

General Liability Update

for

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presented by

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1. Jurisdiction and Venue

Rule 2179. Venue

(a) Except as otherwise provided by an Act of Assembly or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in

- (1) the county where its registered office or principal place of business is located;
- (2) a county where it regularly conducts business;
- (3) the county where the cause of action arose; or
- (4) a county where a transaction or occurrence took place out of which the cause of action arose.

(b) An action upon a policy of insurance against an insurance company, association or exchange, either incorporated or organized in Pennsylvania or doing business in this Commonwealth, may be brought

- (1) in a county designated in Subdivision (a) of this rule; or
- (2) in the county where the insured property is located; or
- (3) in the county where the plaintiff resides, in actions upon policies of life, accident, health, disability, and live stock insurance or fraternal benefit certificates.

Rule 1006. Venue. Change of Venue

(a) Except as otherwise provided by Subdivisions (b) and (c) of this rule, an action against an individual may be brought in and only in a county in which the individual may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law.

Pennsylvania plaintiff sued New York accountant for malpractice. Although accountant prepared tax returns for Pennsylvania residents, there was no other evidence of contacts to support general jurisdiction. Also, occasional phone calls to client, contacts with Pennsylvania IRS office and existence of contract and professional relationship was insufficient to confer personal jurisdiction over accountant in Pennsylvania. **Poole v. Sasson, 122 F.Supp.2d 556 (E.D.Pa., 2000).**

Plaintiff sued eye surgeon's corporation in Philadelphia County, though his business operated and the cause of action arose in Montgomery County. Defendant sought transfer of venue to Montgomery County. The court held that defendant's consultation work at several hospitals in Philadelphia County were insufficient to establish "regularly conducted business," absent evidence of how the consultation furthered the goals of the corporation and whether there was compensation. **Gilford v. Altman, M.D., __ Pa. Super. __, 770 A.2d 341 (2001).**

In declaratory judgment action by carrier against insured in legal malpractice claim, defendant raised factual challenge to required \$75,000 threshold amount in controversy. Fact that offer and demand in the underlying suit was in the amount of \$200,000 was insufficient to meet burden, as court was afforded no information as to the value of the claim against the insured. **Coregis Insurance Co. v. Schuster, 127 F.Supp.2d 683 (E.D.Pa., 2001).**

2. Statute of Limitations

[§ 5524. Two year limitation](#)

The following actions and proceedings must be commenced within two years:

- (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
- (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
- (3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.
- (4) An action for waste or trespass of real property.
- (5) An action upon a statute for a civil penalty or forfeiture.
- (6) An action against any officer of any government unit for the nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession.
- (7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter.
- (8) An action to recover damages for injury to a person or for the death of a person caused by exposure to asbestos shall be commenced within two years from the date on which the person is informed by a licensed physician that the person has been injured by such exposure or upon the date on which the person knew or in the exercise of reasonable diligence should have known that the person had an injury which was caused by such exposure, whichever date occurs first.

[§ 5525. Four year limitation](#)

The following actions and proceedings must be commenced within four years:

- (1) An action upon a contract, under seal or otherwise, for the sale, construction or furnishing of tangible personal property or fixtures.
- (2) Any action subject to [13 Pa.C.S. § 2725](#) (relating to statute of limitations in contracts for sale).
- (3) An action upon an express contract not founded upon an instrument in writing.
- (4) An action upon a contract implied in law, except an action subject to another limitation specified in this subchapter.
- (5) An action upon a judgment or decree of any court of the United States or of any state.
- (6) An action upon any official bond of a public official, officer or employee.
- (7) An action upon a negotiable or nonnegotiable bond, note or other similar instrument in writing. Where such an instrument is payable upon demand, the time within which an action on it must be commenced shall be computed from the later of either demand or any payment of principal of or interest on the instrument.
- (8) An action upon a contract, obligation or liability founded upon a writing not specified in paragraph (7), under seal or otherwise, except an action subject to another limitation specified in this subchapter.

Mentally retarded woman brought host of claims against former guardians, based upon nonconsensual sterilization of plaintiff in 1977 at age 16, which she allegedly discovered at 1993 doctor's visit. Action was removed to federal court. Third Circuit held that two-year statute of limitations on state law claims was not tolled, as statutes do not authorize tolling for mental incompetency and discovery rule applies reasonable standard to when party should discover a latent injury, not the standard of the mentally incompetent or illiterate. As the state statute of limitations would conflict with the intent of federal Section 1983 and Section 1985 claims of promoting civil rights, however, these would not have to be applied - under these facts, where the person who should have brought the claim on minor's behalf actually caused the harm, this would justify equitably tolling the statute. **Lake v. Arnold, 232 F.3d 360 (3rd. Cir. 2000).**

Western District Court predicts that Pennsylvania would adopt 2-year statute of limitations for bad faith claim under 42 Pa.C.S.A. Section 8371. The duty here is imposed because of the relationship between the insurer and insured, and therefore is akin to tort, even though it has some roots in the Unfair Insurance Practices Act and contract law. **Lochbaum v. United States Fidelity & Guaranty Company, 136 F.Supp.2d 386 (W.D. Pa., 2000).**

§ 8371. Actions on insurance policies

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

Two year statute would not be tolled, when claim was filed one day after expiration, due to temporary incapacities of plaintiff counsel due to back surgery. The non-negligent circumstances exception applied in cases involving periods for filing of appeals would not be extended to statutes of limitations. **Mosley v. Settles, __Pa.Super.__ 779 A.2d 1208 (2001).**

3. Negligent Infliction of Emotional Distress

Nurse who was stuck by needle used on welfare services agency patient, who had AIDS, brought action against agency claiming negligent failure to inform her of AIDS and failure to provide her with sufficient equipment. Though the nurse did not contract AIDS, she did thereafter suffer from a variety of emotional and nervous disorders. It was held that parasitic damages for fear of AIDS are available where there is a causal connection between an objective, measurable and observable injury (the needle stick here) and the possible development of AIDS. If plaintiff could prove negligence and causation, she could recover for emotional distress. The Order granting the agency summary judgment was reversed. **Shumosky v. Lutheran Welfare Services of Northeastern PA., Inc.**, __Pa.Super.__, 784 A.2d 196 (2001).

4. Defamation

Plaintiff received a termination letter from her employer, signed by four council members, indicating that a bill would be sent for the items missing from her hotel room while attending a conference. Plaintiff sued for defamation. While the letter could have defamatory meaning in light of the effect it would have on the mind of the average person, the court failed to adopt the broad federal standard for publication - since only council members saw/signed it, there was no third person involved. Even if it were published, the court noted, there would be no abuse of privilege where the motive was proper, the circulation was to those necessary and the defamatory matter was central to the letter's purpose. **Davis v. Resources for Human Development, Inc.**, __Pa.Super.__, 770 A.2d 353 (2001).

5. Informed Consent

Supreme Court holds that information concerning a surgeon's qualifications and experience is irrelevant to the doctrine of informed consent, whether or not solicited by the patient - the doctrine only applies to information concerning the risks of the procedure itself. This does not preclude, the Court added, the potential for a negligence claim or claim for misrepresentation. **Duttry v. Patterson, M.D., 565 Pa. 130, 771 A.2d 1255 (2001).**

Plaintiff, who underwent surgery which included implantation of bone screws, later filed suit against physicians and hospital, alleging lack of informed consent relative to non-disclosure of fact that bone screws had been given a Class III classification by the FDA. A Class III device is one for which, *inter alia*, there is insufficient evidence to assure safety and effectiveness. The court disallowed the claim, holding that the category into which the FDA places a device for marketing and labeling does not enlighten a patient as to seriousness of operation, the organs of the body involved or the possible results. The label is not a material fact, risk, complication or alternative to a surgical procedure. **Southard v. Temple University Hospital, 566 Pa. 335, 781 A.2d 101 (2001).**

6. Internet

Plaintiffs claimed that defendant wrongfully obtained the right to use a domain name under false claims of ownership in a separate arbitration procedure established to deal with trademark related domain name disputes, under the Uniform Domain Name Dispute Resolution Policy. It was held that Pennsylvania would recognize neither a cause of action in conversion for interference with a domain name, as the same is intangible property which is not identified with a document, nor a novel cause of action, cyberbullying, as trademark misuse has only been recognized as a defense to a trademark infringement claim and not as an affirmative cause. The court held, however, that claims for tortious interference with contract and abuse of process could proceed, as questions of fact remained. **Famology.com Inc. v. Perot Systems Corp., 158 F.Supp.2d 589 (E.D.Pa., 2001).**

7. Unlawful Detention

Patron and her children were detained by store employees with reasonable suspicion that patron had items for which she did not pay. She was escorted to the manager's office, her child's backpack was searched and she was held ten minutes until police arrived. It was held that where there was no evidence that patron was ever touched or in imminent fear of harmful or offensive conduct, there was no assault and battery; even if there were, the store was immune for detention for reasonable time and in reasonable manner under Retail Theft Act. **Szlydowski v. City of Philadelphia, 134 F.Supp.2d 636 (E.D. Pa., 2001).**

[§ 3929. Retail theft](#)

(a) Offense defined.--A person is guilty of a retail theft if he:

(1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof;

(2) alters, transfers or removes any label, price tag marking, indicia of value or any other markings which aid in determining value affixed to any merchandise displayed, held, stored or offered for sale in a store or other retail mercantile establishment and attempts to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of the full retail value of such merchandise;

(3) transfers any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment from the container in or on which the same shall be displayed to any other container with intent to deprive the merchant of all or some part of the full retail value thereof; or

(4) under-rings with the intention of depriving the merchant of the full retail value of the merchandise.

