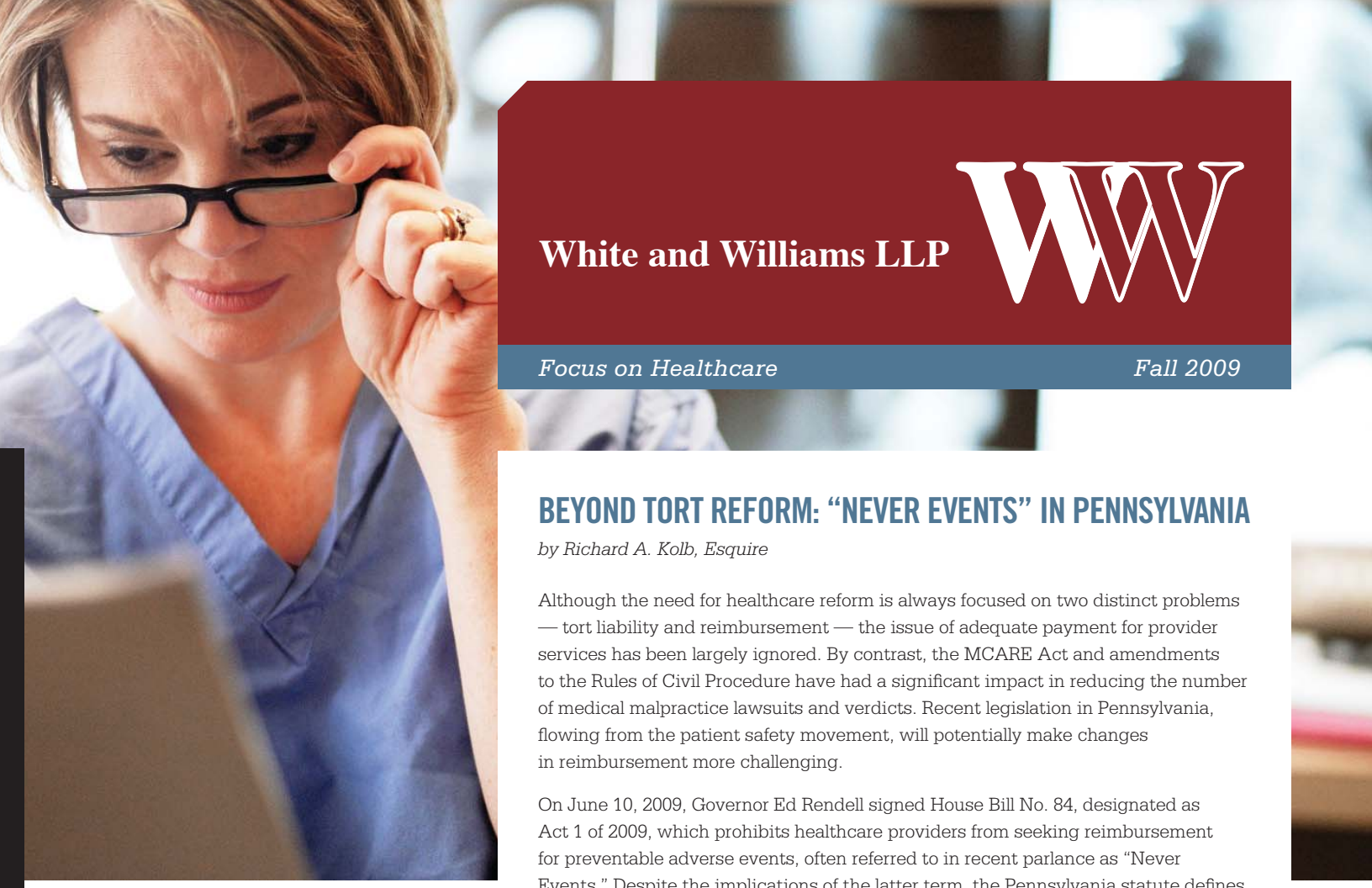

White and Williams LLP

Focus on Healthcare *Fall 2009*

BEYOND TORT REFORM: "NEVER EVENTS" IN PENNSYLVANIA

by Richard A. Kolb, Esquire

Although the need for healthcare reform is always focused on two distinct problems — tort liability and reimbursement — the issue of adequate payment for provider services has been largely ignored. By contrast, the MCARE Act and amendments to the Rules of Civil Procedure have had a significant impact in reducing the number of medical malpractice lawsuits and verdicts. Recent legislation in Pennsylvania, flowing from the patient safety movement, will potentially make changes in reimbursement more challenging.

