2014 Joint Seminar Speakers

Hon. Jeffrey A. Weill, Sr.

Dr. John D. Davis, IV
Donna B. Jacobs
Jason Walton
Scott Burnham Hollis
J. Michael Coleman
W. Andy Asbell
Jacob O. Malatesta

Issue Highlights:

A Non-Bankruptcy Lawyer’s (Partial) Guide to the Automatic Stay and Related Issues in Bankruptcy

The Phantom of the Chalkboard - The Collateral Source Rule and “Billed” versus “Paid” Medical Bills

A Second Bite at the Contractual-Damages Apple: Why Don’t Plaintiffs Have to Prove Lost Profits the First Time Around?

The Transportation Lawyer’s Guide Through the Murky World of the MCS-90 Endorsement
Joint Seminar of the Mississippi Claims Association and the Mississippi Defense Lawyers Association

Table 100 Conference Center (adjacent to Lowe’s on Lakeland Drive)
Flowood, Mississippi
October 16, 2014

Schedule

8:45 a.m. — Opening Remarks
Terry Woods
2014 MCA President
Diane Pradat Pumphrey
2014 MDLA President

Issues in Civil Litigation - Remember Your Audience
Hon. Jeffrey A. Weill, Sr.
MS Circuit Court Judge - District 1

9:30 a.m. — Evaluation & Management of Cervical Spine Disorders
John D. Davis, IV, M.D.
NewSouth NeuroSpine
Flowood, MS

10:15 a.m. — Break

10:30 a.m. — E-Discovery: This is What “Scary” Dreams are Made of
Donna B. Jacobs, Esq.
Butler Snow LLP
Ridgeland, MS

11:15 a.m. — There’s Been A Collision! Now What Do I Do?
Jason Walton
Walton & Associates, LLC
Meridian, MS

12:00 p.m. — Lunch

1:00 p.m. — Mississippi Alcohol & Dram Shop Law
Scott Burnham Hollis, Esq.
Jones Walker, LLP
Olive Branch, MS

1:45 p.m. — Selling the Evidence: Using Media at Trial
J. Michael Coleman, Esq.
Hagwood Adelman Tipton, P.C.
Jackson, MS

2:30 p.m. — Break

2:45 p.m. — Structural Fire Analysis
W. Andy Ashell, IAAI-CFI
Rimkus Consulting Group, Inc.
Ridgeland, MS

3:30 p.m. — Wait, Who Do I Represent? - An Update on Hartford and Moeller
Jacob O. Malatesta, Esq.
Hagwood Adelman Tipton, P.C.
Jackson, MS

4:15 p.m. — Adjourn

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G. Todd Butler, Editor
A Message from the President

Fall is a season of change and excitement as school and football starts for us. Likewise, there is a lot going on with the MDLA at this time of the year. The 24th Annual Joint Seminar with the Mississippi Claims Association is set for October 16, 2014, at Table 100 Conference Center in Flowood. There is a slate of speakers who promise to be both informative and entertaining. The topics are timely and should prove to be of interest to both groups. Special thanks to Mike Coleman for heading up this seminar. If you have not been before, this is an excellent opportunity to meet with insurance claims professionals in a relaxed setting. You are invited to go to the MDLA website and download the registration brochure.

As noted in the last publication there are a number of committees that are hard at work to make the organization even better. The Membership Committee, headed by Doug Vaughn, has identified members in each of the three districts whose memberships have lapsed. They are going to extend a personal invitation to these former members to rejoin the fold. There are many reasons to continue membership, not the least of which is that you will be connected with other members of the bar who share your type of practice. You can share stories, share wisdom, share burdens and share victories as part of the group.

It is hard to believe that this organization will have been in existence for fifty years as of next year. It has stood the test of time and that deserves a celebration. Many thanks to the 50th Anniversary Celebration Committee, headed by Michele McCain, who have met a number of times to plan this gala celebration. Mark your calendars for the party on May 1, 2015, which will be held at the Old Capitol Inn in Jackson. There will be food, drink, music and more. The Committee is planning on a feast with a sit down dinner for the participants. They are also working on highlighting events and people important to the organization. This will be a wonderful time to look back at the organization’s growth and history. Plan to join us that night to renew old friendships and make new ones as we celebrate this milestone.

The Marketing Committee, chaired by Julie Gresham, has come up with a plan for partnership opportunities with individuals and groups. This will include sponsorships at meetings and seminars along with advertising in The MDLA Quarterly. They have also come up with a sponsorship level that would include being highlighted in mailings and promotional materials that are sent out to members. The committee has started this process by coming up with a target list of those who have a past history with the organization or who have a relationship with attorneys. You are encouraged to share any ideas of potential sponsors with this committee. They are also in the process of coming up with a tiered sponsorship to increase participation.

If you are a member of DRI you may be going to the Annual Meeting in San Francisco. The meeting runs from October 22 – 26, 2014. Our own Jane Brown, Executive Director, has been part of the planning committee for this event. We know it will be good. They have a number of speakers including Google’s David Drummond, Jeffrey Toobin from CNN Worldwide, Vernice “Fly Girl” Armour, not to mention Mika Brzezinski and Joe Scarborough from MSNBC’s Morning Joe. You can go to the DRI website and register online for this premiere event. How bad can it be to be in San Francisco in October?

If you haven’t had the chance, look at the new MDLA website. It has been launched and looks very smart and professional. You can send in information about defense wins and other timely topics. We welcome your continued interest, support and participation in this organization.

Diane Pradat Pumphrey
MDLA President

Last Reminder - DRI Annual Meeting
October 22-26, 2014 in San Francisco, California

Please forgive me as I use my article space for one last friendly reminder that the DRI Annual Meeting is only weeks away. As mentioned in my last article, this year’s Annual Meeting is being held October 22-25, 2014 in San Francisco, California. The location alone says enough. For those who have been to San Francisco before, I need not say more. For those who have not been before, it could soon become one of your most favorite cities.

Wine country, Union Square, Fisherman’s Wharf, Chinatown, Alcatraz, the Golden Gate Bridge, cable cars, and AT&T Park. In fact, this year’s Thursday night reception will be held at AT&T Park. The main reception and party will be held down on the field itself, but you will also have the opportunity to visit the locker rooms, skyboxes, and other parts of the stadium.

There will be CLE programs ranging from Eye Witness Misidentification, Witness Memory Errors, Lawyer Stress Management and Addiction, Trial Tactics, Law Practice Management, Changing Demographics, Alternative Dispute Measures, Data Breach Protection, Non-Compete Agreements, Class Action Litigation, Defense of Catastrophic Claims, Judicial Funding, and Jury Issues. In addition to the excellent CLE, there is a great slate of speakers as well. David Drummond, the Senior Vice-President and Chief Legal Officer of Google will speak on Management of a Multi-National Corporation such as Google. Joe Scarborough of MSMBC’s Morning Joe with provide a no-holds barred political commentary Jeffrey Toobin, a Senior Analyst for CNN, one of the country’s
most recognized experts on politics, media, and the law will speak as well. Similarly, Dan Harris, the co-anchor of Nightline and the weekend edition of Good Morning America will discuss his new number one New York Times bestselling book. Other speakers include Michael Chertoff (former Secretary of Homeland Security), John Rizzo (in-house counsel at the CIA), David Lopez (General Counsel of the EEOC), and special guest speaker Vernice Armour, America’s first African-American female combat pilot.

If you have any questions about this year’s Annual Meeting, please don’t hesitate to give me or Jane Brown a call, or review the brochure on DRI’s website.

Please also take advantage of the DRI’s new Advocate Campaign. If you recruit a full dues paying member or convert a free member to a full dues paying member, you will receive a $200 Advocate Certificate. These Certificates are redeemable towards the cost of registration for any DRI seminar, Annual Meeting, or publication. This offer is effective through October 22, 2014, and Certificates must be used or redeemed by February 28, 2015. Recruit just one member to the DRI now, and you can get another $200 off the registration fee for this year’s Annual Meeting.

Tennessee Defense Lawyers Association
Fall Seminar and Annual Meeting
October 16-18, 2014 in Tunica, MS

Our friends to the north, the Tennessee Defense Lawyers Association, will hold their 2014 Fall Seminar and Annual Meeting in Mississippi this year, specifically Thursday, October 16 through Saturday, October 18, 2014 at the Horseshoe Casino in Tunica, Mississippi, and they have graciously extended an invitation to all members of the MDLA to attend. On Thursday, October 16, following the Joint Seminar of Mississippi Claims Association and MDLA in Jackson, the TDLA will be hosting a cocktail reception that evening starting around 6:30 p.m. Everyone is free to do dinner on their own that evening, although certainly groups of attendees will be eating together.

On Friday October 17, there will be a full day of CLE, and it has been approved for credit with the Mississippi Commission on CLE. That evening, there will be a President’s dinner at the casino.

On Saturday morning, the TDLA has arranged for several buses to take anyone interested to The Grove in Oxford for a tailgating party prior to the Ole Miss vs. Tennessee football game and can assist in finding tickets if you also want to attend the game itself.

It is very kind of the TDLA to invite the MDLA members to their seminar and fall meeting, and I would certainly encourage anyone interested in attending. The TDLA and MDLA are both members of the DRI Southern Region, and we have a very strong working relationship with them. This is another great way to network with other defense lawyers just across the state line. Thanks again to the TDLA for inviting us.

For anyone interested in attending the TDLA meeting, please feel free to take a look at the TDLA website (www.tdla.net) and click on the “Events” link. For any other questions, please feel free to contact the Executive Director of the TDLA, Kathi McKeown at (502) 228-9256 or email her at TN.DLA@att.net.

W. Wright Hill, Jr.
DRI MS State Representative

Young Lawyers and Student Chapters Preparing for Fall Events

The Young Lawyers Division of the MDLA is looking forward to a busy and active fall. YLD socials are being planned for each of the three geographic regions of the MDLA. Events are being scheduled in Jackson, Oxford, and Gulfport. The YLD socials provide a great opportunity for those MDLA members in their first ten years of practice to get to know one another and to get involved in the MDLA. Details regarding the fall socials will be distributed by email in the coming days.

The Young Lawyers Division will be present at the Bar Admissions Ceremony on September 25, 2014, and will be accepting applications for new members to join the MDLA. For a number of years, the MDLA has waived the annual dues for the first year of membership for all new members. In January, the MDLA board passed a resolution providing that any potential member who completes a membership application at the Bar Admission Ceremony will not only have the first year of dues waived but also will have the initiation fee waived. If you know any new admittees to The Mississippi Bar who will be in attendance at the ceremony, please encourage them to visit the MDLA table and complete a membership application at the ceremony.

