corporation who executes workers' compensation

continued on page 18

Workers' Compensation Update *continued from page 19*

forms LIBC-509 and 513 is electing to not be an employee and is excluded from coverage under the Act.

Wagner v. WCAB (Anthony Wagner Auto Repairs & Sales); No 1527 C.D. 2011; filed June 4, 2012; by Justice Leavitt

The claimant, operator and sole shareholder of a two-person auto repair and sales business, sought workers' compensation benefits following an automobile accident. The insurer contended that the claimant had waived workers' compensation coverage for himself under § 104 of the Act by executing LIBC-509, "Application for Executive Officer Exemption," and LIBC-513, "Executive Officer's Declaration." These forms provide that an executive of a corporation may elect not to be considered an employee for purposes of the Act and waives all benefits.

The WCJ found for the employer on this issue, rejecting the claimant's testimony that he was not informed he was waiving workers' compensation coverage where the evidence showed that he knowingly and voluntarily signed the Bureau forms. The insurer's witnesses testified that they advised the claimant and his girlfriend, who handled the insurance matters, that employees of a corporation may be covered for workers' compensation if their earnings are included in the payroll on which the premium is calculated. The claimant declined to provide that information, and his accountant advised that the claimant was to be exempt. The insurer proved that the claimant personally signed the LIBC forms to exclude coverage, and the judge found that he was charged with knowing what he signed. The Board affirmed the judge's decision.

The claimant argued on appeal that the judge and Board erred because his insurance policy did not include an endorsement showing that he was exempt from the policy's coverage, contrary to the "Workers' Compensation Rating Manual" that provides for a specific endorsement when an executive waives workers' compensation coverage.

The court rejected this position, noting that the policy included an endorsement, made after the claimant incorporated his business, that the employer had changed from a sole proprietorship to a corporation, that the payroll included only the mechanic's and not the claimant's earnings, and that the policy was based on one employee. Given this endorsement, it could not be argued that the policy clearly covered a second employee, i.e. the claimant.

The court further found that the judge is not responsible for enforcing the terms of the "Rating Manual" or the insurance company law. It noted that the only clear mandate of the "Rating Manual" is that the executive officer must personally execute LIBC-509 and 513, which the claimant here did.

The importance of testimony on the practical, everyday use of a body part is subject to a specific loss claim.

Miller v. WCAB (Wal-Mart); No. 1741 C.D. 2011; filed May 25, 2012; by Senior Judge Colins

The claimant was working for Wal-Mart as a claims manager responsible for merchandise returns when she sustained a left arm fracture, left shoulder adhesive capsulitis and weakness, and radial nerve palsy. The injury required two surgeries to insert a rod and 15 bolts into the upper arm and then removal of the bolts. Following the injury, the claimant continued to work with the employer as a greeter and then a telephone switchboard operator, but she could not work her second job. Nearly three years after the injury, the claimant filed a claim petition alleging specific loss of her left arm.

The litigation on the claim petition involved lay testimony from the claimant and three employees, medical testimony from three physicians and surveillance evidence. In a 32-page, 97-findings decision, the WCJ denied the claim petition. The Board affirmed, and the Commonwealth did as well, but on the limited grounds that the claimant's injury was not a specific loss for all practical intents and purposes. In reaching its decision, the court extensively analyzed the judge's findings and the law on specific loss, and even reviewed the

surveillance video in assessing the judge's credibility determination.

The court first noted that the judge found the employer's medical expert credible, who opined that, although the claimant suffered from a partial disability, she did not suffer a specific loss of the arm. After examining the claimant and finding normal range of motion in all planes of her shoulder, along with normal movement of her elbow, hand and fingers, the expert concluded that the claimant was "functional" with partial impairment of the arm. In contrast, the claimant's doctor testified with "absolute medical certainty" that she had a total loss of function of the use of the left upper extremity, which is permanent, including a significant loss of her ability to perform activities of daily living such as grooming, bathing and dressing.