(5) destroys, removes, renders inoperative or deactivates any inventory control tag, security strip or any other mechanism designed or employed to prevent an offense under this section with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof.....

(c) Presumptions.--Any person intentionally concealing unpurchased property of any store or other mercantile establishment, either on the premises or outside the premises of such store, shall be prima facie presumed to have so concealed such property with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof within the meaning of subsection (a), and the finding of such unpurchased property concealed, upon the person or among the belongings of such person, shall be prima facie evidence of intentional concealment, and, if such person conceals, or causes to be concealed, such unpurchased property, upon the person or among the belongings of another, such fact shall also be prima facie evidence of intentional concealment on the part of the person so concealing such property.....

(d) Detention.--A peace officer, merchant or merchant's employee or an agent under contract with a merchant, who has probable cause to believe that retail theft has occurred or is occurring on or about a store or other retail mercantile establishment and who has probable cause to believe that a specific person has committed or is committing the retail theft may detain the suspect in a reasonable manner for a reasonable time on or off the premises for all or any of the following purposes: to require the suspect to identify himself, to verify such identification, to determine whether such suspect has in his possession unpurchased merchandise taken from the mercantile establishment and, if so, to recover such merchandise, to inform a peace officer, or to institute criminal proceedings against the suspect. Such detention shall not impose civil or criminal liability upon the peace officer, merchant, employee, or agent so detaining.

8. Contracts/Non-Compete Clauses

Tenured law school professor was terminated through a university tenure proceeding, allegedly for sexual and other misconduct involving female students. He filed suit for breach of contract, arguing, *inter alia*, that a determination of “serious misconduct” needed to be determined by the court as the term was not defined in the school’s “statutes” on tenure and termination. Summary judgment was granted by the trial court, and this was affirmed by the Superior Court. On appeal, the Supreme Court affirmed the granting of summary judgment on the basis of different reasoning. The standard here should be the same as for review of any granting of motion for summary judgment, i.e., a determination as to whether a genuine issue of material fact existed, as opposed to a “substantial evidence” type standard used by the Superior Court. Also under standard contract principles the tenure statutes, incorporated into the employment contract, when read in context clearly gave the university, not the courts, exclusive control over the determination of the professor’s status. A conclusive and final decision had been made, and a breach of contract claim was not an appropriate forum to have a de novo review of the issues decided. **Murphy v. Duquesne University of the Holy Ghost, 565 Pa. 571, 777 A.2d 418 (2001).**

Plaintiff company sought temporary injunctive relief against salesman who, shortly after leaving plaintiff’s employ, was servicing for a competitor a number of customers of plaintiff with whom plaintiff had cultivated relationships over many years and for whom salesman was plaintiff’s contact. Under Illinois law, it was held that two year period of restriction was reasonable, and where there was no evidence that the customers were ever salesman’s customers prior to his employ with plaintiff and where plaintiff faced irreparable harm (imminent loss of long-standing customer relationship), injunctive relief was appropriate. **Siemens Building Technologies, Inc. v. Camacho, 168 F.Supp.2d 425 (E.D.Pa., 2001).**

Employer sought to enforce non-compete clause in former employee’s contract via temporary injunction, and injunction was granted. Here, employee’s argument that corporation’s name change following a complete stock buy-out effectively changed employer such that covenant was not enforceable was rejected, as the stock transfer essentially created merely a different name for the same corporation. Restrictions for one year to not deal with employer’s customers in limited geographic area was enforceable, however prohibition against employee ever being employed in same business as employer was not warranted and would not be enforced. **Siemens Medical Solutions Health Services Corp. v. Carmelengo, 167 F.Supp.2d752(E.D.Pa., 2001).**

9. Environmental Law

Settling responsible parties sought CERCLA contribution from defendant, a non-settling third party. Where evidence demonstrated that wastes at site were co-mingled and indivisible, contribution was permitted in proportion to amount of waste contributed by third party by weight, using the “Gore factor” of contribution to the harm, toxicity of waste volume (by weight) and cooperation with the government by settling parties. **United States v. Pesses, 120 F.Supp.2d 503 (W.D.Pa., 2000).**

Owner of battery recycling facility sought contribution against various scrap metal dealers who supplied spent batteries for recycling, after settling with government under CERCLA consent. While pending, Congress passed the Superfund Recycling Equity Act, insulating suppliers of materials for recycling from liability. It was held that Act applied retroactively to claims pending at time of enactment. Also, fact that supplied material was not completely recyclable would not affect application, as Act specifically included entire spent lead-acid batteries. **Gould v. A&M Battery & Tire Service, 232 F.3d 162 (3rd. Cir. 2000).**

Private cause of action under the Pennsylvania Storage Tank and Spill Protection Act applies to contamination of lands and waters and provides no protection against discharge of chemical vapors into the air. **Banks v. Ashland Oil Company, 127 F.Supp.2d 679 (E.D. Pa., 2001).**

Manufacture insured sough coverage for environmental pollution clean-up costs, under policy which provided coverage for pollution that was “sudden and accidental” but not otherwise. Manufacturers maintained that those words, in the usage in the industry, mean “unexpected and unintended.” Manufacturers also asserted the doctrine of regulatory estoppel, based upon the insurance industry’s memo to the Pennsylvania Insurance Department that the exclusion of pollution unless it was “sudden and accidental” would not result in any significant decrease in coverage. The Supreme Court held that regulatory estoppel was sufficiently pleaded to withstand defendant’s demurrer, the doctrine intended to prevent parties from switching positions to suit their own ends. Also, it was held that the plaintiff properly pleaded that the CGL policies do indeed provide coverage for both gradual and abrupt pollution or contamination as long as it was unexpected and unintended, and the trial court would have to determine if that is what the memorandum meant. **Sunbeam Corporation v. Liberty Mutual Insurance Company, 566 Pa. 494, 781 A.2d 1189 (2001).**

Chemical manufacturer purchased land in 1964, discovering soon thereafter the land was extensively polluted with arsenic waste, a by-product of the previous owners’ and its

manufacturing process. It thereafter added the site to its CGL insurance coverage, advising the primary coverage carrier, its broker and the proper commonwealth authorities, but not its excess carriers, of the problem. The EPA brought a CERCLA claim in 1980, and in 1988 the plaintiff manufacturer notified its excess carrier that it was asserting a claim. The carrier sought to dismiss the claim on the basis of the known loss doctrine. In a case of first impression, it was held that the doctrine provided a defense if the insured knew or should have been aware of *a likely exposure* to losses which would reach the level of excess coverage. The facts supported such a finding here. **Rohm and Haas Company v. Continental Casualty Company, 566 Pa. 464, 781 A.2d 1172 (2001).**

Allegheny County Health Department and EPA had issued notices of violations of Clean Air Act and state regulations related to same against LTV Steel. LTV Steel permanently shut down Pittsburgh operation in February 1998, the United States thereafter filing a suit under CAA to recover civil penalties for violations. Several months later, LTV filed under Chapter 11. U.S. filed a motion to have bankruptcy stay declared inapplicable, and court agreed. As the U.S. was not seeking to enforce a money judgment but rather to seek entry of a civil penalty, the clear language of the bankruptcy statute contemplated this suit as an exercise of police powers, which is exempted from the stay. The CAA was enacted to “protect and enhance the quality of the Nation’s air resources so as to promote the public welfare and the productive capacity of its population,” and the effort to recover a civil penalty clearly was an exercise of police power. **United States v. LTV Steel Co., Inc., 269 B.R. 576 (W.D.Pa., 2001).**

10. Insurance

A. Exclusions

Carrier denied UIM coverage to police officer injured while using patrol car, under “regularly used non-owned car” exclusion. Under facts of this case, exclusion was void

as against public policy. Officer had fully complied with MVFRL on his own vehicle, and he had no option as to use of the patrol car, such that his knowledge or lack of knowledge of the exclusion in employer's policy was irrelevant. **Prudential Property and Casualty Insurance Company, __Pa.Super.__, 764 A.2d 1111 (2000).**

Pollution exclusion held to apply to lead based paint in a residential setting. The plain language of the clause lead to the conclusion that lead was a chemical "pollutant" and that any movement off of a residential wall would satisfy requirement "discharge, dispersal, release or escape." **Fayette County Housing Authority v. Housing and Redevelopment Insurance Exchange. __Pa. Super.__, 771 A.2d 11 (2001).**

Landlord entered into premises of tenant and removed large amount of inventory for failure of tenant to pay rent, pursuant to terms of lease. Landlord's carrier sought declaration that it did not owe duty to defend on subsequent claims levied against landlord by tenant. As the underlying complaint alleged, *inter alia*, harms arising out of wrongful eviction, a tort specifically enumerated in the policy, the duty to defend existed. Where the landlord was never convicted of violation of any law, the assertion of the "willful violation of a penal statute or ordinance" exclusion would not avail the carrier. **CGU Insurance v. Tyson Associates, 140 F.Supp.2d 415 (E.D.Pa., 2001).**