Both Student Chapters will resume their MDLA speaker series during the fall semester. For the past several years, the cornerstone of the MDLA Student Chapters’ programming has been the monthly speaker series hosted by the MDLA. The MDLA, through its members, has sponsored practicing attorneys to give one hour lectures on topics of interest selected by the members of the Student Chapters. Recently, the lecture series have focused on the practical aspects the law practice, with programs on depositions, opening and closing statements, voir dire, and examining witnesses at trial. The MDLA has also sponsored panel discussions on the transition from law school to the law firm and interview workshops.

At the University of Mississippi School of Law, the speaker series is held on campus during the lunch hour to allow for maximum participation from the student members. For the Mississippi College School of Law, various Jackson area law firms have opened their doors for evening presentations, which provide the added benefit of allowing the firms’ attorneys to meet the future members of the defense bar. If you or your firm are interested in participating in the MDLA Student Chapter speaker series, please contact Kyle Miller at kyle.miller@butlersnow.com.

Kyle V. Miller
Young Lawyers Division Liaison

The MDLA Quarterly • Fall 2014
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A Non-Bankruptcy Lawyer's (Partial) Guide to the Automatic Stay and Related Issues in Bankruptcy

By Danny E. Ruhl

Danny E. Ruhl is a Shareholder with Copeland, Cook, Taylor & Bush, P.A. He represents clients primarily in the areas of creditor's rights and bankruptcy, commercial litigation, lender liability defense, foreclosures, and collections. Prior to law school, Mr. Ruhl graduated from Tulane University with his B.S.E. in Civil Engineering, served five years of active duty as a Navy Supply Corps officer, and worked as a branch manager for AmSouth Bank. Mr. Ruhl earned his J.D. Degree (summa cum laude) from Mississippi College School of Law, where he served as an Executive Editor for the Law Review.

Introduction

This article is intended to provide a brief and non-exhaustive overview of the automatic stay arising in bankruptcy, including a basic discussion along the way of a handful of issues that may arise in certain typical cases. The discussion is geared towards helping non-bankruptcy lawyers identify these issues if and when they come up so they can avoid potential pitfalls and decide, with the help of an experienced bankruptcy lawyer if appropriate, how best to advise their clients.1

The Automatic Stay

A voluntary bankruptcy case under Title 11 of the United States Code (the “Code”) is commenced by the filing of a petition with the bankruptcy court.2 The filing of the petition creates a bankruptcy estate generally comprised of all legal or equitable interests of the debtor in property as of the commencement of the case, wherever located and by whomever held.3

The filing of the petition generally also “automatically” gives rise to a stay of certain actions and other thing pursuant to § 362(a).4 The automatic stay, which is applicable to all entities (which term includes people),5 generally prohibits, with certain exceptions, the following, among other things:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case . . . . or to recover a claim against the debtor that arose before the commencement of the case . . . ; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case . . . ; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case . . . .” (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case . . . ; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ; [and] (7) the setoff of any debt owing to the debtor that arose before the commencement of the case . . . against any claim against the debtor[.].6

To boil it all down to the extent possible, the automatic stay generally “prohibits ‘all entities’ from making collection efforts against the debtor or the property of the debtor’s estate.”7

The automatic stay is designed to give the debtor “breathing room” from creditors and a chance for a fresh start,8 and to help protect the property of the debtor’s estate by “preclud[ing] creditors from taking almost any action to obtain [estate] property . . . or to collect from a debtor upon a prepetition debt outside the bankruptcy process.”9 Indeed, for

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1 Some disclaimers are needed at the outset. The bankruptcy code, procedural rules, local rules, and related law are, or certainly can be, somewhat complex, and often involve numerous exceptions and the like. Further, as in other areas, the law can vary widely depending on the jurisdiction, and even among bankruptcy court decisions from different judges in the same district. The law also can and does vary based on what chapter of the Code the case is proceeding under (e.g., Chapter 7, 11, 13). Accordingly, this article is, out of necessity, quite generalized and not intended to express definitive opinions on the law or related procedure, and anyone seeking to rely on its contents should first consider consulting a bankruptcy practitioner about the particulars of any case. Consistent with the above, the contents of this article do not all necessarily reflect the views of the author or his firm.
3 Id. at § 541(a)(1). There are examples, exceptions, and caveats referenced in the Code. See e.g. id. at § 541(a)(2)-(7), and (b).
4 Id. at § 362(a).
5 Id. at §§ 362(a), 101(15).
6 Id. at § 362(a)(1)-(7).
7 Campbell v. Countrywide Home Loans, Inc., 545 F. 3d 348, 353 (5th Cir. 2008) (citations omitted).
8 Templeton Mortg. Corp. v. Chestnut (In re Chestnut), 422 F. 3d 298, 301 (5th Cir. 2005).
the aforementioned reasons, the stay is “among the most fundamental debtor protections in bankruptcy law and its scope in protecting debtors and debtor property is broad.”

The stay is also designed to provide protection to creditors. As explained in certain of the legislative history pertaining to § 362:

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against [the debtor and] the debtor’s property. Those who acted first would obtain payment of their claims in preference and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure in which all creditors are treated equally.”

Duration of the Automatic Stay

The automatic stay generally continues, subject to certain exceptions set forth in the Code, as follows: (a) with respect to the stay of an act against property of the estate, until such property is no longer property of the estate (e.g. due to abandonment); and (b) with respect to the stay of any other act, until the earliest of (i) the time the case is closed, (ii) the time the case is dismissed, or (iii) the time a discharge is granted or denied.

Violations of the Automatic Stay – Select Issues

Actions taken against property of the estate “are invalid, whether or not a creditor acts with knowledge of the stay.” Importantly, “invalid” means voidable in this context, and not void, at least in the Fifth Circuit. In fact, it is well-settled in the Fifth Circuit that “actions taken in violation of the automatic stay are not void, but rather they are merely voidable, because the bankruptcy court has the power [under certain circumstances] to annul the automatic stay pursuant to section 362(d),” on the request of a party in interest and after notice and a hearing. If actions taken in violation of the stay were deemed void instead of voidable, the power to annul the stay retroactively in this manner would be rendered superfluous. The foregoing effectively puts the burden on debtors and other parties in interest to pursue alleged stay violations and obtain any relief to which they may be entitled in connection therewith.

In this regard, and subject to at least one limited exception, only a party injured by a willful stay violation can recover damages. “A willful violation does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant’s actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was ‘willful’ or whether compensation must be awarded.”

The Fifth Circuit has established a three-part test to determine whether a stay violation was willful violation: (1) the offending party must have known that the stay was in effect; (2) the offending party’s acts must have been intentional; and (3) the offending party’s acts must have violated the automatic stay.

Regarding the first prong of this three-part test, “[k]nowledge of the bankruptcy petition has been held [by some courts] to be the legal equivalent of knowledge of the automatic stay.” Further, some courts have found that parties with notice of a bankruptcy case have a duty to seek information which should reveal the scope and applicability of the stay.

There is a split of authority regarding whether purely oral notice of the case and/or stay constitutes sufficient notice to satisfy the “knowledge” element of § 362(k) and help substantiate a stay violation. “Some courts have held that written confirmation of the filing of the bankruptcy petition is required.” Other courts, along with a leading treatise on bankruptcy law, have held that oral notice is sufficient.

On a related note, some courts have found that, once it receives actual notice of the filing of the case, the burden is on

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13 See e.g. In re Calder, 907 F. 2d 953, 956 (10th Cir. 1990) (cited with approval in Jones v. Garcia (In re Jones), 63 F. 3d 411, 412 n.3 (5th Cir. 1995)); Bustamante v. Cueva (In re Cueva), 371 F. 3d 232, 236 (5th Cir. 2004).
14 In re Jones, 63 F. 3d at 412. See also Picco v. Global Marine Drilling Co., 900 F. 2d 846, 850 (5th Cir. 1990); Sikes v. Global Marine Inc., 881 F. 2d 176 (5th Cir. 1989); In re Woods, 478 B.R. 190 (Bankr. S.D. Miss. 2012).
18 Id. at § 362(k)(1); see also Clarence O’Neal Leverette, Sr. v. Community Bank (In re Leverette), 2013 Bankr. LEXIS 4052 at *9 (Bankr. S.D. Miss. September 25, 2013).
19 In re Leverette, 2013 Bankr. LEXIS at *9-10 (citing Brown v. Chesnut (In re Chesnut), 422 F. 3d 298, 302 (5th Cir. 2005)) (other citation omitted).
20 See Young v. Repine (In re Repine), 356 F. 3d 512, 519 (5th Cir. 2008); see also In re Leverette, 2013 Bankr. LEXIS at *10.
21 Henkel v. Lieckman (In re Lieckman), 297 B.R. 162, 190 (Bankr. M.D. Fla. 2003); see generally In re Repine, 536 F. 3d at 519.
25 Id. at 247 (citing Lile, 103 B.R. at 836; 3 Collier on Bankruptcy ¶ 362.02 (16th ed. 2012)).
the creditor to make sure that the stay is not violated. Courts have also found that, if the stay has been violated by a creditor prior to receipt of actual notice of the case filing, the burden is on the creditor to reverse any action taken in violation of the stay. Accordingly, courts have held that “a creditor’s continued retention of property of the estate after notice of the bankruptcy filing is a violation of the automatic stay.”

Based on the above, if you determine that a client has or may have unintentionally violated the automatic stay, and has since received sufficient notice or knowledge of the subject bankruptcy case, it would be wise to consider advising the client to take (and document) active measures to reverse the stay-violating action by, for example, promptly returning any wrongfully held property, promptly filing and pursuing a motion for appropriate relief with the bankruptcy court (such as under § 362(f)), or otherwise promptly seeking confirmation from the court that your client has not violated the stay. Otherwise, the client may face potentially costly damages for a willful stay violation.

Damages for Violations of the Automatic Stay

Regarding such damages, bankruptcy courts have been found to have the authority to address stay violations under their civil contempt powers pursuant to, among other possible things, 11 U.S.C. § 105(a). Indeed, the stay has been found to constitute a self-executing injunction and order of the bankruptcy court for purposes of contempt. “The movant in a civil contempt proceeding must show by clear and convincing evidence that: 1) a court order was in effect; 2) the order required certain conduct by the respondent; and 3) that the respondent failed to comply with the order.” Further, the Fifth Circuit has noted that “[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.”

The Code also provides debtors and other individuals with a private right of action under § 362(k) for addressing willful stay violations. This provision has been said to “supplement” rather than replace the remedy of civil contempt.