The court further noted that the judge's decision was strongly influenced by the discrepancy between the limitations the claimant demonstrated in court and to her doctors and the use of her arm as shown in surveillance video and testimony by co-workers. The video demonstrated use of the arm to grasp a steering wheel, to lift the arm to enter a restaurant and assist her mother, and to open a car door. The employees testified that they saw the claimant use her left arm in a manner inconsistent with her testimony regarding grasping, holding and range of motion.

On appeal, the court found that the judge used a wrong legal standard for establishing specific loss of the arm, stating that the loss must include loss of use of the hand and forearm. This position is incorrect, as a claimant may prove a specific loss even where some use of the injured body part is retained. That error, however, did not infect the judge's factual and credibility determinations, which were supported by substantial evidence.

The judge's finding that the injury was not permanent was not supported by the record as the only doctor to address this issue explained that the claimant was at maximum medical improvement and that any future surgery would be to reduce her pain, not function. Nonetheless, the

continued on page 20



Protecting Your Practice is Our Policy™



MLM Offers PDI Members a Defense Against the Economy

Minnesota Lawyers Mutual, PDI's endorsed professional liability insurance program, is now offering an exclusive policy to PDI members with several important enhancements to their standard Lawyers Professional Liability (LPL) program for Pennsylvania lawyers, including:

- **Additional Claim Expense** benefit equal to one half of the policy single limit up to a maximum of \$250,000 per policy period.
- **Increased Supplementary Payments Limit** from \$5,000 to \$10,000. This includes loss of earnings if you attend a trial at our request and coverage for costs and fees incurred defending disciplinary claims.
- **Aggregate Deductible Coverage.** This caps the total amount you will have to pay for deductibles, regardless of the number of claims in a single policy period.

To qualify, PDI member firms are required to have PDI membership as follows:

- 1-4 firm members: 75% PDI membership
- 5-10 firm members: 50% PDI membership
- 11-20 firm members: 33% PDI membership
- 21 and above firm members: 25% PDI membership

In Addition, MLM offers PDI member firms premium savings in two ways (these price savings are available irrespective of the percentage of PDI membership in the firm):

- Up to a 25% premium discount for qualifying firms (based on risk characteristics).
- Plus a 5% premium discount for any PDI member covered by an MLM LPL policy.

To get more information and a quote please contact: Tom Auth
Direct Number: 215-830-1389 Email: tauth@mlmins.com
Or apply online at www.mlmins.com

Workers' Compensation Update *continued from page 18*

court upheld the decision based on the finding of no specific loss.

Commonwealth Court rejects the claimant's argument that a C&R agreement should be rescinded due to a mutual or unilateral mistake on behalf of the employer.

Su Hoang v. WCAB (Howmet Aluminum Casting, Inc.); 2277 C.D. 2011; filed August 20, 2012; by Judge McCullough

The claimant sustained a work-related injury in October of 2007 that was acknowledged by a notice of compensation payable (NCP). In 2009, the parties entered into a compromise and release agreement (C&R) and sought approval of the C&R at a hearing conducted by a judge. The claimant testified at the hearing, with the claimant's son acting as a translator. The claimant testified that he understood he was giving up his right to any claim for benefits and that, if the settlement was approved, he could never come back against the employer or the insurance company for any reason. The claimant also told the judge, in response to her questions, that his son translated the C&R for him and that he was satisfied that all of his questions had been answered. The judge approved the C&R agreement.

After the C&R was approved, claimant's counsel discovered that there was an unpaid medical bill totaling \$37,674. Claimant's counsel sent employer's counsel a copy of the bill, along with a letter stating that the claimant believed that all medical bills had been paid at the time of settlement. Later, claimant's counsel sent employer's counsel another letter, restating a phone conversation in which employer's counsel admitted to being unaware of the bill at the time of settlement and stating that he had been told that the treatment at issue was not related to the work injury. Ultimately, the claimant filed review and penalty petitions, seeking to rescind the C&R on the basis of mutual mistake of fact, as well as a unilateral mistake on behalf of the employer.

