General Liability Update

for

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presented by

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Appendix A - Article by **James W. Creenan**, *Fair Share Act Requires New Approaches to Claims Defense*, Your Best Defense, Fall 2002.

I. **Case Law Update**

1. Agency

Patient brought a negligence action against a physician who performed an in-office colonoscopy as well as the independent-contractor anesthethist who had failed to remove an anesthesiological catheter from her arm. In determining whether or not the doctor could be liable for the actions of the independent contract anesthethist, the Pennsylvania Superior Court reviewed the doctrine of ostensible agency. In the instant matter, the Superior Court held that because the procedure was performed in a private physician's office rather than a hospital did not bar the application of the doctrine of ostensible agency. The court held the doctor could be liable under the ostensible agency theory because when patients visit their respective doctors' offices for medical attention or to undergo in-office procedures, they are normally looking to the doctor or doctor's agents for care, rather than the doctor's independent contractor. As such, holding the doctor liable for the negligence of independent contractor nurses or other personnel under the theory of ostensible agency is consistent with the rationale behind the application of this theory to hospitals and health management organizations (HMO). **Parker v. Freilich, 803 A.2d 738 (Pa. Super. 2002).**

2. Antitrust

Plaintiff brought federal antitrust action and state law action against defendant, contending that defendant engaged in illegal monopolization and attempted monopolization and conspired to restrain commerce in violation of the Sherman Antitrust Act with respect to electronic article surveillance (EAS) tags. Additionally, plaintiff alleges that, under Pennsylvania Law, defendant interfered with its contract with a manufacturer of EAS tags, engaged in unfair competition and misappropriated its trade secrets. In their ruling on the parties' motions in limine concerning the admissibility of expert testimony, the district court held that the plaintiff's economic expert's opinion as to the relevant market, and defendant's supracompetetive pricing therein, was admissible. The court also found admissible the contrary opinion given by defendant's economic expert, expert damages testimony (in part), the testimony of defendant's patent and financial experts and the testimony of defendant's foreign law expert's report (in part). To the contrary, affidavits given in prior litigation were not admissible under the residual exception to the hearsay rule, nor was evidence that defendants had previously sued to enforce the patent. - **ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc., 198 F. Supp. 2d 598 (E.D. Pa. 2002).**

3. Arbitration

A transportation services company filed a lawsuit against an alleged tortfeasor with which the company entered into contract for services, alleging claims for breach of contract and tort claims for misappropriation of trade secrets, breach of fiduciary and common law duties, and intentional interference with prospective contractual relationships. The Defendant filed preliminary objections to the complaint claiming that all counts contained in the complaint were to be resolved by arbitration pursuant to the arbitration clause contained in the parties' contract. The trial court overruled the preliminary objections as to the tort claims but dismissed the breach of contract claim. In reversing the order of the trial court, the Pennsylvania Superior Court applied the Pennsylvania Supreme court's holding in Ambridge Borough Water Authority v. Columbia, 458 Pa. 546, 328 A.2d 498 (1974) as well as its holding Shadduck v. Christopher J. Kaclik, Inc., 713 A.2d 635 (Pa. Super. 1998). In the Ambridge case, the Pennsylvania Supreme Court held that where a valid contract to arbitrate exists and the claims go directly to obligations created under the contract, such claims will be found to fall within the scope of the arbitration clause. In the Shadduck case, the Superior Court held that an agreement to arbitrate disputes arising from the contract encompasses tort claims where the facts supporting a tort action also support a breach of contract action. Specifically, the Shadduck court noted that "a claim's substance, not styling, is to control whether the complaining party must proceed to arbitration or may file in the court of common pleas." *Id.* at 637. In analyzing the record, the Pennsylvania Superior Court found that the Plaintiff's tort claims did arise out of the contract between the parties and therefore were subject to the arbitration clause contained therein. **Pittsburgh Logistics Systems v. Professional Transportation and Logistics, Inc., 803 A.2d 776 (Pa. Super. 2002).**

Independent insurance agent's lender (bank) brought action against insurance companies (insurance company), insolvent agent (agency) and successor agency (successor) for a declaratory judgment on priority of its security interest in commissions and policy expirations. Bank appealed after the trial court denied bank's summary judgment motion and entered summary judgment in favor of insurance company and successor. Bank argued that the trial court erred in concluding that bank's security interests in the insurance commissions and expirations of insurance policies generated by the now-defunct agency were inferior to the rights and interests of insurance company and successor. After appeal and cross-appeal, the Superior Court found that agency and bank did not have any rights to post-termination commissions, yet it was unclear as to whether any pre-termination commissions were in question. The Superior Court vacated the summary judgment in favor of insurance company and successor and the denial of bank's summary judgment motion and remanded to the trial court for proceedings not inconsistent with the opinion. The court concluded that (1) Article 9 of the UCC applied to security interest that lender had in commissions and policy expirations; (2) the security attached was perfected; (3) insurance company's possession of copies of the policy expirations did not grant superior rights to those of the lender; (4) the company's interest in policy expirations was a security interest inferior to lenders's perfected security interest; (5) statute making Article 9 of the UCC inapplicable to any right of setoff is limited to banks, and therefore did not apply to insurance company's offset rights in commissions; and (6) lender did not have any right to commissions after termination of agency agreement. **Commercial National Bank of Pennsylvania v Seubert & Associates, 807 A.2d 297 (Pa.Super., 2002).**

Mortgage funding company brought a conversion action against bank after bank seized funds mistakenly wired by loan portfolio purchaser to bank account of bankrupt mortgage originator that owed bank money, rather than wired to funding company's account. The court of Common Pleas entered judgment on jury verdict in favor of mortgage funding company, and the bank appealed. Superior Court affirmed in part, reversed in part and remanded for new trial on the issue of punitive damages. The Superior Court found sufficient evidence to support the determination for the jury that Pioneer owned the Fund and the Bank was liable for conversion. The Bank argued that it had an automatic right to setoff and did not need to take any steps to effectuate this right, however the Court found that the Bank was missing the critical element of the right to automatic setoff, being that the funds against which setoff is exercised must belong to the depositor. The Bank relied on Section 606 (b) of the Banking Code of 1965, 7 P.S. §606, in arguing that it was entitled to a directed verdict because of its statutory defense to Pioneer's conversion claim. However, the Superior Court held that the lender's failure to assert a claim to the funds pursuant to the adverse claims statute did not supply the Bank with a statutory defense. The Court further held that the error in allowing the lender to make inflammatory allegations that the Bank was guilty of conspiracy and cover-up was harmless and that allowing the jury to hear evidence of the Bank's discovery violations was appropriate sanction for the Bank's willful, repeated discovery violations. **Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp., 797 A.2d 269 (Pa. Super. 2002).**

5. Civil Rights / Equal Protection

After failing Board certification on three occasions, claimant surgeon, a Hispanic, filed a charge of discrimation with the PHRC and later with the EEOC. The instant action was filed on the basis of national origin and race discrimination in violation of Title VII, Section 1981, and the PHRA. Defendants filed Motions for Summary Judgment. In determining if plaintiff has made out a prima facie case, it was noted that plaintiff had no evidence of direct, intentional discrimination, only of statistics of the fail rate of Hispanics compared to that of Caucasions. It was held that the statistical evidence, standing alone, was insufficient to set forth a prima facie case. The numbers were not statistically significant at all, and there was no accounting of possible other reasons for failure. Further, it was held that even if the numbers were sufficient to set forth a case, it would not be sufficient to overcome defendants' legitimate, non-discriminatory reason for failing plaintiff (to certify the education, experience, and knowledge of broadly qualified and responsible surgeons), and there was no evidence of pretext. **Castillo v. The American Board of Surgery, 221 F.Supp.2d 564 (E.D.Pa., 2002).**

SEPTA required that applicants for transit officer be able to run within twelve minutes 1.5 miles, citing this as the minimum aerobic capacity necessary to perform the job. Clamant asserted this had a disparate impact on females and should not be permitted, under the Civil Rights Act of 1991. In *Lanning I* (181 F.3d 478 (3rd Cir. 1999)), it was held by the Circuit Court that a discriminatory cutoff score on an entry level employment examination must be shown to measure the minumum qualifications necessary for successful performance of the job in question in order to survive a disparate impact challenge. Here, SEPTA procuced more than sufficient competent evidence to support that this requirement measured the minimum standard necessary. **Lanning v. Southeastern Pennsylvania Transportation Authority, 308 F.3d 286 (3rd Cir. 2002).**

Plaintiff commenced a civil rights action against the Governor of the Commonwealth of Pennsylvania, a county, a district attorney's office, various government officials, and a police officer for violations and retaliation under the First Amendment, the Americans with Disabilities Act (ADA), and 42 U.S.C. § 1983. Plaintiff's complaint also alleged violations of the Pennsylvania Constitution, malicious prosecution, abuse of process, and conspiracy. The federal district court granted in part and denied in part Defendants' Motions to Dismiss, thereby leaving only certain § 1983 claims and the claim for malicious prosecution against the police officer. Plaintiff filed a Motion for Reconsideration of the court's order granting the Motion to Dismiss. The court denied said Motion, holding that Plaintiff did not establish any of the three (3) grounds under Rule 59(e) of the Federal Rules of Civil Procedure pertaining to reconsideration. A motion for reconsideration should only be granted if there is (1) newly available evidence, (2) an intervening change in controlling law, or (3) a need to correct a clear error of law or to prevent manifest injustice. The court further noted that a motion for reconsideration is not properly grounded on a request that the court simply rethink a decision it has already made. In further support of its ruling, the court cited the principle that, because federal courts have a strong interest in finality of judgments, motions for reconsideration should be granted sparingly. - **Douris v. Schweiker, 229 F.Supp. 2d 391 (E.D. Pa. 2002).**

In 1994, Plaintiff-husband suffered a brain injury, along with other serious injuries, after falling at home. In June of 1998, although still suffering residual problems with memory, physical activity and other brain functions, he began to integrate back into society and resumed

working. On June 28, Plaintiff-husband was pulled over by one of Defendant police officers while driving home from a local diner. Although he had been driving along normally, the officer stopped him based on a tip that she received from two off-duty officers who had seen Plaintiff-husband in the diner parking lot and believed that he was drunk and unfit to drive. When the police officer approached Plaintiff-husband, he attempted to explain to her that his capacity was impaired by a brain injury. She asked him to step out of the vehicle and to undergo sobriety tests. Plaintiff-husband refused, but consented to a blood test. At that point, the officer attempted to arrest Plaintiff-husband pulling his hands behind him to place them in handcuffs. Because of his injuries, this resulted in excruciating pain and he reflexively spun away from her. The officer believed that Plaintiff-husband was resisting arrest so she forced him to the ground, handcuffed him and kicked him several times. In the process, Plaintiff-husband re-injured the shoulder and arm that he had been rehabilitating. Plaintiff-husband accepted ARD without pleading guilty or admitting to the alleged offenses. After the incident, he became paranoid, antisocial, stopped bathing and performing household chores, would become easily upset andwould not leave his home unaccompanied, threatened to strike his wife which he had never done previously and became suicidal. As a result, he and his wife divorced and their house was repossessed. Plaintiffs filed an action against the arresting officer, police chief, police department and municipality alleging, among other things, assault and battery, false imprisonment and 42 U.S.C.S. §1983. To prevail on a §1983 claim, a plaintiff must show that the defendant, through conduct sanctioned under the color of state law, deprived the plaintiff of a federal constitutional or statutory right. The Court granted Plaintiffs' Praecipe to Dismiss the municipality, police department and two police officers. Defendants' Motion for Summary Judgment was admitted in part and denied in part. The Court ruled that material issues of fact exist in regard to Plaintiff-husband's §1983 claims as to whether the arresting officer, in an individual capacity, had probable cause to detain, arrest and transport Plaintiff-husband and whether she used excessive force in arresting him. The officer is required under Pennsylvania law to have a reasonable suspicion to stop a car and probable cause to detain an occupant. In this case, the information provided by the two off-duty police officers without the arresting officer's own investigation is likely not enough to constitute probable cause. Likewise, Plaintiff-husband's false imprisonment and assault and battery claims against the arresting officer individually would also be presented to a jury during trial. **Pahle v. Colebrookedale Township, Larry Mauger, Colebrookdale Police Department, Douglas/Berks Township, Tod Heckman, Douglas/Berks Township Police Department, Katherine Fryer and Dana Dotterer, 227 F.Supp. 2d 361 (E.D. Pa. 2002).**

Appellant parents brought civil rights action against appellees, emergency medical technicians (EMTs), a city and the city health department. This suit arose out of the tragic death of Appellants' one-year old son after choking on a grape. The EMTs tried to restore the boy's breathing in route to the hospital, the grape was removed from decedent's throat at the hospital and he died two days later from "asphyxia by choking." Appellants filed the civil rights suit against the EMTs for alleged violations of their son's life, liberty, personal security and bodily integrity without due process of law in violation of the Fourteenth Amendment and for

deprivation of their son's rights, privileges and immunities secured by the Constitution of the Commonwealth of Pennsylvania. The defendants filed a motion for summary judgment relying on the case of *DeShaney v. Winnebago County Department of Social Services*, *489 U.S. 189, 103 L.Ed. 2d 249, 109 S. Ct. 998 (1989)* which held that the Due Process Clause generally does not require the government to provide intervention or rescue services. The court held that there was no federal constitutional right to rescue services and the State did not play a part in feeding the child the grape which ultimately caused his death. The states are not constitutionally obligated to provide their citizens with rescue services, nor did were they constitutionally required to provide competent rescue services when they chose to undertake this task. The order of the District Court granting defendants' motion for summary judgment was affirmed by the U.S. Court of Appeals on the ground that Appellants failed to state a violation of their federal constitutional rights. **Brown v. Commonwealth of Pennsylvania Department of Health Emergency Medical Services Training Institute, 300 F. 3d 310 (C.A. 3d 2002).**

6. Class Actions

Plaintiff commenced an action against defendant corporation, a supplier of electrical generation services, for false advertising under the Unfair Trade Practices and Consumer Protection Law (UTPCPL). Plaintiff alleges that Defendant disseminated false advertisements about the total cost of its electricity. Plaintiff then filed a Motion for Class Certification that the trial court initially granted to include a class of persons who began or continued purchasing energy from Defendant during a certain time period. Upon Defendant's motion for reconsideration, the trial court denied class certification. On appeal to the Superior Court, the decision of the trial court to deny class certification was affirmed. The Court held that the UTPCPL requires, in a private action, that a plaintiff suffer an ascertainable loss as a result of the defendant's prohibited conduct. Accordingly, each plaintiff must allege reliance upon Defendant's alleged false advertisement which means that each plaintiff purchased energy from Defendant because he or she viewed and believed Defendant's false advertisements. The Superior Court also rejected Plaintiff's related argument that the proposed class be established by application of a rebuttable evidentiary presumption of reliance. The Court pointed out that there is no authority which would permit a private plaintiff to pursue an action against an advertiser because an advertisement might deceive members of the audience and might influence a purchasing decision when the plaintiff himself was neither deceived nor influence. **Aronson v. Greenmountain.com, 809 A.2d 399 (Pa.Super. 2002).**

This case involved an appeal from Plaintiff's motion for class certification pursuant to Rule 1702 of the Pennsylvania Rules of Civil Procedure. The underlying case was a civil action against the defendant cable company for unlawful liquidated damages, breach of contract and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law arising out of defendant's late fee policy. The plaintiff was a subscriber/customer of the defendant cable company and was assessed and paid a $2.00 late fee because his cable bill was paid after the due date. In holding that the lower court erred in denying certification, the Pennsylvania Superior Court ruled that the plaintiff had meet the requisite criteria for class certification. The Court held that Plaintiff met his burden because (1) joinder of all class members was impracticable and therefore numerosity existed, (2) as to commonality, the common issue affecting all class members was the company's late fee policy; (3) whether the late fee was reasonable was the ultimate question to be determined as a matter of law; and (4) the plaintiff's claims were typical of the proposed class because they focused on the common allegation that the company's late fee bore no reasonable relation to the damage caused by a subscriber's delinquent payment. In light of the foregoing, the trial court's order denying class certification was reversed and the case was remanded .**Baldassari v. Suburban Cable TV Co., Inc., 2002 Pa. Super. 275; 808 A.2d 184 (2002).**

7. Contracts

Plaintiffs alleged that defendants issued a “Stadium Builders License” (SBL) brochure soliciting the plaintiffs to purchase SBL’s for Heinz Field. Purchasers would be assigned seating after the seats were physically installed in the stadium. Purchasers were to make payments for the SBL’s in three equal installments, including a non-refundable one-third deposit which was due with the Application. Following submission of the Application/ initial payment, plaintiff’s received from defendants two documents which in turn contained an integration clause stating that “this Agreement contains the entire Agreement of the parties with respect to the matters provided for herein and shall supersede any representations or agreements previously made or entered into by the parties hereto”. Plaintiffs’ seats turned out to be outside the SBL section depicted in the brochure. Claims for breach of contract, negligent misrepresentation, fraud and violation of the UTPCPL were made. The trial court dismissed. As plaintiffs remitted the first one-third of their payment for the SBL’s, and because they could not get that money back, the contract was completed at that point, thus making the new integration provisions unilateral changes and unenforceable.

The Commonwealth Court agreed with the trial court that the “gist” of the negligence/fraud actions sounded in contract, not tort, because the tort claim was based precisely on the same conduct that plaintiffs asserted as a breach of contract. With respect to claim for declaratory relief, the Court agreed that the trial court had erred in dismissing such claim. Plaintiffs had requested that the trial court declare the integration clause void and inapplicable or, alternatively, that the SBL brochure and terms set forth therein should be integrated in the contract by virtue of specific references to the set SBL section locations as defined by the SBL brochure. The Court found that the trial court completely overlooked the plaintiffs’ alternative request. The Court agreed with the dismissal of the request for injunctive relief however, as any injury could be adequately compensated by money damages. Finally, the Court found that the SBL’s could be considered a service under the “goods or services” provision of the UTPCPL. Therefore, it concluded that the trial court’s dismissal of claims under the UTPCPL was improper. **<u>Yocca v. Pittsburgh Steelers Sports, Inc.</u>, 806 A.2d 936 (Pa. Cmwlth. 2002).**

The case arose out of the assignment by Defendant Hoaster of the employment agreement and covenant not to compete of the Plaintiff to Defendant Gebhard as part of an asset sale of an insurance agency. The Plaintiff sued the Defendants for intentional interference with prospective contractual relations and sought to void the contract’s covenant to not compete. The trial court found the covenant enforceable, but modified the terms its terms and awarded the employee no damages. The Pennsylvania Superior Court affirmed. The Pennsylvania Supreme Court reversed the Superior Court’s order and, in a case of first impression, held that a covenant not to compete in an employment contract was not assignable, absent an assignability provision in the contract, by an employer to a purchaser of the assets of the employer’s business. The Court also ruled that the assignor could not enforce the covenant against the employee, because, (1) was no longer in the insurance business, if had no protectable business interests and (2) no trade secrets

were at stake because the identities of potential clients were widely known and easily available. **Hess v. Gebhard & Co., Inc.,__Pa.Super.__, 808 A. 2d 912 (2002).**

The Court of Common Pleas of Cumberland County granted former shareholder's motion for judgment notwithstanding the verdict and granted him a new trial on the issue of damages, after former founding shareholder in a law firm brought action against other shareholders for value of stock after leaving the firm and starting him own firm. The law firm and shareholders asserted defense of oral agreement among shareholders which limited the compensation for a shareholder who left the firm and competed against the firm. The law firm and other shareholders appealed. Appellants' first argument that the trial court erred in construing the oral shareholders' valuation agreement as an employment contract and that the court incorrectly applied the standard for judging restrictive covenants was unfounded according to the Superior Court. The Superior Court agreed with the trial court's finding that the valuation provision was not limited in either time nor territory and, as such, was enforceable. The Superior Court, with respect to appellants' equitable estoppel issue, found that although appellee did help to create and implement the original oral forfeiture clause, they could not fashion a law denying a party the opportunity to challenge an agreement restraining the ability to earn a livelihood. The Superior Court further found that the trial court did not err in excluding the testimony of appellee's abuse of alcohol, reasoning that there was not an abuse of discretion and that this testimony could have only served to improperly influence the jury.- **Capozzi v. Latsha & Capozzi, P.C., 797 A.2d 314 (Pa. Super. 2002).**

Homeowners brought action against construction company and financing note holder for breach of contract, breach of warranty, and violation of the Unfair Trade Practices and Consumer Protection Law following a dispute that arose with respect to home improvement work being performed by a construction company and financed by note. Construction company and note holder appealed from an order of the trial court dismissing their motion to compel arbitration. Appellants claim that the trial court committed an error of law by determining that the arbitration clause did not apply to the claims set forth in Appellees' complaint. Appellants argue that the third contract made between the parties represented the parties' integrated agreement. Conversely, Appellees claim that the language of the arbitration clause stating "obligations of work performed under this Contract" referred only to the financing. Appellees also contend that the arbitration clause violated the Magnuson-Moss Warranty Act (MMWA) in that Appellants were selling packaged goods and services and, therefore, providing warranties subject to the MMWA. The Superior Court of Pennsylvania, in reversing and remanding the decision of the trial court, held that: (1) arbitration clause in the third contract regarding financing applied to claims arising out of the second contract regarding the purchase of goods and services; (2) unfair trade practices claims were covered by the arbitration clause; (3) arbitration clause was not unconscionable; and (4) the MMWA did not apply. - **Huegel v. Mifflin Construction Co., Inc., 796 A.2d 350 (Pa. Super 2002).**

Plaintiff claimed that he had been lured away from a secure job in California by the offer of a position as general manager of a new branch office for Alarm Security Group in Philadelphia. He was sent a letter indicating that his "earnings are guaranteed to be $100,000" during the first twelve months. That branch office never opened and the defendant claimed that its offer had been contingent upon acquiring enough companies with existing business to open the new office. The defendant argued that it was entitled to summary judgement because it is well-settled in Pennsylvania that, absent a written contract to the contrary, employees are at-will and can be terminated at any time for any reason or no reason at all. Although agreeing with the general rule concerning at-will employment and the well-settled concept that oral assurances as to the predicted duration of the employment do not modify the at-will presumption, the court denied ASG's Motion for Summary Judgement. The court held that it was for the jury to determine whether additional consideration had been provided by the plaintiff that would rebut the presumption of at-will employment. The plaintiff presented evidence of hardships, such as giving up a substantial year-end bonus with his former employer and having his wife and children move from California to Philadelphia. The court also allowed the plaintiff to present to a jury his theory of liability based upon allegations of fraud, since a jury could believe that the defendants misrepresented the certainty as to whether the Philadelphia office was actually going to open. Additionally, the court allowed the plaintiff to proceed on a theory of liability based upon the Pennsylvania Wage Payment and Collection Law, since the jury was being permitted "to consider whether plaintiff had supplied sufficient additional consideration to warrant a finding of an implied employment contract" and, consequently, could conceivably find that wages were due to the plaintiff. The court did reject other theories of liability put forward by the plaintiff. For instance, the court found no indication that Pennsylvania imposed a duty of care on toward prospective employees that would support a claim of negligence in employment. The court also refused to recognize promissory or equitable estoppel as an exception to the at-will employment doctrine. **Walsh v. Alarm Security Group, 230 F. Supp. 623 (E. D. Pa. 2002)**

Employment referral firm sued employer for commission fee after employer hired candidate. Candidate had previously interviewed with employer via contact though firm, but he was not hired because of high salary requirements. Ten months later, when candidate was laid off from other job, he contacted employer directly about another opening after firm never responded to his queries regarding status of employer, and candidate was hired. Firm sent bill for commission fee, and employer refused to pay. It was held that as the events leading to the hiring of candidate were separate from any actions taken by the firm on his behalf, no claim for unjust enrichment "quasi-contract" existed; even if employer was enriched by firm providing initial introduction to candidate, the enrichment was not unjust. No quasi-contact or contract implied at law was seen to exist. **Ameripro Search, Inc. v. Fleming Steel Company, __Pa.Super.__, 787 A.2d 988 (2001).**

8. Damages

Trial court in motor vehicle accident case admitted evidence of unpaid medical bills, and large verdict for plaintiff followed. Defendant appealed, asserting as error the admission of the unpaid bills since the bills were "payable" under the MVFRL, which provides that a person eligible to receive benefits under the act "shall be precluded from recovering the amount of benefits paid or payable under this subchapter...". The court agreed that the trial court did not abuse its discretion in admitting the bills, i.e., they were not "payable" under the act. The court looked at the reasoning in *Scott v. Erie Insurance Group*,__Pa.Super.__, 706 A.2d 357 (1998), where bills not paid because not performed by an approved/covered physical therapist were not "payable," with favor. **Bennyhoff v. Pappert, __Pa.Super.__, 790 A.2d 313 (2002)**.

