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In This Issue...

SOCIAL NETWORK DISCOVERY– THE TWO FACES OF GREED

By Frederick C. Fletcher, II, Esquire

Defense counsel have the strength of 10 because their hearts are pure. Well, maybe this is a bit of hyperbole, but nowadays the omnipresent social networking phenomena has given plaintiffs an irresistible invitation to make "self-executing disclosures" of their most personal habits before and after their personal injury litigation is commenced.

Think about it. Facebook, Myspace, Twitter and the like are real time postings of pictures and prose by an author seeking to communicate accurately with friends and family. This desire to reveal and exchange information with other people is the act of pulling back the curtain that unfortunately does not take place in most litigation. True, a seriously injured plaintiff is more than glad to share accurate information regarding a post-accident diminishment of previously enjoyed activities of daily living. They are able to demonstrate real injury, and with the assistance competent, ethically grounded legal representation, they have no reason to exaggerate. However, many personal injury claimants, perhaps spurred by greed and avarice, believe it is their God-given right to stretch the truth in order to maximize their recovery. After all, the defendant hurt them and the insurance company is just in the business of denying legitimate claims, so why not level the playing field by telling a little white lie?

Discovery in civil litigation is designed to compel the opponent to disclose information and documents germane to the lawsuit. The idea at work is that an accurate exchange of information will support proper evaluation of liability and damage issues. Experienced counsel understand that appropriate disclosure of documents and facts, unfavorable and favorable, is by far the best policy. To be "blind-sided" at trial by the smoking gun document or the undisclosed witness is personally and professionally disastrous, to say nothing of the effect of such behavior on a client.

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But let's get back to our greedy plaintiff. The man rear-ended with minimal property damage, but claims long-term disability and intractable pain. Without a plausible damage defense, he is going to be the recipient of a large settlement or perhaps larger jury verdict. In the past, the defense has utilized surveillance video, neighborhood canvassing and public record searches to size up the plaintiff and test his credibility. Does he walk the walk, or just talk the talk? Or, stated another way; is he truthful in his claims?

Social networking sites present a unique opportunity to have the plaintiff do the heavy lifting of investigating himself. Social networking gives an over-reaching claimant "enough rope to hang himself." What could be better than to impeach a plaintiff by his own words and photographs? He claims he cannot take out the trash, but he is shown waterskiing on his Facebook page. He says he is deeply embarrassed by his facial scarring from the accident, but there he is on the internet with a facial close-up for the entire world to see.

Savvy defense counsels are making sure to ask plaintiffs whether or not they are members of social networking websites and, if so, their user and login names. Plaintiffs are also asked if they have "taken down" any images or public postings since the time of the accident. That is, is the plaintiff trying to re-cast their internet persona to be more consistent with their litigation persona?

The Pennsylvania lower courts are starting to process discovery motions seeking to both protect (plaintiffs) and uncover (for defendants) this potentially rich vein of information. No controlling appellate decisions have come down yet and the lower courts decisions are a mixed bag of protecting claimed privacy on the one hand, and allowing transparency of information to promote honesty and disclosure in the litigation discovery process.

Plaintiff McMillan sued defendants in Jefferson County after being rear-ended in a motor vehicle accident. Plaintiff admitted to being a member of Facebook and MySpace, but refused to provide his user and login names. Mr. McMillan's public disclosures on Facebook revealed a fishing trip and attendance at the Daytona 500 car race in Florida. Defendant considered these events to be at odds with plaintiff's claims of permanent injury and inability to enjoy life's pleasures. Defense counsel filed a Motion to Compel discovery. They told the court they were looking for information to impeach and contradict disability and damage claims. The plaintiff asked the court to treat the communications on social websites with friends as confidential and protected.

The court researched the Privacy Policies of Facebook and Myspace and concluded that such postings are not confidential. When a user communicates through Facebook or Myspace, they understand that third party recipients will also be receiving the message and may further disclose them. This fact is incommensurate with a claim of confidentiality. While the flow of information between a person and their attorney, doctor and psychologist may be facilitated by confidentiality protections, the same guarantee is not necessary to encourage the development of friendships. Furthermore, any possible relationship harm is trumped by the benefit of correctly disposing of litigation. The court went on to observe that a lack of injury and inability is relevant to the defense and it is reasonable to assume that McMillan may have made additional observations about his travels in private posts not currently available to the defendants. Gaining access to these posts could help to prove either the truth or falsity of McMillan's alleged claims. The court ordered plaintiff to provide his user names and passwords to defense counsel. Interestingly, the court went on to order that plaintiff not delete or alter existing information and posts, and that plaintiff's usernames and passwords not be divulged to defendants themselves.

