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UPDATE ON THE LAW

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MORE INFORMATION

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Court Prohibits Medical Confidentiality Orders

In a case successfully litigated by this firm, the West Virginia Supreme Court has held a circuit court may not issue a protective order directing an insurance company to return or destroy a claimant's medical records prior to the time period set forth by West Virginia Insurance Commissioner regulations for the retention of such records.

In *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, (No. 35514, W.Va., filed June 16, 2010), State Farm sought and obtained a writ of prohibition against an Order entered in the Circuit Court of Harrison County which prohibited State Farm from electronically maintaining its records and which called for the return or destruction of a plaintiff's medical records at the conclusion of the case. In rejecting both portions of the Order, the Supreme Court held State Farm could not destroy records at the conclusion of the case as such would place it in violation of its regulator's rules.

In a unanimous opinion authored by Justice Margaret Workman, the Court held State Farm acted in good faith when it immediately appealed the Circuit Court's Order and returned the plaintiff's medical records without reviewing them.

The Court expressed shock that despite clear language of the Insurance Commissioner's rules and Informational Letter 172 that other plaintiffs throughout the state have sought and obtained similar orders. As a result, the Court issued its new syllabus point prohibiting such actions by trial courts in the future.

As to electronic maintenance of claim files, the Court found the practice appropriate and concluded the plaintiff failed to demonstrate good cause for a protective order with terms beyond privacy statutes and rules already in place. The Court specifically found plaintiff had failed to present any evidence State Farm has violated the State Privacy Rule or that State Farm intends to inappropriately disseminate plaintiff's medical records. Moreover, the Court cited plaintiff's lack of evidence on State Farm's record retention policies which she challenged as well as plaintiff's failure to explain why the Insurance Commissioner's privacy rules are insufficient.

Court Creates New Third Party Cause of Action Against Insurers

The West Virginia Supreme Court has created a new private cause of action for third parties against insurers based upon the Human Rights Act. In *Michael v. Appalachian Heating, LLC and State Auto Ins. Co.*, (No. 35127, W.Va., filed June 11, 2010), the Court interpreted the Human Rights Act definition of "person" to include insurers and held W.Va. Code § 5-11-9(7)(A) prohibits unlawful discrimination by a tortfeasor's insurer in the settlement of a property damage claim when the discrimination is based upon race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status.

The issue came to the Court as certified questions from the Circuit Court of Kanawha County after the plaintiff amended her property damage suit against Appalachian Heating to include its insurer, State Auto. Plaintiff alleged her fire loss claim was not fairly evaluated because she was African-American and resided in public housing. State Auto argued the claim was really a third party Unfair Trade Practices Act claim which has been barred by the West Virginia Legislature.

The Court rejected the proposition that the remedy for such alleged discrimination is an administrative complaint before the Insurance Commissioner finding the UTPA regulates insurance trade practices while the Human Rights Act remedies discrimination which the Court held serves a different purpose.

In his dissent, Justice Menus Ketchum found the appropriate remedy for the claim was an administrative complaint and warned the plaintiffs' bar not to overuse the newly created cause of action stating: "What I foresee, in the future, is that the Human Rights Act will be subjected to the same abuse that maligned the Unfair Trade Practices Act. A handful of litigators will unleash a flood of lawsuits alleging discrimination in the settlement of a third-party property damage claims by insurance companies - and in most of those cases, the evidence of "discrimination" will be entirely spurious. … But my years of practicing law has taught me that a mere allegation of unlawful discrimination can be a powerful weapon for negotiation of a spurious claim. Jurors do not like insurance companies."

Justice Thomas McHugh likewise dissented finding that third-party relief for insurance-related discrimination has never been expressly, or even impliedly authorized in the Act, or in any other West Virginia statute.

The opinion is silent as to the statute of limitations, standard of proof or damages for such claims. It is anticipated the contours of the new cause of action will be defined in follow-up litigation and appeals which will also likely include institutional discovery of claim settlement amounts.

Court Applies "Nerve Center" Test to Diversity Question

The Supreme Court of the United States has interpreted the removal statute that considers a corporation's "principal place of business" to mean its "nerve center" or the site where its highest officers direct, control and or coordinate the corporation's activities.

The Court decided the issue in *Hertz Corp. v Friend, et al.,* (No. 08-1107, decided Feb. 23, 2010). The Court analyzed 28 USC §1332(c)(1) and determined the "principal place of business" language of the statute typically applies to corporate headquarters for the diversity of citizenship analysis.

Less Than "Letter-Perfect" Selection/Rejection Form Upheld

The U.S. District Court for the Southern District of West Virginia has held that technical or procedural errors on a selection/rejection form will not invalidate the form or the mandatory offers of uninsured or underinsured motorist coverage.

In *Webb v. Shaffer and State Farm Mut. Auto. Ins. Co.* (Civil Action No. 3:09-cv-82, S.D.W.Va., entered March 9, 2010), plaintiff contended her grandfather, the named insured , was not provided a commercially reasonable offer of UIM coverage because the selection/rejection form did not include the agent's name or the Policy/Binder number as required in Informational Letter 121. Judge Robert Chambers, however, did not find the absence of this information to be a fatal defect.

The Court found the form to be compliant with W.Va. Code §33-6-31d and *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987), because it provided the "qualitative standards by which an offer of underinsured motorist coverage must be judged." The Court found Informational Letter 121 did not alter the statute or case law but simply provides substantial, technical detail regarding the mechanics of an offer.

Finding the standard against which to judge offers is whether the insured received a commercially reasonable offer, the Court concluded that a commercially reasonable offer may be one that does not perfectly conform to the technical requirements of the Code or the Informational Letter. The law does not require a "perfect" offer, but only one that is "commercially reasonable," the Court held. It is the "overall content and quality of an offer" that matters, the Court concluded.

