SIDEBAR
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USING THE PROSPECTIVE UTILIZATION REVIEW PROCESS TO TACKLE THE DANGERS OF ONGOING MEDICAL TREATMENT

By Matthew B. Esslinger, Esquire

Over the past years the costs of medical bills and medical liability in the workers' compensation setting has steadily increased. Many doctors continue to prescribe ongoing treatment, including narcotics, without any indication of lasting improvement, increase in function, or decrease in pain levels. However, on December 2, 2011, with the Commonwealth Court's issuance of J.D. Landscaping v. WCAB (Heffernan), 31 A.3d 1247 (Cmwlth. 2011), this problem reached new heights and presented new risks for employers and insurers, as the court awarded death benefits based on an employee overdosing on narcotics for his prescribed work injury.

In Heffernan, the employee sustained a work injury in 2002 that was originally accepted as a low back strain but then expanded to include a herniated disc at the L4-5 level. In March of 2006, the employer filed a utilization review request challenging the reasonableness and necessity of all treatment prescribed by Dr. George Rodriguez, on or after March 15, 2007, including medications. On June 4, 2007, the utilization reviewer found that all treatment by Dr. George Rodriguez, including prescriptions for Sonata, Fentanyl, Oxycodone, Fentora, Docusate, and Lyrica were not reasonable and necessary from February 15, 2007, and ongoing into the future. Dr. George Rodriguez initially filed an appeal of that determination but later that was withdrawn.

On June 18, 2007, the employee was found dead with a box of Fentanyl patches. An autopsy revealed that the employee died from drug intoxication due to an overdose of Fentanyl prescribed for his work injury. A fatal claim petition was then filed alleging that his death was due to the work injury. During the hearing, Dr. George Rodriguez testified that his practice included himself along with his sister, Dr. Daisy Rodriguez. The testimony demonstrated that both doctors understood the utilization review process and due to the

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utilization finding that Dr. George Rodriguez's treatment, including his prescriptions, were not reasonable and necessary and that the pharmacy would not fill those prescriptions due to the utilization review finding. Working within that understanding, Dr. George Rodriguez told Dr. Daisy Rodriguez to "handle the situation" and she was free to prescribe whatever treatment she felt appropriate. Dr. Daisy Rodriguez testified that she felt that "this was purely just an issue of replacing prescriptions," and proceeded to write a prescription for the employee on June 16, 2007, giving the employee the same prescriptions written by Dr. George Rodriguez on June 14, 2007, which included the Fentanyl patches. The Workmen's Compensation Judge granted the Fatal Claim Petition and awarded fatal claim benefits. In granting the Fatal Claim Petition, the WCJ noted that while Dr. George Rodriguez was subject to the utilization review determination that his treatment was not reasonable and necessary, his sister, Dr. Daisy Rodriguez, was not subject to that utilization review determination. The WCJ further found that neither Dr. George Rodriguez nor Dr. Daisy Rodriguez scheduled their visits and treatment of patients to get around the utilization determination, citing that Dr. Daisy Rodriguez was free to agree or disagree with Dr. George Rodriguez' plan of care. The employer appealed acknowledging that utilization determinations are provider specific, but arguing that the utilization review determination should nevertheless apply as Dr. Daisy Rodriguez wrote prescriptions identical to those issued by Dr. George Rodriguez two days earlier and with knowledge of the UR determination. The Workers' Compensation Appeal Board affirmed the WCJ.

The Commonwealth Court affirmed as well, stating that UR determinations do not address causal relationship. Moreover, based on that principle, the court found that the June 2007, utilization review determination finding that Dr. George Rodriguez' treatment including prescriptions was irrelevant to the fatal claim issue of whether an employee's death is causally related to the work injury.

