White and Williams LLP

Executive Newsletter Summer 2007

Environmental Product Liability

Marathon Environmental Suit May Finally End After Defense Wins Second High-Stakes Jury Trial

In what may signal the beginning of the end of a lawsuit that has been pending since 1990, a Pennsylvania Commonwealth Court jury recently returned a verdict in favor of White and Williams' client, Monsanto Company. It was the second time the case went to verdict — the first verdict in the plaintiffs' favor was overturned by the Pennsylvania Supreme Court. The new verdict is a testament to persistence, advocacy, and strategic decision-making. White and Williams Partner and former Litigation Department Chair Tom Goutman acted as lead counsel for both trials and the appeal.

The plaintiffs, several Pennsylvania state agencies, claimed $120 million in damages allegedly resulting from chemical contamination of the Transportation and Safety Building in Harrisburg. Monsanto manufactured the chemical in question, polychlorinated biphenyls ("PCBs"), until shortly before a Congressional ban in the mid-1970's. At the time, PCBs were routinely used in many building products, including mastic, caulk, and glue. Plaintiffs demolished the building several years after PCBs were detected in the aftermath of a June 1994 fire. Plaintiffs alleged that PCBs can cause cancer and pediatric developmental effects, and that the PCBs found on surfaces and within building products throughout the building created an intolerable risk to workers' health and safety. After deliberating for five hours, the jury returned a verdict in Monsanto's favor, specifically finding that PCBs were not "defective."

In The Beginning, There Was Asbestos

The litigation began in 1990 when the plaintiffs sued the manufacturer of asbestos-containing insulation that had been sprayed on the under-flooring of the Transportation and Safety Building when it was constructed in the mid–1960's. Even though PCBs were detected throughout the building in 1994 as a result of post-fire testing, plaintiffs did not join Monsanto until 1997 — a joinder motivated, in part, by the financially precarious position of the asbestos defendant. As the financial fortunes of the asbestos defendant slowly sank, plaintiffs re-tooled their case to focus on the "deep pocket," Monsanto Company. Thus, although the building had 1.2 million square feet of deteriorating asbestos — a condition whose government agencies had long viewed as a health hazard that required removal — those same government agencies told the juries in both trials that the asbestos was, in fact, "safe," and that PCBs were so "dangerous" that the 12-story office tower had to be demolished.

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From the Chair…

George J. Hartnett
Chair, Executive Committee

It is with great pride that I warmly introduce our four newest Partners, Mike Horner, Ed Koch, Ryan Udell and Bob Walsh. We are equally pleased to announce that Bruce Bell, Dave Bronstein and Greg Capps have been named as Counsel to the firm. These excellent attorneys bring a breadth of talent and depth of capacity to manage your most multifaceted litigation, try your challenging cases, and complete your most complex business deals. We are grateful for the immense contributions they have made to our firm, and moreso, to you, our clients.

Mike Horner practices in the areas of products liability, employment law, premises liability, trucking litigation, insurance coverage and professional liability. Mike earned his Juris Doctor from Widener University School of Law and his B.A. from Rutgers University. He is a lifetime Delaware Valley resident and long-suffering Philadelphia sports fan who enjoys golfing, fishing and traveling with his wife. Mike can be contacted at 856-317-3658 or hornerm@whiteandwilliams.com

Ed Koch focuses primarily on the appellate process and consultation in state and federal courts in the areas of products liability, medical malpractice, class actions, insurance coverage and commercial business disputes. Ed earned his Juris Doctor, with honors, from the Florida State University College of Law and his B.A., *cum laude*, from Villanova University. Outside the office, he enjoys golf, movies, and being a dad to his three children. Ed can be contacted at 215-864-6319 or koche@whiteandwilliams.com.

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The First Trial

In May 1999, the first trial began in Commonwealth Court in Philadelphia. It was to be the longest jury trial in Pennsylvania history, not ending until August 2000. Plaintiffs presented multiple expert witnesses who testified about PCB's alleged health effects, the extent of PCB contamination in the building, and the source of that contamination ("off-gassing" of PCBs from building products.) Witnesses attested to the allegedly resulting damages ($125 million for a new building, $20 million for decontamination and demolition, $35 million for new furniture and a new computer system, and $50 million for relocation costs incurred during demolition and reconstruction). Monsanto countered with expert testimony that despite the Congressional PCB ban, epidemiological evidence failed to demonstrate that PCBs were a human health hazard, and that, in any event, PCB levels in the building were safe. Further, Monsanto contended that the source of the contamination was not "off-gassing" (because of PCBs well-known chemical stability and low vapor pressure) but rather the incineration of PCB–containing building products in the 1994 fire. Lastly, evidence showed that much of plaintiffs' claimed damages would have been incurred by the state anyway, even in the absence of alleged PCB contamination. After deliberating over 13 days, and just one hour after advising the Court that it was hopelessly deadlocked, the jury returned a verdict against Monsanto in the amount of $90 million.

The Supreme Court Reverses

In a landmark decision in May 2006, the Pennsylvania Supreme Court reversed. It granted judgment notwithstanding the verdict on over $100 million of plaintiffs' claimed damages, and remanded the case for a new trial on the remaining claims.

The Supreme Court found to be reversible error the trial judge's ruling that had permitted plaintiffs to seek recovery for fire-related contamination. The Supreme Court held that as a matter of law, the incineration of a product cannot be an "intended use" under strict product liability. The Supreme Court rejected plaintiffs' novel damage theory that would have allowed a windfall recovery for replacement costs in property damage cases (instead of the long-established measure of the lesser of repair costs or diminution in market value). Lastly, the Supreme Court threw out various categories of damage claims that had not been supported by appropriate expert testimony.

