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To submit ideas for articles, please contact editor Katherine Dempsey at 412-288-4003 or send her an email at kdempsey@psmn.com.

Civil Litigation Update

Pennsylvania Bar Association — Your Other Partner

Spring 2015

When Does Aggressive Advocacy Expose Lawyers to Potential Defamation Liability? Navigating the Bounds of Judicial Immunity

By Thomas G. Wilkinson Jr. and Alexa L. Sebia

Thomas G. Wilkinson Jr.

Alexa L. Sebia

You represent Mr. Big, a prominent businessman who has just been accused of assaulting a young woman in a hotel room after slipping a drug into her drink. The alleged assault occurred years ago after a political fundraiser and it was never reported to the authorities. Your opposing counsel announced at a press conference that she had filed her complaint and demonized your client for "preying" on a vulnerable girl, causing her to suffer years of post-traumatic stress and lack of self-esteem.

Your client vehemently denies any misconduct and urges you to do the same — publicly — because, "These false accusations are going to destroy my reputation and my business relationships unless we get out there and show that this lying woman is just out for my money!" You oblige by promptly issuing a press release, stating: "It is curious that this plaintiff waited years until after my client was named CEO of BIG Enterprises to falsely accuse him. Her salacious allegations lack any credibility and when this nuisance suit is over, we intend to sue her and her lawyer for frivolous litigation."

Do I have to remain silent while the other side causes irreversible harm to my client's name and business?

As you draft Mr. Big's indignant answer "vehemently" denying the allegations, you receive an amended complaint adding a count for defamation against both you and your client claiming that the remarks you made to the media impugned the plaintiff's good reputation for truth and veracity. Several questions immediately come to mind: How can I be liable for publicly repeating my client's own flat denial that he committed the assault? Do I have to remain silent while the other side causes ir-

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reversible harm to my client's name and business? Do I need to call my professional liability insurance broker to ask if I have coverage for the defamation claim? In addition to the defamation claim, you also begin to worry that your aggressive defense may get you bounced from the case. Not only are you a named party, but you also now have a simmering conflict with your client who is beginning to question the wisdom of your media strategy.

Defamation claims against lawyers who publicly criticize the credibility or impugn the motives of their opponents have received considerable attention of late, particularly when they involve high-profile celebrity clients. Such claims complicate cases and upset the valuation and risks that a case presents, more often to the detriment of the lawyer who was not anticipating having to defend him- or herself in addition to his or her client. The risks are serious, especially in a jurisdiction such as Pennsylvania that has relatively weak legal protections for lawyers who speak publicly about their cases.

What Can You Say?

Pennsylvania Rule of Professional Conduct 3.6 (Trial Publicity) instructs that "a lawyer shall not make extrajudicial statements that the lawyer knows or reasonably should know will be disseminated by means of public communication, and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Primarily to avoid tainting the prospective jury pool, lawyers are limited under the rule to making innocuous statements identifying the claims or defenses and referring to information drawn from the public record. They may also make statements reasonably required to protect a client from the "substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." Pa.R.P.C. 3.6(c). In this way, expressing opinions about the credibility of witnesses or the guilt or innocence of a criminal defendant is generally off-limits.[1] The ethics rules do not, however, define the scope of common-law judicial immunity or privilege protections afforded to lawyers who wish to speak on behalf of clients embroiled in a controversy that has garnered media attention.

Pennsylvania has a rich history of powerful politicians, lawyers and even judges pursuing and defending defamation claims arising from statements made to the media about pending cases and criminal investigations.[2] Despite this long-standing local custom of colorful invective and put-downs of the sort more commonly on display at our sporting events, the somewhat muddled law can be viewed as either protective of those with sensitive dispositions or unduly hostile to speech.

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We are not talking about the kind of online speech that might be construed to threaten violence, as the U.S. Supreme Court is poised to address in the pending Anthony Elonis[3] case involving offensive rap lyrics that the defendant directed to his wife. Rather, we consider speech that involves our cases and our clients that is intended to advance their interests, often in reply to speech that the client deems repugnant and harmful to his or her reputation or a pending case.

Where Can You Say It?

Statements made by attorneys in the regular course of judicial proceedings are absolutely privileged and therefore cannot form the basis for defamation liability. *Post v. Mendel,* 507 A.2d 351 (Pa. 1986). This privilege extends not only to communications made in open court, but also encompasses pleadings and less formal communications such as preliminary conferences and correspondence between counsel in furtherance of a client's interests. *Pelagatti v. Cohen,* 536 A.2d 1337 (Pa. Super. 1987). The privilege gives judges the freedom to independently administer the law, parties uninhibited access to the courts, and witnesses the peace of mind to give complete and unintimidated testimony without fear of reprisal through defamation actions. *Id.* at 1344; *see also Richmond v. McHale,* 35 A.3d 779 (Pa. Super. 2012).

In *Richmond*, for example, an attorney representing a plaintiff in a civil matter brought an action against the defendant's attorney in the underlying case for slander, based on accusations made during a discovery conference. 35 A.3d at 784 (noting that statements accused plaintiff's attorney of attempting to extort money from defendant). Because the statements were made during a judicial proceeding, the court held that they were absolutely privileged and thus could not form the basis of a defamation claim. *Id.* at 785.

The fact that absolute judicial immunity protects statements made by attorneys during judicial proceedings does not necessarily mean that it also protects later acts of republishing pleadings or other judicial materials to the media. In fact, the Pennsylvania Supreme Court has held that newspaper accounts of judicial proceedings and attorney remarks uttered at press conferences, even in the reiteration of privileged judicial documents, are extra-judicial communications that enjoy qualified immunity only.[4] *Barto v.*

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Felix, 378 A.2d 927 (Pa. Super. 1977). As such, newspaper articles may fairly and accurately report judicial proceedings, and counsel may remark to the press about those proceedings, provided that the statements are not made for an improper purpose or malicious motive. *Id.* at 931.

In *Barto,* a public defender represented a man convicted of murdering a young girl. After filing post-trial motions, the attorney related the contents of his brief to the media at a press conference. *Id.* at 930. The brief and his public remarks contained defamatory material about state police officers involved in investigating the murder. *Id.* The court held that absolute judicial immunity did not protect the public defender because the remarks, though mere reiterations of judicial documents, were made at a press conference and thus were outside of a judicial proceeding. *Id.* (recognizing that qualified immunity was accorded to public information relative to judicial proceedings).

[M]erely forwarding a copy of a complaint or other judicial document to the media may be enough to expose an attorney to suit.

The Pennsylvania Supreme Court further narrowed this already limited protection for lawyers by holding that merely forwarding a copy of a complaint or other judicial document to the media may be enough to expose an attorney to suit. *Bochetto v. Gibson,* 860 A.2d 67 (Pa. 2004). In *Bochetto*, a lawyer faxed a copy of a filed complaint to *The Legal Intelligencer,* which then published a story about the case and quoted some of the complaint's allegations. *Id.* at 70. Both the trial court and Superior Court held that the lawyer's delivery of a filed pleading to the media was protected by the judicial privilege. The Supreme Court disagreed, holding that the act of sending the already filed complaint to the media "was an extrajudicial act" that occurred outside of the regular course of the judicial proceedings and was not relevant in any way to those proceedings. *Id.* at 72-73. As such, the allegations were beyond the scope of the privilege.[5]

Pennsylvania's approach affords particularly limited protection to attorney communications in comparison to other jurisdictions. In New York, for example, fair and true statements made by lawyers about any judicial, legislative or other official proceeding are absolutely privileged and thus cannot serve as the basis for defamation liability.[6] Increasing the risk of exposure, the Pennsylvania Supreme Court has "expressed its doubts" about granting summary judgment on the issue of the speaker's actual malice because that issue "calls a defendant's state of mind into question and does not readily lend itself to summary judgment disposition."[7] The Pennsylvania Supreme Court has further restricted protection of attorney communications by finding that the state's Shield Law protecting newspaper sources from compelled disclosure applies only to information that would reveal a source's identity.[8]

What Can You Do to Avoid Liability?