The judge dismissed the claimant's petitions, and the Workers' Compensation Appeal Board (Board) affirmed. Both the judge and the Board pointed out that the approved C&R did not contain language acknowledging that all reasonable and necessary medical bills had been paid.

The Commonwealth Court affirmed the decisions below, concluding that there was a lack of evidence presented by the claimant that the C&R should be rescinded based on a mutual mistake of fact or a unilateral mistake of fact. According to the court, there was simply no evidence that the employer knew or should have known of the claimant's mistake regarding the unpaid medical bill. The court also referenced language contained in paragraph 18 of the C&R specifically stating that the agreement resolved "all indemnity and medical to which claimant may have been entitled for any injuries sustained while working for the employer, and that the C&R represented a full and final settlement of any claim, both past, present and future, that claimant had against the employer."

The decedent died in the course of his employment where his injury occurred in the furtherance of his business as a college professor even though precipitating events occurred at lunch off campus.

The Pennsylvania State University v. WCAB (Rabin); No. 224 C.D. 2011; filed August 15 2012; by Senior Judge Friedman

The decedent, who worked as a professor at Penn State, suffered from significant pre-existing medical conditions including lymphedema, uncontrolled diabetes, hypertension, difficulty breathing, cardiac problems and cellulitis of the legs. Under a doctor's care over a period of six years, his health conditions improved to the point where he required only routine quarterly checkups.

The decedent was working with a student who was preparing and defending his doctoral thesis. The decedent and the student worked together on the thesis, including meeting at a local restaurant because of their conflicting work schedules. On December 20,

2006, they were together at a restaurant exhaustively reviewing a draft of the thesis. They stopped to have lunch when the decedent suddenly fell to the floor, complaining of pain in his chest, shoulders and arm. He was taken to the hospital where he suffered a left shoulder fracture/dislocation. Had he not been injured, the decedent and student intended to continue their work on the dissertation.

At the hospital, he underwent a procedure involving a closed reduction of the fracture and dislocation, wherein infection was identified as a risk. During his hospital stay, the decedent began complaining of left shoulder pain and other problems. He later developed intense pain with cardiac and respiratory distress and was moved to the ICU where he subsequently died. The treating physician concluded that he expired from multiple medical problems stemming from his upper extremity fracture.

A fatal claim petition was filed, which the judge granted, finding that the decedent was engaged in the furtherance of the business or affairs of Penn State when he fell and was injured and died as a result of those injuries.

On appeal, the employer argued that the decedent's injuries did not occur in the course of his employment as he was on a break from work and at a public restaurant. The Board affirmed. On appeal to the Commonwealth Court, the court found that, indeed, the decedent's injuries did arise in the course of his employment as he was involved in a multi-hour meeting, which included a working lunch, in furtherance of his job duties as a college professor. According to the court, the lunch was an inconsequential departure from regular work activities. The court also rejected the employer's challenge to the medical findings, concluding that there was credible, unequivocal medical evidence that the decedent's work contributed to his demise.



A DELVE INTO 2012

A look back at the important Pennsylvania civil litigation cases and trends of the past year

By Daniel E. Cummins, Foley, Comerford & Cummins, Scranton, PA

Over the past year, uncertainty was the norm in a number of areas in Pennsylvania civil litigation. As noted in greater detail below, the courts and civil litigators struggled with questions as to the proper standard for products liability matters, the parameters of Facebook and attorney-expert discovery, and the overall handling of post-*Koken* automobile accident cases.

Products Liability

Over the past year the courts, and more particularly, Pennsylvania's federal courts have split over the issue of whether products liability cases should be governed by the standard found in the Restatement (Second) of Torts or the different standard adopted in the Restatement (Third) of Torts. To date, the Pennsylvania Supreme Court has touched, but not squarely ruled, upon this issue.