The Northumberland County case of Zimmerman v. Weis Markets, Inc. reached much the same conclusions as McMillan. Zimmerman was hurt in a forklift accident at work and sustained injuries including leg scarring. At a deposition he testified that he was embarrassed to wear shorts. His public MySpace page showed him wearing shorts and his scars visible.

Defense counsel filed a Motion to Compel discovery of plaintiff's passwords. Again, plaintiff's purported privacy issue was weighed against the pursuit of truth. The court decided that truth is the paramount ideal and granted defendant's motion stating:

"By definition, a social networking site is the interactive sharing of your personal life with others; the recipients are not limited to what they do with such knowledge. With the initiation of litigation to seek monetary award based upon limitations or harm to one's person, any relevant, non-privileged information about one's life is shared with others and can be gleamed by defendants from the Internet is fair game in today's society."

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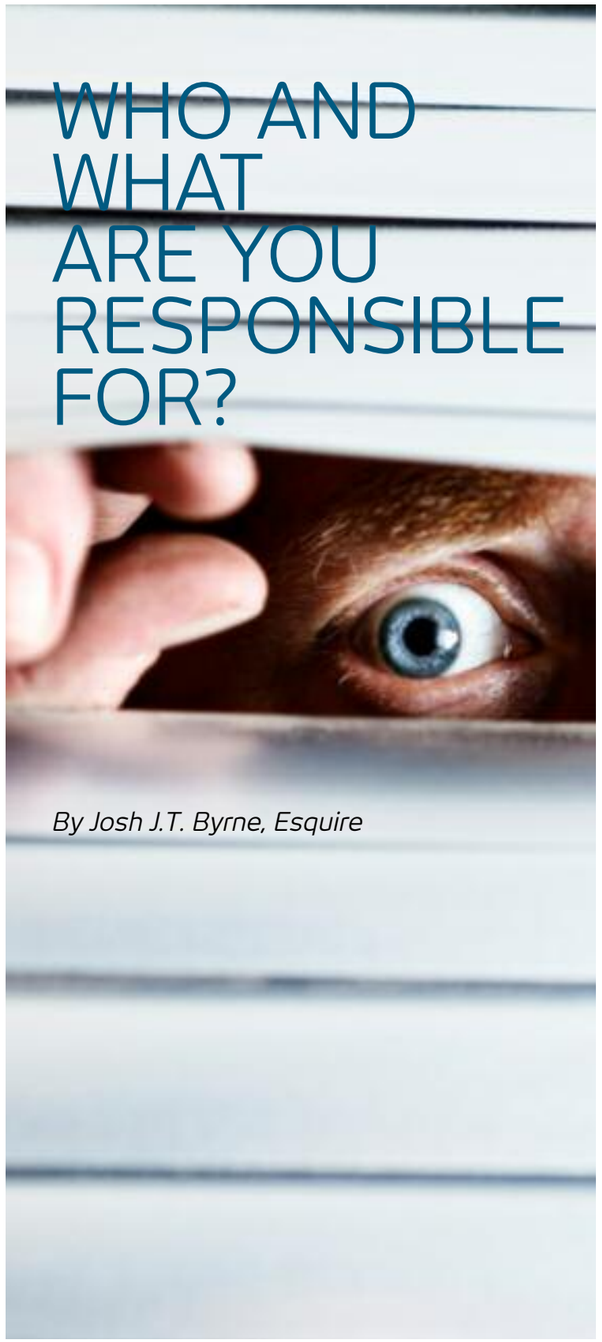

Bonnie Sweeten, the infamous "hoax mom," is back in the news following her guilty plea to a count of wire fraud and a count of aggravated identity theft. Ms. Sweeten used her position as a paralegal to steal nearly $1 million from clients of the law firm, the law firm itself, and a relative. She also faked a racially tinged abduction while travelling to Disney World. The sobering news for attorneys is the ramifications for Ms. Sweeten's former employer. Former attorney Debbie Ann Carlitz has faced multiple lawsuits and has been disbarred upon consent, largely because of the actions of Ms. Sweeten.

Ms. Carlitz was originally suspended in March 2008. According to the disciplinary opinion, Ms. Carlitz was practicing law while on inactive status due to failure to comply with CLE requirements. Ms. Carlitz was found to have violated Rules of Professional Conduct 5.5(a) Practicing law in violation of the regulation of the legal profession; 7.1 False communication about the lawyer's services; 8.4(c) Professional misconduct to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and 8.4(d) Conduct prejudicial to administration of justice. Ms. Carlitz was suspended for one year and one day.
Ms. Carlitz later claimed she did not know she was on inactive status because Ms. Sweeten received the notice of the transfer to inactive status, signed it, and sent it back without informing Ms. Carlitz. Moreover, Ms. Carlitz claimed she did not even know about the disciplinary proceedings, and the consent suspension was entered into without her knowledge. The entire disciplinary action was handled by Ms. Sweeten without Ms. Carlitz's knowledge. The suspension was vacated following an emergency petition for review. There is no opinion stating why Ms. Carlitz is now disbarred.