The Court further examined extrinsic evidence and found further support for the insured's knowing and intelligent rejection of UIM coverage, specifically, declarations pages which did not include UIM coverage and other forms in which the insured accepted and later rejected the coverage.

The granting of summary judgment on State Farm's cross motion for summary judgment then mooted the bad faith claim premised on the selection/rejection forms as well.

Series of Embezzlements Ruled As One Occurrence

Interpreting whether one or multiple "occurrences" occurred in an embezzlement action, the U.S. Court of Appeals for the Fourth Circuit has affirmed summary judgment in favor of Erie Insurance Company. In its unpublished decision of *Beckley Mechanical, Inc. v. Erie Ins. Prop. & Cas. Co.* (No. 09-1549, 4th Cir., decided April 13, 2010), the Court held that claims arising from one employee's dishonest conduct constituted one claim subject to one policy limit.

The insured alleged that because the employee embezzled with a series of fraudulent checks, each was subject to the policy limit for employee dishonesty coverage. Because the policy defined an occurrence as "a series of acts" for purposes of the employee dishonesty provision, the Court concluded the language was not ambiguous and that the various embezzlements constituted one occurrence. In so doing, the Court specifically rejected the insured's theory of a continuing tort, finding that doctrine applies to the statute of limitations, not to policy coverage.

Federal Court Finds No Constitutional Right to Privacy in Medical Records

The U.S. District Court for the Northern District of West Virginia has held there is no general constitutional right to privacy with respect to disclosure of personal information and that, specifically, there is no constitutional right to privacy in personal medical information. Furthermore, the Court held in *Blackston v. Vogrin* (Civil Action No. 2:10-cv-14, N.D.W.Va., entered March 24, 2010), that any protections granted under HIPAA exempts information disclosed in judicial proceedings.

In *Blackston*, plaintiff filed a civil rights suit under 42 USC §1983, alleging an assistant prosecutor in Ohio County violated his constitutional rights to privacy by disclosing personal medical information to the Circuit Court during a sentencing proceeding concerning his HIV status.

Magistrate John Kaull recommended the Complaint be dismissed with prejudice for failure to state a claim. District Judge Robert Maxwell adopted the recommendations and dismissed the case on April 28, 2010. The plaintiff has filed a notice of appeal to the U.S. Court of Appeals for the Fourth Circuit.

Gulf Oil Spill Will Generate Numerous Insurance Claims

Companies with exposure to the sinking of the Deepwater Horizon oil rig in the Gulf of Mexico are insured for losses totaling about $1.4 billion, according to initial reports from the companies involved in the incident as well as early insurance and reinsurance industry estimates compiled by the Insurance Information Institute.

"The insurance losses from the sinking of the Deepwater Horizon will be significant and one of the largest losses ever for global offshore energy insurance and reinsurance markets," said Dr. Robert Hartwig, president of I.I.I. "The risks inherent in carrying out such a complicated endeavor, however, are well-syndicated, with the insured loss spread across a broad spectrum of insurers and reinsurers on a global scale." Hartwig also noted that British Petroleum (BP) also carries a significant amount of self-insurance.

"Offshore energy facilities are among the most difficult and complex commercial risks to insure, especially in the Gulf of Mexico, where hurricanes often damage platforms and undersea pipelines. Yet significant spillage of oil is rare," Dr. Hartwig added. The most expensive oil spill in U.S. history involved the Exxon Valdez in 1989. While insurers paid hundreds of millions of dollars, the majority of the losses were paid by Exxon. Likewise, the larger the loss from the Deepwater Horizon incident, the greater the share that will be paid by BP, Hartwig said.

It is anticipated that property damage and liability policies will generate the largest dollar-amount claims.

Local Attorneys Must Attend All Proceedings with *Pro Hac* Vice Counsel

The Committee on Unlawful Practice of the West Virginia State Bar has issued an advisory opinion concerning the parameters of *pro hac* vice admission in West Virginia, again stressing that local counsel must attend all proceedings.

In Advisory Opinion 10-001, the Committee reviewed Rule 8 of the West Virginia Rules for Admission to the Practice of Law holding that an attorney not licensed in West Virginia may not appear in a West Virginia court nor take any act that falls within the definition of the practice of law without first obtaining *pro hac* vice admission. This requirement, the Committee held, exists regardless of whether a suit or other proceeding is actually pending.

Rule 8 also requires the participation of a "responsible local attorney" to associate with the attorney admitted *pro hac vice*. Responsible local attorneys must maintain an office in West Virginia. Requirements imposed upon responsible local attorneys includes signing every pleading, attending all hearings, trial or proceedings, and attending all depositions or other actions. The Committee expressed a preference for in-person attendance, but indicated that counsel can attend via telephone or video-conferencing if the attorney admitted *pro hac vice* appears in the same manner. As a result, attorneys admitted *pro hac vice* must be accompanied by the responsible local attorney at all times during any proceeding or act involved in the practice of law.

The Committee held these responsibilities imposed upon responsible local attorneys are not intended to build a monopoly or create unfair advantages to West Virginia attorneys over out-of-state attorneys, but rather to protect the public since out-of-state attorneys are not subject to discipline by the West Virginia Supreme Court. This requirement, the Committee held, will help ensure the public is properly served by qualified counsel.

Third Party Bad Faith Claim Against Surety Dismissed

A construction company's "bad faith" claims against another's surety have been dismissed as barred due to West Virginia's abolition of third party bad faith causes of action.