In an age where lawsuits are frequently accompanied by press releases and media appearances, extrajudicial statements are routine, except where gag orders have been issued in criminal cases. Moreover, it seems to many that the guidance in Rule 3.6 is only honored in the breach, and that lawyers are seldom sanctioned or disciplined for public statements about their cases that exceed the permitted subjects under the rule. Thus, as Mr. Big's attorney, what can you do to counteract the harmful publicity your opponent is generating for his or her complaint while still avoiding exposure to potential defamation liability?

Know the Law

Misperceptions and lack of consistent application from state to state serve to increase liability-exposure risk to counsel. Thus, it is important to be familiar with the relevant law that applies in your jurisdiction. As a Pennsylvania attorney, you may vehemently deny any misconduct or wrongdoing on Mr. Big's behalf in an answer or other judicial proceeding without exposing yourself to defamation liability. Once outside of the judicial proceeding arena, however, you are protected only by qualified immunity for defamatory statements made to the public, even where remarks merely reiterate the contents of court filings. Qualified immunity may be lost if public statements are knowingly false or made in reckless disregard for the truth.

Understand That Informal Communications are Still Communications

Lawyers who blog about cases or use social media often fail to take concerns about defamation into account before posting. This is particularly true where there is perceived pressure to publicize victories and solicit business. Online communications are often posted quickly and may not be carefully crafted to recognize that pleadings are simply unproven contentions and should be treated as such when forwarding or describing them in blogs or other social-media postings. As such, it is important for attorneys to

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understand that even informal online communications have the potential to trigger defamation exposure.[9]

Moreover, lawyers run the risk of vitiating any protection by recirculating defamatory allegations in pleadings or by posting them on social media or legal blogs without performing any due diligence as to their veracity. Indeed, in Pennsylvania, the simple act of republishing may make it harder to get a defamation case dismissed.[10]

[I]t is important for attorneys to understand that even informal online communications have the potential to trigger defamation exposure.

Consider the Time Frame

In order to determine whether a communication is made "in the regular course of a judicial proceeding," Pennsylvania courts consider when an action is initiated and when counsel is retained. *See Woodell v. Gary A. Monroe & Assocs.,* No. 3:12-cv-474, 2013 WL 1654065, at *3 (M.D. Pa. April 16, 2013). In this way, timing is everything. In *Woodell,* for example, an attorney made defamatory statements in furtherance of what he claimed was "investigating a dispute" and "gathering information in preparation for litigation." *Id.* Citing *Bochetto,* the U.S. District Court for the Middle District of Pennsylvania emphasized that with respect to communications made prior to the institution of proceedings, all protected communications must be "pertinent and material" and issued in preparation for contemplated proceedings. *Id.* In other words, statements made before an attorney-client relationship is established or prior to initiating legal action may expose a lawyer to liability.

Be Sure that Your Client is On Board with the Message

It is important that your client is aware of and in agreement with the nature of the message being conveyed to the media, including social media, about the case.[11] Select a few clear and direct points that dovetail with your client's legal position and consistently stick to them. These talking points should be easy to remember and communicate to the media, and avoid inflammatory accusations directed to the opposing party or counsel.

Take, for example, Philadelphia criminal defense attorney Ted Simon, who represented Amanda Knox, the student accused of murdering her roommate in Perugia, Italy. Throughout the protracted trial and multiple appeals, Simon conveyed a consistent and clear message to the media: There is insufficient evidence to convict. This key theme was repeated frequently to the public to drive home the defense's legal position and influence public opinion.

Know When to Keep a Low Profile

It is a scientific fact (for which we cannot cite any scientific support) that many are willing to believe the most scurrilous accusation about a high-profile person, whether it concerns infidelity, misuse of alcohol or drugs or other misbehavior. And it is another well-known fact that media consultants and pundits counsel that silence in the face of such accusations will be accepted as ineffective or, worse, as an admission of guilt.[12] While quick and complete denials of allegations may appear necessary, however, there are certain instances where silence is beneficial. For example, silence may encourage settlement and avoid inciting the other side to both repeat and to "ramp up" its media campaign. Thus, it is wise to avoid lodging accusations that will only serve to spark more aggressive public statements from the opposition and further vilify your client.

This was the case surrounding the highly publicized arrest of Chris Brown in 2009. Notwithstanding the media crush soliciting comment from Brown's camp, his attorney Mark Geragos realized that a media blitz would likely anger the judge and discourage the prosecutor from negotiating a plea bargain.[13] Geragos also knew that because the case was not likely to proceed to trial, there was no potential jury pool to taint. Thus, despite the fact that the media published many false rumors surrounding the incident and his client, Geragos opted to refrain from "spinning" his client's position in the media and quietly struck a plea deal.

Be Familiar with Your Professional Liability Insurance Policy

Lawyers handling cases that may draw media interest or who use social media to post about legal matters should familiarize themselves with the scope of coverage available under their professional liability insurance policies. Most policies provide coverage for defamation claims arising from a lawyer's representation of clients, but may not extend to protect against the lawyer's witty but snarky commentary about cases and parties via social media. Some policies also do not extend such defamation coverage to punitive damages.

Speaking Out May Lead to Exposure for Defamation

It is natural to want to criticize an accuser as a liar out for money or engaged in a scheme to extort an unwarranted settlement. Consider

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Harvard Law professor emeritus Alan Dershowitz, who threatened to sue former federal judge Paul Cassel and his co-counsel for defamation for linking him to a sex-trafficking scandal involving a high-profile convicted pedophile. Instead of waiting for the salacious allegations to be debunked in court, Dershowitz went on the offensive, appearing on multiple talk shows and labeling himself the "innocent victim of an extortion conspiracy." Dershowitz went as far as to demand that Cassel be disbarred for filing his petition without adequately fact-checking his client's accusations first. In response to this aggressive media strategy, Cassel and his co-counsel brought their own suit for defamation against Dershowitz. While Dershowitz may welcome the opportunity to litigate and take discovery in his defense, most lawyers would prefer to avoid getting mired in collateral litigation over their public statements.

A Few Words (On the Record)

Aggressive advocacy outside the confines of the courthouse may trigger potential defamation exposure for lawyers and their clients, even for lawyers who simply circulate filed pleadings to reporters or accurately summarize them via social media. Even in an age where lawsuits are often accompanied by press releases, media appearances and blog postings, extrajudicial statements made by attorneys lack immunity from liability, at least in Pennsylvania. Lawyers being urged by a client to take allegations to the media should pause and consider the ethical and defamation-exposure implications of public statements, even when a lawyer believes the facts stated to be supported by credible evidence and to be essentially duplicate allegations in privileged court filings. Thus, any media strategy should include taking appropriate steps to ensure that communications made through either the more traditional media outlets or via social media comply with the governing ethics guidance and do not create collateral defamation exposure for the lawyer or the client.

Aggressive advocacy outside the confines of the courthouse may trigger potential defamation exposure.

1 *See* Pa.R.P.C. 3.6, Cmt. [5].

2 *See, e.g., Curran v. Philadelphia Newspapers, Inc.,* 439 A.2d 652 (Pa. 1981) (former U.S. Attorney's libel action against publisher of newspaper article concerning his resignation); *Sprague v. Jill Porter, et al.,* No. 1649 EDA 2013, 2014 Pa. Super. LEXIS 4360 (Pa. Super. Aug. 26, 2014) (prominent attorney's libel suit concerning column critical of lawyer's testimony in former state senator's public corruption trial); *Smith v. Wagner,* 588 A.2d 1308 (Pa. Super. 1991) (county official's defamation action against newspaper after official was branded as liar, thief and crook).