The suspension was not the only problem Ms. Sweeten caused for Ms. Carlitz. Ms. Carlitz was sued by a client whose settlement check was cashed by Ms. Sweeten.
Ms. Carlitz was sued by other clients for legal malpractice around the same time. Ms. Carlitz was also sued by a mortgage company for a loan taken out by Ms. Sweeten in Ms. Carlitz's name.

The lesson here is that we are responsible for what goes on in our offices. There may be defense that can be mounted by claiming ignorance, but that does not mean that the misdeeds of others in your office will not cost you hundreds of hours and thousands of dollars, or that the defense will ultimately be successful. Malpractice avoidance requires knowing what is going on in your office, and taking swift action as soon as you suspect a problem.

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THE DUTY TO DEFEND: ASSAULT, BATTERY & CLAIMS OF SELF DEFENSE

BY MICHAEL A. COGNETTI, ESQUIRE AND JORDAN S. DERRINGER, ESQUIRE

In Pennsylvania, an insurer's duty to defend is measured by the allegations in the underlying complaint. In Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., the Pennsylvania Supreme Court has explained the rule as follows:

It is well established that an insurer's duties under an insurance policy are triggered by the language of the complaint against the insured. In Mutual Benefit Ins. Co. v. Haver, 555 Pa. 534, 725 A.2d 743, 745 (1999), we stated:

A carrier's duty to defend and indemnify an insured in a suit brought by a third party depends upon a determination of whether the third party's complaint triggers coverage. [citation omitted]. This principal has been long held in this Commonwealth as well as in other jurisdictions. In Wilson v. Maryland Casualty Col, 37 Pa. 588, 105 A.2d 304, 307 (1954), we explained:

[T]he rule everywhere is that the obligation of a casualty insurance company to defend an action brought against the insured is to be determined solely by the allegations of the complaint in the action...

Kvaerner, 902 A.2d 888, 896 (Pa. 2006). In Kvaerner, the Pennsylvania Supreme Court held that the lower court committed reversible error in considering evidence extrinsic to the underlying complaint in determining whether the insurer had a duty to defend.

Despite the clarity of this rule, insureds constantly seek to have the court consider evidence extrinsic to the complaint in the hopes of triggering coverage under the policy. In a recent case, Swartz Campbell attorneys Michael A. Cognetti, Esquire and Jordan S. Derringer, Esquire, were successful in obtaining a declaratory judgment in favor of the carrier where the underlying complaint did not set forth any claims within the scope of the coverage afforded by the policy. In Nationwide Mutual Ins. Co. v. Malofiy, 2011 WL 1050050 (E.D.Pa. 2011), the insured sought coverage under a homeowner's policy in connection with allegations that he committed an assault and battery of the underlying tort plaintiff. The factual background in the case involved an altercation at a bar. A fight broke out between the insured and the underlying plaintiff. Following the fracas, the insured was arrested and charged with several violations of the Pennsylvania Criminal Code, including aggravated assault, simple assault, recklessly endangering another person, and possession of an instrument of crime.

In the underlying tort action, it was alleged that the insured struck the underlying plaintiff in the head and face with a beer glass causing him to sustain severe disfiguring personal injuries. According to the underlying plaintiff, the actions of the insured were done with the "malicious intent to injure" and constituted a "battery as a matter of Pennsylvania law."

Coverage was sought under a homeowner's policy of insurance which provided as follows:

We will pay damages an insured is legally obligated to pay due to an occurrence resulting from negligent personal acts or negligence arising out of the ownership, maintenance or use of real or personal property. We will provide a defense at our expense by counsel of our choice.

An occurrence was defined as follows:

"OCCURRENCE" means bodily injury or property damage resulting from an accident, including continuous or repeated exposure to the same general condition. The occurrence must be during the policy period.

A defense was provided pursuant to a reservation of rights and a declaratory judgment action was instituted seeking a declaration that the insurer had no obligation to provide coverage to the insured because the allegations of assault and battery in the underlying tort action did not constitute an occurrence as defined by the policy.

The tort action and the declaratory judgment action were stayed pending resolution of the criminal trial. The insured was subsequently found not guilty at the criminal trial. During the criminal proceedings, the insured maintained the position that he acted in self-defense, a position that he continued to assert in the declaratory judgment action.