On June 10, 2009, Governor Ed Rendell signed House Bill No. 84, designated as Act 1 of 2009, which prohibits healthcare providers from seeking reimbursement for preventable adverse events, often referred to in recent parlance as "Never Events." Despite the implications of the latter term, the Pennsylvania statute defines a "preventable serious adverse event" as "an event…*that is within the healthcare provider's control to avoid, but that occurs because of an error or other system failure."* The list of so-called "Never Events" established by the National Quality Forum and adopted in large part by the Department of Public Welfare includes many categories that are only vaguely defined, without any concept of fault. (*i.e.* the intra-operative or immediate post-operative death of an ASA Class I patient, injury or serious disability associated with a product malfunction, injury resulting from attempted suicide, serious injury associated with a fall, and maternal death or serious injury associated with labor and delivery in a low-risk pregnancy). Although incidents of this nature are unwanted events, they may nonetheless be complications that are unavoidable or such that did not result from any negligent act or omission on the part of the healthcare providers involved. Fortunately, the new Pennsylvania statute acknowledges this reality and proscribes reimbursement only for events that are "within the healthcare provider's control to avoid."

One result from this statutory language is that the decision for reimbursement, hinging on what events were avoidable, may well be matters that are disputed, once regulations and policies are fully implemented by the Department of Public Welfare. Administrative appeals and litigation may well be necessary in an effort to assure fair reimbursement. Such claims for review will be based on essentially the same issues that form the basis for defending professional liability actions. The determination of whether a serious adverse event was avoidable should involve whether the appropriate standard of care was followed or breached in the particular circumstances presented. It remains to be seen whether DPW or other administrative agencies will apply a higher standard as to what is "within the healthcare provider's control to avoid" for reimbursement purposes. Act 1 was effective as of August 10, 2009 and will include any regulations published by DPW in the Pennsylvania Bulletin. The separate provisions of the statute and applicable regulations pertaining to nursing homes will take effect in one year from the date of enactment.

For more information regarding these new changes, please contact Mr. Kolb at 215.864.7112 or kolbr@whiteandwilliams.com.

IN THIS ISSUE…

COURT WATCH

ANNA BRYAN, *Partner, Philadelphia Office*

Anna Bryan received a defense verdict in Wyoming County Court of Common Pleas in a complex obstetrical case involving the death of a 28-week-old infant four hours after delivery at home. Plaintiff's theory at trial was that the mother, a chronic schizophrenic, showed clear signs of preterm labor, including vaginal bleeding, which were allegedly ignored by the defendant obstetrician, and that he should have personally evaluated plaintiff the evening she first appeared at a nearby emergency department. Plaintiff presented expert testimony suggesting that the preterm baby, if born at the hospital rather than at home, would likely have survived. Ms. Bryan presented evidence that the mother was not in preterm labor at the times in question, which was challenging since it was conceded that plaintiff did experience early labor caused by a partial placental abruption. A key medical fact was the timing of abruption. Through defense experts, using computer graphics and photographs of the placental pathology, Ms. Bryan was able to establish that the placenta showed clear signs of chronic poor perfusion, but that the abruption itself was of an acute nature and not clinically evident at the times Plaintiff alleged. The defense presented expert witnesses in obstetrics, psychiatry and placental pathology. Over 20 motions *in limine* were heard before trial on multiple issues, with multiple legal issues briefed by **Mary Dixon, Esq.** of our appellate department. Ms. Bryan was assisted at trial by associate **Mary Kay Plyter, R.N., Esq.**

Ms. Bryan can be contacted at 215.864.6207 or bryana@whiteandwilliams.com.

CHARLES EPPOLITO III, *Partner, Philadelphia Office*

Charles Eppolito III obtained a defense verdict in a medical malpractice action tried in the Dauphin County Court of Common Pleas in Harrisburg, in March – April 2009. The case involved allegations of significant permanent injury and limitations due to negligence in failing to timely and properly diagnose and treat a spinal fracture/injury suffered during childbirth. There were claims asserted against two obstetricians, a family practitioner, the clinic employing the health care providers, and the hospital. The family practitioner was dismissed on the first day of trial after argument on a Motion for Summary Judgment. At the conclusion of trial, the jury found that none of the remaining defendants were negligent. The defense verdict was returned in approximately one hour. **Ed Beitz,** an associate in the Philadelphia office, assisted in the trial.

Mr. Eppolito can be contacted at 215.864.6302 or eppolitoc@whiteandwilliams.com.

FIRM ANNOUNCEMENTS

After three decades of service, **Chuck Roessing** retired as the Managing Partner of our Berwyn office on August 31, 2009. The firm would like to thank Chuck for his years of dedicated service, and wishes him the best. As a result of Mr. Roessing's retirement, partner **David Zaslow** has become the new Managing Partner of our Berwyn office.