3 See *United States v. Elonis,* 730 F.3d 321 (3d Cir. 2013), cert. granted, 134 S. Ct. 2819 (2014).

4 Qualified immunity does not protect an attorney who publishes defamatory statements knowing them to be untrue or in reckless disregard of the truth. *See Purcell v. Westinghouse Broadcasting Co.*, 191 A.2d 662 (Pa. 1963). If a lawyer enjoys absolute immunity, on the other hand, he or she is protected irrespective of the care or knowledge accompanying the publication.

5 Justices Castille and Eakin dissented, noting "no principled distinction" between the lawyer giving the publicly filed complaint to a reporter and the reporter obtaining a copy at the courthouse. *See* Note, "Zealous Representation: An Examination of Judicial Privilege, the First Amendment, and Attorneys' Statements to the Media," *The Review of Litigation,* Vol. 25:1 at 247, 250 (Winter 2006)(contending that duty to advance client's interests may include garnering media exposure by sending filed pleadings to a reporter).

6 N.Y. Civ. Rights Law § 74 (McKinney 1992); *see also Katz v. Lester Schwab Katz & Dwyer, LLP,* 2014 N.Y. Slip Op. 33202(U) (N.Y. Dec. 4, 2014). In *Katz*, an expert defense witness brought a defamation suit against attorneys for publicly identifying him as a liar in a legal blog. The blog accused the expert of repeatedly lying during judicial testimony and falsely mischaracterizing the results of independent medical examinations. The court held that the expert's complaint failed to state a cause of action for defamation because the posts concerned fair and true statements about judicial proceedings and thus were absolutely privileged under Section 74 of the Civil Rights Law.

7 *Weaver v. Lancaster Newspaper, Inc.*, 926 A.2d 899 (Pa. 2007) (republication may support actual malice finding); *see also* K. Allen, "Delimiting Defamation: Pennsylvania Supreme Court Protects Reputation From Freedom of Speech Defense," *The Philadelphia Lawyer* (Summer 2008).

8 *See Castellani v. Scranton Times, L.P.,* 956 A.2d 937, 949-50 (Pa. 2008) (emphasizing that media defendants in defamation case are not protected by Shield Law where defamed plaintiff seeks information which would not reveal source's identity and declining to compel disclosure of newspaper source where source itself constitutes criminal act).

9 *See Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Development Inc.,* No. 0425, 2006 LEXIS 1 (Pa. Com. Pl. Jan. 4, 2006) (noting that online comments made on websites and social media may contain material that is defamatory per se). For a discussion of the tension between a lawyer's First Amendment right of free speech in social media and client confidentiality, *see* J. Jacobowitz & K. Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media,* 36 Campbell L. Rev. 75 (2014); *see also* E. Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment,* 47 Emory L.J. 859, 863 (1998).

10 *Weaver, supra,* 875 A.2d at 905-07.

11 *See* Pa.R.P.C. 1.6(a) (lawyer shall not reveal information relating to client representation unless client gives informed consent).

12 Mark Geragos & Pat Harris, Mistrial 219 (2013).

13 *Id.* at 232.

To Call, or Not to Call —
Dilemma Created by Unfavorable Expert Report

By Daniel E. Cummins

There are times when a defendant in a civil litigation matter secures a report from a medical expert after an independent medical examination (IME) of a plaintiff in which the defense-retained expert confirms that the plaintiff did indeed sustain some form of injury as a result of the subject accident.

The Pennsylvania Rules of Civil Procedure require that all such reports be produced to opposing counsel. However, in such cases, the defendant is faced with the dilemma of whether or not to admit this expert report into evidence and/or to call the defense expert as a witness at trial by videotape deposition or as a live witness.

In some cases where a plaintiff or his or her claim lacks credibility the defendant may decide not to present the expert opinion of the defense-retained medical doctor and, instead, attack the plaintiff's case through cross-examination of the plaintiff and the plaintiff's expert, along with a challenge as to whether or not the plaintiff has met his or her burden of proof on the injuries and damages claims presented.

An issue then arises as to whether or not the plaintiff may call the defense medical expert as a witness in favor of the plaintiff's case.

Nearly 100 Years of Jurisprudence

As noted by Judge R. Stanton Wettick in his decision in the case of *Howard v. Port Authority of Allegheny County,* 8 Pa. D. & C. 4th 241, 245 (Allegh. Cnty. C.P. 1990), "[s]ince at least 1918, Pennsylvania has recognized a privilege which protects experts who have no personal knowledge of the factual issues of the lawsuit from testifying in private civil litigation against their will." In recognizing this rule, Judge Wettick cited *Pennsylvania Co. For Insurances on Lives and Granting Annuities v. City of Philadelphia,* 105 A. 630 (Pa. 1918), *Evans v. Otis Elevator Co.,* 168 A.2d 573 (Pa. 1961), and *Williams v. South Hills Health System,* 24 Pa. D. & C. 3d 206 (Allegh. Cnty. C.P. 1981).

As Judge Wettick noted, the rationale behind this rule is that when an expert witness must spend additional time on the matter serving as a witness in the court proceedings, that witness is inconvenienced and must take away time from his or her own employment.

Another recognized basis for this rule is an "an acknowledgement of an expert's proprietary interest in his [or her] own opinion, and the recognition that he [or she] should not be required to relinquish it without his [or her] consent." *Boucher v. Pennsylvania Hospital*, 831 A.2d 623, 632 (Pa. Super. 2003).

Stated otherwise, the courts have ruled that "[T]he private litigant has no more right to compel a citizen to give up the product of his brain, than he has to compel the giving up of material things. In each case, it is a matter of bargain, which, as ever, it takes two to make, and to make unconstrained." *Boucher,* 831 A.2d at 632.

Daniel E. Cummins

Other Pennsylvania court decisions that have ruled along the same lines include *Columbia Gas Transmission Corp. v. Piper*, 615 A.2d 979, 982-83 (Pa. Commw. 1992); see also *Spino v. John S. Tilley Ladder Co.*, 671 A.2d 726, 739 (Pa. Super 1996), *aff'd*, 696 A.2d 1169 (Pa. 1997).

Nothing is Free

This is not to say that the plaintiff is entirely precluded from calling a defendant's expert witness on behalf of the plaintiff under the subpoena powers granted by the court. Rather, the plaintiff retains that right but the Pennsylvania courts have held that the expert is entitled to be compensated for his or her time and opinion and, if the plaintiff is not willing to pay that compensation, the expert cannot be compelled to testify against his or her will.

As Judge Wettick noted in the *Howard* case, *supra*, a party may subpoena a witness and, under such subpoena, the amount of compensation and expenses that shall be paid to that witness served with the subpoena to testify in the court proceeding is governed by 42 Pa. C.S.A. § 5903. That statute provides for a witness-fee per day as well as travel expenses in terms of mileage.

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Daniel E. Cummins is an insurance defense attorney with the Scranton law firm of Foley, Comerford & Cummins. He was selected as the Pennsylvania Defense Institute's 2014 Distinguished Defense Counsel of the Year. He also has a civil litigation column with the Pennsylvania Law Weekly *and is the creator and writer of the nationally honored Tort Talk blog (www.TortTalk.com).*

To Call, or Not to Call *Dilemma Created by Unfavorable Expert Report*

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However, Judge Wettick reiterated that experts cannot be compelled to testify without receiving an expert-witness fee under this rule because 42 Pa. C.S.A. § 5903(a)(1) states that the provisions of this statute do not affect "[t]he right of a witness who gives expert testimony to receive additional per diem compensation therefore."

