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UPDATE ON THE LAW

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MORE INFORMATION

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State Farm Policy Language Upheld

In a case successfully litigated by this firm, the West Virginia Supreme Court found State Farm's auto policy language to be clear and unambiguous and not in contravention of the financial responsibility statute. In *Blake, et al. v. State Farm Mut. Auto. Ins. Co.,* (No. 34725, W.Va., filed Nov. 2, 2009), the Court upheld language in the policy which mirrors carve-outs in the financial responsibility statute concerning property in the care, custody, and control of the insured. State Farm's insured, Blake, borrowed his neighbor's trailer. The trailer was not insured. Moreover, the insured did not carry collision coverage on his truck. The insured then caused a single vehicle accident in which he damaged his truck and destroyed the attached trailer. The trailer owner subsequently sued Blake for damage to the trailer. Blake sought coverage and a defense from State Farm which was denied due to policy language excluding damage for property in the care, custody, and control of the insured.

State Farm contended, and the Supreme Court agreed, that when attached to the insured's truck, the trailer became an extension of the truck thus carrying the same - but no more than - the coverage applicable to the truck.

The Court also rejected any argument that the policy language was ambiguous and specifically rejected an attempt to use extrinsic evidence to demonstrate an ambiguity. Plaintiff attempted to utilize a ruling in Montana wherein State Farm appeared to take a position inconsistent with the position taken in this case. The West Virginia Court refused plaintiff's attempt, holding: "It is only when the document has been found to be ambiguous that the determination of intent through extrinsic evidence becomes a question of fact."

Lastly, the Court again made a finding in footnote 6 as to when the doctrine of reasonable expectations is triggered, reverting to its original stance that it applies only after an ambiguity is found in the contract. Because this policy language was held to be clear and unambiguous, the doctrine did not apply to permit plaintiff another opportunity to create coverage under the policy.

Court Expands Methods of Service

The West Virginia Supreme Court of Appeals has set forth a new point of law as to how corporations may be served with notices of 30(b)(7) depositions in *State ex rel. Progressive Classic v. Bedell*, (No. 34858, W.Va., filed Oct. 13, 2009).

The Court now permits service of a subpoena for a deposition under Rule 30(b)(7) to be served upon a domestic or foreign corporation through the corporation's agent or attorney-in-fact authorized by appointment or statute which would include the Secretary of State. Previously, the only manner provided for under Rule 4(d)(1)(A) of the West Virginia Rules of Civil Procedure was personal service. When Progressive Classic challenged that service through the Secretary of State was not effective service, the Circuit Court of Harrison County entered a series of Orders holding Progressive in contempt and awarding attorney's fees, costs, and civil penalties accruing daily until Progressive complied with the subpoena.

On appeal, Justice Menus Ketchum held that Progressive's position was technically correct, yet expanded the avenues of service. In what appears to be *dicta*, the Court also held that service of the subpoena could also have been obtained through service at one of Progressive's claims offices in West Virginia. However, there is no mention in the Court's opinion as to whether any officers, directors or individuals authorized to accept service of process work in any West Virginia claims office.

In reaching its decision, the Court considered the history of Rules 45 and 4 and the federal counterparts to these Rules although the Federal Rules are somewhat different in their language. Ultimately, the Court concluded that personal service as stated in Rule 4(d)(1)(A) "cannot constitute the exclusive manner of service upon a corporation."

Thereafter, the Court upheld the sanctions imposed against Progressive which accrued while Progressive was challenging the propriety of service.

Race Discrimination Case Against Mall Overturned

The West Virginia Supreme Court of Appeals has reversed two orders of the West Virginia Human Rights Commission finding the Charleston Town Center mall engaged in race discrimination.

In *Charleston Town Center Co, LP v. The WV Human Rights Comm'n,* (Nos. 34739 and 34740, W.Va., filed Nov. 17, 2009), the Court found that actions of security guards were proper against several African-American youth who violated the mall's code of conduct for being loud and being in the food court without purchasing food and that they were asked to leave for being loud and because the mall was closing. These actions, the Court found were not pretextual and that the plaintiffs failed to demonstrate that race was the motive for the actions in question. The Court found the administrative law judge's findings of racial discrimination to be speculative and found the ALJ's weighing of the evidence to be arbitrary noting that, without exception, the ALJ excused or found irrelevant all evidence of misconduct by the plaintiffs. The Court also questioned the ALJ's impartiality finding the opinions "tainted" by hostility and sarcasm toward the mall and its agents.

West Virginia Ranked #2 Judicial Hellhole

West Virginia has been ranked the country's second leading "Judicial Hellhole" by the American Tort Reform Association, eclipsed in 2009 by South Florida. In the annual report, ATRA identified West Virginia " as a place in which civil defendants often cannot receive justice. This perception is due to the state's unique lack of appellate review; the home court advantage provided by locally elected judges to in-state plaintiffs against out-of-state corporations; unfair trial practices; and the novel, liability-expanding decisions of its high court." The report also cited the close relationships between the plaintiffs' bar and Attorney General Darrell McGraw. West Virginia remains the only statewide "hellhole" although 2009 was characterized as "relatively quiet."

While remaining one of the worst places in the country to receive a fair trial, ATRA also identified West Virginia as a "point of light" for its Independent Commission on the Judiciary which recently recommended the creation of an intermediate appellate court and permitting an appeal as a matter of right.

"Until West Virginia shows tangible change, however, it remains a troubling Judicial Hellhole," the report stated. The state has been a "regular" on the list for the eight years it has been published, due in large part to the elected judiciary and the relationship between bench and plaintiff's bar. One notable former trial lawyer, Dickie Scruggs, identified such jurisdictions as "magic jurisdictions." Scruggs was recently disbarred and is currently in prison for involvement in a conspiracy to attempt to bribe a judge.

The 2009 Judicial Hellholes are:

South Florida
West Virginia
Cook County, Illinois
Atlantic County, New Jersey
New Mexico appellate courts
New York City

Those jurisdictions identified on the "watchlist" are: California; Alabama; Madison County, Illinois; Jefferson County, Mississippi; Gulf Coast and Rio Grande Valley, Texas. "Dishonorable Mentions" are: Arkansas Supreme Court; Minnesota Supreme Court; North Dakota Supreme Court; Pennsylvania Governor Ed Rendell.

Points of Light identified in the report are: West Virginia; Maryland Court of Appeals; New Jersey Supreme Court; Vermont and California Courts; U.S. Supreme Court. Governor Joe Manchin's office praised the report for focusing on the administration's efforts at judicial reform. The West Virginia Association for Justice, formerly ATLA, criticized the report as "inaccurate."

