White and Williams LLP

Executive Newsletter

Winter 2008

2007: A Year of Growth, Expansion and Opportunity in China

White and Williams LLP has formalized a strategic alliance with the Xue Law Firm, a ten attorney commercial practice law firm based in Shanghai, China. The Shanghai alliance has provided our clients with the benefits and experience of a respected law firm in the Chinese marketplace. Not only has this alliance allowed us to better serve U.S. companies going to China, but it has provided a venue for serving China-based companies seeking to make investments in the United States.

In early June 2007, Gary Biehn and Chunsheng (Tony) Lu presented "How to Organize, Evaluate and Invest in China" at the First China International Private Forum in Tianjin, China. This was a historical event, as over one thousand Chinese companies and more than one hundred foreign companies attended the Forum.

In October 2007, Chunsheng (Tony) Lu, in collaboration with the Xue Law Firm, represented Montgomery County based client Keating Fibre International, Inc. in a case involving an international commercial contract dispute. The case was litigated before a Chinese trial court and we successfully obtained a significant judgment against a local Chinese company.

For more information on our China Business Practice Group, please contact Gary Biehn, at 215-864-7007 or biehng@whiteandwilliams.com or Tony Lu at 215-864-7006 or luc@whiteandwilliams.com.

The audience celebrates the Opening Ceremony of the First China International Private Forum in Tianjin.

Tony Lu meets with attendees at the First China International Private Forum in Tianjin.

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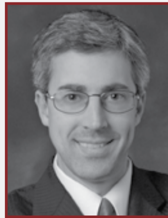
From the Chair…

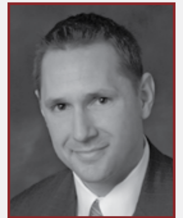
George J. Hartnett
Chair, Executive Committee

It is with great pride that I warmly introduce our four newest Partners. Marc Casarino, Nancy Conrad, Shane Heskin and Rich Maurer are excellent attorneys who 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 more so, to you, our clients.



Marc Casarino focuses on complex business litigation and has a broad range of experience both prosecuting and defending a variety of business-related disputes. He represents public and privately held companies with respect to contract disputes, commercial real estate concerns, creditor claims, corporate governance, shareholder rights and partnership disputes. Marc received his B.S. from the University of Delaware in 1994 and his J.D. in 1997 from the Widener University School of Law. When not at work, he enjoys spending time with his family, gardening and going to the beach. Marc can be contacted at 302-467-4520 or casarinom@whiteandwilliams.com.

Nancy Conrad practices in the area of employment law and litigation. In addition to representing management in all areas of employment relations, Ms. Conrad's practice includes the defense of discrimination claims, wrongful discharge, contract and injunction proceedings. She also assists employers with workplace issues, including review of handbooks and policies, guidance on performance management issues and employee training. Nancy received her B.A., *magna cum laude*, in 1976 from Lycoming College and her M.Ed., *summa cum laude*, in 1977 from The Pennsylvania State University. She received her J.D., *cum laude*, in 1989 from Temple University School of Law. When not at the office or with her three children, Nancy is active with several boards and organizations that raise awareness and funding for breast cancer research and programs. Nancy can be contacted at 610-782-4909 or conradn@whiteandwilliams.com.



Shane Heskin has a broad range of experience in complex commercial litigation, insurance coverage, bad faith, mass tort defense, asbestos defense, class action defense, bankruptcy litigation and securities litigation. His practice focuses primarily on environmental coverage disputes and bad faith. Shane received his B.A., *summa cum laude*, in 1996 from Mayville State University and his J.D., *summa cum laude*, in 1999 from Albany Law School. He is an active member of the White and Williams softball and basketball teams and is an avid golfer. Shane can be contacted at 215-864-6329 or heskins@whiteandwilliams.com.

Rich Maurer's litigation practice includes the defense of maritime torts, construction defect claims, and a wide variety of commercial matters. He earned a Master's degree in Cello from The Juilliard School in 1989, after winning First Prize in the 1986 Aspen Competition. In 1993, Rich graduated from Georgetown University Law Center, where he was a member of the Criminal Justice Clinic. Rich and his wife, Judy Song, are raising a family in Center City Philadelphia. Outside the office, he works on school and community efforts, such as the Fairmount ArtsCrawl. Rich can be contacted at 215-864-7088 or maurerr@whiteandwilliams.com.

Doris Kearns Goodwin Receives 2008 Virginia Barton Wallace Award

Dori Desautel (left) and Gale White (right) present the 2008 Virginia Barton Wallace Award to Doris Kearns Goodwin (center).

Historian, Author and NBC News Analyst Doris Kearns Goodwin graciously accepted the Virginia Barton Wallace Award at a breakfast hosted at the Ritz-Carlton in Philadelphia on Nov. 8, 2007. Kearns Goodwin most recently released her decade-long project, "Team of Rivals: The Political Genius of Abraham Lincoln," to critical acclaim.

White and Williams LLP established the Virginia Barton Wallace award to honor the firm's first female partner. In 1961, Ginny Wallace became one of the first women to be named a partner in a major Philadelphia law firm. A trailblazer, Ginny retired in 1980, but continued to consult for the firm until she was in her 90's. The Virginia Barton Wallace award was founded after her passing to honor her memory and her contribution to women in law. The Award includes a $10,000 check to be presented to a charity of the recipient's choosing.

