EDITORS’ NOTEPAD

The Transportation Practice Group of ALFA International has published Transportation Update for about sixteen years. In response to the requests of clients we updated our extensive website in 2005. We now have an archive of many recent issues of Transportation Update on the website including this one at www.alfainternational.com.

This issue of Transportation Update will only be published electronically. Our primary method of distribution will be by email, but this issue will simultaneously appear on our web site. Electronic publication also allows us to include hyperlinks for the use of our readers. If your first contact with Transportation Update is through our website, you can be added to our email distribution list by contacting us through Katie Garcia. Please add Transportation Update to the subject line, and we will email the current issue and each subsequent issue to you as it is published. If you wish to receive Transportation Update in hard copy format, contact an ALFA attorney listed at the end of this newsletter, and they can provide this service for you.

In previous years Transportation Update primarily reported case, regulatory and statutory notes from around the country of general interest to the trucking community. In April 2005, we began to include reports from around the country of Verdicts and Settlements of particular interest. Any reader who learns of a settlement or verdict that they think would be of interest to the trucking community is encouraged to report that settlement or verdict to Michael K. Sheehy. Michael can be reached as follows:

Please see the Practice Tips section of this Update. This section features articles of medium length which cover practical questions of interest to both those who manage litigation for motor carriers and those who represent them. The Editors think that articles in this section have widespread application throughout the country.

The topic covered in this issue of Practice Tips is The Strong Arm of Military Subrogation. Insurers and firms faced with a claim by the government or considering settlement with a claimant who is a member of the Armed Forces must be aware of the statutes and various theories of recovery that the government may assert. This article examines and explains the relevant statutes and theories so that you may be armed with the information that you need to consider before reaching a settlement agreement with a service member or his/her beneficiary. If you have any questions or want additional information, please contact Dick Krieg at dkrieg@lewisking.com.

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EDITORS’ NOTEPAD (CONT.)

In this issue, we have an Article titled The Critical State of Self-Critical Analysis: Is the Privilege Still Viable? Critical Analysis: By Robert P. Corbin. The article discusses the current state of the federal law dealing with the self-critical analysis privilege.

Please see below for a summary of an article of interest that will be published in the spring edition of the Update. We welcome comments, suggestions for improvement, and topics which you would like for us to address in future issues. It is our goal to provide timely relevant information to members of the trucking community. Our editors can be contacted as follows:

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FUTURE EVENTS

The Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry each year. Our seminar this year is scheduled for April 25 – 27, 2007 at the Barton Creek Resort & Spa in Austin, Texas. The seminar is titled The Road to Resolution, and the focus of this program is upon various approaches to effective alternative dispute resolution. Two mock mediations displaying contrasting mediation methods will be presented.

The 2008 Transportation Seminar will be held in Palm Beach, Florida at The Breakers from April 30 to May 2.

Please contact Katie Garcia at kgarcia@alfainternational.com for additional information. We will also post information on our website at www.alfainternational.com.

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Barton Creek Resort and Spa.

Questions, comments and suggestions about this program can be directed to our program chair, Paul T. Yarbrough of the Albuquerque, N.M. firm of Butt, Thornton and Baer, P.C., at the number listed below, or by email at ptyarbrough@btblaw.com

Logistical questions about the program can be directed to Katie Garcia at the number listed below or by email at kgarcia@alfainternational.com

The upcoming seminar is offered in response to requests from clients and from those who attended previous programs. Additional information about our 2007 seminar is posted on our website.

In advance of the conference, please consider the fact pattern that accompanies this edition of the Update. The facts as stated in the attachment will serve as the basis for the mediations.
**FUTURE ISSUES OF TRANSPORTATION UPDATE**

The summer issue of Transportation Update will be published in July.

**CONTENTS**

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**CASES, REGULATIONS, & STATUTES**

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**ARIZONA**

**DUTY IS A QUESTION OF LAW RESERVED FOR THE COURT**

**GIPSON V. CASEY, 150 P.3D 228 (AZ 2007) (EN BANC)**

**INTRODUCTION**

This case affects all negligence actions filed in Arizona. Although the facts do not involve a motor carrier or anyone involved in the transportation industry, this case will effect all future negligence actions filed against or brought by motor carriers litigating in Arizona.

**FACTS**

The case concerns a plaintiff, the surviving parent of a decedent, who filed a wrongful death action against decedent’s co-worker alleging that the co-worker negligently caused decedent’s death by furnishing prescription pills to decedent’s girlfriend at an employee holiday party.

The decedent received several Oxycontin pills and mixed them with alcohol based on his own decision to do so. Those pills were provided by defendant, as they had been in the past, to decedent’s girlfriend. She in turn provided those pills to her boyfriend (decedent) at a holiday party sponsored by decedent’s employer where beer was furnished. Later that night, decedent died in his sleep of toxicity based on the amount of alcohol and Oxycontin in his blood.

The Superior Court (trial court) granted summary judgment in favor of the defendant on the basis that duty was a question of law to be determined by the Court. The court held that defendant owed no duty to decedent. The Court of Appeals reversed and found that defendant owed decedent a duty of care.

**ANALYSIS**

In Arizona, in order for a Plaintiff to establish a claim for negligence, the plaintiff must prove four elements:

1. A duty requiring the defendant to conform to a certain standard of care;
2. A breach by the defendant of that standard;
3. A causal connection between the defendant’s conduct and the resulting injury; and
4. Actual damages.


**Gipson** unequivocally clarifies that the first element that a plaintiff must establish, duty, is a legal determination reserved for the Court. Whether a duty exists is not a factual question for the jury.

The **Gipson** court went on to consider several issues which are relevant to a Court when determining whether a duty exists. First, the Court determined and “expressly [held] that foreseeability is not a factor
to be considered by courts in making determination of duty and [they rejected] any contrary suggestions and prior opinions.” This clarified some confusion in the jurisdiction concerning whether foreseeability of duty should be considered when making the determination as to whether a duty existed. Foreseeability is a question of fact that goes to the question of breach. Such, foreseeability is a question reserved for the jury.

Secondly, the Court analyzed the different relationships between parties which can create a duty between persons based on special or direct relationships. Under Arizona common law, various types of relationships can give rise to a duty. These include, but are not limited to, the land owner/invitee relationship, the tavern owner/patron relationship, and the special relationships recognized by § 315 of the Restatement (Second) of Torts (1965), that create a duty and control the actions of others. They found, in this case, that none of those special relationships existed. Gipson, 150 P.3d at 232.

Finally, the Court decided that the question of whether public policy favors a legal duty being created was a question for the Court. In this case, several statutes prohibit the distribution of prescription drugs to persons lacking a valid prescription. See Id. at 233. On that basis, the Court found that a legal duty existed between the defendant and the decedent.

CONCLUSION
This case is an important development because it clarifies

that, in Arizona, the existence of a legal duty is a question for the Court. In cases where it can be argued that no duty exists, summary judgment is now an available and efficient option for defendants.

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CONNECTICUT

SUPREME COURT OF THE STATE OF CONNECTICUT ESTABLISHES NEW TORT: TORT OF INTENTIONAL SPOLIATION – RIZZUTO V. DAVIDSON LADDERS, INC.

In the October 3, 2006 decision of the Supreme Court of the State of Connecticut, authored by Justice David M. Borden, the Court found that sanctions previously in place and available to litigants in instances of “intentional bad faith spoliation” were inadequate. Citing its inherent power to recognize new tort causes of action, the court established a new remedy and recognized an independent cause of action for the intentional spoliation of evidence.