For more information about Mr. Zaslow and his practice, please visit www.whiteandwilliams.com.

LEGISLATIVE ALERTS

NEW LAW REQUIRING NOTIFICATION BY THIRD PARTIES AND INSURERS TO DPW

An important change has been made to the law imposing notification requirements on third parties and their insurers in cases involving plaintiffs/claimants who have received DPW benefits. Pennsylvania's Act 44 of 2008, 62 P.S. §§ 1409, *et seq.,* applies to matters involving persons who have received medical assistance (specifically including Medicaid benefits) through Pennsylvania's Department of Public Welfare (DPW). The Act applies to claims and causes of action asserted on or after September 2, 2008, and places obligations upon third parties and insurers similar to those found under the new Medicare requirements. *(See below).* Liability insurers must now establish a direct relationship with DPW's Division of Third-Party Liability, and, in any case where the third party or insurer has information indicating a claimant received medical assistance benefits, provide DPW with several important notices relating to the claim. Third parties and insurers are subject to civil money penalties if they fail to comply with the notice requirements or make disbursement of settlement proceeds in matters where DPW has an interest without insuring payment of DPW's claim. DPW has promulgated safe harbor provisions which enumerate certain actions that a third party or insurer can take to shield themselves from potential liability to DPW.

THE BOTTOM LINE

If your claim or matter arose after September 2, 2008, and involves a medical assistance beneficiary, you *must* ensure that proper notice is given to DPW under the Act, and that DPW's interests are addressed before you settle or satisfy a judgment in the matter. As a case in point, we have recently been involved in a matter in which DPW filed a motion to set aside a settlement and intervene in a case on the grounds that plaintiff's counsel failed to timely notify them of the proposed settlement and failed to honor the DPW lien. That sends a clear signal to third parties and insurers, and their counsel, that being proactive early in the case and strictly following the notice requirements is the best way to avoid such problems down the road.

For more information, contact Kevin Cottone at 215.864.7108 or cottonek@whiteandwilliams.com.

MEDICARE SECONDARY PAYER ACT WRENCHES CHANGE FOR INSURERS

Federal law expects that where a healthcare provider (or any other tortfeasor) causes harm to a Medicare-eligible patient, and where Medicare pays medical bills related to that harm, Medicare will be reimbursed for the tort-related bills that it paid. Changes required by the 2007 Medicare, Medicaid and SCHIP Extension Act (MMSEA) are rolling out between July 1, 2009 and January 1, 2010. Insurers and self-insurers will be burdened with new reporting requirements. More importantly, the law makes it easier for Medicare to seek reimbursement jointly from plaintiffs, plaintiff lawyers, liability insurers, and self-insurers. The law also imposes substantial penalties on non-compliant insurers. Medicare provides health insurance to 43 million seniors, recipients of Social Security Disability benefits, and others. Any case that involves, or has the potential to involve, a Medicare recipient will become more complicated in terms of pretrial discovery and reporting. For cases that might otherwise settle, Medicare reimbursement will be a profound complicating factor. In the past, a plaintiff's Medicare status was largely irrelevant; soon it will be a driving factor for both the plaintiff's bar and the insurance industry.

For more information, contact Bill Kennedy at 610.240.4703 or kennedyw@whiteandwilliams.com.

RECENT DEVELOPMENTS IN THE LAW

WILL NURSING EXPERTS BE ALLOWED TO TESTIFY ON SUBJECTS OF CAUSATION AND DAMAGES IN PENNSYLVANIA?

In a decision which could open the door to nursing experts testifying on subjects of causation and damages, a recent Pennsylvania Supreme Court case overruled the controlling Superior Court case on that issue. In *Freed v. Geisinger Medical Center,* 971 A.2d 1202 (Pa. 2009), the Pennsylvania Supreme Court took on and, *sua sponte,* overturned the decision in *Flanagan v. Labe,* 690 A.2d 183 (Pa. 1997), which prohibited a nurse from offering expert testimony on causation because it constitutes a "medical diagnosis" beyond a nurse's competency as defined by the Professional Nursing Law. The *Freed* Court based its decision on the faulty rationale that the Professional Nursing Law is not an evidentiary standard. If it stands, the *Freed* decision now allows nurses to offer opinions on medical diagnosis and causation in a courtroom despite the fact that it would be illegal for them to do so in practice. The defendant-healthcare providers filed an application for reargument, arguing that the Court decided to overrule *Flanagan sua sponte* (*i.e.,* without having given the parties an opportunity to be heard on the issue), and also that the Court failed to understand that, although the Professional Nursing Law is not itself an evidentiary standard, it limits the competency of nurses in practice and, therefore, limits the competency of nurses to testify in a court of law. On August 21, 2009, the Court granted reargument on the issues of the plaintiff's waiver of any challenge to *Flanagan* and the validity of *Flanagan.* A hearing date has not yet been set on this important appeal. The Appellate Practice Group of White and Williams has been retained to participate in the appeal.