Following resolution of the criminal trial, a Motion for Judgment on the Pleadings was filed on behalf of the insurer. In response, the insured argued that he was

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entitled to a defense because he was acting in self-defense. The insured sought to introduce the transcripts from the criminal trial. Swartz Campbell attorneys argued that the court could not consider the evidence that the insured acted in self-defense or the transcripts from the criminal trial. In this regard, it was argued that the claims of self-defense and the criminal trial transcripts were extrinsic to the underlying complaint and that Pennsylvania law mandates that it is solely the allegations in the underlying complaint which controls the duty to defend.

The court noted that even though the claims of self-defense could provide a complete defense to the allegations in the underlying tort action, they were not relevant to the duty to defend inquiry because they were extrinsic to the underlying complaint. Despite the court's recognition that extrinsic evidence could prove to exculpate the insured from liability, the court was nevertheless constrained to consider only the allegations in the underlying complaint. Finding that the allegations of assault and battery in the underlying complaint did not constitute an occurrence as defined by the policy, the court entered judgment in favor of the insurer and held that it had no duty to defend the insured.

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Your UR Determination does not affect your causal connection: Separating the utilization review process from the causal connection determination.

By Matthew B. Esslinger, Esquire

It has been long held that the utilization review process was set in place to determine whether questioned medical treatment was reasonable and necessary. However, the question seemed to linger regarding whether a negative utilization review determination had an effect on whether said treatment was also found to be causally related to the work injury. That question has finally been answered by the Commonwealth Court in Securitas Security Services v. WCAB (Schuh), 16 A.3d 1221 (Pa. Commw. 2011).

In Securitas, claimant sustained a work injury to his back in November of 2004 which was accepted by a Notice of Temporary Compensation Payable that converted to a Notice of Compensation Payable (NCP) accepting a "lower back strain." In October of 2005, claimant began receiving treatment from Dr. Berger who diagnosed claimant as suffering from a major depressive disorder and prescribed a treatment plan which included psychotherapy and medications. In May of 2006, the employer filed a prospective utilization review of all future treatment by Dr. Berger. The utilization review found that all Dr. Berger's treatment was reasonable and necessary. The employer did not appeal.

In July of 2007, claimant filed a review petition seeking to amend the description of injury to include diagnoses of depression and anxiety. In support of that petition, claimant did not present any evidence. Rather, claimant relied solely on the argument that employer was estopped from denying liability for the psychological injuries by virtue of the unappealed utilization review determination. The Workers' Compensation judge agreed with claimant and found that by employer availing itself of the utilization review process employer effectively acknowledged that claimant's psychological treatment was related to the work injury. Based on that determination, the Workers' Compensation judge expanded claimant's

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work injury to include work-related mental/physical injuries in the nature of depression and anxiety. The employer appealed.

The Workers' Compensation Appeal Board affirmed finding that all of the elements of collateral estoppel were satisfied. The board further found that generally an employer must acknowledge a work injury before the utilization review may be requested citing to Armstrong v. WCAB (Haines & Kibblehouse, Inc.), 931 A.2d 827 (Pa. Commw. 2007), wherein the court found that an employer is not entitled to seek utilization review if the nature of the claimant's work injury has not been established. Based on same, the board held that the employer effectively acknowledged liability for claimant's psychological condition by paying for related medical expenses and taking advantage of the Workers' Compensation Act's utilization review scheme. The employer appealed.

On appeal, the employer argued that the Workers' Compensation judge erred in relying on collateral estoppel to find that employer has accepted liability for the psychological injuries. The Commonwealth Court agreed. In holding same, the court found that for collateral estoppel to apply four elements must be met. Specifically, estoppel applied where the issues are identical, actually litigated, essential to the judgment, and material to the adjudication. In this instance, the court found that the issue of whether claimant's psychological conditions were related to the 2004 work injury, was not identical, litigated, essential, or even relevant to the utilization review determination. Rather, the court cited to the fact that pursuant to the Workers' Compensation Act, utilization review organizations (UROs) shall only decide the reasonableness and necessity of the treatment under review, and may not decide the causal relationship between the treatment under review and the employee's work-related injury.

The court also agreed with the employer's argument that the payment of medical expenses or the filing of the utilization review request did not establish a causal relationship between a medical condition and claimant's work injury. In holding same, the court cited to the well-settled rule that an employer's voluntary payment of a claimant's medical expenses did not operate as an admission of liability. Rather, the court reasoned that if payment of medical expenses acted to accept liability, it would force employers to abandon the practice of voluntarily paying for medical treatment without accepting liability for same, which ultimately benefits claimants.

Additionally, the court cited that there was nothing in the case law or cost containment regulations suggesting that the mere filing of a utilization review request imposed liability on an employer for a specific injury. Finally, the court noted that, while the present case was not a medical-only case, it recognized that in medical-only cases the statute supported employer's ability to file a utilization review determination where it was paying for medical treatment, despite the fact that it has not filed documents with the bureau admitting liability for a work related injury.