The damages potentially available for willful violations of the automatic stay include actual compensatory damages, attorney’s fees, and, under appropriate circumstances, punitive damages. Regarding punitive damages, they cannot be awarded under the bankruptcy court’s civil contempt powers. However, they may be awarded under § 362(k) in a proper case. Such a case, at least in the Fifth Circuit, exists when the court finds “egregious, intentional misconduct on the violator’s part.”

Relief from the Automatic Stay

A party in interest may seek and obtain relief from the automatic stay by filing a motion with the bankruptcy court and satisfying the requirements set forth in 11 U.S.C. § 362(d) after notice and a hearing. Section 362(d) provision provides in part as follows:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay --

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
(2) with respect to a stay of an act against property under subsection (a) of this section, if —
(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization...

Regarding (d)(1), “cause” is not defined and many things have been determined to constitute sufficient cause, including bad faith. The meaning of “adequate protection” is illustrated in 11 U.S.C. § 361, and may consist of, for example, making periodic payments, providing additional or replacement liens, and/or providing the creditor with the “indubitable equivalent” of its lien (such as through an equity cushion). The existence or lack of adequate insurance is often at least a component of the adequate protection analysis.

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29 This provision provides: (f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay ... as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under ... this section.
30 In re Leverette, 2013 Bankr. LEXIS at *11 (collecting numerous cases).
32 In re Leverette, 2013 Bankr. LEXIS at *11-12 (citing Petroleos Mexicanos v. Crawford Enters., Inc., 826 F. 2d 392, 400 (5th Cir.1987)).
33 Id. at *12 (quoting Am. Airlines Inc. v. Allied Pilots Ass’n, 228 F. 3d 574, 585 (5th Cir. 2000)).
35 In re Lile, 103 B.R. at 837 n.4; In re Sanchez, 372 B.R. at 311 n.13.
37 In re Roman, 283 B.R. 1 (B.A.P. 9th Cir. 2002); 11 U.S.C. §362(k).
38 In re Repine, 536 F. 3d at 521.
39 There is a special provision applicable to stay relief in cases involving “single asset real estate,” as that phrase is defined in the Code.
In a motion for relief from the automatic stay, the burden of proof regarding (d) (2) is on the creditor (or other party in interest seeking relief) to show that the debtor does not have any equity in the property, and on the debtor with respect to all other issues. Most courts view equity, in this context, as the difference between the value of the subject property and all encumbrances that are on it, and creditors and their counsel often use appraisals and appraiser testimony to establish that value. Regarding the debtor’s burden, they must prove that the property is necessary and that an effective reorganization is a real prospect.

There are many things that non-bankruptcy lawyer who find themselves practicing in bankruptcy court might like to know (in addition to the other information discussed in this article and a lot more). Here are just a few related to relief from the stay.

First, if you get involved in a Chapter 13 case in which a plan has already been confirmed, that plan may prevent stay relief based on pre-confirmation grounds. Indeed, a court recently found that the effect of confirmation of a Chapter 13 plan bound the creditor and prevented stay relief to the extent it was based solely on grounds existing prior to confirmation. That said, if the debtor is or becomes in violation of the terms of that plan, such as by defaulting on plan payments, it could give rise to a new, post-confirmation grounds for stay relief.

Second, property that has been abandoned from the debtor’s bankruptcy estate under 11 U.S.C. § 554 is, according to numerous courts, still protected by the automatic stay. “[T]he abandonment of [property] . . . removes such [property] from the bankruptcy estate, but upon removal from the bankruptcy estate it continues as property of the debtor . . . , and the stay continues in effect . . . .” Before a creditor has a right to a debtor’s property, relief from the automatic stay must be granted, either by court order or by operation of law.

Third, if you move to lift the stay in a bankruptcy court in Mississippi, be aware that our Courts recently amended their Local Rules effective as of December 1, 2013. Those amendments contain a good deal of information related to seeking stay relief, including listing certain “supporting documentation” that the moving party “shall include” in and/or attach to their motion, requiring the attorneys involved to confer as to certain matters in advance of the hearing, and requiring lift stay orders affecting real property to either incorporate or attach as an exhibit the legal description of the real property.

Fourth, if you think the automatic stay has been terminated or is otherwise not in effect, but you are nevertheless uncomfortable taking some action, or having your client take some action, for fear that a court might ultimately disagree with your thinking down the road, you have the option to seek a “comfort order” pursuant to 11 U.S.C. § 362(j). That provision provides: “On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.” It is not uncommon for lawyers to seek and receive such orders for the purpose of confirming that the stay is not in place. In fact, state courts sometimes request such orders be obtained before proceeding with litigation that may have implicated the stay at one time. These orders can also be helpful in cases involving repeat filers, in which the status of the stay may not always be as clear as one would hope.

Exceptions to the Automatic Stay – Select Issues

There are numerous exceptions to the automatic stay going into effect. In fact, there are twenty-eight (28), ten (10) of which were added in 1995. Many of the exceptions are beyond the scope of this article. However, a few of them are referenced or discussed in general terms below. Specifically, the stay does not apply to, among other things: (a) the commencement or continuation of a criminal action or proceeding against a debtor; (b) an action to enforce a government unit’s police or regulatory powers; (c) the filing of a UCC-3 continuation statement to keep a UCC-1 financing statement effective.

In addition, Section 362(b)(18) allows for the “creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition.” Under this provision, the stay does not stop a lien for post-petition ad valorem taxes from attaching to a debtor’s property. Nevertheless, unless the governmental unit obtains relief from the stay from the court, they are generally prohibited by § 362(a) from actually conducting a tax sale to execute on that lien.

Conclusion

This article only scratches the surface of the topics discussed. Nevertheless, I hope it proves helpful, especially to my fellow defense lawyers who don’t normally find themselves, as I do, on the inside of a bankruptcy court.
The Phantom of the Chalkboard - The Collateral Source Rule and “Billed” versus “Paid” Medical Bills

By Arthur D. Spratlin, Jr. and Margaret Z. Smith

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I. Is the Collateral Source Rule Out of Touch With the Modern American Healthcare System?

The rationale behind the collateral source rule is that a wrongdoer should not benefit from any “payments” to (or on behalf of) an injured party by another. But does this approach take into account the current reality of America’s healthcare system? It has become an anomaly for an individual or an insurer to pay 100% of the “billed” amount of medicals. In today’s world, the amount of a medical bill that is paid by private insurers and public benefit programs is based on predetermined figures that have been contractually agreed upon, and the remainder is “written off.” Accordingly, a plaintiff never incurs liability for the medical provider’s total bills. Is a “write-off” a “payment”? The truth is that the portion of the medical bill that is discounted or “written off” was never a “payment” on behalf of the plaintiff in the first place.

Thus, a plaintiff should not be allowed to use the total “billed” amount of his medicals to demonstrate his damages when, in reality, the “written off” portion of that total was not a payment, but a category of damages the plaintiff avoided. Instead, the more rational argument is that the “reasonable value” of medical services is the amount the provider ultimately agrees to accept in payment for that service.

If the collateral source rule is truly a rule to prevent unfairness to the injured party, should there also be a rule to prevent an injured party from taking advantage of the rule? To illustrate, should an injured party be permitted to put his total medical bills on the chalkboard during closing arguments, even though private insurance/Medicare paid only 50%, and the remainder was “written off,” leaving the plaintiff paying nothing out of pocket? Does the collateral source rule have any application to the “written off” amount?

Historically, it appears that most courts have looked at “write-offs” as “payments” when it comes to the application of the collateral source rule. But, on a national level, that analysis is changing, in light of ongoing tort reform measures being discussed around the country. This paper will examine the laws in a few selected states to see how this issue is unfolding.

II. States Applying the Collateral Source Rule

A. Mississippi

The collateral source rule has long been recognized by the Mississippi Supreme Court. The rule is based on common law and provides that “a wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, wholly independent of him.” McGee v. River Region Med. Ctr., 59 So. 3d 575, 581 (Miss. 2011) (quoting Coker v. Five-Two Taxi Service, Inc., 52 So. 2d 356, 357 (Miss. 1951)). The collateral-source rule is often a source of debate in determining the proof of damages a party may present at trial. Generally, the issue arises as it did in Wal-Mart Stores, Inc. v. Frierson, 818 So. 2d 1135, 1138 (Miss. 2002):

Prior to trial, the parties disagreed as to the proof Frierson could present to the jury with respect to the extent of his injuries. The Friersons had no private health insurance. Medicaid and Medicare paid a portion of Frierson’s medical expenses. Pursuant to Medicaid or Medicare regulations, that portion of Frierson’s expenses not paid by Medicaid or Medicare was ‘written off,’ or eradicated, by those who had provided medical assistance to him. The Friersons made no independent payments. Wal-Mart filed a motion in limine attempting to prevent the Friersons from introducing evidence of any of the medical expenses which had been eradicated. Wal-Mart argued that allowing the introduction of these expenses would allow the Friersons to realize an impermissible windfall as no one would ever be required to pay the amounts written off.

In Frierson the court ultimately extended the collateral source rule in the context of Medicare payments. 818 So.2d 1135, 1138. Although defendants have made numerous attempts to prevent plaintiffs from showing their “billed versus paid” medical bills, the Mississippi Supreme Court has continually rejected the “windfall” argument. For example, in Brandon HMA, Inc. v. Bradshaw, Medicaid paid plaintiff’s medical bills. 809 So.2d 611, 618 (Miss. 2001). Thus, the defendant-hospital argued that allowing a plaintiff to recover for expenses he himself never had to pay undermined the purpose of
compensatory damages, which is to make the injured party whole. *Id.* The plaintiff countered by relying on the well-recognized collateral source rule that prevents a tortfeasor from using “the money of others” to reduce the cost of its own wrongdoing.

The Mississippi Supreme Court agreed with the plaintiff and held as follows:

Today for the first time, we hold that Medicaid payments are subject to the collateral source rule. [Plaintiff’s] brief summarized the logic nicely: ‘[T]he Hospital (Brandon) does not get a break on damages just because it caused permanent injuries to a poor person.’ We conclude that the trial court did not err in admitting [Plaintiff’s] medical bills which exceed the amount paid by Medicaid.