Pennsylvania Professional Litigation

Getting Sanctions Under The Certificate of Merit Rules

by Steven J. Forry

Ever since Pennsylvania's requirement of Certificates of Merit in professional liability cases was enacted in 2003, defendants have pressed to determine whether the Rules truly provide for recoverable sanctions against abusers, or whether the concept of sanctions is merely a paper tiger to quell rising discontent over the medical malpractice crisis. When writing the Rules in January, 2003, the Pennsylvania Supreme Court required a plaintiff in a professional negligence case — typically, a medical malpractice case — to file a Certificate of Merit signed by the plaintiff attorney. The rule itself requires the signing attorney to represent that an "appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm . . ." Pa. R. Civ. Pr. 1042.3(a)(1).

Significantly, the Certificate of Merit rules require only that the plaintiff attorney — not the actual expert — sign the Certificate. The requirement exposes the signing plaintiff attorney to sanctions under state law (the equivalent of the federal court's Rule 11 sanctions). Pennsylvania Rule of Civil Procedure 1023.1 imposes upon the plaintiff attorney signing the Certificate of Merit an affirmative duty to conduct a reasonable inquiry under the circumstances. This provision, like its Rule 11 counterpart, makes it insufficient for a plaintiff attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. The language under Rule 11 and, arguably under Rule 1023.1, explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of the pleading before it is signed.

As a result, a plaintiff attorney who improperly signs a Certificate of Merit is exposed to sanctions under the Rule if she failed to obtain the required, written statement that there exists a reasonable probability that the care, skill or knowledge exercised by the defendant fell outside acceptable professional standards. The plaintiff attorney could also be sanctioned if the written statement came from a licensed professional who fails to meet the qualifications set forth in Section 512 of the Medical Care Availability and Reduction of Error Act, 40 Pa. Stat. § 1303.512. A third basis of potential sanctions would be if the written statement did not opine on causation.

As a prerequisite to sanctions, the mechanical mandates of the Rule requires that the defendant be dismissed from the case, either voluntarily, through verdict or order of court. After being dismissed from the litigation, the defendant must then make a written request for a copy of the actual, written statement underlying the Certificate of Merit. The plaintiff has 30 days within which to produce the written statement which formed the basis of the certificate of merit.

It is not until the former defendant's attorney receives a copy of the actual statement provided by the reviewing expert that he will be able to identify whether sanctions are appropriate. If so, there seemed to have been a procedural obstacle: does a Court continue to exercise jurisdiction over the matter after there has been a final judgment in favor of the defendant? Recently, widely-regarded Allegheny County jurist Judge R. Stanton Wettick, Jr. decided that it did.

In *Koppel v. Celin*, Mr. and Mrs. Koppel instituted a professional liability action against three (3) separate healthcare providers, including an otolaryngologist, Dr. Celin. The Koppels alleged that the defendants failed to timely and appropriately diagnose Mrs. Koppel's papillary thyroid cancer. In *Koppel*, the plaintiff attorney discontinued the litigation as to all defendants on April 12, 2006. On June 15, 2006, one former defendant-doctor's attorney demanded the written statement that supported the Certificate of Merit. On July 5, 2006, the former plaintiffs' counsel provided the case study report prepared by his reviewing expert. After reviewing the report, however, counsel for the former defendant filed a motion for sanctions.

The former plaintiff attorney resisted the motion by arguing that the April 12 discontinuation was a final judgment, and that a Court had only 30 days thereafter in which to alter or amend it. Judge Wettick carefully analyzed the Rules, however, and determined that under that reasoning, sanctions could never be imposed at all, and the entire Certificate of Merit structure would become toothless. Furthermore, Judge Wettick held that the imposition of sanctions under Rule 1042.7 is not a modification of the judgment; instead, the imposition of sanctions constitutes a resolution of a collateral matter not governed by the judgment. Judge Wettick recognized that the defendant was not seeking to alter the judgment in his favor, but rather seeking sanctions against someone who was not even a party to the lawsuit—namely, the plaintiff attorney.

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Liability Insurance

Single Cause is Comin' to Town

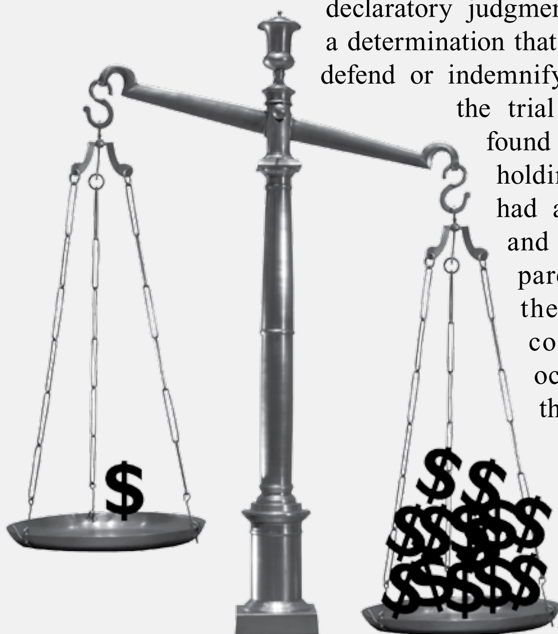
The Number of Occurrences Depends on the Insured's Particular Act Which Gives Rise To Liability

by Randy J. Maniloff and Jennifer L. Wojciechowski

On December 27, 2007, the Pennsylvania Supreme Court gave insurers in Pennsylvania a late holiday gift — its decision in *Donegal Mutual Insurance Co. v. Baumhammers*. For policyholders, it was coal in their stockings.

In *Baumhammers*, the Pennsylvania Supreme Court held that the Commonwealth adheres to the "cause" of loss test for purposes of determining the number of "occurrences," and, hence, the number of limits of liability, available under a general liability policy. The court's finding of a "single cause" capped the insurer's maximum potential liability at $300,000, and not $1.8 million as the Superior Court had held. The Pennsylvania high court also clarified that the relevant "cause" is the insured's action or inaction which resulted in that particular insured's alleged liability.