The stated purpose of the report is to identify areas of the country where the scales of justice are radically out of balance and to provide solutions for restoring balance, accuracy and predictability to the American civil justice system. Solutions identified by ATRA for restoring balance to the civil justice system are to stop "litigation tourism," enforcing consequences of filing frivolous lawsuits and stemming abuse of consumer laws.

The focus of this report is squarely on the conduct of judges who do not apply the law evenhandedly to all litigants and do not conduct trials in a fair and balanced manner, the report stated, advocating for public awareness of perceived abuses.

Judicial Happenings

- Berger Confirmed as Federal Judge in Southern District

A unanimous U.S. Senate confirmed Judge Irene C. Berger on October 27, 2009, as a federal judge to sit in the U.S. District Court for the Southern District of West Virginia. Berger will become the first black federal judge in West Virginia's history. She has served on the Circuit Court of Kanawha County since 1994.

President Obama nominated the McDowell County native in July. After a September hearing, the Senate Judiciary Committee unanimously approved her nomination on October 1. Berger was sworn in December 10 by Chief Judge Joseph R. Goodwin.

Sen. Robert C. Byrd called Berger "not only an outstanding jurist, she is also an exemplary person. Embodying true Mountaineer spirit and pride, Judge Berger's contributions to legal service and education have been substantial. Sitting on the bench, she will continue her fine service to her community and to the great state of West Virginia," he said.

- Webster Appointed in Kanawha County

On December 2, Governor Joe Manchin appointed Carrie Webster as judge of the Circuit Court of Kanawha County to replace Irene Berger. Webster will take the bench December 28.

Webster served as Chair of the House Judiciary Committee. She will be required to run for election to retain the appointed judicial seat in the 2010 general election.

Webster is a 1997 graduate of West Virginia University College of Law and was the recipient of the Public Interest Advocate Legal Fellowship in 1998. In addition to her legislative service, Webster maintained a solo practice in Charleston.

House Speaker Rick Thompson has appointed Tim Miley (D-Harrison) to replace Webster as chair of the House Judiciary Committee.

- Davis Appointed to Fourth Circuit

On November 9, 2009, the U.S. Senate confirmed Andre M. Davis as an associate justice of the U.S. Court of Appeals for the Fourth Circuit. Mr. Davis hails from Baltimore, Maryland, and has served as a district judge in the District of Maryland since 1995. This was the second time Judge Davis was nominated for a seat on the Fourth Circuit bench.

Davis, 60, is a graduate of the University of Pennsylvania and the University of Maryland School of Law. Before attending law school, Judge Davis worked as an Assistant Housing Manager and Equal Employment Opportunity Specialist from 1972 to 1974 with the Housing Authority of Baltimore City. His legal career includes federal clerkships in the District Court of Maryland and the Fourth Circuit, the U. S. Department of Justice, Civil Rights Division, and the U.S. Attorney's Office.

Davis' appointment on a 72-16 vote gives Democratic nominees a 6-5 lead on the Court which is historically known as the most conservative federal appellate court in the country. Four vacancies remain on the Fourth Circuit bench which hears appeals from West Virginia, Maryland, North Carolina, South Carolina, and Virginia.

Nationally, 20 appellate vacancies and 75 district courts seats remain vacant. The district court seat for the Northern District of West Virginia, Martinsburg Division, also remains vacant, although a candidate has again been nominated.

- Casey Nominated for Federal Judgeship

Charleston attorney Nicholas Casey was nominated on October 21, 2009, by U.S. Senators Jay Rockefeller and Robert Byrd to be judge of the U.S. District Court for the Northern District of West Virginia. Mr. Casey is nominated to fill the seat in the Martinsburg Division that has been open since the 2006 death of Judge Craig Broadwater.

Mr. Casey is presently chair of the WV Democratic Committee and is a partner in the Charleston law firm of Lewis Glasser Casey & Rollins. He is also a CPA. Casey has served as personal counsel to Governor Manchin and is also a lobbyist for Mylan Pharmaceuticals.

It will now be up to President Obama to formally nominate Casey for the judgeship, at which point confirmation hearings before the U.S. Senate will convene.

Federal Court Expands Time for Service

In interpreting Rule 4 of the Federal Rules of Civil Procedure, the U.S. District Court for the Northern District of West Virginia has ruled a trial court may expand the time for service of process even without requiring the plaintiff to demonstrate good cause why process was not timely served.

In *Cox v Babcock & Wilcox Construction Co., Inc., et al.,* (Civil Action No. 5:09-cv-84, N.D.W.Va., decided Nov. 9, 2009), the Court denied motions to dismiss filed pursuant to Rule 12(b)(5).

Factors which the Court considered in determining whether to grant an extension to a plaintiff who has not shown good cause include: whether the statute of limitations would bar re-filing; whether an extension would prejudice the defendant; whether the defendant had actual notice of the suit; whether the plaintiff would eventually effect service.

Ex-wife Not a Policyholder, Claim Barred

Nationwide has obtained summary judgment in the U.S. District Court for the Southern District of West Virginia where a divorced spouse awarded the insured vehicle in the property settlement was listed only as an additional driver not as the policyholder and thus had no standing to file a bad faith claim when she disagreed with the total loss evaluation of the vehicle.

In *McGrew v Nationwide Mut. Ins. Co.,* (Civil Action No. 2:08-cv-1209, S.D.W.Va., decided Oct. 20, 2009), the Court found the former wife of the policyholder did not occupy the same status as the policyholder which was defined in the policy as the first person named in the declarations and specifically excluded spouses as "policyholders." The policy also stated that no interest in the coverages could be transferred without Nationwide's written consent. Therefore, although the family court awarded possession of the vehicle to the former wife and title was held in the name of the former wife, the court concluded the former wife was not the policyholder.

Federal Court Permits Direct Action Against Reinsurer

The U.S. District Court for the Southern District of West Virginia has held a reinsurer is a proper party to a breach of contract/bad faith claim filed by the insured because the reinsurance agreement is ambiguous as to the reinsurer's role and therefore it was reasonable for the insured to expect the reinsurer to act as a direct insurer.

In *Felman Production, Inc. v Industrial Risk Insurers,* (Civil Action No. 3:09-cv-481, S.D.W.Va., decided Oct.19, 2009), the insured, which operates a metals plant in West Virginia, sued Westport and Swiss Reinsurance for inconclusive coverage positions following damage at the West Virginia plant. Both defendants are members of Industrial Risk Insurers' unincorporated association.

Swiss Re moved to be dismissed arguing no direct claims lie against the reinsurer. Judge Charles Chambers, however, denied the Motion finding the parties disagree as to whether Swiss Re was a reinsurer due to signatures on the policy of the "member companies."

Fourth Circuit Certifies Insurance Question

The U.S. Court of Appeals for the Fourth Circuit has certified questions of insurance law to the West Virginia Supreme Court of Appeals concerning how the merger of two corporate entities may impact a non-assignment clause in a business auto insurance policy issued before the merger to the non-surviving corporation.