The Second Trial

In January 2007, almost seven years after the first trial ended, the second trial began. As before, plaintiffs' trial team was led by an out-of-state, nationally known mass and toxic tort trial lawyer. Plaintiffs used the same experts and presented much the same evidence as in the first trial. Monsanto recalibrated its trial strategy in light of the Supreme Court's "intended use" holding. It conducted only limited cross-examination of plaintiffs' PCB health effect experts, and decided not to call any of its three PCB health effect experts. In place of expert testimony, Monsanto used dozens of government memoranda, pronouncements, press releases and newsletters issued before Monsanto had been sued — documents that unequivocally gave the Transportation and Safety Building a clean bill of health. Because of Monsanto's truncated defense, the second trial lasted only five weeks — and this time, Monsanto won.

Another Appeal?

On July 3, 2007, a three-judge panel of the Commonwealth Court denied plaintiffs' post-trial motions, setting the stage for another possible appeal to the Supreme Court. Monsanto's appellate team, lead by White and Williams' Appellate Practice Group Chair, Kim Kocher, is confident that, this time, the jury's verdict will stand. Thus, after seventeen years of litigation, this case may, at long last, be nearing its final chapter.

Tom Goutman headed the White and Williams team which represented Monsanto Company. He can be reached at 215-864-7057 or goutmant@whiteandwilliams.com.

Federal Court Litigation

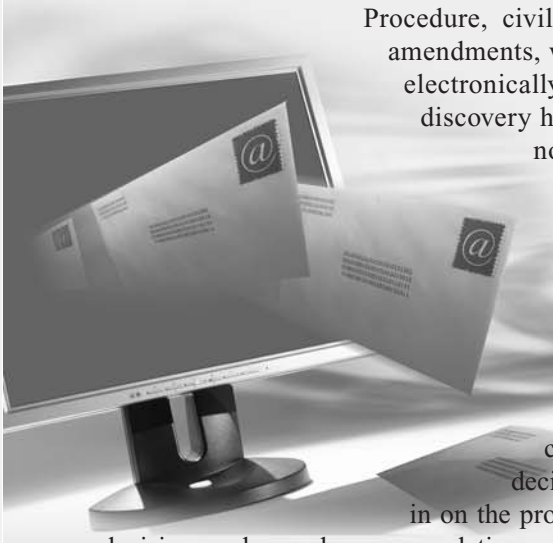
Preparing for Litigation in the Age of Electronic Discovery

by Richard A. Kolb and Gregory F. Brown

Recently, Senator Patrick Leahy (D. VT), Chairman of the Senate Judiciary Committee, made the following observation about the production of electronic documents in a high-level discovery dispute:

> [T]hey say these e-mails have not been preserved. I don't believe that. I don't believe that. You can't erase e-mails, not today. These e-mails have gone through too many servers. They can't say they have been lost. That is akin to saying the dog ate my homework. It doesn't work that way.

With the electronic discovery amendments to the Federal Rules of Civil Procedure, civil litigants may face similar scrutiny. The amendments, which specifically address the discovery of electronically stored information, signify that the law of discovery has come of age. Under the amended Rules, now in effect, the modern federal litigant faces a new set of responsibilities with respect to the maintenance and production of electronic data.



Until recently, the discovery of electronic data was governed by Rules that were drafted before the computer became the mainstay of the workplace. In lieu of rules specific to electronic information, courts throughout the country generated decisions and local rules. Private groups weighed in on the proper execution of electronic discovery. These decisions, rules, and recommendations encompassed a number of diverse approaches.

Recent Amendments to the Federal Rules of Civil Procedure

A more predictable system of electronic discovery is promised by the most recent amendments to the Federal Rules of Civil Procedure. On December 1, 2006, Federal Rules of Civil Procedure 16, 26, 33, 34, 37 and 45 were amended to accommodate for the unique characteristics of electronic information. The new Rules attempt to strike a balance between the right to obtain relevant electronic information and the burden of providing it.

Electronic data often contains highly relevant information. As Senator Leahy observed, it is also difficult to destroy. While most electronic information is arguably recoverable, the process of restoring and providing the data in usable form can be time-consuming and expensive, and may require the assistance of an independent consultant. Consequently, a litigant may face significant costs if a court requires it to produce inaccessible electronic data.

The new Rules allow a litigant to object to a request for an electronic information if the data is "not reasonably accessible because of undue burden or cost." If challenged, the objecting party must be prepared to substantiate such a claim. Even if evidence of undue cost is produced, the court may still compel the production of the information if the requesting party demonstrates good cause.

The amendments also acknowledge that the pre-production review of electronic data can be difficult and could result in the inadvertent disclosure of privileged information. Accordingly, the Rules now provide that the responding party may demand that the requesting party return or destroy inadvertently-disclosed information. The Rules include a procedure for resolving contested assertions of privilege. The Comments to the Rules advise parties to agree on their respective rights to make late assertions of privilege before the exchange of discovery. Such accords are colloquially referred to as "clawback agreements."

The Rules amendments further provide that the parties must agree on the practical aspects of the production of electronic information. Issues to be addressed by the parties include the form in which the electronically-stored data will be provided. A key consideration in determining whether a given form is acceptable is whether each party can equally access the information in the form provided. Another consideration is the discoverability of embedded data, or "metadata," which is hidden information about a document or data. Metadata can reveal when a document was created, who accessed it, what changes were made, and even who made them. That kind of information may be relevant, and the management of the discovery of metadata is an important consideration before and after the commencement of litigation.

Sanctions and the Preservation Obligation

Perhaps the most important aspect of the amendments are the changes to the sanctions rule. Generally, the sanctions rule penalizes litigants who fail to provide complete discovery. In their most drastic form, sanctions can determine the outcome of a case. Still, the new amendments prohibit sanctioning a party "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The Comment explains that the Rules now recognize that computer systems routinely delete or purge information in the ordinary course of operation, which is an essential function. The Comment defines such routine operation as "the alteration of and overwriting of information, often without the operator's specific direction or awareness."