This case demonstrates the shocking result of both excessive use and abuse of narcotics and the current utilization review process that is not treatment specific but rather provider specific. That element of the utilization review process allows employees who receive unfavorable utilization review results to simply go to a different provider and receive exactly the same treatment. While the above events based on the very short time periods between the utilization review decision and the overdosing would be very difficult to prevent, insurers and employers can reduce the risks associated with ongoing treatment, including narcotics, by continuing to review medical bills and the amount of treatment. That information can then be used to determine whether a prospective utilization review would be warranted and beneficial. In making this determination, in addition to considering the amount and frequency of the ongoing treatment, including use of ongoing narcotics, it is also important to review the corresponding medical reports with an eye towards whether the ongoing treatment demonstrates any improvement in pain levels or functions. In many cases, employees may receive years of ongoing unchanged treatment and medications, despite the fact that the employee has no increase in their function, ability to return to work, or a decrease in their pain levels. This scenario was demonstrated in the recent case of Leca v. WCAB (Philadelphia School District), 39 A.3d 651 (Pa. Cmwlth. 2012).

In Leca, the employer filed a prospective utilization review request to determine the reasonableness and necessity of a claimant's chiropractic care beginning on February 14, 2008, and ongoing. The utilization review determination found the treatment reasonable and necessary. The employer appealed via a Petition for Utilization Review. In support of same, it offered an October 2007, IME report from an orthopedic surgeon who, following an examination of the claimant, noted that while the chiropractic treatment claimant was receiving at that time provided temporary relief it offered no overall improvement in his pain complaints. It should be noted that to avoid a possible imposition of unreasonable contest attorneys' fees, whenever an employer is appealing an unfavorable utilization review determination they must have an IME or some medical evidence demonstrating that the treatment at issue is unreasonable and unnecessary. The IME doctor further noted that at the time of his exam, the claimant had constant numbness, could not stand or walk, could only sit for a few minutes and had constant pain ranging from 7-10 on a scale of 1-10. Based on those findings, the IME doctor found that the claimant was a candidate for lumbar surgery and his ongoing chiropractic treatment could not be justified due to the lack of improvement in his condition. The employer also had a records review performed wherein the doctor, also an orthopedic surgeon, found that based on the claimant's records the doctor could find no improvement in the claimant's condition despite treatment for three and a half year period. The doctor referenced that despite medications, adjustments, and therapy, claimant's pain was the same and in some instances worse. The doctor further stated in her report that the primary purpose of the chiropractic treatment, passive modalities, and physical therapy was to restore function, and in the absence of objective evidence that said treatment resulted in an increase in function, the continued treatment would not be reasonable. Conversely, the claimant submitted a contrary records review which found that while the treatment at issue extended well beyond the typical standards of care, the documented subjective complaints and positive objective findings supported the treatment under review. Following a review of the evidence, the WCJ granted the employer's Utilization Review Petition. The WCJ noted that because the IME doctor examined the claimant that doctor was in a better position to render an opinion regarding the effect of the treatment at issue. On appeal, the Commonwealth Court rejected the claimant's attempt to liken the above facts to other case law wherein the court found that the employer had to offer evidence that referenced a specific procedure involving the implantation of a spinal cord stimulator, and found that unlike that scenario the treatment involved here was not directed towards specific procedures, but rather, medical treatment that was repetitive and ongoing in nature. The court found that the doctor's findings that the treatment at issue in Leca was not justified based on the lack of evidence that such care resulted in increased function or decreased pain, supported the finding that the treatment was not reasonable and necessary. The court further noted that contrary to the claimant's argument on appeal the orthopedic doctors relied on by the employer were competent to review a chiropractor's treatment. The court reasoned that the Act only requires that the utilization reviewer reviewing doctor be of the same like practice as the provider under review and did not apply to the challenge of a utilization review determination.

The above case illustrates the benefits of reviewing not only medical bills for the amount and frequency of the treatment but also reviewing the medical records accompanying them. A careful review of medical records, with an eye towards whether the ongoing treatment and medications is improving function and/or pain will allow employers and insurers to determine whether a utilization review is warranted. This approach can help to prevent extreme events, such as those demonstrated in Heffernan, as well as to reduce the ever rising medical costs associated with ongoing treatment that offers no benefit.

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Pfizer May Now Face State Court Asbestos Liability Suits

By Mohamed N. Bakry, Esquire

On April 10, 2012, the United States Court of Appeals for the Second Circuit decided that Pfizer can now face asbestos liability in state court over products once manufactured by its bankrupt subsidiary, Quigley Co., thus continuing a dispute that has lasted for over 30 years.

