

# UPDATE

Trends, Issues and Developments in Insurance Law

## Insurance Law

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## REFUSAL TO PROVIDE A MEDICAL AUTHORIZATION

By Mark E. Kinley

Many cases being handled for defense of the insured, particularly in motor vehicle accident cases, involve clear liability. That is to say, the negligence of the insured in proximately causing the accident leading to the plaintiff's alleged injuries and damages is clear. In those cases, the only realistic, practical defense to the action may be as to damages, making discovery of the plaintiff's complete medical history of paramount importance, whether it be towards eventually obtaining a fair and reasonable settlement of the action or, if need be, taking the action to trial with the hope of obtaining a verdict substantially less than the plaintiff's final pre-trial demand.



Obviously, discovering a plaintiff's complete medical history requires obtaining the medical records of the plaintiff, which is usually done by having the plaintiff sign and return a HIPAA-compliant medical authorization allowing defense counsel to obtain the plaintiff's medical records. Sometimes, however, a plaintiff will refuse to provide a medical authorization, stating that he/she is not required by the West Virginia Rules of Civil Procedure, or the Federal Rules of Civil Procedure, as the case may be, to execute a medical authorization. Is this true, and, if so, what should defense counsel do when a plaintiff refuses to provide a medical authorization to make certain that the plaintiff is not concealing pre-existing or subsequent medical problems of the same or similar kind alleged by the plaintiff to have been caused by the accident?

There are no reported decisions in West Virginia wherein the issue of whether a plaintiff is required to provide a medical authorization for release of his/her medical records has been addressed. That is not to say, however, that the issue has never been addressed by any court in West Virginia. There are several unreported decisions from judges in West Virginia, both at the state and federal levels, wherein the issue has been addressed. In reviewing those decisions, it is evident that the courts in West Virginia agree that there is no rule of civil procedure, whether state

or federal, which specifically requires a plaintiff to provide a medical authorization. Nonetheless, several courts in West Virginia have required a plaintiff to provide a medical authorization to defense counsel, reasoning that the rules of civil procedure do provide for the imposition of sanctions against parties who do not cooperate in discovery and that a defendant is entitled to conduct an independent analysis of a plaintiff's medical records in their entirety, without pre-screening of the medical records by plaintiff's counsel. In those instances, the courts involved have essentially found that unilateral control over the discovery process by plaintiff's counsel is contrary to the rules of civil procedure even if there is no specific language in any of the rules of civil procedure requiring a plaintiff to provide a medical authorization. This is an argument that should always be advanced by defense counsel in drafting any Motion to Compel an Executed Medical Authorization from a plaintiff. Of course, defense counsel should always argue as well that there are no documents more relevant in a tort action seeking damages for bodily injury than those reflecting pre-existing or subsequent medical problems of the plaintiff of the same or similar kind alleged by plaintiff to have been caused by the accident.

Absent filing a Motion to Compel an Executed Medical Authorization, or in the event that such Motion is denied, defense counsel must instead rely on a well-crafted request for production of documents under Rule 34 of the West Virginia Rules of Civil Procedure, or Rule 34 of the Federal Rules of Civil Procedure, as the case may be, to obtain the medical records of the plaintiff. In so doing, defense counsel should make certain that the request for production of documents is broad enough to cover the

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plaintiff's complete medical history, limited only, perhaps, to a particular time period to counter any argument by plaintiff that the request is overly broad. This means that, in the request for production of documents, defense counsel should not only request all documents describing or reflecting in any way any medical treatment received by the plaintiff before and after the subject accident for any medical condition/problem/pain regarding the parts of plaintiff's body alleged to have been injured in the accident, but should also include more specific requests such as, for example, a request for all documents and tangible things describing or reflecting in any way any medical treatment received by plaintiff from all of his/her primary care physicians over the last twenty years. Likewise, in separate requests, defense counsel should request all documents and tangible things describing or reflecting in any way any medical treatment received by the plaintiff from all emergency rooms, chiropractors, physical therapists, psychologists/psychiatrists/counselors, and pharmacies over the last twenty years. Additionally, to ensure plaintiff complies with the requests, the request for production of documents should end with a request that the plaintiff provide a privilege log listing each and every document responsive in any way to the foregoing requests for production which the plaintiff has either altered/redacted, withheld from discovery, or otherwise failed to produce in its complete and unedited form to the defendant, including a detailed description of the document and the specific basis in the law for the plaintiff having either altered/redacted, withheld from discovery, or otherwise failed to produce the document in its complete and unedited form. Propounding such a well-crafted request for production of documents makes it much less likely that a plaintiff will be able to conceal any pre-existing or subsequent medical problems of the same or similar kind alleged by him/her to have been caused by the accident. It has even occasionally resulted in a plaintiff providing an authorization for release of his/her medical records to avoid the time and expense of gathering his/her own medical records for the defendant.