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From the Chair…

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Ryan Udell concentrates his practice on general business matters, mergers, acquisitions and divestitures, corporate financings, structured finance transactions, and intellectual property matters. Ryan received his Juris Doctor, *magna cum laude*, from Temple University School of Law and his B.A. from Emory University. He is an active member of the Board of Directors of Federation Early Learning Services, a non-profit operator of early childhood development centers in the Philadelphia area. When not at work, Ryan enjoys spending time with his family and dogs. He can be contacted at 215-864-7152 or udellr@whiteandwilliams.com.

Bob Walsh devotes his practice primarily to representing insurance companies in complex insurance coverage litigation and providing claims advice involving environmental liabilities, asbestos, toxic tort and construction defects. Bob earned his Juris Doctor, *cum laude*, from Seton Hall University Law School, where he was a member of the *Seton Hall Law Review*. He received his B.A. from Rutgers College. When not at work or spending time with his family, Bob is active in leadership in his parish church and enjoys exercising and reading history. He can be reached at 215-864-7045 or walshr@whiteandwilliams.com.

Bruce Bell concentrates his practice on mergers and acquisitions, general corporate law, commercial transactions and agreements, securities law and antitrust matters. Bruce earned his Juris Doctor, *magna cum laude*, graduating second in his class, from The Dickinson School of Law and his B.S., *summa cum laude*, from The Wharton School of the University of Pennsylvania. In addition, he is a Certified Public Accountant. Bruce and his wife enjoy traveling, speaking and studying Italian, attending the theatre and spending time with their families and their dog. Bruce can be contacted at 215-864-6256 or bellb@whiteandwilliams.com.

Dave Bronstein concentrates his practice on construction defect cases and defends clients in cases involving construction accidents and defects and premises and products liability. Dave received his Juris Doctor from Widener Law School and a B.A. from The Pennsylvania State University. Outside the office, he has a passion for all things Philadelphia and enjoys volunteering as a tour guide for the City. Dave can be contacted at 215-864-7142 or bronsteind@whiteandwilliams.com.

Greg Capps focuses on the representation of insurance companies in contract disputes involving such issues as asbestos and environmental and long-term exposure to harmful substances. Greg received his Juris Doctor from Widener University School of Law and his B.A. from Louisiana State University. Outside of the office, he is extensively involved in his community and currently serves as President of the Board of Directors of Cheltenham Sports, a non-profit recreational and sports organization and is head coach of a girls travel soccer team. In his free time, Greg enjoys downhill skiing and biking with his three children, college football and cooking. He can be contacted at 215-864-7182 or cappsg@whiteandwilliams.com.

Our Commitment to Diversity

Firm Culture

We believe that diversity broadens and enriches our work environment. It produces creative thinking and innovative solutions. Diversity allows us to better serve our clients.

The White and Williams Diversity Committee helps create and implement strategies to recruit, develop, and retain attorneys and staff from diverse backgrounds. Our Diversity Committee's mission reflects the Firm's commitment to hiring and retaining individuals who reflect today's diverse and dynamic society.

Led by Committee Chair, Wes Payne, the Diversity Committee's good work resulted in White and Williams being named to the 2007 list of "Top 100 Law Firms for Diversity" by *MultiCultural Law*, the magazine for diversity in the legal profession. Beyond his involvement in our Diversity Committee and his busy litigation and insurance practice, Wes is actively committed to diversity issues outside of the Firm. He served as moderator at the 1st Annual Diversity Summit, Report of Law Firms and Corporate Counsel in Pennsylvania hosted by the Pennsylvania Bar Association. Wes also published "Mentoring and Retention of Minority Attorneys" in American Lawyer Media's *The Legal Intelligencer* and is a Board Member of the Philadelphia Diversity Law Program.

Complementing the good work of our Diversity Committee, members of our diverse work force are frequently recognized for their contributions to the legal and local communities. Associates Nicole Whittington and Louisa Chen were recently named as "Minorities on the Verge" by *The Legal Intelligencer* and *Pennsylvania Law Weekly*. The "Minorities on the Verge" list highlights minority attorneys who, through the quality of their work and their impact on their firms, are rising to prominence in the state legal community.

White and Williams welcomes your partnership in enhancing diversity. For information on our commitment to diversity, contact Wes Payne at 215-864-7076 or paynew@whiteandwilliams.com.

Preparing for Litigation in the Age of Electronic Discovery

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Although the new sanctions Rule provides some protection to a litigant who loses discoverable information due to a computer system's routine operation, avoiding sanctions for failing to produce a document may not be as simple as claiming that the "computer system erased it." The Comment warns that "good faith operation" requires a party to prevent the loss of all electronically-stored information that is subject to a "preservation obligation."

The Comments' explanation of the preservation obligation is nebulous, but a reliable definition appears in the influential *Zubulake* cases (a series of decisions from the United States District Court for the Southern District of New York). There, the court explained that the preservation obligation attaches when a party reasonably knows or anticipates that the information could be "material to a potential legal action." *Zubulake* suggests that those who "know" or "reasonably anticipate" becoming involved in federal litigation must take affirmative steps to preserve electronic information long before suit is filed.

How to Prepare for Electronic Discovery

An organization can prepare to fulfill obligations under the new Rules by implementing policies and procedures for the systematic preservation of electronic data. The Comments to the Rules advise that a "litigation hold" should be instituted as soon as litigation is reasonably anticipated. One aspect of a litigation hold is prompt intervention to prevent a computer system's routine destruction of information that would otherwise occur in the ordinary operation of the system. Another step is to notify employees to preserve potentially discoverable data. An organization can also manage its preservation obligation by developing and implementing a document retention system that is designed with an eye toward the statute of limitations applicable to certain documents. A team approach, involving computer specialists, managerial staff, and experienced litigation counsel, will help create and implement the best policy.

