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## NOTABLE CASES AND VOICES FROM THE BENCH

### PENNSYLVANIA SUPERIOR COURT HOLDS NO EXCUSE NEEDED TO OPEN DEFAULT JUDGMENT IF FILED WITHIN 10 DAYS

The Pennsylvania Superior Court was recently asked to determine whether Pennsylvania Rule of Civil Procedure 237.3(b) eliminates the traditional common law requirement that a reasonable excuse for the late filing or non-filing be provided prior to opening a default judgment. Attix, et. al. v. Lehman, 2007 WL 1544644 (Pa. Super. 2007). The Court held that it did.

In this matter, a minor bicyclist was injured when he was struck by Defendant's vehicle. His parents filed this action on his behalf. Defendant failed to file a timely answer to the complaint and Plaintiffs provided notice that they would seek a default judgment. Defendant failed to respond to that notice and Plaintiffs filed for a default judgment in this matter. The Court entered the default judgment. Within ten (10) days of the entry of default, Defendant filed a petition to open the default judgment and attached a proposed answer to that petition. The trial court denied the petition and Defendant appealed.

Under traditional common law, a Defendant was required to include in their petition to open a default judgment, a reasonable excuse for their late filing or non-filing. Pa.R.C.P. 237.3(b) however provides that if a petition for relief from a default is filed within 10

days after the entry of judgment on the docket, the Court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

The Court noted that default judgments are generally not favored. The purpose of allowing defaults to be taken 'is to prevent a dilatory defendant from impeding the plaintiff in establishing his claim'; it is not intended as a means for a plaintiff to quickly obtain a judgment without the difficulties of litigation. Peters Twp Sanitary Auth. v. Am. Home & Land Dev. Co., 696A.2d 899, 902 (Pa. Commw. 1997). Upon reviewing and interpreting the Rule, the Court held that Pa.R.C.P. 237.3(b) eliminated the requirement of a reasonable excuse. The Court held that if the petition was filed within 10 days and states a meritorious defense, the trial court must open the default judgment.

This case is important as it interprets Rule 237.3(b) and provides the Defendant an absolute right to have a default judgment opened if they act quickly. On the other hand, Rule 237.3(b) also allows plaintiffs to open a judgment of non-pros without providing an excuse if they act quickly.

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## PENNSYLVANIA SUPREME COURT ADDRESSES EMPLOYER'S BURDEN OF PROOF IN SUSPENDING WORKERS' COMPENSATION BENEFITS

The Supreme Court of Pennsylvania has addressed the burden of proof assigned to an employer when the employer petitions to suspend an employee's indemnity benefits based on the employee's bad faith rejection of available employment.

In order to suspend an employee's benefits, generally, an employer must produce medical evidence illustrating that the employee has recovered some or all of his/her ability and the employer must prove that they referred the employee to an open job within the employee's physical capabilities. The employee must then demonstrate that he/she followed through with the job referrals in good faith. If the employee follows through with the job referral and the referral fails to result in employment for the employee, the employee's benefits should continue.

In Pitt Ohio Express vs. WCAB (Wolff), 912 A.2d 206 (Pa. 2006), the Supreme Court clarified the burden of proof assigned to employers with regard to a Petition to Suspend Benefits when the employee, in bad faith, rejects employment offered to him/her within the occupation category for which the employee has been given medical clearance. In this case, the Employee's benefits were suspended due to a bad faith rejection of a job offer. The Employee's benefits were then reinstated due to a worsening of condition (surgery). Once the Employee recovered from his surgical procedure, the Employer once again filed a Petition to Suspend Benefits, arguing that the Employee had recovered from the work injury sufficiently enough to perform the modified work offered to him by the Employer, but had failed to return to work. The Employee

testified that he was, in fact, capable of performing the modified duty position but did not return to work. The Employee's benefits were then suspended.

The Employee appealed the suspension of benefits, arguing that the Employer did not satisfy its burden by showing continued job availability. The Supreme Court of Pennsylvania eventually reviewed this issue and determined that the Employee's bad faith relieved the Employer of its responsibility to show that a suitable position was available to the Employee. In so holding, the Court reasoned that they would not assign a never-ending duty to keep a job available to an employee who rejects the job in bad faith.

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## SETTLEMENT STARTS UIM CLOCK

The 3rd Circuit Court of Appeals was faced with a novel question in the case of State Farm Mutual Automobile Insurance Co. v. Rosenthal, 484 F.3d 251, C.A.3 (Pa. 2007). The issue that the court set out to determine was when the four-year statute of limitations begins to run on underinsured motorist claims. Three possibilities were advanced: (1) the date of the accident (State Farm's argument); (2) the date on which the insured settles with the adverse driver for less than the insured's damages (Rosenthal's argument); or (3) the date on which the insurer rejects the insured's underinsured motorist claim (the District Court's holding).

In June of 1998, Brian Rosenthal, a State Farm insured, was in a motor vehicle accident that resulted in a \$1-\$2 million loss of earnings for the Pennsylvania attorney. In June of 2003, Rosenthal settled his claim against the adverse driver for \$85,000. Rosenthal's attorney requested that State Farm approve the settlement and additionally informed the insurer of his intent to pursue a UIM claim against State Farm. Rosenthal's attorney demanded an underinsured motorist

arbitration from State Farm. In response, State Farm filed a complaint with the District Court seeking declaratory judgment, stating that Rosenthal's underinsured motorist claim was time-barred by the four year statute of limitations. Rosenthal responded by filing a motion for summary judgment.