In a different scenario though, where the deposition for trial of the defendant's expert has been completed, a defendant may not thereafter preclude a plaintiff from utilizing that deposition at trial. Under Pa. R. C. P. 4020(a)(5), any party may use that deposition for any purpose at trial. *See also Wiley v. Snedaker*, 765 A.2d 816 (Pa. Super. 2000). The rationale behind that rule is that, in such cases, the defense made the witness available, the expert freely testified and his or her testimony thereby became available for use by either party.

In addition to jury trials, this particular issue has arisen at compulsory arbitration and at jury trials on appeal from an arbitration under which the plaintiff elects to cap his or her damages in exchange for the right to proceed to the jury trial by way of documents alone in lieu of live testimony from expert witnesses as a cost-saving measure. Such a procedure proceeding by documents alone is authorized under Pa. R. C. P. 1305 and 1311.1.

Judge Wettick's decision in the *Howard* case stands for the same proposition that these rules apply to the arbitration setting, as well as an appeal from an arbitration, with equal force. Accordingly, where a plaintiff is proceeding on documents alone at an arbitration or a Rule 1305, 1311.1 trial, a plaintiff cannot introduce the defendant's expert reports over the objection of the defendant unless the plaintiff secures the consent of the defendant's expert to do so and pays the expert for the time associated with the opinion.

Other Avenues

Where a plaintiff has been frustrated in his or her inability to use a favorable expert report from the defense side, the plaintiff may attempt other avenues to bring that evidence before the fact-finder.

For example, a plaintiff may assert that he or she is nevertheless still entitled to inform the jury through his or her own testimony that he or she attended an IME at the referral of the defense attorney. A plaintiff may also assert that he or she is entitled to an adverse-witness jury instruction on the basis that the defendant originally identified the defense expert as a potential trial witness and, thereafter, changed strategy and declined to call that expert as a witness. While such arguments can be attempted, it is noted that both of these efforts have been rebuffed by the courts of Pennsylvania.

In the case of *Gloffke v. Robinson*, 812 A.2d 728 (Pa. Commw. 2002), the court noted that the general rule that the decision on whether to tell the jury that an adverse inference may be drawn from a failure of a party to produce some circumstance, witness or document lies within the broad discretion of the trial court and will not be reversed absent a manifest abuse of that discretion.

With respect to an adverse inference being allowed, the *Gloffke* court went on to note that the general rule is that "where evidence which would properly be part of a case is within the control of the party in whose interest it would naturally be to produce it, and, without satisfactory explanation he [or she] fails to do so, the jury may draw an inference that it would be unfavorable to him [or her]." 812 A.2d at 734, *quoting Clark v. Philadelphia College of Osteopathic Medicine*, 693 A.2d 202, 204 (Pa. Super. 1997), *quoting Haas v. Kasnot*, 92 A.2d 171, 173 (Pa. 1952).

Lehigh County Judge Edward D. Reibman addressed this issue in greater detail in the more recent case of *Purta v. Blower and Erie Insurance Exchange*, No. 2010-CV-2515 (Lehigh Cnty. C.P. Feb. 6, 2012). In that case, Judge Reibman stated that there was no error in precluding the plaintiff from testifying about the mere fact that she had been examined by a defense expert. The court ruled that "[n]othing probative of the issues of negligence and causation arise from that fact …" and as such, such information was not relevant and therefore not admissible.

Judge Reibman additionally ruled in *Purta* that the prerequisites for an adverse-inference instruction were not met as a result of the defendant's decision not to call the IME doctor as a witness. *Citing O'Rourke v. Rao*, 602 A.2d 362, 364 (Pa. Super. 1992). The court noted that the "missing witness rule is inapplicable if the 'witness is equally available to both sides of the litigation.' " As such, Judge Reibman found that there was no basis to offer an adverse-inference instruction to the jury.

Conclusion

Overall, while it appears that the defense can preclude any efforts by a plaintiff to unilaterally utilize a defense-expert report, the plaintiff retains the right to pay the defense expert for use of the report and/or the expert's opinion at trial. As such, while in most cases an unfavorable expert report can be shielded from coming to light at a trial or hearing, such a report will, in most cases, still serve as an impetus to get the case settled before it ever reaches that stage.

Judge Gerald McHugh Remarks at Philadelphia Regional Dinner — Vocation of a Judge

By Kathleen Wilkinson

On March 12, the Section welcomed Judge Gerald A. McHugh of the U.S. District Court for the Eastern District of Pennsylvania as the keynote speaker at a well-attended Regional Section Dinner at the Four Seasons Hotel in Philadelphia.

Gerald A. McHugh

Kathleen Wilkinson

In 2013, Judge McHugh helped the bar during the 50th anniversary of the *Gideon v. Wainwright* decision, in urging the establishment of a right to counsel in civil cases involving basic human needs. He lined up Sen. Stewart Greenleaf to conduct statewide hearings to establish the need to recognize "Civil Gideon." McHugh has been recognized as a champion for justice in the public-interest community. Against this background, McHugh discussed his first year as a judge interacting with his law clerks (who he referred to as the "young Jedi" — a la "Star Wars"), listening to other judges and working with the bar. He gave examples of his clerks trying to find law that might be on point, and concluding that the court has substantial discretion in many cases. McHugh fervently believes judges "want to get it right" — yet at the same time have to balance a sense of fairness with legal precedent.

Growing up in West Philadelphia, and graduating from St. Francis de Sales School, McHugh went on to St. Joseph's Prep, where he was introduced to volunteer work with the Community Service Corps. At St. Joseph's College, majoring in theology, he volunteered as a tutor at the former Holmesburg Prison.

McHugh has been recognized as a champion for justice in the public-interest community.

Following graduation from Penn Law School, he clerked for Judge Alfred L. Luongo and Judge Edmund B. Spaeth, learning from them the importance of treating every litigant as you yourself would want to be treated. McHugh was a partner at Raynes McCarty before being appointed to the federal bench. He was a board member and president of the Philadelphia Bar Foundation, which funds legal assistance to the poor, and past president of the statewide Pennsylvania Legal Aid Network (PLAN).

McHugh gave a wonderful presentation with great observations that were very well received by those in attendance.

Kathleen Wilkinson is a partner at Wilson Elser Edelman & Dicker LLC and council member of the Civil Litigation Section; kathleen.wilkinson@wilsonelser.com.

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Opinions from the Pennsylvania Courts

Peggy M. Morcom, Pennsylvania Case Notes Editor

SUPREME COURT

Supreme Court Holds That the First Manifestation Rule, Set Forth in *D'Auria v. Zurick Insurance*, 507 A.2d 857 (Pa. Super. 1986), is Applicable When the Bodily Injury or Property Damage Becomes Reasonably Apparent

In *Penn Nat'l. Mut. Cas. v. St. John*, 106 A.3d 1, 86 MAP 2012 (Pa. Dec. 15, 2014) (opinion by Baer, J.) (dissenting opinion by Saylor, J.), the Pennsylvania Supreme Court reviewed the applicability of the "multiple-trigger" theory of liability-insurance coverage previously adopted in the context of asbestos litigation, ongoing and progressive property damage to trigger all policies in effect from the time of exposure to the harmful condition to the manifestation of the injury.

The underlying facts involved the insureds' expansion of their dairy herd and milking facility, an unknown defect performed by a plumbing company and the effect of work performed by a subcontractor, which eventually led to contaminated water being provided to the farm's herd of milking cows.

The dispute involved which of several insurance policies were implicated for coverage under the facts presented. The insureds argued that coverage should be triggered under all policies in existence from the time of the exposure to the harmful condition until the manifestation of the injury. The insurance carrier argued the policy of insurance that was in effect when the injury first manifested was applicable.