The Comments to the new Rules imply that the existence of a such a "litigation hold" policy demonstrates good faith on the part of a non-producing party. That good faith weighs against the imposition of sanctions if the electronic data is nonetheless lost. A well-conceived policy may also persuade a court that certain information cannot be produced without undue burden or cost.

While the new amendments to the Federal Rules of Civil Procedure regarding electronically stored information represent a significant development in the law of discovery, the law's finer points have yet to be developed. In the meantime, a safe strategy is to implement a policy that addresses the management and retention of electronic data and to instate a litigation hold policy that can be applied in the event litigation is anticipated. Such steps will reduce the possibility of sanctions, cut costs, and perhaps save an organization from claiming, in Senator Leahy's words, that "the dog ate its homework."

Dick Kolb is a senior member of our Healthcare Law Group and has been an active trial lawyer for over thirty years. He can be contacted at 215-864-7112 or kolbr@whiteandwilliams.com.

Greg Brown focuses his practice on medical malpractice litigation in the state and federal courts in Pennsylvania and New Jersey. He can be contacted at 215-864-7150 or browng@whiteandwilliams.com.

Preparing for the Future

Welcome Back, Michael Olsan

White and Williams is pleased to welcome back Michael S. Olsan as a Partner in our Reinsurance Practice Group. Michael's homecoming, after spending two years at another Philadelphia law firm, signifies the implementation of two key strategies. First, Michael's vast experience in Reinsurance will strengthen an already thriving practice area. Second, his return sets the stage for a succession plan for our Reinsurance Practice Group, currently led by Tom Allen.

The Reinsurance Group continues to grow and Tom will remain as its Chair. However, since a proactive and long-range succession plan is critical to the continued success of the group, Michael's return is strategically timed. He returns very eager to work closely with Tom and the firm's clients as they prepare for the future of the practice.

Michael received his Bachelor of Arts from Franklin and Marshall College and his Juris Doctor, *summa cum laude*, from Syracuse University College of Law. At Syracuse, Michael was the Technical Editor of the *Syracuse Law Review* and was elected to the Order of the Coif. He is licensed to practice in Pennsylvania and New Jersey and is admitted to appear before the U.S. District Court for the Eastern District of Pennsylvania and the District of New Jersey. Michael is a member of the American, Pennsylvania, New Jersey and Philadelphia Bar Associations and ARIAS-US. He is also a fellow of the Academy of Advocacy of Temple University. In 2007, Michael was selected in a survey of his peers as a Pennsylvania "Super Lawyer" by *Law & Politics* magazine. In 2006 and 2007, he was a featured speaker at the Robert W. Strain Reinsurance and Contract Wording Textbook Training Course.

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Insurance Coverage

Avoiding the Knee-Jerk in Insurance Policy Interpretation

by Randy J. Maniloff and Jennifer L. Wojciechowski

As insurance coverage cases go, this one looked like the court had been lobbed a softball. At issue was the interpretation of an insurance policy exclusion which the judge concluded "does not make sense" and called an "absurdity." Any first-year law student knows that if a provision in an insurance policy is ambiguous — and what else could a "nonsensical" provision be? — the language is construed against the insurer which drafted the text. In short: the insurer loses. In the world of insurance policy interpretation, this is as black letter as it gets. But despite all that, a judge in the Eastern District of Pennsylvania recently ruled in *AstenJohnson v. Columbia Casualty Company* that this linguistically-challenged insurance policy exclusion still applied so as to preclude coverage — a lot of coverage. In fact, as the front page headline of Philadelphia's *The Legal Intelligencer* newspaper declared: "Insurers Win Case That Could Have Cost $52 Million."

So how could this have happened? How could a decision that seemingly would not require the court to break a sweat turn out this way? The answer is that while ambiguity in an insurance policy is certainly never a good thing for the insurer's case, it may not be a *fait accompli* that the insurer must write a check. As Judge Lawrence F. Stengel made clear in *AstenJohnson*, there may be more to insurance policy interpretation than the widely-held (and sometimes knee-jerk) reaction that if a contract provision is ambiguous, it is automatically construed against the insurer as the drafter.

AstenJohnson is a lengthy and fact-intensive decision. At issue was the availability of insurance coverage for numerous claims alleging bodily injury on account of exposure to asbestos fibers contained in a product that was manufactured by AstenJohnson. At the core of this 122-page decision was the interpretation of a liability insurance policy exclusion that provided, in pertinent part, as follows: "It is agreed that this policy does not apply to any claim alleging an exposure to or the contracting of asbestosis or any liability resulting therefrom" (emphasis added).

Interpretation of the Asbestosis Exclusion

The parties asserted that the Asbestosis Exclusion was unambiguous, but for conflicting reasons. AstenJohnson argued that it was limited to claims that alleged injury due to the specific disease of "asbestosis" (interstitial fibrosis or scaring of the tissue of the lungs caused by the inhalation of asbestos fibers). Thus, they contended, the exclusion would not apply to claims for other asbestos-related diseases, such as lung cancer or mesothelioma. The insurers argued that the exclusion applied to all asbestos-related claims. Judge Stengel decided in favor of the insurers.

In so ruling, the court acknowledged that the term "contracting of asbestosis" appeared to limit the exclusion to solely claims alleging that specific asbestos-related disease. However, the court was also mindful that the phrase "exposure to … asbestosis" was "nonsensical" because a person can not be injured from exposure to a person with asbestosis. But instead of throwing up his hands and declaring the exclusion ambiguous, Judge Stengel examined the phrase "exposure to … asbestosis" in the context of AstenJohnson and its products.