Defendant driver tapped plaintiffs' vehicle's rear end, and plaintiffs brought a personal injury action. The jury found in favor of defendant, even though the defendant's doctors conceded that some injury had taken place and even thought the negligence was clear, and plaintiff sought a determination that the verdict was against the weight of the evidence. After a lengthy analysis of case law applicable to this type of situation, the court held that there was evidence to support the jury finding. Even though there may have been some injury, the jury could have found that there was not *compensable* pain and suffering. The jury was not required to find that every injury causes pain or the pain alleged, and a jury was not required to award plaintiff any amount as it could have believed that any injury suffered in the accident was insignificant. In this case, plaintiff had a history of back trouble, and the impact in the accident was very slight. **Malczyk v. Oesch, __Pa.Super.__, 789 A.2d 717 (2001).**

A doctor's malpractice insurer became insolvent and the Pa. Property and Casualty Guarantee Insurance Association (PPCGIA) became the guarantor of a claim made against the doctor. PPCGIA sought a complete offset to mold the verdict to zero based on the non-duplication of recovery provisions of PPCIGA's enabling statute (40 P.S. Sec. 991.1817), which requires that a claimant must first exhaust his rights under other available insurance, such as Blue Cross and Blue Shield and all other coverages other than policies of an insolvent insurer. The Superior Court held that the only reasonable reading of the provision was to require that the claim to be offset must be for the same loss as the claim asserted against the insolvent insurer. Since the damages awarded in the medical malpractice case were for pain and suffering, not for the medical bills or wage loss, there was no set off for amounts paid out by the plaintiff's Workers' Compensation carrier. **Fanning v. Davne, __Pa. Super.___, 795 A2d 388 (2002).**

Appellant commenced personal injury action against motorist, whose vehicle collided with vehicle in which appellant was a passenger. The Court of Common Pleas entered judgment for the motorist, finding that his negligence was not the proximate cause of appellant's injuries.

Appellant filed a post-trial motion seeking a new trial and the motion was denied. Appellant argued that the trial court erred in permitting appellee to present evidence that appellant was receiving social security disability benefits, which appellant claimed was a violation of the collateral source rule. The Superior Court agreed with appellant's reasoning that, through examination of the record, appellee's counsel cross-examined appellant regarding the fact that appellant applied for social security disability benefits. The effect of the questions by appellee's counsel, when combined with his opening statements, had the cumulative effect of informing the jury that Appellant was receiving social security benefits for the same injury that was the subject of that litigation. The appellants also argued that the trial court erred in excluding cross-examination on the issue of bias when excluding a portion of the deposition of appellee's expert. Appellant claimed that the jury should have heard a specific question and answer from this deposition, however, the Superior agreed with the trial court in finding that the prejudicial effect of this information outweighed its probative value. The Superior Court held that because the motorist violated the collateral source rule, and because it was impossible to determine what effect this violation had on the jury, a new trial was warranted. - **Nigra v. Walsh, 797 A.2d 353 (Pa. Super. 2002).**

PPCIGA was entitled to offset contributions made by the insurer of the father of the injured plaintiff where the parents had sought compensation for medical expenses individually in addition to pain and suffering on behalf of their daughter in this medical malpractice lawsuit for prenatal injuries. The settlement agreement of the malpractice lawsuit stated that the father's medical insurance paid most of the $800,000 in medical expenses incurred due to prenatal injuries to the daughter, and it was admitted that the settlement was intended to cover both present and future damages related to the malpractice claim. Moreover, the Court rejected the plaintiffs' argument in the alternative that, if PPCIGA were entitled to an offset, it should be applied proportionately to the total settlement rather than being deducted in full. Applying the rules of statutory interpretation, the Court noted that the plain words of a statute cannot be disregarded where the language is free and clear from any ambiguity. Thus, the Court enforced the "plain meaning" of the statutory language that states that "[a]ny amount payable on a covered claim under this act shall be reduced by the amount of any recovery under other insurance." 40 P.S. Sec. 991.1817(a). A different result might have been obtained if the parents had been able to settle the case with a release language attributing all or a specified portion of the settlement amount to the daughter's pain, suffering, humiliation, etc. The key question is always whether the other insurance covers the same loss as the claim asserted against the insolvent insurer. **Price v. PPCIGA, ___Pa. Super.___, 795 A2d 407 (2002).**

9. Environmental Law

Plaintiff is a company that applies sewage sludge to land sites that were formerly used for surface mining. The company brought an action seeking a declaratory judgment that the Pennsylvania township's ordinance requiring companies that apply sewage sludge to comply with certain procedural requirements was unconstitutional. Before the District Court of the Middle District of Pennsylvania was a motion filed by the township seeking dismissal and for a more definite statement from plaintiff. In regards to the ordinance the court held that the Surface Mining Control and Reclamation Act (SMCRA) did not preempt Pennsylvania township's ordinance because after Pennsylvania's state program had been federally approved, the federal statue ceased to have a direct effect on Pennsylvania surface mining. The Court then held that the Pennsylvania Surface Mining Conservation and Reclamation Act (PaSMCRA) did not preempt the Pennsylvania township's ordinance because the ordinance did not regulate surface mining. The ordinance was also found not to violate substantive due process because the township rationally might have believed that the ordinance would serve to protect its citizens from the dangers of sewage sludge. In addition, the ordinance did not violate the Equal Protection Clause on the ground that it treated sewage sludge differently from other types of waste because the difference in safety between sewage sludge and other types of waste was a sound, rational basis for creating the classification. The court held that the ordinance's $40-per-ton fee, which treated appliers of sewage sludge differently from entities that applied organic materials other than sewage sludge, did not violate the Uniformity Clause of the Pennsylvania Constitution. It was found that the classification was reasonable and rationally related to a legitimate state purpose. Lastly, the court held that the plaintiff stated a claim that the ordinance was preempted by the Sewage Facilities Act (SFA). **Synagro-WWT, Inc. v. Rush Tp., Penn., 204 F.Supp. 2d 827 (M.D. Pa. 2002).**

Owner of battery breaking facility brought contribution action under CERCLA to recover response costs from scrap metal dealers that sold spent lead-acid batteries to facility for recycling. Dealers asserted exemption for said liability by Superfund Recycling Equity Act. After applying factors for determining if defendants were *bona fide* recyclers, court looked at existence of any exclusions under CERCLA. Even if facility paid above market price for batteries, dealers were small family run operations with limited resources, facility claimed it was in compliance with environmental regulations at time of disposal, minor difference in prices between facility and its competitors was not important to dealers and dealers had no way of determining facility's non-compliance with substantive environmental laws, no "exclusion" was applicable, and dealers would be exempted. **Gould, Inc. v. A&M Battery & Tire Service, 176 F.Supp.2d 324 (M.D.Pa., 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. ERISA

Plaintiff, an employee of the subsidiary, brought a class action alleging violations of federal and state laws in connection with the sale of a wholly owned subsidiary by the parent to a successor corporation. The subsidiary, parent and successor were all named as defendants. Plaintiff alleged that the sale of all stock of subsidiary to successor constituted a termination of employment of the subsidiary employees, entitling them to severance pay and accrued vacation pay under the subsidiary's Severance Pay Policy. The successor filed motion to dismiss, which was granted as to the state law claims, the same being pre-empted by ERISA. The motion to dismiss with regard to ERISA claim was denied. The District Court found that ERISA applies not only to pensions but also welfare benefits, entitling plaintiffs to opportunity to prove they were terminated and had their benefits reduced in connection with the stock sale. The Court also found that Section 510 claims are not limited to employers, and such claims may be brought against anyone who engages in conduct prohibited by ERISA. Thus, plaintiffs are also entitled to opportunity to make a claim against the successor. **La Fata v. Raytheon Co., et al., 223 F.Supp. 2d 668 (E.D.Pa 2002).**

Plaintiff filed suit against defendant insurer alleging breach of contract, breach of fiduciary duty, violation of the Pennsylvania Unfair Insurance Practices Act and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, in connection with defendant's refusal to pay disability benefits under a policy held by plaintiff. Defendant moved for dismissal of all of plaintiff's claims on the grounds that the disability policy was an "employee benefit" within the meaning of ERISA, and preempted thereby. In denying the Rule 12(b)(6) motion, the District Court noted that there was not evidence to refute the plaintiff's allegations that he paid the policy premiums out of his own pocket, that the policy was neither established or maintained by plaintiff's employer or that plaintiff's employer endorsed or received consideration for the policy. Given the surrounding circumstances, a reasonable person could not find a "plan" under ERISA. - **Revello v. The Paul Revere Life Ins. Co., 224 F.Supp. 2d 946 (E.D Pa. 2002).**

Claims administrator denying claimant's long term disability benefits (based on loss of use of arm) apparently disregarded physician's findings of disability on the ground that physician only found that claimant was disabled from working as a fork lift operator as opposed to a security guard. Where job description for security guard made clear that it would be necessary for claimant to use both arms, and where physician actually did find claimant disabled from working as a security guard, denial met "arbitrary and capricious" standard, and judgment was awarded to claimant. **Gerhart v. Merck & Company, Inc., 176 F.Supp.2d 400 (E.D. Pa., 2001).**

Plaintiff commenced an action, including a breach of contract claim, against defendant corporations in state court to recover benefits under a disability policy. Defendants had the case removed to federal court within 30 days of the filing of the complaint and then filed a motion to re-characterize the breach of contract claim as a claim for denial of benefits under the Employee Retirement Income Security Act (ERISA). Plaintiff filed a motion to remand the case to state court on the ground that the removal was not within 30 days from the date on which Defendants became aware of the grounds for removal. The District Court denied Plaintiff's motion to remand, holding that knowledge of the defendants, outside the content of the pleadings, does not warrant the running of the 30-day removal period. The Court reasoned that the relevant test is not what the defendants purportedly knew, but whether the filed document provided adequate notice of federal jurisdiction. The 30-day period runs from the receipt of such document. The Court granted Defendants' motion to re-characterize the breach of contract claim as a claim for denial of benefits under ERISA. The Court held that claims arising out of employee benefit plans, actions concerning improper processing of claims for benefits, and common-law contract and tort claims for damages under a benefit plan, are preempted by ERISA under 29 U.S.C.S. § 1144(a), which provides that the rights, regulations, and remedies afforded under ERISA supersede any and all state laws insofar as they relate to any employee benefit plan. **Bell v. Unumprovident Corporation, 222 F. Supp. 2d 692 (E.D. Pa. 2002).**

Former employees brought ERISA action against plan administrators, after administrators denied salary and continuation benefits to them on the basis of refusal to accept offer of comparable employment. The Appeal Committee making the decision had based its decision on the Retention Agreement as proof of an offer of comparable employment, however the district court held that the lack of specificity as to the nature of the job offered precluded the Committee from meeting the Plan's mandate that they exercise discretion informed by the factors outlined in the plan. Here, the Retention Agreement only mentioned an offer of "comparable employment" but did not provide any detail needed for informed discretion, such as compensation and benefits, duties and responsibilities, specific geographic location or schedule of days of work. Thus, the decision to deny benefits was arbitrary and capricious and would be overturned. **Ressler v. Aetna U.S. Healthcare, Inc., 180 F.Supp.2d 660 (E.D.Pa., 2001).**

11. Experts

Plaintiff state agencies commenced an action against defendant building products manufacturers for damages arising out of contamination of a state building due to the presence of asbestos and polychlorinated biphenyls (PCBs). Judgment was entered against one defendant, which filed a motion for post-trial relief. Said motion was denied by the trial court, and defendant appealed said denial to the Superior Court of Pennsylvania. On appeal, defendant argued that plaintiffs failed to prove, with expert testimony, a causal connection between the trace amounts of PCBs in the building and their damage claims. Specifically, defendant maintained that expert testimony was required to support a finding that PCBs could not be cleaned up and the building safely reoccupied, that PCBs required the demolition and reconstruction of the building and that PCBs permanently damaged the building beyond repair. The Superior Court held that, based upon the lay testimony of record indicative of the actual difficulty encountered in attempts to eliminate the PCBs, there was no need for the testimony of an expert because the jury was capable of comprehending said lay testimony. The Court reasoned that, if all the primary facts can be accurately described to a jury and if the jury is capable of comprehending such facts and drawing correct conclusions from them as would a witness with special training, then there is no need for the testimony of an expert. **Commonwealth of Pennsylvania, Department of General Services v. United States Mineral Products Company, 809 A.2d 1000 (Pa.Cmwlth. 2002).**

Plaintiff commenced an action against the manufacturer of a cement mixer for injuries he received while driving a truck that had a cement mixer mounted on it. Plaintiff alleged that the barrel portion of the cement mixer inadvertently rose while he was driving his employer's truck and struck a bridge overpass. Defendant-manufacturer moved to exclude and/or limit the testimony of a proferred expert witness on behalf of plaintiff. The proposed testimony of said expert witness was that the agitator, the component of the mixer that causes the barrel to rise, was defectively designed because it lacked warning or safety devices to alert the driver to the fact that the agitator was rising while he was driving the truck. The expert opined that the vehicle should have had a shut-off valve in the hydraulic line controlling the lifting function of the barrel that would enable the driver to close the hydraulic fluid supply while operating the vehicle. Based on the Federal Rules of Evidence and the U.S. Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals* relative to the use of expert testimony in federal courts, the District Court held that a *Daubert* hearing was unnecessary because the record contained the expert's curriculum vitae, a report detailing his opinions regarding the alleged design defect, and two videotapes showing an examination of the allegedly defective agitator and an exemplar agitator. The Court reasoned that it had sufficient information from which to judge the expert's background, training, and experience, as well as determine the reliability of his opinions and whether they will assist the trier of fact, in accordance with *Daubert*. Accordingly, the Court ruled that the expert testimony regarding the shut-off valve was excluded as he did not have experience or a background in engineering and designing hydraulic systems. A demonstration of

the agitator's hydraulic controls was not sufficient to show how the safety device worked in practice. However, given the expert's experience with accident reconstruction and repair of damaged vehicles, he was qualified to testify as to the cause of plaintiff's accident. - **Kerrigan v. Maxon Industries, 223 F.Supp. 2d 626 (E.D. Pa. 2002).**

A tractor-trailer driver injured after slipping on spilled fuel and falling from step system filed a product liability claim against tractor's designer and lessor. The alleged design defect consisted of the placement of the fuel tank in close proximity to the step system. Plaintiff submitted two expert opinions and the defendants moved to exclude both under Federal Rule of Evidence 702. The trial court concluded that the first expert, Dr. Wilcox, could not testify on matters relating to surface friction and radius of the step edge because he lacked the relevant qualifications in these areas and failed to utilize discernible methodologies in arriving at his conclusions. The court excluded proffered testimony from both experts regarding the alleged design defect because neither expert employed discernable methodologies to support their opinions. A witness is qualified to provide expert opinion if he possesses "specialized knowledge," meaning "skill or knowledge greater than the average layman," relevant to the subject of his testimony. The courts will allow an expert to provide testimony if based on scientifically valid reasoning and methodology, pursuant to the seminal Supreme Court case of Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The trial court reasoned that Dr. Wilcox's opinion on surface friction and radius of the step edge was too speculative (because he failed to investigate the actual surface friction on the tractor's steps) and, as a result, found his methodology to be unreliable. Dr. Wilcox remained competent to testify on matters relating to step geometry, the door handle, and tread depth. Finally, the trial court concluded that experts are not permitted to testify on matter of "generalized common sense" simply because they involve technical details. **Fedor v. Freightliner, Inc., 193 F. Supp.2d 820 (E.D. Pa. 2002).**

Boy, through his mother, sued Housing Authority claiming that exposure to lead paint in Authority properties since birth caused various neurological and intellectual deficits. Plaintiffs' experts at trial were not licensed psychologists, though they gave interpretations of various psychological tests, and defendant was able to exclude their testimony as being in violation of the Psychologists Practice Act and was granted a non-suit. Plaintiff appealed. The court reversed, holding that even if their interpretations fell within the prohibited "practice of psychology," they were clearly qualified as neuroscientists and therefore within an exception to the need for a license, such that exclusion based on this reasoning alone was in error. Also, Pennsylvania has not held that a license is needed for one to be qualified as an expert, as an expert can be qualified by skill, experience, training or education so as to have knowledge beyond that possessed by a layperson. **Ford v. Philadelphia Housing Authority, 789 A.2d 360 (Pa.Cmwlth. 2001).**

12. False Claims Act

Plaintiff filed a claim for retaliatory discharge against his employer under the whistle blower provisions of the False Claims Act, 31 U.S.C. Section 3730 (h). Plaintiff had been director of clinical oncology trials at defendant facility. He had been asked to author a grant application for a study, however the Director of the facility refused to submit the application given the facilities refusal to commit enough resources to patient safety. Plaintiff was directed by other medical professionals to submit the application, and he refused. While on vacation, plaintiff's name on the application was replaced with another and the application was submitted. Plaintiff raised the issue of scientific misconduct and, allegedly as a result, was fired. In order to recover under the FCA, plaintiff must show that he was engaged in "protected conduct," i.e., acting "in furtherance of " a FCA action. Here, there was no possibility that plaintiff could have filed a viable FCA action because the statutory requirements could not be met. He had to demonstrate that the application that he refused to sign was a "claim," meaning that it was a "request or demand...for money or property." A request to be designated as a clinical center was not a request or demand for money," it was only the first step in a long process that could lead to payments. **Dookeran v. Mercy Hospital of Pittsburgh, 281 F.3d 105 (3rd. Cir. 2002).**

13. Fraud

After exercising the property inspection contingency, Buyers became concerned over the fact that home had two sump pumps. Sellers asserted that duplicative sump pumps were installed as a "precaution" and signed a written disclosure statement that the property had no "water problem". Buyer understood this to mean that the pumps were unnecessary and never ran. After moving in, they realized that the pumps did run intermittently, and sometimes constantly during heavy rains. During one heavy rain, the circuit breaker controlling the pumps shut off, causing flooding in the basement. Buyers sought recession of the contract and damages alleging fraud with regard to the sellers statements concerning the sump pumps. In affirming summary judgment in favor of the Sellers, the Superior Court found that Buyers did not establish a prima facie showing of fraud. Sellers did not hid the existence of the sump pumps and Buyers were competent adults who should have been able to infer from the existence of the pumps that those devices may run from time to time. **Blumanstock vs. Gibson, 811 A.2d 339 (Pa.Super. 2002).**

14. Insurance

A. Application

Beneficiaries of life insurance policy brought action against life insurer when life insurer canceled policy following the death of the insured due to misrepresentations in his application. The life insurer canceled the insurance policy on the life of decedent because decedent lied about his drug and alcohol abuse and treatment on his application, misrepresentations which were discovered in a routine investigation. The United States District Court granted summary judgment in favor of insurer, the beneficiaries appealed, and the Court of Appeals held that: (1) the beneficiaries did not have standing to assert psychotherapeutic privilege with respect to insured's treatment records, and (2) the policy was void ab initio. Because the rationale for psychotherapeutic privilege is the same as for attorney-client, the court turned to attorney-client privilege cases for guidance. Relying on the case of Commonwealth v. Trolene, 263 Pa. Super. 263, 397 A.2d 1200, the District Court found that Pennsylvania courts have held that only the client has standing to assert the privilege. The court reasoned that under Pennsylvania law, a life insurance policy is void ab initio where the applicant's representations are false, made fraudulently or otherwise made in bad faith and material to the risk assumed. Matinchek v. John Alden Life Insurance Co., 93 F.3d 96. There was no disputing that decedent knew his answers on his application were false in that he was still using cocaine and undergoing treatment for drug and alcohol abuse. - **Burkert v. Equitable Life Insurance Society of America, 287 F.3d 293 (Pa. 2002).**

Insurance company petitioned for review of an order of the Insurance Commissioner affirming an order of the Pennsylvania Insurance Department which held that the company's cancellation of the insured's homeowner's insurance policy was in violation of the Unfair Trade Practices Act. It was the policy of the insurance company not to provide coverage to any applicant who owned an animal known to be unfriendly. When insured filled out the application, both parties agreed that her dog was not known to be unfriendly, and she received a preferred homeowners' policy. After an incident occurred where insured's dog bit a stranger and her policy was canceled, the insured argued that her dog was provoked into aggressive behavior. In determining whether this incident represented a substantial increase in hazard, the Commonwealth Court looked to see if the dog had been provoked; if so, no increase in hazard existed. The Commonwealth Court affirmed the finding of the Commissioner that the dog was provoked into biting and that there could be no error in further determining that the insurance company was not presented with a substantial increase in hazard after the policy was issued. **Aegis Security Insurance Co. v. Pennsylvania Insurance Department, 798 A.2d 330 (Pa. Cmwlth. 2002).**

B. Auto

1. Arbitration

Claimant sought uninsured motorist benefits under the personal auto policy of his father. Insurer denied benefits, asserting the policy contained a named driver exclusion endorsement applicable to claimant, and filed a declaratory judgment action. Claimant filed preliminary objections to the complaint for declaratory judgment, requesting dismissal of the complaint and an order compelling the parties to proceed to arbitration. Insurer argued in opposition that the dispute as to the validity of the named driver exclusion does not fall within the narrow scope of the arbitration clause. The trial court agreed with the insurer and held that claimant's claim that application of the named insured driver exclusion is violative of public policy and the PA Motor Vehicle Financial Responsibility Law is an issue that must be resolved in the declaratory judgment action. The Superior Court affirmed. **Henning v. State Farm Mutual Ins. Co., __ Pa. Super. __, 795 A.2d 994 (2002).**

Plaintiff sued her insurer over its refusal to arbitrate her uninsured motorist claim. Insurer persisted in refusing to arbitrate and in contesting the claim despite advice from its own in house counsel that the Court was likely to side with the insured. The federal district court rejected the insurer's Motion for Summary Judgement as to plaintiff's claim for bad faith and granted plaintiff's Motion for Summary Judgement on her contract and bad faith claims. The Court held that insurer acted in bad faith by persistently refusing to arbitrate the UM claim, despite the unambiguous clause in its insurance policy, its own counsel's advice, the lack of case law to support its position, and by continuing to refuse to arbitrate despite a court order compelling arbitration. It would be an issue for the jury to determine as to whether punitive damages would be appropriate and the amount of any such damages. The Court also held that the plaintiff did not state a claim under the Pa. Unfair Trade Practices & Consumer Protection Law; instead, plaintiff's claim involved the insurer's refusal to perform its contractual obligations and did not involve allegations of unfair or deceptive methods, acts, or practices in the conduct of offering for sale any services. **Anderson v. Nationwide Ins. Enterprise, 187 F.Supp.2d 447 (W.D.Pa., 2002).**