The case arose from an incident in 2000 when Richard Baumhammers went on a shooting spree, killing five people and seriously injuring another. Baumhammers was convicted of five counts of first degree murder and other crimes. The victims and their Estates filed suit seeking damages from Baumhammers and his parents. They alleged that the parents were negligent in failing to confiscate Baumhammers' gun and in failing to advise the proper authorities of Baumhammers' violent propensities. The parents sought coverage under their homeowners policy issued by Donegal Mutual Insurance Company. The Donegal policy provided a $300,000 per "occurrence" limit of liability and defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions. . . ." Donegal commenced a declaratory judgment action seeking a determination that it had no duty to defend or indemnify the parents. At the trial level, the court found against Donegal, holding that Donegal had a duty to defend and indemnify the parents, and that the allegations constituted six occurrences under the Donegal policy.



On appeal, the Pennsylvania Superior Court, following re-argument *en banc,* affirmed the trial court's decision on both issues. Adopting the Third Circuit's rationale in *Nationwide Mutual Fire Ins. Co. v. Pipher* (1998), the Superior Court found that the parents' alleged negligence constituted an "accident," thus satisfying the policy's "occurrence" definition, despite the recognition that the ultimate injuries were caused by Baumhammers' intentional acts. Then, purporting to apply the "cause" test for determining the number of occurrences, the Superior Court noted that there are two alleged proximate causes of the victims' injuries: Baumhammers' attacks and Baumhammers' parents' negligence.

The Superior Court was persuaded by the rationale used by courts (such as the Florida Supreme Court in *Koikos v. Travelers Ins. Co.* (2003)) that find multiple occurrences, by focusing on the "immediate cause of the harm, the cause that ultimately triggered the liability of the insured." Looking to the "immediate injury-producing act," the Superior Court determined that there were six occurrences because Baumhammers shot six victims. The court rejected Donegal's argument that the parents' negligence constituted a "continuous or repeated exposure to the same general harmful conditions" because the victims were not "exposed" to the parents' negligence. Therefore, given Donegal's $300,000 per occurrence limit of liability, Donegal's potential indemnity exposure was determined to be $1.8 million.

Donegal sought review by the Pennsylvania Supreme Court, which granted the request for allowance of appeal and ultimately reversed, in part, the Superior Court's decision. First, the Supreme Court relied on its 2006 decision in *Kvaerner Metals v. Commercial Union Ins. Co.*, as well as the Third Circuit's decision in *Pipher.* It affirmed that portion of the Superior Court's decision that found that there was an alleged "accident" which satisfied the Donegal policy's definition of an "occurrence."

Citing *Kvaerner*, the Court stated that it has defined an "accident" in the context of insurance coverage as "an unexpected and undesirable event occurring unintentionally." The *Baumhammers* Court stated that the "extraordinary shooting spree embarked upon by Baumhammers, resulting in injuries to plaintiffs, cannot be said to be the natural and expected result of the parents' alleged acts of negligence." Rather, the Court stated that the shooting spree was unexpected and, therefore, constituted an "accident" as required by the Donegal policy's definition of an "occurrence." Donegal, therefore, was obligated to defend the parents in the action brought against them resulting from their son's shooting spree.

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Getting Sanctions Under The Certificate of Merit Rules

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Having hurdled the procedural barrier, Judge Wettick then analyzed whether sanctions should be imposed.

Judge Wettick first considered Dr. Eisler's qualifications in the context of Rule 1042.3 and Section 512 of the Medical Care Availability and Reduction of Error Act. Dr. Eilser received her medical school training at Bengbu Medical School in China; with no indication from her *curriculum vitae* that she underwent any type of formal internship or residency training in any particular field of medicine. As one of her professional accolades, Dr. Eisler "stud[ied] cases on trial or under investigation through the various programs of *court TV* ". Dr. Eisler's *Curriculum Vitae* provided no insight whatsoever into her licensure or particular field of specialization.

Under Section 512 of MCARE, the expert is required to possess an unrestricted physician's license to practice in at least one state or the District of Columbia and be engaged in, or retired within the past five years from, active clinical practice or teaching. Additionally, the expert must practice in the same sub-specialty or in a sub-specialty with a substantially similar standard of care as the defendant physician.

> **"Those who file improper Certificates of Merit face post-litigation sanctions of attorney's fees, expenses, and other penalties."**

Judge Wettick recognized that the plaintiff's expert did not appear to be in the appropriate field of medicine. "[A]ny attorney reviewing [plaintiff expert's] curriculum vitae would have had absolutely no reason to believe that Dr. Eisler practiced in the same or related field as the defendant physician". Judge Wettick concluded "it would be impossible for any attorney who reviewed the CV and the Rules of Civil Procedure governing certificates of merit … to conclude in good faith that a certificate of merit may be based on any report issued by [this expert]." Judge Wettick thus held that the plaintiff attorney failed to obtain a statement from an appropriate licensed professional as required by the Certificate of Merit rules.

Judge Wettick further held that the underlying "written statement" did not opine that the defendant had breached the standard of care, but rather simply concluded that the former defendant doctor's liability "could be argued." Judge Wettick ruled that such an amorphous phrase fell short of the Rule's requirement (that there exists a reasonable probability that the care, skill, or knowledge exercised or exhibited by the doctor in his treatment, practice, or work fell outside of the accepted professional standards). In addition, Judge Wettick noted that the plaintiff expert did not opine that the defendant-doctor's conduct was a cause in bringing about the alleged harm.

