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www.waymanlaw.com *Summer 2011* *Vol. 10 No. 2*

SMART Act's Potential to Cure Medicare Secondary Payer Ills

By Jonathan M. Gesk

Pursuant to the Medicare Secondary Payer Act, 42 U.S.C. §1395y ("MSP Act"), Medicare assumes the role of secondary payer in cases where a primary payer exists. A primary payer is considered any workers' compensation, liability or automobile policy or no fault insurance. Although enacted in 1980, the MSP Act has been the target of increased scrutiny and debate due to the recent passage of the SCHIP Extension Act in December 2007. Specifically, Section 111 of the SCHIP Extension Act created heightened reporting requirements for the Responsible Reporting Entities (i.e., insurers). These heightened reporting requirements suggest that the Center for Medicare and Medicaid Services ("CMS") intends on increasing its enforcement of the MSP Act. This is further evidenced by the steep penalties attorneys and insurers face if they fail to comply with the reporting requirements.

The goal of the increased reporting requirements was to help CMS identify those individuals who received Medicare payments when Medicare should have been a secondary payer. The losses to the United States government from failing to recover payments in these situations are approaching two billion dollars a year.

While the new regulations serve an essential purpose – tracking Medicare payment recipients – the approach of CMS after identifying those recipients is causing havoc for plaintiffs, defendants, counsel and insurers. The problem primarily lies in the following area: CMS's current policy is to not provide Medicare lien numbers until after a case has been resolved. This is based on the notion that Medicare's right to reimbursement doesn't accrue until a payout has been made to the Medicare recipient.

This makes it extremely difficult to settle a case in which liability or damages are being aggressively challenged. A settlement is typically some discounted amount off the total alleged damages, accounting for questions as to liability, comparative negligence and the costs of litigation. However, without Medicare communicating or negotiating the lien prior to settlement, plaintiffs are unwilling to settle as they are unsure of what amount they will get to keep.

In response to this growing problem, as well as other concerns with the MSP Act and SCHIP Extension Act, United States Congressman Tim Murphy of the 18th District of Pennsylvania is spear-heading a new bill to amend the MSA Act. The Strengthening Medicare And Repaying Taxpayers Act of 2011 ("SMART Act") seeks to make simple amendments to the current law that should provide drastic

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The Evolving Pennsylvania Law of Jurisdiction Over Out-of-State Companies Based on Internet Presence

by Jeffrey A. Kubay

In recent years, businesses and consumers alike have increasingly used the internet as the starting point for conducting business, with purchases resulting from, at least in part, the interaction with an out-of-state vendor's website. But what happens when a purchaser is dissatisfied with the purchase and must ultimately pursue legal recourse; can the purchaser sue the out-of-state company in a Pennsylvania court?

In 1997, a federal court sitting in Pennsylvania first addressed the relationship between personal jurisdiction and the websites of out-of-state, or "foreign," companies in the case of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. 1997). In the absence of state appellate case law relative to this issue, the federal district court in the *Zippo* case established a "sliding scale" of jurisdiction based largely on the degree and type of interactivity on the website. In establishing this sliding scale, the court developed a methodology for determining whether a court's exercise of jurisdiction is constitutionally proper. The *Zippo* court stated that:

> *At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. . . . At the opposite end are situations where a defendant has simply posted information on an Internet [website] which is accessible to users in foreign jurisdictions. A passive [website] that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction . . . . The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.*

In 2002, the Superior Court became the first Pennsylvania state appellate court to address this issue with its decision in the case of *Efford v. The Jockey Club,* 796 A.2d 370 (Pa.Super. 2002). In *Efford,* the plaintiffs bred, raised and sold horses in Pennsylvania. The defendant was a non-profit organization that registered horses and had offices in New York and Kentucky, but not in Pennsylvania. The plaintiffs had registered horses with the defendant via regular mail. The defendant revoked the registration papers of four of the plaintiffs' horses, and the plaintiffs then brought an action in equity in Pennsylvania seeking reinstatement of the registration papers. The defendant argued that there was no basis for personal jurisdiction by the Pennsylvania court over the defendant, and the trial court agreed and dismissed the case. On appeal, *Efford* adopted the *Zippo* sliding scale and concluded that the defendant's website fell within the middle ground of the scale because the site provided information about the club and permitted users to register their horses via the internet. Nonetheless, the court ruled that the website was not sufficient to establish personal jurisdiction because it was merely general advertising with the "added convenience of an on-line registry." *Id.* at 375.