At the trial court level, the court held the "multiple-trigger" theory of liability inapplicable given that the Pennsylvania appellate courts have decided to apply the theory outside of latent disease cases, such as asbestosis or mesothelioma. The court reasoned that because the sustained damage did not lay dormant for an extended period of time, the first-manifestation rule determined the applicable coverage, thereby holding that the damage to the dairy herd was a single occurrence that stemmed from a single negligent act. On appeal, the Superior Court affirmed the lower court's ruling (divided panel).

After review, the Supreme Court affirmed the lower court's decision and held that coverage is triggered only under the policy that was in effect when the bodily injury or property damage becomes "reasonably apparent." In so ruling, the court applied the "first-manifestation" rule, set forth in *D'Auria v. Zurick Insurance*, 507 A.2d 857 (Pa. Super. 1986), to determine the triggering of liability coverage.

The Court declined to apply the "multiple-trigger" theory of liability insurance coverage to this set of facts. The Court also declined to align Pennsylvania with the 3rd Circuit and the authority from other jurisdictions, applying the multiple-trigger theory of liability insurance for all cases involving "continuous, progressive property damage over successive policies."

Peggy M. Morcom

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Retaining Counsel Insufficient to Constitute "Ascertainable Loss" to Bring Private Cause of Action Under UTPCPL

In *Grimes v. Enterprise Leasing Company of Philadelphia, LLC*, 105 A.3d 1188, 4 MAP 2014 (Pa. Dec. 15, 2014) (per curiam), the Pennsylvania Supreme Court determined that costs associated with retaining counsel to bring an action under the Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. § 201-1 *et seq.*, did not constitute an "ascertainable loss" under the act, thereby enabling the party to bring a private cause of action.

This action arose as a result of a rental car agreement that provided that the plaintiff-appellee would pay for any damage to the vehicle incurred during the rental period, including loss of use and diminution in value.

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The contract also contained a power of attorney clause that authorized Enterprise to request payment for such damages directly from the renter's insurance carrier or credit card company.

When plaintiff returned her rental car, she was informed she was responsible for a scratch on the car and billed $840.42. Plaintiff thereafter retained counsel and filed a six-count complaint against Enterprise, including a claim for damages under the UTPCPL's "catch-all" provision. 73 P.S. § 201-2(4)(xxi). Enterprise filed a counterclaim for its damages, then subsequently moved for judgment on the pleadings.

Enterprise stipulated it would cease its collection efforts and file a praecipe to discontinue its counterclaims if the court ruled in its favor, which the trial court did, finding plaintiff failed to establish that she suffered any pecuniary loss. The UTPCPL provides a private cause of action for any individual who, because of a violation of the act, suffers "any ascertainable loss of money or property, real or person." 73 P.S. § 201-9.2(a).

On appeal, the Superior Court reversed, finding that plaintiff had sufficiently pleaded an "ascertainable loss." Namely, the threat to collect the money due, coupled with the plaintiff's hiring counsel to file suit were sufficient to satisfy the "ascertainable loss" requirement. The Superior Court also stated that the UTPCPL should be liberally construed to further the legislative intent of protecting consumers.

The Pennsylvania Supreme Court granted Enterprise's petition for allowance of appeal to consider the issue of whether a plaintiff suffers "ascertainable loss" when she voluntarily hires an attorney and allegedly incurs litigation expenses to challenge allegedly wrongful conduct, even when plaintiff has paid no money to the defendant.

Enterprise argued that merely retaining an attorney to commence suit was insufficient and that if such a proposition was allowed, anyone could meet the "ascertainable loss" requirement simply by hiring counsel, even when they suffered no actual loss of money or property. Plaintiff responded that the attorneys' fees were the direct result of the wrongful act. She also argued the UTPCPL provides for costs and attorneys' fees so that consumers who suffer even a small loss can bring a claim.

On review of the order granting judgment on the pleadings, the Court determined plaintiff never pleaded a loss of money or property. In fact, it found she admitted in her answer that she never paid anything to Enterprise. Further, the Court noted that she did not plead that the unpaid bill alone satisfied the "ascertainable loss" requirement. Nor did she plead that the mere retention of counsel was sufficient.

Even if plaintiff had made such averments, the Court concluded that the mere acquisition of counsel would have been insufficient to satisfy the "ascertainable loss" requirement. In making this conclusion, the Court examined the statute and found its plain language precluded plaintiff from prevailing. First, it noted that the fact that the UTPCPL permits attorneys' fees was not dispositive. Rather, it found the award of attorneys' fees was a separate and distinct remedy from "ascertainable loss[es]." As a result, plaintiff's interpretation was not reasonable or the result intended by the General Assembly. Second, the Court rejected plaintiff's argument that the act was weakened; finding that the attorney general or district attorney had the power to bring actions to protect the public's interest. Moreover, individuals who satisfied the "ascertainable loss" requirement could still bring their own private actions. Next, it rejected plaintiff's argument that Enterprise's stipulation to dismiss should mandate a different result, finding the fact remained that plaintiff failed to sufficiently plead "ascertainable loss." Lastly, it looked to other jurisdictions that had similar provisions and found those states also did not permit fees incurred to retain counsel to be included in the calculation of "ascertainable loss." As a result, the Supreme Court reversed the Superior Court.

— Contributed by Jaime S. Bumbarger, McQuaide Blasko, State College, jsbumbarger@mqblaw.com.

Pennsylvania Supreme Court Affirms Extrapolation of Damages Evidence in Wage and Hour Class Action

In *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656, 32 EAP 2012 (Pa. Dec. 15, 2014) (per curiam), the Supreme Court of Pennsylvania affirmed a nine-figure judgment against Wal-Mart and Sam's Club (referred to collectively herein as "Wal-Mart") for wage and hour violations. At trial, the jury found in favor of a class of employees and the trial court entered judgment for $187,648,589. On appeal, the Superior Court generally upheld the award, subject to correction of a mathematical error and recalculation of attorney's fees. Wal-Mart appealed to the Supreme Court arguing that it was inappropriately subjected to a "trial by formula" and the plaintiff-appellees "were thereby improperly relieved of their burden to produce class-wide common evidence on key elements of their claims."

The employees "asserted that Wal-Mart had promised them paid rest and meal breaks, but then had forced them, in whole or in part, to miss breaks or work through breaks, and also to work 'off-the-clock,' i.e., to work without pay, after a scheduled shift had con-

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cluded." A 187,979-member class consisting of Pennsylvania Wal-Mart employees from March 19, 1998, to December 27, 2005, filed claims for breach of contract, unjust enrichment and violations of the Pennsylvania Wage Payment and Collection Law (WPCL) and Pennsylvania Minimum Wage Act (PMWA).

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), the U.S. Supreme Court held that a class of plaintiffs could not establish liability for a subset of employees and then extrapolate that finding to the rest of the class (i.e., a "trial by formula"). However, in *Braun*, the class established liability using "Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits" demonstrating "an extensive pattern of discrepancies between the number and duration of breaks earned and the number and duration of breaks taken."

The Pennsylvania Supreme Court upheld the extrapolation of damages to the class as a whole, where liability was established by evidence of class-wide violations. The employees established damages through "data and analysis from Wal-Mart's own business records, including time clock and cashier log-in data." The Court also noted a "relaxed burden of proving damages" in wage and hour cases that involve record-keeping violations. The Court therefore rejected Wal-Mart's argument that it had been subjected to a "trial by formula" relieving the plaintiff-appellees of their obligation to produce common evidence on key elements of their claims. The Supreme Court affirmed the judgment of the Superior Court.

Judge Saylor filed a dissenting opinion. "[T]he Appellee class was permitted to effectively project the anecdotal experience of each of six testifying class members upon 30,000 other members of the class at large." Judge Saylor stated that the extrapolation of damages "would never hold up to peer review as a matter of science" and should therefore not be relied upon for such a large class-action verdict.