In *State Auto Prop. and Cas. Ins. Co. v Eastern Data Systems, Inc., et al.,* (Nos. 08-481, 08-2096 and 08-2157), the federal appeals court concluded there was no controlling West Virginia law on the point. The West Virginia Supreme Court has not yet ruled.

Federal Court Dismisses Spoliation Claims

The U.S. District Court for the Northern District of West Virginia has refused to certify questions to the West Virginia Supreme Court of Appeals and has granted summary judgment to an insurer facing a spoliation of evidence claim arising from its destruction of a semi-trailer after it settled a property damage claim.

In *Williams v Great West Cas. Co.,* (Civil Action No. 5:08-cv-137, N.D.W.Va., decided Dec. 14, 2009), the Court refused four questions posed by the plaintiff. Plaintiff alleged spoliation following a fatal crash and explosion of a semi-trailer carrying gasoline which occurred in Tyler County in 2006. Great West insured the tractor for property damage only. The owner of the tractor advised Great West he did not wish to retain ownership of the tractor and thereafter it was destroyed nine days after the loss. In a subsequent wrongful death action filed by the driver's estate, the estate alleged spoliation and attempted via certified questions to expand West Virginia law on negligent spoliation by a third party which the federal court refused.

To present a negligent spoliation claim against a third party, the third party must have actual knowledge of pending or potential litigation. *Mace v Ford Motor Co.,* 221 W.Va. 198, 653 S.E.2d 660 (2007). The Court further refused to certify a question as to whether state law requires an insurer to maintain a vehicle during the course of its investigation finding no requirement of such in state law. "If a duty to preserve evidence existed, it would arise under the state rule addressing the duty to investigate," found Judge Frederick P. Stamp, Jr.

The Court further found the estate was a third party claimant and the insurer had no duty to notify the estate concerning the destruction of the trailer owned by another individual.

Senior Status Judge McCarthy Passes Away

Senior Status Judge Daniel L. McCarthy died Wednesday, November 25, in Bridgeport. Judge McCarthy served as judge in the Circuit Court of Harrison County from 1983 to 1996 at which time he became a senior status judge upon his retirement. Since retirement, Judge McCarthy maintained a significant civil mediation practice throughout the state.

Judge McCarthy was a veteran of the U.S. Navy and was a 1958 graduate of the West Virginia University College of Law. Prior to taking the bench, he served as an assistant prosecuting attorney in Harrison County and also served 12 years on the Harrison County Commission.

Defense Verdict Reversed Based Upon Cartoon

The West Virginia Supreme Court of Appeals has reversed a defense verdict in a medical malpractice suit finding improper argument by defense counsel. In *Jones v. Setser,* (No. 34619, W.Va., filed Nov. 13, 2009), the Court found prejudice because defense counsel used a "Wizard of Id" comic strip in his closing argument.

Defense counsel showed a cartoon to the jury in which a woman is seated at the table of a fortune teller who states: "I've made contact with your recently departed Uncle Ned." In the next frame, the woman asked the fortune teller: "You have? What did he say?" In the last frame, the fortune teller answers: "He wants you to sue the doctor." After plaintiff's objection was sustained, defense counsel continued with his argument that the defendant doctor would have been blamed regardless of what procedure he employed on plaintiff's decedent.

Defense counsel next showed the jury a slide entitled "Dr. Setser Can't Win," arguing the plaintiff's counsel and expert would "take a bad result and turn it into malpractice every time." Thereafter, plaintiff moved for a mistrial which the Circuit Court of Cabell County refused.

In its *per curiam* opinion, the Supreme Court found these arguments to be personal attacks on the credibility of plaintiff's counsel and expert and that such "character derogation" exceeded the scope of permissible argument.

Medical Board Cautions Use of Protection Letters By Plaintiffs' Bar

On November 9, 2009, the West Virginia Board of Medicine released a public policy statement cautioning physicians about letters of protection. Finding that letters of protection (LOP) are not ethically prohibited, may nonetheless pose ethical issues for physicians when used with health insurance carriers.

The board described LOPs as "legal instruments creating a contractual agreement between a physician and a patient's attorney … often used to guarantee payment to the physician…when the [patient/client] does not have insurance or resources to pay the physician's fee after an injury allegedly caused by a third party. The guarantee of payment is usually conditioned upon a successful outcome… in a tort action."

The Board found that LOPs generally guarantee payment in full regardless of negotiated or reduced reimbursement rates with health insurers. Thus, LOPs may provide the physician higher reimbursement.

The Board cautioned physicians not to require LOPs before treating an established patient with health insurance as such may place the financial interest of the physician ahead of the patient's welfare in contravention of Principles of Ethics of the American Medical Association. Refusing to treat or dismissing an existing patient who has health insurance and with whose insurer the physician is a contracted provider may also be considered a violation of the West Virginia Medical Practice Act subjecting the physician to discipline the Board held. The Board therefore urged practitioners "to reflect and use caution when utilizing a LOP."

If nonetheless utilized, the Board suggested an inclusion in LOPs that the practitioner will first attempt to bill the insurer "in the customary manner" and only upon rejection will the LOP go into effect.

Court Expands Discovery Rule

The West Virginia Supreme Court of Appeals has expanded application of the discovery rule which tolls the running of the statute of limitations and created new standards for its analysis making the inquiry a fact question for a jury.

The Court expanded the application in *Dunn v Rockwell, et al.,* (No. 34716, W.Va., filed Nov. 24, 2009), instituting a five-step review. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action. Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. Fifth, the court or jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by a jury, the Court held.

In so doing, the Court overruled its 1992 decision of *Cart v Marcum,* 188 W.Va. 241, 423 S.E.2d 644 (1992), which permitted application of the discovery rule only upon a demonstration of fraudulent concealment, inability to comprehend the injury, or other extreme hardship.

The Court also held that statutes of limitations are not applicable in equity for which the common law doctrine of *laches* applies and further held that the statute of limitations for a civil conspiracy claim is determined by the nature of the underlying conduct on which the claim of conspiracy is based since civil conspiracy is not a "stand-alone cause of action."

The issues were presented in a land dispute case in which the plaintiffs sued attorney Doug Rockwell; his wife, Carol, who owns the land in question; and Martin & Seibert, L.C., Mr. Rockwell's former employer. Carol Rockwell and Martin & Seibert, L.C. were granted summary judgment by the Circuit Court of Jefferson County on their respective statute of limitations arguments. Summary judgment to Martin & Seibert, L.C. was affirmed, but was reversed as to Carol Rockwell because of unresolved factual questions as to when the plaintiffs learned of their alleged injuries.