Rizzuto was an action for injuries arising from product liability. The factual allegations were as follows. On December 16, 1996, the plaintiff, Leandro Rizzuto, was shopping at a Home Depot store in Norwalk, Connecticut. While shopping, plaintiff climbed a ladder manufactured by Davidson Ladders, Inc. The ladder collapsed suddenly and the plaintiff fell, sustaining

2 Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1173 (Conn. 2006). The previously available sanctions included:

(1) The imposition of an adverse inference permitting the trier of fact to draw an inference that the destroyed evidence would have been unfavorable to the party that destroyed it. Beers v. Bayliner Marine Corp., 675 A.2d 829 (Conn. 1996);


(3) Finding of civil or criminal contempt. Connecticut Practice Book § 1-21A; and

(4) The recovery of attorney’s fees for a party’s “dilatory, bad faith and harassing litigation conduct.” Millbrook Owners Ass’n, Inc. v. Hamilton Standard, 776 A.2d 1115, 1123 (Conn. 2001).

3 Rizzuto, 905 A.2d at 1172-1173.
4 Id. at 1169.
5 Id.
physical injuries. 6

In August of 1997, the plaintiff filed an action sounding in product liability against Davidson Ladders and Home Depot. 7

The plaintiff alleged, among other things, that the ladder had been manufactured and designed improperly, and that it had been sold with inadequate warnings. 8

Subsequent to the commencement of litigation, plaintiff’s counsel asked both Davidson Ladders and Home Depot to preserve the subject ladder so that an examination of the ladder could take place. However, the ladder was allegedly destroyed before the plaintiff had an opportunity to inspect it. 9

On May 8, 2001, the plaintiff amended his Complaint to insert the claim for intentional spoliation of evidence. By way of the claim, the plaintiff alleged that:

1 “[b]y destroying and/or not preserving [the] ladder, the defendants. . . intentional spoliated evidence critical to [the plaintiff’s] pending product liability action”;

2 “[t]he plaintiff’s case ha[d] been damaged to the point where no expert [could] conclusively establish the mechanism of the defect which caused the plaintiff’s injuries;” and

3 “as a result of the spoliation, the plaintiff [might] not be able to prove his case, and his interest in the [product liability cause] of action

Davidson Ladders and Home Depot moved to strike the plaintiff’s intentional spoliation of evidence claim on the grounds that no such cause of action existed under Connecticut law. The trial court agreed that no cause of action existed and granted the motion to strike on March 19, 2003. The plaintiff then appealed the trial court’s decision.

The Supreme Court reversed the trial court’s decision and concluded that the prevailing sanctions for the intentional spoliation of evidence were insufficient in an instance when a “first party defendant destroys evidence intentionally with the purpose and effect of precluding the plaintiff from fulfilling his burden of production in a pending or impending case.” 11

In particular, the court stated that the defendants’ “bad faith” and intentional destruction of the ladder deprived the plaintiff of the means to establish a prima facie case of product liability against the defendants. 12

Thus, the Rizzuto decision appears to limit the application of the tort of intentional spoliation to first-party defendants 13 and “intentional bad faith spoliation” as opposed to lesser “intentional innocent spoliation.” 14

The court then defined the elements necessary for establishing the tort of intentional spoliation:

1 “the defendants’ knowledge of the pending or impending civil action involving the plaintiff”;

2 “the defendants’ destruction of evidence”;

3 “in bad faith, that is, with the intent to deprive the plaintiff of his cause of action”;

4 “the plaintiff’s inability to establish a prima facie case without the spoliated evidence”; and

5 “damages”. 15

The court then clarified the plaintiff’s burden of proof with respect to causation and damages, “in light of difficulties of proof inherent in the tort of intentional spoliation.” 16

The court stated that in order for the plaintiff to establish proximate causation, the plaintiff must only prove that “the defendants’ intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a prima facie case in the underlying litigation.” 17

It is presumed that “but for the fact of spoliation of evidence, the plaintiff would have recovered in the pending or potential litigation” and the defendant has the burden to produce evidence showing that “the plaintiff would not have prevailed in the underlying action even if the lost or destroyed evidence had been available.” 18

Indeed, the court specifically declined to require the plaintiff to prove some probability of success in the underlying action. 19

6 Id.
7 Id.
8 Id.
9 Id. at 1169-1170.

10 Id.
11 Id. at 1173.
12 Id. at 1172-1173.
13 Id. at 1173, n.5.
14 Id. at 1187.
15 Id. at 1178-1179
16 Id. at 1179-1180.
17 Id.
18 Id. at 1180-1181.
19 Id.
Lastly, the court then specifically addressed the proper measure of damages arising from the tort of intentional spoliation. Noting that it was guided by the purpose of restoring a victim of intentional spoliation to the position he or she would have been in if the spoliation had not occurred, the court found that the plaintiff is entitled to recover the full amount of compensatory damages that he or she would have received “if the underlying action had been pursued successfully.”

Notably, Chief Justice William J. Sullivan, in dissent, strongly criticized the establishment of the tort for intentional spoliation. He concluded that the existing remedies are sufficient to deter and punish acts of spoliation and moreover, it is against public policy to provide compensation for damages where liability cannot be established.

20 Id. Alexei Plocharczyk, Esq.
21 Id. at 1187-1188.

NEW JERSEY

OFFER OF JUDGMENT REMAINS VALID EVEN WHERE MULTIPLE TRIALS ARE INVOLVED

The experienced litigator and claims professional understand that, in certain situations, the making of an offer of judgment may move the case to a faster and a more desirable resolution. A recent appellate court decision, however, makes it clear that transportation professionals with civil actions in New Jersey need to understand the consequences of an offer of judgment made on behalf of the claimant. In Negron v. Melchiorre, 389 N.J.Super. 70 (2006), the Superior Court of New Jersey, Appellate Division, held that an offer of judgment remains valid and subjects the offeree to the consequences set forth in the offer of judgment rule, even though multiple trials were involved before a final judgment was rendered.

In Negron, the plaintiff filed a lawsuit against a tavern as a result of serious, permanent and allegedly disabling personal injuries which the plaintiff sustained in an altercation that occurred in the tavern’s parking lot. Pursuant to Rule 4:58, plaintiff offered to settle his case against both defendants for a sum certain. Rule 4:58-1 provides:

If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest and attorney’s fee.

The defendant did not accept the plaintiff’s offer of settlement within the time frame provided by this Rule. Pursuant to Rule 4:58-2:

If the offer of a claimant is not accepted and the claimant obtains a verdict or determination at least as favorable as the rejected offer or, if a money judgment, in an amount that is 120% of the offer or more, excluding
allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (a) all reasonable litigation expenses incurred following non-acceptance; (b) prejudgment interest of eight percent on the amount of any recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R.4:42-11(b), which also shall be allowable; and (c) a reasonable attorney’s fee, which shall belong to the client, for such subsequent services as are compelled by the non-acceptance, such fee to be applied for within 20 days following entry of final judgment and in accordance with R.4:42-9(b).

The case ultimately proceeded to trial. The first trial ended without a verdict. The presiding judge declared a mistrial after noticing that several jurors had fallen asleep. A second trial took place, with a jury verdict finding the tavern liable for the plaintiff’s injuries. This same jury also found in favor of an individual co-defendant, determining that he had not assaulted the plaintiff. The jury in the second trial, however, did not award any damages for pain and suffering. Immediately following the verdict at the second trial, plaintiff moved for a new trial, arguing that the damage award was indicative of a compromise verdict. The trial court granted the plaintiffs’ motion and ordered a new trial on the issues of liability and damages as to the tavern only. The Court, however, upheld the jury’s verdict in favor of the individual defendant found not liable by the jury in the second trial.