Judge Wettick then considered the measure of sanctions. He concluded that sanctions could include "reasonable attorneys fees, other expenses and ordering payment of a penalty into the Court." Judge Wettick specifically noted that "the difference between imposing sanctions under Rule 1023.4 and Rule 1042.7 is that the sanctions under 1023.4 are limited to those specifically described in the rule, while Rule 1042.7(b) provides that a Court may impose whatever sanctions it deems to be appropriate, including those provided in Rule 1023.4." From that, the Court awarded the attorneys' fees and costs incurred by the doctor's insurer in defending the underlying claim in the amount of $6,967.94, and additional attorneys fees incurred in pursuing the motion for sanctions in an amount not to exceed $2,000. He awarded a sum to reflect the increased insurance premiums experienced by the doctor as a result of the filing of the underlying litigation in the amount of $8,277.00. Finally, the Court directed plaintiffs' counsel to make a donation to a charity in the amount of $2,000 (Operation Smile, a worldwide effort to repair childhood facial deformities).

In *Koppel*, Judge Wettick evaluated plaintiffs' counsel's conduct by a "reasonableness" yardstick. He did not analyze whether there was any act of bad faith on the part of plaintiffs' counsel. Judge Wettick evaluated plaintiffs' counsel's actions both with respect to determining the qualifications of the reviewing expert as well as to the substance of the opinions expressed by the expert in the context of the Certificate of Merit rules.

The Certificate of Merit rules apply not only to doctors, but to any health care provider, and to non-health care professionals like accountants, architects, engineers, pharmacists, attorneys, and veterinarians. *Koppel* provides a valuable template for those who have been sued without the kind of foundation that the Certificate of Merit rules were intended to require

Steve Forry concentrates his practice on the defense of professional malpractice claims, handling both trial and appellate matters for physicians, hospitals and professional liability insurance carriers. He can be contacted at 412-566-3531 or forrys@whiteandwilliams.com.

Single Cause is Comin' to Town

(Continued from page 4)

Perhaps the most attention-grabbing aspect of the Supreme Court's opinion was its reversal of the Superior Court regarding the number of occurrences (and policy limits) implicated. Addressing this key issue, the Pennsylvania Supreme Court noted that courts have utilized two principal tests for determining number of occurrences at issue: the "cause" test (the majority view) and the "effect" test. The Pennsylvania Supreme Court acknowledged that, although it had yet to adopt the "cause" test, the Superior Court had concluded on numerous occasions that the "cause" test should be followed by Pennsylvania courts. *See, e.g. D'auria v. Zurich Ins. Co.* (Pa. Super. 1986) (adopting the cause of loss test to determine that misdiagnosis and mishandling of patient was one "occurrence") and *General Acc. Ins. Co. v. Allen* (Pa. Super. 1998) (failing to prevent child abuse to three children was one "occurrence").

Noting that *Baumhammers* is "a disturbing case with tragic consequences," the Pennsylvania Supreme Court found that only one "occurrence" was alleged. Rejecting the Superior Court's application of the "cause" test, to the extent that it relied on the "immediate injury-producing act," the Pennsylvania Supreme Court stated that the focus should instead be on "the act of the insured that gave rise to its liability." The Supreme Court found persuasive the Nevada Supreme Court's application of the "cause" test in its 1994 decision in *Washoe County v. Transcontinental Ins. Co.* In *Washoe*, a day care center employee allegedly sexually abused children at the center over a three-year period. Washoe County allegedly negligently licensed the day care center during the time period in which the abuse took place. Determining that Washoe's negligent licensing of the day care center was the "cause" of the children's injuries, the Nevada Supreme Court stated that "because each of the separate instances of molestation arose from the same proximate cause, *i.e.* the County's alleged negligence, that negligence was a single occurrence."

Citing *Washoe*, the Pennsylvania Supreme Court found that Baumhammers' parents' liability was predicated on their negligence in failing to confiscate their son's weapon or in failing to notify the appropriate law enforcement or mental health personnel of his violent propensities. The parents' negligence constituted one accident and, therefore, one "occurrence" as defined by the Donegal policy.

Formally adopting the "cause" test for determination of the number of occurrences in Pennsylvania, the Supreme Court held that the number of occurrences is determined by reference to the particular insured's act that gives rise to the particular insured's liability. The Court explained that, determining the number of occurrences in this manner "recognizes that the question of the extent of coverage rests upon the contractual obligation of the insurer to the insured." The parents' coverage is determined by the accident over which the parents could exercise control — here, their negligent failure to confiscate Baumhammers' weapon or to notify the proper authorities of Baumhammers' violent propensities.

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Tax Alert

Key Developments in Select Federal and State Tax Issues

By William C. Hussey, II

On January 16, 2008, the U.S. Supreme Court, affirming the 2nd Circuit Court of Appeals, resolved a split among the federal Circuit Courts by holding that investment advisory fees paid by a trust are deductible only to the extent that they exceed 2% of the trust's adjusted gross income ("AGI"). These investment advisory expenses do not qualify for the exception in Code Section 67(e)(1) under which certain costs paid or incurred in connection with the administration of a trust that wouldn't have been incurred if the property weren't held in the trust may be deducted in arriving at AGI. The ruling does not impact the deductibility of fees paid to banks and other trust companies solely for fiduciary services. However, it will likely result in a higher income tax burden for trusts, and the beneficiaries of those trusts, that incur investment advisory and similar expenses.