The court's decision in Securitas represents not only an answer to the questions regarding utilization review filings and their effect on determinations regarding causal relationship, but also security in knowing that those determinations do not preclude employers and carriers from contesting the causal connection following a unfavorable utilization review finding. This case also codifies the long-held rule that payment of medical payments does not serve to accept liability.

Finally, this case supports the ability of an employer to use the utilization review process, and its unique ability to stop liability for payment of medical expenses during the litigation of a petition without the danger of accepting liability for additional work injuries. The impact of this can be demonstrated by the following example. An employer and carrier have accepted a minor injury, such as a low back strain, by way of a medical only NCP, but are still litigating whether said injury is disabling and the scope of the injury, such as whether it included aggravation to degenerative conditions existing in the claimant's spine. They are also litigating whether said injury requires either injections or chiropractic treatment. While they can clearly refuse to pay for said treatment, arguing that same is not related to a back strain, said refusal could present the risk of a penalty as cases have found that an employer risks the imposition of penalties where it denies treatment for the same body part that has been accepted as work related. However, with the Securitas case in their back pocket, employers and carriers can now file the utilization review request to determine whether said treatment is reasonable and necessary, without carrying the risk of accepting liability for said treatment even if the URO finds against the employer and carrier.

Consequently, the Securitas case represents another tool in the ongoing battle to reduce and eliminate ever increasing medical costs in workers' compensation cases.

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TIME FOR POST-KOKEN RULES?

By James C. Haggerty, Esquire and Leonard A. Sloane, Esquire

In Pennsylvania, the adjudication of uninsured and underinsured motorist claims has undergone a substantial change. Previously, all UM and UIM disputes were litigated in mandatory arbitration proceedings before three lawyers chosen by the plaintiff's and defendant's attorneys. In fact, the Insurance Department would not approve an automobile policy in Pennsylvania unless it included a mandatory arbitration clause for the adjudication of such claims. In IFP v. Koken, 889 A.2d 550 (Pa. 2005), in ruling upon the challenge of the Insurance Federation to this arbitration requirement, the Supreme Court determined that the Insurance Department had no authority to require mandatory arbitration of UM and UIM claims. As such, the stage was set for a significant change in the manner in which UM and UIM claims would be resolved.

In response to the Koken opinion, most if not all i nsurers modified their automobile policies in Pennsylvania. Some insurers completely eliminated any reference to arbitration with respect to UM and UIM claims. Others retained arbitration clauses. However, these clauses required joint consent for arbitration of such claims. Thus, arbitration, while being retained as a viable method for the resolution of UM and UIM disputes, became a voluntary, not mandatory, process in most instances. If arbitration is not jointly agreed to by the parties, then a claimant is required to institute suit in a court of competent jurisdiction. The adjudication of UM and UIM claims in court has given rise to a plethora of novel issues in Pennsylvania. These issues are being addressed on a case by case basis within separate lawsuits filed in numerous counties throughout Pennsylvania with different results amongst the courts. In fact, more than 70 orders and/or opinions have been issued throughout the Commonwealth, often with opposite conclusions in connection with similar legal principles. The time has come to establish rules for the handling of these cases on a uniform basis.

In Pennsylvania, the Supreme Court has established Rules Committees to address issues in various practice areas. Rules addressing the litigation of UM and UIM claims may now be needed. Specifically, rules governing the adjudication of uninsured and underinsured motorist disputes can be formulated by representatives of the bench, along with plaintiffs' bar and the defense bar. These rules could be submitted to the Civil Procedural Rules Committee and the Committee on Rules of Evidence for consideration. At the same time, a standard jury charge could be developed for use in UM and UIM cases for consideration by the Committee for Proposed Standard Jury Instruction. In this way, standard procedures for the adjudication of UM and UIM claims in the Pennsylvania courts could be established.

As noted, the issues which arise in the adjudication of UM and UIM claims are being adjudicated on a case by case basis in the courts in each individual UM or UIM lawsuit. These issues need to be considered and

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addressed in formulating proposed rules for the litigation of UI and UIM claims. Among these issues are the following:

• **Venue:** The Rules of Civil Procedure govern venue. Generally, in auto cases, venue is proper where the accident occurred or where the defendant can be severed. See, Pa.R.C.P. 1006(a). If the defendant is a corporation, as in the UM or UIM case, suit may be brought in any county were the insurer regularly conducts business. See, Pa.R.C.P. 2179(a). Some insurers currently include forum selection clauses in their policies. One such clause has been held to be enforceable. See, O'Hara v. First Liberty, 984 A.2d 938 (Pa. Super. 2009). When a tort and UIM claim are brought together, additional venue issues arise not specifically addressed in O'Hara. Since most insurers do business in all Pennsylvania Counties, forum shopping may arise. Therefore, rules need to be adopted establishing the appropriate venue for the litigation of all UM and UIM cases, including cases where the third party case and UIM case are joined together.