In that light, the judge concluded that the words can be given a plausible meaning: "A person must be exposed to asbestos to create the risk of contracting asbestosis. Given the exclusion's language barring claims that allege the contracting of the disease itself, the 'exposure to' language can only refer to the cause of the disease (the mineral asbestos) in order to give meaning to each word of the exclusion."

Judge Stengel then went a step further and noted that Pennsylvania law also allows for an examination of trade custom and usage, course of performance and the circumstances surrounding the making of the insurance policy to ascertain the parties' intent as evidenced in the policy language. This examination also resulted in the conclusion that the Asbestosis Exclusion was intended by the parties to exclude all asbestos-related claims.

For example, on the subject of trade custom and usage, the court concluded that during the relevant time period, early 1980s, the term "asbestosis" was regularly used as a catch-all for all asbestos-related diseases. Looking at course of performance, the court was persuaded that AstenJohnson's failure to tender a single non-asbestosis claim to Columbia Casualty for twenty years — while seeking coverage from many other insurers — supported the conclusion that the insured understood that the Asbestosis Exclusion was intended to exclude all asbestos-related claims. Lastly, an examination of the circumstances surrounding the making of the insurance policy revealed that an "asbestosis-only" exclusion would have given an insurance company very little protection, as plaintiffs would often allege asbestosis, along with other asbestos-related injuries. Because AstenJohnson and Columbia Casualty both knew this, they could have only intended for the Asbestosis Exclusion to exclude all asbestos-related claims.

Ambiguity in Insurance Policies

While *AstenJohnson* asserted that the Asbestosis Exclusion was in fact unambiguous, the decision may provide a lesson for the frequent situation in which an insured argues that coverage is owed because a policy provision is "ambiguous".

Judge Stengel stated that, whether the Asbestosis Exclusion is unambiguous or ambiguous, Pennsylvania law permitted examination of a variety of extrinsic factors to ascertain the parties' intent in the policy language. Despite citing extensive authority, not all courts in Pennsylvania seem to agree on the do's and don'ts in this area.

For example, not long ago the Pennsylvania Supreme Court addressed whether an exclusion in an automobile policy for "using a car…to carry people or property for a fee" applied to an accident taking place while a pizza was being delivered. Unlike the lengthy analysis and examination of extrinsic facts in *AstenJohnson*, the Pennsylvania high court delivered a swift answer — in 30 minutes or less: "The instant matter is a prime example of language in a policy that can be understood in more than [sic] way. [Plaintiff] prefers one interpretation; [the insurer] favors the other. Regardless of which one is 'right' or 'wrong,' the fact is that because each interpretation is reasonable, the exclusionary term is ambiguous, and we must construe it in favor of the insured." *Prudential Property and Casualty Co. v. Sartno*, 903 A.2d 1170, 1177 (2006). *See also Kvaerner Metals v. Commercial Union*, 908 A.2d 888, 897 (Pa. 2006) ("When the language of the policy is clear and unambiguous, [we must] give effect to that language. Alternatively, when a provision in the policy is ambiguous, the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage.") (citations omitted).

On the other hand, the Pennsylvania Supreme Court in *Sunbeam Corporation v. Liberty Mutual Insurance Company*, 781 A.2d 1189 (Pa. 2001) held that consideration of the custom in the industry or usage in the trade is relevant and admissible in construing an insurance policy and is not dependent upon any obvious ambiguity in the words. In a dissenting opinion, Justices Saylor and Castille had still another take on the rule, and one that differs from those pronounced by the Supreme Court in *Sartno* and *Kvaerner Metals*: "[O]nly if the policy language is ambiguous is resort to be made to extrinsic evidence." *Sunbeam* at 1195.

As *AstenJohnson* and certain Supreme Court decisions demonstrate, Pennsylvania's principal rule for interpreting insurance policies may be more gray than black. While insurers should of course strive to avoid ambiguities in their policies, simply because a provision "does not make sense" may not be the end of the story.

Randy J. Maniloff concentrates his practice in the representation of insurers in coverage disputes over various types of claims. He can be contacted at 215-864-6311 or maniloffr@whiteandwilliams.com.

Jennifer Wojciechowski focuses her practice on the representation of insurers in coverage disputes over various types of claims. She can be contacted at 215-864-7019 or wojciechowskij@whiteandwilliams.com.

Andy Susko Takes the Presidency of the Pennsylvania Bar Association

Andrew F. Susko, Chair of our Litigation Department, became the 113th President of the Pennsylvania Bar Association (PBA) during the organization's Annual Meeting at The Park Hyatt Philadelphia at the Bellevue on June 21, 2007. Andy's top priority as PBA President will be to lead efforts to make the justice system more accessible to all citizens, regardless of their income. "The fairness of Pennsylvania's justice system is best measured by its availability to the poor," said Andy. "I challenge every Pennsylvania lawyer to aspire to have at least one active case representing a client unable to pay."

Andy will also spearhead a statewide movement to urge the retention and election of competent, qualified judges in the fall election. Under his leadership, the PBA will take steps to educate voters about judicial candidates and their qualifications. "It's vitally important to the health of the legal profession and the justice system of the Commonwealth that competent, qualified judges get a fair look by the voters."

An active trial lawyer in the areas of insurance fraud, disability, bad faith, and medical malpractice, Andy has always carved out time for professional service both in Philadelphia and around the state. He is a former President of the Pennsylvania Defense Institute, past-Chair and present member of the PBA House of Delegates, and a past-Chair of the PBA Young Lawyers Division. He serves as the Co-Chair of the PBA Task Force on the Judicial System. He has served as the Chair of many PBA Committees, including the PBA "Project Peace" subcommittee, which worked with the Attorney General's Office to establish a statewide dispute resolution program for elementary and middle school students. Active in the Philadelphia area pro bono community, he serves on the board of the Legal Clinic for the Disabled and was a member of the board of the Homeless Advocacy Project. Even with his new statewide duties, and aided by his Partners and Associates, Andy continues his busy practice.