In *Orange Construction Corp. v. Travelers Cas. & Sur. Co. of America* (Civil Action No. 2:10-cv-315, S.D.W.Va., entered April 14, 2010), Orange contracted with Steeb Crawford Construction, LLC to provide labor, materials, and supplies on a state-sponsored construction project. Travelers served as the surety under a payment bond guaranteeing payment for labor and materials. West Virginia University is the landowner and oblige of the security bond. When Steeb failed to pay Orange, Orange sued Travelers for breach of contract, common law, and statutory "bad faith."

Because Orange is not the insured, the District Court classified Orange as a third party claimant and dismissed the suit as barred after enactment of W.Va. Code §33-11-4a(j).

No Punitive Damages in Medical Monitoring Cases

The West Virginia Supreme Court has reduced a $381 million class action verdict against E.I. DuPont finding that punitive damages may not be awarded on a cause of action for medical monitoring. The Court further reduced punitives on the remaining verdict so that the punitive to compensatory ratio was 1.76:1, thus reducing the verdict to $183 million. Presumably, 1.76:1 is now the permissible ratio in West Virginia pursuant to *Perrine, et al. v. E.I. DuPont DeNumours and Co., et al.*, (Nos. 34333,34334 and 34335, W.Va., filed March 26, 2010

The Court also conditionally affirmed the remainder of the verdict but remanded the case to the Circuit Court of Harrison County for a jury trial on whether the claim is barred by the statute of limitations. The case stems from allegations of contamination in the town of Spelter, WV, from a zinc smelter facility.

In a lengthy opinion authored by Judge Alan Moats, sitting by appointment, the Court held that when a trial or appellate court reviews an award of punitive damages for excessiveness, the court should first determine whether the amount of the punitive damages award is justified by aggravating evidence, such as the reprehensibility of the defendant's conduct, and then consider whether a reduction is appropriate due to mitigating evidence, such as a comparison to compensatory damages.

In conducting its due process analysis, the Court determined that the punitives to compensatory ratio – after elimination of that portion of punitives attributable to medical monitoring – was 2.1:1. Thus, the Court reduced the punitives by another $20 million so that the ratio became 1.76:1 which it concluded did not violate principles of due process pursuant to *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

Chief Justice Davis dissented, in part, and specifically objected to prohibiting punitive damages in medical monitoring actions arguing that the cost of medical monitoring is only the compensatory element of damages; punitive damages must be separately permissible for malicious conduct. In a separate partial dissent, Justice Margaret Workman took the same position as to punitive damages in medical monitoring actions but only for willful, wanton, and egregious conduct.

In a separate dissent, Justice Menus Ketchum called for a reversal of the entire verdict stating: "It is easy to enrage a jury against a large multi-national corporation." He also criticized plaintiffs' expert soil scientist stating: "Retained expert witnesses are like eggs. You can buy them by the dozen - they are just more expensive."

The Court subsequently denied DuPont's Petition for Rehearing arguing that the allocation of punitive damages for medical monitoring should be increased to 70% of the total punitive damages verdict.

Immunities to Appointed Counsel Expanded

In rejecting a legal malpractice claim, the West Virginia Supreme Court has ruled that an attorney appointed by a federal court to represent a criminal defendant, in a federal criminal prosecution in West Virginia, has absolute immunity from purely state law claims of legal malpractice that derive from the attorney's conduct in the underlying criminal proceedings.

The issue arose in *Mooney v. Frazier,* (No. 35224, W.Va., filed April 1, 2010), upon certified questions from the Circuit Court of Cabell County. In reaching its ruling, the Court expanded the scope of W.Va. Code §29-21-20 which provides certain immunities for court-appointed counsel in state actions to now apply to federal appointments in West Virginia.

Proposed Revised Rules of Appellate Procedure

The West Virginia Supreme Court of Appeals has issued revised Rules of Appellate Procedure which are open for public comment through July 19, 2010. The purpose of the revisions is to bring the court in line with appellate practice nationally, said Chief Justice Robin Davis.

Supreme Court Clerk Rory Perry has authored the proposed Rules which includes 18 new rules and an overhaul of many of the existing Rules. The overarching purpose is to streamline and provide transparency to the appellate process. One of the key differences in the proposed Rules is the abolition of the motion docket and the creation of two argument dockets split between Rules 19 and 20 depending upon the nature and complexity of the case. All appeals will now result in substantive written decisions, even if denied, rather than orders refusing to accept petitions for appeal so as to guarantee an appeal of right.

Bystander Emotional Distress Claims Ruled Derivative

In granting summary judgment to State Farm, the U.S. District Court for the Southern District of West Virginia has determined that a bystander emotional distress claim of a close family member who witnesses a relative injured or dying is derivative of the death claim and, therefore, that claim is subsumed within the per person limits available for the death claim.

The issue arises from a 2007 head-on collision in which Rosa Webster was killed and her husband, a passenger in the vehicle, witnessed his wife's death in addition to sustaining individual personal injuries. State Farm settled the death claim for the $100,000 per person liability limits and later settled the personal injury claim of the passenger for $100,000 per person limits. However, the passenger reserved the right to sue for additional damages for negligent infliction of emotional distress for witnessing his wife's death.

In *Webster v. State Farm Mut. Auto. Ins. Co.* (Civil Action No. 1:09-cv-714, S.D.W.Va., entered March 19, 2010), District Judge David Faber recognized a split of authority but found under the clear language of the policy, any bystander emotional distress claims are derivative of the claims of the injured individual. Policy language at issue stated that the limits shown under "Each Person" is the most State Farm would pay "for all damages resulting from bodily injury to any one person injured in any one accident, including all damages sustained by other persons as a result of that bodily injury." (emphasis added).

The Court concluded: "Clearly, any bystander emotional distress damages of Mr. Webster Sr. would have been sustained as a result of Mrs. Webster's bodily injury."