• **Joinder:** Previously, the tort and UIM case were litigated in separate forums. Now, in many instances, the cases are filed together in one action in the Courts of Common Pleas. An issue exists as to whether the UIM insurer can be joined as a defendant in the tort action. If joinder is permitted, then the role of the UIM insurer at trial must be addressed. The UIM carrier, when joined in the tort case, may, in some instances, be only an excess insurer. In other instances, the entire policy would be in play in addition to the policy on the third party defendant. Therefore, the manner in which the insurer is treated at trial becomes an important issue to both the insurance company and the injured party. Standard rules could identify and resolve these potential problems.

• **Insurance:** Historically, the existence of insurance was inadmissible in the trial of the auto accident case. Now, in the post-Koken era of the joinder of claims where the UIM insurer is joined as a defendant, there needs to be a uniform system for the handling of these insurance issues. The mention of insurance needs to be governed by standardized rules. In many instances, however, the insurer will be the only defendant. In these cases, the insurer must be identified. How the issue of insurance will be treated in such cases becomes of prime importance. Accordingly, there needs to be specific procedures for the trial of the case in order to provide a fair system for the litigation of such claims.

• **Evidence:** In the UM or UIM case, the plaintiff will be seeking recovery of contractual insurance benefits. Previously, in arbitration, the UM/UIM claim was litigated as a standard tort action. Uniform rules need to be established with respect to the manner in which the UM/UIM case is to be tried. Specifically, rules are needed to address:

- admissibility or exclusion of credits from the tort action;
- admissibility or exclusion of coverage limits;
- admissibility or exclusion of insurance policy evidence, e.g. premium payments, years insured, etc.;
- admissibility or exclusion of insurer advertisements or slogans.
- admissibility or exclusion of the type of claim and/or the identification of the parties', e.g., "underinsured motorist claim," or "underinsured driver" or "underinsured motorist carrier."

In effect, a uniform approach as to the manner in which the case is to be tried, i.e. as a tort action, a contract claim, or a hybrid, needs to be established.

• **Bad Faith:** Often, in UM and UIM cases instituted in court, a count seeking recovery of extra-contractual bad faith damages is included in the complaint. Questions may arise as to whether these claims are properly included in the UM/UIM lawsuit. These extra-contractual claims may present issues which are different from the joinder of the tort and UIM claims. Rules governing the joinder or severance of such claims need to be developed.

• **Jury Charge:** The charge to the jury in the UM/UIM case is also of importance. What information, if any, is to be given to the jury regarding the nature of the claim, the existence of insurance, and the function of the jury in rendering an award in such cases is of prime importance. Standardized Points for Charge need to be developed and submitted for consideration to the appropriate Supreme Court Committee.

• **Coverage:** Many UM and UIM claims also involve coverage issues. A question exists as to whether

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Pennsylvania Governor Signs "Fair Share Act" into Law

By Miriam Dole, Esquire and Shawn E. Martyniak, Esquire

On June 28, 2011, Pennsylvania Governor Tom Corbett signed into law Senate Bill 1131, also known as the "Fair Share Act," which amends the Comparative Negligence Statute. The law will largely eliminate "joint-and-several" liability for all actions brought to recover damages for negligence in Pennsylvania. Under the Fair Share Act, a civil defendant found to be less than 60 percent liable will be responsible for paying only their fair share of any damages verdict.

Under the prior "joint-and-several" law, a plaintiff could recover 100 percent of the damages awarded, regardless of that defendant's apportioned liability. If co-defendants were judgment-proof or could not pay, a defendant whose liability was as little as 1 percent could be required to pay the entire amount of the verdict. The "paying defendant" would be required to seek to recover from the non-paying defendants, but this effort would result in additional court costs and fees and might not be successful. Under the new law, a defendant who is less than 60 percent liable will only be required to pay its apportioned percentage of the verdict. The statute states that each defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment against each defendant for the apportioned amount of that defendant's liability, except for certain types of actions.
The statute clearly delineates certain exceptions from the law. One exception in the law makes a defendant who is more than 60 percent at fault potentially liable for the full amount of any judgment. Other exceptions include: intentional acts, misrepresentation, hazardous waste sites, and liquor law violations.