Andy is a summa cum laude graduate of The Florida State University and a graduate of the Villanova University School of Law, where he was a member of the Law Review and was selected for its Board of Editors.

You can reach Andy at 215-864-6228 or suskoa@whiteandwilliams.com.

New and Notable

Gary Biehn, Chair of our China Business Group, served as moderator for "China Town Hall: Location, Connections and National Resources" hosted by the **World Affairs Council of Philadelphia**. He also participated in **First China International Private Equity Forum Tianjin Binhai New Area, People's Republic of China**.

Marc Casarino, in our Creditors' Rights Group, presented "Practical Tips for Avoiding Employment Claims" to **Delaware State University**.

Marie Cespuglio, in our Healthcare Group, presented "Documentation to Deposition" to the Southeastern PA chapter of the **Association of Women's Health, Obstetrical and Neonatal Nurses**.

Merritt Cole, Chair of our Securities Law Group, was appointed Co-Chair of the Marketing Committee of the newly-formed Law Practice Management Division of the **Philadelphia Bar Association** and to the 2007 Nominations Committee of the Philadelphia Bar Association. He also participated in the panel discussion "Private Placements" hosted by the Pennsylvania Bar Institute and lectured at the **Community College of Philadelphia** on "Introduction to the Securities Laws — Practical Aspects".

Nancy Conrad, in our Labor and Employment Group, presented "Legal Issues: Co-ops, Internships and Volunteers" at the Annual Conference of the **National Association of Colleges and Employers** and "Women, Work and the Law" to the Executive Women's Council of the **Greater Lehigh Valley Chamber of Commerce**. She also served as captain of the **Pennsylvania Bar Association** Women in the Profession Team for the Cure at the **Susan G. Komen Breast Cancer Walk** in Philadelphia.

John Encarnacion, in our Property-Subrogation Department, has been appointed to the Editorial Board of "YL", the young lawyer supplement of **The Legal Intelligencer**. Also, he was named by the **Philadelphia Bar Association** Young Lawyer Division as liaison for the **Asian American Bar Association of the Delaware Valley**.

Chuck Eppolito, in our Healthcare Group, was elected Secretary of the **Pennsylvania Bar Association** and was presented with the Michael K. Smith Excellence in Service Award. The Award is given by the Pennsylvania Bar Association to a young lawyer who, through his or her exemplary personal and professional conduct, reminds lawyers of their professional and community responsibilities.

Shari Gekoski, in our Business Department, was presented with the Excellence Award by the **American Red Cross Penn-Jersey Region**. The award was in recognition Shari's coordination of the firm's participation in the American Red Cross Legal Challenge.

Bob Kargen, Chair of our Creditors' Rights Group, presented "Anything But Bankruptcy" at the Mid-Atlantic Conference of the **American Bankruptcy Institute**.

Bill Kennedy, Mike Plevyak, Jason Archinaco, and **Steve Forry,** all in our Litigation Department, presented a seminar on "Indemnity and Insurance Obligations in Contracts and Leases" to **Chubb Insurance** claims, underwriting, and broker personnel in Pittsburgh, Pennsylvania and Chesapeake, Virginia.

Ed Koch and **Chuck Roessing**, both in our Litigation Department, presented a continuing education seminar "Update of Medical Malpractice Reforms in Pennsylvania" to **Zurich Insurance** claims and underwriting personnel.

Dick Kolb, in our Healthcare Group, presented "The Trial of Medical Malpractice Cases" to the **Pennsylvania Bar Institute**.

Randy Maniloff, in our Commercial Litigation Department, was a speaker at the 2007 Committee Rendezvous of the **Brokers and Reinsurance Markets Association** and addressed the **Association of Insurance & Financial Analysts**. He also published "Coverage Litigation and the Magic 8-Ball; Difficulties in Predicting The Outcome of Coverage Disputes" in ***Mealey's Litigation Report: Insurance***.

Rich Maurer, in our Litigation Department, and his wife Judy Song, gave a recital for cello and piano in conjunction with the display of more than 300 paintings by Dolya Goutman, a noted Philadelphia artist. The event was part of the **Fairmount ArtsCrawl**, a community-wide event featuring the art, music and other cultural resources of the Fairmount neighborhood of Philadelphia.

Pete Mooney, in our Commercial Litigation Department, was named to the 2006 Pro Bono Honor Roll of the **Philadelphia Court of Common Pleas**.

Platte Moring, Managing Partner of our Allentown office, was the Featured Speaker at the 100th Anniversary of the **Allentown Flag Day Association**.

John Pauciulo, in our Business Department, was a panelist at the Executive Roundtable "Funding the Future: Private Equity and Your Company's Next Step" hosted by **KYW Newsradio**.

Bob Pindulic, in our Litigation Department, presented "Managing a Disability Insurance Law Practice" at the 10th National Advanced Forum on Resolving Disability Insurance Claims & Litigation of the **American Conference Institute**.

David Ragonese, in our Litigation Department, has become an adjunct professor of law in the Trial Advocacy Program at **Seton Hall University School of Law**.

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LITIGATION

U.S. Supreme Court Further Limits the Scope of Punitive Damages Awards

by Edward M. Koch and William L. Doerler

The United States Supreme Court has imposed further limits on punitive damage awards. In *Phillip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), the Court held that the U.S. Constitution's Due Process Clause prohibits states from awarding punitive damages to punish a defendant for injuries that it purportedly inflicts upon non-party strangers to the litigation.

Prior Limitations on Punitive Damages

The Supreme Court has previously discussed the constitutional limitations on the imposition of punitive damages in *Gore v. BMW*, 517 U.S. 599 (1996) and *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). These cases emphasize the need for states to avoid the arbitrary determination of an award's amount and impose limits on a jury's discretionary authority. As the Court noted in *BMW*, an arbitrary system deprives the defendant of "fair notice . . . of the severity of the penalty that a State may impose." The Court expressed concern that large awards may be an indication that the punishment reflects not an application of the law, but one state's, or one jury's, caprice or policy choice.