Finally, when a plaintiff refuses to provide an authorization for release of his/her medical records it is not imprudent or rash for defense counsel to view that as a "red flag" and assume that the plaintiff is attempting to frustrate the discovery of evidence damaging to his/her action. Making that assumption can actually be a very good thing, prompting defense counsel to analyze the plaintiff's medical records much more closely as they are received and to question the plaintiff more vigorously in deposition as to his/her pre-existing and subsequent medical history. When an authorization is not forthcoming, the level of scrutiny should always be turned up by defense counsel.

### Additional Items of Interest

» **West Virginia Informational Letter 172** (Sept. 2009) "is intended to remind insurers of their obligation to properly document claim files to ensure that the Offices of the Insurance Commissioner ("OIC") can conduct a complete and thorough review of the subject claim by permitting the OIC to fully assess the subject insurer's claim adjusting or processing methods." If the provision is violated, it can lead to license revocation or suspension. Please also consider this in reference to proposed orders requiring insurance companies to destroy documents upon completion of litigation.

» **Noland v. Virginia Ins. Reciprocal**, 686 S.E.2d 23 (W. Va. September 24, 2009). The Court reversed the circuit court's partial summary judgment in favor of Virginia Insurance Reciprocal ("VIR"), holding that VIR had a duty to defend the plaintiff, who was an additional insured, under an umbrella policy once the primary coverage was exhausted despite the presence of an "other insurance" clause in the policy. Court affirmed dismissal of the claims against four other defendants based on statute of limitations grounds. Court held in new Syllabus Point 4 that the one-year statute of limitations ("SOL") contained in West Virginia Code § 55-2-12(c) applies to a common law bad faith claim. The Court further held in new Syllabus Point 5 that in a first-party bad faith claim based upon an insurer's refusal to defend (brought under W. Va. Code § 33-11-4(9) and/or as a common law bad faith claim), the SOL begins to run on the claim when the insured knows or reasonably should know that the insurer refused to defend him or her in the action. The Court made no ruling as to when the SOL begins to run in WV on a bad faith claim predicated on a refusal to indemnify.

» **State ex rel. Progressive Classic Ins. Co. v. Bedell**, \_\_ S.E.2d \_\_, 2009 WL 3321447 (W. Va. Oct. 13, 2009). A subpoena duces tecum was properly served on the defendant's insurer, Progressive, through the West Virginia Secretary of State in an effort to obtain factual information from the insurer's claim file. The Court rejected Progressive's argument that service was not proper because, as a non-party foreign corporation, personal service was the exclusive method of service.

» **McGrew v. Nationwide Mut. Ins. Co.**, Slip Copy, 2009 WL 3380339 (S.D. W. Va. Oct. 20, 2009). Judge Goodwin granted summary judgment to Nationwide on the plaintiff ex-wife's claims of bad faith arising from the handling of a vehicle property damage claim due to the policyholder ex-husband's failure to notify the insurer of a change in marital status.

» **American Modern Home Ins. Co. v. Corra**, Slip Copy, 2009 WL 3424226 (S.D. W. Va. Oct. 22, 2009). Judge Goodwin granted summary judgment to

American Modern finding no duty to defend or indemnify. The Court ruled in reliance upon the West Virginia Supreme Court's response to a certified question finding that knowingly permitting an underage adult to consume alcohol on a homeowner's property does not constitute an "occurrence" under a homeowner's policy that defined the term as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in . . . bodily injury or property damage." Issues of fact precluded summary judgment as to the applicability of medical payments coverage.