As an aside, the Court questioned whether the emotional distress damages are even covered under the policy since the policy covers "bodily injury" which excludes emotional distress claims.

Legislative Action

During the 2010 regular legislative session, the West Virginia Legislature enacted a number of bills that impact insurers and insurance practices.

- Electronic Insurance Verification

During the regular 2010 legislative session, the Legislature passed a bill permitting implementation of an electronic insurance verification program. In enacting W.Va. Code §17D-2A-6a, the Legislature authorized the Insurance Commissioner to contract with a third party vendor to implement an electronic verification system. The system will permit on-demand verification of insurance. All insurers writing auto liability insurance in West Virginia must participate. It is anticipated the Commissioner will separately promulgate rules concerning participation and compliance. The statute becomes effective June 13, 2010.

- Lien on Debris Removal Coverage

Effective June 9, municipalities now have a statutory lien on homeowner's insurance proceeds available for clean-up, even if debris removal is not part of the policy. Municipalities now have an initial lien which is the larger of $5,000 or 10% of the face value of the policy when property is declared a total loss. Municipalities then have 30 days to file a lien against the property which can only be released upon certification the property has been cleaned up, or that satisfactory arrangements to do so are in place or the insurer has paid the full amount to the municipality.

- Servicemembers Civil Relief Act

The Legislature also enacted W.Va. Code §151F-11 entitled the West Virginia Servicemembers Civil Relief Act which adopts federal law. Effective June13, any member of the West Virginia National Guard called to state active duty by the Governor for a period of 30 days or more, shall have all of the protections, rights or benefits that are afforded and may accrue to a person on federal active duty.

- "Erin's Law" Enacted

The West Virginia Legislature has enacted legislation increasing penalties and imposing mandatory jail sentences for drivers who flee the scene of an accident where someone is killed. In enacting "Erin's Law," House Bill 4534, the driver of any vehicle involved in a crash resulting in injury to or death of any person shall immediately stop the vehicle and remain at the scene as long as necessary. Drivers may leave the scene if necessary to render assistance to an injured person.

Any person who knowingly violates W.Va. Code §17C-4-1 in an accident causing death will be guilty of a felony subject to fines up to $5,000, at least one year in prison, or both. Any person violating the statute in an accident involving injury will be guilty of a misdemeanor subject to fines up to $1,000, up to one year in jail, or both.

The re-enacted statute is now known as "Erin's Law" in honor of Erin Keener, a nursing student killed in 2005 after being struck and dragged by a fleeing vehicle. A suspect was not identified for four years. The new statute becomes effective June 11, 2010.

- First-Time Offenders May Defer DUI Charges

First-time drunken driving offenders have been granted leniency by the West Virginia Legislature if they meet certain conditions and participate in an alcohol test and lock program.

During the 2010 legislative session, the Legislature added a provision to DUI laws, specifically W.Va. Code §17C-5-2b, which permits first-time offenders to defer further proceedings, without a guilty finding, with placement on probation subject to successful completion of the Motor Vehicle Alcohol Test and Lock Program for a period of at least 165 days after serving a 15-day license suspension. Participation in the deferment program is only permitted once per individual.

- Circuit Court Fees

Fees charged by circuit clerks were also permitted to be increased for all docketing and filing fees as well as assessed costs such as abstracts of judgments, transcripts and copies of documents supplied by clerks to litigants and counsel. The new statute permits clerks to charge postage fees three times the amount of actual postage. The new fees take effect July 1.

Without Contract, Breach of Contract Claim Dismissed

The U.S. District Court for the Northern District of West Virginia has dismissed two counts of a subrogation action filed by Cincinnati Insurance Company against a construction manager following collapse of walls at a construction site near Wheeling.

In *The Cincinnati Ins. Co. v. Cost Co. and Pedersen & Pedersen, Inc.* (Civil Action No. 5:10-cv-7, N.D.W.Va., entered May 11, 2010), the Court found that Cincinnati could not proceed on a breach of contract claim when it did not identify any breach of duty owed under a construction proposal. Cincinnati admitted it did not have a contract signed by all parties, merely a proposal. In its Motion to Dismiss, the defendant argued Cincinnati's lack of knowledge as to the scope of defendant's duties was a "fatal gap" in its pleadings. Judge Frederick P. Stamp, Jr. agreed, finding no factual support for the claim. Specifically, the Court held that Cincinnati failed to support its claims with anything other than "labels and conclusions." Without a contract, the claims as to duties and obligations owed by the defendant are speculative, the Court held.

Because the separately plead tort action could not arise independent of the breach of contract claim, that claim was also dismissed.

Jury Awards $600,000 Bad Faith Verdict Against Nationwide

A Marshall County (Moundsville), West Virginia, jury has returned a verdict finding Nationwide Mutual Insurance Company acted in "bad faith" in adjusting an underinsured motorist claim and has awarded $600,000 in damages, $200,000 of which was for punitive damages. *LeMasters v. Nationwide Mut. Ins. Co.*, (Civil Action No. 06-C-137).

Wayne LeMasters, a Moundsville city councilman, was involved in a 2004 collision with a Nationwide insured and received the driver's $50,000 liability limits. After three years of litigation, Nationwide paid LeMasters his $50,000 UIM limits. Plaintiff alleged in excess of $250,000 in lost wages and medical expenses. LeMasters then amended his Complaint to allege improper claim adjustment activity against Nationwide.

In his "bad faith" suit, plaintiff challenged Nationwide's maintenance of a list of approved IME physicians, alleged bonuses paid to management were tied to the company's loss ratio, and alleged the company otherwise profited from delaying payment of the UIM claim.