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In the 2008 case of *Haas v. Four Seasons Campground,* 952 A.2d 688 (Pa.Super. 2008), the Superior Court again concluded that personal jurisdiction was lacking over the defendant. In *Haas,* the defendant was a campground, incorporated and located in New Jersey. The plaintiffs, residents of Pennsylvania, had viewed the campground's interactive website and decided to rent campground space. Because the defendant campground's website did not allow seasonal contract purchases to be made on-line, the plaintiffs drove to New Jersey and signed a contract for the same. While they were staying at the campground, the plaintiff-husband was injured in an accident. On appeal, the Superior Court found that the campground's website was not sufficient to subject it to specific jurisdiction in Pennsylvania. Although the plaintiffs' found the campground as a result of an internet search, the court

stated that "the mere presence of a website without more, however, is not sufficient to subject a business to specific jurisdiction." *Id.* at 693. The court reasoned that because campground contracts were not available "for transmission via personal computer," its website was merely passive, and therefore, the company was not subject to jurisdiction.

In 2009, the Superior Court again ruled that there was no personal jurisdiction over a foreign company, notwithstanding the company's interactive website. *Moyer v. Teledyne Continental Motors, Inc.*, 979 A.2d 336 (Pa.Super. 2009). In *Moyer,* the defendant was an aircraft repair company that had approximately 20 regular Pennsylvania customers and maintained an interactive website available to existing and prospective customers. In finding that jurisdiction was lacking, the court noted that the website simply provided status information relative to inventory and the mere physical location of parts that had been submitted by customers for repair.

Based on the foregoing, it appears that, under existing Pennsylvania case law, nothing short of actually entering into a contractual relationship over the internet will subject a foreign company to personal jurisdiction in Pennsylvania based upon its website. The above-identified *Haas* decision emphasized the fact that the plaintiffs there actually went to New Jersey to sign the subject contract. But what if a Pennsylvania resident makes a reservation of some type (e.g. hotel, rental car) over the internet on a company's website but later consummates the transaction by signing the appropriate contract documents outside of Pennsylvania? One would reasonably believe that making the reservation in Pennsylvania via the website would be construed as transacting business such that personal jurisdiction would lie. Without having to render such a legal conclusion, the United States District Court for the Western District of Pennsylvania suggested such a result in its August 2010 decision in *Hickton v. Enterprise Rent-A-Car Company,* 735 F.Supp. 2d 277 (W.D. Pa. 2010), a case with an added jurisdictional wrinkle. There, the court was considering whether it could exercise jurisdiction over Enterprise Rent-A-Car Company of Missouri (ERAC-Missouri), a parent company of Enterprise Rent-A-Car Company of Pittsburgh (ERAC-Pittsburgh). Upon consideration of whether the Enterprise brand's "highly interactive" website conferred jurisdiction over ERAC-Missouri, the court noted that the website was central to ERAC-Pittsburgh's business in Pennsylvania because customers could reserve automobiles for rent via the website, despite the fact that that subsidiary did not maintain any hyperlinked websites or web pages. Notwithstanding the fact that ERAC-Missouri was responsible for the website's content, the court concluded that the website did not confer jurisdiction over ERAC-Missouri because the website was not central to its business, a holding company that provides administrative services to its operating subsidiaries as opposed to renting vehicles.