The case was tried for a third time. In the third trial, the jury found the tavern negligent. In the third trial, the jury also found the tavern was fully responsible for the incident and awarded plaintiff one million dollars in damages as well as medical expenses and lost wages. The defendant tavern moved for a new trial or remittitur but these motions were denied by the trial court. The trial court also entered judgment in favor of the plaintiff and against the tavern and the judgment included costs and counsel fees in the amount of approximately fifty thousand dollars as a result of the trial court determining that the offer of judgment filed on behalf of the plaintiff in December, 2002 remained effective through the third trial, which took place in 2005.

The appellate court began its analysis by noting the public policy behind the offer of judgment rule, which is to promote the early settlement of civil lawsuits. According to the Court, “[A] key aspect of this policy, is the availability of sanctions against the party who fails to accept an offer of settlement that, after the entry of a final judgment, falls within a certain range of the jury’s verdict, as established by the Rule.” Negron at 76.

The Court also looked to the Rule itself and found nothing in the Rule which would require an offeror to reaffirm an offer. In addition, the plain language of the Rule does not limit the availability of sanctions to the costs incurred in connection with one trial only. Rather, “[T]he only precondition to the filing of an application for sanctions is the entry of a final judgment.” (Citing former Rule 4:58-5, (now Rule 4:58-2).

The Court in Negron noted that the New Jersey offer of judgment rule was modeled after the federal offer of judgment rule. Fed.R.Civ. P. 68. The New Jersey appellate court referenced an explanatory Note published by the Advisory Committee on the 1946 amendments to the federal offer of judgment rule which provided, in pertinent part, that:

It is implicit….that as long as the case continues – whether there be a first, second or third trial – and the defendant makes no further offer, his first and only offer will operate to save him the cost from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

Negron, supra at 91. The Court in Negron also looked to decisions from other state courts which have examined the issue of how to determine the scope of sanctions in the context of multiple trials. Relying upon Fed. R.Civ. P. 68, these state court decisions have held that the prevailing offeror is entitled to recover sanctions related to not only the initial trial, but to subsequent trials as well.
In its opinion, the Court noted that this interpretation of the offer of judgment rule results in the offeror being in a “…clear position of advantage.” Under the express language of the rule, once the acceptance period has expired, the offeror risks nothing by going forward with the trial. The offeree, on the other hand, not only faces the possibility of an unfavorable jury verdict, but to the sanctions available under the offer of judgment rule. While the Court in its opinion expressed concern about this “…shift in the balance of power between litigants…”, it felt that its role as an intermediate appellate court was to interpret the Rules and not to rewrite them.

Finally, the Court specifically rejected the defendant’s argument that the Court should consider the defendant’s liability insurance limits in determining whether to enforce the offer of judgment rule sanctions.

The Court of Appeals reversed the trial court, holding that whether Bates had violated her statutory duty pursuant to R.C. 5321.04(A)(2) was a question for the jury. The court also held that the trial court should have allowed Robinson to admit her original medical bills of $1,919.00 under Ohio’s collateral-source rule. The Court of Appeals concluded that the difference between the amount actually paid for the medical services, and the amount of the original bill for the medical services was a benefit to the plaintiff, triggered the collateral-source rule, and thus barred admission of the original medical bill.

The collateral-source rule is an exception to the general rule that in a tort action, the measure of damages is that which will compensate and make the plaintiff whole. Under the collateral-source rule, the
plaintiff’s receipt of benefits from sources other than the wrongdoer is deemed irrelevant and immaterial on the issue of damages. The rule prevents the jury from learning about a plaintiff’s income from a source other than a tortfeasor so that a tortfeasor is not given an advantage from third-party payments to the plaintiff.

The Court examined the collateral-source rule in other jurisdictions and found that ten state courts have concluded that plaintiffs are entitled to claim and recover the full amount of reasonable medical expenses charged, including amounts written off from the bills pursuant to contractual rate reductions. Other states have concluded that plaintiffs are entitled to recover only the amount actually paid by the plaintiff’s insurance. The Court also noted that effective April 7, 2005 the Ohio General Assembly passed Ohio Revised Code Section 2315.20 which allows introduction of collateral benefits in tort actions, but the new tort reform statute did not apply since it became effective after the cause of action in this case accrued, and after the complaint was filed.

The Court reasoned that the collateral-source rule does not apply to write-offs of expenses that are never paid. The written-off amount of a medical bill differs from the receipt of compensation or services. Since no one pays the write-off, it cannot possibly constitute payment of any benefit from a collateral source. Since no one pays the negotiated reduction of the bill, admitting evidence of write-offs does not violate the purpose behind the collateral-source rule. The tortfeasor does not obtain a credit because of payments made by a third party on behalf of the plaintiff.

The Court believed that the fairest approach is to make the defendant liable for the reasonable value of a plaintiff’s medical treatment, since different insurance agreements exist. The reasonable value of medical services is a matter for the jury to determine from all relevant evidence. Both the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care.

This opinion represents a fundamental shift in Ohio law toward admission of the amount paid by an insurer, as such was previously not admissible at trial, but the opinion is somewhat limited since this opinion would appear to apply mainly to cases filed or whose cause of action accrued prior to Ohio’s new tort reform statute (effective date April 7, 2005).

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SOUTH CAROLINA

“BOBTAILING” IN SOUTH CAROLINA

In a recent unpublished opinion, the United States Court of Appeals for the Fourth Circuit held that a Carrier’s insurance policy covered a motor vehicle accident in which the independent owner-operator was bobtailing from home to work. Republic Western Ins. Co. v. Williams, Nos. 06-1045, 06-1046, 2007 WL 81683 (4th Cir. Jan. 10, 2007). In Republic, Lathaddeus Williams, an independent owner-operator of a Freightliner tractor, leased his tractor to P.B. Express, Inc. (“PBX”) for the purposes of hauling containers among several different port locations in Charleston, South Carolina. On April 30, 2003, while en
route from home to a PBX terminal, Williams was involved in a motor vehicular accident. At the time of the accident, Williams was not hauling a container; he was driving the Freightliner from an overnight parking lot near his home to the local PBX terminal in anticipation of receiving an assignment.

At issue on the appeal to the Fourth Circuit was the question of which relevant insurance policy provided coverage for the accident. Williams had been issued an insurance policy by Republic Western Insurance Company (“Republic”) for coverage of his vehicles that were not used for commercial purposes. Carolina Casualty Insurance Company (“Carolina”), meanwhile, provided coverage to PBX for vehicles used in commercial transportation. Upon appeal from the U.S. District Court for the District of South Carolina, at Charleston, which had granted summary judgment to Republic, the Fourth Circuit reversed the lower court’s decision, holding that Williams was covered under the permissive use provisions of the Carolina policy at the time of the subject accident.

The Republic policy contained an exclusion that provided no liability coverage for vehicles “used to carry property in any business or in route for such purpose.” Id. at *4. Because Williams was acting in accordance with his usual course of business by driving to the PBX terminal to obtain an assignment, the Court concluded that Williams indeed was en route for a business purpose at the time of the accident. As an initial matter, therefore, the Court found that the exclusion provision of the Republic policy applied such that the accident was not covered under the Republic policy.