As to Martin & Seibert, L.C., the Court found that any cause of action based upon the doctrine of *respondeat superior* arose in 2003 and expired in 2005 before suit was filed. The Court specifically found no fraud or acts of concealment by Martin & Seibert, L.C. that might toll the statute of limitations.

All Parties Must Be Identified to Preserve Appeal

A petition for appeal must identify all parties who appeal and a petition identifying one party and including others through the use of the term "et al" is insufficient to preserve other parties' claims. The West Virginia Supreme Court of Appeals reached this conclusion in *Mountain America, LLC, et al. v Huffman,* (No. 34426, W.Va., filed Nov. 25, 2009).

This case began as a property tax dispute with the county assessor in Monroe County when several parties attempted to appeal the assessment to the Circuit Court. The petition for appeal, however, did not name each petitioner in the appeal; it stated "Mountain America, LLC, et al." Therefore, the County Commission alleged the petition was deficient as to others who were attempting to appeal their assessment. The Circuit Court and the Supreme Court agreed.

Judge Robert Irons in the Circuit Court of Monroe County wrote: "it is impossible to pick up the court file and determine the name of the Appellants or the tax parcels in question. A review of the record of the hearing before the Board of Equalization reveals the names of at least some of the persons contesting their assessments, but this is insufficient for purposes of West Virginia Rules of Civil Procedure Rule 10. The burden here is clearly on the person seeking to appeal, to identify the names of the persons seeking to appeal with some particularity in the initial filings in circuit court." Thus, the circuit court ruled that the matter would proceed with Mountain America as the sole Appellant and that the style of the case should be amended to delete the term "et al." That ruling was affirmed by the Supreme Court in an opinion authored by Chief Justice Brent Benjamin.

Rule 10 of the West Virginia Rules of Civil Procedure requires that "in the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties."

Defense Verdict In Dog Bite Case

Matthew R. Whitler of Martin & Seibert, L.C., successfully defended a homeowner accused of allowing his dog to attack his neighbors' young daughter at a jury trial in October in the Circuit Court of Morgan County.

The plaintiffs claimed they witnessed the defendant's dog attack and then chase the seven year-old girl in their yard. Several inconsistencies as to the type of dog and the nature of alleged eyewitnesses was brought forth on cross-examination. Direct testimony of the homeowner and a family member who also lived at the residence directly conflicted with the plaintiffs' accounts. Furthermore, defense witnesses testified they were not home at the time of the alleged incident. It was uncontroverted their dog was locked in a kennel with a six-foot fence when they left their residence. The Morgan County animal control officer who investigated the attack stated she found the dog asleep and secured in the kennel 30 to 45 minutes after the attack.

The jury deliberated for 20 minutes before returning a defense verdict.

Court Reverses $5 Million Antitrust Verdict Against Erie

The West Virginia Supreme Court has overturned a $5 million verdict rendered against Erie for alleged restraint of trade. In *Princeton Insurance Agency and Webb v. Erie Ins. Co., et al.*, (No. 34498, W.Va., filed Nov. 18, 2009), Erie had an agency agreement with Princeton Insurance Agency. Shortly after beginning the agency relationship, there was a steep decline in profitability and quantity of Erie products sold. Erie suspected business was being steered to another insurer and sought production reports from the agency to determine if there was any act of steering. Ultimately, Erie terminated its relationship with Princeton and the agency sued for, *inter alia*, restraint of trade, antitrust violations, and improper disclosure of private consumer information.

At trial, the jury ruled in Erie's favor on the claim of improper disclosure of private consumer information, but found that Erie's termination of the agency agreement was an unreasonable restraint of trade. The jury awarded $1.4 million in compensatory damages and another $1.4 million in punitive damages. The Circuit Court of Mercer County, however, vacated the punitive award increasing it to $4.2 million.

The Supreme Court, however, found no concerted action between Erie and the responsible agent at Princeton Insurance Agency concluding the absence of such was fatal to the antitrust claim. The Court also found no proof of antitrust injury. The Court specifically found that the agency's lost income could have been sustained due to the proper termination of the agency agreement which would not constitute antitrust damages. Therefore, the verdict was reversed.

This firm filed an *amicus* brief on behalf of the West Virginia Insurance Federation in support of Erie.

Constructive Service over Non-resident Defendants Void

The West Virginia Supreme Court has overruled a default judgment entered against non-resident defendants, finding the Circuit Court of Wirt County lacked *in personam* jurisdiction over the defendants because of improper service.

In *Leslie Equipment Co. v. Wood Resources Co., LLC,* (No. 34712, W.Va., filed Oct. 29, 2009), the Court found that constructive service via certified mail was ineffective. Writing for a split court, Justice Thomas McHugh held that to enable a court to hear and determine an action, it must have jurisdiction of the subject matter and of the parties. The absence of either is fatal to jurisdiction.

The Court analyzed the various methods of service permitted by Rule 4 of the West Virginia Rules of Civil Procedure against W.Va. Code §56-3-33, the long-arm statute. The long-arm statute permits service through the Secretary of State, which service confers personal jurisdiction over the non-resident so long as the suit alleges one of the specifically delineated acts in the statute. By failing to avail itself of the statutory method of substituted service through the Secretary of State pursuant to the long-arm statute, the plaintiff's constructive service by certified mail did not confer *in personam* jurisdiction over the defendants and the default judgment was overruled as void and unenforceable.

"Going and Coming" Rule Upheld

The West Virginia Supreme Court has again confirmed the "going and coming" rule holding that injuries which occur en route to or from the place of employment are not compensable under workers' compensation unless the travel is in the course of and a result of employment duties.

In *Williby v. WV Office of the Ins. Commissioner,* (No. 34455, W.Va., filed Nov. 2, 2009), a loan clerk at First Century Bank left the bank on her lunch hour. She fell crossing the street returning to the bank after picking up her lunch. The appellant filed a workers' compensation claim which was denied by the Workers' Compensation Board of Review. That denial was affirmed by the Supreme Court.

Claimant alleged she was "on the clock" at the time of her injury and that her action of walking across the street was an "accommodation" to her employer because she was rushing to get her lunch because of inadequate staffing at the bank on the day of her injury. These claims were rejected by the Supreme Court in its *per curiam* opinion.

Court Sanctions Plaintiffs' Counsel for Filing Frivolous Lawsuit

Sanctions against plaintiff's counsel have been affirmed by the West Virginia Supreme Court. In *Warner v. Wingfield and Klie*, (No. 34495, W.Va., filed Nov. 3, 2009), the Court upheld sanctions of $12,236.33 representing the defendants' attorneys fees in defending what the Circuit Court of Randolph County found to be a frivolous lawsuit.