Plaintiffs in death case settled case against tortfeasor for \$15,000, based upon terms of carrier's family member limitation, where this amount was extent of coverage. Several months later, the Superior Court declared a similar provision against public policy in *Lambert v. McClure, 407 Pa.Super. 257, 595 A.2d. 629 (1991)*, and plaintiffs filed the instant suit. The Court held that *Lambert* should not be applied retroactively to invalidate the settlement, as the case was no longer pending. As the provision was valid at the time of settlement, the court also found no mutual mistake or misrepresentation. **Davis v. GEICO, __Pa.Super.__, 775 A.2d. 871 (2001).**

Insurance agent, who was authorized by Agency to bind coverage on behalf of Aetna, absconded with premiums. Aetna eventually learned of fraud and provided retroactive coverage to the defrauded insureds, thereafter filing suit against the Agency. Agency turned claim in to its E&O carrier, Utica, which denied coverage. A consent judgment was entered against Agency, which assigned its rights against Utica to Aetna. On consideration of Utica's Motion for Judgment on the Pleadings, Pennsylvania Supreme Court finds that exclusion for claims for "any liability for money received by an insured"

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applied to Agency - agent, acting within the scope of duties, was clearly an insured as defined under Utica policy, even though Agency never actually received the premiums. **Travelers Cas. & Surety Co. v. Castegnaro, 565 Pa. 246, 772 A.2d. 456 (2001).**

Owner of handgun gave it to employees of bar that he was going to buy, to protect the bar's assets and employees. An employee, prior to the sale being completed, mishandled the gun and killed someone. Handgun owner's homeowner's carrier denied coverage under "business pursuits" exclusion. It was held that exclusion would not apply, as

handgun owner did not have as yet legal or financial interest in bar and did not secure any profits or earnings. **White v. Keystone Insurance Company, __Pa.Super.__, 775 A.2d. 812 (2001).**

Wife driver, with husband and mother passengers, collided with other vehicle. Passengers receive serious injuries. Other driver joined wife driver for contribution. Case was settled, wife receiving monies from other driver's carrier only, but husband and passenger also receiving benefits from wife's policy. When husband and passenger sought to recover UIM benefits on wife's policy, carrier asserted dual recovery provisions prevented payment of UIM and liability benefits under same policy. The validity of this provision was the issue on appeal. After careful consideration of intent of the Motor Vehicle Financial Responsibility Law, the Circuit Court concluded that the case law refusing to invalidate this type of provision was always presented with factual scenarios which dealt with one driver and one policy, where the insured was trying to convert cheap UIM coverage into the much more expensive liability coverage. In this case, where there were dual drivers and dual policies, Pennsylvania public policy would invalidate the provision, despite its unambiguous language. The policies in favor of liberal interpretation of the statute and the remedial intent were considered paramount in the court's determination, and the only lower court treatment of this issue was in favor of coverage. **Nationwide Mutual Insurance Company v. Cosenza, 258 F.3d 197 (3rd Cir. 2001).**

Ruptured gas line resulted in house fire for homeowners. Homeowners sued municipality for it negligence in maintaining the gas line, and municipality sought coverage and a defense from its commercial general liability insurer. The carrier denied claims based on "total pollution exclusion" and municipality filed declaratory judgment action. It was held that carrier failed to meet its burden of proving that natural gas unambiguously is a pollutant as defined by the policy - despite exclusion of natural gas as pollutant or contaminant under CERCLA and its state counterpart, policy referred only to irritant or contaminant, and in this factual situation the policy could be ambiguous. **Municipality of Mt. Lebanon v. Reliance Insurance Company, __Pa.Super.__, 778 A.2d 1228 (2001).**

Insurer brought action for Declaratory Judgment, seeking a determination that it did not owe coverage/defense under the intentional act exclusion in its homeowner's policy covering defendant in underlying suit. Defendant was alleged to have attempted to choke

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one plaintiff and to have intentionally shot both plaintiffs in that case, with claims of assault and intentional conduct being made. After the DJ action was filed, plaintiffs amended complaint to add claim of negligence. The court held that arbitrary use of the word negligent to describe actions which are clearly intentional in nature will not trigger coverage or defense, with no new allegations of fact. **State Farm Fire and Casualty Company v. Dalrymple, 153 F.Supp.2d 624 (E.D.Pa., 2001).**

Carrier sought to invoke prior existing claim exclusion under professional liability policy issued to law firm in May, 1996. Medical malpractice case had been dismissed for lack

of activity in 1991, which dismissal was eventually affirmed by the Supreme Court in April 1996. Court applied mixed subjective/objective standard, looking at what facts insured subjectively had available and then the objective understanding of a reasonable attorney with that knowledge. Clearly insured in this case knew of client's dissatisfaction by January 1994 letter from client and the potential for a claim. Firm's assertion that they could not have reasonably foreseen a claim because any claim would have been time-barred under the statute of limitations was unavailing; this was a subjective belief in the lack of merit, where a reasonable attorney would have seen the weaknesses in this defense and the possibility of a longer breach of contract statute. Carrier was found to have no coverage obligations. **Coregis Insurance Company v. Baratta & Fenerty, Ltd., 264 F.3d 302 (3rd Cir. 2001).**

Insured plaintiff's estate brought claim against insurer, who denied accidental death benefits on the basis of exclusion for "any loss ...caused directly, indirectly, wholly or partly by...being intoxicated." Insured was intoxicated when another vehicle swerved and caused the vehicle beside insured to swerve into insured's lane, with the insured himself swerving and leaving the road and meeting a fatal crash. While the exclusion would not be avoided for being ambiguous or inconspicuous, as it used common terms and was easily seen on the back of a two page explanation of benefits, the lack of any evidence that the insured intoxication was causally related to the accident allowed the breach of contract claim by insured to proceed. Also, bad faith could reasonably be found by a jury based upon a theory that the carrier denied coverage upon learning of the intoxication without conducting a reasonable investigation into causation and without a basis. **Giangreco v. Unites States Life Insurance Co, 168 F.Supp.2d 417 (E.D. Pa., 2001).**

Pennsylvania Supreme Court looked at issue of whether lead-based paint would be "pollutant" included in policy exclusion of "discharge, dispersal, release or escape of pollutants." After determining that lead paint was clearly a pollutant as that term is used in common usage, the Court looked carefully at the process by which lead-based paint becomes available for human ingestion/inhalation. In rejecting the earlier decision of this court in *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 735 A.2d 100 (1999), which held that the language of the exclusion was meant to "comprehend all such types and degrees of movement," the Supreme Court looked at the slow surface

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degradation needed and the fact that the other terms in the exclusion ordinarily imply an active or clearly perceived physical event and concluded that the exclusion would not apply to the imperceptible flaking of lead paint. At most, "dispersal" might imply a more gradual event, but its ambiguity was interpreted in favor of the insured. **Lititz Mutual Insurance Co. v. Steely, __ Pa. __, 785 A.2d 975 (2001).**

B. Arbitration

Insured mother, who was passenger in husband's vehicle in one car accident, sought to recover underinsured motorist coverage under separate policy of daughter, who resided in household. Insurer sought to invoke family vehicle exclusion, and filed declaration of same. Insured sought to dismiss, claiming matter fell within arbitration clause of policy. The court refused to predict Pennsylvania public policy under these circumstances, rather holding that policy limitation of arbitration to issues of whether insured was legally entitled to compensatory damages and the amount did not encompass coverage dispute. Broad interpretation given to arbitration clauses that were not limited in scope did not apply. **State Farm Mutual Automobile Insurance Company v. Coviello, 233 F.3d 710 (3rd. Cir. 2000).**

Insurer sought declaration that its UM/UIM selection forms were valid, in dispute over amount of coverage. Where arbitration clause in policy was broadly applicable to coverage disputes, insured had challenged form to obtain additional UM/UIM coverage and clause did not explicitly exclude UM/UIM issues, dispute over selection form would be within scope of arbitration clause. **The Hartford Insurance Co. v. O'Mara, 123 F.Supp.2d 834 (E.D. Pa., 2000).**

C. Cancellation

First two installments under four installment option on premiums were due April 29, 2000 and May 29, 2000. After no payment was received, carrier sent out proper cancellation notice, indicating that two full payments were needed by May 29 to avoid cancellation. On May 16, carrier received one installment and sent letter advising it still needed second installment by May 29 to avoid cancellation. Receiving no payment, policy was canceled on May 29, then reinstated on June 11 when the second payment was received. Insured was involved in accident on June 9, for which carrier denied coverage, and this lawsuit followed. Insured's argument that cancellation notice can only be sent after premium was past due (May 29) was rejected, and court found that policy was not in effect at time of accident. **Kelly v. Allstate Insurance Company, 138 F.Supp.2d 657 (E.D. Pa., 2001).**