Quigley Co., manufactured three products for the steel industry between 1940 and the 1970s that contained asbestos. In 1968, Pfizer purchased Quigley, and in 1992 the company ceased most of its operations. Quigley Co. filed for bankruptcy in 2004. Though Pfizer claimed that it never made or sold any Quigley products, its logo appeared on several products made by Quigley.

The lawsuits at issue were filed in 1999 by Peter Angelos, Esquire, of the Law Office of Peter Angelos in Pennsylvania State Court. Plaintiff argued that 11 U.S.C. § 524(g) regarding discharge of liabilities for debtors, does not bar action directed against Pfizer as a third party because the relationship, in light of Quigley's conduct or the claims asserted against it, must be a legal cause of or a legally relevant factor to Pfizer's alleged liability. Plaintiff also argued that the Amended Preliminary Injunction (API) is inapplicable to the Angelos suits, because Pfizer's liability as an "apparent manufacturer" under §400 hinges on the presence of Pfizer's name and logo on Quigley's products, while the fact of Pfizer's ownership of Quigley is legally irrelevant. The Court agreed with Plaintiff, stating, "We are confident that the Angelos reading of the statutory language at issue here is the correct one. Section 524(g) is designed to facilitat[e] the reorganization and rehabilitation of the debtor as an economically viable entity, as well as make it possible for future asbestos claimants to obtain substantially similar recoveries as current claimants. Barring the prosecution of claims bearing only an accidental nexus to an asbestos bankruptcy is less than tangentially related to that objective." The Court concluded that Pfizer's ownership interest in Quigley is legally irrelevant to the Angelos suits' §400 claims, and the API, modeled as it is on 11 U.S.C. § 524(g)(4)(A)(ii), does not enjoin the suits against Pfizer. Therefore, Pfizer may now face asbestos liability suits.

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RECENT PENNSYLVANIA *LEGAL MALPRACTICE* OPINIONS

by Josh J.T. Byrne, Esquire

Although not strictly speaking a "legal malpractice" decision, the Eastern District of Pennsylvania's decision in Travelers Indem. Co. v. Stengel, 2011 WL 6739458 (E.D. Pa. 2011), is of interest in terms of legal malpractice defense, and the case history shows how convoluted these actions can become. The case was a contribution action arising out of an underlying legal malpractice action, which arose out of an underlying wrongful use of civil proceedings (Dragonetti) action, which in turn arose out of a zoning appeal.

Travelers was pursuing the action as an assignee of the rights of a couple by the name of Sanford. Attorney Stengle represented the Sanfords in bringing a zoning appeal, which included a RICO claim against the members of the Board of Supervisors, although the Sanfords filed the RICO claim pro se, Stengle drafted it. Immediately thereafter, representation was taken over by Stengle's co-defendant Berry, who filed an amended RICO complaint. The amended complaint was dismissed, and two members of the Board brought a wrongful use of civil proceedings action against the Sanfords. The attorneys assigned by the Sanfords' insurer, the Nelson firm, did not file an answer to the Supervisor's complaint, and a judgment was entered against the Sanfords for $3,030,000. The Sanfords then brought a legal malpractice action against the Nelson firm. Travelers, as insurers for the Nelson firm settled the legal malpractice action and the wrongful use action by paying the Supervisors $1,500,000. The Travelers v. Stengle case, seeking contribution from Stengle and Berry, followed.

The court granted summary judgment in favor of Stengle and Berry, finding that the Nelson firm and Stengle and Berry were not joint tortfeasors, and as they were not joint tortfeasors there could be no contribution. The court reasoned that Stengle and Berry owed the Sanfords a different duty than the Nelson firm, that different experts would be needed to prove the two cases, and that the acts were severable in time. Importantly, "neither individual was able to guard against the acts of the other." The court also found that the harm was so far removed from Stengle's and Berry's actions that it was not foreseeable and could not constitute proximate cause.