Although the *Hickton* decision provides additional guidance with respect to the issue of personal jurisdiction based upon a company's website, that case is a federal trial court decision that is not binding upon any Pennsylvania court. Moreover, the Supreme Court of Pennsylvania, the state's highest court, has not at all addressed this issue. Thus, the Superior Court case of *Efford* and its progeny provide the framework for determining whether a Pennsylvania court can exercise personal jurisdiction over a foreign company based upon the interactivity of its website. That line of cases, however, has not expressly established a bright-line rule that personal jurisdiction over a foreign company is proper only where the parties enter into a contract through the company's website. For now, whether such jurisdiction lies will typically have to be determined on a case-by-case basis by applying the *Zippo/Efford* sliding scale for website interactivity/ jurisdiction.

Discussion of the Dodd-Frank Act and its Impact on Real Estate Litigation

by Gregory S. Knight

The Dodd–Frank Wall Street Reform and Consumer Protection Act, signed into law last year, has had, and is having, a significant impact on the real estate market and will likely have significant impact on real estate litigation going forward.

Most important to real estate professionals is the impact on residential mortgages and loan originators. Mortgage originators are prohibited from steering any consumer to a residential mortgage loan that the consumer lacks a reasonable ability to repay or has predatory characteristics or effects such as equity stripping, excessive fees or abusive terms. Further, mortgage originators are prohibited from steering a consumer from a "qualified mortgage" under the new ability to repay test under Truth in Lending, to a mortgage that is not a qualified mortgage. Mortgage originators are also prohibited from engaging in abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender or age. Mortgage originators are prohibited from mischaracterizing

- the credit history of a consumer,
- the residential mortgage loans available to a consumer
- the appraised value of the security property

What is different under the Dodd-Frank Act from past anti-predatory lending legislation is that loan officers will now have individual liability for violations of any of these prohibitions. That liability includes actual damages, up to a maximum of 3 times the originator's compensation, plus the borrower's attorney fees.

Clearly this means that a lender needs to be on top of his game. If a lender has been ethical in the past, prior to these new proposed rules, he'll have no issues under the new regime. But if a lender has been someone who skirts ethics in the past, then the liability would be too great for them to remain in the industry. The enforcement of these provisions will fall to one of the most significant and far-reaching provisions of the Dodd-Frank Act which is Title X , which creates the Bureau of Consumer Financial Protection. It is more formally known as the Consumer Financial Protection Act of 2010. The CFPB has been charged with a wide range of consumer protection duties and has been given unprecedented authority and independence. The new bureau will be housed at the Federal Reserve with a dedicated budget funded by the Federal Reserve, yet the bureau will be independent of the Fed. The Bureau will have an independent director appointed by the President and confirmed by the Senate. The Bureau will contain five major units including Research, Community Affairs, Complaint Tracking and Collection, Office of Fair Lending and Equal Opportunity, and Office of Financial Literacy. The CFPB will have rule-making authority and will be able to autonomously write rules for consumer protections governing all bank and non-bank financial institutions. The bureau will have authority to examine and enforce

regulations for banks and credit unions with assets over $10 billion. Those institutions with $10 billion or less will continue to be supervised by their primary regulator, such as the Office of Comptroller of the Currency and others. The CFPB will supervise and examine all mortgage related businesses including lenders, servicers and mortgage brokers. The Bureau will also take on supervision of payday lenders and student lenders.

One of the more significant but little noticed provisions is the ability to act quickly. The Bureau will constantly watch for bad or predatory business practices and has been granted authority to act quickly to stop them without waiting for Congress to pass enabling legislation.

What is different under the Dodd-Frank Act from past anti-predatory lending legislation is that loan officers will now have individual liability for violations of any of these prohibitions. That liability includes actual damages, up to a maximum of three times the originator's compensation, plus the borrower's attorney fees.

It also makes changes to RESPA, The Real Estate Settlement and Procedures Act of 1974, specifically in matters relating to how servicers interact with borrowers. Title XIV addresses a variety of appraisal and valuation issues. For example, it prohibits a broker price opinion as the primary valuation tool in connection with valuation of a primary residence. It allows use of an automated valuation model but requires bank regulators in concert with the Appraisal Standards Board of the Appraisal Foundation to establish quality control standards. The Act also addresses appraisal management companies which are widely used by financial service institutions. It requires that the fee paid to the appraiser and the administration fee charged by the management company both be set forth on the closing statement, commonly referred to as the HUD-1. Within one year, the Government Accountability Office is required to conduct a study of the effectiveness and impact of various appraisal methods, valuation models and distribution channels as well the HVCC and the Appraisal Subcommittee.