Although Frierson and Bradshaw seem to suggest that the applicability of the collateral source rule to medical bills has no limits, the Mississippi Supreme Court recently found a narrow exception to this rule. In *McGee v. River Region Medical Center*, the defendant-hospital argued that a plaintiff should not be allowed to recover the “written-off” portion of his medical bills, 59 So. 3d 575, 581 (Miss. 2011). The Mississippi Supreme Court qualified its holdings in *Frierson and Bradshaw* by stating that “we do not read these cases to establish a per se rule that ‘written-off’ medical expenses are admissible.” *Id.* Instead, “[f]rom an evidentiary perspective, every case turns on its own facts and the purpose for which the evidence is offered.” *Id.* The question comes down to relevance, “provided he or she can demonstrate relevance, a plaintiff should be allowed to present evidence of his or her total medical expenses, including those amounts ‘written off’ by medical providers.” *Id.*

The *McGee* court went on to outline the issue as whether the collateral source rule applies to a plaintiff’s recovery of damages even though the total medical bills may be found to be relevant and admissible. *Id.* Importantly, the court found the following:

Applying the rule to the facts of this case, we find that the collateral source rule simply does not apply to the ‘written-off’ portion of the [hospital’s] bill. The rule, by its very language, applies only to prohibit the introduction of evidence of payments from collateral sources wholly independent of the tortfeasor. In this case, [the hospital], to whom the bill was owed, is also the alleged tortfeasor. [The hospital] provided medical services, but was not paid by [Plaintiff], Medicare, or any other source for a large portion of those services. To accept [Plaintiff’s] argument would require [the hospital] to absorb the cost of services rendered for which there was no reimbursement and then be potentially liable for those services again in damages. We therefore find that, although the entire medical bill may be relevant to aid the jury in assessing the seriousness and the extent of the injury, [Plaintiff] may not recover as damages those amounts ‘written off’ by [the hospital].

*Id.* (emphasis by the court). This holding opens the door to defense arguments that the collateral source rule is not an ironclad, per se rule, in the context of “write-offs,” but rather a rule to be analyzed under the facts in each particular case based on relevancy, purpose, and basic fairness.

Recently, the district court for the Southern District of Mississippi addressed whether *McGee* limited plaintiff’s recovery where the United States was an alleged tortfeasor and plaintiff’s medical bills had been paid by Medicaid, a governmental entity. *Chickaway et al. v. United States*, 2012 U.S. Dist. LEXIS 110602 (S.D. Miss. August 7, 2012). *Chickaway* was a medical-malpractice case under the Federal Tort Claims Act in which plaintiff’s total medical bills were reduced from $894,173.07 to $91,000 as a result of negotiations conducted by Medicaid. *Id.* at *2-3.* The Government argued that it should be able to introduce this evidence to reduce the amount of potential economic damages because it was both the tortfeasor and the source of the Medicaid payments. *Id.* at *5-6.* The court rejected the Government’s argument and found that the “difference between [the present case] and the one facing the Mississippi Supreme Court in *McGee* is that [Plaintiff’s] medical bills were not written down by the defendant.” *Id.* at *6-7.* (Emphasis added.)

Specifically, the district court distinguished *McGee* from *Chickaway* by finding that “the entities that wrote down [plaintiff’s] medical bills [were] not the United States but, rather, various hospitals that [were] not defendants to [the] lawsuit.” *Id.* The court further found that “because the United States [was] not the entity that did the ‘writing down,’ it [was] not entitled to diminish its liability by circumventing the collateral source rule.” *Id.* The district court therefore found that *McGee* was not controlling, and that “the Court is left with Mississippi’s broader view of Medicaid payments, which is that they are indeed subject to the collateral source rule.” *Id.* at *8-9.* Interestingly, the court assumed that a “payment” was synonymous with a “write-off.” *Id.* at *5.*

However, any argument to exclude the “written-off” medicals must also take into account Mississippi Code Section 41-9-119, which states that “proof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable.” An “opposing party may, if desired, rebut the necessity and reasonableness of the bills by proper evidence.” *Estate of Bolden v. Williams*, 17 So. 3d 1069, 1071-72 (Miss. 2009) (quoting *Jackson v. Brunfield*, 458 So. 2d 736, 737 (Miss. 1984)). Therefore, it is incumbent upon the defendant to present evidence to contradict a plaintiff’s admission of medical bills into evidence in order for a jury to award a plaintiff less than the amount presented.

For instance, in *Downs v. Ackerman* the plaintiff presented evidence demonstrating that she had suffered over $20,000 in medical bills resulting from an automobile accident. 2012 Miss. App. LEXIS 411, *8-9* (June 26, 2012). The defendant admitted fault on several occasions during the trial and, other than cross-examining plaintiff’s medical experts, at no point presented evidence to contradict the allegations that the medical bills resulted from the accident. *Id.* at *14-15.* The jury returned a verdict for exactly $20,000, approximately $800 less than the medical bills. *Id.* at *11.* Relying on prior caselaw, the Mississippi Court of Appeals concluded that “the jury’s verdict in favor of [plaintiff] for only $20,000 is against the overwhelming weight of the credible evidence and does not adequately compensate her for all of her claimed damages.” *Id.* at *16.* However, on writ of certiorari, the Supreme Court of Mississippi reversed the Court of Appeals, finding that the cross-examination of plaintiff’s experts

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was sufficient to cast doubt on whether the accident caused the subject injuries. No. 2011-CT-00089-SCT (on writ of certiorari).

B. Arkansas

Under Arkansas law, “as a general rule, it is improper for either party to introduce or elicit evidence of the other party’s insurance coverage.” Younts v. Baldor Elec. Co., Inc., 832 S.W.2d 832, 834 (Ark. 1992). But, this general rule is strictly construed to prohibit the introduction of collateral source payments for the sole purpose of mitigating damages. See Shipp v. Franklin, 258 S.W.3d 744, 747 (Ark. 2007) (holding that “[t]he collateral source rule applies unless the evidence of benefits from the collateral source is relevant for a purpose other than the mitigation of damages.”) (emphasis added). In determining whether a plaintiff can recover for payments by a third party, the Arkansas Supreme Court has held that “[a] successful plaintiff in a personal injury action is entitled to recover whatever is a reasonable and necessary outlay in attempting to be cured of his injuries.” Blisset v. Frisby, 458 S.W.2d 735, 741 (Ark. 1970). Arkansas is also governed by a statute (Ark. Code Ann. Sect. 16-46-107), which allows for the presentation of “doctor bills, hospital bills, ambulance service bills, drug bills, and similar bills for expenses incurred.”

In 2003, the Arkansas legislature attempted to limit a plaintiff from being able to admit into evidence the entire “written-off” portion of his medical bills by adopting A.C.A. § 16-55-212, which provided that “any evidence of damages for the costs of any necessary medical care, treatment, or services received shall include only those costs actually paid by or on behalf of the plaintiff or which remain unpaid for which the plaintiff or any third party shall be legally responsible.” However, the Arkansas Supreme Court invalidated this provision as unconstitutional, finding that it was a rule of evidence and therefore fell within the Arkansas Supreme Court’s domain, i.e., violated separation of powers under the Arkansas Constitution. Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 142 (Ark. 2009); see also Maggette v. BL Dev. Corp., 2011 U.S. Dist. LEXIS 58077, *21-22 (denying defendant’s motion to limit proof regarding the amount of plaintiffs’ past medical bills that do not reflect the actual amounts paid or owed because the Arkansas Supreme Court invalidated A.C.A. § 16-55-212).

C. Georgia

Under Georgia law, “[t]he collateral source rule bars the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant’s liability and damages for such payments.” Kelly v. Purcell, 301 Ga. App. 88, 91, 686 S.E.2d 879, 882 (Ga. Ct. App. 2009); Hoeflick v. Bradley, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006). The Georgia Court of Appeals has explicitly held that a plaintiff is entitled to present at trial the gross amount of his medical bills, including a “write-off” of medical expenses. Olarius v. Marrero, 248 Ga. App. 824, 825-826, 549 S.E.2d 121 (Ga. Ct. App. 2001) (citing Candler Hosp., Inc. v. Dent, 228 Ga. App. 421, 491 S.E.2d 868 (Ga. Ct. App. 1997)). Further, “a plaintiff can recover from the jury all special damages provable, but cannot receive in judgment again what has already been paid by the defendant or on the defendant’s behalf by an insurer.” Id. (Note: A statute to abrogate the collateral source rule was passed and then declared unconstitutional in 1991. Denton v. Con-Way Southern Express, Inc., 402 S.E. 2d 269 (Ga. 1991)).

D. Louisiana

In Louisiana, a plaintiff is generally allowed to recover the costs of third-party payments made by insurers for medical treatment. Bellard v. American Century Ins. Co., 980 So. 2d 654 (La. 2008). The courts in Louisiana have established that for claims for medical expenses that are supported by medical bills, the jury should award the plaintiff the full amount of medical expenses unless there is conflicting evidence or reasonable suspicion that the medical bills are unrelated to the accident. Venissat v. St. Paul Fire & Marine Ins. Co., 968 So. 2d 1063, 1071 (La. App. 3 Cir. 2007). Accordingly, the courts have found that “a jury manifestly errs if the victim has proven his or her medical expenses by a preponderance of the evidence, and it fails to award the full amount of the medical expenses proven.” Id.

E. Tennessee

The collateral source rule is currently a popular topic in the Tennessee Legislature and the legal community. In 2013, a proposed bill named the “Phantom Damages Elimination Act” would essentially abrogate the application of the collateral source rule to “written-off” medicals in Tennessee.1 The proposed bill would limit an injured party’s recovery to economic damages for medical costs that are (1) actually paid by or on behalf of the claimant, (2) necessary to cover unpaid medical expenses, and (3) necessary to satisfy future medical charges.2 The bill was heavily debated in the 2013 session of the Tennessee Legislature, and was re-introduced in the 2014 session.3

The Tennessee Legislature has already adopted a unique statute for plaintiff’s recovery from a health care provider in medical malpractice actions. Tennessee Code Ann. Section 29-26-119 provides:

In a health care liability action in which liability is admitted or established, the damages awarded may include (in addition to other elements of damages authorized by law) actual economic losses suffered by the claimant by reason of the personal injury, including, but not limited to, cost of reasonable and necessary medical care, rehabilitation services, and custodial care, loss of services and loss of earned income, but only to the extent that such costs are not paid or payable and such losses are not replaced, or indemnified in whole or in part, by insurance provided by an employer either governmental or private, by social security benefits, service benefit programs, unemployment benefits, or any other source except the assets of the claimant or of the members of the claimant’s immediate family and insurance purchased in whole or in part, privately and individually.

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1 SB 1184/HB 0978
2 Id.
III. States Abrogating or Modifying the Collateral Source Rule

A. Alabama

The State of Alabama modified the common law collateral source rule by statute in 1987. The Legislature enacted Code of Alabama Section 12-21-45, which provides that “[i]n all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff’s medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence.” Section 12-21-45 Ala. Code 1975 (emphasis added). On the other hand, the statute goes further to allow the plaintiff “to introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses.” Id.