On December 15, 2007, the Pennsylvania Department of Revenue issued amendments to its Realty Transfer Tax Regulations. The new Regulations will directly impact the transfer taxes that many Pennsylvania taxpayers will incur in common real estate transactions, including without limitation, Section 1031 Like Kind Exchanges, sale-leaseback transactions and assignments of real estate sales contracts. Close attention to the structuring of these real estate transactions will be required in order to avoid the uncertainties introduced by the Regulations that, in many instances, are a tax trap for the unadvised.

If you would like to discuss how any of these changes may affect your business or tax planning, or have any other tax or estate planning questions, please contact Bill Hussey (215-864-6257), Stephen Zivitz (215-864-6240) or Scott Borsack (215-864-7048).

Bill Hussey focuses on taxation and estate planning issues. He can contacted at 215-864-6257 or husseyw@whiteandwilliams.com.

IRS Circular 230 Notice: To ensure compliance with certain regulations promulgated by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication is not intended or written to be used, and cannot be used, by any taxpayer for the purpose of (1) avoiding tax-related penalties under the U.S. Internal Revenue Code, or (2) promoting, marketing or recommending to another party any tax-related matters addressed herein, unless expressly stated otherwise.

Insurance: Pennsylvania Bad Faith

Does the Attorney-Client Privilege Still Exist in Bad Faith Litigation?

by Platte B. Moring, III and Daniel J. Twilla

The attorney-client privilege is one of the oldest privileges recognized in the American legal system. It has the important purpose of encouraging full and truthful communications between attorney and client. Recently, however, plaintiffs in insurance bad faith cases have asserted that the attorney-client privilege does not always protect communications from disclosure when the plaintiff is seeking information concerning an insurance carrier's handling of a claim. While there is no "bad faith" exception to attorney-client privilege, an insurer should be aware that when it relies on advice of counsel as a defense to bad faith or when its attorney has acted as a claims adjuster with a law degree during investigation of the claim, a court may order that communications between attorney and client be produced.

Basics of the Attorney-Client Privilege

Under Pennsylvania's privilege statute, codified at 42 Pa. C.S.A. § 5928, a communication is protected by the attorney-client privilege if it meets several prerequisites. The person who asserts entitlement to the privilege must be (or must seek to be) a client of the attorney. The person to whom the communication was made must be a lawyer (or a lawyer's subordinate) acting in that capacity in connection with the communication. The communication must relate to a fact about which the attorney was informed by the client for the purpose of securing primarily either an opinion of law or legal services, and not for the purpose of committing a crime or a tort. The communication must be solely between the client (or clients) and the attorney, as the presence of non-parties invalidates the privilege. Lastly, the privilege must be affirmatively claimed (and not waived) by the client.

The burden of proving that the attorney-client privilege applies to a communication rests with the party asserting the privilege. Courts take a dim view of those who assert a blanket protection when responding to discovery requests. Instead, a party seeking to assert the privilege should make a clear showing that it applies to each communication for which protection is sought. Often, this is done by creating a privilege log. In fact, a privilege log listing all privileged documents is required in federal courts. The privilege log may include the name of the author of the privileged communication, all recipients of the communication, the date of the communication, and a brief description of the substance of the communication (without actually revealing any privileged information). If a privilege log is sufficiently detailed, it may provide enough information for a court to rule on a claim of protection without an *in camera* review of the purportedly privileged documents themselves. The privilege log should be adequate to permit the court to determine whether all elements of the privilege are present in each document.

Attorney-Client Privilege In Bad Faith Litigation

There is no hard and fast "bad faith" exception to the attorney-client privilege in Pennsylvania. There are, however, arguments which plaintiffs have made in order to obtain communications between an attorney and client while avoiding the protections of the attorney-client privilege.

Some courts have held that if an insurer defends itself against a bad faith claim by asserting that it relied on the advice of counsel, the insurer then waives the attorney-client privilege and invites discovery of all communications from its attorneys. If a client injects a lawyer's assistance into a dispute, or if an insurer places an attorney-client communication at issue in a dispute involving the client as a party, then the attorney-client privilege will most likely be deemed by the court to have been waived.

The extent to which an insurer must raise "advice of counsel" as a defense before a court will find that it waived the attorney-client privilege was recently tested in *Oak Lane Printing and*

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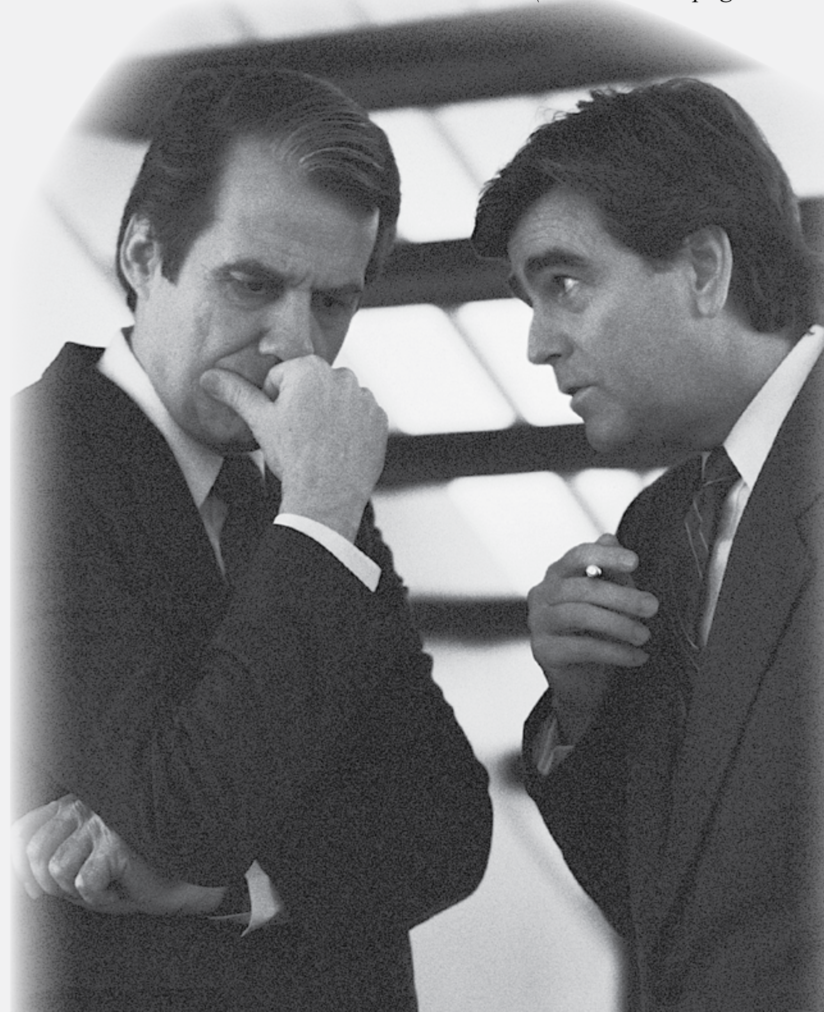