For more information about the Appellate Practice Group, please visit www.whiteandwilliams.com.

LANDMARK THIRD CIRCUIT OPINION CREATES NEW CAUSE OF ACTION AGAINST NURSING HOMES UNDER THE FEDERAL CIVIL RIGHTS ACT

The Third Circuit has issued a far-reaching and troubling opinion for owners and operators of nursing homes. In *Grammer v. John J. Kane Regional Center – Glen Hazel,* 570 F.3d 520 (3d Cir. 2009), the Court held that a plaintiff may bring a civil rights claim under 42 U.S.C. §1983 against a county-operated nursing facility for alleged violations of the Federal Nursing Home Reform Act Amendments (FNHRA). 42 U.S.C. § 1396r.

The plaintiff-decedent was an 80-year-old resident of John Kane Regional Center, a county-operated nursing home, where she received skilled nursing care. During the course of her stay, the plaintiff-decedent developed a decubitus ulcer and ultimately died. On behalf of Decedent's estate, the plaintiff sued the facility under section 1983, complaining that plaintiff-decedent's civil rights were violated because the County failed to meet its obligations under the FNHRA. Finding that no private right of action existed under the FNHRA for purported violations of the statute, the District Court dismissed the lawsuit.

Reversing the District Court, the Third Circuit held that the FNHRA conferred individual rights upon residents that were enforceable through section 1983. Among the "rights" conferred by the FNHRA is a right to care that promotes "maintenance or enhancement of the quality of life of each resident." *Grammer,* 570 F.3d at 524. Remarkably, the Court reasoned that such language was not "'so vague and amorphous' that… enforcement would strain judicial resources." *Id.* at 528.

At first blush, *Grammer* appears limited to county-operated nursing facilities, such as the one involved in that case, because such facilities satisfy the requirement that only persons/entities who act "under color of state law" can be liable under section 1983. Creative plaintiffs' attorneys may utilize *Grammer* to assert civil rights claims against private agencies, but such claims will not likely survive judicial scrutiny. Another, more serious implication of *Grammer,* however, is that plaintiffs' attorneys will likely seize upon the decision to claim that it recognizes newly-enumerated rights and establishes standards of care applicable to *all* nursing facilities, and that any purported violation of those rights would constitute negligence *per se.* In effect, the Court of Appeals in the *Grammer* case raised the standard of care applicable to nursing facilities to include strict compliance with those enumerated rights; therefore, all nursing facilities that accept Medicaid funds may be subjected to these new and vague standards. As a result, compliance with Medicaid requirements may no longer measured in terms of substantial compliance, but in terms of *perfect compliance.*

For more information about this opinion, FNHRA and related issues, please contact Deborah E. Ballantyne, NHA, Esq. at 215.864.7171 or ballantyned@whiteandwilliams.com.

White and Williams LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103-7395

BEYOND HEALTHCARE

WHITE AND WILLIAMS COVERAGE COLLEGE® 2009

Healthcare Group members **Edward Koch** and **Kevin Cottone** will join over 30 White and Williams attorneys as faculty members at Coverage College® 2009. Now in its third year, the annual daylong event sponsored by the firm provides insurance claim professionals an opportunity to engage in intensive study of a diverse insurance coverage curriculum. Students can choose from 16 Masters Classes covering a variety of complex insurance issues, such as construction defect, coverage litigation, "green" issues, claim investigation, the subprime mortgage meltdown, underwriting in the claims process, long-tail claims, personal and advertising injury and settlements, releases and liens.

Ed and Kevin will teach "Settlements, Releases and Liens: Unlocking the Mystery and Avoiding the Traps." Students enrolled in this course will explore the rationale behind the many varieties of releases, including general releases, *pro rata* and *pro tanto* joint tortfeasor releases, Griffin releases, and other hybrid releases. They will learn the common traps and misconceptions arising from settlements and releases. The effect of third-party liens, including the developing law of Medicare and Medicaid liens, also will be discussed, including the new reporting requirements and how to address the liens in the settlement and the release.

For more information about Coverage College®, please visit www.whiteandwilliams.com.

EDITOR | DANIEL P. MARTZ, ESQ.
215.864.6320
martzd@whiteandwilliams.com

PRIMARY OFFICE: 1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103
REGIONAL OFFICES: Allentown, PA | Berwyn, PA | Boston, MA | Conshohocken, PA
Cherry Hill, NJ | New York, NY | Paramus, NJ | Pittsburgh, PA | Wilmington, DE