Various commentators note that the Restatement (Second) of Torts calls for a more narrow application of negligence principles in the products liability context. In contrast, the Restatement (Third) of Torts decreases the emphasis upon the concepts of "intended use" and "intended user," and places a greater emphasis on the doctrine of "reasonable foreseeability." Such changes advocated by the Restatement (Third) not only permit a wider class of injured parties to recover, but also, arguably, provide a more lenient path to a recovery against a manufacturer of a defective product.

The Pennsylvania federal courts have struggled with this issue in the absence of concrete guidance from the Pennsylvania Supreme Court. The Third Circuit Court of Appeals has repeatedly stated or suggested in its recent decisions in *Berrier v. Simplicity Manufacturing*, *Covell v. Bell Sports*, and *Sikkelee v. Precision Automotive* that federal trial courts should apply the Restatement (Third) of Torts in products liability cases.

Yet, several Pennsylvania federal district

court judges have declined to do so on the grounds that the Pennsylvania Supreme Court has at least signaled that the Restatement (Second) should continue to be applied. Those federal district court judges have noted that, while the Third Circuit has made repeated predictions that the Pennsylvania Supreme Court would adopt the Restatement (Third) if faced with the issue, in reality, the Pennsylvania Supreme Court declined to adopt the Third Restatement analysis despite an apparent opportunity to do so in its decision in *Beard v. Johnson & Johnson*.

According to a recent November 6, 2012 article by *Pennsylvania Law Weekly* columnist Amaris Elliott-Engel entitled "Products Liability Confusion Continues in Pennsylvania," those federal district court judges who have chosen to follow the Restatement (Second) in products liability cases contrary to the Third Circuit's analysis include: Judge William E. Jones of the Middle District in *Sikkelee v. Precision Automotive*, Judge Nora Barry Fischer of the Western District in *Gross v. Stryker*, and Judge Arthur J. Schwab of the Western District in *Konold v. Superior International Industries*

Elliott-Engel also noted in her recent column that federal court district judges who have chosen to apply the Restatement (Third) under the Third Circuit's prediction include: Judge Mark R. Hornak of the Western District in his decisions in the cases of *Sansom v. Crown Equipment Corp.* as well as *Lynn v. Yamaha Golf-Car Co.*, Judge Donetta W. Ambrose in *Zollars v. Troy-Built*, and Judge Maurice Cohill, Jr. in *Spowal v. ITW Food Equipment Group*.

The overall result on this issue appears to be a split of authority between the Pennsylvania state courts and federal courts, along with a split of authority within the federal trial bench. More specifically, until the Pennsylvania Supreme Court finally decides this issue, it appears that the Pennsylvania

state courts will apply the Restatement (Second) to products liability, while the Pennsylvania federal courts will waiver between the two Restatements depending upon the judge handling the matter.

Facebook Discovery

A recurring issue that has yet to reach any appellate court is whether a civil litigant's private Facebook pages are subject to discovery in a personal injury matter. This issue has resulted in somewhat conflicting decisions in the Pennsylvania courts of common pleas.

In his notable decision in the case of *Trail v. Lesko*, Judge R. Stanton Wettick provided a detailed review of the issue in a 22-page opinion. The opinion included a background on Facebook itself, along with a summary of a number of Facebook discovery decisions handed down to date, both from within Pennsylvania and from outside jurisdictions. Judge Wettick ultimately ruled in *Trail* that both the plaintiff's and the defendant's cross motions to compel access to the other party's Facebook pages would be denied under the particular facts at issue in that motor vehicle accident litigation.

Judge Wettick denied the requests for Facebook discovery, in part, under a rationale that such requests were unreasonable pursuant to Pa.R.C.P. 4011. In the context of this case, "the intrusions that such discovery would cause were not offset by any showing that the discovery would assist the requesting party in presenting its case."