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SUPERIOR COURT

Superior Court Determines That Former In-House Counsel of Defunct Companies Cannot Properly Invoke Attorney-Client Privilege

In *Red Vision Systems, Inc. et al. v. National Real Estate Information Services, L.P. et al.*, 108 A.3d 54, 416 WDA 2014 (Pa. Super. Jan. 13, 2015) (Opinion by Strassburger, J.), the Pennsylvania Superior Court faced an issue of first impression in the Commonwealth of Pennsylvania. Namely, the court was asked to determine whether former in-house counsel for three defunct companies could properly invoke the attorney-client privilege for purposes of shielding from discovery documents concerning the companies' disposition of assets. The court answered this question in the negative.

Plaintiffs filed their complaint in the Court of Common Pleas of Allegheny County, alleging that defendants failed to pay invoices for professional services totaling more than $500,000. Plaintiffs then learned that each of the defendant companies was defunct and/or dissolved. Plaintiffs also suspected that the defendants transferred substantial assets to other entities in order to avoid paying creditors.

In order to obtain information relating to the disposition of defendants' assets and to identify possible sources of recovery, plaintiffs filed a notice of intention to serve defendants' former in-house counsel, Thomas K. Lammert Jr. (Lammert), with a subpoena to attend and testify. The subpoena also required Lammert to produce documents related to the identification of defendants' management personnel and insurance coverage, as well as any transfer of defendants' assets.

Lammert filed a motion to quash the subpoena on grounds that many of the requested documents were protected by the attorney-client privilege, or would require the disclosure of sensitive information of third parties subject to non-disclosure agreements. Lammert also argued that he would incur undue burden and expense in reviewing and categorizing the documents, which were electronically-stored. Plaintiffs contested the motion.

The trial court, by way of an opinion and order entered by Judge R. Stanton Wettick Jr., denied Lammert's motion to quash because: 1) the attorney-client privilege did not protect defendants' documents since the defendants no longer existed and had no interests in need of protection; 2) Lammert would not violate any non-disclosure agreements by producing documents pursuant to a court order limiting the use of confidential information; and 3) because Lammert need not concern himself with privilege or confidentiality issues, he could "blindly turn over" the documents without any sort of burdensome review.

Lammert filed a notice of appeal with the Superior Court. In a unanimous opinion authored by Senior Judge Eugene B. Strassburger III and joined by Judges Kate Ford Elliott and Cheryl Lynn Allen, the Superior Court first considered whether the trial court's interlocutory discovery order was immediately appealable as a collateral order under Pa.R.A.P. 313.

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After applying the collateral-order test, the court determined that the issue concerning attorney-client privilege was of such import as to be immediately appealable. The issues regarding the alleged violation of non-disclosure agreements and the undue burden placed on Lammert in producing documents did not satisfy the collateral order test and, as such, the court declined to exercise jurisdiction over those issues.

Turning to the issue of first impression concerning the attorney-client privilege, the Superior Court held that "the communications between a corporation or other business entity and its attorney remain subject to the attorney-client privilege after the company dissolves and/or ceases normal business operations *so long as the company retains some form of continued existence evidenced by having someone with the authority to speak for the 'client.'*" (emphasis added).

Because the defendants ceased operations without some form of continued existence evidenced by having someone with the authority to speak for them, the Superior Court affirmed the trial court's order and found that the attorney-client privilege "does not prevent Lammert from disclosing defendants' communications."

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Superior Court Holds Consolidation of Two Separate Actions Does Not Affect Interlocutory Nature of Order

In *Malanchuk v. Sivchuk*, 106 A.3d 789, 1379 EDA 2012 (Pa. Super. Dec. 17, 2014) (Opinion by Ford Elliott, P.J.E.), the Pennsylvania Superior Court under took *en banc* review to determine whether it had jurisdiction over an interlocutory appeal taken in a consolidated case with a single plaintiff asserting identical claims against two different defendants. The court held that the consolidation of the two separate cases did not affect the interlocutory nature of the order in question, rendering it unappealable.

Appellant in *Malanchuk* filed actions to recover damages for injuries he sustained when he fell from scaffolding while working on a construction site. He filed an action against the owner of the site, asserting negligence and products liability claims, and a second action against the contractor for the project asserting the same claims. The actions were thereafter consolidated by an order of court.

The trial court granted summary judgment in favor of the owner on the products-liability claim, but denied summary judgment on the negligence claim because the owner did not qualify as a statutory employer under the Pennsylvania Workers' Compensation Act. The trial court granted summary judgment as to all claims asserted against the contractor. Appellant then appealed the order, but did not file a petition seeking permission to appeal under Pa.R.A.P. 312.

On appeal, the Superior Court determined that the order was not a final order under Pa.R.A.P. 341(c) because it did not dispose of all claims and parties. The court further noted that appellant failed to file a petition seeking permission to appeal the interlocutory order under Pa.R.A.P. 312. Accordingly, the court determined that it did not have jurisdiction to hear the appeal.

Appellant argued that the order was final as to the contractor because it ended all litigation as to that defendant. In doing so, he relied upon *Kincy v. Petro*, 2 A.3d 490 (Pa. 2010) for the proposition that while actions may be consolidated under Rule 213(a), complete consolidation may only occur where the actions involve the same parties, subject matter, issues and defenses. Appellant contended that his cases retained separate identities because they involved different defendants.

The Superior Court was not persuaded by this argument. The question before the *Kincy* court was whether complaints filed by separate plaintiffs could be merged after the statute of limitations expired. The Superior Court emphasized that the key to understanding *Kincy* was that the statute of limitations had expired by the time the cases were consolidated. If a complete merger of the cases were permitted in *Kincy*, it would have effectively permitted an amendment of the complaint to include a new cause of action, thereby creating a loophole in the statute of limitations. The Superior Court determined that *Kincy* was distinguishable on its facts as the instant case involved one plaintiff asserting the same claims against different defendants. The court further noted that *Kincy* never addressed appealable orders.

The Superior Court found no reason to treat the interlocutory summary judgment order any differently simply because appellant commenced separate actions against the defendants, which were later consolidated under Rule 213(a). The court held that consolidation of the actions had no effect on the interlocutory nature of the order before it. The Superior Court was therefore without jurisdiction to hear the appeal and quashed it as interlocutory.

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Pennsylvania Federal Business Decisions

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Third Circuit Permits Enforcement of Forum Selection Clause by Non-Signatories Against Non-Signatories

In a recent precedential decision, the 3rd U.S. Circuit Court of Appeals addressed whether non-signatories to a contract containing a forum-selection clause could enforce the clause against non-signatories to the same contract. The court answered this question affirmatively.

Carlyle Investment Management, LLC, et al. v. Moonmouth Company, S.A., et al., 779 F.3d 214 (3d. Cir. Feb. 25, 2015), involved an investment dispute between multiple plaintiffs and multiple defendants, several of whom had entered into contracts containing forum-selection clauses. Despite the fact that fewer than all parties had signed the subject contracts, the court held that the forum-selection clause was enforceable. In support of its holding, the court generally focused on the close relationship that existed between the signatories and the non-signatories, who were either affiliated companies or directors or officers of the signatories. Additionally, the court took a broad view of whether the non-signatories claims arose out of the contracts containing the forum-selection clause, electing to enforce the clause even though the claims actually arose out of subsequent contracts.

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Third Circuit Holds That Allstate Insurance Company Did Not Violate Federal Anti-Retaliation Laws in Lawsuit Brought by EEOC

In *EEOC v. Allstate Ins. Co.*, 778 F.3d 444 (3d Cir. Feb. 13, 2015), the 3rd U.S. Circuit Court of Appeals affirmed summary judgment in favor of Allstate Insurance Company (Allstate), determining that Allstate did not violate federal anti-retaliation laws by requiring its employee agents to sign a release that waived existing legal claims in order to receive unearned post-termination benefits. The Equal Employment Opportunity Commission (EEOC) had filed a lawsuit against Allstate, alleging violations of federal anti-retaliation laws relating to the termination of approximately 6,200 Allstate employees.