Whether the Carolina policy provided coverage depended on the permissive use provision of the policy. For the permissive use provision to apply and to provide coverage to an additional insured, two elements were required: “(1) use of an owned, hired, or borrowed auto; and (2) permission from PBX.” Id. at *4. Carolina did not argue that the Freightliner was not a “hired auto”; therefore, the only issue was whether Williams was using the Freightliner with PBX’s permission. The lease between Williams and PBX provided, in pertinent part, that the “Carrier shall have Exclusive possession, control, and use of the equipment and shall assume complete responsibility for the operation of the equipment while in actual use for the Carrier. Whenever the equipment is not in actual use for Carrier, the equipment shall bear no placard or other reference of any kind to Carrier.” Id. at *5 (emphasis added in opinion).

Further, the Court noted that PBX had allowed Williams to drive the Freightliner to and from work, thereby rendering Williams’ use necessarily permissive. Id. Coverage for Williams at the time of the subject accident therefore was provided under the Carrier’s policy with Carolina, held the Court. Id.

However, in analyzing the terms of the Carolina insurance policy, the Court considered also the Federal Motor Carrier Safety Regulations, which provide that leases between carriers and owner/operators shall recognize “the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease. Id. (citing 49 C.F.R. § 376.12(c)(1)) (emphasis added in opinion). Given this statutory language, the Court concluded that the lease provision stating PBX was responsible for the operation of the Freightliner only “while in actual use” for PBX was a violation of the regulation, and the Court thus looked beyond the terms of the lease contract, concluding that “[b]ecause parties may not enter into a contract that violates the law, PBX—by operation of the regulation—had exclusive possession and control of the Freightliner throughout the term of the lease.” Id. at *5 (emphasis added).
TENNESSEE

EXPERT TESTIMONY REGARDING A PERCEPTION-REACTION TIME OF .75 – 1.5 SECONDS ALLOWED

In the case of Dunn v. Davis, No. W2006-00251-C0A-R3-CV, 2007 WL 674652 (Tenn. Ct. App. Mar. 6, 2007), the Tennessee Court of Appeals, Western Division, considered the appeal of the judgment in a wrongful death case stemming from a motor vehicle accident involving a pedestrian. In short, a 16-year-old pedestrian named Dunn was killed while walking home from school when he was struck by a vehicle operated by the defendant, Amelia Davis. There were many issues considered by the Court of Appeals; however, this summary focuses upon only one element of the Court’s holdings. In specific, the trial court allowed testimony from an expert witness named Dr. Larry Williams. This expert concluded that based upon a traveling speed on the part of the defendant at a rate of 35 miles per hour; a certain brake-to-stop time for the vehicle operated by the defendant; “the point at which the [vehicle operated by the defendant] came to rest; and a perception-reaction time of .75 to 1.5 seconds;” the decedent-pedestrian was at a specific position within the street when the accident occurred. Id. at p. 8. (Emphasis added).

On appeal, the defendant argued that the testimony of the expert regarding perception-reaction time range of .75 to 1.5 seconds was unreliable because the opinion was stated in terms of a range. In its opinion, the Court noted that the “transcript of the trial reflects that Dr. Williams testified that the range of perception-reaction time was 1 to 1.5 seconds (contrary to the previously referenced perception-reaction time of .75 to 1.5 seconds).” The Court stated that the expert was thoroughly cross-examined on the issue of the range and that the testimony was properly submitted to the jury.

It is unclear from the full opinion whether counsel for the defendant failed to cross-examine the expert or to introduce proof regarding such a low perception-reaction time. Regardless, the Court allowed the testimony, and at least in the Western Section of Tennessee, a perception-reaction time of less than 1.5 seconds seems to have merit.

TENNESSEE

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; POST-SALE DUTY TO WARN IN A PRODUCTS LIABILITY CASE; SUBSTANTIAL SIMILARITY REQUIREMENT IN CASES OF OTHER SIMILAR INCIDENTS; AND PUNITIVE DAMAGES

In the case of Flax v. Daimler Chrysler Corp., No. M2005-01768-COA-R3-CV, 2006 WL 3813655 (Tenn. Ct. App. Dec. 27, 2006), the Tennessee Court of Appeals for the Middle Section of Tennessee, considered the appeal of a case for wrongful death brought by the parents of an infant child who died from head injuries sustained in a rear-end collision. The infant’s seat in the minivan that he occupied snapped in the rear-end collision and resulted in the infant’s head colliding into the head of another
The plaintiffs further pled allegations of strict liability in the design of the front seat backs claiming that the seats were defective and unreasonably dangerous and that they lacked the strength and structural integrity to hold an occupant in an upright and stable position during a rear-end collision. The plaintiffs further averred that the manufacturer knew that the design of the seats rendered them defective or unreasonably dangerous; that the manufacturer through advertising and marketing induced families with children to purchase the mini-vans; and that the plaintiffs relied upon the representations of the manufacturer regarding the design of the seats and placement of children in the mini-van when the manufacturer knew or should have known from its own testing that the passenger seats would fail, collapse, or give way or bend backwards in foreseeable rear-end collisions just as they had given way in other instances involving injuries to mini-van occupants.

It is important to note that the manufacturer of the mini-van met government standards for seat back strength as established by the National Highway Traffic Safety Administration. Furthermore, the “evidence from the record suggests that the load strength of the seat [of the mini-van] was comparable to that of the seats of other manufacturers whose mini-vans were offered for sale in the United States at the time.” In fact, the plaintiffs could introduce through expert proof only one type of mini-van offered for sale in the United States at the time of the sale of the mini-van to the plaintiffs that had substantially different seats (in terms of load strength) from the seats in the mini-van that was operated by the plaintiffs.

Finally, there was proof that not only did the seats that were used by Daimler Chrysler in the mini-van in question meet the government requirements for load strength but actually exceeded the standards by a factor of approximately 2 times.

Despite these facts and amazingly, the Tennessee Court of Appeals was not called upon to review the jury’s findings of liability against Daimler Chrysler on the plaintiffs’ claims of the strict liability and negligence. The Court used the afore-referenced factors in support of its decision to reverse the trial court’s award for punitive damages. There was insufficient showing under the standard of clear and convincing evidence that Daimler Chrysler acted in a reckless manner in its manufacture of the mini-van.

As to negligent infliction of emotional distress, the Tennessee Court of Appeals analyzed the evolution of the cause of action and concluded that expert medical or scientific proof is required for any “stand-alone” claim under the claim of negligent infliction of emotional distress. In short, the Court of Appeals held that where there are “not multiple claims for damages by a plaintiff that would deem a negligent infliction of emotional distress cause of action “parasitic”, the action is stand-alone, and the heightened proof requirement set forth in the Camper v. Minor,

Finally, in this case, the trial court admitted into evidence approximately 37 incidents regarding other mini-van seat back accidents as being relevant to the issue of knowledge or reason for the manufacturer to know that the seat design was unreasonably dangerous or defective. The court enunciated the rule that similar incidents must be substantially similar to the incident in question to be admitted into evidence. Of the 37 incidents admitted into evidence by the trial court, the Court of Appeals concluded that only 12 of the 37 incidents occurred prior to the purchase of the mini-van by the plaintiffs. The Tennessee Court of Appeals held that the admissibility of the 37 incidents was appropriate because the incidents were substantially similar to the incident in question and were probative as to the dangerous nature of the seats. However, the Tennessee Court of Appeals concluded that 25 of the 37 incidents should not have been admitted into evidence as proof for the dual purpose of showing both the dangerous condition and notice to the manufacturer.