Overall, Judge Wettick's opinion in *Trail* and the other Pennsylvania trial court decisions handed down to date can be read together as standing for the proposition that, where there is an initial threshold showing that discovery of the opposing party's Facebook pages is likely to lead to the discovery of information pertinent to the claims or defenses presented, such discovery will ordinarily be allowed.¹

continued on page 22

A Delve into 2012

continued from page 21

Discoverability of Attorney to Expert Communications

Another recurring discovery issue is whether communications by an attorney to an expert retained by that attorney are discoverable. In August of 2012, the Pennsylvania Supreme Court granted *allocatur* to squarely address this issue in the case of *Barrick v. Holy Spirit Hospital*.²

By way of background, the Dauphin County Court of Common Pleas ruled in *Barrick* that these types of communications were indeed discoverable particularly where, as here, the trial court found that the written communications by the plaintiff's counsel with the plaintiff's medical expert could have, in the words of the trial court judge, "materially impacted" the expert's formulation of his opinion.

On appeal, the original three-member panel of the Superior Court affirmed the trial court's decision that these types of communications by an attorney to an expert were discoverable. Then, on re-argument, an *en banc* panel of the Pennsylvania Superior Court reversed and held that these communications were not discoverable, in part, due to the protections afforded by the attorney work product doctrine, which prevents the disclosure of an attorney's mental impressions, conclusions, or opinions regarding strategy.

Thereafter, in a one-page order filed by the Pennsylvania Supreme Court on August 31, 2012 granting *allocatur*, the court noted that it will review the issue of "whether the Superior Court's interpretation of Pa.R.C.P. No. 4003.3 improperly provides absolute work product protection to all communications between a party's counsel and their trial expert."

The Pennsylvania Supreme Court's decision in *Barrick v. Holy Spirit Hospital* will be closely watched as it could substantially impact how attorneys confer with their experts from this point forward in civil litigation matters.

Post-Koken Update

Another area of uncertainty in Pennsylvania civil litigation matters involves the handling of the novel post-*Koken* automobile accident matters.

It has been nearly seven years since the automobile accident litigation landscape was forever changed by the monumental Pennsylvania Supreme Court decision in the case of *Insurance Federation of Pennsylvania v. Commonwealth, Department of Insurance (Koken)*, 889 A.2d 550 (Pa. 2005). In that decision, the Pennsylvania Supreme Court held that automobile insurance carriers were not required to include arbitration clauses in their policies for the resolution of underinsured and uninsured motorist claims.

Thereafter, most carriers removed the arbitration clauses from their policies thereby requiring UM/UIM claims to proceed through the court system like any other matter. This gave rise to a wide variety of difficult, novel post-*Koken* issues at all stages of the civil litigation process.

To date, other than the issue of proper venue, the appellate courts have not had an opportunity to squarely address any novel post-*Koken* issue of note. Among the most troubling of those issues are: (1) the question of consolidation versus severance of UIM and third party claims under a single caption; (2) the order of allowable discovery when bad faith allegations are asserted; (3) requests for the bifurcation of the trial of third party and UIM claims; and, (4) the permissibility of references to "insurance" at trial. There remains a serious split of authority among the trial courts of this Commonwealth on almost all of these issues.³

Now that several years have passed since these types of cases were first filed in the court system, a number of these novel post-*Koken* cases are moving through to jury verdicts and are beginning to climb the appellate ladder. Possibly, the first such case to reach the Superior Court will be an Allegheny County case entitled *Stepanovich v. McGraw and State Farm Ins. Co.*

This case represents one of the first opportunities for a Pennsylvania appellate court to squarely address important, recurring issues from post-*Koken* cases. In particular, it appears that the focus of the appeal in the *Stepanovich* case is whether post-*Koken* cases should be bifurcated into two separate trials, i.e., one on the third party negligence claims and one on the UIM claim.