In Javaid v. Weiss, 2011 WL 6339838 (M.D. Pa. 2011), the court granted dismissal of the plaintiffs legal malpractice claims finding that the complaint was too speculative. The court also found that defendants had raised significant questions about whether the claim was barred by the two year statute of limitations for a professional liability claim. Although plaintiff had asserted a separate count of breach of contract, the court found he had not "adequately pled a separate claim for breach of contract, but has instead simply repackaged his allegations of negligence and recast them as a breach of contract claim." This decision is a strong reiteration of the concept that a legal malpractice claim sounding in contract must be based on the breach of an explicit contractual term.
What is the malpractice or professional liability avoidance takeaway from these cases? There are two obvious lessons from the Travelers case: 1) do not over-plead, and 2) file answers to complaints in a timely manner. The case also will be useful when defending legal malpractice or wrongful use of civil proceedings claim which include cross-claims for contribution. From the Javaid case we learn that if you do not breach an explicit contract provision, you will have a good statute of limitations defense for cases that are filed more than two years after the alleged negligence.

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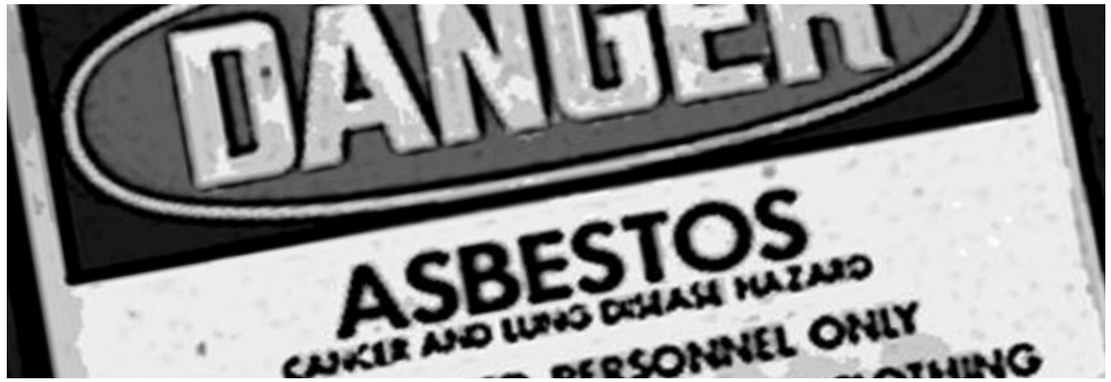
United States Supreme Court Decision has Immediate Impact on Local Asbestos Cases

By Walter L. McDonough, Esquire and Christine P. Busch, Esquire



On February 29th, 2012, the Supreme Court of the United States handed down its decision in the case of Gloria Gail Kurns, Executrix of the Estate of George M. Corson v. Railroad Friction Products Corporation, et al., 565 U.S. ___ (2012). This is an asbestos products liability case against, among others, various alleged manufacturers and suppliers of asbestos containing components used in railroad locomotives and the manufacturers of the locomotives themselves. Plaintiff's decedent, George Corson, contracted mesothelioma, allegedly as the result of working as a welder and machinist employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. Plaintiff alleged that he installed brake shoes manufactured by defendant, Railroad Friction Products Corporation, which contained asbestos and that he worked with and/or around locomotives manufactured by a successor in interest to defendant, Viad Corporation. Suit was filed in the Philadelphia County Court of Common Pleas and removed to the United States District Court for the Eastern District of Pennsylvania. Defendants Railroad Friction Products Corporation and Viad Corporation moved for summary judgment pursuant to the federal pre-emption provisions of the Locomotive Inspection Act, which motions were granted. The decision dismissing the case against those two defendants was affirmed by the United States Court of Appeals for the Third Circuit. Plaintiffs petitioned the Supreme Court of the United States for Certiorari which was granted.

The Supreme Court of the United States, in a 6-3 decision, affirmed the lower courts decisions dismissing plaintiffs' complaint pursuant to the doctrine of federal pre-emption. In so doing, the Court relied heavily on the prior Supreme Court case of Napier v Atlantic Coast Line R. Co., 272 U.S. 605 (1926). The Court held that in enacting the Locomotive Inspection Act (LIA), 49 U.S.C. § 20701 et seq., Congress pre-empted the entire field of locomotive regulation such that the states could not enact their own statutes or regulations regarding the design of locomotives nor could they permit common law suits against the manufacturers of locomotives or the manufacturers of component parts used in those locomotives.