New and Notable

Jerry Anders, in our Products Liability Group, was appointed to the **Civil Procedural Rules Committee** by the Pennsylvania Supreme Court.

John Baker, in our Labor and Employment Law Group, served as a Contributing Editor to "The Developing Labor Law", a treatise of the **American Bar Association**.

Deb Ballantyne, in our Healthcare Group, has been appointed to the Health Law Institute Advisory Board at **Widener University School of Law**.

Gary Biehn, Chair of our China Business Practice Group, presented "Tried and True: Successful Business Techniques in China to Protect Your IP" at the China IP Road Show presented by the **United States Patent and Trademark Office**. Also, Gary was a panelist for "Ten Questions You Should be Asking about Doing Business in China...and the Answers" hosted by **Citizens Bank**.

Scott Borsack, in our Tax and Estates Group, was a panelist at the Executive Roundtable "Keeping Success in Business Succession: A Dollars and Sense Approach" hosted by **KYW Newsradio**.

Marc Casarino and **Jim Yoder**, both in our Business Department, presented "Legal Ethics: Solutions to the Most Common Challenges" hosted by the **National Business Institute**. Also, **Marc Casarino** will present "Commercial Landlord-Tenant Law" hosted by **Sterling Educational Services, Inc.** on April 16, 2008.

Merritt Cole, Chair of our Securities Law Practice Group, served as a panelist for "Fairness Opinions – the Changing Landscape" at the 2007 Annual Business Lawyers Institute sponsored by the **Pennsylvania Bar Institute**. He also presented "Fundamental Changes, Mergers, Sales of Assets and Share Exchanges" at the Fundamentals of PA Business Corporation Practice program sponsored by the **Pennsylvania Bar Institute**.

Kevin Cottone, in our Healthcare Group, has been appointed Co-Chair of the Medical Legal Committee of the **Philadelphia Bar Association**.

Nancy Sabol Frantz, in our Business Department, was appointed to the **Independent Regulatory Review Commission** by Pennsylvania House Republican Leader Sam Smith.

John Encarnacion, in our Subrogation-Property Department, has been elected Vice President of the **Asian American Bar Association of the Delaware Valley** and has been appointed Chair of the Editorial Board of "YL", the young lawyer supplement of ***The Legal Intelligencer***.

Chuck Eppolito, in our Healthcare Group, was named a "Lawyer on the Fast Track" by ***The Pennsylvania Law Weekly*** and ***The Legal Intelligencer***. He was also a panelist and moderator for the **Pennsylvania Bar Association** programs "Maximizing Your Mentoring Relationship and/or Program" and "Using Time Management Techniques and Technology To Maximize the Quality of Attorneys' Life and Work".

Tom Goutman, in our Litigation Department, co-authored "The Art of Retrial" with Martin Zucker, Assistant General Counsel at Monsanto Company. The article will appear in the February issue of ***The ABA Litigation Journal***.

Ed Koch, in our Appellate Practice Group, served as moderator for "To Appeal or Not to Appeal" at the Midyear Meeting of the **Pennsylvania Bar Association**.

Dick Kolb, in our Healthcare Group, was a faculty member at the Mid-Atlantic Deposition Program hosted by the **National Institute for Trial Advocacy**.

Chris Leise, Managing Partner of our Cherry Hill office, will present the **New Jersey Institute of Continuing Legal Education** program "Update of New Jersey Insurance Law" on February 18, 2008 and March 1, 2008. He will also present "Understanding Insurance Law 2008" at a **Practicing Law Institute** seminar on April 15, 2008.

Tony Lu, in our China Business Group, presented "Private Equity: Facing New Challenges in Investing in Asia" at the **Wharton Global Business Forum**.

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Does the Attorney-Client Privilege Still Exist in Bad Faith Litigation?

(Continued from page 7)

Letter Service v. Atlantic Mutual Insurance Company, 2007 U.S. Dist. LEXIS 42923 (E.D. Pa., June 13, 2007). There, the plaintiff sued insurance companies who had issued policies covering property damage to a damaged printing press, but who had refused to pay the entire cost to replace the press. Among other claims, the plaintiff alleged the insurers had acted in bad faith. The insurers answered the complaint by stating that their claims handling was "in good faith and compliance with the law."