Hopefully, other cases will follow up the appellate ladder in the near future in order that the litigants and trial court judges may obtain guidance on issues of contention in this area of the law.

Pusl Overturned

An important decision that was handed down late in 2012 in the auto law context involved whether a tortfeasor defendant was entitled to a credit in the amount of any UIM recovery already secured by the injured party for the same accident. In *Smith v. Rohrbaugh*, the Pennsylvania Superior Court held that its previous decision in the case of *Pusl v. Means*, 982 A.2d 550 (Pa.Super. 2009) allowing such a credit was wrongly decided and, therefore, overruled.

In *Pusl*, which was handed down three years ago, the Superior Court held that, where a plaintiff first recovered underinsured (UIM) benefits in a car accident case from his or her own automobile insurance company, the defendant tortfeasor in the companion lawsuit on the liability portion of the claim was entitled to a credit against any verdict up to the UIM amounts already received by the plaintiff. The purpose behind this ruling was to prevent what was viewed as a double recovery by the plaintiff for the same injuries in violation of the Motor Vehicle Financial Responsibility Law.

In the recent *Smith v. Rohrbaugh* case, the trial court followed *Pusl* and took the amount of the UIM benefits previously secured by the plaintiff and applied it as a credit against the jury's verdict entered against the tortfeasor defendant driver. The plaintiff objected to the application of this credit and appealed.

On appeal, the Superior Court in *Smith*

noted that the *Pusl* decision had been based, in part, upon the Superior Court’s prior decision in the case of *Tannenbaum v. Nationwide Ins. Co.*, 919 A.2d 267 (Pa.Super. 2007), which pertained to the recovery of first party benefits. However, as noted by the *Smith v. Rohrbaugh* court, that prior Superior Court decision in *Tannenbaum* was overruled by the Pennsylvania Supreme Court. See 992 A.2d 859 (Pa. 2010). Thus, a rationale underpinning the Superior Court’s ruling in *Pusl* was removed.

The *Smith* Superior Court stated that the court in *Pusl* had correctly decided that a section of the Motor Vehicle Financial Responsibility Law (MVFRL), i.e., 75 Pa.C.S.A. Section 1722, prevented a double recovery of first party benefits in motor vehicle accident matters.

The *Smith v. Rohrbaugh* court also noted that UIM benefits have been colloquially considered to be first party benefits because they come from the first party carrier. However, the court found that the *Pusl* decision incorrectly equated UIM benefits with the type of first party benefits that are specifically defined in the MVFRL by the Legislature and referenced under the policy against a double recovery of such benefits. Based upon a finding that that reasoning in *Pusl* was incorrect, it was held in *Smith v. Rorhbaugh* that the *Pusl* court had incorrectly concluded that the Section 1722’s prohibition against a double

recovery of first party benefits applied to UIM payments.

As such, the *Pusl* credit no longer exists and it appears that a plaintiff may now, if desired, secure UIM benefits prior to proceeding on a claim against the third party tortfeasor on the liability side.

Holding Up Settlements on Medicare Liens

Another ongoing trend in civil litigation matters is the continuing problem of addressing Medicare liens asserted against personal injury settlements and verdicts.

In its 2010 decision in the case of *Zaleppa v. Seiwel*, the Superior Court upheld a plaintiff’s argument that defendants and liability carriers in personal injury matters did not have a right to demand that certain steps be taken by a plaintiff to ensure that a Medicare lien be satisfied before a settlement could be completed.

Since the issuance of the *Zaleppa* decision, a few trial court decisions have come down expanding on this issue. In 2011, in both the Cambria County case of *Vincent v. Buck*, and the Monroe County case of *Dailey-Console v. Barnwell*, the trial court judges relied upon the *Zaleppa* case to support a granting of a plaintiff’s motion to compel a defendant to pay a settlement over the defendants’ objection that Medicare lien issues were not yet resolved.