In this case, Hartford issued a policy containing under insured motorist coverage to the insured. A car that she was riding was struck by a truck and she was injured. The driver of the car she was uninsured. Suit against the driver of the truck and his employer was pending in state court. The Plaintiff insurance company sought a declaratory judgment that it had no current contractual obligation either to pay insured motorist benefits to defendant insured, or to arbitrate her claim for such benefits. The insured sought a declaration that she was entitled to uninsured motorist benefits or, alternatively, for permission to have the eligibility be determined by arbitration. The parties cross-moved for summary judgment. The insurance company asserted that it should not be required to pay uninsured motorist benefits or arbitrate her claim for those

benefits until after the state action was concluded. The insured countered that under Pennsylvania law she was not required to wait for the resolution of the state court action before seeking her uninsured motorist benefits. The cental conflict related to the timing of the insured's arbitration demand and the amount, if any, to be awarded. The language of the arbitration clause in the insurance policy was extremely broad, and provided only one exception which did not apply in the instant. Therefore, the insured's summary judgment motion was granted and the insurance company's summary judgment motion was denied. **Hartford Insurance Company of the Midwest v. Anne Altomare, 220 F. Supp. 2d 410 (E.D. Pa. 2002).**

Insured sought UIM benefits in arbitration proceeding against carrier, although case pending against tortfeasor with $15,000 limits had not been concluded. The arbitrators awarded insured $50,000, but directed insured to give carrier a credit of $15,000 for the third party coverage and provided that payment would not have to be made until third party action had been concluded by payment of any settlement or judgment. The insured's policy provided that no payment would be made until limits of all other auto liability policies had been exhausted by payment. After judgment in favor of the tortfeasor was entered in the third party case, carrier sought to vacate arbitration award as premature and an error of law, and the court agreed, vacating the award. Insured appealed, and the Superior Court reversed. Pursuant to *Harper v. Providence*, 753 A.2d 282 (Pa.Super.2000), where the UIM carrier was credited with face value of liability coverage, its rights were not prejudiced by refusal of arbitration panel to enforce the exhaustion clause. This would be irrespective of the outcome of the third party action - had an award for the insurer been made and the insured won in the third party action, the insured could not vacate the award as being inconsistent. **Krakower v. Nationwide Mutual Insurance Company, __Pa. Super. __, 790 A.2d 1039 (2001).**

2. Conflicts

Appellant, Nationwide, appealed from an order granting summary judgment in favor of West, Neely and Allstate Insurance Company (appellees). West was a Pennsylvania resident and a passenger in a vehicle owned and operated by Neely, an Ohio resident. Neely's automobile was registered in Ohio and insured by the state of Ohio through Allstate. West was injured when the vehicle was struck by a vehicle driven by Slaughter in Pennsylvania. West settled with Mr. Slaughter and his insurer, and subsequent to this settlement, he submitted UIM claims to Allstate, as the insurer for Neely, and to Nationwide, since West owned two vehicles insured by a Nationwide policy in Pennsylvania. Naitonwide argued that the trial court erred as a matter of law and/or abused its discretion in determining that Pennsylvania law was not applicable to Mr.West's recovery of UIM benefits because there was no true conflict of law between Pennsylvania and Ohio law and, furthermore, erred in determining that pursuant to a conflict of laws analysis, Ohio has in interest in the outcome of this case over and above that of Pennsylvania. Relying on the case of *Caputo v. Allstate Insurance Co.*, 344 Pa.Super. 1, 495 A.2d 959 (1985), the court stated that it must apply the law of the state having the most significant contacts or relationship with the contract and not the underlying tort. The court did not hesitate in concluding that the state of Ohio had the most significant contacts with Neely's policy with Allstate in that the policy was executed and delivered in Ohio, Neely was domiciled in Ohio and the vehicle was registered in Ohio. The Court affirmed the lower court's decision in holding that Nationwide was the primary underinsured motorist benefits carrier and that owner's policy provided excess coverage. **Nationwide Mut. Ins. Co. v. West, 807 A.2d 916 (Pa.Super., 2002).**

3. Coverage

Appellants (minors) sued appellee tortfeasor for personal injuries sustained in a motor vehicle accident which occurred on August 3, 1997, when the tortfeasor made a left turn in front of their mother's vehicle, in which they were passengers. Following discovery, it was revealed that the insurance covering the mother's vehicle had lapsed. The trial court granted the tortfeasor's motion for summary judgment, finding the minors were deemed to have selected the limited tort option because their mother did not buy insurance coverage for the car in which they were passengers. The minors appealed. The appellate court held that the purpose of 75 Pa. C.S.A. §1705(a)(5) was to punish only the minor's mother for her failure to meet financial responsibility requirements. Under 75 Pa C.S.A.§1714, the mother's exclusion from first-party benefits only applied to those with an ownership interest in her vehicle. The minors were not owners of the vehicle, nor were they named insureds or insureds under 75 Pa. C.S.A. §1705(f). Therefore, under 75 Pa. C.S.A. §1705(b)(3), they could maintain an action for both noneconomic loss and economic loss pursuant to applicable tort law. **Holland v. Marcy, 2002 Pa. Super. 381 (2002).**

Claimant who was injured while a passenger in a rental truck involved in an accident sought underinsured motorist benefits under her husband's personal auto policy. Insurer denied benefits on the basis that at the time of injury, claimant was a passenger in a rented truck which had a load capacity of over one ton rather than a "car" as defined in the policy. The lower court granted the order of the insurer, denying benefits. The Superior Court reversed, stating that the insurer's attempt to restrict the benefits required by law to be offered to Pennsylvania insureds to situations where the insured is a passenger in a "car" or a pedestrian struck by a motor vehicle is void as against Section1731 of the PA Motor Financial Responsibility Law. The PA MVFRL requires that the insurer by the express terms of the statute offer every one of its insureds the opportunity to purchase underinsured motorist coverage which would provide benefits whenever an insured who purchased that coverage suffered injury "arising out of the maintenance or use of a motor vehicle and was legally entitled to recover damages therefor from the owner or operator of the underinsured motor vehicle." **Prudential Property and Cas. Ins. v. Ziatyk, __Pa. Super. __, 793 A.2d 965 (2002)**.

Personal Auto Insurer of Insured-McAninley filed declaratory judgment action, seeking declaration that underinsured motorist benefits (UIM) were not owed to McAninley under its policy for injuries sustained by McAninley in a motor vehicle accident in which he operating his employer's pick-up truck. Insurer denied coverage on two bases, including (1) that McAninley was not operating a "car" at the time of the accident as indicated in the policy language to afford him UIM coverage, and (2) McAninley was operating a regularly used non-owned motor vehicle at the time of the accident and the policy contains an exclusion for UIM coverage when injured while operating such a vehicle. Relative to the first argument, the Court held that its decision in *Prudential Property and Cas. Ins. Co. v. Ziatyk*, 793 A.2d 965 (Pa. Super. 2002) controls, and the inclusion of policy language limiting UIM coverage to "cars" is contrary to the mandate of the Motor Vehicle Financial Responsibility law, 75 Pa.C.S.A. § 1731(c), and would not be upheld to preclude UIM coverage because insured was operating a pick-up truck when injured.

On the second argument, the Court held that the “regularly used non-owned motor vehicle” exclusion in a case such as this one where the insured purchased UIM coverage on his own auto policy but was operating his employer’s vehicle which was covered under a policy on which the employer elected not to purchased UIM coverage was violative of public policy and would not be enforced. The Superior Court affirmed the entry of summary judgment in favor of Insured-McAninley, ruling UIM coverage was applicable to this loss. **Prudential Property and Cas. v. McAninley, 801 A.2d 1268 (Pa. Super. 2002).**

Automobile insurer brought declaratory judgment action seeking declaration that named insured was not entitled to underinsured motorist benefit when named insured was injured while a passenger on another named insured’s motorcycle not covered by the policy. Insurer relied on household exclusion, which stated that coverage is not provided for injuries sustained involving “any motor vehicle you own which is not insured for this coverage under this policy....... ” Insured did not argue that the household exclusion was ambiguous; rather, insured argued that public policy precluded application of exclusion to her case because she had chosen and paid for UIM coverage. Insurer relied on precedent of numerous appellate cases that hold household exclusion is not ambiguous. The trial court granted insurer’s Motion for Judgment on the Pleadings. The Superior Court recognized the household exclusion’s validity, and further noted that insureds circumvent the exclusion by purchasing UIM coverage for a single vehicle from one carrier and collect on that policy when the insured is injured in another vehicle not insured by that carrier. Therefore, the Superior Court affirmed the denial of coverage based on the household exclusion. **Old Guard Ins. Co. v. Houck, 801 A.2d 559 (Pa. Super. 2002).**

4. Lapse

Plaintiff insureds commenced a breach of contract/negligence action against Defendant insurer. Defendant participates in the National Flood Insurance Program as a private insurer under which it issued a Standard Flood Insurance Policy (SFIP) to Plaintiffs. Plaintiffs claimed that Defendant breached its contractual duty by failing to send or improperly sending a renewal notice. Plaintiffs further argued that they were not aware that the policy had lapsed. Defendant moved for summary judgment, claiming that there are no issues of material fact and that it owed no duty to send Plaintiffs any notice regarding renewal. This District Court granted Defendant's motion for summary judgment because there were no genuine issues of material fact and because the interpretation of contracts, including insurance policies, is generally a question of law, not of fact. The Court recognized that federal common law governs the interpretation of the SFIP whereby standard insurance law principles are utilized to construe such policies. The District Court applied ordinary principles of contract law in construing the subject policy because insurance policies are considered contracts. The Court noted that it is required to give effect to the clear policy language. The Court held that the plain and unambiguous language of the policy indicated that Defendant was under no obligation to send any renewal notice to the Plaintiff insureds. The Court further held that a belated receipt of a notice does not constitute a waiver of the applicable policy language relative the obligation to send a renewal notice. - **Transamerican Office Furniture v. Travelers Property and Casualty, 222 F. Supp. 2d 689 (E.D. Pa. 2002).**

Appellant DOT sought review of an order of the trial court sustaining appellee registrant's challenge to the suspension of his automobile registration for failure to maintain insurance coverage, pursuant to Pennsylvania Vehicle Code 75 Pa. Cons. Stat. § 1786(d). Registrant claimed that the first notice he had that his automobile insurance policy was not in effect occurred when DOT notified him that his registration was being suspended for failure to maintain coverage. Registrant did not appeal to the Commonwealth's insurance regulatory agency, but renewed his policy and challenged DOT's action in Court. The court found that the lack of coverage on registrant's automobile "was the result of the insurance carrier's neglect and not the result of any action or inaction on the part of the Defendant." In *Donegal Mutual Insurance Co., v. Pennsylvania Dep't of Ins*., 694 A.2d 391 (Pa. Cmwlth. 1997), proof of the office filing procedures with proof that the notice was written within the normal course of business and was placed in the normal course of mailing was sufficient to show receipt of the item. In the instant action, the Commonwealth Court found that DOT did not meet its burden of proof however to establish that the vehicle owner was without insurance coverage for thirty-one days, since it did not demonstrate that registrant's insurance lapsed because he failed to respond in a timely manner to an offer to renew for twelve months by paying the premium. **Beitler v. Pennsylvania Department of Transportation, Bureau of Motor Vehicles, 811 A.2d 30 (Pa. Cmwlth. 2002).**

Appellee vehicle owners were notified by appellant, DOT, that their vehicle registrations were being suspended under 75 Pa. Cons. Stat. § 1786(d), because the owners had been without automobile insurance for more than thirty-one days. The owners claimed they were never notified by their insurer of the cancellation of their insurance. The owners appealed, and the appeals were sustained by order of the trial court, who determined that the owners did all that they were required to do and were without default. DOT appealed claiming it established a lapse in coverage, as required for a suspension. In *Donegal Mutual Insurance Co., v. Pennsylvania Dep't of Ins*., 694 A.2d 391 (Pa. Cmwlth. 1997), proof of the office filing procedures with proof that the notice was written within the normal course of business and was placed in the normal course of mailing was sufficient to show receipt of the item. In the instant action, the Commonwealth Court found that DOT did not meet its burden of proof to establish that the vehicle owner was without insurance coverage for thirty-one days since it did not attempt to show that the insurer sent a notice of cancellation or non-renewal. **Cain v. Pennsylvania Department of Transportation, Bureau of Motor Vehicles, 811 A.2d 38 (Pa. Cmwlth. 2002).**

The decision of the Insurance Commissioner to approve an insurer's notice of nonrenewal was affirmed. The insurer only had to prove that the insured consumed alcoholic beverages that had an adverse impact on her driving and did not need to show actual conviction of DUI. A police officer testified that the insured had an odor of alcohol, glassy eyes, slurred speech, and staggering gate, and he was therefore permitted to offer an opinion in the administrative proceeding that the insured was intoxicated when she collided with two utility poles. The insured admitted that she had consumed four glasses of wine prior to the accident, and, based upon all of the evidence, it was reasonable to conclude that the alcohol consumption had materially increased the probability of a loss. **Connor v Insurance Dept., 810 A2d 182 (Pa.Cmwlth. 2002)**.

5. UM/UIM

a. Damages

Officer was 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 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).**

b. Coverage

This was an action for Declaratory Judgment. The defendant, the Corporate Secretary of the Tierney Associates, Inc., sought underinsured motorist coverage under a policy issued by USF&G to Tierney Associates, Inc. On August 19, 2000, Tierney was injured in a motor accident while a passenger in a car owned and operated by Edward Kupstas. Tierney collected the limits under the Kupstas policy and the limits of the underinsured motorist coverage provided under her personal automobile insurance. She subsequently sought further underinsured coverage from the policy provided to Tierney Associates, Inc, arguing that she should be afforded coverage based clearly on her status as a corporate officer. The District Court relied upon 3 decisions, Nationwide Mut. Fire Ins. Co. v. Salkin, 163 F. Supp. 2d 512 (E.D. Pa. 2001), Ohio Cas. Ins. Co. v. Akron, 1992 U.S. Dist. LEXIS 14960, Civ. A. No. 91-5805, 1992 WL 24790 (E.D. Pa. Sept. 25, 1992) aff'd mem., 993 F.2d 878 (3rd Cir, 1993), and West American Ins. Co. v. Griffith, 1991 U.S. Dist. LEXIS 2139, Civ.A.No. 90-6034, 1991 WL 24699 (E.D. Pa. Feb. 21, 1991), aff'd mem., 944 F.2d 899 (3rd Cir. 1991), in determining that there were persuasive intermediate court decisions that held that corporate officers and directors were not necessarily intended beneficiaries of policies of automobile insurance issued to their corporations. The court specifically noted that the 3 cases compelled the conclusion that when a policy plainly indicated that the term "you" referred solely to the insured corporation, and only the named insured, a corporate officer was not a class one beneficiary under the policy. **United States Fidelity and Guaranty Company v. Tierney Associates, Inc., and Ceil Ann Tierny, 213 F.Supp. 468 (M.D. Pa. 2002).**

The Plaintiff insurer sued the defendant parents for declaratory relief. Both parties moved for summary judgment. The parents, one of whom was injured while operating their automobile, claimed their automobile qualified as an underinsured motor vehicle under their resident daughter's policy. The insurer claimed that an "underinsured motor vehicle" under the daughter's policy did not include an automobile furnished for the use of a relative. The court held the policy exclusion in the daughter's policy clearly and unambiguously barred recovery. The only way that parents could have succeeded on the claim was if the family vehicle exclusion was invalidated. The parents were in a position to control the amount of liability coverage for the accident vehicle, and were seeking to supplement that inadequate coverage with UM coverage on other family vehicles. The fact that UM coverage was afforded by a resident daughter's policy, as opposed to a separate policy procured by parents, was an immaterial distinction. The parents could not turn to their daughter's insurer to supplement the liability limits on the parents' own vehicle. Finally, the family vehicle exclusion was consistent with the legislative intent to stop the spiraling costs of automobile insurance in the state. As a result, the plaintiff motion for summary judgment was granted, and defendant's motion for summary judgment was denied. **State Farm Mutual Automobile Insurance Company v. Leonard and Mary Coviello, et. al., 220 F. Supp. 2d 401 (M.D. PA 2002)**

Lincoln General appealed the trial court order entering summary judgment against it involving a deadhead/bobtail policy it issued to provide coverage to Wassson Trucking, the driver and owner/operator of the truck that regularly leases the subject truck to Fenner. Liberty Mutual provided trucking/business insurance to Fenner Trucking, an authorized carrier. Wasson was involved in a motor vehicle accident while driving the truck, and personal injury and property damage claims ensued. Wasson tendered the claims to Lincoln General and Liberty Mutual. The Fenner/Wasson lease agreement states that the lease begins when Wasson receives the load being shipped. Lincoln General's policy also excluded coverage when the vehicle is being driven for or on behalf of any other person. The Liberty Mutual policy provided coverage only during times when the vehicle driven under the lease. The Superior Court, per Judge Klein, after a lengthy discussion of the former ICC's regulations, held that the Wasson was not acting for Fenner's benefit at the time of the accident. Therefore, Lincoln General's policy provided coverage for the accident and Liberty Mutual's did not. **Lincoln General Insurance Company v. Liberty Mutual Insurance Company, 804 A.2d 661 (Pa. Super. 2002)**.

Plaintiff insurance company sued Defendants, husband and wife, for declaratory relief, and both parties moved for summary judgment. Plaintiff issued an antique automobile policy to Defendants for a 1966 Ford pickup truck. Subsequently, Defendants were struck by an uninsured vehicle while in Defendant-wife's 1988 Chevrolet Camaro, a vehicle which she owned and insured under a separate policy through a different insurance carrier. Defendant-husband, a passenger in the Camaro at the time of the collision, sustained injuries. Defendants then filed a

claim for uninsured motorist benefits under the policy covering the Camaro, however after these benefits were exhausted, they filed a claim for uninsured motorist benefits under their antique automobile policy. The issue before the Court was whether an insurance company is obligated to pay uninsured motorist benefits to policyholders in an accident involving a vehicle covered under a different policy. The Court ruled that because Defendants were not occupying the antique automobile during the collision, they were not entitled to uninsured motorist benefits through that policy. The Court reasoned that the language of the subject policy was plain and unambiguous and defined "insured" as any person occupying the covered automobile. Therefore, Plaintiff's Motion for Summary Judgment was granted and Defendants' Motion for Summary Judgment was denied. **- St. Paul Mercury Insurance Co. v. Timothy Perry and Donna Perry, 227 F.Supp. 2d 430 (E.D. Pa. 2002).**

Minor passenger on snowmobile was injured what the snowmobile was struck by an automobile. The parents sought to have extensive medical bills paid for through their auto carrier. The carrier filed objections to the complaint, asserting an exclusion for injuries sustained while occupying a snowmobile. The trial court granted the objections and the insured appealed. The Superior Court agreed with the trial court's determination that the policy and the MVFRL both excluded coverage for this type of injury. Since a snowmobile was " a recreational vehicle not intended for highway use," (in fact it is specifically not allowed to be used on a street or highway), it would not be a covered vehicle. Moreover, a very limited exception to this rule for crossing over a highway would not apply to a 12 or 13 year old child, since minors are specifically not permitted to cross over. **Gallo v. Nationwide Insurance Company, __Pa.Super.__, 791 A.2d 1193 (2002).**

Exclusions of government vehicles from the definition of an "underinsured motor vehicle" were invalid as to a county bus and car, despite the statutory damages cap. The MVFRL applies to government vehicles except federally-owned vehicles and defines "underinsured motor vehicle" to include vehicles when the limits of self-insurance are insufficient, and it is thus violated by the exclusions. Where a statutory damages cap caused the available limits of self-insurance to be insufficient, the statutory requirement for an underinsured motor vehicle are met; the reason for the insufficient liability insurance is unimportant. **Kmonk-Sullivan v. State Farm Mutual Automobile Insurance Company, __Pa.__, 788 A.2d 955 (2001).**

c. Waiver

The plaintiff was injured by a vehicle driven by an uninsured motorist (UM) and in this action he challenged the automobile insurer's refusal to pay stacked UM benefits based on a stacking waiver signed by his deceased wife, who was formerly the first named insured on the policy. The United States District Court for the Western District of Pennsylvania granted summary judgment for insurer, and insured appealed. The Court of Appeals had to determine whether the requirement in 75 Pa.C.S. § 1738(e) that a valid stacking waiver "must be signed by the first named insured" mean that a valid waiver must be signed by the current first named on a policy, thus imposing a continuing obligation on insurers to acquire a new stacking waiver if the first named insured on a policy changes, or does § 1738(e) merely require that a valid waiver only must be signed by the first named insured at the time the waiver is signed. The Court held the later, and in confirming the judgment of the District Court found that the plaintiff was not entitled to derive the benefits of stacked coverage because the waiver form executed by his late wife remained valid even after the plaintiff became the first named insured under the policy. It is important to note, however, that the Court of Appeals had to predict what the Pennsylvania Supreme Court will ultimately decide due to uncertainty of PA law regarding this issue . As a result, once the Pennsylvania Supreme Court faces this question in another case it will presumably resolve it once and for all, and the finding in this case will become irrelevant. **Rupert v. Liberty Mut. Ins. Co., 291 F.3d 243 (C.A.3 Pa. 2002).**

Plaintiffs' son was injured in a motor vehicle accident and collected liability limits from tortfeasor. In seeking UIM benefits, plaintiffs sought to have their limits declared to be extended to their bodily injury limits of $500,000 ($1 million stacked), although they had signed a form selecting UM/UIM coverage limits of $50,000/$100,000. The form in question had two sections (UIM and UM) and each section was divided into blocks to accommodate waiver of coverage, reduction of limits and rejection of stacking. Plaintiffs' signature appeared for the blocks for reduction in each of the UIM and UM sections, and the language provided for $50,000/$100,000. Plaintiffs argued that since Section 1731(c.1) provides that an insurer must provide forms for waiver/rejection on separate pages for each coverage, the form here was inadequate to lower limits. Insurer argued that the statute would not apply to instances of selection of specific coverage limits as opposed to outright waiver/rejection. The Pennsylvania Supreme Court held that the statute would not impede enforcement of specific-limits election even though multiple elections were made on a single page which also contained unrealized waiver/rejection language. The technical requirements for rejection on separate pages apply solely to circumstances where an insurer attempts to enforce outright waiver/rejection of UM/UIM coverage. **Lewis v. Erie Insurance Exchange, __Pa.__, 793 A.2d 143 (2002).**

d. Stacking

Motorist appealed from an order entered in the Court of Common Pleas of Lehigh County denying his request for a determination that he was entitled to “stacked” underinsured motorist benefits under his Erie insurance policy. With the belief that he was entitled to additional coverage under his Erie policy, the motorist filed for UIM arbitration and the arbitrators awarded monetary damages without addressing the issue of “stacking”. The motorist filed a petition to confirm the arbitration award and included a prayer to determine the “stacking” issue. The trial court determined that McGovern was entitled to the amount which had already been paid to him under his Erie policy and McGovern appealed. The Superior court held that the motorist could not stack coverage under one policy for other vehicles owned by the motorist but covered under policies issued by other insurers. The Superior Court reasoned that this approach would be ludicrous, for this concept would bind an insurer to provide coverage for vehicles never rated, over which the insurer has no control. The Court held that, as a matter of public policy, it could not require an insurer to bear such a burden. - **McGovern v. Erie Insurance Group, 796 A.2d 343 (Pa. Super 2002).**

6. “Use,” “Loss,” “Other Insurance” and “Accident”