Thus, Section 12-21-45 “does not dictate any particular outcome, but, rather, it allows a jury to make its own informed decision as to the effect of third-party payments of medical and hospital expenses on a plaintiff’s recovery.” Crocker v. Grammer, 87 So. 3d 1190 (Ala. 2011). “[A] jury can now decide, based on the unique facts of each case, whether such a reduction would be appropriate.” Id. at 1193. See Marsh v. Green, 782 So. 2d 223 (Ala. 2000) (noting that Section 12-21-45 allows both sides an opportunity to explore the equities of reducing a personal-injury award based on third-party payments of medical and hospital expenses).

The Crocker court noted that a plaintiff can ameliorate any prejudice from the introduction by the defendant of third-party payments. Thus, the statute provides a built-in mechanism for assuring that a plaintiff is not unduly prejudiced. Id. at 1194. Importantly, in Crocker, the Court of Civil Appeals of Alabama addressed whether evidence of third-party payments of a plaintiff’s medical and hospital expenses would be relevant to determine the proper award of damages. Id. at 1192-93. The court answered in the affirmative, finding that the information complied with the Alabama Rules of Evidence, since it is “a fact that is of consequence to the determination of the action.” Id. at 1193. (Note: Indiana and Ohio similarly allow both sides to put on evidence of the full amount billed, and the actual amount paid, in order to let the jury decide the reasonable value of the medical expenses.)

B. California

The California Supreme Court recently held that a plaintiff may only recover the amount actually paid by plaintiff or his insurer to show damages. Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130, 1138 (Cal. 2011). The court stated that it’s holding “in no way abrogate[d] or [modified] the collateral source rule as it [had] been recognized in California,” by concluding that the negotiated rate differential (i.e., the “written-off” amount) in medical bills is not a collateral payment or a benefit subject to the collateral source rule. This holding illustrates the current trend toward the proper application of the collateral source rule in the context of the modern healthcare billing system in the United States. Id. at 1145. Howell provides a detailed analysis of why the collateral source rule is not applicable to “written-off” medicals and is an excellent resource for preparing a motion in limine on behalf of a defendant.

In addition, the California legislature has modified the rule for two particular scenarios. For instance, in a medical malpractice case, the defendant may introduce evidence of collateral payments and benefits provided to the plaintiff for his injury; the plaintiff may then introduce evidence of premiums paid or contributions made to receive the benefits. Cal. Civ. Code § 3333.1, subd. (a). The second situation allows a public entity defendant to move to reduce a personal injury award against it by the amount of certain collateral source payments. Gov. Code, § 985, subd. (b).

C. North Carolina

North Carolina authored legislation in 2011 to abrogate the collateral source rule:

Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

N.C. Gen. Stat. §8C-1, Rule 414 (emphasis added).

D. Oklahoma

Enacted in November 2011, Oklahoma Statute Title 12, Section 3009.1 effectively limited a plaintiff’s recovery for medical bills to the actual amount paid, stating in part:

A. Upon the trial of any civil case involving personal injury, the actual amounts paid for any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party shall be the amounts admissible at trial, not the amounts billed for expenses incurred in the treatment of the party.

12 Okl. St. § 3009.1 (emphasis added). Following the passage of this bill, much of the common law – which arose from cases where medical bills were the main source of evidence in personal injury claims – is no longer applicable.

E. Texas

Texas Civil Practice and Remedies Code Section 41.0105, enacted in 2003, abrogated the collateral source rule:

In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

Tex. Civ. Prac. & Rem. Code § 16.063 (emphasis added). This language has been interpreted to preclude recovery for the difference between the amount

“[I]t is reasonable to read ‘actually’ as also modifying ‘incurred’, referring to expenses that are to be paid, not merely included in an invoice and then adjusted by required credits. Thus, ‘actually paid and incurred’ means expenses that have been or will be paid, and excludes the difference between such amount and charges the service provider bills but has no right to be paid.”

IV. Conclusion

The good news for defendants is that there appears to be a trend in recent years to bring the collateral source rule in sync with the billing practices of modern healthcare. This ongoing tort reform movement has seen the modification or even abrogation of the rule in some 37 states, with others abandoning the rule in specific areas, such as medical malpractice. In reaching these holdings, the courts are beginning to acknowledge the fact that the “write-offs” are never actually paid by anyone, and are therefore not “payments” as contemplated by the collateral source rule. This current view results in a more equitable compensation system for all – where plaintiffs are fairly compensated, and defendants are not unfairly penalized. At a minimum, it seems fair that a jury should be allowed to hear both sides – and assess the reasonable value of the medical services – a middle-ground approach that Alabama and other states have now adopted.

*A Second Bite at the Contractual-Damages Apple: Why Don’t Plaintiffs Have to Prove Lost Profits the First Time Around?*

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A litigant is entitled to but one bite at the damages apple. . . . I know of no law directing that a plaintiff who misses with his first shot at proving damages should be given a second shot. If we have cases suggesting such, they may be safely said out in left field.¹

Thus wrote Justice James Robertson in 1988. Since that time, however, the Mississippi Supreme Court has staked out a firm position in “left field.” Plaintiffs who failed to present sufficient proof to support a damages award (typically for lost profits) were not subject to the usual ruling when a party fails to present sufficient evidence at trial—that is, a judgment rendered for the defendant. Instead, they were given a second bite at the apple on remand.

**The Former State of the Law: Prove Damages at Trial or Else**

A trial is not a rehearsal, where either side is entitled to a do-over if it flubs its proof the first time. The Mississippi Supreme Court has repeatedly held that failure to put on sufficient proof of actual damages means that a judgment for actual damages must be reversed and rendered, or that a judgment denying such damages must be affirmed. For instance:

- “That evidence is legally insufficient to undergird a damages award even when considered under established limitations upon our scope of review as indicated above. We reverse the award of damages for loss of future profits and on that issue render judgment for Lovett.” *Lovett v. E.L. Garner, Inc.*, 511 So. 2d 1346, 1353 (Miss. 1987).
- “What [Plaintiff] overlooks is the fact that as plaintiff he bore the burden of proving his damages with reasonable certainty. If the ‘Income Summary’ —which everyone agrees is not real reliable—is taken away and Master Tann’s (non)finding is accepted, Butler loses, for he is then without any competent proof of the amount of his damages.” *Butler v. Pembroke*, 568 So. 2d 296, 298 (Miss. 1990) (affirming judgment that held net profits could not be ascertained).
- “Plaintiffs are required to prove loss of net profits, and we conclude that Super D failed

in that respect. Under Lovett, supra, this Court reverses the damages for loss of profits and on this issue renders judgment for Fred’s.” Fred’s Stores, Inc. v. M & H Drugs, Inc., 725 So. 2d 902, 915 (Miss. 1998).

- “Without proof of actual monetary damages, a plaintiff cannot recover compensatory damages under a breach-of-contract action. While we agree with the Court of Appeals that Banks breached the [contract], we find that there is insufficient proof in the record to sustain an award of compensatory damages to BCI for the breach of contract.” Bus. Comm’ns, Inc. v. Banks, 90 So. 3d 1221, 1225 (Miss. 2012) (reversing award of actual damages & remanding only on issue of attorney’s fees) (emphasis in original).

So, in these cases, “insufficient proof” did not lead to a remand for a second try, but to the Court’s ruling that the plaintiff had forgone a claim to the damages in question.

In Fred's Stores, the Court cited with approval the federal-court opinion in Cook Indus., 334 F. Supp. 817 (emphasis added). And in another case, regarding mitigation damages—which, though not lost profits, must likewise be proved “to a reasonable certainty”—the Court, citing inter alia cases pertaining to contract damages, unanimously affirmed the trial court's ruling that the plaintiff presented insufficient evidence for a jury instruction on that category of damages. Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736, 740-41 (Miss. 1999) (“relying on pure speculation” could not prove damages where plaintiff “failed to present sufficient proof”).

In none of these cases was a plaintiff entitled to a do-over. Courts in other states have held likewise. See, e.g., Am. Diamond Exch., Inc. v. Alpert, 28 A.3d 976, 987-88 (Conn. 2011) (reversing & rendering for defendant where “plaintiff’s choice of evidence” offered “no reliable proof” as to lost profits); Triad Drywall, LLC v. Bldg. Materials Wholesale, Inc., 686 S.E. 2d 364, 366-67 (Ga. Ct. App. 2009) (affirming directed verdict for defendant on “insufficient” proof of lost profits); Shepard v. State Auto. Mut. Ins. Co., 463 F. 3d 742, 748 (7th Cir. 2006) (“when a plaintiff cannot establish damages with sufficient certainty to avoid speculation or conjecture by the jury, the defendant is entitled to judgment as a matter of law”); Metro. Express Servs. v. City of Kansas City, 71 F. 3d 273, 275 (8th Cir. 1995) (affirming denial of lost-profits damages where plaintiff failed to prove with reasonable certainty or offer best-available evidence); Robert A. Huggins Gen. Contractor v. Willoughby, 595 So. 2d 1003, 1004 (Fla. Ct. App. 1992) (reversing denial of directed verdict where proof of lost profits “insufficient”).

A defendant is not entitled to a new trial in order to try to get its story straight the second time around, and a plaintiff should not be entitled to a new trial to put on the evidence he was supposed to present the first time. “The plaintiff bears the burden of proof as to the amount of damages.” J.K. v. R.K., 30 So. 3d 290, 299 (Miss. 2009). “Where the evidence is insufficient as a matter of law to sustain a jury’s award, final judgment is entered in favor of the moving party on the damages issue presented notwithstanding the verdict of the jury.” Investors Property Mgmt., Ltd. v. Watkins, Pitts, Hill & Assocs., 511 So. 2d 1379, 1381 (Miss. 1987). At least, so one may have thought.


Despite the foregoing precedents, some recent cases, without citing authority for such a holding, have indeed remanded for a new trial where the proof of damages was held speculative and conjectural:

- “We likewise find that lost profits were not proven with a reasonable degree of certainty, and that no rational trier of fact could have found lost profits beyond a reasonable doubt.” Ballard Realty Co. v. Ohazurike, 97 So. 3d 52, 66 (Miss. 2012) (remanding for new trial).

- “We agree with Coleman that evidence adduced as to Waller’s future lost profits for living customers, with whom Waller still has enforceable contracts, was speculative in nature and warrants a remand for a new trial on damages.” Coleman & Coleman Enters. v. Waller Funeral Home, 106 So. 3d 309, 316 (Miss. 2012).

- “The trial court did not err in denying Jackson HMA’s motions for directed verdict and judgment notwithstanding the verdict, for Morales offered sufficient evidence that he had suffered damage. But, insufficient evidence was adduced to undergird the jury’s award. As such, we reverse and remand for a new trial solely on the issue of damages.” Jackson HMA, Inc. v. Morales, 130 So. 3d 493, 501 (Miss. 2013).