A unanimous three-judge panel rejected State Farm's motion for declaratory judgment, and further rejected their argument that the statute of limitations should begin to run on the date of the accident. The court also declined the District Court's contention that the clock began to run on the date the insurer rejects the insured's UIM claim.

Instead, the 3rd Circuit Court of Appeals ruled that the clock does not start running on a claim for underinsured motorist (UIM) benefits until the insured settles with the adverse driver for less than the value of his damages. The court reasoned that "[u]nlike an uninsured motorist case where the issue of whether a motorist has coverage at all is easily determined, the question of whether an insured motorist has enough coverage is not." Thus, the above mentioned holding sought to harmonize the law with respect to the statute of limitations regarding uninsured and underinsured motorist claims. Regardless of whether the adverse driver is underinsured or uninsured, the date that the clock starts is essentially the same, "i.e. the date on which the insured definitely ascertains the deficient insurance status of the adverse driver."

(Special acknowledgment to Law Clerk Jennifer L. Weidler for the preparation of this article.)

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## LEGISLATIVE UPDATE

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### NEW AMENDMENTS TO TITLE 231 OF THE PENNSYLVANIA CODE

The Supreme Court of Pennsylvania promulgated a new Rule of Civil Procedure concerning cross-claims. Under the new rule, 1031.1, the assertion of a claim by one party against another party to an action is a matter of pleading, as opposed to joinder of parties. Under the new rule, the claim is pleaded as a cross-claim.

The second noteworthy amendment relates to the rules governing joinder of additional defendants. Rule 2252(a) was amended in an attempt to limit the rules governing joinder of additional defendants to the joinder of persons not already parties to an action. The joinder may be effectuated by “any party,” not merely the defendant or additional defendants, as the prior rule held.

Under the old Rule 2253(a), governing the time frame for joinder, an additional defendant, without leave of court, had “sixty days after the service upon the original defendant of the initial pleading of the plaintiff or any amendment thereof.” The revised rule allows a joining party to join an additional defendant without leave of court if the joinder is accomplished within one of two time frames (whichever is longer). The first of these is the sixty-day time period, mentioned above. The second time frame is new and relates to the time for the filing of the joining party’s answer to the time set forth under Rule 1026, Rule 1028 or an order of court. The new language of Rule 2253(a) also allows for late joinder “by the written consent of all parties approved by and filed with the court.” Additionally, it requires the filing within twenty days of the praecipe for writ of summons or of the complaint joining the additional defendant. Subdivision (b) of Rule 2253 governs the procedure for objection to a proposed late joinder of an additional defendant. Any party may object to the motion to join on the

grounds of prejudice. However, only the plaintiff may object on the grounds of the absence of reasonable justification for the delay in commencing the joinder proceeding.

The new subdivision (c) governs the procedure by which a person not previously a party who has been joined as an additional defendant may object to his or her late joinder. The person joined as an additional defendant may object to his or her late joinder by filing preliminary objections, raising the ground of prejudice and any other ground applicable under Rule 1028 governing preliminary objections.

One rescinded rule that is of note was Rule 2255(b). It previously prohibited the filing of pleadings between an additional defendant and “any party other than the one joining the additional defendant.” Rule 2256(c) was also rescinded, which read “[a] party against whom a counterclaim is asserted shall have the same right to join any one as an additional party that is given to a defendant in Rule 2252.”

Apart from the joinder and cross-claim changes, there were a few minor amendments made to other Civil Procedure Rules. One such revision was to Rule 425, governing service upon additional defendants. The burdensome requirement that the joining party serve with the complaint copies of all pleadings in the action was deleted. Instead, “the joining party, upon request, shall furnish copies of all or specified pleadings filed in the action.”

(Special acknowledgment to Law Clerk Jennifer L. Weidler for the preparation of this article.)

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## RECENT VERDICTS

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### MCDONNELL OBTAINS DISMISSAL IN MED-MAL CASES

Kent & McBride Senior Associate Jeffrey McDonnell was recently successful in having several clients dismissed from three separate medical malpractice actions. Two were voluntary dismissals, one involuntary.

The first case was against a cardiologist and involved an alleged failure to properly diagnose and treat a myocardial infarction in a woman admitted for bilateral knee replacement surgery. Within one day after surgery, the patient died of a heart attack. Apparently, on the strength of the Defense’s expert opinion as to both liability and causation, Plaintiff decided to settle with a co-defendant and dismiss McDonnell’s client, but with no money contributed on his behalf towards the settlement.

The second case was against a family practitioner and involved an alleged failure to properly diagnose and treat laryngeal cancer. The Plaintiff, a middle-aged female, had treated with the Defendant for several years, primarily for upper respiratory infections. During the last year of Defendant’s treatment of her, she developed an earache and dysphasia. A referral to an ENT led to her cancer diagnosis. Once again, this time literally on the eve of trial, Plaintiff - who was without an expert opinion supporting causation - voluntarily discontinued the action without any payment on behalf of the Defendant.

Lastly, a trial court granted summary judgment in favor of an obstetrical resident and hospital in a case involving a tubal ligation. There, sterilization failed due to the misidentification of the fallopian tube. Although the attending surgeon remained in the case, the court agreed that Plaintiff’s expert report was insufficient as to McDonnell’s clients.

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# OFF THE RECORD

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## WELL WISHES FROM K&M

Everyone here at Kent & McBride would like to wish all of you  
a happy and safe summer season.



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