Individual was injured while a passenger in a vehicle owned by his grandfather and being driven by his friend, with permission. The owner of the vehicle carried a primary personal auto liability policy with Pennland Ins. Co. The owner also carried a personal blanket excess liability policy with Harleysville Ins. Co. The driver was covered as an insured under his mother's personal auto policy with Aetna Casualty and Surety Ins. Co. Pennland tendered its policy limits to the injured party. Harleysville also paid under its policy and then filed a declaratory judgment action against Aetna, asserting Aetna should have paid as the second tier of coverage. The insurers disagreed over the interpretation of the "other insurance" clauses in their respective policies. Harleysville argued it should have been excess to Aetna since its policy states it will be excess insurance "over any valid and collectible *primary insurance*." Aetna's policy states it is excess insurance over any other collectible insurance where the injuries were sustained in a vehicle the insured does not own. The trial court ruled that Pennland provided the primary coverage, Harleysville alone provided the second tier of coverage because it reasoned that Aetna was not "primary insurance" on the loss, and Aetna provided the third tier of coverage. The Superior Court and Supreme Court affirmed. **Harleysville v. Aetna, __ Pa. __, 795 A.2d 383 (2002).**

Vehicle owner and passenger brought declaratory judgment action against vehicle's insurer, seeking benefits uninsured motorist benefits (UIM) portion of the policy with respect to injuries that they suffered during a car jacking. Parties cross-moved for summary judgment. The policy at issue provided for uninsured motorist benefits coverage for reasonable expenses incurred for necessary medical and funeral services as a result of bodily injury (1) caused by accident and (2) sustained by an insured, bodily injury to mean accidental bodily harm to a person and that person's resulting illness, disease or death. The only question for the Court was whether the injuries sustained by Plaintiffs were the result of an accident. The insurer argued that Plaintiffs' injuries were not covered under the terms of the policy because their injuries were not caused by an accident but rather by their own intentional conduct, claiming that if Plaintiffs did not try to stop the carjackers from stealing their, they would not have been injured. The District Court granted summary judgment for owner and passenger holding that the actions taken by owner and passenger in trying to stop carjackers did not rise to the level of intent to cause harm that would preclude coverage for injuries sustained by owner and passenger under policy's provision covering injuries caused by "accident". - **Kirkpatrick v. AIU Insurance Co., 204 F. Supp. 2d 850 (E. D. Pa. 2002).**

Trial court entered summary judgment in favor of automobile insurer and against the insurer and lienholder. The Superior Court affirmed the summary judgment order. The loss occurred when the policyholder's son had permission to drive the insured vehicle. The insured's son failed to heed a police officer's sirens and flashing lights, a twelve mile pursuit ensued, and the insured vehicle left the roadway causing substantial damage. Insured's son was arrested for various offenses, and he pleaded guilty to all offenses. Insurer denied coverage and, thereafter, insured refused to pay outstanding amounts owed to lienholder. Lienholder the brought this action to recover outstanding amount of loan. Insured answered the Complaint, denying

liability due to willful and intentional conduct of insured's son. Lienholder took a default judgment against insured. The Superior Court held that the insurance policy's loss payable clause rendered the lienholder a "simple" loss payee, because acts of the insured could invalidate the loss payee coverage. Under Pennsylvania case law, a "standard" loss payee exists only when the clause expressly indicates the insured's conduct will not invalidate coverage. Therefore, Chrysler (the lienholder) could only collect from the insurer if the insured could collect under the policy. The Superior Court further held that the insured's son's actions did not meet the policy's definition of "loss", which required "direct and accidental" damage to the vehicle. The Superior Court further affirmed the trial court's finding that the son's conduct in failing to heed the police office constituted an "omission" under the loss payee clause. **Cardwell v. Chrysler Financial Corp., 804 A.2d 18 (Pa. Super. 2002).**

Employee of contractor was killed while operating a dump truck which struck electric lines. Employee's estate sued the contractor, asserting that it gave negligent instructions to employee regarding handling of the truck. Contractor and its insurer brought a declaratory judgment actions against employee's commercial auto. policy provider (Rockwood), asserting that this carrier had a duty to insure and indemnify the contractor because the contractor was a "user" since it was directing employee and, even if not a user, it was "liable for" the conduct of the employee. The trial court held that contractor was not an insured under the Rockwood policy, that the direction of the dump truck by contractor was too tenuous to constitute a "use." In a case of first impression, the Superior Court held that guiding or directing a vehicle operated by another would not be a "use" of the vehicle under its normal meaning, unless the policy would provide otherwise. Some other jurisdictions seeing significant guidance (as where the operator could not see at all) as a use were not persuasive, as a distinction between little guidance or much guidance would not make sense - it would still involve directing the movement of the vehicle. The language "liable for" would apply to contractor's liability for wrongful acts of the driver, and those facts were not present here. **Belser v. Rockwood Casually Insurance Company, __Pa.Super.__, 791 A.2d 1216 (2002).**

7. Release

Medical providers appealed from an order of the Court of Common Pleas, Philadelphia County, granting summary judgment in favor of owner, and insurer, of truck involved in patient's motor vehicle accident which occurred in 1995. In 1997, patient and appellees signed a general release for all claims. Medical providers appealed Court of Common Pleas of Philadelphia County summary judgment order to recover medical expenses ostensibly not covered by first party benefits. The Superior Court found that a patient's execution of general release did not constitute "payment" of first party benefits, and thus, four-year statute of limitations was not extended to allow providers to see recovery of cost of medical benefits. **Philadelphia Ambulatory Care Center, Inc., et al. v. Rite Aid Corporation, et al., 805 A.2d 613 (Pa. Super. 2002).**

C. Bad Faith

Plaintiff secured a judgement in a bad faith action against a life insurance company for a breach of its obligation to make timely payment on a policy of mortgage life insurance. After the insurance company delayed payment of the judgement through dilatory tactics, plaintiff filed a second lawsuit against the insurer, this time seeking an additional bad faith recovery from the insurer. Both suits were base upon Pa.'s statute for victims of bad faith by insurance companies, 42 Pa.C.S.A. Sec. 8371. The Pa. Superior Court held that the plaintiff was not entitled to utilize the statute in order to collect a judgement from the insurer. Once a judgement or a settlement had been reached as to the insurer's obligations under its policy, the insurer's fiduciary duty as an insurer ceased and the statute no longer applied, since the suit then is one to obtain payment on a judgement or a settlement rather than a suit to obtain proceeds due under a policy of insurance. Therefor, the plaintiff had only the normal remedies available to anyone wishing to enforce a judgement or a settlement. **Ridgeway v U. S. Life Credit Life Insurance Co., ___Pa. Super.___, 793 A2d 972 (2002).**

Insureds brought action against their homeowners' insurer, claiming breach of contract and statutory bad faith. A bench trial was conducted, and the Court of Common Pleas entered judgment in favor of insureds and insurer appealed. Insurer contended that the trial court erred in denying it's right to jury trial on the breach on contract claim and denying its motion for a directed verdict, in that the verdict was against the weight of the evidence and the award of damages was excessive. The Superior Court held that the trial court did err in denying appellant's request for a jury trial and that the trial court erred in denying appellant's motion for a new trial. The insurer asserted that the insureds' bad faith claim under 42 Pa. C.S. A. §8371 was not an action in equity because the insureds requested monetary damages, and §8371 provides an adequate remedy at law. The Superior Court held that the trial court erred in concluding that §8371 provided equitable jurisdiction and found that §8371 was not analogous to equity claims and does not have any effect on the right to a jury trial for a breach of contract claim. The Superior Court held that the homeowners' insurer was entitled to a jury trial on the insureds' breach of contract claim and, therefore, reversed and remanded.- **Petrecca v. Allstate Insurance Co., 797 A.2d 322 (PA. Super. 2002).**

This action arises from a medical malpractice suit litigated in state court resulting in a judgment against the Plaintiffs. The doctors then commenced the instant action against their primary insurer, The Medical Protective Company, for breach of contracts, negligence and bad faith, based on MedPro's conduct in the underlying litigation. Med Pro subsequently impleaded third-party defendants, the Commonwealth of Pennsylvania medical professional liability catastrophe loss fund and John Reed (collectively the CAT fund) for contribution and/or indemnity. MedPro filed a Motion to Dismiss Plaintiff bad faith claim. On May 19, 1999, the Philadelphia Court of Common Pleas entered a $2,798,924.00 judgment against the Plaintiff based on the professional negligence and/or malpractice occurring in 1992. That award encompassed not only the jury's original verdict of $2,085,000.00 but also substantial delay damages pursuant to the Pennsylvania Rule of Civil Procedure 238. Thereafter, on August 24, 1999, Plaintiffs' insurer, MedPro paid $400,000.00 into court towards the judgment, tendering

its $200,000.00 policy limits for each doctor. The judgment and accruing interest as of the appeal remained unpaid. In their Amended Complaint, Plaintiffs contended that MedPro, though providing its policy limits, breached its contract, acted in bad faith and negligently handled the underlying suit. In light of Plaintiffs' claim, MedPro impleaded the CAT fund. The CAT fund, a statutorily created agency may provide up to a million in coverage for Pennsylvania-based medical professionals incurring professional liability, after the primary insurer has tendered its policy limits. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, MedPro moved to dismiss the doctors bad faith claim. To establish liability for bad faith refusal to pay, an insured must demonstrate both of the following: (1) the insurer lacked reasonable basis for denying benefits, and (2) the insurer knew or recklessly disregarded its lack of such reasonable basis. In the instant matter, the court found that as a matter of law MedPro had a reasonable basis for withholding delay damage and postjudgment interest payment and that it's conduct at most, could amount to breach of contract. **Lawrence I. Livornese, M.D., et. al. v. The Medical Protective Co., 219 F. Supp. 2d 645 (E.D. Pa. 2002).**

Insureds sued their automobile insurance carrier alleging that insurer's delay in paying their claim for underinsured motorist (UIM) benefits was in bad faith. The Third Circuit Court of Appeals upheld the lower court's ruling and held (1) proof that the insurer was motivated by improper purpose is not required to support a claim under the Pennsylvania bad faith statute; (2) evidence supported the jury's conclusion that the insurer acted in bad faith; (3) the fact the arbitrator had awarded one insured less than she thought did not preclude a finding of bad faith; (4) insurer's conduct supported the jury's award of punitive damages; (5) the punitive damages remedy in an action under the Pennsylvania bad faith statute triggers a federal constitutional right to a jury trial; and (6) the denial of attorney's fees, though erroneous because it was based on the court's belief that the insurer was "punished" enough, was harmless error because it was only error in regard to the court's explanation, not in its application. **Klinger v. State Farm Mutual Auto Insurance Company, 115 F. 3d 230, 233 (3d Cir. 1997).**

Insured was injured in motor vehicle accident and collected liability limits, thereafter seeking UIM benefits against its carrier. Medial records/reports were sent to the carrier, with a demand of about $52,000. Carrier requested and IME, to which consent was given, but it never scheduled it. After additional statements, records and authorizations were provided, and an expert medical deposition given, an offer of $10,000 was made months later. A final offer of $14,000 was rejected and the matter proceeded to hearing. An award for $77,000 was entered for insured, as well as an award for $2,500 for the loss of consortium claim. Insured filed a bad faith claim, asserting the carrier did not evaluate his claim reasonably, and the trial court awarded punitive damages in the amount of $275,000 and attorneys fees in the amount of $14,000, plus costs, finding that the carrier did not make a good faith evaluation despite clear liability and compelled its insured to institute litigation.

In upholding the matter on appeal, the Superior Court held that the trial court properly reviewed the evidence as a whole in finding that the carrier did not take steps to learn of the insured's condition and that the log entries were merely snippets from medical records without an understanding of plaintiff's condition. Also, the court noted that although this is a first party claim, the valuation of the claim still follows traditional third party concepts; a carrier owes its insured a duty of good faith and fair dealing. It was further held that the trial court had properly considered the carrier's Best Claims Practices Manual, as the same was relevant in showing a philosophy which did not encourage reasonable case-by-case analysis. The manual here provided for trying to reduce the average claim to lower than its competitors, becoming a "defense-minded" carrier, aggressively using IME's, trying to catch claimant's off guard, etc. Finally, expert testimony on whether the carrier's actions were bad faith was properly considered. The verdict was upheld, and attorneys fees for both the underlying litigation and for the pursuit of the bad faith claim were seen as proper. **Bonenberger v. Nationwide Mutual Insurance Company, __Pa.Super.__, 791 A.2d 378 (2002).**

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).**

D. CAT Fund

Insurer filed petition in the Commonwealth Court against CAT Fund seeking coverage for non-party health care providers after the Fund denied its request because the insurer failed to file a claim within 180 days, as required by the Health Care Service Malpractice Act. The Fund filed preliminary objections to the petition, arguing that it did not receive notice as required within 180 days and that the second count for bad faith under both Title 42, Section 8371 and the UTPCPL did not apply to this commercial situation. The Commonwealth sustained the preliminary objections to the bad faith count, reasoning that the Fund is not an "insurer", the petition was not brought by insured entities, and the Fund's services are "commercial in nature" and are not intended to serve personal, family, or household. **Pennsylvania Medical Society Liability Insurance Co. v. Commonwealth of Pennsylvania Medical Professional Liability Catastrophe Loss Fund, 804 A.2d 1267 (Pa. Commw. 2002).**

E. Miscellaneous Commercial Policies

Insurer brought declaratory judgment action against law firm and related entities involved in lawsuit brought by former employee, alleging that homeowners and umbrella liability policies it issued did not obligate to indemnify or defend firm in lawsuit. The firm appealed after the Court of Common Pleas dismissed insurers. Upon receiving a complaint alleging intentional infliction of emotional distress and discrimination filed by John Doe, appellants requested indemnification from several insurance companies with whom they had policies, all of which refused after determining that appellants' respective policies did not cover the discrimination-based lawsuit. The Superior held that the trial court's dismissal of claims against the insurer as a sanction for firm's discovery violations was not an abuse of discretion and that the scope of coverage of insurance policies did not include lawsuits brought by former employees. The Court reasoned that because appellants engaged in a pattern of conduct over a sixteen-month period which included ignoring discovery requests and interrogatories, missing deadlines and disobeying court orders to comply, these discovery violations were a "nature of severity" that warranted dismissal. The Superior Court also found appellants decision to fire John Doe to be a "business" decision that did not fall within the policy. **Philadelphia Contributionship Insurance Co. v. Shapiro, 798 A.2d 781 (Pa. Super. 2002).**

Action was brought by workers' compensation insurer against insured trucking company and company's shareholders, alleging claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as fraud, breach of contract, and unjust enrichment, based on insurer's alleged responsibility for claims of drivers that were excluded from policy. A third party claim was brought by defendants against lessor that leased the drivers to company, lessor's workers' compensation insurer and lessor's insurance agent. Third party insurer and agent filed motion for summary judgment after the settlement of first-party claims. The district court held, in response to third party insurer and agent's request that the court examine the issue of its jurisdiction, that the it would exercise its discretion to retain jurisdiction over supplemental claims based on concerns of judicial economy and fairness to the parties. Also, because the lessor's agent did not act with apparent or implied authority, they could not bind lessor's insurer under the doctrine of respondeat superior to the terms of coverage for leased employees beyond those contained in the policy. **Donegal Mutual Insurance Company v. Grossman, 195 F. Supp. 2d 657 (M.D. Pa. 2001).**

Garage was insured under two policies, a Garage Policy and a Commercial Umbrella Policy (with excess liability coverage over the garage policy). The garage loaned a car it owned to a patron while the patron was having his vehicle serviced. While operating the loaner car, the patron was involved in a motor vehicle accident, resulting in the death and serious injuries of his passengers. His passengers sought liability and underinsured motorist benefits from both the Garage Policy and the Commercial Umbrella Policy in settlement of their claims. The insurers denied the claim, but offered $30,000.00 from the Garage Policy to the injured parties which represented the statutory minimum limits of automobile liability coverage required under the PA Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. § 1702. In a declaratory judgment

action, the trial court agreed with the insurers and held that the patron-driver qualified as an insured under the Garage Policy only because he qualified as a customer using a covered vehicle with permission of the garage, and this Garage Policy language specifically excluded such an insured from primary coverage and limited the coverage afforded to the limits required by PA MVFRL, here $30,000.00 (injury to two persons in one accident). The trial court further held that the patron-driver was not covered as an insured under the Commercial Umbrella Policy because that policy indicated it would pay excess over the underlying insurance only if the insured qualified for the underlying insurance by its own terms and not where the insured is covered by the underlying insurance simply because of statutory mandates as was the case here. The Superior Court affirmed. Statutes mandating minimum primary coverage are not intended to affect umbrella policies whose purpose is to protect the named insured (Garage) and not the customers' (patron-driver) assets. **Cordero v. Potomac Ins. Co., __ Pa. Super. __ , 794 A.2d 897 (2002).**

General Contractor's Commercial General Liability Insurer, State Auto, filed a declaratory judgment action, seeking a declaration that it did not owe a duty to defend or indemnify its insured in a suit instituted by an individual for injuries sustained while working on a project for the insured. State Auto asserted that the injured party was an employee of the insured, and therefore, the policy excluded coverage for this loss. State Auto asserted the policy language which stated that coverage did not apply to bodily injury to "an employee of the insured arising out of and in the course and scope of employment by the insured." The Insured argued that the injured individual was an independent contractor and not an employee. The trial court agreed with the insured and held that the facts of record evidenced that the injured party was an independent contractor and not an employee, and therefore, State Auto owed a duty to defend/indemnify. The Superior Court reversed and held that the injured party was an employee and the exclusionary language was applicable to preclude coverage. **State Automobile Mutual Insurance Company v. Christie Construction Company, 802 A.2d 625 (Pa. Super. 2002)**.

The Insurance Commissioner as the statutory Rehabilitator of Fidelity Mutual Life Insurance Company requested approval of the Court of her Third Rehabilitation Plan. The Policyholders' Committee ("Committee") and certain individuals and unsecured creditors objected to the plan. The Committee first challenged the Court's standard for reviewing the Rehabilitation Plan, suggesting a closer scrutiny than that authorized under an abuse of discretion review for components of the plan governing corporate action. The Court rejected this position and upheld the abuse of discretion standard of review. Next, the Committee challenged the Court's jurisdiction over release language in the Plan, discharging claims against non-debtor third parties. The Court held it does have jurisdiction as conferred by 42 Pa.C.S.A. § 761(a)(3), and that the proposed release of non-debtor third parties, including the release of the Rehabilitator, her agents and employees and officers, directors as well as of agents of Fidelity Mutual arising out of their capacities as representatives of the Rehabilitator from post closing negligence claims based on their acts or omissions during the rehabilitation, is necessary and proper to the Plan. The release provisions do not bar timely claims filed prior to closing, those claims for conduct that arises after closing or intentional wrongdoing. The Court also rejected

the argument that inclusion of this language presents a conflict of interest or is against public policy. The Committee next challenged the plan language that assigned all common or derivative third party claims to FLIC (the acquired stock life insurance company that is assuming policy obligations and certain liabilities of Fidelity Mutual), and that these claims were to be pursued exclusively by the Rehabilitator or by FLIC as assignee of such claim. The Court held that it was not an abuse of discretion to include this assignment provision, and upheld the same. The next objection was to the proposed indemnification provision that FLIC will assume all liability, including that not paid for or reimbursed by applicable liability coverage, under Fidelity Mutual's indemnification program in effect on 2/14/94, requiring FLIC to assume indemnification obligations beyond the limits of Directors and Officers policy the Rehabilitator purchased. The Court agreed and ruled the Rehabilitator could not propose the transfer of unlimited indemnification obligations from Fidelity Mutual to FLIC, and the plan was ordered to be modified. The next objection was for failing to include a provision that FLIC will assume all tax liability of policyholders without limitation. The Court rejected this argument. Lastly, the Court considered the individual's objections which included an objection that Fidelity Mutual should be liquidated rather than rehabilitated. The Court overruled this objection, stating that the decision to rehabilitate the business of an insurer is within the sound discretion of the Rehabilitator and not to be rejected by the reviewing court absent an abuse of discretion, and there is no evidence that the creditors and policyholders would not fare at least as well under a rehabilitation plan as they would under a liquidation. The Rehabilitator was ordered to modify her plan in accordance with these rulings. **Koken v. Fidelity Mut. Life Ins. Co., 803 A.2d 807 (Pa.Cmwlth. 2002)**.

Plaintiff brought medical malpractice suit against doctor who performed ankle surgery after plaintiff was injured in motor vehicle accident, and Superior Court affirmed order granting summary judgment. The Court held that the Release issued by auto insurance company that insured the vehicles involved covered and barred the plaintiff's claim against the doctor because said claim accrued before he executed the release. The time at which a claim accrues is dispositive and releases from liability are strictly construed so as not to bar the enforcement of a claim that has not yet accrued at the date of the release's execution.-**Fortney v. Callenberger, 801 A.2d 594 (Pa. Super. 2002).**

This action involved an insurance coverage dispute between an insurer and assignees of an insured and arose out of the sale of speculative oil leases. Plaintiffs were two groups of people who purchased oil well leases from Stephen Barry Shellington, an authorized agent for the Equitable Life Assurance Society of the United States. Shellington was insured under professional liability policies issued by Defendant to the Equitable and its agents. The oil ventures failed and Plaintiffs filed suit against Shellington. Defendant agreed to defend Shellington pursuant to a reservation of rights. Without the consent of Defendant, Shellington entered into a settlement agreement with Plaintiffs in which he stipulated to the entry of judgment in favor of each Plaintiff for $387,500.00 and assigned to Plaintiffs his rights under two policies with Defendant (identical policies, one issued in 1995 and the other issued in 1996.

Defendant refused to pay, and Plaintiffs sued. Defendant moved for summary judgment on 5 bases. The court granted Defendant's motion solely on the basis that Plaintiff's claims were not covered against Shellington under either policy because the claims were not "first made and reported" during a single policy period as mandated under each policy. Noting that the particular policies were "claims made" policies, which protected against claims made during the life of the policy regardless of when the act giving rise to the claim occurred, the court found that failure to comply with the reporting provision of a "claims made" policy precluded coverage. The court relied upon Employers Reinsurance Corp. v. Sarris, 746 F. Supp. 560 (E.D. Pa. 1990) in rendering its decision. **Pizzini v. American International Specialty Lines Insurance Co., 210 F. Supp. 2d (E.D. Pa. 2002).**

Insurer sought a declaratory judgment that it did not have a duty to defend and indemnify insured roofer in underlying negligence actions. Insurer brought declaratory judgment action after suit was filed against insured for damages arising out of the repair and replacement of the roof on property owned by underlying plaintiff. Trial court entered judgment in favor of insured, holding that the policy required insurer to defend and indemnify insureds in an underlying claim brought against them. Furthermore, the court found that there was no exception found within the policy as to excuse insurer from defense and indemnification. On appeal, the Superior Court held that the insurer was required to defend insured but that it was premature to rule on whether or not insurer had a duty to indemnify. The court reasoned that it must first be determined whether insurer was liable under the terms of the policy and the fact of the case. Because the duty to indemnify is a conditional obligation, the duty arises only if, after trial on the third party claims, it is determined that the loss suffered is covered by the terms of the policy. **Unionamerica Ins. Co., Ltd. v. J.B.Johnson, 806 A.2d 431 (Pa.Super., 2002).**

Plaintiff, insured, in this declaratory judgement action seeking coverage, appealed the entry of summary judgement against it and in favor of the insurance carrier, Zurich. Insured was sued in Federal District Court in California for, among other things, patent infringement. Insured lost the case at the trial court and appealed. Insured then sought coverage from Zurich. Shortly thereafter, the Court of Appeals for the Ninth Circuit reversed the judgment as to the product patent. Then the Federal Circuit reversed and affirmed the District Court's judgment. Insured then filed the instant action seeking a declaration that Zurich was required to defend and indemnify it in the underlying patent action as an "advertising injury" or as a "misappropriation of style of doing business" pursuant to the terms of the policy. The District Court granted summary judgment. In the instant case, the Court of Appeals for the Third Circuit affirmed. First, the Court held that, "Allegations that [insured] stole a patented method for cutting concrete and also advertised the results of that theft, does not convert the underlying theft into an "advertising injury."" Second, the insured argued that the underlying suit also constituted "misappropriation of style of doing business." The Court rejected this argument saying it was not alleged that insured copied its marketing strategy or style of attracting customers, but that insured copied its patented methods. Lastly, insured argued that when the patent is for a method of doing something, that method is its style of doing business. Insured cited no authority to support this

theory. Consequently, the Court rejected that theory and affirmed the judgment of the District Court denying coverage. **Green Machine Corporation v. Zurich-American Insurance Group, 313 F.3d 837 (2002)**.