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TENNESSEE

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

In the case of Eskin v. Bartee, No. W2006-01336-COA-R3-CV, 2006 WL 3787823 (Tenn. Ct. App. Dec. 27, 2006), the Tennessee Court of Appeals, Western Section, considered on appeal the issue of negligent infliction of emotional distress in the context of the following facts:

Brenda Eskin was a student at an elementary school and was waiting for a ride to her home from school. She was standing in an area designated for the children to await their ride home. While waiting, the defendant, Bartee, lost control of her vehicle and struck the child. Immediately after the accident, the child’s mother received a call from a neighbor who had assumed the responsibility of picking the child up from school. The neighbor told the child’s mother that the child had been struck by a car and that the child was hurt. The neighbor’s statement regarding the accident and injuries were relayed to the child’s parent in such a way as to lead the parent to believe that the accident was minor and that the child had not been seriously injured.

Upon hearing the statement, the mother immediately drove the short distance to the school. Upon arrival, the mother saw her child lying unconscious at the scene of the accident in a pool of blood. The child had not yet received any medical care.

In their individual capacities and as representatives and parents of the minor child who had been struck by the defendant’s vehicle, the parents of the child filed a lawsuit against the operator of the vehicle, the Shelby County Board of Education, the plaintiff’s uninsured/underinsured motorist carrier, and other defendants. In their Complaint, the parents pled a claim for severe emotional injuries caused by “the defendants’ negligence and the emotional distress suffered by them when they came upon the accident scene and witnessed Brenda lying on the pavement, unattended, in a pool of blood.” In the Motion for Summary Judgment filed by the uninsured/
underinsured motorist carrier, the defendants averred that in Tennessee a plaintiff “cannot recover against a defendant for negligent infliction of emotional distress when she was not present at the time of injury to a third person and did not observe the accident occur through one of her senses.”

After hearing the proof, the trial court entered an Order granting summary judgment in favor of the uninsured/underinsured motorist carrier.

The Court of Appeals considered the issue of negligent infliction of emotional distress in the context of the propriety of granting the Motion for Summary Judgment. There was no presumption of correctness regarding the trial court’s grant or denial of summary judgment and that the Court of Appeals considered the propriety of the trial court’s Order on a de novo review of the record.

In overturning the trial court’s Order of summary judgment in favor of the defendants, the Court of Appeals cited the case of Camper v. Minor, 915 S.W.2d 439 (Tenn. 1996), and stated that in that opinion the Court abandoned “the requirement of physical manifestation, or injury rule, and held that cases claiming negligent infliction of emotional distress should be analyzed under the general negligence approach. ‘In other words, the plaintiff must present material evidence as to each of the five elements of general negligence – duty, breach of duty, injury or loss, causation in fact, and proximate or legal cause in order to avoid summary judgment.’” The Court of Appeals further referenced the Camper v. Minor decision which held that a recovery for negligent infliction of emotional distress should be reserved “only for ‘serious’ or ‘severe’ emotional injuries, which the Court defined as injuries ‘where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.’” In addition, to recover for such a theory, the “claimed injury must be supported by expert medical or scientific proof.”

The Court of Appeals further referenced the case of Ramsey v. Beavers, 931 S.W.2d 527 (Tenn. 1996), which essentially did away with the “zone of danger” rule and provided that liability under the theory of negligent infliction of emotional distress would be determined under general negligence principles.

In addition to referencing the aforesaid Tennessee case law which provides for a right of recovery for negligent infliction of emotional distress under general negligence principles, the Court found support for its position through the Supreme Court of Washington opinion styled Hegel v. McMahon, 960 P.2d 424 (Wash. 1998), which held as follows in considering the same issue of negligent infliction of emotional distress:

A family member may recover for emotional distress caused by observing an injured relative at the scene of an accident after its occurrence and before there is substantial change in the relative’s condition or location. Applying this rule to the facts of these cases, we conclude that it was improper for the lower court to dismiss the plaintiff’s claims for negligent infliction of emotional distress. Because the plaintiffs in both cases were present at the scene, and may have witnessed their family member’s suffering before there was a substantial change in the victim’s condition or location, their mental distress was not unforeseeable as a matter of law.

Based upon the foregoing, the Tennessee Court of Appeals refused to require actual observance of the injury-producing accident. It recognized that the “sensory observance of the injury-producing event is not an absolute essential element.” In short, the Tennessee Court of Appeals followed the rule of Ramsey and concluded that there is no bright line rule of observation of an injury-producing event as a necessary element to recovery of damages under a theory of negligent infliction of emotional distress. Rather, general negligence principles “control the cause of action.”

Please note that in construing the Camper decision, subsequent courts have held that a heightened standard of proof requiring expert testimony is applicable only when a claim of recovery through the theory of negligent infliction of emotional distress is the sole claim (stand-alone claim) made by the plaintiff (see Estate of Amos v. Vanderbilt University, 62 S.W.3d 133 (Tenn. 2001).
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TENNESSEE

ADMISSIBILITY OF MEDICAL HISTORY AND CONVICTION FOR COCAINE POSSESSION AS RELEVANT TO DAMAGES ISSUE

In the case of Hall v. Stewart, No. W2005-02948-C0A-R3-CV, 2007 WL 258406 (Tenn. Ct. App. Jan. 31, 2007), the Tennessee Court of Appeals for the Western Section of Tennessee considered a wrongful death case that arose out of the death of Billy Wayne Jones, who was killed when a bulldozer ran over him. Mr. Jones’ adult daughter (Teresa Diane Jones) and the plaintiff Johnnie Mae Hall (who was the girlfriend of the decedent) filed a wrongful death suit, and the jury issued an award of $100,000 to the plaintiff that was reduced to $51,000 in light of the jury’s finding that Mr. Jones was 49% at fault in the accident.

The plaintiffs filed a motion for a new trial which was denied. The plaintiffs then filed an appeal and claimed that the court should not have admitted evidence concerning the decedent’s past medical history without proper expert testimony and should not have admitted into evidence the decedent’s guilty plea to a possession of cocaine charge.

On appeal, the Tennessee Court of Appeals noted that the sole basis for the jury’s award was for Ms. Jones’ (who was an adult child of the decedent) claim for loss of parental consortium. The Court set forth no opinion regarding the basis for the girlfriend’s prosecution of the case with the adult child of the decedent.

At the trial of the case, Dr. Kenneth Snell, who was the Deputy Chief Medical Examiner of Shelby County, was called upon by the plaintiffs to testify about the cause of death. On cross-examination by counsel for the defendants, Dr. Snell testified from medical records that the decedent had a history of blacking out, having dizzy spells, had diabetes, and had other medical conditions. The medical history was argued by counsel for the defendants to be relevant with respect to life expectancy. The plaintiffs argued that the introduction of such medical history with respect to the issue of life expectancy was inappropriate because the doctor could not testify within a reasonable degree of medical certainty to the effect of the health conditions upon the decedent’s life expectancy. Counsel for the defendants argued that the reasonable degree of medical certainty standard was not applicable and that the expert testimony need only “substantially assist the trier of fact” on a matter that is beyond the keen of the jury’s common knowledge.

With respect to the admission into evidence of the cocaine possession conviction, the plaintiffs-appellants argued that the admission into evidence of such conviction should have been barred because of the low probative value of the evidence and because of the high risk of unfair prejudice. The defendant-appellee argued that the cocaine conviction was relevant with respect to life expectancy and with respect to the impact of the conviction upon the decedent’s employment prospects. The defendant-appellee further argued that the conviction of the crime reflected upon the claimant’s character and his ability to earn an honest livelihood. (It is important to note that the plaintiffs-appellants actually introduced the conviction into evidence at the trial of the matter and then filed an appeal challenging the admission into evidence of the same).

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VERDICTS AND SETTLEMENTS

No Verdicts and Settlements reported in this issue.