While we anticipate that defendants pursued under both negligence and strict liability will attempt to utilize the act to reduce their proportionate liability, it remains to be seen as to what extent the courts will permit the application of this new law to limit liability for defendants held strictly liable. The Fair Share Act amends Pennsylvania's negligence statute, but then states that it will include actions where there are claims against defendants based on negligence and defendants based on strict liability. The act does not specifically state that strict liability defendants shall be assessed percentage liability, however, merely that each defendant shall only be responsible for its own apportioned share. An apportioned share could be either a percentage of the total liability or a pro-rata share of the liability not apportioned to defendants found to be negligent.

Well-established case law clearly states that strictly liable defendants shall be liable for pro rata, not percentage shares. We anticipate that plaintiffs will argue that the language of the Fair Share Act does not conflict with that established precedent. Assessing percentage liability to defendants found strictly liable would inject fault/negligence concepts into strict liability cases, however, which the Pennsylvania Supreme Court held to be improper in Walton v. Avco, 530 Pa. 568, 610 A.2d 454 (Pa. 1992). This would further complicate Pennsylvania's already-complex liability scheme. We expect there will also be litigation as to the proper interpretation of what constitutes a case "...brought to recover damages for negligence...". Would this act apply to cases which initially include allegations of negligence or only to cases where a negligence claim is pursued to verdict or settlement? The courts will eventually address these issues.

However these terms are eventually defined by the Pennsylvania courts, so long as a case is "brought to recover damages for negligence", and an asbestos defendant's share is less than 60 percent (however apportioned), that defendant can only be required to pay its own apportioned share, not the entire verdict.

Another important aspect of the new law allows the judge or jury to apportion liability to nonparties with whom plaintiff has entered into a release. This could allow defendants to introduce evidence against some bankruptcy trusts and other entities not sued for jury consideration, to possibly reduce the damages they are required to pay.

The Fair Share Act is effective immediately, but will only apply to cases that accrue on or after the effective date of the law, which is June 28, 2011. This means the change will most likely have no effect upon current suits, but will be applied in new filings.

For more information regarding the Pennsylvania Fair Share Act, please contact Norman Haase at nhaase@swartzcampbell.com, Miriam Dole at mdole@swartzcampbell.com or Edmund John at ejohn@swartzcampbell.com .

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these coverage issues should be litigated in the lawsuit addressing the liability and damage issues.

See Richner v. McCance, 13 A.2d 950 (Pa. Super. 2011). Standard rules could address these issues, also.

These and other issues need to be addressed by a balanced committee, the goal of which is the fair and efficient trial of UM and UIM cases in Pennsylvania.

In conclusion, the time has come for consideration of the establishment of standardized rules for the adjudication of UM and UIM claims. In the post-Koken environment, these cases are now more often tried in court than in arbitration. Currently, the litigation of these cases often becomes a war of motions, seeking pre-trial rulings on many of the above noted issues. Within the 67 counties in the Commonwealth, we have already begun to see many different approaches by the courts to address and resolve these various issues. In fact, in more than 70 cases, judges have issued orders or opinions addressing the issues of joinder, severance, venue, trial procedures, etc., often producing opposite results in different counties and even within the same county. A set of standardized Rules and Points for Charge would eliminate unnecessary Motion practice while establishing some certainty and uniformity in the system of the litigation of UM and UIM cases. Plaintiffs' attorneys, defense counsel, injured parties and insurers will all benefit from standardized Rules and Procedures.

*Reprinted from the **Auto Law Supplement of the Legal Intelligencer.**

NEWS & FIRM NOTES

- **Josh J.T. Byrne, Esquire,** of the Philadelphia office, presented lectures on legal malpractice avoidance throughout Pennsylvania this spring on behalf of the Pennsylvania Bar Association. Mr. Byrne has spoken to lawyers in Monroe, Lackawanna, Luzerne and Chester counties, as well as at the Delaware County Bench-Bar Conference.

- **Shae Chasanov, Esquire,** of the Wilmington office, obtained judgment in favor of Dairyland Insurance following oral arguments on May 19, 2011 in the Court of Common Pleas in Sussex County. The court granted Dairyland's Motion for Summary Judgment, upholding the restricted coverage provision contained in plaintiff's motorcycle insurance policy. The restricted coverage provision included a "single vehicle" exclusion. The plaintiff argued that the exclusion was void as against public policy, and tried making a factual dispute. The court held that the single vehicle exclusion did not violate public policy and was properly offered to plaintiff pursuant to Delaware law. Jason Sapp v. Dairyland Ins. Co., CPU6-10-002541.