The Locomotive Inspection Act states, in part, that a railroad carrier may use or allow to be used on its lines only locomotives whose parts or appurtenances are in a proper condition or safe to

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operate without unnecessary danger of personal injury, which parts have been inspected as required and which parts can withstand every test prescribed by the Secretary of Transportation. The Act gave the Secretary of Transportation the authority to promulgate regulations to insure the design and manufacture of locomotives and component parts. In holding that Congress pre-empted the entire field of locomotive design and manufacture by enacting the LIA, the Court held that states could not enact their own statutes or regulations regarding any aspect of locomotive design or manufacture. Similarly, the LIA proscribed any common law suits against manufacturers of locomotives or their component parts on either a negligence theory, a failure to warn theory, a product liability theory or a design defect theory.

Kurns dealt with the locomotive and brakes affixed directly to the locomotive, which were found to fall squarely within LIA regulation. The question remains, after Kurns, as to whether federal pre-emption under the LIA applies in situations involving injuries arising from appurtenances of locomotives, braking systems on cars other than the locomotive, and rail cars and their component parts. Some of these issues were raised in Philadelphia County Court of Common Pleas cases of Thomas Atwell (No. 0405-1366) and Alvin Harris (No. 0507-0783). Prior to the Supreme Court ruling in Kurns, the Philadelphia Court of Common Pleas in those cases denied summary judgment to both a brake shoe manufacturer and gasket manufacturer, some of whose parts were used on parts other than the locomotive, finding those facts put the cases out-side of federal preemption under the LIA, with which the Superior Court agreed. Allocatur was denied in these cases by the Pennsylvania Supreme Court. Following its decision in Kurns, the United States Supreme Court granted the Petitions for Writ of Certiorari in Atwell and Harris, vacated the judgment of the Pennsylvania Superior Court in each and remanded the matters back to the Superior Court "for further consideration in light of the Court's decision in Kurns."

On May 25, 2012, Judge New heard oral argument in a series of Philadelphia Court of Common Pleas cases that addressed federal pre-emption of railroad claims under the Locomotive Inspection Act pursuant to Kurns and its potential extension to appurtenances of locomotives, braking systems and rail cars. Defendants collectively argued for a broad interpretation of "appurtenances", as addressed in the LIA, to cover such things as brakes, gaskets, engine parts of the locomotive itself as well as rail cars and items on rail cars. Plaintiff maintained the position that "if it's not attached to the locomotive, it's not an appurtenance", relying upon the vacated decisions in Harris and Atwell.

Defendants further argued that the US Supreme Court established the field pre-emptive effect of the SAA (Safety Appliances Act--companion legislation to the LIA) in Southern Ry. Co. v. RR Comm. Indiana and its progeny. These cases expressly state that there is federal field pre-emption over safety appliances, such as brakes and other railroad equipment such that state law products liability claims are pre-empted. It was further argued that rail cars are built to comply with federal safety regulations and as such, are equally pre-empted.

Judge New granted summary judgment in favor of locomotive manufacturers, brake manufacturers (for brakes used both on locomotives and rail cars) and rail car manufacturers alike. Accordingly, the court has not only adhered to Kurns (field pre-emption regarding the locomotive itself and products used on the locomotive) but also has anticipated that the Superior Court will extend the LIA's pre-emptive field to cover state law claims arising out of defects to rail cars and products used on rail cars (such as brakes, gaskets, insulation products) in Harris and Atwell pending before it on remand.