A neighborhood boundary line dispute resulted in attorney Erika Klie filing a five-count complaint alleging invasion of privacy, trespass, assault, outrage, and interference with right-of-way. However, when defending herself against sanctions, counsel told the trial court "all we wanted was for the Defendants to purchase a couple gallons of paint and paint the fence." The trial court found the relief sought did not justify the "serious allegations made in the complaint," further finding the allegations of the complaint to be unfounded.

The trial court held that counsel did not meet with the plaintiffs to discuss the merits of their claim prior to filing suit or had met with them only briefly. On appeal, the Supreme Court held the "entire premise of the civil action appears to be based upon miscommunications or incorrect assumptions, resulting in the filing of an essentially baseless lawsuit by Ms. Klie on behalf of the Warners. The absence of communication is also apparent in the fact that Ms. Klie failed to advise the Warners that the Wingfields had submitted a counter-offer during this litigation."

Ultimately, the Court concluded a neighborhood dispute was "parlayed into a civil action" without a sufficient factual basis, the impact of which was an abuse of the legal system.

Attorney Ordered Jailed for "Grandstanding"

A Philadelphia Court of Common Pleas judge sentenced a plaintiff's lawyer in an asbestos trial to a week in jail on October 19, 2009, for "grandstanding." John Langdoc of Baron and Budd was fined $1,000 and ordered incarcerated after he created an exhibit during trial to display the hourly rate of defense experts.

The incident occurred while Langdoc was questioning his own expert and elicited testimony that the expert's fee of $600 per hour was in line with other experts' fees to which defense counsel objected. One defendant objected since it was involved in a separate phase of the trial and its expert was not a retained expert. Ultimately, the plaintiff's expert testified *in camera* to the judge that he had never seen the exhibit counsel created while the witness was on the stand and could not vouch for the various rates attorney Langdoc listed on the chart.

The judge questioned Langdoc asking: "You just threw this up here as a shot, right?" Langdoc answered yes. The judge then reconvened the trial advising jurors that Langdoc's behavior was "entirely improper procedure, completely wrong and it is prejudice in this trial." Direct examination concluded and the judge dismissed the jury.

"Sheriff, will you take this prisoner away," Lynn said after holding Langdoc in contempt. Neither the judge nor the sheriff could confirm Langdoc slept seven nights behind bars.

Days later, the Court declared a mistrial based upon improper closing argument by the same attorney.

Court Avoids Question Concerning Rental Policies

The West Virginia Supreme Court of Appeals has declined to rule substantively on whether the omnibus clause, W.Va. Code §33-6-31(a), is applicable to automobile rental insurance policies finding the issue was not properly raised at the trial court level and thus waived on appeal.

The issue was presented in *Lin v Yi*, (No. 34596, W.Va., filed Nov. 25, 2009), when Lin, a student at Salem International University, leased a vehicle from Enterprise and purchased a $1 million supplemental liability policy issued by Empire Fire and Marine Insurance Company. The policy only covered the authorized driver. However, Lin permitted a friend to drive who was driving when the accident occurred. As a result of the single vehicle accident, the insured sustained a head injury. His declaratory judgment action for coverage was granted by the Circuit Court of Kanawha County on the basis that the omnibus clause covers permissive users. The Circuit Court also found that without specifically naming excluded drivers, the exclusion was invalid and further found that the exclusion must be attached to the policy.

However, W. Va. Code § 33-12-32 (h)(4)(B) permits rental companies to use master, corporate or group agreements for liability insurance that provides coverage to renters and other authorized drivers.

The Supreme Court held that the applicability of W. Va. Code § 33-6-31(a) to automobile rental insurance is questionable in light of the Legislature's enactment of W. Va. Code § 33-12-32, but concluded the issue was waived by Enterprise and Empire as it was not properly raised in the trial court. The Court pointed out in its *per curiam* opinion, however, "we do *not* hold that W. Va. Code § 33-6-31(a) is applicable to automobile rental insurance policies. Rather, we simply affirm the circuit court's decision in the absence of error properly preserved for this Court's review." (emphasis in original).

Agent Dismissed Due to Insurer's Settlement with Insured

An agent, sued by his principal for misrepresentation in presenting an incomplete and inaccurate application for insurance has prevailed on dismissal of those claims before the West Virginia Supreme Court.

In *Jennings v. Farmers Mut. Ins. Co. v. Fike,* (No. 34743, W.Va., filed Nov. 24, 2009), Farmers sued its agent after it was sued by the insured following a fire loss. Only after the loss did Farmers learn that the application it had accepted was missing pages and contained inaccurate information. Farmers contended that had it known of the missing information, it would not have issued the policy. The insured sued Farmers and settled that claim for $500,000.00 in addition to the $245,000 paid for the fire loss itself. The insured then sued Farmers and agent Fike for breach of contract and Farmers filed a cross-claim for misrepresentation, contribution, and indemnification. Upon settling with Farmers, the insured assigned to Farmers her claims against Fike. The agent thereafter moved for summary judgment which the Circuit Court of Monongalia County granted and the Supreme Court affirmed.

Applying *Zando* principles, the Supreme Court held that the Farmers settlement relieved the agent of any liability for contribution holding that a right to contribution can only be invoked by a joint tortfeasor while in litigation. Settlement extinguishes that claim.

The Circuit Court also held that the record as established by Farmers did not support a claim for misrepresentation which the Supreme Court affirmed. Finally, the Court affirmed a prior holding that personal injury claims may not be assigned.

Bills Discharged in Bankruptcy Not Recoverable

A plaintiff was denied the right to recover her medical bills incurred in an automobile accident because those bills were discharged in bankruptcy and thus never paid nor actually incurred. *Tate v. Hernandez*, 280 S.W.2d 534 (Court of Appeals of Texas, decided March 5, 2009).

The Texas Court of Appeals first considered whether a wrongdoer should receive the benefit of a bankruptcy discharge which the Court characterized as "the bankruptcy equivalent of the collateral source rule." The Court distinguished between damages and debts and held a plaintiff can recover reasonable and necessary costs of medical expenses proximately caused by the tortious conduct of another, even if those expenses were subsequently discharged.

However, the Court then considered a statute on damages enacted as part of tort reform legislation which limited recovery to the actual amount of bills paid or incurred. Because the bills were discharged in bankruptcy, the Court concluded they were never actually paid or incurred and thus were neither necessary to compensate plaintiff for his injuries nor otherwise recoverable.

Lawyer Not Liable for Fees in Improperly Removed Case

While a party may be held liable, an attorney who erroneously removes a case to federal court may not be held liable for the payment of attorney's fees for the improper removal. The Fourth Circuit Court of Appeals reached this decision under 28 U.S.C. §1447(c) in *In re: Crescent City Estates, LLC v. MR Crescent City, LLC, et al.,* (No. 08-2367, decided Dec. 7, 2009).