2 Justice Mills dissented as to a separate holding on emotional distress.
In Morales, the Court expressly held that “Morales failed to provide sufficient evidence upon which the jury or a court could conclude that the income figures represented net income,” *id.* at 500; that “the evidence submitted was insufficient to support the amount of damages awarded,” *id.*; and that “[o]ther evidence adduced at trial was inadequate to support the amount of damages.” *id.* at 501. And yet, the Court did not render, but remanded.

In effect, these holdings seem to confuse the different standards for JNOV and new trial under Rule 50. See Miss. State Hwy. Comm’n v. Moorehead, 285 So. 2d 139, 140 (Miss. 1973) (“the question before an appellate court in reviewing the action of a trial court in ordering a new trial on the ground that the damages are excessive or inadequate is not whether there is sufficient evidence to support the verdict”). A new trial is granted where the verdict is against the overwhelming weight of the substantial evidence; but where no substantial evidence is presented to the jury, a JNOV, not a new trial, is the correct ruling. See, e.g., White v. Yellow Freight Sys., 905 So. 2d 506, 510 (Miss. 2004) (distinguishing JNOV and new trial). Any cases to the contrary are, as Justice Robertson wrote, “out in left field.”

The puzzling nature of Ohazurike, Coleman, and Morales is more readily seen when one considers that, to escape a directed verdict or JNOV, a plaintiff must present substantial evidence to the jury. *Denbury Onshore*, 98 So. 3d at 452. The Court has consistently defined “substantial evidence” and “speculation or conjecture” as mutually exclusive:

- “Such speculation and conjecture does not arise to the level of ‘substantial evidence.’” *Freeman v. Huseman Oil Int’l*, 717 So. 2d 742, 745 (Miss. 1998).
- “We are in agreement with the circuit court that the doctor’s statement that ‘something dramatic’ happened on July 27 must be regarded as mere speculation and conjecture and does not rise to the level of substantial evidence.” *Todd’s Big Star v. Lyons*, 301 So. 2d 847, 849 (Miss. 1974).
- “[T]he evidence upon which the verdict rests is purely fanciful and speculative, and cannot be said to rest upon any substantial basis.” *Mobile & Oh. R.R. Co. v. Clay*, 125 So. 819, 824 (Miss. 1930).

In so holding, the Court was in accord with the generally accepted meaning of “substantial evidence.” See, e.g., *Anthony v. Chevron U.S.A.*, 284 F.3d 578, 583 (5th Cir. 2002) (defining “substantial evidence” as “sufficient so that a jury will not ultimately rest its verdict on mere speculation and conjecture”).

If, then, evidence which is merely speculative, or a scintilla, or otherwise “inadequate” and “insufficient,” is all that a plaintiff offers in support of his claim for damages—then his proof does not rise to the minimum required for “substantial evidence,” and the correct ruling on appeal is that the trial court erred in denying a directed verdict or JNOV. And yet, in at least three recent decisions, that was not the law.

What Can Be Done?

It remains possible that the Mississippi Supreme Court will return to its earlier precedents. Defense counsel should continue to cite to holdings such as Lovett, given that cases such as Morales do not present a clear overruling of those cases—indeed, Morales cites Lovett. At some point, the Court may find itself required to expressly consider whether plaintiffs’ proof of contractual damages is an exception to the rule.

The Court’s decision in the recent Business Communications case, already quoted above, may also be cited to the trial courts. In that case, the plaintiff had proved breach of contract, but failed to prove compensatory damages at trial. *Bus. Comm’ns*, 90 So. 3d at 1225. But “where a suit is brought for a breach of a contract, and the evidence sustains the claim, the complainant is entitled to recover at least nominal damages for the failure of the defendant to carry out his agreement.” *Id.* at 1226 (quoting *Callicott v. Gresham*, 161 So. 2d 183, 186 (Miss. 1964)); see also *Cook Indus.*, 334 F. Supp. at 817 (awarding only nominal damages where plaintiff failed to prove lost profits). Nominal damages are, of course, “small or trivial in nature, awarded for a technical injury due to a violation of some legal right.” *Thomas v. Harrah’s Vicksburg Corp.*, 734 So. 2d 312, 319 (Miss. Ct. App. 1999) (citing cases for awards of one cent and $50.00).

Therefore, where the trial court finds that a breach of contract has been proved but that the proof of damages is questionable, defense counsel may wish to argue that only nominal damages are recoverable. This is true even if the jury did not award them:

If this Court reversed and remanded on this issue, Whitten could only receive nominal damages. Instead, *this error will be cured by this Court reversing and rendering an award of nominal damages without the necessity of remand or retrial.* See *Daniel v. McNeel*, 221 Miss. 666, 668, 74 So. 2d 753, 754 (1954) (where the Court reversed and rendered and awarded a nominal sum of $10.00 when the only issue to be resolved was the payment of nominal damages.)

*Whitten v. Cox*, 799 So. 2d 1, 18 (Miss. 2000) (emphasis added); accord, *Gaw v. Seldon*, 85 So. 3d 312, 318 (Miss. Ct. App. 2012) (citing *Whitten*). Because such an award must be “trivial or trifling,” there is no need for any fact-finding by the jury.

Allowing plaintiffs repeated bites at the apple in their proof of damages creates an unacceptable burden on the litigants and on the judicial system. Bearing the risk in mind of a remand for a do-over on damages, defense counsel can be better prepared to brief this issue in the trial court and on appeal. ■
Financial responsibility means having insurance policies or surety bonds sufficient to satisfy the minimum public liability requirements. 

Public liability means liability for bodily injury, property damage, and environmental restoration.

~ from the website of the Federal Motor Carrier Safety Administration

The MCS-90 endorsement is an increasingly litigated and often misunderstood single-page “form” that is often appended as a “rider” to insurance policies in order to satisfy the financial responsibility requirements of the Federal Motor Carrier Act of 1980 (“MCA”). Pub. L. No. 96-296, 94 Stat. 793 (the Federal Motor Carrier Act of 1980).

In one’s understanding of the MCS-90 endorsement and related law, this article provides an in-depth analysis of the endorsement in detail, its history, and application, as well as current or developing law on selected issues replete with citations to resources available for further review and information.

Historical Backdrop

In the past, carriers licensed by the Interstate Commerce Commission (“ICC”), now defunct and replaced by the Surface Transportation Board, were accused of employing leased, borrowed, or interchanged vehicles such as tractor-trailers in order to avoid safety regulations governing equipment and drivers. See, e.g., Am. Trucking Ass’ns v. United States, 344 U.S. 298, 304-05 (1953). In some cases, employment of non-owned trucks resulted in confusion as to who was financially responsible for accidents caused by those vehicles. See, e.g., Mellon Nat’l Bank & Trust Co. v. Sophie Lines, Inc., 298 F. 2d 473, 477 (3d Cir. 1961). This avoidance and resultant confusion was viewed as “abuses” that purportedly threatened the safety and other interests of the public and economic stability of the trucking industry.

These perceived abuses motivated Congress to amend the Interstate Commerce Act—authorizing the ICC to develop regulatory laws holding commercial motor carriers responsible for the operation of vehicles certified to them. 49 U.S.C. § 304(e) (1956); see Motor Carrier Act of 1935, 49 Stat. 543, ch. 498, approved 1935-08-09 (revised and re-enacted in 1978 through 49 U.S.C. § 1107); see also 49 U.S.C. § 10927. In response to this Congressional mandate, the ICC developed and promulgated regulations requiring: (1) that every lease entered into by a licensed commercial carrier contain a provision declaring it will maintain “exclusive possession, control, and use of the equipment for the duration of the lease”; (2) that the carrier “assume complete responsibility for the operation of the equipment for the duration of the lease” (49 C.F.R. § 1057.12(c)); and (3)

2. The MCS-90 form (and other related forms) may be downloaded from the Federal Motor Carrier Safety Administration website: http://www.fmcsa.dot.gov/forms/print/MCS-90.htm. A copy is appended to this article along with a “schedule of limits” which is discussed below.
3. In one case, a court invoked the terms of an MCS-90 endorsement and incorporated them into the policy as a matter of law (and presumably public policy) even though the endorsement was not actually attached (physically attached) to the insurance policy at issue. Transp. Indem. Co. v. Carolina Cas. Ins. Co., 652 P.2d 134, 145 (Ariz. 1982).
4. The regulations define “financial responsibility” as: “the financial reserves (e.g., insurance policies or surety bonds) sufficient to satisfy liability amounts set forth . . . covering public liability.” 49 C.F.R. § 387.5; 49 U.S.C. § 13906(a)(1) (“sufficient to pay . . . each final judgment against the registrant [motor carrier] for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles”); see also 49 C.F.R. §§ 387.7, 387.301(a)(1); Distribution Servs., 320 F. 3d at 489 (noting that MCA imposes a liability insurance requirement “upon each motor carrier registered to engage in interstate commerce”) (emphasis added).
6. See generally Empire Fire & Marine Ins. Co. v. Guar. Nat’l Ins. Co., 868 F. 2d 357 (10th Cir. 1989) (“[U]se by truckers of leased or borrowed vehicles led to a number of abuses that threatened the public interest and the economic stability of the trucking industry. In some cases, ICC-licensed carriers used leased or interchanged vehicles to avoid safety regulations governing equipment and drivers. In other cases, the use of non-owned vehicles led to public confusion as to who was financially responsible for accidents caused by those vehicles.”); 16 COUCH ON INSURANCE § 226:10 (3d ed. 2008) (“The relationships in the trucking business are often complicated and usually involve multiple policies. For example, one entity can own the tractor while another entity owns the trailer, with both of these entities having contractual arrangements with another party, the trucking company.”).
that the carrier maintain insurance or other form of surety “conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles” under the carrier’s permit. 49 C.F.R. § 1043.1(a); see H.R.Rep. No. 96-1069, at 6, as reprinted in 1980 U.S.C.C.A.N. at 2288; see also 49 U.S.C. §§ 13902, 13906.

These efforts to regulate the trucking industry out of concerns for safety were the exception at a time when legislation was being enacted “to deregulate the trucking industry, increase competition, reduce entry barriers, and improve quality of service” through, for example, passage of the MCA. See H.R.Rep. No. 96-1069 (1980), as reprinted in 1980 U.S.C.C.A.N. 2283; see also 96-1069, at § 2288. The MCA, therefore, included provisions addressing these safety concerns. Carolina Ins. Co. v. Distrib. Servs., Inc., 320 F. 3d 488, 489 (4th Cir. 2003); Empire Fire & Marine Ins. Co. v. Guar. Nat’l Ins. Co., 868 F. 2d 357, 362 (10th Cir. 1989).