When insured was scheduled for renewal of automobile policy, he received notice requesting one half of the premium as his semi-annual payment. His agent had told him in the meantime that he could arrange for monthly payments, and the insured sent the appropriate amount for his December and January monthly premiums. Rather than credit the insured properly, the carrier credited that amount paid against the semi-annual premium due and sent the insured notice that he owed a balance on his January premium. When his agent told him his January was overdue, at the agent's suggestion, the insured paid the entire balance due on his account. His policy was still canceled (without the insured receiving notice) due to late payment for January, and the insured sought review by the Insurance Department. On insured's appeal to the Commonwealth court after

adverse rulings by the Bureau of Consumer Services and the Insurance Commissioner, it was ruled that the Commissioner erred by not rescinding the cancellation. The carrier was estopped from canceling the policy. As the insured followed his agent's instructions throughout and had a long term relationship with the carrier during which he paid his premiums in a timely fashion and kept in touch with his agent, he could rely on his agent's information and believe that his policy would not be canceled without notice. **Tryson v. Pennsylvania Insurance Department, 784 A.2d 857 (Pa.Cmwlth. 2001).**

D. UM/UIM

Amount of UM/UIM coverage was in dispute. Plaintiff had purchased an auto policy from defendant with single liability limits of \$300,000 and single UM/UIM limits of \$300,000, and two vehicles were covered. In order to purchase an umbrella liability policy, they were advised they had to increase auto policy limits to \$500,000, and a new policy was issued providing \$500,000 liability and \$300,000 UM/UIM coverage. Plaintiff sought determination that \$1 million in UM/UIM coverage existed, while defendant argued \$600,000 would be the stacked limit. As no written request for lower UM/UIM coverage existed under Section 1734 of the MVFRL, and no Important Notice was provided under Section 1791, the difference in coverages could simply not exist under clear Pennsylvania law, and the policy was reformed to reflect \$1 million UM/UIM coverage. Argument that sections involved would not deal with *increase in liability coverage* was rejected, and while claimed request for UM/UIM limits lower than liability limits might be equivalent of Section 1734 request, with no writing there could be no lower limits. **Cebula v. Royal & SunAlliance Insurance Co., 158 F.Supp.2d 455 (M.D.Pa., 2001).**

Decedent was passenger in car driven non-negligently by policy-holder's daughter. The accident was caused by joint negligence of policy-holder's son (in a different vehicle) and a third party, separately insured. After collecting liability limits in both policies, decedent sought UIM coverage under policy-holders policy, but carrier denied claim on basis of

set-off in policy that provided any UIM payments would be reduced by amounts paid under liability limits of same policy, effectively eliminating the UIM claim here. The court held that decedent was a class two insured, not a party to the insurance contract involved, and could have no different expectations. Also, the fact that decedent was a passenger in a vehicle driven by a non-negligent driver would offer no distinction. Although the public policy argument was more compelling, and the court suggested that this type of setoff would serve, under these circumstances, to eliminate a statutorily

mandated coverage, the clear language of the set-off and the case law bound the court to disallow the coverage. **Bowersox v. Progressive Casualty Insurance Company**, __Pa.Super.__, 781 A.2d 1236 (2001).

Insured was injured in motor vehicle accident. The other driver offered their policy limits, which was insufficient to cover damages, and insured sought UIM benefits on her own policy. She also filed a products claim against manufacturer of surgical equipment and settled that claim. Insurer in UIM claim asserted breach of consent to settle clause, and board of arbiters ruled in carrier's favor. Petition to vacate was granted, and carrier appealed. The Court upheld the command of *Nationwide Mutual Insurance Company v. Lehman*, 743 A.2d 933(Pa.Super.2000) and affirmed, indicating that where there was no evidence of prejudice from the settlement, the purpose of the clause was lacking. Enforcement would be counter to public policy. **Cieranowski v. State Farm Mutual Automobile Insurance Company**, __Pa.Super.__, 783 A.2d 343 (2001).

Officer injured on the job when his vehicle, a township police cruiser, was rear-ended by a drunk driver. After accepted tender of other driver's policy limits, officer sought recovery under township UIM coverage, seeking a declaration as to whether both compensatory *and punitive* damages would be recoverable. In upholding the trial court's decision, the Court opined that the township policy's exclusion of punitive damages was clear and that if the legislature would have intended punitive damages to be recoverable under the MVFRL, it would have expressly included them in the language of the law. The exclusion was seen, in a case of first impression, to not be contrary to the MVFRL. Also, as the township had bargained with the carrier for the policy, not the individual officer, there could be no claim that this was a contract of adhesion. **Robson v. EMC Insurance Companies**, __Pa. Super.__, 785 A. 2d 507 (2001).

E. Coverage/Defense

Carrier sued co-insurer for share of costs of defense, where co-insurer had refused to provide a defense in claim against insured for boycott, monopoly and conspiracy to monopolize under Sherman Act. Court held that duty to defend did exist under personal injury coverage since, even though counts did not include defamation claim, allegations of defamation were made; factual allegations, not solely cause of action, were

determinative. **CGU v. Travelers Property Casualty, 121 F.Supp.2d 819 (E.D.Pa., 2000).**

Legal malpractice insurer provided defense to insured in state court action and pursued declaratory relief in federal court. In underlying case, insured's attorney threatened carrier that it would enter into consent judgment with plaintiff for \$3 million, with the implication that plaintiff would pursue claim directly against carrier. Afraid that it might lose opportunity to litigate obligation to pay, carrier settled the case. Carrier subsequently brought action against insured to recoup settlement monies. Carrier's action was dismissed, as mistaken belief that it could be held directly liable for consent judgment, where policy made clear that judgment entered by insured without carrier consent would be unenforceable against carrier, would not defeat voluntary payment doctrine. **Coregis Insurance Co. v. Law Offices of Carole F. Kafrisen, 140 F. Supp.2d 461 (E.D.Pa., 2001).**

Spouse and four children survived decedent killed in an airplane crash and brought suit against the owner of the airplane. The owner was insured by American Eagle Insurance, which, during the course of the litigation, became insolvent. PIGA took the place of the insolvent carrier pursuant to 40 P.S. Section 991.1803. The question on appeal was whether the five surviving claimants, who brought claims for wrongful death, *inter alia*, were to be considered one claim or five claims under the statute, which has a \$300,000 cap per claimant. The Superior Court reasoned that the intent of the statute was to provide coverage for all "covered claims," such that if the claim was covered under the insolvent's policy, it would be a "claim" for statutory purposes. The treatment of the claims under state law as derivative or separate claims would therefor be irrelevant. Here, there was no evidence on whether the claims would have been covered under the American Eagle policy, and so the matter was remanded for a determination on this issue. **Keystone Aerial Surveys, Inc. v. Pennsylvania Property & Casualty Insurance Guaranty Association, __Pa.Super.__, 777 A.2d 84 (2001).**

[§ 991.1803. Pennsylvania property and casualty insurance guaranty association](#)

.....

- (b) The association shall have the following powers and duties:
 - (1)(i) To be obligated to pay covered claims existing prior the determination of the insolvency, arising within thirty (30) days after the determination of insolvency or before the policy expiration date if less than thirty (30) days after the determination of insolvency or before the insured replaces the policy or causes its cancellation if he does so within thirty (30) days of the determination. Any obligation of the association to defend an insured shall cease upon the association's payment or tender of an amount equal to the lesser of the association's covered claim

obligation or the applicable policy limit. Such obligation shall be satisfied by paying to the claimant an amount as follows:

.....

(B) An amount not exceeding three hundred thousand (\$300,000) dollars per claimant for all other covered claims.

.....

(2) To be deemed the insurer to the extent of its obligation on the covered claims and, to such extent, shall have all rights, duties and obligations of the insolvent insurer as if that insurer had not become insolvent.....

Plaintiff purchased Elite Collector Policy from defendant, for collector cars which he had agreed to use only on limited basis. He also had a regular use vehicle insured with Erie. His son was killed as a passenger in another automobile. After collecting the insurance on the other automobile and the UIM coverage on plaintiff's Erie vehicle, plaintiff sought UIM coverage on the Collector Policy. Both plaintiff and insured sought a declaratory judgment in their favor on the coverage issue. Defendant asserted that the policy required one to be occupying the subject vehicle to be considered an "insured." The district court noted the separation of "you or any family member" and "any other person 'occupying' 'your covered auto'" signified that the owner and his family members would be covered whether or not they occupied the vehicle. Accordingly, the court found coverage to exist. Defendant, with limits of \$200,000, sought to be freed from paying to its insured more than 2/3 of the limits, in light of the \$100,000 Erie underinsurance already collected and the "multiple sources" provision of its policy. The district court rejected this as well, asserting that no where does the policy or the statute allow for the insurer to set-off payment to the insured - the carrier can recover through pro-rata contribution from another carrier. It is against public policy to allow excess coverage to be converted into "gap" coverage through policy language. **Quinney v. American Modern Home Insurance, 145 F.Supp.2d 603 (M.D. Pa., 2001).**

Pennsylvania Property and Casualty Insurance Guaranty Association's statutory right to setoff amounts paid by other insurers was determined to be non-waivable. PPCIGA would not be estopped from asserting right by failure to expressly do so at time of settlement. Even if claimants were misled by PPCIGA's counsel's failure to expressly assert the right, claimants could not establish that they reasonably relied on that omission or that they lacked a duty to inquire at the time of the settlement. Counsel did not have authority to waive PPCIGA's statutory setoff. **Storms v. O'Malley, __Pa.Super.__, 779 A.2d 548 (2001).**