It is important to note the basic requirements in the law for loan officer compensation. The law states "... no mortgage originator (defined to include loan officers and brokers) shall receive from any person (or entity), and no person shall pay to a mortgage originator, directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of the principal)". The new law also

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benefits. The SMART Act provides a statute of limitations on CMS's right to pursue payment, an option for beneficiaries to prepay Medicare the estimated amount owed and creates an appeals process for claimants who want to challenge CMS's lien determination.

However, its biggest impact may lie in its proposed changes to the timeframe in which CMS would be required to provide Medicare liens. Specifically, a new provision would be added that permits a claimant or insurer to contact CMS four months prior to an anticipated settlement date and request a statement of the condition payment reimbursement amount. CMS would then have sixty-five days after receipt of the statement request to respond with a statement of reimbursement amount. If CMS does not respond, the claimant or insurer shall provide an additional notice to CMS. If CMS does not respond to the additional notice, the claimant and insurer shall not be liable for reimbursement for any past payments made by Medicare.

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Clearly, the effect of such a law would be to put all parties on notice of the Medicare lien at worst one month prior to an anticipated settlement date or conference. This would surely promote the settlement of Medicare related claims, thus increase the frequency with which Medicare is reimbursed for conditional payments.

On June 22, 2011, an Energy & Commerce subcommittee heard testimony regarding the current problems with the MSP Act and the proposed solutions incorporated into Congressman Murphy's bill. There was compelling expert testimony detailing the problems with the current system and how both beneficiaries and CMS are being hurt by the bureaucratic process. Overall, the hearing was a success. The SMART Act has garnered bipartisan support with thirty co-sponsors currently signed on. The next step will be for the Energy & Commerce subcommittee to hold a mark-up hearing and prepare the bill for introduction on the House floor. If the SMART Act continues to receive such a positive response, it could be the law by the end of the year. ❖

Lessons Learned: Recent Decisions Concerning Subsequent Design Changes in Product Liability Cases

by Kristin M. Moritz

The common law of Pennsylvania, like that of most other jurisdictions, embodies the common law "subsequent repairs" doctrine, which excludes evidence of subsequent remedial measures when such evidence is offered to establish fault or culpable conduct. This general rule was later codified in Pennsylvania Rule of Evidence 407 and in 2001, the Pennsylvania Supreme Court, in the landmark decision of *Duchess v. Langston Corporation,* 769 A.2d 1131, 1146 (Pa. 2001), held that this rule extends to preclude use of a subsequent design change as substantive evidence of a product defect in a strict products liability case. However, Rule 407's general prohibition is expressly inoperable in relation to remedial measures evidence offered for impeachment or to prove other controverted matters, such as ownership, control or feasibility of precautionary measures. Pa.R.E. 407.

A manufacturer or supplier of a product defending against a strict liability case is forced to argue against the inevitable claim of an alternative, safer design, while at the same time maintaining the advantage of the rule excluding evidence that an alternative design was later implemented. While the Supreme Court explained that "feasibility" is interpreted more broadly that mere technological possibility, the Court also cautioned that the exception "should be applied cautiously" to avoid the exception "overwhelming the general rule." *Duchess,* 769 A.2d at 1146. The Supreme Court recognized that the feasibility exception "has not been applied where a defendant merely suggests that an original design is acceptable, or argues about tradeoffs involved in taking precautionary measures." *Id.* The Supreme Court stated that the exception comes into play only where a party's feasibility arguments "are framed in categorical terms, are presented in the form of superlatives, or, more generally, upset the balance of fairness that Rule 407 seeks to maintain."