Specifically, the MCA provides that a commercial motor carrier may operate only if registered to do so and must be “willing and able to comply with . . . [certain] minimum financial responsibility requirements.” Id. at §§ 13901 & 13902(a)(1) (emphasis added); T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc., 242 F. 3d 667,670 (5th Cir. 2001). Financial responsibility requirements of the MCA may be met through one of three methods:

1. “Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980” (Form MCS-90) issued by an insurer(s);

2. A “Motor Carrier Surety Bond for Public Liability under Section 30 of the Motor Carrier Act of 1980” (Form MCS-82) issued by a surety; or

3. A written decision, order, or authorization of the Federal Motor Carrier Safety Administration authorizing a motor carrier to self-insure under § 387.309, provided the motor carrier maintains a satisfactory safety rating as determined by the Federal Motor Carrier Safety Administration . . .

49 C.F.R. § 387.7(d)(1)-(3). In other words, a motor carrier can establish proof of the requisite financial responsibility in one of three ways: (1) by an MCS-90 endorsement, (2) by a surety bond, or (3) by self-insurance. See Distrib. Servs., Inc., 320 F. 3d at 489. The first of these three is the preferred method of “the vast majority of motor carriers.” C. Anto & M. Halverson, The MCS-90 Endorsement (The Ultimate Monkey Wrench), In Transit (Dec. 16, 2011) (published in Defense Research Institute’s Trucking Litigation Committee newsletter).

MCS-90 Endorsement

As discussed, the regulations promulgated pursuant to the MCA require proof of compliance with the financial responsibility requirements. Specifically, a MCS-90 endorsement form is set forth in 49 C.F.R. § 387.15 and mandates the following relevant provisions in an endorsement:

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Motor Carrier Safety Administration.

In consideration of the premiums stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial requirements of the MCA.

1 The Federal Motor Carrier Safety Administration is currently responsible for administering the MC and other related regulations.

2 The MCA defines “motor carrier” as “a person providing motor vehicle transportation for compensation.” 49 U.S.C. § 13102(14). Federal regulations promulgated pursuant to the MCA and accompanying the MCS-90 endorsement define “motor carrier” as a “for-hire motor carrier or a private motor carrier.” 49 C.F.R. § 387.5. In turn, “for-hire carriage” is defined as “the business of transporting, for compensation, the goods or property of another.” Id. The term “motor carrier” also includes, but is not limited to, a motor carrier’s agent, officer, or representative; an employer responsible for hiring, supervising, training, assigning, or dispatching a driver; or an employee concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories.” 49 C.F.R. § 387.5.

A motor carrier transporting property must demonstrate financial responsibility of “at least $750,000.00.” 49 U.S.C. § 31133(b)(2); 49 C.F.R. § 387.9. This minimum level of financial responsibility requirements applies only to “for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce” and motor carriers transporting hazardous materials. 49 C.F.R. § 387.3. A copy of the “schedule of limits” is appended to this article.

The MCS-90 endorsement constitutes such proof of requisite financial responsibility under the MCA. See 49 U.S.C. § 31139(f)(1)(A); 49 C.F.R. § 387.7(d)(1). Consequently, every liability insurance policy issued to motor carriers of interstate commerce contains the MCS-90 endorsement. Distribution Servs., Inc., 320 F.3d at 489. The implementing regulations “prescribe [ ] the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce.” 49 C.F.R. § 387.1, and “apply[y] to for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce.” Id. at § 387.3. Specific minimum levels are defined by the cargo being transported. Id. at § 387.9.

3 A copy of an MCS-90 endorsement form is appended to this article.
responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere . . . . It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company’s liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

### MCS-90 Endorsement and Liability Insurance

To recap, federal law on financial responsibility requires motor carriers to establish that they have effective insurance coverage that will sufficiently protect the public from risks to which it is exposed through a commercial carriers’ trucking operations. See id. § 387.1 (addressing the level of coverage required as a matter of law). Through the express language of the MCA and related regulations, these provisions are intended to impose a mandatory requirement that motor carriers obtain a minimum level of liability insurance, depending on the cargo they carry. See id. § 387.9 (for example, for-hire interstate transportation of nonhazardous commodities having a gross vehicle weight of 10,000 lbs. or more requires coverage of $750,000). They also ensure the “collectability” of a judgment obtained against the carrier in the event of liability. See id. § 387.15, Illus. I (“[T]he insurer . . . agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence . . . .” (emphasis added)); see also Yeates, 584 F. 3d at 874; Ill. Cent. R.R. v. Dupont, 326 F. 3d 665, 666 (5th Cir. 2003); 49 U.S.C. § 13906 (2006) (MCS-90 ensures that the carrier’s insurer “will pay within policy limits any judgment recovered against the insured motor carrier for liability resulting from the carrier’s negligence, whether or not the vehicle involved in the accident is specifically described in the policy”).

Unfortunately, the financial responsibility provisions of an MCS-90 endorsement are rather ambiguous regarding how they interact with underlying insurance coverage. For example, an MCS-90 endorsement declares that “no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the [insurance company] from liability or from the payment of any final judgment, within the limits of liability herein described.” Id. Thus, this provision suggests that the endorsement modifies an underlying policy to the extent the policy is inconsistent. However, the endorsement also provides that “all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company.” Id. This ambiguity has led to confusion regarding an MCS-90 endorsement’s effect on an injured party’s right to recover a judgment against a motor carrier.

The majority view of the MCS-90 endorsement and its coverage of a “final judgment” in an appropriate action describes the insurer’s obligation under the endorsement as one of a surety (as discussed further in another section below) rather than a modification of the underlying policy. The endorsement is a safety net in the event other insurance is lacking. See Canal Ins. Co. v. Carolina Cas. Ins. Co., 59 F. 3d 281, 283 (1st Cir. 1995) (holding the endorsement to be a “suretyship by the insurance carrier to protect the public--a safety net--but not insurance relieving . . . [another] insurer. On the contrary, it simply covers the public when other coverage is lacking”); see also Kline v. Gulf Ins. Co., 466 F. 3d 450, 455-56 (6th Cir. 2006) (same); Canal Ins. Co. v. Underwriters at Lloyd’s London, 435 F. 3d 431, 442 n. 4 (3d Cir. 2006) (same); Canal Ins. Co. v. Distrib. Servs., Inc., 320 F. 3d 488, 490 (4th Cir. 2003) (same); T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc., 242 F. 3d 667, 672 (5th Cir. 2001) (same); Harco Nat’l Ins. Co. v. Bobac Trucking Inc., 107 F. 3d 733, 736 (9th Cir. 1997); Occidental Fire & Cas. Co. of N.C. v. Int’l Ins. Co., 804 F. 2d 983, 986 (7th Cir. 1986). Under this reasoning, an MCS-90 insurer’s duty to pay a judgment arises, not from an insurance obligation, but from the endorsement’s language guaranteeing a source of recovery in the event the motor carrier negligently injures a member of the public on the highways.

Contrary to the minority view (see, e.g., Empire Fire), the majority describes the surety obligation--to pay a judgment

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11 See “Schedule of Limits” appended to this article; see also http://www.fmcsa.dot.gov/forms/print/MCS-90.htm (from FMCSA website).
12 A surety in this instance has been characterized as “a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default or miscarriage of another, the principal.” 74 Am. Jur. 2d Suretyship § 1 (1974); see Carolina Cas., 533 F.3d at 1208. Accordingly, the MCS-90 insurer would be a surety for the motor carrier, the principal. Under the surety framework, the MCS-90 endorsement would obligate the carrier’s insurer to be answerable for a public liability judgment-up to certain amounts-against the motor carrier. Yeates, 584 F.3d. at 878 (“endorsement is a safety net that covers the public in the event other insurance coverage is lacking.”).
against a motor carrier under the MCS-90 endorsement— as one that is triggered only when (1) the underlying insurance policy to which the endorsement is attached does not otherwise provide coverage, and (2) either no other insurer is available to satisfy the judgment against the motor carrier, or the motor carrier’s insurance coverage is insufficient to satisfy the federally-prescribed minimum levels of financial responsibility. Kline, 466 F. 3d at 455-56; Underwriters at Lloyd’s London, 435 F. 3d at 442 n.4; Minter v. Great Am. Ins. Co. of N.Y., 423 F. 3d 460, 470 (5th Cir. 2005); Yeates, 584 F. 3d at 878; see Herrod v. Wilshire Ins. Co., 2012 U.S. App. LEXIS 21057, at *11 (10th Cir. Oct. 12, 2012) (“we perceive nothing in the MCS-90 endorsement, the MCA, or the relevant regulations that would suggest that a motor carrier’s MCS-90 insurer may avoid paying a negligence judgment entered against its insured on the basis that the injured member of the public has received compensation from a different motor carrier’s insurer in settlement of claims against that motor carrier.”) (unpublished opinion); see also Carolina Cas. Ins. Co. v. E.C. Trucking, 396 F. 3d 837, 841-42 (7th Cir. 2005) (rejecting argument that MCS-90 insurer was relieved of obligation to pay final judgment rendered against its insured on the basis that injured party received compensation via a loan-receipt agreement in settlement of claims against another defendant).

Case law of the majority view dictates that the MCS-90 endorsement, its terms, and its operating provisions (that supersede any limitation in the underlying insurance policy) are only implicated as between an injured member of the public and the MCS-90 insurer. See, e.g., Distrib. Servs., Inc., 320 F.3d at 493. Referencing the express language of the MCS-90 endorsement—which provides that “all terms, conditions, and limitations in the policy to which the [MCS-90] endorsement is attached shall remain in full force and effect as binding between the insured and the company”—these cases conclude the MCS-90 endorsement operates only to protect the public and “does not alter the relationship between the insured and the insurer as otherwise provided in the policy.” 49 C.F.R. § 387.15 Moreover, “the MCS-90 endorsement cannot reasonably be read to alter the terms of the policy for the benefit of other insurers.” Id. The endorsement, in other words, is irrelevant to and has no effect on the ultimate allocation of a judgment against a motor carrier as between the carrier and its various insurers.

The MCS-90 Endorsement and Related Issues

Vehicles Not Listed On Policy

The MCS-90 endorsement provides “that the insurer will pay within policy limits any judgment recovered against the insured motor carrier for liability resulting from the carrier’s negligence, whether or not the vehicle involved in the accident is specifically described in the policy.” Ill. Cent. R.R. v. Dupont, 326 F.3d 665, 666 (5th Cir. 2003) (emphasis added); see 49 C.F.R. § 387.3, 387.7, 387.15 (2010); see also Canal Indem. Co. v. Williams Logging & Tree Services, Inc., 714 F. Supp. 2d 654 (S.D. Tex. 2010). Stated another way, even if the MCS-90 endorsement is attached to a policy that covers only listed vehicles, the endorsement applies to all vehicles that have statutory insurance requirements under the MCA. Canal Ins. Co. v. First Gen. Ins. Co., 889 F. 2d 604, 608 (5th Cir. 1989), modified by 901 F. 2d 45 (5th Cir. 1990).