Declaratory judgment action was filed by carrier to determine its obligations to defend and indemnify employee of its insured. Insured had permitted employee to drive company vehicle primarily for transportation to and from work, warning him “not to get sloppy drunk and drive it around.” Employer had apparently acquiesced in employee driving to local bar after work for drinks, however. In auto accident underlying action, employee was legally intoxicated and under influence of marijuana while driving home from bar on own time. Policy requirement that insured must have permission of owner to be elevated to level of additional insured was clear, and actions here were clearly outside of scope of permission where there was nothing to indicate that particular actions were with consent. **TICO Insurance Company v. March, 155 F.Supp.2d 441 (E.D.Pa., 2001).**

Insureds sued insurers to recover compensation for damage to personal property caused by a house fire at their residence. Delays in payment prompted suit, and defendant insurers filed Motion to Dismiss (treated as Motions for Summary Judgment) asserting the lack of cooperation of plaintiffs in their investigation. Insureds allegedly did not submit to an examination under oath and failed to turn over financial records requested. Though the different insurers had slightly different rationale for their Motions, the court denied all Motions to Dismiss (except for one unsupported claim). The failures of plaintiffs were not as a matter of law a material breach; insurers needed to show specific evidence they needed and prejudice by insureds’ failures. Also, allegations of failure to promptly and thoroughly investigate and of the lodging of baseless and spurious claims of fraud were sufficient to withstand Motion to Dismiss, as questions of fact existed and no material breach clearly existed. Also, the one insurer’s argument that since it had not yet denied coverage, the claim was premature, would not be accepted, in light of insureds’ allegation of failure to promptly investigate and time limitation in policy for bringing claim. **Ania v. Allstate Insurance Company, 161 F.Supp.2d 424 (E.D.Pa., 2001).**

Plaintiff, twenty feet from employer's truck while taking an instrument reading, was struck by another vehicle. Claimant clearly was not "occupying" the vehicle for UM coverage purposes. The claim that the beacon on the truck was required by federal regulations was unavailing, as plaintiff was not engaged in an activity directed toward or in preparation of entering the vehicle. **Curry v. Huron Insurance Company, __ Pa.Super. __, 781 A.2d 1255 (2001).**

Injured passenger in motor vehicle involved in accident recovered liability limits of his driver and driver of other auto and sought underinsurance benefits under auto policy of his father, with whom he lived. Father’s policy was issued to corporate entity and covered vehicle owned by his father’s corporation. The named insured on the policy was the corporate entity, and an insured under the policy included a family member of “you,” if “‘you’ are an individual.” It was held “you” in policy necessarily meant the corporate entity, not the individual. The court could not accept that plaintiff was a family member of a business entity. Benefits were denied. **Nationwide Mutual Fire Insurance Company v. Salkin, 163 F.Supp.2d 512 (E.D.Pa., 2001).**

F. Bad Faith

Insurer failed to settle a case without a bona fide belief that it had a good possibility of winning and was found to be in bad faith. Trial court granted j.n.o.v., holding that the carrier's payment of the excess verdict nullified the bad faith claim, as compensatory damages were not available under Section 8371 and it had not charged the jury on breach of contract. The Superior Court reversed, noting that payment of the excess would not preclude award of compensatory damages, remanding for calculation of interest, fees and costs under Section 8371. On appeal, the Supreme Court affirmed. Where, as here, the insured can prove that it sustained damages in excess of the verdict, the payment of the excess has little to do with the insured's damages - it is not freed from other known or foreseeable damages incurred by insured. Also, ability to award compensatory damages for bad faith under common law was not prohibited by Section 8371's additional authority to the court to award interest, costs and fees. Fact that 8371 does not mention compensatory damages does not prohibit their award. **Birth Center v. St. Paul Companies, Inc., __ Pa. __, 787 A.2d 376 (2001).**

11. Intellectual Property

Telecommunications provider (Qwest) sued competitor (Cyber-Quest) for trademark infringement. Defendant assertion that its provision of computer equipment could not infringe where plaintiff's trademark registration listing "telecommunication services" was unavailing since a purpose of trademark law is to allow expansion of protected mark into other markets. Also, there was sufficient question of fact as to whether the two marks were confusingly similar so as to preclude motion to dismiss. **Qwest Communications International v. Cyber-Quest, Inc., 124 F. Supp. 2d 297 (M.D. Pa., 2000).**

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Franchisee, pursuant to Agreement, was required to bring his hotel up to franchisor's standards and receive written authorization from franchisor prior to using franchisor's service trademarks and trade names. Franchisee began using franchisor's trademarks and name, answering the phone using franchisor's name, using stationery with franchisor's name and otherwise advertising as the franchisor, despite not bringing hotel up to standard or receiving written authorization. Franchisor sued to enjoin actions and to recover damages. The court held that not only were defendant's actions an infringement of the plaintiff's trademarks, his continued infringement despite numerous warnings from plaintiff to discontinue use of trademark rendered his conduct willful, allowing the award of attorney's fees under 15 U.S.C. Section 1117(a). Also, individual defendant sole shareholder could be personally liable even if acting in scope of

employment and without any special or contractual relationship. **Choice Hotels International, Inc. v. Pennave Associates, 159 F.Supp.2d 780 (E.D.Pa., 2001).**

Plaintiff brought unfair competition, trademark infringement, dilution and cyberspiracy claims against defendant competitor. After lengthy analysis of *Interspace Corp. v. Lapp, Inc.*, 721 F.2d 460, 461 (3d. Cir. 1983) factors to determine confusion likelihood (Lapp factors), it was held that logo of the plaintiff was sufficiently distinct so as to not cause likelihood of confusion by consumers. Textual marks of plaintiff, however, were seen to have taken on secondary meaning for consuming public, again after lengthy analysis of numerous factors. This secondary meaning existing, the Lapp factors were again used to determine likelihood of confusion, and court held that the textual marks of “Pocono Raceway” and “Pocono” as applied to automobile racetrack facilities, were likely to be confused with defendant’s textual marks, and so plaintiff was entitled to relief on unfair competition claims. Also, as textual mark was famous, dilution claim could proceed as well. On cyberspiracy claim relative to mark, under 15 U.S.C. Section 1125(d), lack of evidence of bad faith was fatal to claim. **Pocono International Raceway, Inc. v. Pocono Mountain Speedway, Inc., 171 F.Supp.2d 427 (M.D.Pa., 2001).**

12. Experts

In strict liability claim against manufacturer of wood refinisher which allegedly burst into flames, defense expert could testify that most likely cause of the fire was that plaintiff either inserted or withdrew a plug from an electrical outlet in vicinity of fire; evidence would be relevant to defect or causation issues, though not for purposes of demonstrating negligence which would be inadmissible in strict liability case. **Coffey v. Minwax Company, ___ Pa.Super. ___, 764 A.2d 616 (2000).**

Physician failed to diagnose abdominal aneurism, as he never received the x-rays, which clearly showed this, from the hospital. In reversing the granting of summary judgment to the hospital,

it was held that expert testimony was not needed on issue of hospital negligence in its policies regarding delivery of x-rays - the want of care was obvious on either the part of the hospital or the physician. **Cangemi v. Cone, D.O., __Pa.Super.__. 774 A.2d1262 (2001).**

Defendant auto manufacturer file Motion in Limine to exclude expert testimony as to defect of its vehicle in crashworthiness case. A *Daubert* hearing was held, wherein the expert substantially expanded upon the details of his methodology and the bases for his opinions beyond the information contained in his report. The court held that where the conclusions reached by the expert at the *Daubert* hearing were consistent with his report, the conclusions would not be excluded. Any prejudice would be remedied by a deposition of the expert and/or leave to supplement defendant's own expert report to address the new information. As to the expert's qualifications, although qualified to speak on the issues of seat belt design and barrier design, the expert testified he was not knowledgeable on the issues of warning content and placement, and his testimony in this latter regard was excluded. **Bowersfied v. Suzuki Motor Corporation, 151 F. Supp.2d 625 (E.D. Pa., 2001).**

After house fire, plaintiff brought strict liability claim against manufacturer of toaster asserted to have caused the fire. Plaintiffs' expert had two theories, namely that the toaster overheated (manufacturing defect) and that it did not have a thermal cut-off device (design defect). As to the former, plaintiffs' expert examined contacts in toaster and saw evidence of welding, and as to the latter, the expert opined that the device could have easily been added based upon a similar product in Canada and his general knowledge of the devices and their applications. The Court found the expert testimony insufficient under Rule 702 of the Rules of Evidence, *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). The expert's methods were unreliable, as he never tested his hypothesis of the spontaneous combustion from overheating, never attempted to re-create it and did not adequately support why the markings on the contacts seen under a microscope meant that welding had occurred, *inter alia*. Also, he offered no evidence of the Canadian toaster model and offered no advice as to how the incorporation of the cut-off could have been effectuated. He also offered no exemplar oven to test its fire-prevention capacity. No question of material fact remained without the expert testimony. **Booth v. Black & Decker, Inc., 166 F.Supp.2d 215 (E.D. Pa., 2001).**

13. Products Liability

Mother and two children were killed in fire started by child playing with disposable lighter, and product liability suit was filed. The trial court dismissed claim on the basis that a child was not an intended user of the product, but the Superior Court reversed, as it is intended to be used around children, they have reason to come into contact and it is not reasonably obvious that a

child would not use this. Also, where the dangers were great and a safer alternative could be had with minimal costs, the risk-utility analysis made an award of summary judgment improper. **Phillips v. Cricket Lighters, __Pa.Super.__, 773 A.2d. 803 (2001).**