In *BMW*, the Court outlined a three-party test to evaluate the constitutionality of punitive damages awards. The test looks to (1) the degree of reprehensibility of the defendant's misconduct, and (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded, and (3) the difference between the punitive damages awarded and the civil penalties authorized by statute or in comparable cases.

Although the Court has not established a bright-line rule for determining when a punitive damages award is so excessive that it violates the Constitution, the Court stated in *Campbell* that "few awards exceeding a single-digit ratio between punitive damages and compensatory damages . . . will satisfy due process."

The Court has also addressed whether a jury can consider a company's business practices, as a whole, when it determines the level of punitive damages. In *Campbell*, the Court held that it was improper for the jury to consider the insurer's national operations, reasoning that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."

The Williams Case

Williams arose out of the death of a heavy cigarette smoker. The jury found that Phillip Morris knowingly and falsely lead the smoker to believe that cigarette smoking was safe. At trial, the judge declined Phillip Morris' request for a jury instruction which would have told the jury that, although it could consider the extent of harm to others when analyzing the reprehensibility of the company's conduct, it could not punish the company for the impact of its alleged misconduct on other persons who were not before the court. The jury awarded the smoker compensatory damages in the amount of $821,000 (including approximately $800,000 in non-economic damages), and a whopping $79.5 million in punitive damages. After trial, however, the judge determined that the award of $79.5 million dollars was excessive, and reduced the award to $32 million. Both sides appealed.

Consistent with the rationale set forth in *Campbell*, the Supreme Court held that the U.S. Constitution's Due Process Clause forbids a state from using a punitive damages award to punish a defendant for injuries that may have been inflicted on non-parties. The Court reasoned that permitting an award on that basis is unconstitutional because the defendant is not given an opportunity to present every available defense with respect to non-parties. For instance, in *Williams*, Phillip Morris had no opportunity to defend against purported injuries to nonparties by showing that the nonparties were not entitled to damages because they knew that smoking was dangerous or that they had not relied on Phillip Morris' statements to the contrary.

The Court further held that permitting a jury to award damages to punish the defendant for injuries to non-parties would create a limitless standard for awarding punitive damages. The jury would have to speculate with respect to how many victims there were, the severity of their injuries, and the circumstances of how their injuries occurred. As the Court noted, a standard that creates risks of uncertainty, arbitrariness, and lack of notice raises fundamental due process concerns.

Pursuant to *Williams*, evidence of actual harm to non-parties is admissible under the "degree of reprehensibility" prong of the *Gore* test to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the public. The jury may not, however, fashion a damages award, which punishes the defendant directly for the harm it allegedly caused to nonparties. A damages award designed to punish the defendant for injury to parties who are not before the court violates the Due Process Clause.

The Impact of *Williams*

The Supreme Court's decision in *Williams* clarifies the uses to which evidence of purported injuries to non-parties may be used. *Williams* also reaffirms that punitive damages awards are limited to punishment for the conduct causing harm to the specific plaintiff before the court.

Consistent with *Campbell*, the *Williams* decision should be helpful when litigating whether punitive damages awards are unconstitutionally excessive. By specifically limiting the punitive damages award to punishment for harm caused to the specific plaintiff, defendants should have a stronger argument that there are very few circumstances where punitive

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damages awards should exceed a single-digit ratio. Still, defendants exposed to punitive damages must bear in mind that the evidence of harm to others is admissible as to "reprehensibility." Although the jury will be instructed to base punitive damages on the harm caused to the plaintiffs at bar, hearing evidence of harm to others may lead the jury to the impose higher punitive damages awards than if the evidence were not admitted.

Going forward, courts will need to fashion appropriate jury instructions to limit the evidence associated with punitive damages. Although some statutes, such as Pennsylvania's medical negligence punitive damages statute, expressly limit punitive damage assessments to consideration of "harm to the patient," other statutes do not contain similar limitations. For instance, Pennsylvania law permits punitive damages for certain civil rights violations, but does not set forth a standard for awarding such damages. Thus, trial courts handling cases that do not contain express limitations will need to ensure that they give proper limiting instructions regarding punitive damages, which limit the punitive damages award to amounts, which punish the defendant for damages caused to the plaintiff.

Ed Koch is a member of our Appellate Practice Group and his practice consists primarily of consultation in state and federal courts. He can be contacted at 215-864-6319 or koche@whiteandwilliams.com.

Bill Doerler's practice includes medical malpractice, toxic torts, product liability, premises liability, insurance coverage, and appellate litigation. He can be contacted at 215-864-6383 or doerlerw@whiteandwilliams.com.

White and Williams Opens the Door to Business Opportunities in China

We are pleased to announce a new, strategic alliance that will greatly facilitate our clients' interests in exploring business opportunities in China. White and Williams has formalized an arrangement with the highly-regarded Xue Law Firm, a ten attorney commercial practice firm based in Shanghai, China.

Following China's cultural revolution in the 1970's, Weiyong Xue, Managing Partner of the Xue Law Firm, became one of the first legal practitioners in China. Xue was a member of Shanghai First Law Firm, the first law firm established in China, until he founded the Xue Law Firm in 2001. Xue's practice includes civil litigation and complex business transactions. He represented the Shanghai government in its first joint venture negotiation with a German automobile company.

Gary Biehn, Chair of both our Business Department and China Business Group, spearheaded White and Williams' involvement in services related to the Chinese market. "Gary was first in his class when he earned his degree in Economics and he has keen interest in the global economy," said George Hartnett, Chair of the Executive Committee. "He watched the economies in Asia very closely and started to build his China practice long before most lawyers even thought about that part of the world." Our China Practice Group was established in 2003 and the Shanghai alliance is a necessary step in the expansion of our China-related services. "We have been assisting our U.S. clients in pursuing business opportunities in China for some time," commented Gary Biehn. "Our alliance with the Xue Law Firm is a natural progression for us — we need to have attorneys in China on a continual basis."