Scirex is a firm that conducted clinical testing of new drugs. After it was learned that its nurses repeatedly failed to follow protocols, the entire clinical testing results became worthless, and Scirex had to repeat the studies at no cost to its sponsors. The nurses were to have observed patients for 8 hours after administration of a pain medication and to record their observations every 30 minutes. Instead, the nurses frequently let the patients go home after only 1 hour, but they recorded falsified 30 minute interval observations. Scirex sought to recoup some of its losses under an "Employee Dishonesty" policy it carried to cover losses caused by any fraudulent or dishonest acts by its employees. The insured argued that it should not have to pay because the nurses were not "dishonest" but merely acting on their belief that adherence to the protocols was unnecessary and, therefore, were not acting with knowledge of wrongdoing. The court rejected this reasoning, since the nurses certainly were aware of their wrongdoing when they falsified the records of observations. The insurer was successful, however, in limiting the claim to a single "occurrence." Scirex claimed a loss totaling $880,000 from 4 separate studies that were ruined, but the policy had a limit of liability of $280,000 per occurrence. The court agreed with the insurer that each ruined study was not a separate occurrence; instead, it held that the policy clearly stated that a "series of related acts" would "be deemed to be one occurrence or event." **Scirex Corp. v. Federal Insurance Co., 313 F3d 841 (3d Cir. 2002)**

Written notice of a malpractice claim to the risk management director of Hahneman Hospital, a unit of AHERF, was held to constitute receipt of written notice of the claim to the liability insurer. Because the risk manager "played an integral role within the Office of General Counsel" of AHERF, it was held that written notice received by the risk manager was "Notice received by the 'Company' under" the pertinent provision of its insurance policy. The particular insurance policy provided that compliance with the notice provision of the policy was "by giving notice thereof to the Office of the General Counsel of [AHERF]." A second issue decided in the case was that the CAT Fund was permitted to deny liability for part of the $900,000 promised under a settlement agreement, since it was determined that the total amount of the yearly aggregate remaining for the year the claim was made under this "claims made" policy was $775,000, and the law is that the state cannot be estopped by the acts of its agents and employees if those act are in violation of established law. **St. Paul Fire & Marine Insurance Co v. Roche et al, 809 A2d 1045 (Pa. Cmwlth.2002).**

Employee of guardianship company handling decedent's estate stole funds from the estate. Company sued its insurance carrier for breach of contract and bad faith for refusal to

cover claims under employee dishonesty provisions. Policy, to establish dishonesty, required "manifest intent to ...[cause] [the insured]...to sustain loss." In predicting what the Pennsylvania

Supreme Court would hold on this novel issue, the district court held that "intent" meant "purposefully," i.e., with the specific purpose, object or desire to cause loss to the insured. With no evidence in the instant matter that the employee intended to cause loss to anyone but the estate or stole from the estate knowing that a loss to the insured would be inevitable, embezzlement was not covered by policy. **Shoemaker v. Lumbermens Mutual Casualty Co., 176 F.Supp. 2d 449 (W.D. Pa., 2001).**

Insured, which manufactured coal products, sold a customer a material which was defective and which rendered a batch of a product produced by its customer with this material useless. The customer made claim against the insured, and insured sought coverage under its CGL policy with insurer, who denied the claim. The instant breach of contract claim was brought. In applying the analysis of the seminal case in this area, *Redevelopment Authority of Cambria County v. International Insurance Co.*, 454 Pa.Super. 374, 685 A.2d 581 (1996), the court found that there was no "occurrence" under the policy, as the gist of the claim against the insured was for breach of contract or warranty, not tort. Any breach of duty would have been based on duties arising by mutual consent under the contract specifying the quality of the material produced, not duties imposed by social policy. **Keystone Filler & Manufacturing Co, Inc. v. American Mining Insurance Company, 179 F.Supp.2d 432 (M.D.Pa., 2002).**

F. Exclusions

Homeowners insurer brought declaratory judgment action against insureds, seeking determination that insureds were not entitled to defense or indemnity under homeowners policy in a third-party personal injury action. In determining whether or not the intended harm exclusionary clause of insureds' policy precluded indemnification, the court considered the underlying civil complaint, the prior criminal conviction of insured and the intent testimony submitted in the action. The plaintiff in the underlying action stated a claim for negligent or reckless, not intentional, infliction of injury, which appeared to qualify as an "occurrence" within the policy's coverage. Regarding insured's prior conviction, the court held that, without a specific finding by the jury as to intent, there was no way for the Court to determine whether the criminal verdict was based upon a finding of intentional conduct, which would fall within the insurance policy exclusion. Furthermore, the court held that plaintiff, insurer, was not entitled to a finding that the insured's actions resulted from wilful or malicious intent or that the insured intended the resultant harm to plaintiff, in order to trigger the insurance policy's exclusions. Plaintiff, therefore, had a duty to defend and indemnify insureds. - **State Farm Fire & Casualty v. Dunlavey, 197 F. Supp. 2d. 183 (E.D. Pa. 2001).**

Superior Court vacated summary judgment on behalf of the plaintiff, owner of a gas station, and rendered decision for the insurer in action for declaratory judgment to determine rights under insurance policies with respect to gasoline line break and leak. The Court held that gasoline was a "pollutant" under pollution exclusions in policies and that insurer had no duty to defend owner. In interpreting the language of the policies with the goal of ascertaining the intent of the parties, the Court reasoned that the gasoline that leaked into the soil was a "pollutant" within the meaning of the policy, and thus clearly and unambiguously excluded from coverage.- **Wagner v. Erie Insurance Company 801 A.2d 1226 (Pa.Super. 2002).**

Insureds sought UIM benefits under Prudential personal automobile policy for injuries husband sustained while using wife's company car. Wife's employer had declined to purchase UM/UIM coverage for the vehicle. Prudential declined coverage, citing the regularly used, non-owned vehicle exclusion. Insureds brought suit, and a panel of arbitrators concluded that the exclusion violated public policy as applied to the husband but not as to the wife. The trial court concluded that the exclusion violated public policy in both instances. On appeal to the Superior Court, a divided panel affirmed the trial court. The Pennsylvania Supreme Court granted allocatur to determine whether the "regularly used, non-owned car" exclusion violates public policy. The Supreme Court recognized that the public policy behind the MVFRL was to contain spiraling automobile insurance premiums, and queried how invalidating a policy exclusion could serve that end. The Supreme Court, per Justice Zappalla, concluded that voiding the exclusion would frustrate the public policy concerns of high insurance premiums and would require insurers "to underwrite unknown risks that it has not been compensated to insure." The Court further concluded that UM/UIM benefits do not necessarily "follow the person" in the same manner as first party benefits due to the policy's priority scheme. Finally, the Court concluded that the insured-wife should have taken affirmative steps to learn whether her employer provided UM/UIM coverage on the company car. In a lengthy dissent, Justice Saylor examined the

MVFRL and applicable case law, concluding ultimately that the trial court's invalidation of the exclusion should have been affirmed. **Burstein v. Prudential Property and Cas. Ins. Co., 801 A.2d 516 (Pa. 2002).**

This case involves an appeal from an Order entered December 14, 2001 in the Court of Common Pleas of Chester County. In that action, appellants, the Denslow's, filed a tort action against Matthew P. Fidler, for damages sustained by appellant Merrill Tracy Denslow, IV, when he was physically assaulted by Fidler at Downington Junior Highschool. The Amended Complaint alleged that Fidler threw the minor Plaintiff with such great force that the Plaintiff's head struck the wall and desk causing him to fall unconscious to the floor. Fidler sought a defense in the Denslow's lawsuit from Erie Insurance which had issued to them a homeowner's insurance policy. Erie denied it owed either a defense or indemnity based on language in the policy which specifically excluded coverage for bodily injury expected or intended by anyone it protected. A Declaratory Judgment action followed in which the trial court agreed that Erie owed its insured's neither a defense nor indemnity. The Superior Court agreed and affirmed the lower Court's decision determining that coverage was not determined by the manner in which the claim against the insured was alleged. Rather, the insured's conduct was intentional as a matter of law, as the minor insured either intended to cause the consequences of his act or acted knowing that such consequences were substantially certain to result. Therefore, the trial court was not required to take further evidence to determine, as a matter of law, that the minor insured's actions were intentional. **Erie Insurance Exchange v. Matthew P. Fidler, et al., 2002 Pa. Super 307, 808 A.2d 587 (2002)**.

Daughter passenger was injured on a motorcycle owned and operated by at third party. After recovering policy limits from the tortfeasor, she sought UIM coverage under her father's policy, which was denied by insurer. Arbitrators found in favor of insurer, and the passenger petitioned to vacate, which was denied. The passenger appealed. The "non-car" exclusion relied upon by the insurer, when read along with other portions of the policy, was seen as ambiguous. The applicant for UIM coverage reading the policy provisions would expect to be covered, minimally, when "struck" by an underinsured motor vehicle, however that phrase is interpreted. Moreover, the language of the policy was seen to be at odds with the MVFRL, as the passenger was exactly the type of individual meant to be protected by UIM coverage: her father paid additional premiums, and he had reasonable expectations that he would receive a benefit. The trial court's denial of the petition to vacate was reversed. **Richmond v. Prudential Property and Casualty Insurance Company, __Pa. Super.__, 789 A.2d 271 (2001).**

Defendant's policy provided coverage for advertising injury, but contained an exclusion for "first publication," i.e., it did not cover an injury arising out of a written publication whose first publication took place prior to the beginning of the policy period. A trademark claim was

brought against the insured, for using the insured musical group's name which plaintiff claimed he had owned, and the carrier denied coverage under the above exclusion arguing that the insured used the group's name many years prior to his first policy of insurance. The court held that the exclusion was ambiguous, as the same was reasonably susceptible to more that one interpretation (either that any injury by publication where the publication was first made prior to the policy date was excluded or that the first publication had to have caused the same injury as the publication at issue). The ambiguity was resolved in favor of the insured, particularly where the underlying complaint did not allege an *infringement* prior to the policy date. **Maddox, III v. St. Paul Fire and Marine Insurance Company, 179 F.Supp.2d 527 (W.D.Pa., 2001).**

Pennsylvania Supreme Court looked at issue of whether lead-based paint was "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 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).**

G. Health

Minor child, Elena Lawson, was covered under a health insurance policy that her father bought from Defendant. Two days prior to the effective date of the policy, Elena

went to the emergency room for the treatment of what was initially diagnosed as a respiratory tract infection, but was discovered to be leukemia one week later, and after the effective date of the policy. Defendant denied coverage of the medical expenses related to treatment of the leukemia on the ground that it was a pre-existing condition for which Elena had received treatment prior to the effective date of the policy. Plaintiff's sued on their daughter's behalf and received summary judgment from the District Court. Defendant argued that a pre-existing condition did not require accurate diagnosis of the condition, but merely receipt of treatment or advice for the symptoms of it. Plaintiffs argued that the leukemia was not pre-existing and argued that one could not receive treatment "for" a condition without knowledge of what the condition was. The District Court had relied upon Hughes v. Boston Mutual Life Insurance Co. 26 F.3d 264 (1st Cir. 1994) in determining that the term pre-existing condition as contained in the subject policy was ambiguous and that therefore the policy was read against the scrivener. The 3rd Circuit concurred with the District Court's reasoning, and affirmed its decision. **Joseph Lawson; Tammy Malatak, on behalf of minor child Elena Lawson v. Fortis Insurance Company, 301 F.2d 159 (3rd Cir. 2002).**

H. Homeowners "occurrence"

Home vendors, sued by buyers over alleged misrepresentations regarding sewer conditions at home, brought action against homeowner's insurer for bad faith failure to defend them. Defendant's preliminary objections were granted. It was held that none of the allegations against the insureds, i.e., fraud and deceit in misrepresentations on the Disclosure Statement, discomfort and inconvenience as a result of the misrepresentations or intentional infliction of emotional distress as a result of the misrepresentations constituted an "occurrence" under the policy. None of the allegations involved an "accident" or "continued or repeated exposure to the same general condition." **Sclabassi v. Nationwide Mutual Fire Insurance Company, __Pa.Super.__, 789 A.2d 699 (2001).**

I. PPCIGA

Petitioners appealed an *en banc* decision by the Superior Court that reversed an Order enforcing settlement of their malpractice claims against defendant doctor, his insolvent malpractice insurer and the Pennsylvania Property and Casualty Insurance Guaranty Association ("PPCIGA"). The Supreme Court affirmed. The appeal involved the "PPCIGA" Act. The Court found that Petitioners' claim was a "covered claim" within the meaning under 40 P.S. §991.1817(a) of the Act. However, the Court held that the non-duplication of recovery provision applied to this "covered claim" because Petitioners' own insurer paid an amount in excess of the amount to be paid to Petitioners by PPCIGA on behalf of the doctor's insolvent carrier. Non-duplication of recovery provisions state that any amount payable on a covered claim under the Act must be reduced by the amount of any recovery under other insurance. PPCIGA's two purposes, to protect malpractice insurance policyholders and to protect those with claims against the policyholders, served to prevent the doctor from being liable individually to the Petitioners for the amount of the offset, if any, due. Finally, the Court held that because Petitioners received an amount in excess of the doctor's insurance policy limits, PPCIGA's payment obligation on the "covered claim" was extinguished by application of the non-duplication of recovery provision of the Act. **Bell et al. v. Slezak, et al., 812 A.2d 566 (Pa. 2002)**.

In a decision rendered on the same day as **Bel1 et al. v. Slezak et al.**, the Supreme Court affirmed the Superior Court's denial of an insurer's petition to intervene in subrogation when the insurer learned of Plaintiffs' settlement of a malpractice action. The Court relied upon the non-duplication of recovery provision of the Pennsylvania Property and Casualty Insurance Guaranty Association ("PPCIGA") Act in reaching its decision. The Court referenced Bell and held that if third-party claimants' only recourse (defendant doctor's insurer) for funding a settlement becomes insolvent, the claimants may recover under the PPCIGA Act, unless the Act provides for set-off under the non-duplication of recovery provision. In this case, the non-duplication provision extinguished the subrogation interest of the Petitioners' insurer, even though the carrier paid the Petitioners the other insurance monies to which the offset applied and would otherwise be entitled to subrogate its claim. The Court reiterated that, under the Act, the solvent insurers paying Plaintiffs' claims under other sources of insurance will bear as much of the loss as possible, due to the policy of the Act to lessen the financial burden on the participating property and casualty insurers industry. **Chow et al. v. Rosen et al., 812 A.2d 587 (Pa. 2002)**.

J. Preemption

Defendant allegedly made misrepresentations in newspaper advertisements while comparing benefits under its health insurance plan and plaintiff's plan, and plaintiff sought injunction barring continued dissemination of advertisement pursuant to Lanham Act. The Lanham Act claim was seen not to invalidate, impair or supersede Pennsylvania law (Unfair Insurances Practices Act) regulating deceptive and false claims in this "business of insurance." McCarran-Ferguson Act, which precludes a federal cause of action involving insurance activity if the federal law does not specifically relate to the business of insurance, if the purpose of the state law was to regulate insurance and if applying the federal law would supersede or impair state law governing the activity, therefore would not bar this false advertising claim by one insurer against another. **Highmark, Incorporated v. UPMC Health Plan, Incorporated, 276 F.3d 160 (3rd. Cir. 2001).**

K. Proof

In suit by insured for insurer's failure to pay under homeowner flood insurance policy issued under the National Flood Insurance Act, insurer sought to dismiss since it had not been provided with documentation that damaged items had actually been repaired. Policy requirements of " a complete inventory of the destroyed, damaged and undamaged property" and "any written plans and specifications for repair" did not call for documentation of repairs actually completed. The policy required documentation of "the loss," not the repairs performed, and did not require submission of this documentation. **Mahood v. Omaha Property and Casualty, 174 F.Supp.2d 284 (E.D. Pa., 2001).**

Plaintiff brought unfair competition, trademark infringement, dilution and cyperspiracy claims against defendant competitor. After lengthy analysis of the Interspace Corp. v. Lapp, Inc., 721 F.2d 460, 461 (3d. Cir. 1983) factors to determine likelihood of confusion (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).**

The Copyright Act provides that where a work is created by an employee during the scope of his/her employment the copyright belongs to the employer in the absence of a signed, written agreement to the contrary. 17 U.S.C. Sec. 201(b). Plaintiff was the sole owner and employee of a corporation bearing his name. He filed an action for copyright infringement against defendant, Tiffany and Company, claiming that it had copied jewelry designs for which he had applied for a registration and been refused that registration. Only the party which sought the registration may institute a copyright infringement action, and Tiffany moved to dismiss the claim for that reason. The Court held that an inadvertent error on the application for copyright registration, mistakenly identifying the individual rather than the corporation as the author of the jewelry designs in question, was an inadvertent and immaterial misstatement which did not invalidate the copyright registration. **Morelli v Tiffany & Co., 186 F. Supp. 2d 563 (E. D. Pa., 2002).**

16. Internet

This case involved a determination of personal jurisdiction over non-resident defendants that operated on the internet. Plaintiff, Accuweather, Inc. sued defendants Weather Solutions, LLC, Secure Developer Network, Inc., and related entities for trademark infringement. Weather Solutions and Secure Developer had been operating websites that advertised their services to anyone who visited the sites. Accuweather complained that defendants improperly registered the domain name *totalwx.com* and illegally used the marks "Accu-Weather" and "Total Weather" in association with the website. Defendants moved under federal rule of civil procedure 12(b)(2) to dismiss or transfer the case for lack of personal jurisdiction. According to defendants, because the websites were not sufficiently interactive with Pennsylvania users and because no defendant had requisite ties to Pennsylvania, personal jurisdiction was lacking. The court agreed, holding that the website operators did not have the minimum contacts with Pennsylvania that were necessary to impose personal jurisdiction. The court reasoned that the individual defendants had no contact with Pennsylvania and that the remaining corporate entities had no connection to Pennsylvania. The court transferred the action to Western District of Oklahoma, reasoning that both individual defendants resided in Oklahoma, and that the internet activities were based in Oklahoma. **Accuweather, Inc., v. Total Weather, Inc., et al., 223 F. Supp. 2d 612 (M.D. Pa. 2002).**

A group of public libraries, library associations, library patrons, and Web site publishers challenged the constitutionality of Children's Internet Protection Act (CIPA), which required public libraries to use Internet filters as condition for receipt of federal subsidies . The District held that (1) CIPA unconstitutionality induced libraries to violate the First Amendment; (2) CIPA's disabling provision was insufficient to cure constitutional defect; and (3) CIPA was severable from remainder of public library statutes to which it had been appended. The statute was held to be unconstitutional reasoning that, under the public forum doctrine, extent to which First Amendment permits the government to restrict speech in its own property depends on character of the forum in which the government has created. The First Amendment affords greater deference to restrictions on speech in areas considered less amenable to free expression such as military bases, jail grounds and airport terminals. Furthermore, although the government had a compelling interest in preventing dissemination of obscenity, child pornography and material harmful to minors, software's inherent over-and-under-inclusiveness meant that the statute was not narrowly tailored, and the libraries did have less restrictive alternative means at their disposal. - **American Library Association, Inc. v. U.S., 201 F. Supp. 2d 401 (E.D. Pa. 2002).**

17. Jurisdiction and Venue

Debtor brought action against creditor and credit reporting agency, alleging violations under the Fair Credit Reporting Act (FCRA) and various state law claims. Plaintiff alleged that the credit agency reported inaccurate information to Trans Union about an account in plaintiff's name for which he disputed responsibility. As a result, plaintiff contends that he has been denied various forms of credit and has been subject to elevated interest rates due to his poor credit rating. The credit reporting agency moved for lack of personal jurisdiction and improper venue. The district court, in determining this issue, applied the three prong test from Imo Industries, Inc. v. Kiekert AG, 155 F. 3d 254(3d Cir. 1998), which held that a court may only exercise personal jurisdiction if (1) the nonresident defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum; and (3) the defendant expressly aimed his tortious conduct at the forum, such that the forum was the focal point of the tortious conduct. Plaintiff satisfied the first prong of the test in Imo Industries because plaintiff asserted the commission of the intentional torts of defamation and tortious inference with contractual relations, as well as violation of the FCRA. Plaintiff stated that all of the damages he suffered financially and emotionally occurred within Pennsylvania, satisfying the second prong. The district court found that the creditor did not have the requisite minimum contacts with Pennsylvania in failing to satisfy the third prong, however, in that the creditor did not expressly aim its tortious conduct at the forum such that the forum could be said to be the focal point of the tortious conduct. The exercise of personal jurisdiction was barred. **Harris v. Trans Union, LLC, 197 F. Supp. 2d 200 (E.D. Pa. 2002).**

Plaintiff's estate appealed from an interlocutory order appealable as of right of transferring venue from Philadelphia County to Lehigh County in a medical malpractice action. The estate of patient, who died from metastasis of the malignant melanoma to his brain, brought action against doctor, who allegedly removed a sebaceous cyst from patient's back and discarded the cyst without pathological examination, and various others. Appellant argued that the doctor did not sustain his burden of proving that the trial in Philadelphia County would be oppressive or vexatious, yet the doctor relied on deposition testimony of appellant that stated that all witnesses testifying on the issue of damages were located on Lehigh County. Furthermore, the doctor, in a sworn affidavit, indicated that trial in Philadelphia would hinder his participation in his medical practice and would lead to a temporary closing of the office. The Superior found that the doctor presented detailed evidence supporting his contention that it would be oppressive for the appellees and their witnesses to travel to Philadelphia, and therefore, the trial court did not commit an abuse of discretion. In response to appellant's argument that the timing of the trial court's transfer of venue was an abuse of discretion, in that the case was transferred three days before trial, the Superior Court held that the trial court transferred venue in response to a petition

several days before the trial was scheduled to begin. The Superior Court, in response to appellant's argument that there was no evidence that the choice of forum was designed to harass, held that the trial judge had sufficient basis to transfer venue. The Superior Court relied on the cases of Hoose v. Jefferson Home Health Care, Inc., 754 A.2d 1 (Pa. Super. 2002) and Cheeseman v. Lethal Exterminator, Inc., 549 Pa. 200, 701 A.2d 156 (1997), which held that a defendant may meet his burden by establishing on the record that the chosen forum is oppressive to him, for instance, that trial in another county would provide easier access to witnesses or other sources of proof. - **Borger v. Murphy, 797 A.2d 309 (PA. Super. 2002).**

Plaintiff, a provider of data recovery services, brought a state court action against its customer, seeking damages for a breach of contract and unjust enrichment. After moving the action to federal court, the defendant customer moved to dismiss for lack of personal jurisdiction and venue. The court granted defendant's motion by holding that personal jurisdiction did not exist over the customer. Specifically, the federal district court, located in Pennsylvania, held that it could not exercise personal jurisdiction over the defendant customer of a Pennsylvania provider of data recovery services in an action for an alleged breach of services and unjust enrichment given the fact that the defendant was a Delaware corporation with its sole place of business in Tennessee. Furthermore, the customer did not engage in any business in Pennsylvania and communications from the defendant customer to plaintiff provider was directed to plaintiff's offices in Georgia. The mere fact that the underlying agreement contemplated that any emergency services contracted for would be provided, the contract's choice-of-law provision did not equate to an agreement to litigate disputes in Pennsylvania. While defendant may have foreseen that its cancellation of contract would cause defendant economic harm in Pennsylvania, that contact, without more, was insufficient to establish minimum forum contacts required by due process. **Sunguard Recovery Services, LP v. Fulton Bellows & Components, Inc., 186 F. Supp. 2d 549 (E.D. Pa. 2002).**