On April 14, 2010, after 7 days of trial, the jury found Nationwide committed statutory and common law bad faith with a specific finding of a general business practice of violating the Unfair Claims Settlement Practices Act, thus awarding $600,000. It is anticipated the plaintiff will separately seek a judicial finding he substantially prevailed against Nationwide and seek an additional award of attorney's fees.

Negligent Hiring Does Not Constitute an "Occurrence"

An allegation of negligent hiring does not meet the definition of an "occurrence" in a commercial general liability policy per a recent ruling of the U.S. District Court for the Southern District of West Virginia.

In *State Auto Prop. and Cas. Inc. Co. v. Edgewater Estates, Inc., et al.* (Civil Action No. 2:09-cv-346, S.D.W.Va., entered April 29, 2010), the insurer issued a CGL to an apartment complex. In a separately filed state court action, one of the tenants alleged her minor child was sexually assaulted by an employee of the complex and alleged negligent hiring of the employee. State Auto filed a declaratory judgment alleging hiring – negligent or otherwise – does not constitute an "occurrence." The Court agreed that negligent hiring is not an "occurrence" which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Court also considered the intentional acts exclusion.

Additionally, although not raised by either party, the Court held the underlying complaint was devoid of any allegation of bodily injury, alleging only mental and emotional injuries. The District Court reiterated that the West Virginia Supreme Court draws a distinction between "bodily injury" and "personal injury."

Federal Court Finds Fraudulent Joinder

In a case successfully litigated by this firm, the U.S. District Court for the Northern District of West Virginia considered the mandatory abstention doctrine and determined it did not apply, thus denying plaintiff's motion for remand. It also found fraudulent joinder of a defendant.

In *Wolfe v. Greentree Mortgage Corp., et al.* (Civil Action No. 3:09-cv-74, N.D.W.Va., entered January 26, 2010), Judge John Preston Bailey considered the factors of 28 USC §1334(c)(2) and found the action was, at least in part, a "core proceeding" of a defendant's bankruptcy case. Core proceedings, per bankruptcy code, include matters involving estate administration, determining the extent ,validity, and priority of liens and other proceedings concerning the liquidation of estate assets. Because the plaintiff was seeking to invalidate a lien on a deed of trust, it was deemed a core proceeding which the federal court could hear.

The Court further held it could consider the case even if not considered a core proceeding because it had complete diversity of citizenship after determining the diversity-defeating defendant was fraudulently joined. Plaintiff named as a defendant a West Virginia notary alleging misconduct by notarizing the plaintiff's signature to a deed of trust outside the presence of the plaintiff and without witnessing the plaintiff sign the document. Plaintiff, however, did not dispute she signed the deed of trust. Thus, the Court concluded there could be no damages from this alleged wrongful act and there was no "glimmer of hope" of a judgment against the notary.

My Space "Friend" Must Be Revealed in *Voir Dire*

A criminal conviction has been overturned due to a juror's failure to disclose she was a My Space "friend" of the defendant. In *State v. Dellinger* (No. 35273, W.Va., filed June 3, 2010), defendant, a Braxton County deputy, was convicted of multiple felony counts.

Post-verdict, it was determined a juror had befriended the defendant one week prior to trial. The juror also failed to disclose in *voir dire* she was related by marriage to a witness and that her brother-in-law worked for another witness. In a post-trial hearing, the juror explained she did not answer *voir dire* questions about knowing the defendant because, although he formerly lived in her apartment complex and she recognized him, they had never spoken directly and he had never been in her apartment. The trial court then declared the juror impartial and denied the defendant's motion for new trial, which the Supreme Court reversed.

Writing for the majority, Chief Justice Davis repeatedly referred to the juror's complete lack of candor and held the juror's silence undermined the integrity of *voir dire* and determined bias was presumed.

Court Sets Forth Parameters of Arbitration Clauses

If parties are contractually to arbitrate a dispute, a trial court may not rule on the potential merits of the claim before referring the matter to arbitration. The West Virginia Supreme Court reached this decision in *State ex rel. Ameritrade v. Kaufman* (No. 35125, W.Va., filed March 5, 2010).

The issue arose when plaintiff filed suit in state court against Ameritrade and an independent financial advisor. Ameritrade sought to compel arbitration and refused the plaintiff's request to stipulate the financial advisor was "controlled" by Ameritrade. While upholding the arbitration provision, the Circuit Court of Kanawha County also granted partial summary judgment to the plaintiff on his vicarious liability count and ordered the arbitrator to "follow the directives of this Court." That "directive," the Supreme Court held, exceeded the trial court's legitimate powers.

Writing for the majority, Justice Thomas McHugh relied upon a decision of the Supreme Court of the United States holding that when trial courts decide the threshold issue of arbitrability, "[t]he courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim."

One month later, the Court expanded upon this ruling in *Ruckdeschel v. Falcon Drilling Co., LLC, et al.* (No.34865, W.Va., filed April 23, 2010), holding when a circuit court is presented with the issue of whether an arbitration agreement is applicable, the court must determine the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred fall within the substantive scope of that arbitration agreement.

General Counsel Again Rank WV Courts as Anti-Business

West Virginia has again ranked as lowest in the nation for the anti-business sentiment of its courts. Per the Harris Interactive survey, Delaware, North Dakota, Nebraska, Indiana, and Iowa ranked highest, with California, Alabama, Mississippi, and Louisiana joining West Virginia at the bottom.

West Virginia has placed last for four years in the survey commissioned by the U.S. Chamber of Commerce. Harris surveyed general counsel and senior management in companies with annual revenues of at least $100 million. Respondents were asked to rank how states treat tort, contract, and class action litigation, judges' competence, and the fairness of juries to achieve the rankings. The overwhelming majority of respondents agreed a state's legal environment is a key factor in making strategic business decisions at their company, such as where to expand or locate.