» **Unum Life Ins. Co. of America v. Wilson**, Slip Copy, 2009 WL 3617747 (N.D. W. Va. Oct. 29, 2009). Judge Bailey granted the insured's motion for summary judgment regarding disability insurance, finding that Unum breached its insurance contract. Additionally, because a claim for breach of the duty of good faith and fair dealing is not an independent cause of action but rather is subsumed in the claim for breach of contract, Unum was found to have breached its duty of good faith and fair dealing.

» **Wrenn v. West Virginia Dept. of Transp., Div. of Highways**, 686 S.E.2d 75 (W. Va. Nov. 2, 2009). The Court affirmed the final order of the circuit court granting a motion to dismiss filed by the Division of Highways ("DOH"). The Court adopted a new Syllabus Point 6, which states that, recognizing the breadth of the DOH's "primary functions," and the expense that would be incurred by providing insurance coverage for every function, the coverage currently afforded by the State's liability insurance policy meets the requirements that such coverage provide "significantly broad protection." Although the exclusions contained in Endorsement No. 7 to the State's liability insurance policy preclude coverage for many of the DOH's primary functions, the Endorsement does not violate the laws and public policy of West Virginia.

» **Blake v. State Farm Mut. Auto. Ins. Co.**, 685 S.E.2d 895 (W. Va. Nov. 2, 2009) (per curiam). In reversing the circuit court's grant of partial summary judgment to the plaintiffs, the Supreme Court found that an automobile liability policy issued to plaintiff Blake did not provide coverage for a claim of damage to a trailer plaintiff Blake borrowed from plaintiff Parker. The policy at issue excluded damages to property owned by, rented to, in the charge of or transported by an insured, which the circuit court held was unenforceable. The Supreme Court held that the circuit court's finding in this regard was contrary to the plain language of W. Va. Code § 17D-4-12, which provides that an insurer is not required to extend liability coverage to property "transported by" or "in charge" of the insured. The Court further held that the exclusionary language in the policy was unambiguous.

» **Tustin v. Motorists Mut. Ins. Co.**, 2009 WL 3785757 (N.D. W. Va. Nov. 10, 2009). The Court found that the insurer failed to rebut the presumption in favor of allowing public access to the entire court file following a settlement. The Court agreed, however, to seal Insurance Commissioner Complaints and notice of claims documents from other customers.

» **Zaleski v. West Virginia Mut. Ins. Co.**, \_\_\_ S.E.2d \_\_\_, 2009 WL 3855856 (W. Va. Nov. 17, 2009) (per curiam). The question on appeal was whether the circuit court was required, by virtue of the Supreme Court of Appeals' prior mandate in *Zaleski I*, to grant the defendant insurer's motion to dismiss and related motions, and whether the circuit court maintained jurisdiction following remand to address the actual content of the defendant insurer's due process hearing procedures for non-renewing coverage prior to sending the matter back to the insurer for a hearing. The Court affirmed the circuit court's denials of the motion to dismiss and related motions. The Court, however, reversed and remanded the circuit court's denial of the insurance carrier's motion for entry of an order remanding the non-renewal to the insurer for further hearing as required by the mandate in *Zaleski I*.

» **West v. West Virginia Dept. of Transp., Div. of Highways**, \_\_\_ S.E.2d \_\_\_, 2009 WL 3856187 (W. Va. Nov. 18, 2009) (per curiam). The Court reversed the judgment of the circuit court entered after a trial by jury resulted in an \$8 million verdict in favor of the plaintiffs. The Court remanded the case for further proceedings in order to determine the threshold issue of whether a properly executed State liability insurance policy was in place at the time of the plaintiff's accident.

» **Princeton Ins. Agency, Inc. v. Erie Ins. Co.**, 685 S.E.2d 914 (W. Va. Nov. 18, 2009) (per curiam). The Court reversed the judgment of the circuit court, entered on a partially adverse jury verdict in a case involving alleged violations of antitrust, unfair trade practices, and consumer protection laws after Erie terminated an independent insurance agency agreement with the plaintiffs, pursuant to which they were authorized to sell Erie's insurance products in West Virginia. The Court concluded on appeal that the plaintiffs failed to introduce sufficient evidence to demonstrate antitrust injury. (Erie prevailed at trial on the unfair trade practices and consumer protection law claims).