The Court of Appeals considered the imposition of fees that are permitted under U.S. Code and whether Congress intended those fees to apply equally to parties and their counsel when a case is remanded after improper removal to federal court. The Court found a presumption that fee-shifting statutes apply only to parties unless explicitly stated otherwise. Absent explicit Congressional authorization, the Court held it had the responsibility to uphold the traditional "American Rule" and concluded fees for improper removal could only be assessed against parties.

The Fourth Circuit was the first federal appeals court to consider the issue.

Federal Court Deems Requests for Admissions Admitted Against Insurer

An insurance company had requests for admissions filed against it deemed admitted by Order for failing to follow proper procedure by the U.S. District Court for the Northern District of West Virginia. In *Tustin v. Motorists Mut. Ins. Co.*, (Civil Action No. 5:08-cv-111), Magistrate James Seibert deemed requests for admissions, which essentially made out every element of the plaintiff's burden of proof, admitted.

A value dispute arose in *Tustin*, an underinsured motorist/bad faith claim. Plaintiff has demanded policy limits of $100,000 and Motorists has offered $20,000. In discovery, plaintiff sought Motorists to admit, *inter alia*, that medical records were authentic; that treatment was reasonable and necessary and proximately caused by the motor vehicle accident in question; that the claim was handled in accordance with the company's general business practice; and that the claim adjustment conformed with the company's training, policies and established practices.

Motorists objected to each request on a variety of grounds. As to medical records, Motorists contended it was not in possession of the originals and, therefore, could not admit to authenticity. Magistrate Seibert found there was no authority in the Federal Rules of Civil Procedure to object on the grounds a party is not in possession of original documents and found the attempted qualification of the answer to be improper. The proper method, the Court held, was to admit in part and qualify or deny the rest. As a result, the Court deemed the matters admitted. The Court also criticized defense counsel for not inspecting the original records and questioning the health care providers as to their record keeping practices when the providers were deposed. As to reasonableness and necessity of the medical treatment, the Court found that because the defendant alleged it could not speak for a health care provider, such was again an improperly qualified answer.

As to the bad faith counts, plaintiff sought admissions as to general business practice and adjustment per company training, policies and practices. Motorists again qualified its response, indicating these requests sought legal conclusions. This, the Court found, was an "unreasonable" response and these too were deemed admitted.

Court Reverses $50 Million Verdict Against Massey - Again

For the third time, the West Virginia Supreme Court has reversed a $50 million verdict returned in Boone County against Massey Coal. *Caperton v. A.T. Massey Coal Co., Inc., et al.*, (No. 33350, W.Va., filed Nov. 12, 2009), began as a breach of contract/tortious interference claim between a small coal operator and conglomerate A.T. Massey. It then became the subject of national scrutiny when Chief Justice Brent Benjamin twice sat on the court which heard the appeal following massive campaign contributions from Massey and its president, Don Blankenship. That issue was appealed to the Supreme Court of the United States which in June held that Justice Benjamin should have recused himself, thereafter remanding the case for another hearing.

Argument was presented to the state Supreme Court September 8 with senior status Judge James Holliday sitting in place of Justice Benjamin. Writing for the majority, acting Chief Justice Robin Davis applied a mandatory forum selection clause in the contract between the two coal operators finding that the dispute should have been litigated in Virginia and therefore the trial court erred in denying Massey's Motion to Dismiss, again overturning the verdict.

The Court has remanded the case to the Circuit Court of Boone County with directions to enter an Order dismissing Massey and its subsidiaries with prejudice.

Justice Margaret Workman later issued a dissent. She continually referred to Massey's "fraudulent" conduct as the basis of her disagreement with the ruling.

Property Owner Not Liable for Independent Contractor's Injuries

The West Virginia Supreme Court has upheld summary judgment to a property owner where an underaged worker was injured in a roofing accident finding that the roofing company which employed the 16-year-old was an independent contractor and no exceptions to the doctrine applied to hold the property owner liable for injuries.

In *France v Southern Equipment Co., et al.*, (No. 34494, W.Va., filed Nov. 24,2009), the Court found no evidence that the property owner knew or sanctioned the illegal activity of hiring the underaged worker. To "sanction" an activity, the Court held, requires some "active approval or encouragement." The Court also reiterated that a property owner only has a duty to turn over a reasonably safe workplace to an independent contractor; the property owner generally cannot be held liable for any hazards thereafter created by the independent contractor. The Court also rejected an argument that roofing work was inherently dangerous, another exception to the independent contactor doctrine.

The majority opinion was authored by Justice Menus Ketchum. Justices Davis and Workman dissented arguing that the property owner should be held responsible due to the presence of an illegal worker since the use of underaged workers is contrary to the Child Labor Act when the property owner knew or reasonably should have known of such.

Justice's Email Exempt from FOIA Request

In refusing a Freedom of Information request of The Associated Press for emails between a Supreme Court justice and a litigant, the West Virginia Supreme Court has held whether communication by a public official or employee is a public record must be analyzed by the content of the email not because of public interest in the record.

In *The Associated Press v. Canterbury,* (No. 34768, W.Va., filed Nov. 12, 2009), AP filed a FOIA request with Steve Canterbury, administrative director of the West Virginia Supreme Court, seeking emails between former Supreme Court Justice Eliot "Spike" Maynard and Massey Energy CEO Don Blankenship. Canterbury denied the request alleging the 13 emails encompassed within the request were not subject to disclosure. AP filed a complaint in the Circuit Court of Kanawha County seeking declaratory and injunctive relief. The Circuit Court then ordered 5 of the emails produced because they dealt with Maynard's re-election campaign, and both parties appealed.

Writing for the majority, Justice Robin Davis found that an e-mail or other writing is a public record *only if* it relates to the conduct of the public's business, responsibilities or obligations of a public body. Finding that personal email communication by a public official or employee does not constitute a public record, the Court held such are exempt from disclosure under FOIA. The Court adopted the reasoning of a Florida court that "personal" emails are not made or received pursuant to law or ordinance or in connection with the transaction of official business.

The Court also rejected AP's alternative argument that the emails were public records because of the public interest context in which they were sought. This was based upon the time frame of the requested emails which covered Maynard's re-election campaign and his connections with Blankenship while Massey had cases on appeal to the Court.

In a dissenting opinion, Justice Margaret Workman argued all 13 emails should be deemed public records because they contain information relating to public business "based on the context in which they were written," because it showed a personal relationship between a justice and a litigant.

Seat Belt Use Continues to Increase

Seat belt use continues to increase and as of September, 2009 was at an all-time high of 84% per an annual survey by the National Highway Traffic Safety Administration.

The survey also found that weekend traveling increased the use of seatbelts to 86% and that use of seatbelts remains higher in states with primary seat belts laws.