During a reorganization of its business in 1999, Allstate decided to terminate the at-will employment contracts of approximately 6,200 sales agents and offer them the opportunity to work as independent contractors. Employees were offered four options: "1) conversion to independent contractor status (the Conversion Option); 2) $5,000 and an economic interest in their accounts, to be sold by September 2000 to buyers approved by Allstate (the Sale Option); (3) severance pay equal to one year's salary (the Enhanced Severance Option); or 4) severance pay equal to 13 weeks' pay (the Base Severance Option)." Employees who chose the Conversion Option were 1) offered a bonus of at least $5,000; 2) not required to repay any office-expense advances; and 3) acquired transferable interests in their business two years after converting. In addition, employees who chose any of the first three options were required to sign a release of all legal claims against Allstate relating to their employment or termination, including discrimination claims arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). However, this release did not cover future claims or bar employees from filing charges with the EEOC, rather it only covered those claims accruing up to the time the employees signed the release. Thousands of employees accepted the Conversion Option.

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Several former employees filed individual and class-action suits, seeking to invalidate the release and alleging discriminatory discharge, retaliation, ERISA violations, breach of contract and breach of fiduciary duty. The EEOC also filed an action, seeking a declaratory judgment that "Allstate illegally retaliated against its employee agents by allowing them to continue their careers with the company only if they waived any discrimination claims."

Following an appeal and upon remand, the district court granted partial summary judgment in Allstate's favor but determined a trial was necessary to evaluate whether the release was signed knowingly and voluntarily and whether the release was unconscionable. The district court then granted summary judgment in Allstate's favor on the EEOC's retaliation lawsuit. The district court reasoned that Allstate's requirement that employees choosing the Conversion Option waive their legal claims "was not facially retaliatory because the policy did not discriminate on the basis of any protected trait, and that Allstate had not specifically retaliated against agents who spurned the Release because, among other reasons, refusing to sign a release did not constitute 'protected activity' under the anti-retaliation statutes."

To establish a prima facie case of illegal retaliation, the following must be shown: "1) protected employee activity; 2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and 3) a causal connection between the employee's protected activity and the employer's adverse action." The EEOC argues that Allstate unlawfully retaliated against its employees in that the release failed to fall within the well-established rule that employers can require release in exchange for post-termination benefits. According to the EEOC, Allstate's conduct was also *per se* retaliatory because it "withheld a privilege of the employees' employment — the offer in the conversion option to continue their careers as Allstate agents — if they refused to release all their claims." Finally, the EEOC argued that by denying employees the option to continue their employment at Allstate as independent contractors unless they signed, the release constituted an adverse employment action.

The 3rd Circuit noted that "employers can require terminated employees to release claims in exchange for benefits to which they would not otherwise be entitled." In determining whether a release is valid though, whether the release was knowingly and voluntarily signed must be considered. In addition, the court pointed out that the release must not waive future claims and employees must receive consideration in return for signing the release. The EEOC argued that Allstate's Conversion Option's offer to become an independent contractor failed to qualify as adequate consideration for the release because the employees "were not terminated in any normal sense." On the other hand though, the EEOC admitted that the Sale Option and Enhanced Severance Option were valid. The EEOC contended that Allstate could have complied with the anti-retaliation laws by simply firing its employees instead of offering them the Conversion Option. The 3rd Circuit held that federal laws are designed to protect employees from such a harmful result. The 3rd Circuit also found that the Conversion Option offered the terminated employees something of value that they were otherwise not entitled to, in that each of the employees who signed the release was "1) offered guaranteed conversion, whereas Allstate had previously retained discretion to deny conversion; 2) came with a bonus; 3) excused repayment of outstanding office expense advances; and 4) gave the converting agent a transferrable interest in his or her business after two years, rather than five."

In determining that the EEOC failed to establish either protected activity or an adverse action, the 3rd Circuit rejected the EEOC's arguments that the "protected employee activity" here was the refusal to sign the release and the associated "adverse action by the employer" was Allstate's withdrawal of the Conversion Option. Under the anti-retaliation statutes, there are two forms of protected employee activity: 1) "oppos[ing] any act or practice made unlawful by" the employment discrimination laws; and 2) initiating or "participat[ing] in any manner in an investigation, proceeding, or hearing under" those laws. According to the 3rd Circuit, the refusal to sign a release failed to constitute "opposition sufficiently specific to qualify as protected employee activity." The 3rd Circuit further noted that the EEOC cites no legal authority that an employer commits an adverse action by denying an employee an unearned benefit on the basis of the employee's refusal to sign a release.

The 3rd Circuit concluded that Allstate did not violate the federal anti-retaliation laws by requiring employees to sign a release in order to receive the Conversion Option as employers can mandate that terminated employees waive existing legal claims to receive an unearned post-termination benefit.

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Third Circuit Clarifies Scope of the Qualified-Immunity Doctrine

The 3rd Circuit recently revisited the whistleblower protections afforded to government employees by the First Amendment of the U.S. Constitution in *Dougherty v. Sch. Dist.*, 772 F.3d 979 (3d Cir. 2014). In *Dougherty*, a Pennsylvania state employee of the School District of Philadelphia spoke to the *Philadelphia Inquirer* to bring to light the alleged fact that the former superintendent of the school district improperly and illegally diverted contracts to ineligible contractors. *Id*. at 983. After the *Inquirer* published an article detailing Dougherty's allegations, Dougherty was first administratively suspended pending investigation and subsequently terminated. *Id.* at 984.

Dougherty filed suit against the school district and the superintendent, alleging an unlawful retaliatory termination for exerting his First Amendment free speech rights under § 1983. In response, all defendants moved for summary judgment alleging qualified immunity. *Id.* at 985. The Eastern District of Pennsylvania held "a reasonable government official would have been on notice that retaliating against Dougherty's speech was unlawful," and ruled that the defendants were not entitled to qualified immunity. *Id.*

On appeal, the 3rd Circuit used *Dougherty* as a means to clarify the way the Circuit analyzes the applicability of the qualified-immunity doctrine. The basics of the qualified-immunity doctrine have long been established into a three-step process: first, the court must determine whether the public employee plaintiff spoke as a citizen, rather than in his or her capacity as an employee, under the test established in *Garcetti v. Ceballos*, 547 U.S. 410 (2006); second, the speech must involve a matter of public concern; and third, "the government must lack an 'adequate justification' for treating the employee different than the general public based on its needs as an employer" under the balancing test established in *Pickering v. Board of Education*, 391 U.S. 88 (1968).

The defendants in *Dougherty* pushed an aggressive reading of the 3rd Circuit qualified-immunity case law, arguing that because Dougherty came by the information he provided to the *Inquirer* through his role as a state employee that he could claim he was speaking as a citizen. *Id.* at 989. The 3rd Circuit roundly rejected this attempted expansion of qualified immunity, stating: "This Court has never applied the 'owes its existence to' test that [the defendants] wish to advance, and for good reason: this nearly all-inclusive standard would eviscerate citizen speech by public employees simply because they learned the information in the course of their employment, which is at odds with the delicate balancing and policy rationales underlying *Garcetti*." *Id.*

Perhaps even bolder than the defendants' argument that Dougherty's speech was not protected because he learned its content in his capacity as a state employee is that the state still was justified in terminating him for the speech because it proved a "disruption." *Id.* at 991. Again, the 3rd Circuit held that the balance on such matters must primarily protect citizen speech first: "speech involving government impropriety occupies the highest rung of First Amendment protection." *Id.* Further, "it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office." *Id.* at 992.