18. Labor Relations

Employers filed a petition for review of an arbitration award after the arbitrator found that the underlying disputes between employers and education associations representing professional employee who employers moved to terminate were arbitrable under grievance procedures contained in collective bargaining agreement, rather than in the governing school code procedures. Subsequently, the trial court conducted oral argument, granting the petition and vacating the arbitration award. In determining whether the arbitrator's decision on the threshold issue was appealable, the Commonwealth Court relied on Shumake v. Philadelphia Board of Education, 454 Pa. Super. 556, 686 A.2d 22 (1996), holding that employees covered under collective bargaining agreements, which provide exclusive remedies for breaches of those agreements, are required to first exhaust their remedies under such agreements prior to filing a lawsuit. The employers contended that Pa. R.C.P. 341 (c) permits immediate judicial review of arbitrator's threshold determination on arbitrability. However, the Commonwealth Court held that this rule requires an express determination that an immediate appeal would, in fact, facilitate resolution of the entire case. The arbitrator made no such express determination, therefore, Pa. R.C.P. 341 (c) did not support an immediate appeal of the arbitrator's threshold determination of arbitrability. **Montgomery County Intermediate Unit v. Montgomery County Intermediate Unit Education Assn, 797 A.2d 432 (Pa. Cmwlth. 2002).**

19. Legal Fees

Homeowners Association brought action seeking removal of a fence and shed constructed by Homeowners in violation of development's restrictive covenants. Trial court ordered the Homeowners to remove the fence, reposition the shed and pay a portion of the Association's attorneys fees. Both parties appealed. The Homeowners argued the trial court denied their due process rights by only hearing testimony from one witness. The Commonwealth Court concluded that the Homeowners did not preserve that issue for Appeal because they failed to file any post trial motions as mandated by Pa.R.Civ.Pro. 227.1(c). The Association argued that the trial court erred by only awarding a portion of the legal fees. The Court found that the trial court did not abuse its discretion by awarding a portion of the fees because the Association only prevailed on a portion of the relief requested. **The Ridings at Witpain Homeowners Assoc. vs. Schiller, 811 A.2d 1111 (Pa.Cmwlth 2002).**

20. Local Agency Immunity

Estate of patient brought negligence action against hospital and township volunteer fire company, alleging that by reason of paramedics' failure to follow direction given to them by the 911 dispatcher, patient's ability to survive was compromised. The estate appealed after the Common Pleas Court granted summary judgment in favor of both the hospital and the fire company, and the Commonwealth Court affirmed in part and reversed in part. The Supreme Court , in reviewing the questions concerning the scope of the vehicle liability exception to the statutory immunity available to local government agencies and the breadth of immunity available under the Emergency Medical Services Act, held that the decision of the fire company to ignore driving directions and travel to a wrong location in emergency vehicle did not provide basis for liability under vehicle liability exception to governmental immunity, and the hospital did not qualify for immunity under Emergency Medical Services Act (EMSA). While the Supreme Court properly acknowledged that there was some range of negligence associated with the physical operation of the vehicle beyond actual driving that would implicate the vehicle liability exception, the Commonwealth Court correctly concluded that the form of negligence alleged by plaintiffs did not qualify. The hospital, attempting a plain meaning argument, reasoned that the Section 11(j)(2) of the EMSA expressly covers hospitals. The Supreme Court, however, held that Section 11(j)(2) evinced an intent on the part of the Legislature to confer immunity upon enumerated emergency medical services personnel but not upon their corporate, institutional, or organizational principals.- **Regester v. County of Chester, 797 A.2d 898 (Pa. 2002).**

21. Medical Malpractice / Informed Consent

Patient brought breach of doctor-patient confidentiality action and tortious interference with marital relations claim against doctor, after doctor had opined to patient's husband that patient's most likely problem was genital herpes based upon lab results. Patient's marriage quickly collapsed thereafter. Without express consent to disclose this information, particularly when so sensitive, trial court had sufficient support to allow case to go to the jury, however where husband had been present for a number of examinations of wife and she had made no efforts to exclude him from exams or other discussions, jury's finding that, based on totality of circumstances, patient gave her implied consent to doctor to disclose information to husband would stand as a matter of law. Court also reiterated that Pennsylvania does not recognize a cause of action for tortious interference with marital relations. **Haddad v. Gopal, __Pa.Super.__, 787 A.2d 975 (2002).**

Pennsylvania Superior Court affirmed Court of Common Pleas judgment on jury verdict in favor of parents of child who suffered brain injury immediately prior to birth and against the hospital wherein the child was born for $15.2 million. Emphasis was placed the varied approach to determining causation in medical malpractice whereby once evidence that the defendant's negligence "increased the risk" of harm to someone in the plaintiff's position and that harm was in fact sustained is introduced, whether or not that the increased risk was a substantial factor in producing the harm becomes an issue for the jury to decide. The Superior Court found that the evidence on causation was sufficient whereby the plaintiff's expert testified within a reasonable degree of medical certainty that the child's "prolonged exposure to these various factors in the womb increased his risk of injury" and "[e]ach of these things... could by themselves cause injury to the brain but all of those things were actually going on at the same time". The Court deemed this sufficient despite the defendant's claims that plaintiff's expert failed to connect deviations in the standard of care with the injury. Also of note, the trial court's jury instruction on the spoliation of evidence in the form of missing fetal monitoring strips was deemed warranted, and Court addressed a breakdown in delay damages based on which parties were responsible for the respective periods of delay from initial suit in 1993 to disposition in 2001. **Cruz v. Northeastern Hospital, 801 A.2d 602 (Pa.Super. 2002).**

Patient sued urologist and medical center for lack of informed consent and battery, contending that urologist planted pump prosthesis in patient's penis without patient's consent. The Supreme Court made clear that over a period of several decades, a claim based upon lack of informed consent involves a battery committed upon a patient by a physician. The Supreme Court held that appellees established a prima facie case of battery with their presentation of evidence that, during consented-to revascularization surgery, the urologist implanted a penile prosthesis which appellee discovered after he awoke. Regarding the issue of whether or not appellees were required to present expert testimony to prove that the implantation of the penile prosthesis without patient's consent was the cause of appellees' mental and emotional injuries,

the Court held that appellees' alleged injuries are obvious and clearly connected to the prosthesis. The Court recognized that a jury need not require an expert to explain the connection between an unwanted implantation of a penile prosthesis and the emotional injuries for which appellees sought recovery. - **Montgomery v. Bazaz-Sehgal, 798 A.2d 742 (Pa. 2002).**

Administratrix of patient's estate brought informed-consent claim against doctor and vicarious-liability claim against hospital for attempted placement of a Permacath which caused hemopneumothorax and cardiac arrest resulting in coma and subsequent death. The Administratrix contends that the site chosen for the insertion of the Permacath was not the optimum site and the Permacath could have been placed in a different vein. The Court of Common Pleas of Philadelphia granted the hospital's motion for summary judgment and the doctor's motion for nonsuit. The Pennsylvania Superior Court affirmed. The Pennsylvania Supreme Court found that the hospital could not be held vicariously liable for lack of informed consent for doctor's alleged failure to obtain informed consent for aortogram. The Court also found that another doctor obtained sufficient informed consent for surgery to implant dialysis catheter. **Valles v. Albert Einstein Medical Center, et al., 805 A.2d. 1232 (Pa. Super. 2002).**

Dentist asserted on appeal, after an adverse verdict against him in an informed consent case, that the trial court erred in allowing plaintiffs' expert to testify as to his opinion on the ultimate issue in the case, i.e., that the result was a significant and material risk of the procedure. Dentist asserted that this issue of materiality was to be decided by the jury. The court agreed, however it noted that an expert's assistance on these key issues would in no way be improper, distinguishing various cases which indicated that an expert opinion was not *necessary*.
Also, it was not error to preclude defendant from cross-examining plaintiff on his knowledge of risk from other similar procedures he had undergone, as the issue was whether the physician *in the case at issue* properly informed the patient of the risks and alternatives *to that procedure.* To allow this would be to invite the jury to confuse the standards by which they were to determine whether a lack of informed consent had occurred *in this case*. **Bey v. Sacks, __Pa.Super.__, 789 A.2d 232 (2001).**

22. Mental Health

Parents of minor daughter brought negligence action against resident of mental health facility, guardian of resident of mental health facility, county mental health provider, and operator of mental health facility after daughter was sexually molested by resident during resident's home visit. Parents argued that the mental health facility should have known that the resident had many a long standing history of sexually deviant behavior including sexual assault of minor children. The Court of Common Pleas of Indiana County granted preliminary objections of provider and denied preliminary objections of operator. Operator and parents appealed. The Superior Court found that the mental health providers and mental retardation services have no duty of ordinary care to control patients, that they know or should know, are likely to cause bodily harm to others; and provider's actions did not constitute a flagrant and gross deviation from standard care for provider to be grossly negligent under the Mental Health and Retardation Act. **F.D.P., et al. v. Ferrara, et al., 804 A.2d 1221 (Pa. Super.**

23. Negligence **(Miscellaneous)**

The case arose out of an alleged hazing incident that occurred at an "interest meeting" at which the Plaintiff was beaten over 200 times on his buttocks with a paddle causing him to suffer renal failure and seizures. The Plaintiff sued the defendant national fraternity, local chapter advisor and other fraternity officials, for negligence. The trial court granted the defendants' respective summary judgments. The Pennsylvania Superior Court vacated the trial court judgment to the extent the trial court granted the chapter advisor's motion for summary judgment and the case remanded for trial. In holding that the Plaintiff could establish a prima facie case of negligence as to the local chapter advisor, the court found that the record supported a factual finding that the advisor breached a duty owed to the plaintiff based upon the plaintiff expert's report, which only implicated the chapter advisor. **Kenner v. Brown v. Kappa Alpha Psi, et al., __Pa.Super.__, 808 A.2d 178 (2002).**

Appellant mother and Administratrix of her son's estate filed a negligence action against Appellees, the owners and operators of a hotel and the hotel security company, for failing to protect her son from a third party's criminal conduct. The mother appealed the granting of Appellees' Motion for Summary Judgment. William Impagliazzo was shot to death at a hotel. He had been among an estimated 200 partygoers under 21 years old attending beer parties on several floors of the hotel when a third party fired his handgun into the crowd where Impagliazzo stood. On appeal, Impagliazzo's mother claimed that the lower court erred in summarily dismissing her Wrongful Death and Survival action when there existed issues of material fact properly reserved for jury resolution. The appellate court found that the mother had made a prima facie case that the owners had breached a duty owed to the son. Because the son was a business invitee, the owners were required to take reasonable precaution against harmful third party conduct that might be reasonably anticipated. There was evidence that identified how the owners knowingly provided a haven for hours of extensive underage drinking and ill-behaved reveling. The hotel security company had notified the owners of the problem. In addition, the mother sufficiently established the element of causation with evidence that the owners' purported negligence was a substantial factor in bringing about her son's death. However, the court concluded that she had not made out a prima facie case against the hotel security company, Wells Fargo Guard Services. Therefore, the order granting summary judgment in favor of the hotel security company was affirmed, but the order granting summary judgment in favor of the owners and operators was reversed. **Adeline Rabutino, Administratrix of the Estate of William Impagliazzo v. Freedom State Realty Company, Inc., et al., 2002 Pa. Super 318, 809 A.2d 933 (2002)**

Plaintiff consulted with defendant physician and health care provided for gynecological exam, which resulted in a referral for an HIV virus test. On November 19, 1990, Defendants informed Plaintiff that she tested positive for the HIV virus “which is the virus causing AIDS, an incurable, fatal disease.” Plaintiff learned in March of 1998 that she was not HIV-positive, in connection with a pregnancy test. Plaintiff commenced her action on December 10, 1999, seeking damages for negligence and negligent and intentional infliction of emotional distress. Defendants moved for summary judgment on two bases: (1) plaintiff’s claims were barred by the two year statute of limitation, and, (2) plaintiff has failed to state a claim because Pennsylvania does not recognize “fear of AIDS” as a valid cause of action. The court ruled that, although evidence existed to put plaintiff on notice that the HIV diagnosis was inaccurate, that factual question rested with the fact-finder. Nonetheless, the District Court granted defendants’ motions for summary judgment, ruling that plaintiff failed to state a claim as no evidence of exposure to HIV existed and no evidence of suffering an “impact” as necessary for her emotional distress claim. **Wilder v. U.S.**, 239 F. Supp. 2d 648 (E.D. Pa. 2002).

24. Products Liability

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 accidently 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).**

Plaintiff and his wife commenced an action against manufacturer of forklift for injuries he sustained while operating said forklift. Plaintiff was injured when he lost control of the forklift and his foot was then crushed between the forklift and the truck he was unloading. In his Complaint, plaintiff alleged that the forklift was defective because it was designed and manufactured without a door enclosing the operator's compartment. After a jury verdict in favor of plaintiff, the defendant-manufacturer took an appeal to the Superior Court of Pennsylvania, which ultimately considered the issue of whether the trial court erred in failing to instruct the jury on the crashworthiness doctrine. The Court noted that the crashworthiness or second collision doctrine requires that, in the design and manufacture of a vehicle, the manufacturer must do so such that the vehicle reasonably protects its passengers from personal injury or death as a result of a motor vehicle accident. Alternatively stated, the manufacturer must contemplate accidents among the intended users of its product. Here, the Superior Court held that the trial court erred in failing to instruct the jury on crashworthiness because (1) the doctrine applied to the facts of this case, (2) plaintiffs advanced the theory at trial, and (3) the lack of such an instruction was prejudicial because defendant-manufacturer had proceeded on the theory that a door was not a safer alternative design. In so holding, the Court reasoned that the doctrine applies because the alleged design defect did not cause the accident but rather allegedly increased the severity of the injury over that which would have occurred absent the alleged defect. - **Colville v. Crown Equipment Corp., 809 A.2d 916 (Pa.Super. 2002).**

Plaintiff family commenced a personal injury action against defendant corporation for injuries sustained to plaintiff in a motor vehicle accident. Plaintiff family based their claim upon a manufacturing defect in an air bag safety restraint

system installed in a motor vehicle. They argued that a strict liability claim may be maintained on the ground that a supplemental inflatable restraint system failed to deploy in the Chevrolet Blazer when plaintiff lost control and crashed into a hillside. Defendant corporation filed a motion for summary judgment claiming that they were prejudiced by the spoilation of evidence when the insurance carrier totaled the vehicle, precluding defendant from refuting the allegations. The District Court granted defendant's motion because Plaintiffs failed to come forth with evidence to sustain their burden of proof on the essential elements of a strict liability claim, nor did they offer any testimony from an accident reconstruction expert to support their theory that there was significant frontal or near-frontal impact. Moreover, plaintiff family did not come forth with evidence of a product liability design defect. The destruction of the Blazer precluded defendant from examining and testing the component part of the vehicle to determine whether the air bag was defective or had been subject to misuse or whether there were reasonable secondary causes that would have accounted for its non-deployment. The Court found that the only appropriate sanction available was summary judgment. **Walters v. General Motors Corporation, 209 F. Supp. 2d 481 (E.D. Pa. 2002).**

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).**

The plaintiff brought a personal injury action which arose out of an injury suffered in a fall by the plaintiff while he was working as an electrician at a manufacturing plant that was under reconstruction. This suit alleged negligence and strict products liability against the system's manufacturer. The Court of Common Pleas, Dauphin County, Civil Division granted partial summary judgment on strict products liability claim in favor of the manufacturer and the Court of Common Pleas, after conducting a jury trial that found the employee 51% negligent, denied employee's request for a new trial. The electrician and his wife appealed the judgment in favor of the systems manufacturer. The Court was asked to determine whether an item that is being assembled by its producer is a "product" and whether one of its assemblers is a "user" under § 402A of the Restatement (Second) of Torts. Specifically, the Court was asked to determine whether the trial court properly granted partial summary judgment to the manufacturer

based on its holding that the partially-assembled commercial furniture finishing oven in which the employee was installing wiring did not constitute a product. The Superior Court held that as a matter of first impression, an oven was not a "product" for purposes of strict products liability. Having reached this result, the Court did not need to address whether the employee was a user or consumer for purposes of application of section 402A, as failure to satisfy any of the elements of strict products liability precluded application of that section. Accordingly, the court affirmed the trial court's grant of summary judgment in favor of the manufacturer on plaintiffs' strict liability claim. The court also held that the jury instruction on the negligent performance of an undertaking to render services was not warranted, and allegations in the complaint were not sufficient to allege an agency relationship between the manufacturer and the employee of the company hired by the manufacturer to oversee installation of the system. Lastly, the Court held the opinion of the manufacturer's expert witness that the oven was a confined and enclosed space under applicable Occupational Safety and Health Act (OSHA) regulations was admissible. **Ettinger v. Triangle-Pacific Corp., 799 A.2d 95 (Pa. Super., 2002).**

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25. Res Judicata / Collateral Estoppel

Patient had a leg amputated and eventually died as the result of a mass in her ankle. The estate brought action against her physicians, under the Keystone network, for malpractice in failing to timely diagnose the mass, however a jury rendered a verdict in favor of defendants. The estate also brought claims against Keystone, asserting negligence, corporate liability, breach of contract and vicarious liability, asserting generally that Keystone placed the health of its patient in opposition to financial benefit of its physicians and failed to exercise reasonable care in formulating rules for its physician reimbursement system. Summary judgment was awarded in favor of Keystone on the vicarious liability, corporate liability and breach of contract theories, on the basis of the collateral estoppel effect of the verdict in the action against the physicians. Summary judgment was awarded on the other counts because plaintiff failed to allege any treatment decision that caused her harm. On appeal, the granting of the motions was upheld. Collateral estoppel would apply, as there was no issue in the negligence of the HMO that would not be dependent on a finding of sub-standard care by the physicians. Also, challenging incentives for the rationing of health care is an attack on the HMO system, and without a showing of harm caused, this would not support a negligence claim. **Bordlemay v. Keystone Health Plans, Inc.,__Pa.Super.__, 789 A.2d 748 (2001).**

Plaintiffs brought a lawsuit against defendant asbestos manufacturers alleging injuries resulting from asbestos exposure. Plaintiff husband alleged that said exposure resulted in a symptomatic nonmalignant asbestos-related disease. Defendant Uniroyal filed a motion for summary judgment on the basis of *res judicata* and the statute of limitations. With respect to the issue of *res judicata*, the motion was based upon a prior lawsuit by these plaintiffs against Uniroyal for personal injuries as a result of asbestos exposure; said lawsuit concluded with a verdict in Uniroyal's favor. In the present case, the trial court granted the motion for summary judgment. The Superior Court held that the doctrine of *res judicata* bars a plaintiff's action where, as here, persons and parties to previous and current lawsuits are identical, the capacity of parties involved is the same in both suits, and where the plaintiff makes identical claims upon identical causes of action. The court added that the "two-disease rule" in asbestos litigation, which permits a person to bring separate claims for nonmalignant disease and malignant cancer without invoking *res judicata*, did not apply because both lawsuits involved nonmalignant diseases. The Superior Court also found that summary judgment was properly granted on the basis of the statute of limitations. In affirming summary judgment in this regard, the court noted that plaintiff husband had discovered his

asbestos-related disease as early as 1987, approximately 13 years prior to the commencement of the present action. Therefore, the present action was filed well beyond the applicable two-year statute of limitations. - **Gatling v. Eaton Corp., 807 A.2d 283 (Pa.Super. 2002).**

Former client brought legal malpractice action against attorney and law firm that failed to file action against third-party tortfeasor, relative to a product that caused claimant's work-related injury. The defendants sought summary judgment, asserting that the denial of claimant's worker's compensation claim served as collateral estoppel on the issue of damages. The trial court granted summary judgment for attorney and firm. Client appealed. The Court noted that the doctrine of collateral estoppel is applicable when (1) an issue decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgement on the merits; (3) the party against whom the collateral estoppel is asserted was a party to the prior action; and (4) the party against whom the collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. In the instant action, the Superior Court found that the first element of collateral estoppel had not been satisfied, in that the issue of whether the Appellant sustained an injury had not been previously determined. Neither the WCJ nor the WCAB ever stated that Appellant did not suffer any injury, only concluding that such injuries did not rise to the level of a work-related disability. In conclusion, the Superior Court held that the trial court erred in finding the doctrine of collateral estoppel applicable and reversed the trial court order granting summary judgment. **Nelson v. Heslin, et al., 806 A.2d 873 (Pa. Super. 2002).**

Former client brought legal malpractice action against attorney and law firm that failed to file action against third-party tortfeasor, relative to a product that caused claimant's work-related injury. The defendants sought summary judgment, asserting that the denial of claimant's worker's compensation claim served as collateral estoppel on the issue of damages. The trial court granted summary judgment for attorney and firm. Client appealed. The Court noted that the doctrine of collateral estoppel is applicable when (1) an issue decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgement on the merits; (3) the party against whom the collateral estoppel is asserted was a party to the prior action; and (4) the party against whom the collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. In the instant action, the Superior Court found that the first element of collateral estoppel had not been satisfied, in that the issue of whether the Appellant sustained an injury had not been previously determined. Neither the WCJ nor the WCAB ever stated that Appellant did not suffer any injury, only concluding that such injuries did not rise to the level of a work-related disability. In conclusion, the Superior Court held that the trial court erred in finding the doctrine of collateral estoppel applicable and reversed the trial court order granting summary judgment. **Nelson v. Heslin, et al., 806 A.2d 873 (Pa. Super. 2002).**

Plaintiff delivered premature baby who died at hospital later that same day, 12/5/94. A malpractice action was later instituted against the hospital and involved doctors, on 10/29/99. Defendants filed motion for judgment on the pleadings, asserting that the two year statute of limitations for wrongful death and survival actions had expired. The motion was granted and plaintiff appealed, asserting that the minority tolling statute as it relates to the survival actions tolls the statute of limitations until two years from the date on which the minor would have turned eighteen, conceding that the wrongful death action was time-barred. The assertion was rejected, the court noting that the tolling statute contemplates a living minor whose parents for whatever reason fails to bring suit on his behalf. The language of the statute clearly is directed toward living minors in its reference to "after attaining the age of majority" and "who has not yet attained the age of 18." The survival action accrued on the day the minor was born and died. **Holt v. Lenko, __Pa.Super.__, 791 A.2d 1212 (2002).**

Motorist and the decedent were involved in an automobile accident on June 20, 1996. On June 5, 1998, Appellants instituted suit against decedent, unaware that he had passed away on December 18, 1996. They later filed a new action against decedent's wife, as administrator of decedent's estate. Decedent's wife, appellee, raised a statute of limitations issue and subsequently filed a motion for summary judgment arguing that the suit was barred because it was filed beyond the two year statute of limitations provide in 42 Pa. C.S.A. §5524 and the motorist appealed. Appellants argued that the trial court erred in refusing to stop appellee from asserting the statute of limitations, claiming that the liability carrier concealed decedent's death in letters written to the motorist. The Superior Court relied on the case of *Montanya v. McGonegal*, 757 A.2d 947 (Pa. Super. 2000), holding that an insurance carrier's failure to inform plaintiffs that the defendant had died was not fraudulent concealment. Furthermore, appellants argued that the trial court erred in granting summary judgment because they claimed that discovery relevant to the issue of concealment was still incomplete. The Court, however, found that an ample period for discovery had passed, and appellants failed to establish either materiality or due diligence with respect to discovery sought. Last, in response to appellants assertion that their timely lawsuit against the decedent tolled the statute of limitations against the estate, the Court held that a dead man cannot be a party to any action, and any such attempted proceeding is completely void and of no effect. Valentin v. Cartegena, 375 Pa. Super. 493, 544 A.2d 1028 (1988). - **Lange v. Burd, 800 A.2d 336 (Pa. Super. 2002).**