"With one in ten Americans out of work and record-high jobless rates in states like California, states can no longer afford to discourage new business and new jobs as a result of a dysfunctional legal climate," said Lisa Rickard, president of the U.S. Chamber Institute for Legal Reform. "States, particularly those at the bottom of the list, desperately need more job, not more lawsuits."

No Duty To Provide Notice of Policy Expiration

Where an insurance company has extended an offer to renew an automobile policy and the insured does not pay the premium due for renewal, thus allowing the underlying policy to expire, there is no duty imposed upon the insurer to notify the insured or a loss payee that the policy has expired.

The West Virginia Supreme Court reached this conclusion in *Putnam Bancshares, Inc. v. Progressive Classic Ins. Co.* (No. 34769, W.Va., filed April 5, 2010), reversing an Order of the Circuit Court of Putnam County.

The Circuit Court misconstrued statutory provisions governing cancellations and nonrenewal situations where mandatory notices are required with expiration, where there is no corresponding notice provision, the Court held.

However, the Court held that an insured has the right to reinstate the expired policy. To reinstate the policy, an application for reinstatement and payment of the premium due must be made within 45 days of the expiration date. If reinstated, coverage will not be retroactive. Rather, coverage begins again on the reinstatement date.

Because the insured did not pay the renewal premium allowing the policy to expire and did not reinstate the policy until the day after the accident, he had no coverage for the accident at issue.

Discovery Mandatory Before Summary Judgment Ruling

The West Virginia Supreme Court has reversed summary judgment in a property damage case holding that granting summary judgment before discovery has been completed must be viewed as "precipitous."

In *Pingley, et al. v. Huttonsville Public Service District* (No. 34969, W.Va., filed March 4, 2010), the Circuit Court of Randolph County granted summary judgment on a sewer backup claim against a governmental entity holding the plaintiffs could not prove breach of any duty because the service district had no prior knowledge of backups. The defendant's summary judgment motion was filed before it answered the Complaint.

In reversing summary judgment, the Supreme Court held there can be liability against a political subdivision for injuries arising out of the negligent maintenance and operation of drains and sewers which does not necessarily require prior knowledge of a sewer line problem.

The Court therefore concluded the plaintiffs had a right to conduct discovery prior to the circuit court's summary judgment determination reiterating a prior holding that "a continuance of a summary judgment motion is mandatory upon a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion." (emphasis added).

Death Certificate Upheld Even After Change of Opinion as to Cause of Death

In reversing summary judgment, the West Virginia Supreme Court, in a *per curiam* opinion, has held that the cause of death listed on a death certificate is *prima facie* evidence of the facts even if the attesting physician subsequently changes his opinion as to the cause of death

In *Goldizen v. Grant County Nursing Home,* (No. 34888, W.Va., filed April 21, 2010), the Circuit Court granted summary judgment to the defendant nursing home after the physician who signed the death certificate changed his opinion, leaving the plaintiff with no expert on causation. On appeal, however, the Supreme Court found there was no equivocation as to the facts stated in the death certificate and that it was to be accorded probative value. The *Goldizen* Court classified the physician's subsequent deposition testimony as an attempt to "constructively amend" the death certificate which it found was improper and would undermine the integrity and accuracy of vital statistics records if permitted. Amendment would only be permissible pursuant to statute, the Court held. Thus, the Court concluded the Circuit Court failed to consider all evidence when it granted summary judgment to the defendant.

Before granting summary judgment, the trial court also excluded another expert designated by plaintiffs because plaintiffs did not depose the expert within the discovery period. Plaintiffs' failure to attempt to timely locate the witness was not accepted by the trial court as a grounds for continuance. This, too, was reversed on appeal. While the Supreme Court agreed plaintiffs were dilatory in their efforts to locate and secure deposition testimony from the witness, it found exclusion of the witness to be too extreme a sanction to be imposed upon a party due to misconduct of counsel. The Supreme Court found the proper "sanction" would have been a verbal reprimand of plaintiffs' counsel and warned trial courts to be "extremely guarded against imposing sanctions that tend to eviscerate a party's case on a critical issue."

Fourth Circuit Justice Affirmed

Another vacancy on the U.S. Court of Appeals for the Fourth Circuit has been filled. On March 2, 2010, the U.S. Senate unanimously confirmed Virginia Supreme Court Justice Barbara M. Keenan to the federal appeals court.

Justice Keenan was the only woman appointed to the Virginia Court of Appeals upon its creation. She was then elevated to the Virginia Supreme Court in 1991.

Justice Keenan received her law degree from George Washington University and previously served as a prosecutor. The Fourth Circuit hears appeals from West Virginia, Virginia, North Carolina, South Carolina, and Maryland.

Default Judgment Reversed

Entry of default judgment as a discovery sanction has been overturned by the West Virginia Supreme Court. In *State ex rel. Richmond American Homes of WV, Inc. v Sanders*, (No. 35440, W.Va., filed June 16, 2010), the Court held the Circuit Court of Jefferson County abused its discretion and failed to make findings to adequately demonstrate and establish the defendants' willfulness, bad faith or fault.

This case stems from a series of civil suits challenging the faulty or fake installation of radon mitigation systems in homes built by Richmond American in a Jefferson County subdivision. The Circuit Court found the defendants engaged in extensive litigation misconduct including direct contact by the defendant's president with some of the represented homeowners, unanswered discovery and a job offer extended to plaintiffs' counsel during a mediation session.

In entering default as a sanction, the trial court found the letter from Richmond's president to be an unauthorized communication which contained false statements and found the job offer to be an attempt to subvert plaintiffs' counsel to work against his clients' interests.