PRACTICE TIPS

THE STRONG ARM OF MILITARY SUBROGATION

In recent years, international events have resulted in the mobilization of more service members (including National Guard and Reserve units). This increase in troop levels has resulted in a corresponding increase of service families traveling to visit their loved ones. With additional travel, it follows that accidents involving active duty service members or their dependent family members have increased. For those handling liability claims that include injured service members or their families, an understanding of the Federal Medical Care Recovery Act and the Third Party Medical Care Recovery Act is necessary.

The Federal Medical Care Recovery Act (FMCRA) is set forth at 42 USC 2651-53. It provides for the recovery of the reasonable value of medical care furnished by the United States on account of injury or disease incurred under circumstances creating tort liability upon some third person. Under the FMCRA, the United States also has the right to recover the costs of pay provided to a service member who is tortiously injured by another.

Congress has also enacted the Third Party Medical Care Recovery Act (TPMCRA) (10 USC 1095) as a corollary to the FMCRA. The TPMCRA provides authority for military treatment facilities (MTF) to collect the reasonable cost of inpatient health care provided at government expense to injured retirees and family members from those individuals’ private health insurance carriers and Medicare supplemental policies.

A military treatment facility may collect outpatient medical care costs in addition to inpatient care costs. Additionally, an MTF may collect medical care costs from any third party insurer. Significantly, this act directs that monies recovered pursuant to its provisions be deposited directly into the local MTF treasury, thereby providing a substantial budgetary source of income and an incentive for an MTF to aggressively pursue these affirmative claims.

The Medical Treatment Facility Third Party Collection Program

Department of Defense (DOD) claims offices and MTFs manage complementary programs to recover for medical care furnished at DOD expense. DOD claims offices will recover from automobile and other insurers, while MTFs will recover from health benefits and Medicare supplemental insurance. If care was wholly or partly provided in a MTF, recovery is possible from both a health benefits insurer and an automobile insurer. The MTF will first attempt to collect from the health insurer. If the MTF cannot recover the full value of the government’s claim from the health insurer, the MTF will forward the claim file to the claims office for collection from the automobile insurer. If the tortfeasor is an uninsured motorist and collection from the tortfeasor is not feasible, claims personnel will pursue recovery from any state uninsured motorist’s fund or from the injured party’s uninsured motorist’s coverage, personal injury protection, or medical payments coverage.

Alternate Theories of Government Recovery

Often, recovery under the FMCRA is not possible because no third-party tort liability exists. State law, including insurance, workers’ compensation, and uninsured motorist coverage provisions, determines the government’s right to recover in situations not covered by the FMCRA. If, under the law where the injury occurred, the injured party is entitled to compensation for medical care received, usually the federal government may recover. The two most common alternate theories are described below.

a. Recovery may be possible under the injured party’s automobile insurance policy. In most cases, the federal government will seek recovery as a third-party beneficiary under the medical payments provision or underinsured/uninsured portion of the injured party’s policy. The ability of the federal government to recover as a third-party beneficiary has been upheld in some states, while other states have taken the contrary position.22 With

22 Cases in which the government has been successful in pursuing claims under the...
the enactment of 10 USC § 1095, the importance of this theory of recovery has diminished. However, there may be cases where this theory provides the only source of recovery such as cases where the injured party was at fault and CHAMPUS/TRICARE paid for the medical care. Since there is no legally recognized tortfeasor, the FMCRA will not apply, and 10 USC § 1095 will not apply because the care is not provided by, or through, an MTF. In this situation, one obstacle for the government is that the government must comply with state procedural law when asserting a claim as a third-party beneficiary. Since the government’s right to recovery hinges on the particular wording of an insurance contract, insurance companies have successfully thwarted government recovery by specifically excluding the United States from the terms of the contract. However, the government has often been successful in voiding such exclusionary amendments to insurance policies. Additionally, in states that have adopted no-fault automobile insurance laws, the government has often succeeded in recovering as a third-party beneficiary under the terms of either the insurance contract or the state no-fault statute itself.

Recovery Rights Under the FMCRA

Pursuant to the FMCRA, the government may pursue recovery of medical costs and the costs of pay under any of the following tactics:

a. Subrogation. The United States is subrogated to any rights or claims held by a person to whom the government has provided medical care and wages (during periods of incapacitation) against the tortfeasor who caused him or her to be injured. As subrogee, the United States can intervene in an injured party’s suit against a tortfeasor or bring suit as the assignee of an injured party’s right of action.

b. Intervention. The United States can intervene in an injured party’s suit against a tortfeasor or bring suit as the assignee of an injured party’s right of action.

c. Independent cause of action. The FMCRA creates an independent cause of action for the United States. The government’s right is independent of the rights of the person receiving medical care. The United States can administratively assert and litigate a medical care claim in its own name and for its own benefit. A failure of the injured person to properly file and/or serve a complaint on the third party may prevent the injured person from recovering, but does not prevent the United States from pursuing its own action to recover. The right arises directly from the statute; the statutory reference to subrogation pertains only to one mode of enforcement. In creating an independent right in the government, the Act prevents a release given by the injured person to a third party from affecting the government’s claim.

d. Item of special damages. The injured party’s attorney can assert the government’s claim as an item of special damages in an injured party’s suit against the tortfeasor.

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23 CHAMPUS is the Civilian Health and Medical Program for the Uniformed Services. Since its establishment on October 1, 1966, Congress and the DOD have made numerous changes to the CHAMPUS program. CHAMPUS officially became known as TRICARE in 1993; however, many persons including several official Armed Forces Regulations and Pamphlets still refer to TRICARE as CHAMPUS.


Notice of Claim

The claims office will assert appropriate FMCRA claims by mailing, certified mail, returned receipt requested, a notice of claim to identified third-party tortfeasors and their insurers, if known. Many insured tortfeasors fail to notify their insurance companies of incidents. This failure may be a breach of the cooperation clause in the policy and may be grounds for the insurer to refuse to defend the insured or be responsible for any liability. However, the United States, as a claimant, may preclude such an invocation by giving the requisite notification itself. The purpose of the insurance clause is satisfied if the insurer receives actual notice of the incident, regardless of the informant. After receiving a notice of claim, the insurer must ensure that the government is named on any settlement draft. If the United States is not so named, and the claim has been asserted, the insurer settles at its own risk.

Determination of the Amount Asserted

a. Medical Treatment Facility Costs. Recovery for MTF care is based on diagnostic related group rates, and a single per-visit outpatient rate established by the Office of Management and Budget (OMB) and/or the Department of Defense (DOD).

b. TRICARE costs. Recovery for inpatient care provided in civilian hospitals and paid through TRICARE is based on the TRICARE diagnostic related group rates, regardless of the actual costs. Rates for outpatient care are based on the TRICARE allowable charge for that medical service.

c. Costs of pay. When a third party tortiously injures a soldier, that soldier is often unable to perform any military duties for a period of time because of the injuries. Citing the FMCRA, claims offices will assert a demand against the tortfeasor to recover the “cost of pay” for the period in which the injured soldier is unable to perform military duties.

d. Ambulance services. Ambulance and air ambulance services provided to soldiers, family members, and retirees are medical costs within the meaning of the FMCRA and 10 USC § 1095, but they are not included in the OMB or DOD rates. Claims offices will obtain a breakdown of the costs for these services from the MTF or the unit providing the services and include this amount in the amount asserted.

e. Burial expenses. If the service member dies from injuries received and is buried at government expense, the government may, in some cases, assert a claim for these expenses. While burial expenses are not medical care within the meaning of the FMCRA or 10 USC § 1095, many insurance policies provide for the payment of such expenses. Claims offices may assert a demand for burial expenses incurred by the government if the insurance contract provides for payment of such expenses and state law recognizes the United States as a third party beneficiary of the contract.