For over a year, White and Williams attorneys have been working on a cooperative basis with the Xue Law Firm. White and Williams' Chunsheng Lu, a Shanghai native who holds a Chinese law degree, spent ten weeks last summer working out of the Xue Law Firm's offices.

The Shanghai alliance provides us with a widely-respected law firm in the Chinese marketplace. Not only will this alliance allow us to better serve U.S. companies going to China, but it will provide a venue for serving China-based companies seeking to make investments in the United States. "We have been assisting our U.S.-based clients with their China operations and the Shanghai alliance will provide us with a vehicle to serve Chinese companies looking to the U.S," said Hartnett. "We believe the Shanghai alliance will make the Chinese market a two-way street for us — we and the Xue Law Firm can help companies coming and going."

Expansion in New York

Welcome, Judith Sullivan

White and Williams is pleased to welcome Judith J. Sullivan as a new Partner in our Business Department. Judith represents high-profile international clients in their cross-border transactional, general business counseling and litigation needs. She serves clients in such varied industries as manufacturing, airline, publishing, service, banking, retail, entertainment, software and real estate. Some of Judith's international clients are headquartered as far afield as Northern Europe, including Iceland, and the United Kingdom, Australia, and the Middle East.

Judith speaks and writes for leading trade journals and continuing legal education providers. She is currently the president of the Transatlantic Business Council, an independent not-for-profit organization offering the opportunity to create links between the New Jersey/New York business community and the European community. She is active in the leadership of a number of professional organizations promoting international trade and the advancement of women to high levels of business, the professions, and government. Judith also sits on the advisory boards for Northfork Bank and Bank of America. She has taught Remedies and Commercial Law for five years as an adjunct professor at Seton Hall University Law School.

Judith received her Bachelor of Arts with high honors from Rutgers University where she was also inducted into the National Honor Society for Political Science. She received her Juris Doctor from Seton Hall University Law School, graduating in the top 10% of her class. Judith clerked for the Honorable Robert E. Tarleton of the General Equity Division of the New Jersey Superior Court. She is admitted to practice law in New York, Florida, New Jersey and the District of Columbia and before several major federal circuit and district courts.

Judith can be reached at 201-368-7214 (Paramus), 212-631-4414 (New York) or sullivanj@whiteandwilliams.com.

New and Notable

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Tom Rogers, Chair of our Real Estate and Institutional Finance Group, chaired the state mandated **Local Tax Study Commission for Haverford Township**. The Commission was mandated by Act 1 of 2006 requiring school districts in Pennsylvania to consider imposing an earned income tax or personal income tax as a method to shift school taxes away from real estate taxes.

Judith Sullivan, in our Business Department, led a Trade Mission to London as President of the **Transatlantic Business Council**. Also, she gave a speech to **Seton Hall University Law School** sharing her insights with the International Law Society.

Jim Yoder, in our Creditors' Rights Group, was elected to the Board of Trustees for **Congregation Beth Emeth** in Wilmington, DE.

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Pennsylvania Insurance Law

Bad Faith Blotter

Insurers: make sure your law library includes these notable decisions about bad faith and extra-contractual damages.

- *Toy v. Metropolitan Life Insurance Company,* 2007 WL 2048931 (Pa.) (July 18, 2007): The Pennsylvania Supreme Court held that the bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371, does not apply to claim arising from an insurer's allegedly deceptive conduct in soliciting the insured to purchase the insurance. *See also*, *Novinger Group, Inc. v. Hartford Insurance Company*, 2007 WL 1450396 (M.D.Pa.) (Conner, J.) (May 16, 2007).
- *Hollock v. Erie Insurance Exchange*, 588 Pa. 231, 903 A.2d 1185 (2006): The Pennsylvania Supreme Court passed an opportunity to clarify statutory bad faith law by dismissing an appeal without making a decision. Left unanswered by the Court's dismissal of the case (the appeal of which it had previously accepted) are whether the Bad Faith Statute (42 Pa. Cons. Stat. Ann. § 8371) encompasses conduct that occurs during the bad faith litigation itself, and what limits there may be on a punitive damages award. Chief Justice Ralph Cappy wrote a strong dissent wherein he opined that an insurer's duty to act in good faith to an insured ends with the start of the bad faith suit. He also suggests that the only relevant conduct to be considered is the conduct of the insurer during the claim handling process; misconduct during the course of the litigation may be addressed in other ways and by other means.
- *McPeek v. Travelers Casualty and Surety Company of America,* 2007 WL 1875801 (W.D.Pa.) (McVerry, J): Under *Birth Center v. The St. Paul Companies, Inc.*, 567 Pa. 386, 787 A.2d 376 (2001), an insured may pursue both statutory damages (attorneys fees and punitive damages) under 42 Pa. Cons. Stat. Ann. § 8371 and compensatory damages under common law bad faith (a claim for breach of the implied contractual duty to act in good faith); *see also, Kakule v. Progressive Casualty Insurance Company*, 2007 WL 1810667 (E.D.Pa.) (Kelly, J.)
- *Employers Mutual Casualty Company v. Loos*, 476 F. Supp. 2d 478 (W.D. Pa. 2007) (Conti, J.): Where an insurer moves for summary judgment, the insured must set forth evidence which could be deemed "clear and convincing" evidence.

Attorneys throughout White and Williams' eight offices defend insurers against bad faith, unfair trade practices, and other extra-contractual damages claims. Contact Bill Kennedy at 610-240-4703 or kennedyw@whiteandwilliams.com, for more information.

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