Plaintiffs commenced separate actions against defendant asbestos manufacturers alleging personal injuries resulting from asbestos exposure during their employment. Plaintiffs alleged that said exposure resulted in nonmalignant asbestos-related diseases. In each action, defendants filed a motion for summary judgment on the basis of the statute of limitations. The trial court granted each motion. Plaintiffs appealed the grant of summary judgment, and the cases were consolidated for appeal purposes. In each of the consolidated appeals, the Superior Court affirmed, holding that the claims were barred by the applicable two-year statute of limitation. The court noted that each plaintiff had filed his action more than two years after the presence of the asbestos-related injury was known or identifiable to him. The statute of limitations begins to

run as soon as the right to institute and maintain a suit arises, and once the prescribed statutory period for commencing a cause of action has expired, the complaining party is barred from bringing suit. The court further recognized that the "discovery rule" is an exception to this rule and operates to toll the running of the statute of limitations. The discovery rule provides that where the existence of an injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible. The Superior Court here, however, found that the discovery rule was inapplicable to each action because each plaintiff had discovered, or should have discovered through reasonable diligence, the existence of his disease more than two years before the action was commenced. - **Bowe v. Allied Signal, Inc., 806 A.2d 435 (Pa.Super. 2002).**

Plaintiffs brought a personal injury action as a result of a rear end collision. Defendant's motion for judgment on the pleadings, on the grounds that plaintiffs' claims were time barred by the statute of limitations, was granted, and plaintiffs appealed. Defendants moved to quash the appeal, but their motion was denied. Plaintiffs contend that they complied with the statute of limitations, alleging that counsel mailed a praecipe for writ of summons but that the document was not filed until six days after the statute of limitations ran, which was when the document was time stamped. Plaintiffs did not cite any authority for the proposition that the mailing of a praecipe for writ of summons by counsel for litigant who is not incarcerated tolls the statute of limitations on the day it is mailed, nor has research been discovered revealing any such cases. Plaintiffs further argued that this case was one of excusable neglect because they did not have control of the mail or the prothonotary's office. The Superior Court held that the trial court correctly concluded that Plaintiffs' suit was time barred, and therefore, judgment on the pleadings was appropriate. **Booher v. Olczak, 797 A.2d 342 (Pa. Super. 2002).**

Property owners brought action against township and its sewer authority, alleging that their property was damaged by sewer overflow caused by the installation of sewage lines by the sewer authority in 1992. The property owners did not file their Complaint until June 1999. The trial court found that the two year statute of limitations applied in this case and granted summary judgment on behalf of the township and sewer authority. The trial court also barred the property owners' complaints of continuing trespass based on the two year statute of limitations. Property owners appealed Court of Common Pleas of Monroe County summary judgment in favor of township and sewer authority. The Commonwealth Court reversed and remanded the case because the two-year statute of limitations applied as well as the owners stated claim for continuing trespass. **Miller v. Stroud Township, et al., 804 A.2d 749 (Pa. Cmwlth. 2002).**

In a medical malpractice action, mother, as parent and natural guardian of her minor child, brought claim against physicians after her child suffered brain damage during delivery at birth. Physicians appealed from judgment of the Court of Common Pleas entering a verdict in favor of the mother and awarding damages. Appellants claim that because a parent's cause of action is not derivative of a child's, the two year statute of limitations was applicable and had run by the time appellee filed her complaint. Though the law is settled that the statute of limitations

begins to run as soon as the right to institute an action arises unless there is an exception to the general rule, the Supreme Court held that evidence in this case supported a finding that the mother was unable, despite the exercise of due diligence, to know of the injury or its cause, so as to toll the running of the statute of limitations.- **Burton-Lister v. Siegel, Sivitz and Lebed Associates, 798 A.2d 231 (Pa. Super. 2002).**

Plaintiff, Administratrix of the estate of her mother, sued defendants, beryllium plant operators, for personal injury and the wrongful death the mother allegedly suffered from exposure to decades of emissions from the operation of the plant. The operators moved for summary judgment on the claims as being barred by the applicable statute of limitations. The decedent lived within two blocks of the beryllium plant virtually all of her life. She began experiencing health problems, including shortness of breath and her lung disease, as of 1997 at the latest. At that point, she knew about the beryllium emissions from the plant. The suit was filed in 2001, asserting claims for strict liability, negligence, fraudulent concealment, civil conspiracy, and wrongful death. The court determined that the statute of limitations period for each claim was two years. Using an objective standard, the Administratrix could not establish that, with the exercise of reasonable diligence, the decedent would not have known about defendants' wrongdoing more than two years before the suit was filed. It was clear under Pennsylvania law that the statute of limitations began to run by 1997 at the latest. The court found no basis for tolling the statute as to any claim. **Reeser v. Cabot Corporation, et al., 223 F. Supp. 2d 644 (E.D. Pa. 2002).**

Lack of prejudice to the defendant does not excuse the failure of the plaintiff to comply with the requirements of the statute of limitations. One of the many plaintiffs' attorneys made no timely effort to serve the complaint on two significant defendants in a fiery chain reaction turnpike accident. The original Complaint of plaintiff Baker was filed on October 10, 1995, within the two year statute of limitations; however, plaintiff failed to make any attempt to serve the Turnpike Commission within thirty days of the filing of the original complaint as required by the applicable rules of civil procedure. Plaintiff did nothing that would toll the running of the statute of limitations, and his later reinstatement of the complaint and service thereof on January 10, 1996 did not prevent the defendant from relying upon the statute of limitations. Similarly, the plaintiff failed to show that a good faith effort was made to serve defendant Lane Construction with original service within the statute of limitations. Plaintiff Baker was also disappointed by the affirmance of the trial judge's grant of remittitur, reducing the award against the remaining defendants from $3.2 million to $2.5 million, stating that the $900,000 portion of the award that was for pain and suffering was "plainly excessive and exorbitant" and shocked the sense of justice in light of the fact that the plaintiff's decedent only survived a few seconds after the impact. The nine year old victim died from third degree burns over 100% of his body, and it certainly is a subjective determination as to how to translate that brief but intense period of suffering into a monetary award. A third issue involved delay damages. One defendant had offered its $100,000 policy limit, but it conditioned that offer upon the collective approval of all twelve of the plaintiffs in the case. Because the offer was conditional, it did not relieve the insurer from paying delay damages under Rule 238. Nationwide could have spared itself from the imposition of delay damages after it offered its policy limits if it had simply offered up its

policy limits to all of the plaintiffs to be divided among them as they saw fit. **Teaman v Zafris, 811 A2d 52 (Pa. Cmwlth. 2002).**

Investor in real estate limited partnership filed a class action complaint against accounting firm hired by partnership to prepare tax returns and to provide auditing services. In the course of its business, the partnership relied on an accounting method known as the "Rule of 78's" to calculate interest, which the IRS later disapproved of in a published Revenue Ruling. Accounting firm continue to utilize the accounting method. In 1990, the limited partners brought a national class action in New York state court and the plaintiff was a member of the putative class, but the New York court denied certification of the class, and this ruling was affirmed on appeal in 1998. Plaintiff brought the instant action in 1999. The accounting firm moved for judgment on the pleadings, raising the statute of limitations as a defense. The trial court entered judgment on the pleadings and dismissed the complaint after concluding that a class action filed in another state does not toll a similar action subsequently filed in Pennsylvania. On appeal, the investor argued that a series of events prevented their knowledge of the accounting firm's liability and tolled the statute of limitations. The Superior Court held that, although the Rules of Civil Procedure toll individual claims if the class is decertified, the filing of an unsuccessful class action in another state does not toll a class action arising on the same grounds and later filed in Pennsylvania. Thus, the appellate court concluded that the New York class action did not toll the investor's negligence and breach of contract claims under Pennsylvania law and, therefore, affirmed the trial court's dismissal of the complaint. **Ravitch v. Pricewaterhouse, 793 A.2d 939 (Pa. Super. 2002).**

Plaintiff brought action for breach of contract to sell real estate resulting from defendant/land vendor's sale of property to third party. The trial court granted defendant's motion for judgment on the pleadings after finding the sale alleged to have breached the contract occurred in March of 1995 and that the plaintiff did not commence the action until April of 2000. Defendant filed a New Matter raising the Statute of Limitations as an affirmative defense to any liability. After the pleadings closed, defendant moved for Judgment on the Pleadings pursuant to the five-year limitation for breach of contract actions under 42 Pa. C.S.A. § 5526. The trial court granted defendant's Motion, and plaintiff appealed to the Superior Court. Plaintiff argued that defendant committed fraud or concealment by continuing to live on the property after executing sales contract with the third party vendee and by failing to place a "for sale" sign on property. In affirming the trial court, the Superior Court concluded that defendant committed no fraud as "mere silence in the absence of a duty to speak . . . cannot suffice to prove fraudulent concealment." Further, as the sale to the third party was duly recorded, the Superior Court panel found that the pleadings did not raise a viable tolling defense to the statute of limitations and held that the trial court correctly determined that plaintiff failed to exercise due diligence in bringing the breach of contract claim. **Weik v. Brown, 794 A.2d 907 (Pa. Super. 2002).**

27. Toxic Torts

Decedent's estate brought the subject action against numerous manufacturers and suppliers of asbestos products in use at decedent's place of employment. Decedent, many years after employment, contracted mesothelioma, a fatal disease strongly associated with asbestos exposure. One defendant, after the deposition of a co-worker of decedent, filed a Motion for Summary Judgment, citing lack of evidence of product exposure. Plaintiff appealed the ruling. On appeal, the Court upheld the "frequency, regularity and proximity" test of Eckenrod v. GAF Corp., 375 Pa.Super.187, 544 A.2d 50, 52 (1988). Here, testimony from a witness that she worked around decedent and that at one time or another over the years defendant's product was used in the area, even if allowed (the court held it was inadmissable in light of plainiff's counsel's mischaracterization of earlier testimony) , was still seen as being too vague to meet the tough standard. The witness had earlier testified that she never saw decedent working with defendant's product and could not say whose products were in use at any particular time. *[Compare with the decision a week earlier in McNeal v. Eaton Corp., 806 A.2d 899 (Pa.Super.2002), where the co-worker testified that he saw defendant's product in use at various times and that dust from the area where it was used fell upon decedent.]* The Court in Wilson would not accept the plaintiff's argument for a distinction in the standard between an asbestosis case and a mesothelioma case, the latter requiring less exposure. **Wilson v. A.P.Green Industries, Inc., et.al., 807 A.2d. 922 (Pa.Super. 2002).**

28. Unemployment Compensation

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.Cmwlth.2001).**

Supreme Court of Pennsylvania reversed and remanded the decision of the Commonwealth Court affirming the UCBR's denial of benefits based on willful misconduct. The claimant admitted to off-duty drug usage, but absent any evidence linking same with her work performance, she could not be denied benefits on a theory of willful misconduct. Albeit, the Court did not address the alternate theory of non-work-related misconduct because it had been waived by employer, but noted that under Section 3 of the Unemployment Compensation statute, claimants may be disqualified for non-work-related misconduct which is inconsistent with the acceptable standards of behavior and which directly affects their ability to perform their assigned duties. **Burger v. UCBR (Pa. 2002).**

Unemployment compensation Claimant filed a petition for review of the determination of the Unemployment Compensation Board of Review (Board) denying him benefits on the basis of Section 402(h) of the Unemployment Compensation Law. Following the closure of a business partnership controlled by Claimant and his wife, Claimant began to operate as a consultant and in that capacity provided services to only one company. In connection with those services, Claimant exercised control over his schedule, his work place and his office. The company issued a 1099 form to Claimant for the year in which the work was performed. On appeal, Claimant argued that he should not be considered self-employed because he provided service for only one company. The Superior Court rejected Claimant's argument and affirmed the decision of the Board, finding that Claimant was an independent contractor and owner of his own business rather than an employee of the company. In so finding, the Court looked to Section 4(l)(2)(B) of the Law, which prohibits compensation for employment where the individual is free from control or direction over the performance of services and where the individual is customarily engaged in an independently established trade or business. The Superior Court held that Pennsylvania's unemployment compensation law is not a vehicle to be used to compensate persons who operated a failed business venture. The Court concluded that the Board had properly determined that Claimant was ineligible for benefits. - **Owoc v. Unemployment Compensation Board of Review, 809 A.2d 441 (Pa.Super. 2002).**

Claimant was fired after reporting to work in an apparently intoxicated state. Event though positive results of her alcohol and drug tests were seen as inadmissable hearsay, the credible evidence of those who observed her provided substantial evidence that claimant reported to work unfit for duty and thus committed willful misconduct, precluding her from benefits. Where an employer policy prohibits a lack of fitness for duty, and a supervisor observes physical symptoms like bloodshot/glassy eyes and a strong aroma of alcohol, the employee must pass the "smell test." The olfactory evidence here that claimant imbibed intoxicating liquor before arriving at work (let alone her admissions to the same) is enough to support a finding of willful misconduct. There is no requirement that the claimant must have been aware of the smell; the fact that supervisors and others at employer's place of business were aware of the smell is sufficient. **Lindsay v. Unemployment Compensation Board of Review, 789 A.2d 385 (Pa.Cmwlth.2001).**

Claimant appealed from an order of the Unemployment Compensation Board which affirmed the denial of compensation as a result of claimant's voluntarily leaving work without a necessitous and compelling cause. Six months into claimant's employment as an executive director of employer, the Pittsburgh branch of the NAACP, a conflict emanated between claimant and another employee. The conflict was resolved, yet two years later, in an unrelated matter, there was an interference made by the same employee which resulted in claimant's resignation. Claimant refused to reconsider her resignation, even though she was informed that the board reprimanded her co-employee and promised to take further action. Claimant was granted benefits at the local office of employment security and employer appealed. The referee reversed, claimant appealed, and the Board affirmed the referee, finding that had claimant not resigned, she could have addressed her employment concerns with the entire board of directors. In her appeal to the Commonwealth Court, claimant argued that the record supported a finding that she resigned with cause of a necessitous and compelling nature, and therefore, the Board erred in denying her benefits. The Board found that the circumstances were insufficient to justify claimant's resignation and countered that claimant failed to take reasonable steps to preserve her employment. Relying on the case of Donaldson v. Unemployment Compensation Board of Review, 62 Pa. Cmwlth. 41, 434 A.2d 912 (1981), and affirming the decision of the Unemployment Compensation Board of Review, the Commonwealth Court found that where an employer promises to take action to alleviate a problem, good faith requires that an employee continue working until or unless the employer's action proves ineffectual. **Craighead-Jenkins v. Unemployment Compensation Board of Review, 796 A.2d 1031 (Pa. Cmwlth. 2002).**

An order of the Unemployment Compensation Board of Review denying claimant benefits was affirmed. The Commonwealth Court held that claimant was not entitled to unemployment benefits because claimant chose to ignore a reasonable accommodation offered by employer despite her indications that she was able and available for work. Claimant was employed by the Pennsylvania Liquor Control Board when she aggravated a pre-existing knee condition while performing her duties at work and was forced to retire from her position on the Board, but she was informed that she was able to pursue other Commonwealth employment with assistance from the State Civil Service Commission. Claimant retired form her position choosing not to submit the civil service application, reasoning that there were no possibilities of

getting a job. Claimant contended that she did not voluntarily terminate her employment; rather, she was forced to resign or face removal from the PCB. Under Section 402(b) of the Unemployment Compensation Law, a claimant who voluntarily terminates employment is ineligible for unemployment compensation benefits unless he or she left the employment for necessitous and compelling reasons. The Commonwealth Court held that claimant's election not to complete the civil service application foreclosed the possibility that she could remain employed by the Commonwealth, claimant thus failing to take all reasonable and necessary steps to preserve her employment. Claimant's reasoning that a job was not guaranteed to her did not amount to a necessitous and compelling reason.- **Nolan v. Unemployment Compensation Board of Review, 797 A.2d 1042 (Pa. Cmwlth. 2002).**

The Commonwealth Court affirmed the decision of the Unemployment Compensation Board of Review denying claimant benefits for voluntarily leaving work without cause of necessitous and compelling nature, and claimant appealed. Claimant worked as a driver for Atlantic Paratransit, a position that required claimant to maintain a valid driver's license. After claimant's vehicle became inoperable, he informed employer that he was unable to get to work because he was unable to buy another vehicle or have his present vehicle repaired. In addition, claimant's driver's license was suspended due to claimant's failure to pay child support. Upon notifying employer of his suspended license, claimant voluntarily separated himself from employment, thereafter applying for benefits. Claimant argued that loss of his vehicle coupled with the suspension of his driver's license constituted a necessitous and compelling reason for his decision to leave his employment. The Commonwealth Court held that, in order for transportation inconvenience to constitute such a cause, claimant must establish that this inconvenience presented an insurmountable problem and that claimant took the reasonable steps to remedy or overcome the problem. The Board correctly held that claimant lost his driver's license through his own action, failure to pay child support, which did not provide him with a necessitous and compelling reason to voluntarily quit his employment. **Pollard v. Unemployment Compensation Board of Review, 798 A.2d 815 (Pa. Cmwlth. 2002).**

Claimant petitioned for review of an order of the Unemployment Compensation Board of Review affirming the decision of a referee denying claimant benefits. Claimant was employed as a full-time supply clerk by Defense Depot Susquehanna when he was required to submit to a drug test as a result of a reassignment during a reduction in force at his employer's facility. Claimant tested positive for marijuana and subsequently entered into a last- chance agreement with his employer on the condition that he would refrain from using illegal drugs and that a positive drug test would result in the termination of his employment. Claimant was discharged for violating the last-chance agreement when he declined from taking a retest. The Commonwealth Court affirmed the decision of the Unemployment Compensation Board of

Review in holding that claimant's failure to abide by an agreement to refrain form the use of illegal drugs constituted willful misconduct under Section 402(e) of the Unemployment

Compensation Law, thereby disqualifying him from receiving benefits. - **Walton v. Unemployment Compensation Board of Review, 797 A.2d 437 (Pa. Cmwlth. 2002).**

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).**

29. Unfair Trade Practices

Automobile purchasers sued manufacturer in state court for fraudulent concealment and violation of the Unfair Trade Practices and Consumer Protection Law relating to defective components of vehicle transmissions. Manufacturer removed the case to federal court. The federal district court granted the manufacturer's motion for judgment on the pleadings and dismissed the complaint. On appeal, purchasers alleged that the trial court erred in applying the economic loss doctrine as a bar to the fraud and consumer protection claims. The United States Court of Appeals for the Third Circuit recognized that the Pennsylvania state courts have not addressed this issue and attempted to predict the Pennsylvania Supreme Court's handling of this issue. The economic loss doctrine bars plaintiffs from recovering in tort those damages (economic losses) whose entitlement flows only from contract. The Third Circuit predicted that Pennsylvania would apply the prevailing reasoning adopted by other jurisdictions and apply the economic loss rule to both the common law fraud and statutory misrepresentation claims. **Werwinski v. Ford Motor Co., 286 F.3d 661 (3d Cir. 2002).**

Spectator at baseball game struck by foul ball brought claims under various theories against baseball club. In addition to holding that no claims existed for product liability (for sale of ticket), for ultra-hazardous activity, for breach of contact, for breach of warranty, for breach of implied covenant of good faith or for breach of implied warranty of safety, court noted that purpose of Unfair Trade Practices and Consumer Protection Law was to protect the public from fraud and unfair or deceptive business practices. Club was seen to have no duty to warn and did nothing that could be characterized as a deceptive business practice. The court noted that even if there was a duty to warn, the warning on the reverse side of the ticket was sufficient. **Romeo v. Pittsburgh Associates, __Pa.Super.__, 787 A.2d 1027 (2001).**

30. Wrongful Employment Practices

Plaintiff employee brought suit against employer for discrimination alleging a hostile work environment and disparate treatment based on racial animus, retaliation for filing claims under the Family and Medical Leave Act and the Pennsylvania Human Relations Act, and age discrimination. The employer moved for summary judgment. In response to Plaintiff's claim that she was passed over for job opportunities, the court found that she failed to show that these omissions rose to the level of tangible adverse employment actions. Furthermore, she failed to offer evidence, beyond her own opinion, that the jobs which she sought were denied on the basis of race or age. Plaintiff also sought to establish that she was denied salary increases and was compensated at a level below that which would have been proportional with her experience and skills. However, the record indicated that she received every salary increase to which she was entitled. The District Court, in granting the employer's motion for summary judgment, held that Plaintiff's claim did not make out a prima facie case because she did not show that she suffered an adverse employment action, she received more compensation than she agreed upon at the time of her promotion to management and her resignation was not a constructive discharge as her displacement was a result of her own request. **Sherrod v. Philadelphia Gas Works, 209 F. Supp. 2d 443 (E.D. Pa. 2002).**

Female plaintiff was hired as a laborer and driver by employer. She asserts that three of her supervisors discriminated against her on the basis of sex by denying assistance of co-workers in loading heavy equipment, making her do jobs alone that men would do in pairs, making discriminatory remarks, laying her off when less senior men were left employed and paying her less for the same work. She also claims she was transferred for complaining about this discrimination. Plaintiff received a right to sue letter from the EEOC, and she filed claims for negligent and intentional infliction of emotional distress and violation of the Pennsylvania Equal Rights Amendment. The negligent infliction claim would not stand in light of the exclusivity provision of the WCA. The intentional claim would also fail, as plaintiff did not allege conduct that was sufficiently outrageous. Sexual harassment alone, without sexual propositions, is generally seen as insufficiently outrageous, and there was no allegation here of retaliation based on rejection of sexual advances. The retaliation complained of here would not constitute outrageous conduct. Plaintiff could maintain her PERA claim however, as while the PHRA preempts common law remedies for discrimination, it does not preempt state constitutional claims pursuant to the PERA. **Imboden v. Chowns Communications, 182 F.Supp.2d 453 (E.D.Pa., 2001).**

Female plaintiff brought claims under Title VII and the PHRA, asserting that she was terminated due to her 1997 pregnancy. Hired in 1990, plaintiff had managed retail shopping for employer. She took maternity leave in 1992-93. While on leave, her supervisors allegedly attempted to replace her with an unmarried individual. In March of 1993, however, one of her supervisors took over the shops where the employer's store had been located, and all management employees were hired in similar capacities, including plaintiff. In 1994, plaintiff

was promoted to office manager at a new office, and in 1996, she was transferred back to office manager at old location. Plaintiff had given birth in June 1997, returning to work in September. She remained in this position until her termination in May 1998. During her pregnancy, her supervisor allegedly made remarks that "she should get out of here, she looked like she would pop" and that "I don't want you to wobble around anymore." In October, she was told she was making too much and might have to take a cut. She was terminated after it was determined that she failed to disclose that one of the slip and fall claimants whose case she was managing was a brother-in-law. Analyzing the claims as a pretext case, the court addressed the *McDonnell Douglass* burden shifting framework, the court noted that when an employee is not pregnant at or around the time she suffered the adverse employment action, her membership in the protected class is less clear, and she has some additional burden under the flexible standard in reviewing the prima facie case under *Geraci.* Here, she was terminated more than eleven months after giving birth. Without a showing that harassment or discriminatory statements continued with regularity until the discharge, the prima facie case must fail. Here, the allegedly reprehensible comments were made one year before discharge. Silent treatment thereafter would not constitute pregnancy discrimination. Later statements regarding pay cuts had nothing to do with pregnancy. Plaintiff could not meet her burden to show that she was "affected by pregnancy, childbirth or related medical conditions" at the time of adverse action. **Solomen v. Redwood Advisory Company, 183 F.Supp.2d 748 (E.D.Pa., 2002).**