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NEWS & FIRM NOTES

John Zeigler, Esquire, and **Matt Esslinger, Esquire,** from the Camp Hill office recently prevailed at the Workmen's Compensation Judge level in defense of a matter where the case had been bifurcated for a determination as to whether the injured worker was an employee versus an independent contractor. Claimant alleged that he was an employee of Defendant on the project on which he was injured. Plaintiff shattered three to six vertebra in his back, shattered his left wrist, suffered four cracked ribs and a cracked sternum when he climbed off of a roof onto scaffolding and the scaffolding collapsed. In rendering a Decision denying and dismissing the Claim Petition, the Judge found the testimony of Claimant less than credible or persuasive where it conflicted with the alleged employer witness. Specifically, the Judge noted that although it was not controlling, this Claimant knowingly signed a "Subcontractor Agreement," and initially knew he was hired in that capacity. The Judge discredited Claimant's argument that his independent contractor status had changed merely based on Claimant's testimony that his other "full-time" job had ended. The Judge relied on additional evidence supporting Claimant's position as an independent contractor such as prior experience, lack of training or supervision by the Defendant, Claimant's use of his own tools, and his ability to refuse jobs and do work for others and finally, his professed understanding of his independent contractor status per the unemployment compensation questionnaire which he completed.

John also recently prevailed in another case at the Workmen's Compensation Judge level defending a Claim Petition where an over the road truck driver who suffered a knee retinacular tear and effusion from a slip and fall alleged that a total knee replacement was reasonable and necessary treatment related to the work injury. In determining that the Employer/Carrier was not responsible for medicals for total knee replacement or any wage loss benefits of any kind the Judge noted that cross-examination of Claimant revealed prior problems and treatment with the knee suggestive of pre-existing and underlying arthritis and degenerative joint disease with the possibility of knee replacement having been raised by physicians prior to the work injury. The Judge discredited Claimant's surgical doctor and credited Employer's independent medical expert that the work injury, specifically a hyperflexion injury, did no aggravate the underlying and pre-existing arthritis and degenerative joint disease.

Finally, the Workmen's Compensation Judge determined that Claimant had failed to prove that any disability for the retinacular tear with effusion exceeded seven days and thus denied wage loss benefits.

Michael A. Cognetti, Esquire, of the Philadelphia Office recently obtained the dismissal of a client by way of a Motion for Summary Judgment in the Court of Common Pleas of Montgomery County. The client was an abutting property owner next to the site of a slip and fall that occurred on ice. The plaintiff was a podiatrist who became disabled and could no longer practice medicine. The demand was in excess of two million dollars. The Court ruled that there was no easement on the client's deed and that the client owed no duty to the plaintiff to maintain the private drive behind his property. The Court also concluded that the Pennsylvania Storm Water Waste Management Act did not apply in the factual scenario of the case. The plaintiff is pursuing his claim against the remaining defendant property owners.

Jeffrey McCarron, Esquire, and **Candidus Dougherty, Esquire,** won summary judgment and an award of sanctions under 28 U.S.C. § 1927 in an action before the United States District Court for the District of New Jersey for breach of contract, negligent misrepresentation and fraud against an attorney and an alternative dispute resolution firm arising from a 2003 arbitration that the plaintiff alleged was not neutral. The action was one of numerous and duplicative actions in federal and state forums by the plaintiff against the same defendants. The Court found the claims by plaintiff were barred by res judicata, collateral estoppel and the entire controversy doctrine and entered judgment in favor of the defendants on all counts. The Court also found that plaintiff had filed a meritless motion to change venue and, by doing so, intentionally and unnecessarily multiplied the proceedings in an unreasonable and vexatious manner and awarded defendants attorneys' fees and costs in reacting to the meritless motion.

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NEWS & FIRM NOTES: CONT.

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Jeffrey McCarron, Esquire, and **Nicole Graham, Esquire,** of the Professional Liability Group successfully defended a lawyer and law firm by obtaining a defense verdict after a week long jury trial. The case arose out of the representation of a physician who had been suspended and his medical staff privileges revoked leading to the alleged loss of his medical practice. The lowest settlement demand was policy limits and plaintiff's damage model and request to the jury was more than 2-1/2 times policy limits.

Ashgate Publishing Ltd will publish, by reprint, a law review article written by **Candidus Dougherty, Esquire,** entitled While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster, 29 N. Ill. U. L. Rev.117 (2008), in the collection The Library of Essays on Emergency Ethics, Law and Policy, edited by Griffith University, Australia and University of Toronto, Canada. The collection will be available December 2012.