» **Streight v. State Farm Mut. Auto. Ins. Co.**, Slip Copy, 2009 WL 4066455 (N.D. W. Va. Nov. 20, 2009). Judge Stamp noted that the court has consistently applied the "preponderance of evidence" standard to the determination of whether a defendant has met its burden of proving the amount in controversy in a removal case based upon diversity jurisdiction.

» **Jennings v. Farmers Mut. Ins. Co.**, \_\_\_ S.E. 2d \_\_\_, 2009 WL 4069263 (W. Va. Nov. 24, 2009) (per

curiam). The owner of a business made a claim for a fire loss of the insured business. After the claim was submitted, the insurer discovered two pages of the insurance application were missing. The insurer first declined to pay under the policy but then investigated the cause of the fire and paid the claim. The business owner brought suit against the insurer and the agent who sold the policy for breach of contract, violations of the Unfair Trade Practices Act, and common law bad faith. The business owner further alleged that the agent was negligent in completing and handling her application and, against the agent and the insurer, alleged intentional and negligent infliction of emotional distress. The insurer cross-claimed against the agent, alleging misrepresentation and seeking contribution and indemnification from the agent. The business owner settled and released all her claims against the insurer and assigned to the insurer all of her claims against the agent. The agent moved for summary judgment on the insurer's cross-claim against him. The circuit court granted summary judgment to the agent on the cross-claim and dismissed certain personal injury claims against the agent that the business owner had assigned to the insurer. The Supreme Court affirmed the circuit court, holding that the claims of contribution between the insurer and agent were extinguished by the insurer's good faith settlement with the business owner. The Court further held that the insurer offered no reasoning to support a finding that its underwriter's carelessness in relying upon an incomplete application was "justified under the circumstances," which negated the insurer's misrepresentation claim against the agent. Finally, the Court held that a cause of action for personal injuries may not be assigned.

» **Wang-Yu Lin v. Shin Yi Lin**, \_\_\_ S.E. 2d \_\_\_, 2009 WL 4163540 (W. Va. Nov. 25, 2009) (per curiam). Court affirmed the circuit court's grant of a declaratory judgment to an insured, finding that, due to the operation of the omnibus insurance statute at W. Va. Code § 33-6-31(a), a supplemental liability insurance policy the insured purchased at the time he rented a vehicle from Enterprise provided coverage to him for injuries he suffered in an accident involving the rental vehicle. The Court declined to consider an argument that W. Va. Code § 33-12-32(h) (4)(B) (pertaining to limited licenses for rental companies) - and not the omnibus statute at W. Va. Code § 33-6-31(a) - applied to the rental insurance policy at issue because the argument was made for the first time on appeal.

» **Petroleum Products, Inc. v. Commerce and Industry Ins. Co.**, Slip Copy, 2009 WL 4782063 (S.D. W. Va. Dec. 4, 2009). In reliance upon 28 U.S.C. 1404(a), the Court refused to dismiss or transfer this coverage case arising from an environmental pollution claim. Although the Court found the forum selection clause in the policy at issue to be valid, it determined that WV was the substantially more convenient place to litigate the case.

» **Liberty Insurance Underwriters, Inc. v. Camden Clark Memorial Hosp.**, Slip Copy, 2009 WL 4825199 (S.D. W. Va. Dec. 8, 2009). Finding that Liberty Ins. owed a duty to indemnify for legal malpractice, the Court held that the policy expressly covers claims of abusive litigation, abuse of process, and malicious prosecution. The Court further found that the policy's limitation of the duty to defend upon exhaustion of the liability policy limits (in this case, on defense costs) was ambiguous. Finally, the Court only retains inherent jurisdiction to enforce complete settlement agreements.

» **Williams v. Great West Cas. Co.**, Slip Copy, 2009 WL 4927710 (N.D. W. Va. Dec. 14, 2009). Judge Stamp refused to expand the law of negligent spoliation by finding that an insurer's regulatory duties under West Virginia's Unfair Trade Practices Act create actual knowledge of a potential claim, that the insurance commissioner's regulations create a duty to keep a vehicle while conducting an investigation, or that an insurer has a duty to notify certain third parties about the destruction of the property at issue. The Court also found that prior knowledge of a design defect does not create a special circumstance under which a duty to preserve evidence could be found to arise.

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