Plaintiff sued employer asserting discrimination under Title I of the ADA, after injuring back in employer's parking lot on the way to work. He was placed in a number of light duty position as he continued to treat for his injuries. He was eventually told to discontinue work entirely, and he file for and received partial workers compensation benefits. He later returned to work, with employer providing various light duty positions, allowing plaintiff to leave early for thearapy appointments. His only complaints were that "he was having a little pain, but putting up with it." He was terminated in May 1997, as he was unable to work with or without accomodation, light duty was not longer available and as he has missed considerable time. Although there was sufficient evidence to show employer regarded plaintiff as disabled, it was held that no jury could make a determination that the accomodations afforded plaintiff were not reasonable. **Buskirk v. Apollo Metals, 307 F.3d 160 (3rd Cir. 2002).**

Plaintiff sued defendant employer asserting gender and pregnancy discrimination, retaliation, and constructive discharge under Title VII and the PHRA, after she was demoted twice and ultimately resigned. On summary judgment motion by defendant, it was held that the pregnancy discrimination claim would fail as she did not produce evidence that anyone in management knew that she was pregant before the decision to demote her was made. Also, there

was inadequate evidence to show a pretext for the employer's reasons given for demotion - there was evidenc from employer of plaintiff causing tesnion and personality conflicts with co-workers and supervisors. Also, another demotion challenge failed because plaintiff's own view of the change as demeaning, unpleasant, discriminatory and retaliatory was insufficient to

demonstrate an adverse employment action. **Riding v. Kaufmann's Department Store, 220 F.Supp.2d 442 (W.D.Pa., 2002).**

Plaintiff sued under the ADA claiming he was subjected to a hostile work environment and eventually discharged from his employment with the United States Postal Service because of his disabilities in violation of the Rehabilitation Act of 1973. Specifically, plaintiff contended that he suffered from three disabilities: a speech impediment, a learning disability and a back injury he sustained the day defendant terminated his employment. In evaluating whether or not each of plaintiff's disabilities met the criteria to qualify as a disability under the Rehabilitation Act, the court found that the employee's alleged speech impediment did not constitute "disability" since the impediment did not substantially limit any major life activities, including speaking. This was further supported by evidence that the employee's prior and subsequent job positions included extensive use of speech over unmodified telephones, that the employee used a regular telephone at home and that the employee had no plans for treatment of his impediment. The court also found that the employee's alleged learning disability did not constitute a "disability," and this was supported by record evidence that employee was successful at a variety of jobs and hobbies, that he received a general equivalency diploma and that he could not identify a specific doctor who had diagnosed him with a disability. Finally, the court also discounted the plaintiff's alleged back injury as "disability" as the injury was temporary in nature and as the employee had returned to many of his normal activities. Finally, the plaintiff failed to demonstrate that his supervisor had regarded him as having an impairment under the "regarded as" theory. The record evidence established that although the supervisor noticed the plaintiff had a slight speech impediment, his supervisor did not experience noticeable difficulty in understanding plaintiff's speech. Additionally, the comments made to the supervisor about the plaintiff allegedly being "slow" did not affect his impression of the plaintiff, and the supervisor did not regard plaintiff as having a disabling back injury at the time of his termination. Because plaintiff was not able to establish a disability under the Rehabilitation Act, the court granted the employer's motion for summary judgment. **Dorn v. Potter**, **191 F. Supp. 2d 612 (W.D. Pa., 2002).**

The plaintiff, an employee, brought this action against the defendant, her employer, alleging violations of the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"). Before the Court was defendant's Motion for Summary Judgment. The plaintiff sought to reenter employer's workforce following a disability leave of six months. When the plaintiff planned to return to her position, she was informed that she was required to reapply for the position. The plaintiff refused to do so, and, thus, she never returned to work with the Defendant. Instead, she initiated this civil action against Defendant. In regards

to the ADEA claim, a plaintiff may establish a prima facie case under the ADEA by demonstrating that: 1) she was a member of the protected class, *i.e.*, she was over forty years old; 2) she is qualified for the position; 3) she suffered an adverse employment decision; and 4) she was ultimately replaced by a person sufficiently younger to permit an inference of age discrimination. The Court granted Defendant's Motion for Summary Judgment with respect to Plaintiff's ADEA claim because she failed to set forth any evidence to suggest that age was in

any way a motivating factor in plaintiff's replacement. Her replacement was based on necessity and not age.

In regards to the ADA claim, to make out a prima facie case under the ADA, a plaintiff must be able to establish that he or she (1) has a "disability" (2) is a "qualified individual" and (3) has suffered an adverse employment action because of that disability. A disability is (A) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. The plaintiff sought the ADA's protection through the "regarded as" definition of disability. For an individual to be disabled under the regarded as portion of the ADA, the individual must demonstrate either that (1) despite having no impairment at all, the employer erroneously believes that the plaintiff has an impairment that substantially limits major life activities; or (2) the plaintiff has a nonlimiting impairment that the employer mistakenly believes limits major life activities. Since the plaintiff produced no evidence other than defendant's knowledge of her disability leave, she failed to establish that Defendant regarded her as having a disability. Accordingly, the Plaintiff did not set forth a prima facie case of disability discrimination, and the Court granted Defendant's Motion for Summary Judgment as it relates to her ADA claim. **Poyner v. Good Shepherd Rehab at Muhlenberg, 202 F.Supp.2d 378 (E.D. Pa. 2002).**

The Court of Appeals held that there was insufficient evidence that the speech of the police officer was a motivating factor in his suspension, and the lower court's "perceived support" theory did not provide a legal basis for liability. Township's motion for judgment as a matter of law was granted after the jury below had found in the plaintiff's favor and the district court had denied said motion. A motion for judgment as a matter of law should be granted only if there is insufficient evidence from which a jury reasonably could find liability - the question is not whether there is literally no evidence supporting the party against whom the motion is directed. In exercising its plenary review, the Court of Appeals noted that the police officer's burden in his First Amendment retaliation claim is to show that his conduct was constitutionally protected and that protected activity was a substantial or motivating factor in the alleged retaliatory action. Likewise, the township may defeat the case of the police officer by showing it would have taken the same action even in the absence of the protected conduct. Ultimately, the Court of Appeals found this to be the case, as all of the township commissioners who voted for a suspension testified that they were unaware of the police officer's protected First Amendment conduct at the time they voted. Thus, there was insufficient evidence from which a jury could reasonably find liability, and judgment was granted to the township as a matter of law. **<u>Ambrose v. Township of Robinson, Pennsylvania</u>, 303 F.3d 488 (3rd Cir. 2002).**

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Plaintiff commenced an action against the Philadelphia Housing Authority (PHA) based on claims arising out of plaintiff's employment as a police officer with, and subsequent termination by, PHA. Plaintiff was diagnosed with severe depression and was prohibited from carrying a firearm. He went on medical leave during which he requested an assignment to PHA's radio room where he would not be required to carry a firearm. PHA denied this request

based on safety concerns. Plaintiff exhausted all of his initial medical leave and was granted two additional leaves of absence. After he failed to request additional leave upon PHA's directive, PHA terminated his employment. In his complaint, plaintiff alleges disability discrimination under the ADA and retaliation in violation of the American with Disabilities Act (ADA). PHA filed a motion for summary judgment relative to all of these claims. The federal district court granted PHA's motion for summary judgment. The court held that Plaintiff failed to establish a claim of unlawful retaliation under the ADA based upon either the alleged failure to accommodate his request for a transfer or his subsequent termination. The court noted that plaintiff must show that a retaliatory animus on the part of the employer--resulting from plaintiff's engaging in protected activity–was a substantial factor in motivating the adverse employment decision. The mere fact that the adverse action chronologically followed the protected activity does not satisfy plaintiff's burden as to retaliation claims. With respect to Plaintiff's termination, the court also reasoned that PHA provided a legitimate non-retaliatory reason for the termination in that Plaintiff admittedly failed to request additional medical leave or otherwise respond to PHA's directive to request additional leave. **Williams v. Philadelphia Housing Authority, 230 F.Supp. 2d 631 (E.D. Pa. 2002).**

Plaintiff/female applicant for part-time employment with the National Guard brought action against the Pennsylvania Department of Military and Veteran Affairs, alleging violations of Title VII based upon the National Guard recruiter's conduct in sexually assaulting her following her interview. Defendant moved for dismissal, and the district court agreed that plaintiff had failed to state a claim for hostile work environment or quid pro quo sexual harassment. Essentially, the plaintiff failed to state a claim for hostile work environment sexual harassment because she could not have been exposed to a hostile work place given that she was not an employee at the time of the alleged assault. She also failed to allege that the National Guard recruiter made sex a condition of her employment, and thus her claim likewise failed to satisfy the quid pro quo sexual harassment criteria. Finally, the plaintiff's failure to specify which type of position she was applying for, civilian versus military, warranted dismissal of her claim without prejudice because Title VII claims are barred with respect to military positions. The court also noted that defendant had Eleventh Amendment immunity from suits under the Pennsylvania Human Relations Act. **Moore v. Pennsylvania Department of Military and Veterans Affairs, 216 F.Supp. 2d 446 (E.D. Pa. 2002).**

Former employee filed suit in federal court against former employers and supervisors alleging violation of Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act, for disparate treatment, hostile work environment and retaliation. Specifically, employee set forth that his supervisor discriminated against him and harassed him because of his Lebanese origin. Supervisor allegedly mocked employee's accent and hand gestures, and employee felt that the criticisms interfered with his ability to perform the duties of his job. Defendants moved for summary judgment as to all counts of the Complaint. The District Court granted the Motions as to the claims for hostile work environment and disparate treatment, but denied defendants' Motion as to the retaliation claims. The District Court relied on the Adams test in its investigation of employee's allegations. Under Adams, a plaintiff must meet five conditions in regard to an alleged hostile work environment: (1)intentional discrimination must

exist based upon a protected class; (2)discrimination must be pervasive and regular; (3)discrimination must detrimentally affect plaintiff; (4)such discrimination would have detrimentally affected a reasonable person of the same class and in the same position; and, (5)respondeat superior liability. Adams v. City of Philadelphia, 895 F.2d 1469, (3d Cir., 1998). The District Court held that employee met prongs one and five of the test, but failed to establish prongs two, three and four. Therefore, employee could not make out a prima facie case for hostile work environment under Title VII. For the same reasons, the District Court found that the PHRA claim failed since generally, the PHRA is applied in accordance with Title VII. However, the District Court did find that employee established a prima facie case for his retaliation claims by demonstrating : (1)he engaged in conduct protected by Title VII; (2)employer took adverse action against him (i.e., suspension and subsequent dismissal); and, (3)there was a causal link between the conduct and the adverse action. **Gharzouzi v. NorthWestern Human Service of Pennsylvania, et al, 225 F.Supp. 2d 514 (E.D.Pa, 2002).**

Former employee filed suit in federal court alleging discrimination in violation of: 42 U.S.C.S. §1981; 42 U.S.C.S. §1985(3); Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §2000e et seq; and, the state law claims of intentional infliction of emotional distress and tortious interference with contract. Defendants Donnelly and CTC owned a parcel distribution facility operated by Genco. Genco, who was later replaced by LRI, contracted with Source One, a temporary employment agency, to provide workers for the facility. At the facility, manager subjected black employees to racial epithets, openly expressed his desire to eliminate black workers from the facility and had actually done so. Ultimately, employee was dismissed from his position. Defendants filed a Motion to Dismiss all counts of the Amended Complaint. One argument that defendants asserted was that §1981 could not have been violated because defendants never had a contractual relationship with employee. The District Court reasoned that employee was an at-will employee of Source One and, therefore, had a contractual relationship within the meaning of the statute. Defendants also sough dismissal of employee's §1985 claim. The District Court ruled that Brown v. Philip Morris, Inc., 250 F.3d 789 (3rd Cir., 2001), precluded employee from asserting a claim under §1985 based on a violation of §1981 and, therefore, dismissed this count. Defendants' third argument attacked employee's intentional infliction of emotional distress claim asserting that he had not alleged the physical harm required by Pennsylvania law. The District Court reasoned that the mental and emotional harm that employee alleged was enough in Pennsylvania to constitute physical harm. Fourth, defendants argued that employee's tortious interference with contract claim should be dismissed because he could not identify the existence of a contract between himself and a third party. The District Court ruled that employee did in fact successfully state this claim against all defendants except Genco, who had ceased operating months prior to employee's dismissal. Lastly, defendants argued for the dismissal of employee's Title VII claim because the EEOC failed to serve them with the requisite Notice of Charge before initiation of this lawsuit. The District Court held that employee satisfied the two jurisdictional requirements to a Title VII claim (filing charges with the EEOC and receipt of EEOC's Notice of Right to Sue), and the EEOC's failure to perform its statutory duties could not be charged to Employee. **McClease v. R.R. Donnelly & Sons Co., et al, 226 F.Supp. 2d 695 (E.D.Pa., 2002).**

Former employee filed suit in federal court against former employer, former supervisor and former co-employees alleging state law intentional infliction of emotional distress as well as hostile work environment and disparate treatment in violation of : Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §2000e et seq; 42 U.S.C.S. §1981; and, the Pennsylvania Human Relations Act, 43 P.S. §951 et seq. In making its decision, the District Court relied on the test used by the Third Circuit regarding claims for a hostile work environment. A plaintiff must prove that the discrimination: (1)was intentional based on race or sex; (2)was pervasive and regular; (3)had a detrimental effect; (4)would have detrimentally affected a reasonable person of the same sex, race and in the same position; and, (5)the existence of respondeat superior. Because employee could not demonstrate that supervisor's comments were sufficiently pervasive, regular or severe, the Court ruled that she had failed to establish a prima facie case. In addition, the District Court held that nothing that employer did constituted the egregious conduct required to establish a claim for intentional infliction of emotional distress. Therefore, all of employee's claims failed and the District Court granted defendants' Motion for Summary Judgment. **Ogden v. Keystone Residence, et al, 226 F.Supp. 588 (M.D. Pa., 2002).**

The district court held as a matter of first impression that defendant/laboratory owed no duty of care with respect to drug testing of plaintiff's employee under Pennsylvania law. To sustain a negligence claim, a plaintiff must show a duty of care imposed by law upon the defendant, breach of that duty, causal connection between the breach and resulting injury, and an actual loss or damage. The court recognized that there is substantial undisturbed precedent under Pennsylvania law that a medical professional owes no duty to the subject of an examination sponsored by a third party. As such, the court would not recognize an actionable duty of care in the circumstances presented here, where the plaintiff/employee sued defendant alleging that the drug tests which it performed were done negligently and that the positive test result for marijuana was incorrect. Although some courts in other states have recognized some duty of care of testing facilities to employees drug-tested at their employer's behest, the court would not consider these select few cases as "persuasive data" that the Pennsylvania Supreme Court would reverse precedent and recognize such a duty of care by drug testing facilities. Accordingly, defendant's motion for summary judgment was granted. **- Tricoski v. Laboratory Corporation of America, 216 F.Supp. 2d 444 (E.D. Pa. 2002).**

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Employee who suffered from asthma, developed pneumonia, and subsequently was discharged sued former employer, alleging violations of the Americans Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Pennsylvania Human Relations Act (PHRA). Employee moved for judgment as a matter of law after summary judgment in favor of former employer on the ADA and PHRA claims and a jury trial on the FMLA claim resulted in a verdict for former employer. In his appeal, employee argued that the District erred in (1) granting Employer's summary judgment on employee's ADA and PHRA claims, (2) admitting hearsay testimony into evidence at the jury trial on his FMLA claim and (3) denying employee's

motion for judgment as a matter of law and his motion for a new trial. The Appellate Court affirmed the decision of the United States District Court for the District of New Jersey holding that (1) employee's pneumonia was not a "disability" for purposes of the ADA; (2)employee's sensitivity to dust and fumes was not a disability under the ADA; (3) because former employer did not know about employee's asthma, that condition could not form the basis of his ADA claim; and (4) the district court did not err in denying employee's JMOL and new trial motions. The court reasoned that pneumonia is a temporary condition that is not protected by the ADA and that, in order for employee to succeed on his FMLA claim, he had to establish not only that he was not returned to an equivalent position but also that he was able to perform the essential functions of that position.- **Rinehimer v. Cemcolift, Inc., 292 F.3d 275 (C.A. 3 (Pa.) 2002).**

Terminated employee brought an action against his hospital employer under the ADA, ADEA and PHRA alleging he was terminated in retaliation for his father having brought a discrimination suit against the same hospital employer and for the plaintiff's perceived assistance in such suit. The court affirmed in part and reversed in part the district court's grant of summary judgment in favor of the employer. The Third Circuit Court of Appeals affirmed the district court's grant of summary judgment with regard to plaintiff's third party retaliation claims under the ADA, PHRA and the first anti-retaliation provision of the ADA as it found that the text of these provisions expressly limits a cause of action to the particular employee that engaged in the protected activity. However, in reversing the district court's grant of summary judgment under the second anti-retaliation provision of the ADA, the court held that such a claim was cognizable based upon the broader scope of language. Specifically, the second retaliation provision of the ADA prohibits employers from coercing, intimidating, threatening, or interfering with any individual with respect to ADA rights. The Third Circuit also reversed the district court's grant of summary judgment under plaintiff's "perception theory" of retaliation. Again, the Court of Appeals held that plaintiff's claim that the employer terminated him because it perceived him as having assisted in his father's law suit was cognizable under the anti-retaliation provisions of the ADA, ADEA and PHRA if he can establish that the employer thought he was assisting his father and thereby engaging in a protected activity, regardless of whether or not the employer's perception was factually correct. **Fogleman v. Mercy Hospital, Inc., 283 F.3d 561 (3rd Cir. 2002).**

Plaintiff sued former employer alleging age discrimination under the PHRA. The plaintiff was a crew foreman who was responsible for supervising workers assigned to install or maintain power lines or equipment. The controversy arose from the plaintiff's acceptance of a Christmas gift of $200 cash from the owner of a company who routinely subcontracted with plaintiff's employer to provide labor crews for various projects. The employer found out about this alleged transaction and, during the initial investigation, was informed by the plaintiff that he had not accepted any cash from the subcontractor, but rather he had been given a $200 gift certificate and returned it. However, during subsequent investigation, plaintiff ultimately confessed that he had accepted a $200 cash gift. The employer then gave plaintiff the option of either termination or resignation. Plaintiff chose to resign. Three existing employees, ranging in age from 50 - 53 years of age assumed plaintiff's duties. In granting the defendants' motion for summary judgment, the court examined the parties' respective burdens under the *McDonell*

Douglas standard. The court held that plaintiff was able to establish a prima facie case despite the fact that he was unable to establish that he was replaced by significantly younger employees. Rather, the court held that a plaintiff may establish this element of prima facie case by establishing that he suffered a dismissal despite the employer's need for someone to perform the same work after he left. The court granted summary judgment, however, as plaintiff was unable to rebut the employers legitimate, nondiscriminatory reason for terminating him. It was the employer's position that plaintiff had been terminated because he violated the employer's standards of integrity when initially accepting the cash gift as well as when he lied to his supervisor when he was asked whether or not he received such a gift. Plaintiff was unable to produce evidence of first hand specific evidence of disparate treatment compared to that received by younger workers. **Kropavich v. Pennsylvania Power and Light Company**, **795 A2d. 1048 (Pa. Super. 2002).**

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).**

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 Servs., 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).**

This is a District Court opinion on a Petition to award counsel fees and costs. Under the ADEA and the PHRA a prevailing party is entitled to an award of reasonable attorney's fees. The party seeking fees has the burden to prove the request is reasonable. The "loadstar" figure is calculated by multiplying the number of hours expended by a reasonable hourly rate. This figure is presumed to be reasonable, however the District Court has considerable discretion to adjust the loadstar upward or downward once the opposing party objects. This Court discussed the method for determining a reasonable hourly rate stating it must assess the "prevailing party's

attorney's experience and skill compared to the prevailing market rates in the relevant community for lawyers of reasonably comparable skill, experience and reputation." Next, the court stated that contingency multipliers were not permissible, however they found rate enhancement reasonable considering the lead counsel's experience and the fact the Defendant submitted no contrary evidence. Next the Court conducted an analysis of the reasonableness of time expended. A court has the affirmative function of reviewing time charged to decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are excessive, redundant or unnecessary, pursuant to the specific objections of the defendant. Base on this standard the Court made some minor downward adjustments. The Court then reviewed the matter for determining the matter of pre-judgment interest and an adjustment for the negative tax consequences of a lump sum payment rather than payment over time. The Court, in its discretion, awarded the Plaintiff both of these additional fees to be paid by the Defendant. As a result of the instant Petition, the district Court awarded the Plaintiff $219,341.48 in attorney's fees and costs. The Court molded the verdict in favor of the Plaintiff to reflect $47,830.00 in pre-judgment interest and damages as a result of tax consequences. Lastly, the Court then reduced the amount of the judgment by $12,700.00, as stipulated by the parties involving another matter. **Jordan v. CCH, INC. 230 F.Supp. 2d 603 (2002)**.

II. Fair Share Act

Statutory Language - 42 Pa.C.S.A. Section 7102

Section 7102. Comparative Negligence

(a) General Rule. In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

(b) Deleted

(b.1) Recovery against joint defendant; contribution.

(1) Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (b.2).

(2) Except as set forth in paragraph (3), a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.

(3) A defendant's liability in any of the following actions shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:

(i) Intentional misrepresentation.

(ii) An intentional tort.

(iii) Where a defendant has been held liable for not less that 60% of the total liability apportioned to all parties.

(iv) A release or threatened release of a hazardous substance under section 702 of the act of October 18, 1988 (P.L. 756, No. 108), known as the Hazardous Sites Cleanup Act.

(v) A civil action in which a defendant has violated section 497 of the act of April 12, 1951 (P.L. 90, No.21), known as the Liquor Code.

4. Where a defendant has been held jointly and severally liable under this subsection and discharges by payment more than that defendant's proportionate share of the total liability, that defendant is entitled to recover contribution from defendants who have paid less than their proportionate share. Further, in any case, and defendant may recover from any other person all or a portion of the damages assessed that defendant pursuant to the terms of a contractual agreement.

(b.2) Apportionment of responsibility among certain nonparties and effect. For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party. A person whose liability may be determined pursuant to this section does not include an employer to the extent that the employer is granted immunity from liability or suit pursuant to the act of June 2, 1915 (P.L. 736, No. 338), known as the Workers' Compensation Act. An attribution of responsibility to any person or entity as provided in this subsection shall not be admissible or relied upon in any other action or proceeding for any purpose. Nothing in this section shall affect the admissibility or nonadmissibility of evidence regarding releases, settlements, offers to compromise or compromises as set forth in the Pennsylvania Rules of Evidence. Nothing in this section shall affect the rules of joinder of parties as set forth in the Pennsylvania Rules of Civil Procedure.

(c) Downhill skiing.

(1) the General Assembly finds that the sport of downhill skiing is practiced by a large number of citizens of this commonwealth and also attracts to this Commonwealth large numbers of nonresidents significantly contributing to the economy of this Commonwealth. It is recognized that as in some other sports, there are inherent risks in the sport of downhill skiing.

(2) The doctrine of voluntary assumption of risk as it applies to downhill skiing injuries and damages is not modified by subsections (a) and (b.1).

(c.1) Savings provisions. Nothing in this sections shall be construed in any way to create, abolish or modify a cause of action or to limit a party's right to join another potentially responsible party.

(d) Definitions. As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Defendant or defendants." Includes impleaded defendants.

"Plaintiff." Includes counter claimants and cross-claimants.

1978, April 28, P.L. 202, No 53, Section 10(89), effective June 27, 1978. Amended 1980, Oct. 5, P.L. 693, No. 142, Section 222(a), effective in 60 days; 1982, Dec.20, P.L. 1409, No. 326, art.II, Section 201, effective in 60 days. **Amended 2002, June 19, P.L. 394, No. 57, Section 2, effective in 60 days.**

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Act 2002-57, Section 2, deleted subsec. (b), which had read:

"Recovery against joint defendant; contribution. – Where recovery is allowed against more that one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from and defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution."

Appendix A

Wayman, Irvin & McAuley, LLC
WI&M