Settling Claims

a. Payment in full. The government may settle a medical care or property damage claim by recovering the full amount of the government’s claim as a lump sum, through installment payments, or as a repair in kind on a property damage claim. An offer for the full amount of available insurance would not pay in full a claim asserted for a greater amount, and the recovery attorney would have to follow compromise procedures.

b. Compromise. When there are difficulties in recovering on a claim (as defined in the Federal Claims Collection Standards, 4 CFR 103), a settlement authority may accept less than the amount asserted from a tortfeasor or insurer for the convenience of the government. Acceptable bases for compromise for the convenience of the government include inability of the tortfeasor to pay, insufficient insurance, or

31 Claims offices will assert a claim for the amount that TRICARE paid even though that amount may sometimes exceed the amount that the civilian hospital billed.

32 Insurers and firms faced with a cost of pay claim should carefully review the assertions. The military has several steps for dealing with injured service members. Service members may be placed on convalescent leave during which time they will be performing no military duties. After, or in lieu of, convalescent leave, service members may be given a temporary profile during which time their duty is restricted; however, they are performing military duties.

33 Claims personnel are sensitive to the possibility that the insurance proceeds might be inadequate and will consider waiving or compromising the government’s claim for burial expenses to avoid undue hardship to the next of kin.
probability that the government will be unable to prove its case, or collection costs that are not commensurate with the amount compromised.

**c. Litigation.** When a tortfeasor or insurer refuses to settle, the recovery attorney will consider litigation to protect the interests of the United States. Litigation will be routinely sought if a particular insurer consistently refuses to settle claims, or if the government’s interests are not adequately represented on a large claim.

### Basic Considerations

Medical care claims asserted under the FMCRA or against a liability insurer under 10 USC § 1095 are founded in tort and must be brought within three years after the action “first accrues” (28 USC § 2415b). Claims asserted under 10 USC § 1095 against a no-fault or personal injury protection insurer are presumably founded in a contract “implied in law” and must be brought within six years (28 USC § 2415a).

Normally, a medical care claim “first accrues” on the initial date of treatment. However, in computing the statute of limitation, 28 USC § 2416(c) excludes the period of time before a U.S. official charged with the responsibility to act in the circumstances knows or should know that there is a basis for a claim.34

Claims asserted against an insurer on a third party beneficiary theory or against a state workers’ compensation fund must be brought with the applicable state statute of limitations which can range from one to six years. Normally, the SOL would begin to run when the injury occurred, rather than on the date of initial treatment.

Federal law does not define what constitutes a tort. The law of the state where an incident occurred is used in determining whether the government has a cause of action founded in tort.

Claims for damage to government property and claims for medical care may arise from the same incident.35 This article focuses on claims for medical care; however, insurers and firms should be aware of potential claims for property damage and the potential problem of when concurrent claims arise. The government will process concurrent claims under the section applicable to each. However, efforts are made to include all medical care and property damage claims in a single demand against the third party or insurance company. If you are faced with a concurrent claims demand you must be aware that the government typically drafts its settlement agreements so that the settlement and release of one claim will not prejudice settlement of the remaining claim.

### Summary

Government claims offices assert claims against tortfeasors and insurers for medical and dental care that is furnished to a member of the U.S. Armed Forces (including a reserve component member), a family member, or retiree at government expense to treat an injury or disease resulting from tortious conduct. Claims offices also assert claims against tortfeasors and insurers for any basic, special, or incentive pay provided to the soldier. The “costs of pay” are recoverable when the soldier is unable to perform any military duties due to injuries caused by the wrongful conduct of a third party tortfeasor. Claims offices also assert claims against insurers other than health benefits insurers, such as automobile insurance companies that provide no-fault and medical payments coverage and workers’ compensation funds. With added incentives, such as getting to keep the monies recovered, MTFs are now aggressively pursuing all possible claims. Insurers and firms faced with a claim by the government, or considering settlement with a claimant who is a member of the Armed Forces, must be aware of the statutes and various theories of recovery that the government may assert. An insurer who settles a claim with a service member or other beneficiary without first ensuring the government claims officer is involved does so at its own risk.

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34 United States v. Hunter, 645 F. Supp. 758, 760 (N.D.N.Y. 1986). For example: the three year SOL would begin to run on most medical care claims paid by Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) no earlier than the date on which CHAMPUS received the bill from the provider.

35 The Federal Claims Collection Act (FCCA) is set forth at 31 USC § 3711. It states that Federal agencies will try to collect all claims of the United States for money or property. Among other things, it provides a basis for agencies to recover for damage to government property. Claims asserted under the FCCA for damage to government property are founded in tort and must be brought within three years after the action “first accrues” (28 USC § 2415b).
THE CRITICAL STATE OF SELF-CRITICAL ANALYSIS: IS THE PRIVILEGE STILL VAILABLE?

I. INTRODUCTION

Motor carriers regularly investigate accidents in which their drivers are involved. During these investigations, company employees are often called upon to make critical self-evaluations in an effort to improve overall safety. If the motor carrier is sued by a third-party, can the third-party obtain any or all of the company’s internal investigation and self-analysis?

Recognizing the need to protect certain self-analyses from discovery, as well as the potential chilling effect disclosure would potentially promote, a privilege of self-critical analysis has developed.

This article will discuss the current state of the federal law dealing with the self-critical analysis privilege. As noted more fully below, a majority of the Circuit Courts of Appeal has refused either to recognize the privilege or to apply the self-critical analysis privilege.

II. HISTORICAL DEVELOPMENT OF THE PRIVILEGE

The privilege was first recognized in Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.C. 1970). Bredice was a medical malpractice case. In her discovery, plaintiff sought, inter alia, the minutes and reports of any board or committee of the defendant hospital or its staff concerning the death of the decedent. The defendant hospital had boards or committees which acted pursuant to the requirements of the Joint Commissions on Accreditation of Hospitals. According to the Bredice opinion, the Commission was organized to standardize hospital practices throughout the nation. Though the Commission lacked legal licensing authority, it was considered a prestigious organization and accreditation by the Commission could only be gained by following the recommendations of the Commission.

The Commission’ recommendations included those designed to improve hospital and medical standards through the use of committee review proceedings. These proceedings involved the professional staff of the hospital who participated in the care and treatment of patients. According to the Commission, the sole objective of these staff meetings was improvement in the available care and treatment of patients. Moreover, the meetings were conducted with the understanding that all communications were to be confidential.

The Bredice Court upheld the recommendations of the pretrial examiner that plaintiff’s motion to compel the production of the minutes of staff meetings be denied. In so holding, the Court noted:

The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques.
They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process. Bredice, at 250.

The Court based its opinion on the “…overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded…. “ Bredice at 251. The Court also determined that the committee meetings, “…being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest”. Bredice at 251.

III. THE REQUIREMENTS FOR APPLICATION OF THE PRIVILEGE

The critical self-analysis privilege generally requires that:

1. The materials must have been prepared for mandatory governmental reports, or for a self-critical analysis undertaken by the parties seeking protection;

2. The privilege extends only to subjective, evaluative materials, but not to objective data in the reports; and

3. The policy favoring exclusion must clearly outweigh plaintiff’s need for the documents.


In Clark, the Court held that the self-critical analysis privilege shielded from disclosure in a gender discrimination civil lawsuit, affirmative action plans prepared by the defendant pursuant to regulations of the OFCCP, an agency of the federal government, and reports and other studies prepared for the Equal Employment Opportunity Commission.