Dougherty aggressively pushes back on government attempts to expand the scope of qualified immunity in the wake of the *Garcetti* opinion and the resulting 3rd Circuit case law.

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Corporate Attorney-Client Privilege Defense Fails in Discrimination Case

Recently, a Pennsylvania federal judge rejected a company's claim to attorney-client privilege as an obstacle to pursuit of a sex-discrimination suit brought by a lawyer and former employee. In *Casey v. UniTek Global Serv., Inc.*, No. 14-2671, 2015 U.S. LEXIS 15715, 2015 WL 539623 (E.D. Pa. Feb. 9, 2015) (opinion by Stengel, J.), the court ruled that, despite her legal background, the employee was hired as a risk-management insurance professional and not as in-house counsel. While acting in a business capacity, the court held, no privilege applied to the employee's communications.

This case illustrates the sometimes blurry line between the roles of insurance-claims handler and legal professional and gives cause for concern to companies that have attorneys leading their internal risk-management departments.

In May 2014, Carolyn Casey sued her former employer, UniTek Global Services Inc. (UniTek), for violations of Title VII and the Equal Pay Act after she was terminated for lodging complaints about sexual harassment and unequal pay. Casey had been hired in 2011 as UniTek's director of risk management and thereafter promoted to vice president of safety and risk. In response to the complaint, the telecommunications services company filed a motion requesting a protective order, claiming that because Casey

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was an attorney, she was prohibited from relying on confidential attorney-client communications in her suit. UniTek emphasized that Casey managed litigation of insurable claims, received court notices, retained and communicated with outside counsel, granted settlement authority and issued discovery responses as part of her employment. UniTek also highlighted that Casey attended quarterly litigation update meetings where she received confidential communications from outside counsel regarding the status of employment-based claims. As such, UniTek argued, internal communications involving Casey were privileged and could not be employed as part of a claim adverse to the company.

Judge Lawrence F. Stengel of the U.S. District Court for the Eastern District of Pennsylvania disagreed, holding that the management of insured claims in litigation does not itself establish an attorney-client relationship. According to Judge Stengel, there was no evidence that UniTek sought Casey's legal advice. Rather, as the director of risk management, Casey's responsibilities were separate from and not reportable to the corporation's general counsel.

The court further emphasized that while Casey's duties were "quasi-legal," her position "did not require legal knowledge, much less a juris doctor." In fact, it highlighted that UniTek has since filled the job opening with two non-attorneys. In this way, the court reasoned, Casey acted as a client to outside counsel rather than as UniTek's attorney.

The district court also rejected UniTek's assertion that Casey should be precluded from revealing information relating to representation of a client under Rule of Professional Conduct 1.6 governing confidentiality, concluding that the rule was inapposite because it "only applies to information that an in-house attorney learned in her capacity as legal advisor."

The court further noted that UniTek failed to identify any specific communication made to Casey in her capacity as a lawyer. Rather, the court suggested that there were "any number of ways that Casey could have learned about the incidents" giving rise to the underlying sex-discrimination claims and even hypothesized that the "scandalous nature of the incidents" were likely "the subject of much office gossip." Even if the privilege did apply, Judge Stengel explained, it would protect only the communications themselves and not the underlying facts or incidents. The court in its ruling also rejected UniTek's motions for a protective order and to quash a subpoena relying on the attorney-client privilege.

Finally, the court concluded that UniTek's invocation of the privilege to prevent discovery and "offensive use of attorney-client communications" in its filings constituted a waiver of the privilege.

Viewed from the standpoint of an employment case, the *UniTek* decision is consistent with the national trend toward allowing in-house lawyers access to discovery that may assist their claim, notwithstanding privilege concerns. The case also illustrates the difficulty in raising privilege to preclude access to communications involving insurance-claims professionals who are also lawyers but primarily serve in risk-management roles outside the office of general counsel. This distinction can be further complicated when in-house lawyers serve in the dual role as legal and business advisors or executives. Under this ruling, to invoke attorney-client privilege, a client must clearly demonstrate that communications involving a lawyer are made for the "express purpose of securing legal and not business advice." Therefore, corporations employing attorneys as risk-management consultants or other insurance claims professionals should be particularly mindful of the limited application of the attorney-client privilege.

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Court Orders Insured to Reimburse Insurer for Settlement Amount Insurer Paid Where Insurer Did Not Owe Coverage

The U.S. District Court for the Eastern District of Pennsylvania held in *American Western Home Ins. Co. v. Donnelly Distrib., Inc.*, No. 14-797, 2015 U.S. Dist. LEXIS 14357 (E.D. Pa. Feb. 6, 2015) (opinion by Schiller, J.), that an insurance company could obtain reimbursement from its insured based on an unjust enrichment theory for $125,000 it paid on its insured's behalf to settle an underlying slip-and-fall case after the 3rd U.S. Circuit Court of Appeals held that the insurance company did not owe coverage to the insured for the incident.

Donnelly Distribution Inc. (Donnelly) was sued for negligence arising out of an alleged slip-and-fall caused by a plastic tie used to wrap papers. American Western Home Insurance Company (American Western) insured Donnelly under a commercial insurance policy. American Western defended Donnelly in the slip-and-fall case under a reservation of rights and subsequently filed a declaratory judgment action seeking a declaration that it owed no duty to defend or indemnify Donnelly. In the declaratory judgment action, the court initially ruled that American Western owed a defense and indemnity to

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Donnelly in the slip-and-fall case, but then vacated that order and ordered additional briefing. Shortly thereafter, Donnelly settled the slip-and-fall case, with American Western, paying $125,000 of the $150,000 settlement amount. The court in the declaratory judgment action subsequently granted summary judgment in favor of Donnelly and declared that American Western owed a duty to defend and indemnify Donnelly. American Western appealed, and the 3rd Circuit reversed, concluding that American Western did not owe a duty to defend or indemnify Donnelly. American Western then filed suit against Donnelly in the Eastern District seeking reimbursement for the $125,000 it paid to settle the underlying action under an unjust enrichment theory, not breach of contract.

The court granted summary judgment in favor of American Western. In doing so, the court considered the factors set forth in *Axis Specialty Ins. Co. v. The Brickman Group, Ltd.*, 756 F. Supp. 2d 644 (E.D. Pa. 2010), which held that "to prevail on an unjust enrichment theory, the insurer must establish that: 1) it did not make the payment due to a mistake of law; 2) the insured was on notice at the time of payment that the obligation to pay was disputed; 3) the insurer did not make the payment primarily to protect its own interest; and 4) permitting reimbursement under the circumstances would not upset the delicate incentive structure inherent in the insurer/insured relationship."

The court found that American Western did not make the payment under a mistake of law, having consistently disputed coverage. It further found that while the settlement benefited American Western, it also benefited Donnelly because it guaranteed a fixed settlement amount and avoided a verdict that could have been higher than the settlement amount. The court also did not believe that a balance of interests between the insured and insurer would be upset by ordering reimbursement, as the decision to settle was reasonable and American Western could not be faulted for settling, given the court's initial ruling prior to settlement of the underlying action that American Western owed a duty to defend and indemnify. Finally, the court held that the 3rd Circuit's ruling that American Western did not have a "duty to indemnify Donnelly for any amount due pursuant to the settlement," when the 3rd Circuit was aware of the settlement at the time of its ruling, indicated that American Western should not be barred from reimbursement following the 3rd Circuit's decision. The court noted that if an insurer were barred in such a situation, "it would provide an incentive for the insurer not to settle, hoping that it owed no duty to indemnify, or stall on litigating and paying a settlement, hoping that its duties would be clarified before it made any payments."

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From the Editor: Calling All Authors!

By Katherine C. Dempsey

Katherine C. Dempsey

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