During discovery, the plaintiff sought all communications between an insurer and its counsel. The insurers provided a privilege log which identified the attorney-client privilege as a basis for withholding certain documents. The plaintiff moved to compel the documents, arguing that the insurers had waived the attorney-client privilege because the answers had asserted that their claims handling was "in good faith and compliance with the law."

The court rejected the argument that an insurer somehow waived the attorney-client privilege by asserting that it had acted in good faith. The court wrote that in a bad faith case, the attorney-client privilege is not waived merely "because the advice of counsel is relevant to the defense," either. The court found that an attorney's advice does not become "at issue" so as to become discoverable merely because the advice is relevant, or even where the advice might affect the client's state of mind. Instead, "[a]dvice of counsel is at issue only where a party attempts to prove its defense by disclosing attorney-client communications." Thus, attorney-client communications should not become discoverable unless the insurer specifically pleads the "advice of counsel" defense. The court concluded that the insurers did not affirmatively raise "advice of counsel" as a defense, and thus they did not waive the attorney-client privilege.

One key to retaining the attorney-client privilege is that the attorney must be acting as an attorney, rather than as an adjuster or investigator. Insurers face problematic opinions in which courts order that communications between an attorney and his or her insurer client must be produced because the attorney was not acting in his or her capacity as a lawyer. To prevent such an invasion, insurers must build an effective case for preserving the attorney-client privilege.

For example, in *Pengate Handling Systems v. Westchester Surplus Lines*, 2007 U.S. Dist. LEXIS 13303 (M.D. Pa. February 27, 2007), the court held that the question of whether pre-complaint claims communications are privileged turns on whether the insurer's attorney was acting in a legal capacity. The *Pengate* plaintiff submitted a claim to the defendant-insurer under a professional liability policy. The insurer denied the claim, and the plaintiff later requested reconsideration of the coverage denial. The insurer hired an attorney-consultant to evaluate a claim-related estimate provided by the plaintiff, and hired an attorney from a different law firm to act as coverage counsel. Following the reconsideration process and subsequent denial, the plaintiff initiated suit and served discovery on the insurer. The insurer responded to the plaintiff's requests with answers, objections, and a privilege log. The plaintiff moved to compel certain documents which were listed on the privilege log, including documents pertaining to the services of the consultant attorney and the coverage counsel.

The court noted that attorney-client privilege extends "only to discussions where the individual is acting as an advisor, *i.e.*, presenting opinions and setting forth defense tactics as to the procedures to be utilized for an effective defense." The privilege does not extend "to a discussion of the facts, no matter how extensive or involved the discussion may become." With that, the court concluded that the coverage counsel had really acted as claims investigators or adjusters prior to February 7, 2005. The court thus ordered the insurer to produce all communications with coverage counsel prior to and until February 7, 2005.

The insurer moved for reconsideration of the order. Hastily composing a declaration (similar to an affidavit) by the outside attorney in which he asserted he and his firm were retained to provide "legal advice," the insurer convinced the court to make an *in camera* inspection of the purportedly privileged documents. Upon that review, the court relaxed its prior order and afforded protection under the attorney-client privilege for specific documents.

Oak Lane, Pengate, and cases like them reflect continuing attempts to erode the contours of the attorney-client privilege in bad faith litigation. *Pengate* suggests insurers should properly build a timely case for preservation of the privilege. The problem with *Pengate* and similar decisions is that it is often difficult to determine exactly when an attorney is acting in a "lawyerly" capacity versus when he or she is merely "discussing facts." Experienced bad faith counsel can help insurers navigate these rocky shoals with sound legal advice so that privileged communications are not lost through inappropriate pleading of the "advice of counsel" defense or by the insurer's use of counsel.

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Securities Law

SEC Approves New Rule Governing Fairness Opinions

by Merritt A. Cole. and Jamie A. Kester

The SEC has approved a new rule regarding fairness opinions more than two years after it was initially proposed by the National Association of Securities Dealers, Inc. ("NASD"). (The NASD is now a part of the Financial Industry Regulatory Authority.) Rule 2290 is intended to make more transparent the process by which fairness opinions are rendered and to disclose conflicts which may arise during the course of that process. To achieve these objectives, the rule imposes new disclosure requirements and procedural requirements on broker-dealers who are members of FINRA and who render fairness opinions if the broker-dealer knows or has reason to know that its fairness opinion will be provided or described to the client's public shareholders. The new rule became effective December 8, 2007.

Background

In rendering a fairness opinion, a financial advisor (often an investment banker) expresses an opinion as to whether the consideration to be received or paid in a transaction is fair from a financial point of view. Fairness opinions are frequently sought in connection with the sale of a company or a significant portion of its assets, going private transactions, and transactions with major shareholders or other related parties. This practice helps boards of directors satisfy their fiduciary duty to act with due care, which is predicated upon acting in an informed manner.

In November 2004, the NASD requested comment on whether it should adopt rules governing disclosures and procedures involved when its members render fairness opinions. The NASD was concerned that investors were not sufficiently informed about various possible conflicts that could influence an investment bank rendering a fairness opinion. Such conflicts may arise, for example, (i) when the investment bank rendering the fairness opinion is also serving as a financial advisor to a party to the transaction and stands to receive a fee, or a portion of a fee, which is contingent upon the successful completion of the transaction; or (ii) if the transaction would benefit one person or group more than others and the person or group receiving the greater benefit was involved in hiring the investment bank or could direct future work to the investment bank.

After reviewing the comments which it received, the NASD proposed Rule 2290 in June 2005. The NASD republished the proposed rule in various forms a number of times; the rule as adopted in its final form differs in important respects from earlier proposed versions.