Parties May Not Unilaterally Withdraw From Binding Arbitration

A party to a binding, irrevocable arbitration cannot unilaterally withdraw from participation in the arbitration after it has begun. If a party to a binding, irrevocable arbitration unilaterally withdraws from the arbitration, the claims or issues raised by the withdrawing party are abandoned, thereby precluding them from being pursued in any subsequent arbitration or civil action, the West Virginia Supreme Court held in *Crihfield v Brown and The Home Show, LLC,* (No. 34593, W.Va., filed Nov. 2, 2009).

The issue arose when Brown unilaterally terminated arbitration concerning a stock purchase agreement and a restrictive covenant involving solicitation of Home Show employees. On the eve of the final arbitration hearing, Brown "withdrew" from arbitration in order to pursue a petition for appeal which was denied. Thereafter, Brown attempted to reinstate arbitration which plaintiff sought to enjoin. Although arbitration was ordered to recommence, it did not and plaintiff thereafter moved for summary judgment which the Circuit Court of Kanawha County denied. That ruling, however, was reversed on appeal.

In an opinion written by Justice Margaret Workman, the Court found that generally, where an arbitration agreement is irrevocable, a party may not unilaterally withdraw an issue from arbitration. Doing so abandons and waives the right to arbitrate. This also precludes the issue from being pursued in any subsequent civil action, the Court held. "To hold otherwise and to give Mr. Brown yet another bite at the apple would be to place the whole system of arbitration in peril," the Court held.

Municipality Immune from Liability For Ice in Parking Lot

In a *per curiam* opinion released November 16, 2009, the West Virginia Supreme Court reaffirmed its prior ruling that political subdivisions are immune from claims resulting from snow or ice on public ways caused by weather. However, those political subdivisions are not immune from losses or claims arising from an affirmative negligent act resulting in snow or ice on public ways.

That position was reaffirmed in *State ex rel. Corp. of Charles Town v. Sanders*, (No. 35034, W.Va., filed Nov. 16, 2009), after the Circuit Court of Jefferson County refused Charles Town's Motion for Judgment on the Pleadings and Motion to Dismiss it from a negligence claim filed by a pedestrian who fell on ice in a public parking lot.

The Supreme Court reversed the ruling finding the municipality had governmental immunity from the claim.

Sotamayor Opinion Prohibits Appeal of Order Compelling Production of Attorney-Client Privileged Material

On December 8, 2009, Justice Sonia Sotamayor issued her first written opinion on the Supreme Court of the United States and ruled there is no immediate right to appeal a ruling compelling production of attorney-client privileged materials.

In *Mohawk Industries, Inc. v. Carpenter*, (No 08-678), the Court held that such matters can be reviewed post-verdict or in a number of ways other than immediate interlocutory review.

"Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence," she wrote. Other avenues identified include:

- ask the district court to certify, and the court of appeals to accept, an interlocutory appeal involv ing “a controlling question of law” the prompt resolution of which “may materially advance the ultimate termination of the litigation”;

- in extraordinary circumstances, petition the court of appeals for a writ of mandamus;

- defy a disclosure order and incur court-imposed sanctions; and

- incur a contempt order against a non-complying party, who can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment.

In excluding interlocutory appeals by way of the collateral order doctrine, the Court held these alternate review mechanisms "not only provide assurances to clients and counsel about the security of their confidential communications; they also go a long way toward addressing Mohawk’s concern that, absent collateral order appeals of adverse attorney-client privilege rulings, some litigants may experience severe hardship."

The limited benefits of permitting an interlocutory appeal, Justice Sotamayor wrote, "cannot justify the likely institutional costs, including unduly delaying the resolution of district court litigation and needlessly burdening the courts of appeals."

Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Ginsburg, Breyer, and Alito joined. Justice Thomas concurred in part.

West Virginia state jurisprudence is much more favorable on this point of protecting the privilege and establishing a framework for *in camera* review of privileged materials while also permitting a petition for writ of prohibition if privileged material is ordered produced. That factor must now be considered when insurers are considering removal of actions to federal court.

State Insurance Policy Exclusion Upheld

The West Virginia Supreme Court of Appeals has upheld exclusionary language in the State's general liability policy finding it excludes insurance coverage for allegations of failure to inspect and failure to make safe public roads, bridges, and rights-of-way, despite the absence of such language in the policy's exclusionary endorsement.

In *Wrenn, et al. v. WV Dept. of Transportation, Division of Highways*, (No. 34717, W.Va., filed Nov. 2, 2009), the Court upheld Exclusion No. 7 of the State's policy. Endorsement No. 7 restricts liability for "wrongful acts" of the Division of Highways and does not provide coverage to any claim resulting from, *inter alia*, the design, maintenance, location, construction, use or control of highways or bridges.

A dispute as to whether coverage therefore existed when two motorists drowned when their vehicle dropped off a single-lane bridge in Wyoming County. Their respective estates sued DOH alleging failure to maintain the bridge in a safe manner and failing to warn motorists of the dangerous condition. The Circuit Court of Wyoming County granted the DOH Motion to Dismiss which the Supreme Court affirmed.

In an opinion written by Justice Margaret Workman, the Court acknowledged that failure to inspect and failure to make safe public roads and bridges are not specifically enumerated in the exclusion, but held those claims "necessarily 'result from' or are at least 'related to' the DOH ownership of and control over the accident site."

The Court also held the exclusion is in line with West Virginia public policy stating: "Despite the DOH's apparent failure to protect the public by more diligent maintenance, it is within the legislative prerogative to determine which activities must be insured. This Court must respect the Legislature's decision to afford considerable latitude to BRIM (Board of Risk and Insurance Management) in determining the scope of insurance coverage for the State's public roads, highways, and bridges, and, because the Endorsement in this case comports with the relevant statutory requirements, the State's public policy has not been violated. It is the Legislature's and BRIM's function to decide whether to provide coverage for situations such as the one alleged herein. This Court's function is to give full effect to the plain meaning of a clear and unambiguous policy exclusion." Justice Robin Davis dissented from the opinion because the endorsement did not specifically exclude the actions and inactions of the DOH.

In a second appeal concerning DOH and the State's policy, the Court reversed an $8 million verdict and remanded the case for further determination whether a properly executed policy was in effect on the date of loss, in *West v WV Dept. of Transportation, Division of Highways*, (No. 34749, W.Va., filed Nov. 18, 2009).

Cline Elected President of NAIC

On December 7, 2009, West Virginia Insurance Commissioner Jane Cline was elected President of the National Association of Insurance Commissioners.

Cline was appointed West Virginia's Insurance Commissioner in 2001. She has earned national recognition during her tenure in bringing about insurance reform in the state including her study on third party bad faith which the state Legislature used in abolishing the private cause of action in 2005. She also created a fraud unit within the department which actively investigates potentially fraudulent claims which has lead to a number of arrests and convictions.