Plaintiff with scoliosis had rod inserted into back. Several years later, knurled surface of rod fractured, leading to an additional operation and back problems. A jury awarded damages on the negligent design case, but the judge granted JNOV, concluding that the rod was not unreasonably dangerous for its intended use. On appeal, the Superior Court affirmed. Plaintiff asserted that the evidence read most favorably lead to the conclusion that the rod was intended to last until spinal fusion took place, however the court was free to reject this conclusion where the intended use so posed presumed that fusion would take place. There was no evidence that the rod was intended to last indefinitely in the absence of fusion. **Schindler v. Sofamor, Inc., __Pa.Super.__, 774 A.2d.765 (2001).**

Parents of child who died as a result of a house fire caused by another child playing with a lighter brought strict liability claim against lighter manufacturer. Defendant's Motion to Dismiss was granted, on the basis that a child was not an intended user of the lighter. On Motion for Reconsideration filed after Superior Court's decision in *Phillips v. Cricket Lighters*, 773 A.2d 802 (Pa.Super.2001)(holding that child was reasonably foreseeable user and use by "intended user" was not required), district court gave *Phillips* little regard and predicted state Supreme Court would require "intended user" for strict liability case. Summary Judgment was upheld. **Hittle v. Scripto-Tokai Corporation, 166 F.Supp.2d 159 (M.D.Pa., 2001).**

Parents sued manufacturer of butane lighter for damages arising from residential fire started by child with lighter, on claims of strict liability and negligence. On negligent design claim, the court held that defendant had a duty to plaintiffs as it was foreseeable that a child could play with a lighter and start a fire and that the risk of this was unreasonable, given society's value on safety and the available alternative of child-proofing. On products claim, the court followed the Superior Court decision in *Phillips v. Cricket Lighters*, 773 A.2d 802, 2001 WL 346061 (Pa. Super. April 10, 2001), and held that Pennsylvania would follow a risk utility analysis as a threshold question for the court, thus reinstating the products claim. The court had previously followed *Griggs v. BIC Corp*, 981 F.2d 1429 (3d Cir. 1992), but Phillips clearly rejected Griggs' "intended user" test. Note that the court chastised defendant for not reporting to it the sister court's decision (favorable to plaintiff) in *Hittle v. Scripto-Tokai Corp.*, 2001 WL 1116556 (M.D.Pa. 2001), given defendant's unique position of being involved and the factual similarity of the case. **Smith v. Scripto-Tokai Corp., 170 F.Supp.2d 533 (W.D.Pa. 2001).**

District Court attempts in this case to analyze and predict how Pennsylvania high court would decide level of duty to warn on part of component part manufacturer. Here, suit was brought against manufacturer of unguarded foot activation switch which was accidentally tripped, causing heavy machinery to start and injuring plaintiff. Noting that the Supreme Court of Pennsylvania has not ruled definitively on the duty to warn of a component manufacturer, and that the case of *Wenrick v. Schloemann-Siemag, A.G.*, 523 Pa. 1, 564 A.2d 1244, 1247 (1989)(plurality opinion), is often mistakenly cited for the proposition of no duty to warn, the court predicted that Pennsylvania would reduce the limitation on a component part manufacturer's duty to warn primarily to an inquiry into whether the relevant use was foreseeable to the manufacturer. As long as the actual use were among the uses foreseeable, the duty would exist; the duty would not be limited to foreseeable specific end uses only. **Colegrove v. Cameron Machine Co., 172 F.Supp.2d 611 (W.D.Pa., 2001).**

14. Labor Relations

Plaintiff purchased various assets of a manufacturing facility, re-hiring most of the union employees of the facility and thus becoming bound to bargain with the union. When the parties were unable to resolve their differences over a grievance, the union requested arbitration under the terms of the CBA in effect between it and the former owner of the manufacturing facility. Plaintiff brought suit to enjoin the union, asserting its inclusion in the purchasing agreement a clause indicating they were not bound by the CBA and it consistent maintenance of that position, and the district court entered an injunction prohibiting the arbitration. On appeal by the union, the Circuit Court affirmed, holding that unconsenting successor employer that is not the alter ego of the predecessor cannot be bound by the terms of CBA negotiated by its predecessor. There

would simply be no contract for the arbitrator to construe. **Ameristeel Corporation v. International Brotherhood of Teamsters, 267 F.3d 264 (3rd Cir.2001).**

15. Wrongful Discharge

Insurance company defendant retrieved stored e-mail sent by an independent contractor agent and used the information to cancel agreement with the agent and withhold earned deferred compensation under the terms of the agreement. *Inter alia*, plaintiff asserted in its Complaint that defendant violated the Federal and Pennsylvania Wiretap Acts and Stored Communications Acts through this retrieval. The court ruled that retrieval is not “interception” unless done during course of transmission, before the transmission is complete. Also, Stored Communications Acts apply only to messages stored in intermediate storage temporarily, after it is sent but before it is retrieved by intended recipient. Retrieval here was not a violation. **Fraser v. Nationwide Mutual insurance Co., 135 F.Supp. 2d 623 (E.D.Pa., 2001).**

Plaintiff, whose employment was governed by a collective bargaining agreement, was terminated after he tried to return to full duty after being on light duty for a period following work-related injury. He filed a wrongful discharge claim, asserting the dismissal was retaliation for his workers compensation claim. It was held that union-represented employees under a CBA cannot maintain an action for wrongful discharge when the terms of the CBA would otherwise protect them. An at-will employee would not have the grievance procedures available under the CBA and thus the distinction is made. This would also be a claim that would be preempted by federal labor law, as it is essentially a claim for violation of a CBA. **Harper v. American Red Cross Blood Services, 153 F.Supp.2d 719 (E.D.Pa., 2001).**

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16. Wrongful Employment Practices

A. Sexual Harassment / Hostile Environment

Female employee brought Title VII, PHRA and intentional infliction of emotional distress claims against employer, asserting that after she spurned supervisor’s requests for a date, she was criticized and berated by supervisor and eventually fired by manager who ignored her complaints. Treating case as quid pro quo harassment claim, court held that claim of two requests for date, one during an obscene phone call, adequately alleged conduct of a sexual nature. Also, where manager and supervisor were alleged to be friends and confidants, fact that manager and not supervisor fired plaintiff did not defeat claim. Finally, criticism, reprimand, disparagement and the requests for dates, while boorish and improper, did not arise to necessary level of outrageousness or atrocity

needed to state intentional infliction claim. **Fugarino v. University Services, 123 F. Supp. 2d 838 (E.D.Pa., 2000).**

Corrections officer brought hostile work environment sexually harassment claim, based upon co-worker's offensive touching of him. Where effective grievance policy apparently stopped the touching, however, no claim could prevail against employer for "failure to prevent" the conduct. As to resultant taunts from inmates, plaintiff was allowed to amend complaint to assert claims of employer's knowledge and failure to take appropriate remedial steps. As to co-workers' and managers' taunts, while weak, the claims were sufficient to withstand lenient motion to dismiss standard. **Weston v. Commonwealth of Pennsylvania, 251 F.3d. 420 (3rd Cir., 2001).**

Plaintiff, who was gay, brought Title VII action against employer asserting same-sex sexual harassment, due to various problems at work with supervisors and co-workers arising as a result of his sexual orientation. The district court held that while the Supreme Court has held that Title VII does provide a cause of action for same-sex sexual harassment, there is no cause of action based upon sexual orientation as opposed to sex. With no allegations that his harassers were motivated by sexual desire, that there was hostility to his presence as a man in the workplace or that he did not fit the stereotype of how men ought to behave or appear, the discrimination here was based solely on sexual orientation and was thus not actionable. **Bibby v. Phila. Coca Cola Bottling Company, 260 F.3d 257 (3rd Cir. 2001).**

Female employee brought Title VII and PHRA claim for a sexually hostile work environment and retaliation claim. As to offensive material found on company computer, the same was not publicly displayed or aimed at the plaintiff and could not serve as a

basis for hostile environment claim, and there was nothing but conjecture to suggest denial of vacation time was based on sex; therefore summary judgment was granted on this portion of claim. Issues of fact existed however on retaliation claim - evidence of "game plan" for discharging plaintiff on performance grounds suggested termination for taking unauthorized vacation time could have been pretext, and question existed as to whether plaintiff had been fired or voluntarily left. **Cronin v. Martindale Andres & Co., 159 F.Supp.2d 1 (E.D.Pa., 2001).**

Female plaintiff brought Title VII and PHRA claims for a sexually hostile work environment and for discrimination. As to hostile environment, four incidents over eighteen month period, including two where male employee touched plaintiff on breast and buttocks, would not amount to sufficiently severe or pervasive conduct so as to alter

the conditions of plaintiff's employment and create abusive work environment. Fact that male employee had received more disciplinary notices that did plaintiff prior to being discharged, however, allowed prima facie case of discrimination to be found. **Saidu-Kamara v. Parkway Corporation, 155 F.Supp.2d 436 (E.D.Pa., 2001).**