- **Shae Chasanov, Esquire,** of the Wilmington office, obtained summary judgment in favor of GEICO in Superior Court of Sussex County on July 8, 2011. Plaintiffs were involved in a motor vehicle accident, and accepted policy limits of $100,000 from the tortfeasor. Plaintiffs then sought recovery under their $300,000 UIM policy from their own insurer, GEICO. Neither plaintiffs nor their counsel sought consent from GEICO before settling the bodily injury liability suit with the tortfeasor, as required by the terms of their Virginia insurance policy. Plaintiffs' counsel argued that the plaintiffs were not residents of Virginia, but rather were residents of Delaware, so that the consent to settlement was not applicable. The court held that the plaintiffs were Virginia residents, and Virginia law applied pursuant to Delaware's "most significant relationship" choice of law test. Plaintiffs' failure to seek prior approval from GEICO barred them from UIM benefits. Marcia and Robert Smith v. GEICO, S08C-11-011 THG.

- On May 18, **David Henry, Esquire,** of the Orlando office presented "Effective Use of Mediation for Claims Personnel" to Selective Insurance at the Hershey Lodge in Hershey, PA, and on May 19, he presented "Advertising Injury and Insuring Intellectual Property" to the Independent Agents & Brokers of PA in Valley Forge, PA. On June 2, he presented a seminar on advance mediation practice titled "Black Hat/White Hat and Grey Matter" at the Florida Liability Claims Conference in Orlando, FL.

  To cap off the summer, David was presented the 2011 President's Award by the Florida Defense Lawyers Association at the FDLA Annual Meeting in Destin, Florida on August 5, 2011. The President's Award was given for outstanding contributions and dedication to the FDLA. David was also awarded the Douglas P. Lawless Award for his efforts in promoting mediation and alternative dispute resolution.

- **Sharon McGrail-Szabo, Esquire,** of the firm's Lehigh Valley office recently obtained approval of a supersedeas fund reimbursement application for a client in the amount of $182,698.88 following successful prosecution of a petition for termination before Judge Dietrich in Allentown. On August 2, Sharon presented a seminar at Chiquita/Fresh Express' annual safety meeting at their plant in Harrisburg, PA on August 2, 2011. Sharon gave a PowerPoint presentation about Pennsylvania Workers' Compensation.

- Swartz Campbell LLC is pleased to announce that **George E. Saba, Jr., Esquire,** of the Lehigh Valley office, has been invited to join the prestigious Council on Litigation Management. The Council is a nonpartisan alliance comprised of thousands of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. Through education and collaboration, the organization's goals are to create a common interest in the representation by firms of companies, and to promote and further the highest standards of litigation management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows.

- In May 2011, **Bradley K. Shafer, Esquire,** of the Wheeling, West Virginia office, obtained a defense verdict in a jury trial in Hancock County, West Virginia. The plaintiff alleged she was the victim of gender discrimination, age discrimination, and retaliation for filing a workers' compensation claim. During the course of trial, plaintiff voluntarily dismissed her claim for gender discrimination. After only a few hours of deliberating, the jury returned finding against the plaintiff on her remaining two claims.

- **Suzanne Tighe, Esquire,** of the Scranton office successfully represented the defendant in the Commonwealth Court. In Dockery v. Borough of East Stroudsburg, --- A.3d ----, 2011 WL 2673143 (Pa.Cmwlth.), the Commonwealth Court held that the plaintiff's failure to file a petition to open/strike the judgment of non pros prior to filing a direct appeal resulted in waiver of all substantive claims. In that case, the plaintiff filed a complaint against the defendant for negligently maintaining storm drains. Following six years of minimal docket activity, the defendant's motion for judgment of non pros was granted. The plaintiff appealed from that order.

  The plaintiff subsequently filed a petition to open/strike the judgment of non pros, however, the petition was filed while the appeal was still pending. Accordingly, the trial court declined to rule on the petition until the plaintiff voluntarily discontinued the appeal.

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NEWS & FIRM NOTES: CONT.

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The plaintiff discontinued the appeal and filed a second petition, which the trial court dismissed without considering the merits.

The plaintiff appealed from the trial court's subsequent dismissal. On appeal, the court addressed whether the petition was properly denied. The court noted that once judgment of non pros was entered and no petition to open/strike was filed, the case in the trial court had ended. Therefore, although the plaintiff voluntarily discontinued the appeal, the case in the trial court was over and could not be revived by filing a second petition. This decision serves as an important lesson with respect to civil procedure and preservation of claims on appeal. For more information or for a copy of the decision, please contact Suzanne Tighe, Esquire (stighe@swartzcampbell.com).

- **Suzanne Tighe, Esquire,** of the Scranton office, presented an update and overview of motor vehicle law insurance issues at the Pennsylvania Bar Institute (PBI) Civil Litigation Update in Philadelphia, Pennsylvania on July 20, 2011. Ms. Tighe reviewed and discussed all developments with respect to claims arising under the Pennsylvania Motor Vehicle Financial Responsibility Law over the past year and discussed matters pending in Pennsylvania Appellate Courts.