In the majority opinion authored by Justice Thomas McHugh, the Court found "no single base of authority" relied upon by the circuit court in its imposition of default as a sanction. The Court also found no prior Order granting a motion to compel with respect to the discovery issues before default was entered. Moreover, discovery disputes were pending before a discovery commissioner at the time the sanction was entered with no recommendations yet made by the discovery commissioner. Because the prerequisite of an order compelling discovery was not in place, the Court held it could not sustain the sanction.

Turning to the inherent power of the Court to sanction a disobedient party, the Court cautioned trial courts to impose sanctions congruent with the harm caused by the party's misconduct repeatedly calling for "restraint and discretion." In again outlining a two-step process of review, the Court first considers whether the sanctioning court identified the wrongful conduct with clear explanation on the record of why it decided that a sanction was appropriate and whether the sanction fits the seriousness of the identified conduct in light of the impact the conduct had in the case and the administration of justice, any mitigating circumstances, and with due consideration given to whether the conduct was an isolated occurrence or a pattern of wrongdoing. Finding neither from the trial court, the Supreme Court granted the Petition for Writ of Prohibition. However, upon remand, the Circuit Court was authorized to again impose sanctions if based upon specific factual findings.

Although concurring, Chief Justice Robin Davis wrote separately to state the egregious conduct warranted the sanction imposed. Chief Justice Davis specifically rejected any argument that the letter to the homeowners was not a violation of the Rules of Professional Conduct stating "this Court does not approve of a party unilaterally contacting another party. This position recognizes the highly aggressive nature of civil litigation today, which makes unsophisticated plaintiffs extremely vulnerable to unscrupulously high pressure tactics by corporate defendants." Furthermore, Chief Justice Davis suggested a defendant seeking direct contact with a plaintiff first inform plaintiffs' counsel who is then obligated to inform plaintiffs of the request. If plaintiff consents, direct contact may be permitted, but only under circumstances approved by the plaintiff. The concurrence concluded with a statement that the record will support the sanction imposed upon remand once the trial court makes the required factual findings.

UIM Coordination of Benefits Language Invalidated

The West Virginia Supreme Court of Appeals has invalidated insurance policy language that limits recovery of underinsured motorist benefits to the highest single limit when two insurers issue separate policies on different vehicles but both could provide UIM coverage to the claimant. In *Cunningham v. Hill, et al.,* (Nos. 34861 and 34862, W.Va., filed June 18, 2010), the Court held such language conflicts with the spirit and intent of the underinsured motorist statute.

In *Cunningham*, the plaintiff was insured under an auto policy issued by Erie and a motorcycle policy issued by State Farm; both carried UIM and plaintiff sought proceeds from both policies. Both policies contained Other Insurance clauses and the insurers pro rated their coverage to provide the plaintiff the sum of the highest of the two policies.

In answering a certified question from the Circuit Court of Boone County, the Supreme Court found such language contrary to West Virginia public policy of full compensation. In a unanimous opinion authored by Justice Brent Benjamin, the Court found the plain and clear language of W. Va. Code §33-6-31(b), which states that "no sums payable as a result of underinsured motorist coverages shall be reduced by payments made under the insured's policy or any other policy," prohibited the coordination of benefits language. Because plaintiffs paid "two full premiums" for separate policies, the Court found they were "entitled to be fully indemnified."

The Court stated in a footnote that the opinion is limited to UIM coverage and is not to be construed as invalidating Other Insurance clauses in auto liability policies. The Court also footnoted that the insurers' reliance upon prior Insurance Commissioner approval of their language was to be given "scant merit."

Only Court Costs Recoverable Under Offer of Judgment

"Costs" that may be assessed against a plaintiff who does not exceed the amount offered in an Offer of Judgment are limited to those expenses defined as "costs" by statute and do not include attorney fees, expert witness fees, nor any other expenses not traditionally taxed as "court costs," the Court held in *Carper v. Watson, et al*. (No. 34750, W.Va., filed June 8, 2010).

Under Rule 68(c), if a defendant makes an offer of judgment and the plaintiff subsequently recovers a final judgment in an amount less than the defendant's offer, the court must award to the defendant the costs incurred by the defendant following the offer of judgment.

In interpreting cost statutes, the Court held that costs properly awarded are "court costs" which include charges for copies of pleadings, fees for legal notices and publications, witness fees, but not an expert witness's appearance fee, costs relating to depositions, jury costs, and court reporter fees.

Other costs are recoverable if the statute applicable to the case expands the definition of "costs" recoverable.

Lack of Proper Service Renders Default Judgment Void

The West Virginia Supreme Court has reversed a default order finding the defendant was not properly served with process. In *Beane v. Dailey* (No. 34630, W.Va., filed April 1, 2010), the Court considered the plaintiff's attempt at substitute service by serving the defendant's mother in Charleston, West Virginia, while the defendant was in the military, stationed in Missouri.

First, the Court held that service of a summons without service of a Complaint was deficient under Rule 4(d)(1)(B). Next, where the return of service does not indicate service was made "at the individual's dwelling place or usual place of abode to a member of the individual's family who is above the age of sixteen (16) years," service is deemed defective.

The term "usual place of abode," the Court held, means a place of present abiding, not a place of "casual abode." Without this fundamental prerequisite stated in the record, the Court held the circuit court's entry of default was an abuse of discretion. Without proper service, the circuit court did not have jurisdiction over the defendant and the judgment rendered against him was void.

Court Upholds Professional Services Exclusion

The West Virginia Supreme Court of Appeals has upheld professional services and professional liability exclusions in commercial general liability and personal umbrella policies finding both provisions are clear and unambiguous.