Accordingly, the feasibility exception has not been applied where a defendant merely suggests that an original design is acceptable, or argues about tradeoffs involved in taking precautionary measures. *Duchess v. Langston Corporation,* 769 A.2d 1131, 1146 (Pa. 2001), citing *Flaminio v. Honda Motor Company, Ltd.,* 733 F.2d 462, 468 (7th Cir. 1984); *Grenada Steel v. Alabama Oxygen Company, Inc.,* 695 F.2d 883 (5th Cir. 1983); *Tuer v. McDonald,* 701 A.2d 1101, 1113 (Md. 1997)(holding that remedial measures evidence was not admissible to impeach testimony that, at the time of the event, the measure was not believed to be as practical as the one employed). As one Court has put it, "where a defendant argues about the trade-offs involved in taking precautionary measures, it is not placing feasibility in issue." *Gauthier v. AMF, Inc.,* 788 F.2d 634, 638, amended, 805 F.2d 337 (9th Cir. 1986). The defendant remains free to defend on the ground that the suggested change, while feasible, would not have made the condition significantly safer, or would have resulted in other disadvantages such that the defendant's original conduct was reasonable. See, e.g., *Mills v. Beech Aircraft Corp.,* 886 F.2d 758, 764 (5th Cir. 1989) (revised manual, offered to show the feasibility of providing a better installation instruction, held properly excluded under Rule 407: "The feasibility exception to Rule 407 does not apply when feasibility is not in controversy. The defendants in the present case did not contest the feasibility of a better installation instruction, but rather maintained that the instructions in the [original] manual were acceptable.").

Where, however, a defendant's evidence and arguments are framed in categorical terms, are presented in the form of superlatives, or, more generally, upset the balance of fairness that Rule 407 Seeks to maintain, courts have found the exceptions applicable. *Duchess v. Langston Corporation,* 769 A.2d 1131, 1146 (Pa. 2001), citing *Wood v. Morback Industries, Inc.,* 70 F.3d 1201, 1208 (11th Cir. 1995)(holding that, where the defendant's expert described the product design using superlatives, namely, the "safest [design] you could possibly put on the machine," the plaintiff should have been permitted to impeach the expert by inquiring why the safest design possible was modified following the plaintiff's accident); *Muzyka v. Remington Arms Co.,* 774 F.2d 1309, 1313-14(5th Cir. 1985)(allowing admission of evidence of modification to a rifle's safety mechanism for impeachment, where the manufacturer's representative repeatedly characterized the original mechanism as the safest possible).

Two recent Pennsylvania cases highlight these principles. In *Jacobson v. BMW of North America,* 376 Fed. Appx. 261 (3d. Cir. 2010), Plaintiff appealed to the Third Circuit, following a Western District jury verdict in favor of Defendant BMW in a products liability lawsuit arising out of

an accident involving a 1987 BMW 325i, a two-door automatic transmission sport coupe. Plaintiff asserted that the car was defectively designed, as it should have been equipped with a Lock System. Prior to trial, BMW filed a motion in limine to exclude evidence of other car manufacturer recalls (by Nissan in 1987 and Jeep in 1994) in order to retrofit their vehicles with Lock Systems. While Plaintiff had adduced this evidence to show that it would have been feasible for BMW to include a Lock System in its vehicle at the time the 325i was manufactured, BMW asserted that it would not contest feasibility at trial. The parties agreed to a stipulation that the Lock Systems were "technologically and economically feasible" at the relevant time and the District Court therefore excluded evidence of other recalls. On appeal, the Third Circuit held that the District Court did not err in excluding such evidence, as the recalls were not admissible under Federal Rule of Evidence 407, as BMW had stipulated to feasibility. *Id.* at 264.