Plaintiff sued former employer alleging racial discrimination and sexual harassment under Title VII and the PHRA. Plaintiff's male supervisor had given her shoulder massages several times a week for four months. She eventually complained to her supervisor, and he discontinued the touching, but he allegedly thereafter threatened to take work away, critiqued her time sheets and argued with her about her work. He also allegedly made two racially inappropriate comments. A heated argument eventually occurred and plaintiff terminated her employment. In granting defendant's Motion for Summary Judgment, the court held that the two racial comments, even in context, did not constitute a continuous period of harassment. Also, though an economic element is not mandatory, the lack of one and the lack of anything other than threats, demonstrated no tangible adverse employment action for purposes of employer's liability on the sexual harassment claim. The defendant's anti-harassment policy was evidence of reasonable care to prevent sexual harassment, and plaintiff's complaint that her supervisor was causing problems, not in compliance with policies and procedures and with no reference to sex or race, demonstrated plaintiff's unreasonable failure to take advantage of opportunity to avoid harm. **Hairston-Lash v. R.J.E. Telecom, Inc., 161 F.Supp.2d 390 (E.D. Pa., 2001).**

Plaintiff, a bartender and secretary for police union, asserted that her supervisors had made numerous sexually suggestive comments to her, unwanted sexual advances, put their arms around her and , when she complained to superiors, put her work under extreme scrutiny. Her hours were cut and she was eventually terminated. Claims for sexual discrimination and hostile environment, as well as for retaliation, were brought. The court, on defendants' motions to dismiss, found plaintiff had set forth sufficient facts to survive a motion. Even considering the Supreme Court's caution to view conduct in an appropriate social context, to distinguish between simple teasing or roughhousing and hostile or abusive conduct (see *Oncale v. Sundowner Offshore Services., Inc.*, 523 U.S. 75 (1998), and noting that a bartender might need to have thicker skin, the allegations were sufficient to avoid dismissal at this stage. **Wallace v. Fraternal Order of Police, Lodge Number 5, 174 F.Supp.2d 242 (E.D.Pa., 2001).**

In hostile work environment claim under ADA, brought by MS patient, comments by co-employee that claimant was reason employees had to go to separate bathroom to be drug-tested, comments regarding claimant being “a real image of excellence”, alleged coldness toward claimant after diagnosis and insincere questioning regarding health were not so severe or pervasive so as to alter the conditions of her employment. **Martin v. Allegheny Airlines, Inc., 126 F. Supp. 2d 809 (M.D. Pa., 2000).**

In case with complicated factual history, it was held that requirement of an employer for injured employee to undergo IME that was job-related and consistent with business necessity would not alone satisfy burden to show that employer “considered” employee disabled under ADA, although it could be considered along with the totality of circumstances - IME would only show *doubts* regarding ability and would only refer to *specific* job, not disability in major life activity under ADA. Also, intermingling of confidential records in violation of ADA would not give rise to cause of action absent actual harm caused. **Tice v. Centre Area Transportation Authority, 247 F.3d 506 (3rd Cir., 2001).**

Employee, 49 and a former heart attack victim, was terminated from position and brought claims under ADA and ADEA. On assertion that employer ‘regarded’ plaintiff as disabled, fact that employer knew of heart attack and had coincidentally terminated other heart attack victims was insufficient to create prima facie case. Where younger persons filled a number of job vacancies, where a younger assistant was not terminated but offered another job, and where two other heart attack victims terminated were over 40, however, enough evidence of pretext existed to withstand motion to dismiss. **Davis v. Tammac Corporation, 127 F. Supp.2d 625 (M.D., Pa. 2000).**

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Discharged employee sued under ADA and PHRA. Employee, who was undergoing drug recovery program directed by employer pursuant to company policy, demonstrated clear urine sample and returned to work. When he was not meeting goals of continuing program, however, the therapist recommended psychological testing, which employer requested. Paranoia was diagnosed, but employee’s failure to take medications resulted in continuing problems in the program. He was directed to in-patient program, which he quit, resulting in his termination. The court held plaintiff could not demonstrate that he was substantially limited in major life activity or that employer considered him disabled *and substantially limited*, as he was allowed to return to work and received overtime. Also, plaintiff was not a qualified individual under the ADA since, though not currently taking drugs, ongoing drug use was an ongoing problem. Finally, in addition to the psychiatric testing being “job-related and consistent with business necessity” and thus allowable under ADA, plaintiff could offer no pretext for the discharge. Summary judgment in favor of employer was granted. **Law v. Garden State Tanning, 159 F.Supp.2d 787 (E.D. Pa., 2001).**

C. Age Discrimination in Employment Act (29 U.S.C. Section 621, et.seq.)

Three employees of defendant, alleging age discrimination and violation of ADEA, sought to have class certified by district court. The allegations were that there was a corporate-wide policy to eliminate “blocker,” or older employees who were slowing the upward career progress of younger, more aggressive employees, and that lump sum options on retirement packages were being withdrawn unless employees signed a waiver of age-related claims. The court found that, with a few minor adjustments, the two classes designated for terminated employees and retiring employees demonstrated a sufficient factual basis on which a reasonable inference could be made that defendant discriminated because of age. Deposition testimony, meeting reports and statistics were used to demonstrate this basis. Without knowing the membership of the classes, it was too early for the court to determine if the members were similarly situated so as to avoid de-certification, as defendant suggested. **Mueller v. CBS, Inc., 201 F.R.D. 425 (W.D. Pa, 2001).**

County was found to be liable under ADEA for providing retirees with Highmark’s Security Blue while providing younger employees with SelectBlue. Defendant sought to introduce evidence of savings that would be afforded plaintiffs by the difference in the plans, to offset damages, and plaintiffs sought to preclude this evidence. It was held that the “make whole” nature of the ADEA and the general prohibition against speculative damages require an economic comparison that could not be meaningfully conducted without this evidence. Plaintiffs cannot be made “better than whole,” and the evidence was allowed. **Erie County Retirees Association v. County of Erie, Pennsylvania, 166 F.Supp.2d 310 (W.D.Pa., 2001).**

D. Race Discrimination

Black employee was terminated following employer’s investigation of possible improper activities, including taking kickbacks, and brought Title VII discrimination claim. Employee sought to show pretext for termination. Evidence of claim by other former black employee of racial discrimination (without any result of claim) and minor inconsistencies in factual versions of wrongdoing on part of employer were insufficient to withstand Motion for Summary Judgment. **Joseph v. Continental Airlines, Inc., 126 F. Supp.2d 373 (E.D.Pa., 2000).**

African American former employee brought action asserting race and age discrimination under Title VII and ADEA. Plaintiff received 2/4/97 letter from employer indicating removal from account executive classification but the possibility of staying with the company until 3/7/97 if he could obtain other position in company. He was terminated

on 3/7/97 after he found no position. Plaintiff submitted EEOC claim 330 days after receiving the letter, beyond the statutory 300 day period. Claim was held to be untimely, that discriminatory acts alleged would have occurred with notification, not with ultimate termination. Clearly from the claim filed, plaintiff was asserting discharge from account executive position, not general employment, and possibility of continued employment did not make 2/4/97 letter equivocal. **Watson v. Eastman Kodak Company, 235 F.3d 851 (3rd Cir., 2000).**

Nontenured professor's contract was not renewed at university. A Title VII claim was filed, asserting disparate treatment on the basis of plaintiff's Ethiopian origin and failure to renew the contract as retaliation for filing an EEOC claim. As to the retaliation, as the decision-making process to not renew had commenced prior to the filing of the EEOC claim, no causal connection could be shown. On the disparate treatment, evidence that another professor of Jamaican origin had slightly higher starting pay was insufficient to raise prima facie evidence of discrimination, as he had been on tenure track at another university and plaintiff had not. Also, negative evaluations, refusals to let plaintiff speak at meetings, refusal to provide research money, etc., were insufficient. Possibly sufficient evidence of supervisor's repeated references to plaintiff as a foreigner was also unavailing, as non-discriminatory reason for failure to renew (plaintiff refused new schedule, did not show for classes, did not order books) was given, and plaintiff could offer no evidence of pretext. Summary judgment was granted to defendants. **Fekade v. Lincoln University, 167 F.Supp.2d 731 (E.D.Pa., 2001).**

Former employee asserted disparate treatment against Muslims, after he was terminated allegedly for forgery and related theft offenses and after being forced to work as a police officer without a gun after wife obtained PFA order. Plaintiff sought discovery from the employer of its reasons for and disposition of various requests for medical leave or light duty on the part of three other officers and sought disciplinary records on 12 other officers. Defendant refused to produce the medical/light duty material requested and agreed only to produce discipline records on other officers with PFA orders against them. The district court found the medical/light duty request to be looking for wholly irrelevant material, as no disparate treatment for light duty or medical leave was asserted, and denied request. As to discipline records, these were required to be produced (subject to confidential treatment of information). Information on other officers not within the protected class as to similar infractions to those committed by plaintiff is clearly relevant in disparate treatment case, as it may tend to show more favorable treatment to other officers. **Morrison v. Philadelphia Housing Authority, 203 F.R.D. 195 (E.D.Pa., 2001).**

Plaintiffs sought civil liability against employer for violation of Pennsylvania Wiretap Act, 18 Pa.C.S.A. Section 5725(a), for alleged interception of communications on surveillance camera. The issue was whether an intent was required as with the federal counterpart. The court held that strict civil liability under the Act would only accrue after a violation of the Act is established, which violation would require that a breach was intentional on the part of the defendant. After a criminal conviction, therefore, strict civil liability would follow, and civil liability without a conviction would follow if plaintiff established intentional violations by a preponderance of the evidence. **Kline v. Security Guards, Inc., 159 F.Supp.2d 848 (E.D. Pa., 2001).**

[§ 5725. Civil action for unlawful interception, disclosure or use of wire, electronic or oral communication](#)

(a) Cause of action.--Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of \$100 a day for each day of violation, or \$1,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

(b) Waiver of sovereign immunity.--To the extent that the Commonwealth and any of its officers, officials or employees would be shielded from liability under this section by the doctrine of sovereign immunity, such immunity is hereby waived for the purposes of this section.