In 2012, a number of federal courts issued similar decisions on the issue. In the Eastern District of Pennsylvania federal court case of *Carty v. Clark*, a plaintiff’s motion to enforce settlement was granted over a defendant’s objections with respect to Medicare lien issues.

Pennsylvania civil litigators have also been citing the District Court of New Jersey’s unpublished decision in *Sipler v. Trans AM Trucking, Inc., et al*, in which that court also ruled, in no uncertain terms, that a plaintiff’s settlement could not be held up by Medicare lien or set-aside issues.

ENDNOTES

¹Copies of the *Trail* opinion, as well as a copy of the other Pennsylvania decisions handed down to date have been compiled under the “Facebook Discovery Scorecard” which can be accessed at www.torttalk.com. Scroll down the right hand column and click on the date under “Facebook Discovery Scorecard.” Once you get to the page listing a synopsis of the cases, click on the case name to be taken to the actual opinions online.

²For full disclosure purposes, it is noted that I drafted the amicus briefs for the Pennsylvania Defense Institute at the Superior Court level.

³The various decisions on these issues are collected in the “post-*Koken* Scorecard” at www.torttalk.com. Scroll down the right-hand column and click on the date under the label “post-*Koken* Scorecard.” Complimentary copies of many of the opinions may be secured upon request.



PENNSYLVANIA DEFENSE INSTITUTE

Committee Preference

Please select up to three committees in which you would like to serve, numbering them in order of preference.

- | | | | |
|--|-------|-----------------------------------|-------|
| Amicus Curiae | _____ | Motor Vehicle Law | _____ |
| Appellate Practice | _____ | Products Liability | _____ |
| Bad Faith | _____ | Professional Liability | _____ |
| Civil Practice and Procedure | _____ | Publications | _____ |
| Employment and Civil Rights | _____ | Transportation and Trucking | _____ |
| House Counsel | _____ | Workers’ Compensation | _____ |
| Insurance Coverage and Subrogation | _____ | | |



Pennsylvania Defense Institute
P.O. Box 697
Camp Hill, PA 17001

PRESORTED
STANDARD
U.S. POSTAGE
PAID
HARRISBURG, PA
PERMIT NO. 557

PENNSYLVANIA DEFENSE INSTITUTE

Application for Membership

Eligibility for Membership:

Those persons shall be qualified for membership and may continue to hold membership herein who are:

Members of the Pennsylvania Bar actively engaged in the practice of civil law, who individually devote a substantial portion of their time on litigated matters, to the defense of damage suits on behalf of individuals, insurance companies or corporations.

Full-time executives, managerial or supervisory employees of insurance companies, self-insurers, or corporations who individually devote a substantial portion of their time to claim administration or to matters with a direct impact upon claims administration including legislation activities.

Please complete the information requested on this form and mail or fax this application with your check (payable to the Pennsylvania Defense Institute) to:
Pennsylvania Defense Institute, P.O. BOX 697, Camp Hill, PA 17001. FAX: 800-734-0732

To ensure proper credit, please supply all names of applicants or have each new member complete a copy of this application.

<p align="center">Annual Membership Fees</p> <p><input type="checkbox"/> 1-9 members per organization — \$225 per member</p> <p><input type="checkbox"/> 10 or more members per organization — \$200 per member</p> <p><input type="checkbox"/> Retired members — \$25 per member</p>
--

If you are an attorney, please provide the following information:

- (1) Name, address, telephone number and compensation for two current clients you represent in litigation matters:

- (2) Name, address and telephone number of two of the Pennsylvania Bar who can confirm that you devote a substantial portion of your practice to litigation matters in defense of damage suits on behalf of individuals, insurance companies or corporations:

Name: _____

Firm or Company: _____

Address: _____

E-mail Address: _____

Telephone Number: _____

Signature _____

Date _____