Joining Cline in leadership positions at the NAIC are: President-Elect Iowa Commissioner Susan Voss; Vice President Florida Commissioner Kevin McCarty and Secretary-Treasurer Oklahoma Commissioner Kim Holland.

$4 Million Malpractice Verdict Reversed in Part *- Sanctions Overruled*

The West Virginia Supreme Court has reversed a $4 million medical malpractice verdict and also set aside an award of attorney's fees and costs awarded by the Circuit Court of Wetzel County to the plaintiff as a sanction for alleged litigation misconduct.

In *Karpacs-Brown v. Murthy,* (No. 34747, W.Va., filed Nov. 19, 2009), the Supreme Court considered several points of error raised following the verdict. The Court reduced the verdict to the $1 million cap for non-economic damages finding no evidence of economic damages was introduced at trial, no jury instructions were submitted on economic damages nor were damages separated on the verdict form. As a result, the Court concluded the physician was not put on notice the phrase "loss of services, protection, care and assistance" could be considered as economic damages. Therefore, the Court next concluded because there was no ascertainable pecuniary loss, prejudgment interest was also not properly awarded to the Plaintiff. The Court, however, upheld damages for physical pain and suffering of the decedent.

The 4-1 Court specifically distinguished, again, between special damages and general damages reiterating it is the defendant's burden of submitting a verdict form which delineates between the types of damages.

Lastly, the Court considered the trial court's award of attorney's fees and costs as a sanction for alleged litigation misconduct. The plaintiff argued vexatious settlement conduct by the physician's insurer throughout West Virginia and other states and alleged vexatious settlement conduct by the physician in another medical malpractice suit in Wetzel County. The Supreme Court rejected both arguments holding it is improper to impose sanctions on a party for "general misconduct which is unrelated to any identifiable harm suffered by the other party in the case." The Court relied upon the Due Process Clause of the West Virginia Constitution holding there must be a relationship between the sanctioned misconduct and the matters in controversy such that the transgression "threatens to interfere with the rightful decision of the case." Therefore, a trial court must fashion a sanction that matches the harm caused by the misconduct.

Justice Workman concurred in part and dissented in part from the decision.

$70 Million Bad Faith Verdict Returned in Texas

A $70 million verdict bad faith verdict against Discover Property & Casualty Company has been affirmed by the trial court. On December 1, 2009, a jury awarded a maintenance supervisor who fell with a chain saw while trimming trees at a Texas apartment complex in 2003 the verdict against his employer's workers' compensation insurer.

A jury in Bexar County, Texas found Discover and its adjusting company, JI Specialty Services, acted intentionally in delaying the claim which inflicted mental anguish on the plaintiff when it did not pay supplemental income benefits. The plaintiff alleged he suffered neck and shoulder injuries making manual labor impossible and sought job retraining to work as a realtor. The Texas workers' compensation commission ruled in Tate's favor finding he had a right to request the retraining be paid by the insurer.

The jury awarded $20 million for past and future mental anguish, $20 million in attorney's fees and $30 million in punitive damages. On December 14, 2009, the trial court in San Antonio affirmed the verdict plus interest. Discover is a subsidiary of St. Paul Travelers.

Jones Celebrates 25 Years with Martin & Seibert, L.C.

Walter M. Jones, III, managing shareholder of Martin & Seibert, L.C. recently celebrated his 25th year with the firm.

Jones, a graduate of Hampden-Sydney College and the West Virginia University College of Law, joined the firm in May, 1974, after serving in the Judges Advocate Corp of the United States Army including time assigned to The Pentagon.

Jones practices primarily in the area of civil litigation defense with an emphasis on insurance class action defense. He has earned an AV rating by Martindale-Hubbell. He has litigated a number of noteworthy matters of first impression in state and federal courts and has been recognized as an expert witness in the field of insurance in extra-contractual claims. In addition, he has and continues to serve as lead counsel in a number of multi-million exposure insurance actions and regularly consults on e-discovery, risk management and document control matters in regional and national class actions. He also frequently lectures in the field of insurance and most recently served as a faculty member for the Mountaineer Series at the West Virginia University College of Law.

Presently Jones manages the firm's collections department and is counsel of record to a number of national property/casualty insurers as well as defending various business interests in environmental, mass tort claims.

Circuit Court of Ohio County Enters Default Against AIG

Default judgment on liability was entered against an AIG subsidiary in November by the Circuit Court of Ohio County which resulted in a $1.4 million compensatory damages verdict.

In *Robinson v Lemasters*, (Civil Action No. 07-C-527), Judge Arthur Recht entered default against National Union Fire Insurance Company of Pittsburgh, PA and AIG Claim Services for discovery abuse including non-meritorious objections to written discovery, failure to produce the defense expert and continued objections after they were overruled by the trial court.

Robinson began as an uninsured motorist claim that later spawned a bad faith claim based upon delay allegations. Per pleadings, plaintiff Jarin Robinson was driving a supply van for his employer, the AIG insured, with a $20,000 UM policy when he was hit by a drunk driver. The driver then fled the scene.

Pleadings in the court file allege AIG did not respond to the notice of claim, letter of representation or submission of approximately $7,200 in medical expenses for 17 onths. Two days after the UM suit was filed, AIG made its first offer of $4,000 and denied med pay to the plaintiff. Two months later, apparently with no change in facts, AIG then offered the policy limits. Plaintiff rejected the offer and immediately amended the Complaint to allege a bad faith/breach of contract/substantially prevailed claim against AIG.

Numerous discovery disputes then ensued in the bad faith claim with defense experts refusing to attend their deposition - once to attend a Penn State football game. AIG also failed to produce an adequate 30(b)(7) witness who when finally produced admitted to claim handling violations. Written discovery went unanswered for more than a year with disputes arising over the production of personnel files of the involved adjusters. When AIG finally answered it objected to almost all discovery requests.

On November 4, 2009, Judge Recht granted default against AIG for these discovery abuses finding the answers to be "woefully inadequate" and chastising the insurer for the numerous objections raised. He also ruled plaintiffs' counsel could speak ex parte with the primary adjuster who had since left AIG's employment. The Judge also prohibited AIG from taking depositions of the plaintiff's experts because they did not request them within the discovery period and indicated he would separately entertain sanctions via attorney's fees and costs incurred by the plaintiff in pursuing the various discovery requests.

Four days later, a jury heard only damages with no defense permitted by AIG and returned a $1.4 million compensatory damages verdict. The jury also found "actual malice" in the claim handling. While deliberating punitive damages, the case settled for a confidential amount.

Plaintiffs were represented by Bordas & Bordas.

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