(c) Defense.--It is a defense to an action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.

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Defendant in plaintiff's successful hostile work environment claim was assessed attorneys fees. As hours asserted by attorney for same time period in arbitration were less than those asserted in petition for fees, number of hours would be reduced accordingly by court. Also, \$200 per hour fee charged exceeded the Community Legal Services schedule of fees for similarly experienced attorney of \$160 - \$180 per hour, and considering nature of case, attorney's ability and affidavits submitted, rate was reduced to \$170 per hour. **Reynolds v. U.S.X. Corporation, 170 F.Supp.2d 530 (E.D.Pa., 2001).**

17. Civil Rights

Class action comprised of all living African Americans who have purchased mentholated tobacco products since 1954 was raised against cigarette manufacturers, for allegedly targeting African Americans for the sale of mentholated versus the less dangerous non-mentholated products, in violation of the prohibition of 28 U.S.C. Sections 1981 and 1982 against discrimination in contract or property transactions on the basis of race. Plaintiffs failed to state a claim, as no disparity in the product is alleged, no refusal to deal with African Americans is

alleged, and no dealing on different terms as to African Americans is alleged. **Brown v. Philip Morris Inc., 250 F.3d. 789 (3rd Cir. 2001).**

18. Statutory Interpretations

A. ERISA (29 U.S.C. Section 1001, et.seq.)

Claimant cut hand while washing dishes. In subsequent suit, claimant asserted that her employer failed to activate her insurance coverage in timely fashion and caused her to be denied medical treatments. Court held that this claim was essentially a claim for deficient medical treatment, which would not be preempted by ERISA; the claim for denial of benefits, which would be pre-empted, was only ancillary to essential claim. Claim was remanded to state court. **Quarles v. Germantown Hospital and Community Health Services, 126 F.Supp. 2d 878 (E.D.Pa., 2000).**

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Beneficiary under ERISA plan was seriously injured in a motor vehicle accident when her car left the road and struck a tree. Beneficiary was under the influence of alcohol at the time of the incident. Claim for benefits was denied, the plan administrator asserting “intentionally self-inflicted injury” and “criminal conduct” exclusions. The former, which excluded charges due “to an attempt at suicide...or any intentionally self-inflicted injury, including injuries incurred while under the influence of...alcohol., ” clearly was intended to prevent a claim that a self-inflicted act was excusable because the actor was under the influence, not to disallow any claim for injury while intoxicated. Also, where the exclusion for criminal conduct required a felony or assault, and the DUI was at most a first degree misdemeanor, this would not apply. As the administrator also funded the plan, the decision to deny was found to not withstand the heightened arbitrary and capricious standard. **Ayers v. The Maple Press Company and Affiliated Companies, 168 F.Supp.2d 349 (M.D.Pa., 2001).**

B. FELA (45 U.S.C.A. Section 51, et.seq.)

Transportation authority working injured on defective ladder brought FELA action. Summary judgment award to authority was upheld, where there was no evidence that authority had actual or constructive knowledge of hazardous condition of ladder or that injury was foreseeable or discoverable through reasonable inspection of ladder. **Manson**

v. Southeastern Pennsylvania Transportation Authority, 767 A.2d 1 (Pa.Cmwlth., 2001).

Prior to trial, FELA claimant agreed to settlement of case at court conciliation. After case was stricken from list as settled, claimant refused to sign release, citing new awareness of additional surgeries being needed. The Court enforced the settlement, and claimant appealed. In affirming, the Superior Court held that the settlement agreement expressed the intention to settle and was binding, despite no formal written signed release. In FELA case, mistake as to expected future development of present condition, as opposed to mistake as to present condition, would not warrant agreement being set aside. **Pulcinello v. Consolidated Rail Corporation, __Pa.Super.__, 784 A.2d 122 (2001).**

C. Wage Payment and Collection Law (43 P.S. Section 260.1, et.seq.)

Employee agreed to reduction in pay in exchange for equity interest in company. When equity interest was not afforded, employee filed claim under Wage Payment and Collection Law. It was held that an equity interest would constitute “wages” under WPCL. Also, failure was based on a mistaken belief that no contract existed; following insurance law cases, it was held that bad judgment did not constitute bad faith so as to allow liquidated damages under statute. **Hartman v. Baker, __Pa.Super.__, 766 A.2d 347 (Pa.Cmwlth, 2000).**

19. Unemployment Compensation

Claimant opted for an early retirement package because she was not certain about continued employment, and she was not sure if another retirement bonus would be available. The Board found that claimant voluntarily left her employment without a necessitous and compelling reason and denied benefits. The Commonwealth Court found the Board decision to be supported by the record and affirmed, where there was no evidence showing work would not be available, and where claimant’s record was impeccable in terms of conduct and performance. **Mansberger v. Unemployment Compensation Board of Review, 774 A.2d.794 (Pa.Cmwlth., 2001).**

Employee added hours to his time sheets that he did not work and received pay from employer, as instructed by supervisor to do as award for good work, under mistaken belief that his supervisor could authorize the falsification. This was found to not constitute a valid justification for misconduct of stealing from employer. Accordingly, benefits were not allowed. **Temple University of the Commonwealth System of Higher Education v. Unemployment Compensation Board of Review, 565 Pa. 178, 772 A.2d. 416 (2001).**

Two employer petitions for review were consolidated before the Court. In the first, the Court found that substantial evidence had existed to support a determination of a necessitous and compelling reason for leaving employment, where a paycheck bounced on one occasion and was not replaced for some time and where the employee had to cash her check at employer's bank because of employer's problems with cash flow. In the other case, there was no evidence of a clear intent that an employee left his employment voluntarily where he punched out after an argument but had been questioned by another manager as to when he would work again and where the employee had called in to see what his schedule would be. **Fekos v. Unemployment Compensation Board of Review, 776 A.2d 1018 (Pa.Cmwlt. 2001).**

Claimant, the only one to produce testimony at the hearing, quit her job after numerous efforts to rectify problems with her employer and remain employed over a period of time were unavailing. She set forth evidence of a racially hostile environment, transfers without reimbursement or very slow reimbursement of relocation expenses, refusal to transfer her to a location promised and failure to provide required performance evaluations. The Court held that the evidence constituted necessitous and compelling reasons for her resignation, such that benefits were owing. **Brown v. Unemployment Compensation Board of Review, 780 A.2d 885 (Pa.Cmwlt., 2001).**

Employee was discharged after medical records given to employer disclosed habitual daily marijuana use and abuse of prescription pain killers, which employee admitted. Employer challenged benefits on the basis of willful misconduct, and employee asserted that use when not at work, when she never showed up for work under the influence, would not amount to same. The Court held that the employer had a perfectly legitimate concern that employee might well attempt to work (as a nurse's aide) in a sufficiently impaired condition so as to create safety problems, her activities thus directly reflecting upon her ability to perform her assigned duties. Benefits were denied. **Burger v. Unemployment Compensation Board of Review, 780 A.2d 731 (Pa.Cmwlt., 2001).**

Employee accepted voluntary early retirement incentive of \$25,000 bonus, testifying that she was not sure if it would be offered again and that she was uncertain of continued employment after company downsizing. She was told that jobs in her department would probably be filtered down to other sections of company. There was nothing in the record to show that there was a lack of suitable, continuing work available for her or that her employment was imminently threatened, only evidence demonstrating that employee was speculating about the status of future employment. Claim that employee left job for necessitous and compelling reasons was unavailing, and Board's denial of benefits was upheld. **Mansberger v. Unemployment Compensation Board of Review, 785 A.2d 126 (Pa.Cmwlt.2001).**

Employee nurse, who had previously been under close supervision for error, failed to closely review dilution ratios for antibiotic and improperly administered same. She was terminated from employment. She sought benefits, but employer claimed she had engaged in willful misconduct. The referee found no evidence of negligence indicating an intentional disregard of the employer's interest and duties and obligations to employer, and benefits were awarded. The Board reversed, and the Commonwealth Court affirmed, holding employee as a nurse to a higher standard than other types of employees. On appeal, the Supreme Court specifically rejected the Commonwealth Court's adoption of an *ad hoc* "higher standard of care" for health care workers, which apparently would permit any negligence of health care workers to constitute willful misconduct - the Act set forth a single standard requiring negligence of such a degree so as to demonstrate an intentional disregard. The special needs of the employer may still be relevant, but a separate standard cannot be justified. Benefit award was reinstated. **Navickas v. Unemployment Compensation Board of Review, __ Pa. __, 787 A.2d 284 (2001).**

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