Dowling, supra, involved a claim under the Jones Act and general maritime law for certain personal injuries which plaintiff allegedly suffered while working aboard the defendant’s ship. The plaintiff requested, in discovery, the minutes of the meetings of the ship’s safety committee held for the roughly one year before the accident. The defendant objected to this discovery asserting the privilege of self-critical analysis.

In Dowling, the Court noted that the party asserting the privilege of self-critical analysis must demonstrate at least three criteria:

First, the information must result from a critical self-

IV. THE IMPACT OF UNIVERSITY OF PENNSYLVANIA V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Supreme Court of the United States has not yet considered the self-critical analysis privilege. The Supreme Court has, however,
refused to recognize a qualified common law privilege against disclosure of confidential peer review materials.

In University of Pennsylvania v. Equal Employment Opportunity Commission, 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed. 2nd 571 (1990), the Supreme Court was asked to consider whether a private university enjoys a special privilege against the disclosure of peer review material in a discrimination case. In this case, the University denied tenure to a member of the faculty. The faculty member then filed a sworn charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The complaint alleged that the professor was the victim of discrimination on the basis of race, sex, and national origin. The EEOC then undertook an investigation into the professor’s charge and requested certain information and documents from the University. When the University refused to provide certain information, the EEOC issued a subpoena seeking, among other documents, the professor’s tenure-review file and the tenure files of five male faculty members who had allegedly received more favorable treatment than the professor denied tenure. The EEOC denied the University’s application, concluding that the documents which the University had withheld were needed in order to evaluate the merit of the claimant’s charges. Because the University continued to withhold the tenured review materials, the EEOC then applied to the Court for enforcement of its subpoena.

The University argued that the Court should recognize a qualified common law privilege against the disclosure of conditional peer review materials. The University argued that this privilege was necessary to protect the integrity of the University’s peer review process, which in turn is central to the proper functioning of many colleges and universities. The Supreme Court rejected the University of Pennsylvania’s arguments for the creation of a new common law privilege.

In its decision, the Supreme Court first noted that though Congress extended Title XII to educational institutions and provided broad subpoena powers to the EEOC, congress did not create a privilege for peer review documents. The Supreme Court stated that it would not create an evidentiary privilege unless the privilege “promotes sufficiently important interests to outweigh the need for probative evidence...”. 493 U.S. at 189, quoting Trammel v. United States, 445 U.S. 40, 51(1980). Because “testimonial exclusionary rules and privileges contravene the fundamental principle that ‘the public...has a right to every man’s evidence”, the Supreme Court held that any such privilege must “be strictly construed”. 493 U.S. at 189.

In University of Pennsylvania, the Supreme Court also indicated that it was reluctant to recognize any testimonial privilege in an area where it appeared that Congress had considered but had not specifically provided for privilege itself. Referring to Federal Rule of Evidence 501 as manifesting a Congressional intent “not to freeze the law of privilege” rather, to provide flexibility to the Courts to develop rules of privilege on a case-by-case basis, Trammel at 47, the Supreme Court indicated that it was “…disinclined to exercise the authority expansively.” 493 U.S. at 189.

The University of Pennsylvania case and its rationale and holding have served as important considerations in the determinations of later courts as to whether to recognize the related privilege of self-critical analysis.

V. THE CURRENT STATE OF FEDERAL LAW REGARDING SELF-CRITICAL ANALYSIS PRIVILEGE

Despite the need for a privilege which protects self-evaluative
materials, a majority of the Federal Courts of Appeals which have considered the issue have either refused to recognize the self-critical analysis privilege or have refused to apply it. In In re: Quest Communications International, Inc., 450 F.3d 1179 (10th Cir. 2006) The United States Court of Appeals for the Tenth Circuit was asked to consider whether the self-critical analysis privilege would protect from disclosure, certain documents which Quest had produced to federal agencies in the course of the agencies’ investigation of Quest. The Court refused to recognize the privilege, noting that the privilege was not expressly adopted when the Federal Rules of Evidence were promulgated. The Court also noted that the self-critical analysis privileged has only been recognized in a minority of states and for certain specified situations (e.g., environmental audits, and insurance compliance). In addition, the Court specifically noted that the Supreme Court of the United States has declined to recognize new privileges.

The United States Court of Appeals for the Seventh Circuit also refused to recognize the self-critical analysis privilege. Burden-Meeks v. Welch, 319 F. 3rd 897 (7th Cir. 2003). In Burden-Meeks, plaintiffs were city employees who alleged that the municipalities fired them for political reasons. In discovery, plaintiffs sought to obtain a document prepared by attorneys representing the Intergovernmental Risk Management Agency, an organization created by various municipalities to pool their liability risks. The Court rejected the Agency’s efforts to attempt to prevent the disclosure of the report pursuant to the self-critical analysis privilege, finding that this privilege has never been recognized in the Seventh Circuit.

Similarly, the United States Court of Appeals for the Ninth Circuit in Union Pacific Railroad Company v. Mower, 219 F. 3d 1069(9th Cir. 2000) specifically rejected the use of the self-critical analysis privilege, finding that the privilege was “particularly questionable” and that they Ninth Circuit has not recognized this novel privilege. Union Pacific Railroad Company, at 1076.

Two Circuit Courts of Appeals have held that the self-critical analysis privilege is not available to shield from disclosure information and documents sought by a federal agency. In In Re: Kaiser Aluminum and Chemical Co., 214 F. 3d 586 (5th Cir. 2000), Kaiser and several of its employees appealed an order issued by the District Court enforcing subpoenas duces tecum issued by the Department of Labor’s Mine Safety and Health Administration. Kaiser argued that certain documents sought by the federal agency were protected by the self-evaluation privilege. The United States Court of Appeals for the Fifth Circuit noted that the Fifth Circuit has not yet recognized the self-evaluative privilege in the context of private litigation. In its opinion, however, the Court did not expressly reject the possible application of the self-evaluative privilege to the production of documents from a federal agency. The District of Columbia Circuit Court squarely held that it did not. In its opinion, however, the Court did not expressly reject the possible application of the self-evaluative privilege in the context of private litigation. Though not a part of its holding, the Court’s comments regarding the privilege at least left open the possibility for some availability under certain circumstances.

The Third Circuit has not yet specifically ruled on whether it recognizes the self-critical analysis privilege. In Armstrong v. DwyerArmsstrong, however, the Court referred to “…the so-called self-critical analysis privilege”. 155 F. 3d 211, 214 (3d Cir. 1998). In addition, in In Re: Grand Jury, the Third Circuit

To date, only one Circuit has actually upheld an order excluding documents based on the privilege. LaClair v. City of St. Paul, 187 F. 3d 824 (8th Cir. 1999). In LaClair, a police officer sued the City of St. Paul, alleging that the City’s police department discouraged reports of sexual harassment by females through a pattern of retaliation once a complaint was made. During discovery, the City sought to exclude from production the results of a workplace assessment survey which had been ordered by the police chief, upon taking office, to evaluate the degree of difficulty female officers were experiencing in the male-dominated city police department. The Eighth Circuit affirmed the trial Court’s decision to prohibit the production of the workplace assessment survey. However, the appellate court did so without specifically adopting the self-critical analysis privilege. 

VI. CONCLUSION

The privilege of self-critical analysis was developed, at least in part, based upon the premise that the public is better served in certain instances where information and documents are protected from disclosure. Despite this clear need for such a privilege and the early judicial recognition and development of the privilege, current federal law in a majority of the United States Courts of Appeals either does not recognize the privilege at all or have refused to apply the privilege.

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