Interpreting a commercial general liability policy, the West Virginia Supreme Court of Appeals has held the term "professional services," when not otherwise defined in the policy, denotes "those services rendered by someone with particularized knowledge or skill in his or her chosen field. Thus, the task must arise out of acts particular to the individual's specialized vocation, not simply an act performed by a professional.

Under this interpretation, the Court held a professional services exclusion in a CGL policy is not ambiguous and applied to claims asserted against an attorney, the insured, for harm arising from his professional services rendered, specifically malicious prosecution, in *Boggs v. Camden-Clark Memorial Hospital Corp. v. Boggs v. Hayhurst and Cincinnati Ins. Co.*, (No. 35223, W.Va., filed April 1, 2010). The Court further held that the exclusion applies whether the person alleging malicious prosecution is the attorney's client or opponent.

Likewise, the Court held the term "professional liability" in a personal umbrella policy that excludes coverage for "'personal injury' arising out of any act, malpractice, error or omission committed by any 'insured' in the conduct of any profession," means those services rendered by an insured with particularized knowledge or skill in his or her chosen field. The Court further rejected the argument the policy was illusory since it found coverage could be afforded under different circumstances.

As a result, the Court found no coverage under either policy for claims asserted against an attorney alleging malicious prosecution. In reaching this conclusion, the Court also rejected the insured's reasonable expectations claim, returning to its original criteria that the reasonable expectations doctrine is limited to those instances in which policy language is ambiguous.

Court Orders Production of Privileged Email Inadvertently Disclosed

A magistrate in the U.S. District Court for the Southern District of West Virginia has determined an inadvertent disclosure of an attorney-client privileged communication waived the privilege and will now consider whether other privileged documents demonstrate that the crime-fraud exception is applicable. At issue in *Mt. Hawley Ins. Co. v. Felman Production, Inc.* (Civil Action No. 3:09-cv-481, S.D.W.Va., entered May 18, 2010), was an internal email that arguably showed the plaintiff, a consultant and outside counsel, discussing ways to bolster an insurance claim for property damage and business interruption.

The plaintiff produced electronically stored information that amounted to more than 1 million pages and marked every page "confidential," which the Court previously found "makes a mockery" of the Court's protective Order. Included in the production were 980 attorney-client privileged communications which plaintiff then sought to claw-back. Defendants opposed the recall arguing the crime-fraud exception to the attorney-client privilege and waiver.

After finding the consultant fell within the privileged relationship, the Court then considered the reasonableness of counsel's review before the discovery production.

Plaintiff argued that documents were not tagged for attorney review due to an undetermined software error. The Court considered all quality review steps taken and concluded that plaintiff over-produced documents, that some documents now alleged to be privileged were not previously identified as privileged or clawed-back, and that plaintiff and counsel failed to perform adequate quality control sampling, including simple key-word searches.

A key factor, the Court held, was that the privileged documents were identified by defendants and that Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure and the parties' stipulation about electronically-stored information placed the responsibility for making a claw-back on the producing party. Thus, the Court deemed the attorney-client privilege waived.

As to the crime-fraud exception, the Court considered whether the email was an attempted fraud or an inquiry about a contemplated fraud. In reviewing the email, the Court found a strong suggestion the plaintiff had attempted to obtain false documents to support the insurance claim. Thus, the *prima facie* threshold has been established and the Court will now conduct an *in camera* review of the documents asserted to be privileged to determine if they fall within the crime-fraud exception.

Study Considers Hospital Cost Shifting to Insurers

The low amount of reimbursement from Medicare and Medicaid is prompting hospitals to shift costs to automobile insurance companies, thus raising claim costs. In a recent study by the Insurance Research Council, it was estimated that $1.2 billion in excess hospital charges occurred in 2007.

"The conventional wisdom is that hospitals aggressively seek to shift costs from public insurance programs to private payers such as auto insurance companies," said Elizabeth Sprinkel, Senior Vice President of IRC.

West Virginia Creates Business Court Division

The West Virginia Legislature has created a business court division within West Virginia's circuit court districts. By enacting W.Va. Code §51-2-15, the Supreme Court cannot designate such a division within the circuit court of any judicial district with a population in excess of 60,000 people.

The Legislature included a statement of public policy in the new statute stating that it finds, due to the complex nature of litigation involving highly technical commercial issues, there is a need for a separate and specialized court docket with specific jurisdiction over actions involving commercial disputes and disputes between businesses. The West Virginia Supreme Court will now promulgate rules for the establishment and jurisdiction of the business court divisions.

Long advocated by Speaker of the House of Delegates Rick Thompson, he stated upon the bill's enactment: "This law sends a powerful message to the business community that this state is business friendly." The bill becomes effective June 10, 2010.

Ohio Admonishes Jurors Not to Utilize Social Media During Trials

The Ohio State Bar Association has promulgated a new model jury instruction whereby trial judges admonish jurors not to utilize any form of social media during their jury service to discuss the case. The admonition also warns jurors not be influenced by popular law-related TV shows such as Laws and Order. Portions of the admonition state:

WARNING ON OUTSIDE CONTACT. Finally, you must not have contact with anyone about this case, other than the judge and court employees. This includes sending or receiving e-mail, Twitter, text messages or similar updates, using blogs and chat rooms, and the use of Facebook, MySpace, LinkedIn, and other social media sites of any kind regarding this case or any aspect of your jury service during the trial. If anyone tries to contact you about the case, directly or indirectly, do not allow that person to have contact with you. If any person persists in contacting you or speaking with you, that could be jury tampering, which is a very serious crime. If anyone contacts you in this manner, report this to my bailiff or me as quickly as possible.

The admonition also warns that any juror who violates these provisions could be held responsible for the costs of the first trial which resulted in a mistrial or could be held in contempt of court.

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