Disclosure Requirements

Rule 2290 requires that a broker-dealer who is a member of FINRA must disclose in its fairness opinion:

- whether the member has acted as a financial advisor with respect to the transaction for which the fairness opinion is sought;
- whether the member will receive compensation contingent on successful completion of the underlying transaction for rendering the fairness opinion or for serving as an advisor for the transaction;
- whether the member will receive any other "significant" payment or compensation that is contingent on the successful completion of the transaction (Early versions of the rule did not include the word "significant.");
- any material relationships that existed during the past two years, or that are mutually understood to be contemplated, in which any compensation was received or is intended to be received as a result of the relationship between the member and any party to the transaction that is the subject of the fairness opinion;
- whether any information that formed a substantial basis for the fairness opinion that was supplied to the member by the company requesting the opinion concerning the parties to the transaction has been independently verified by the member, and, if so, a description of the information or categories of information that were verified;
- whether or not the fairness opinion was approved or issued by a fairness committee; and
- whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the company's officers, directors or employees, relative to the compensation to the public shareholders of the company.

Procedural Requirements

Rule 2290 also requires any member issuing fairness opinions to adopt and implement written procedures for approval of fairness opinions by the member. (The requirement that the procedures be written was not included in the rule as initially proposed.) The written procedures must specify the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion. In those transactions in which it uses a fairness committee, the written procedures must include: (i) the process for selecting personnel to serve on the fairness committee; (ii) the necessary qualifications of persons serving on the fairness committee; and (iii) a process to promote a balanced review by the fairness committee, which shall include the review and approval by persons who do not serve on the

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SEC Approves New Rule Governing Fairness Opinions

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deal team to the transaction. The written procedures must also include the process to determine whether the valuation analyses used in the fairness opinion are appropriate.

Practical Considerations

Many of the disclosures required by Rule 2290, such as disclosures regarding contingent compensation and material relationships, are customarily made in fairness opinions and in proxy statements delivered to shareholders. Certain of the required disclosures, however, are new, particularly those relating to the use of a fairness opinion committee and whether the member rendering the opinion is opining on certain matters relating to compensation of officers and directors.

It is important to note that some provisions of Rule 2290 require determinations to be made, not on the basis of quantitative or other bright-line tests, but rather on subjective standards, such as whether the advisor rendering a fairness opinion will receive any "significant" payment or compensation that is contingent on the successful completion of the transaction.

In light of Rule 2290, financial advisors must carefully review their policies and procedures for issuing fairness opinions and review related fairness opinion forms to ensure compliance with all of the requirements of the new rule.

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Single Cause is Comin' to Town

(Continued from page 6)

Needless to say, "number of occurrences" is an extremely significant — and hotly contested — issue. It arises in the context of numerous coverage scenarios. As *Baumhammers* demonstrated, it can be the difference between $300,000 and $1.8 million being applicable to a loss. In many cases, the high-low range is far greater than that. While policyholders were handed a defeat in *Baumhammers*, all was not lost. *Baumhammers* will surely be used by policyholders to argue that, when the issue is "number of deductibles," the court's same rationale should lead to a decision that only one deductible applies.

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New and Notable

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Randy Maniloff and **Gale White**, both in our Business Insurance Group, co-authored "Willy Wonka & The Money FACTAry: Examining Insurance Coverage For Violating The Information Requirements Of A Credit Card Receipt" published in the November 7, 2007 issue of ***Mealey's Emerging Insurance Disputes***. Also, **Randy Maniloff** published "Insurance-Palooza: 7th Annual Look At The Year's Ten Most Significant Coverage Decisions" in the January 10, 2008 issue of ***Mealey's Litigation Report: Insurance***.

Michael Olsan, in our Reinsurance Group, presented "Reallocation Among Settled and Non-Settled Insurers" at the **Insurance and Reinsurance Allocation Party's National Convention**.

John Pauciulo, in our Business Department, presented "Doing Deals with Private Equity Funds" at the **Pennsylvania Bar Institute**.

Wes Payne, in our Litigation Department, served as a panelist at the 2007 State Civil Litigation Section Annual Meeting of the **Philadelphia Bar Association**. He also presented "Business Development Secrets of Successful Diversity Lawyers" at the **National Constitutional Center** and served as moderator for "Best Practices in Hiring and Retention" at the 2nd Annual Diversity Summit hosted by the Minority Bar Committee of the **Pennsylvania Bar Association**.

Mike Rausch, in our Litigation Department, presented "Effective Report Writing For Products Liability, Warranty and Lemon Law Litigation" to the technical managers and customer commitment staff of **Porsche Cars North America, Inc.**

Patti Santelle, in our Commercial Litigation Department, presented "Coverage for Long-Tail Claims" at the Insurance Coverage and Practice Symposium of the **Defense Research Institute**.

Jeff Seyfried, in our Workers' Compensation Group, will moderate a panel discussion "Employers Unplugged" at the **Bureau of Workers' Compensation Conference** on May 6, 2008.

Judy Sullivan, in our Business Department presented the **New Jersey Institute of Continuing Legal Education** program "Applying Principles of Contract Law to Drafting, Negotiating and Litigating Agreements".

Andy Susko, Chair of our Litigation Department, will receive the Outstanding Leadership in Support of Legal Services Award at the **Pennsylvania Legal Aid Network** Excellence Awards Dinner on March 18, 2008.

Bill Taylor, in our Commercial Litigation Department, authored "Why E-Bonds Are Not Widely Used In The United States" for the Fall edition of *News@PASA*, the quarterly newsletter of the **Pan American Surety Association**.

Liz Venditta, in our Commercial Litigation Department, authored the **Washington Legal Foundation** working paper "*Weiss v. First Unum Life*: Treating Insurers Like Racketeers".

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