In *Sweitzer v. Oxmaster, Inc.,* 2011 U.S. Dist. LEXIS 21665 (E.D. Pa. 2011), Plaintiffs brought a strict liability claim against Oxmaster, relating to a 2009 incident where Plaintiff, a paste mix operator, was scraping residue inside an Oxmaster paste mixer and a mixer paddle allegedly amputate his right index finger. Prior to trial, Oxmaster filed a motion in limine seeking to preclude Plaintiff from introducing evidence of a prototype mechanical scraper which Oxmaster supplied to Plaintiff's employer after the accident. In its motion, Oxmaster argued that there was no evidence to support the proposition that the use of the prototype was feasible, and no evidence indicating that this device was tested, actually put into use, or otherwise proved to be a viable alternative to the product actually supplied. The Court held that the parties appeared to dispute the issue of feasibility. First, the Court, citing *Jacobson,* noted that Oxmaster had not made an admission that feasibility was uncontroverted. Second, the Court stated that the parties' arguments highlighted their disagreement concerning feasibility. As such, the Court denied the motion without prejudice. The case was settled the day following issuance of this District Court opinion.

Based on the differing results in these two cases, it is clear that in manufacturer defense, strategy concerning treatment of subsequent design changes and feasibility of an alternative design should be determined early in the handling of a products case where post-manufacture design changes were made to the product. Pennsylvania Courts give credence to stipulations concerning feasibility, and still generally allow manufacturers to present evidence concerning tradeoffs or argue that the design change, while feasible, would not have made the condition significantly safer, or would have resulted in other disadvantages such that the defendant's original conduct was reasonable. In situations like that of *Oxmaster,* it is crucial to develop evidence early in the case, through written discovery and deposition testimony, to show that the design change was not feasible, and therefore not relevant. In making such strategy determinations early in the case, the manufacturer can be placed in a better position to avoid the inevitable prejudicial effects following the introduction of subsequent design change evidence.

A manufacturer or supplier of a product defending against a strict liability case is forced to argue against the inevitable claim of an alternative, safer design, while at the same time maintaining the advantage of the rule excluding evidence that an alternative design was later implemented.

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states that mortgage originators can be compensated either directly by the consumer through fees or charges paid by the consumer, or by a third party (such as the lender), by not by both. It appears that these provisions will primarily affect brokers, since as the employer, the lender compensates loan officers and loan officers do not collect their compensation directly from the borrower.

Real estate professionals on the lending side need to know how this will affect the loan officers. First, a loan officer's compensation will not be able to vary based on the type of loan, the interest rate, the margin, or any other loan term, except the amount of principal. It is also important to note that this rule applies to all loan officers, whether they work for an independent mortgage company or a bank or bank-owned company. Second, there is nothing in the law that requires every loan officer to be paid the same amount as every other loan officer. Different loan officers will be able to have different compensation plans. Third, loan officers will no longer be able to gain extra compensation by bringing in a loan with a higher margin, nor will they be able to give up part of their commission by discounting the loan price to the borrower.

Violations of any of these provisions could result in claims, regulatory sanctions, criminal prosecution and possibly civil liability for mortgage bankers, brokers and any other real estate professionals involved in the transactions. The standard of care is going to be evaluated by the provisions of the Frank-Dodd Act and the resulting regulations. Real estate professionals and insurers need to keep abreast of these changes, and as the regulations from these bodies discussed are propagated, additional education will be necessary to prevent violations and claims. ❖

WAYMAN *WATCH*

Jeffrey A. Kubay was recently appointed as 1 of the 3 members of the Advisory Committee to the Creditor Trust in the Pittsburgh Hilton Hotel Bankruptcy Litigation. The Creditor Trust, through the Trustee, pursues claims of the bankruptcy debtor against third parties.

Congratulations to **Kate Fagan**, who was recently elected as a Fellow of the American College of Trial Lawyers.

Congratulations also to **Warren Siegfried**, selected as a Super Lawyer in Pennsylvania for the fourth consecutive year.

Paul Mannix has received accreditation as a LEED Green Associate by the United States Green Building Council.

For the second straight year, **Wayman, Irvin & McAuley, LLC** has been included in the **U.S. News "Best Law Firms"** rankings for 2011-12, receiving Metropolitan First Tier Ranking for its defense work in the areas of Personal Injury Litigation and Professional Malpractice Law.