An MCS-90 endorsement is intended to “eliminate[ ] the possibility of a denial of coverage by requiring the insurer to pay any final judgment recovered against the insured for negligence in the operation, maintenance, or use of motor vehicles subject to federal financial responsibility requirements”–again, “even though the accident vehicle is not listed in the policy.” 1 Auto. Liability Ins. 4th § 2:12 (2008); Carolina Cas. Ins. Co. v. Yeates, 584 F. 3d 868, 870 (10th Cir. 2009) (emphasis added) (adopting majority view); Ill. Cent. R.R. v. Dupont, 326 F. 3d 665, 666 (5th Cir. 2003) (“the insurer will pay within policy limits any judgment recovered against the insured motor carrier for liability resulting from the carrier’s negligence, whether or not the vehicle involved in the accident is specifically described in the policy”); accord Canal Ins. Co. v. Herrington, 2012 WL 463712, at *5 (S.D. Miss. Feb. 13, 2012).

Vehicles Not Engaged in Transportation of Property

A plain-English interpretation of the text of the MCS-90 endorsement and section 30 of the MCA leads to the conclusion that only vehicles presently engaged in the transportation of property in interstate commerce are covered. Canal Ins. Co. v. Coleman, 625 F. 3d 244, 249 (5th Cir. 2010) (emphasis added) (“[B] ecause those requirements exist to “satisfy liability . . . for the transportation of property, it follows that the MCS-90 must cover liabilities for the transportation of property.”). The MCS-90 endorsement does not cover other kinds of liabilities— i.e., “liabilities incurred outside of the transportation of property.” Id. (Fifth Circuit rejected argument that MCS-90’s coverage extended to accident involving trucker who, while heading home, backed his truck into another vehicle being driven by plaintiffs who were consequently injured).

Thus, an accident may not be covered if the tractor-trailer at issue was parked alongside the road at the home of the driver’s girlfriend and was arguably not engaged in the transportation of property at the time of the collision. See Pace v. Travelers Indem. Co. of Am., 2010 WL 5141252, at *2 (E.D. La. Dec. 9, 2010) (court held that MCS-90 did not apply in rear-end between truck and vehicle because truck not involved in transportation of property at the time); Canal Ins. Co. v. P.S. Transport, Inc., 2010 WL 817290, at *7 (N.D. Miss. Mar. 4, 2010) (“[I]nsurer was not required to indemnify its insured for a state court judgment for a variety of reasons. First, the driver was ‘not engaged as a for-hire motor carrier pursuant to 49 C.F.R. § 387.3 at the time of the accident,’ as he was not being paid by anyone at the time of the accident. Second, the driver was not transporting property at the time of accident, as he was not hauling cargo when it happened. Finally, the driver was not engaged in interstate commerce at the time of the accident, as he left his South Carolina home and traveled to another location within South Carolina on a purely personal errand, without the requisite ‘fixed and persisting intent . . . to travel outside of South Carolina’ necessary to support a finding that he was engaged in interstate commerce.”) (citations omitted) (citing Brunson v. Canal Ins. Co., 602 F.
Supp. 2d 711, 716 (D.S.C. 2007); see also Herrod, 2012 U.S. App. LEXIS 21057, at *19 (stating that a court must resolve two separate questions—whether a trucking company is a “registered motor carrier” as defined by the MCA and whether that company was operating as a for-hire motor carrier at the time of the accident at issue).

Permissive Users and Other “Unqualified” Insureds

A majority of courts has concluded that the MCS-90 endorsement also applies to permissive users of the vehicle at issue even though they would not otherwise qualify as an insured under the insurance policy at issue. See John Deer Ins. Co. v. Guillermo Nueva, 229 F.3d 853, 858 (9th Cir.2000) ("MCS-90 endorsement requires an insurer to indemnify a permissive user of a non-covered auto") (citing Adams v. Royal Indem. Co., 99 F. 3d 964, 968 (10th Cir. 1996)); Lynch v. Yob, 768 N.E. 2d 1158 (Ohio 2002) (same). In response to John Deere and other cases with similar holdings, the FMSCA issued “regulatory guidelines” which at least suggests that the term “insured,” as used in the MCS-90 endorsement, should be construed to mean the motor carrier identified in the policy. C. Anto & M. Halverson, The MCS-90 Endorsement (The Ultimate Monkey Wrench), IN TRANSIT (Dec. 16, 2011) (some courts have followed this “guideline,” while the Ninth Circuit has alluded to the fact that John Deer may still be valid law).

Exempt Commodities

Courts have held that the MCS-90 endorsement does not apply in cases involving transportation of exempt commodities such as agricultural products. See, e.g., 49 USC § 13506(a)(6) (B) (neither the United States Secretary of Transportation nor the Surface Transportation Board has jurisdiction over commercial carrier’s transportation of “agricultural or horticultural commodities (other than manufactured products thereof)"). Other courts have held that, despite the fact that a carrier is engaged in transportation of exempt commodities, the MCS-90 endorsement may nonetheless apply to the carrier if it is also engaged in the transportation of non-exempt commodities on other separate occasions. See also Century Indem. Co. v. Carlson, 133 F. 3d 591, 599-600 (8th Cir. 1998) ("MCS-90 endorsement applies notwithstanding that an interstate motor carrier transported an agricultural commodity" because an agricultural commodity exemption constitutes a limitation on the jurisdiction of the Interstate Commerce Commission, while the MCS-90 regulation was promulgated under the broader jurisdiction of DOT to impose financial responsibility standards); Canal Ins. Co. v. Owens Trucking, 2011 U.S. Dist. LEXIS 118329, at *18 (S.D. Miss. Oct. 11, 2011) ("Section 13506 does not imply a hole in the MCS-90 Endorsement’s coverage when the offending motor vehicle contains livestock . . . . To read in this ‘exclusion’ would thwart the regulation’s primary purpose: to provide for ‘an appropriate level of financial responsibility for motor vehicles operated on public highways.’ Neither the statute nor the regulation makes an exception for vehicles carrying livestock; neither will this Court.").

Interstate vs. Intrastate and State Endorsements

As noted, the MCS-90 applies only to interstate transportation — not to intrastate transportation. In such cases, minimum levels of financial responsibility under federal law are not required (although some states do dictate their own levels of financial responsibility in the absence of federally mandated levels as discussed below). See, e.g., Thompson v. Harco Nat’l Ins. Co., 120 S.W.3d 511 (Tex. App. 2003); cert. denied, 543 U.S. 876, 125 S. Ct. 100, 160 L. Ed. 2d 127 (2004); Canal Ins. Co. v. J. Perchak Trucking, Inc., 3:CV-07-2272, 2009 U.S. Dist. LEXIS 28932, 2009 EL 959596, at *2 (M.D. Pa. Apr. 6, 2009) (denying summary judgment because “[c]onsideration of the important issues presented in this case should be made only in the context of a concrete determination as to whether the insured’s vehicle was involved in interstate or intrastate commerce at the time of the accident”) (emphasis added); Canal Ins. Co. v. Paul Cox Trucking, 1:05-CV-2194, 2006 U.S. Dist. LEXIS 71307, 2006 EL 2828755, at *4 (M.D. Pa. Oct. 2, 2006) (holding that a federal court has jurisdiction over the question of whether truck was “engaged in interstate commerce at the time of the accident”) (emphasis added).

In analyzing whether a truck is engaged in interstate commerce, several jurisdictions consider the essential character of the truck company’s business. Kolencik v. Progressive Preferred Ins. Co., 1:04-CV-3507, 2006 U.S. Dist. LEXIS 24855, 2006 WL 738715, at *7 (N.D. Ga Mar. 17, 2006) (“Based on the foregoing, the court concludes that endorsement MCS-90 plays no role in the instant accident because it involved only intrastate commerce from Cartersville, Georgia, to Acworth, Georgia, with no intention of the dirt ever going beyond Acworth.”); Branson v. MGA Ins. Co., 673 So. 2d 89 (Fla. Dist. Ct. App. 1996) (declining to apply the MCS-90 to purely intrastate transportation); General Sec. Ins. Co. v. Barrentine, 829 So. 2d 984 (Fla. Dist. Ct. App. 1st Dist. 2002) (“The issue is not whether a truck might be used for an interstate shipment in the future. That much could be said of nearly any tractor-trailer rig. Rather, the issue is whether the injury in question occurred while the truck was operating in interstate commerce.”) (emphasis added).

Other jurisdictions focus their inquiry on whether a carrier has a “fixed and persisting intent” to engage in interstate commerce. See Foxworthy v. Hiland Dairy Co., 997 F.2d 670, 673 (10th Cir. 1997); see also Travelers Indem. Co. of Ill. v. Western Am. Spec. Transp. Serv., Inc., 235 F. Supp. 2d 522 (W.D. La. 2002) (intrastate transportation case in which MCS-90 endorsement applied because totality of circumstances revealed the motor carrier signed an exclusive lease, which referenced ICC regulations, with a trucker for interstate transportation and provided trucker with carrier’s ICC logo); M.J. Leizerman, Litigating Truck Accident Cases (2003).

Absence of an MCS-90’s application notwithstanding, some states such as California and Pennsylvania have imposed on commercial motor carrier’s financial requirements (comparable to its federal counterpart) when intrastate transportation is involved. But see Connecticut Indem. Co. v. QBC Trucking Inc., 2005 U.S. Dist. LEXIS 7939, at *17 (S.D.N.Y. May 5, 2005) (“Any transportation occurring within the commercial zone of New York City is beyond the DOT’s jurisdiction and therefore exempt from DOT regulations”) (citing 49 U.S.C. § 13506(d)(1)); Broadway
Delivery Corp. v. United Parcel Serv. of Am., 651 F. 2d 122, 124 (2d Cir. 1981) (because the New York City commercial zone encompasses New York City and parts of Northern New Jersey, it is exempt from regulation by the DOT).

Triggering of Payment and Subrogation Rights

A payment by the insurer under the MCS-90 endorsement should only occur if and when a final judgment is rendered against the insured. See 49 C.F.R. § 387.15 (“the insurer agrees to pay, within 20 Am., Delivery Corp. v. United Parcel Serv. of against the insured. if and when a final judgment is rendered MCS-90 endorsement should only occur from regulation by the DOT). financial responsibility requirements of or use of motor vehicles subject to the negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980”) (emphasis added). Note, too, that “[s]ettlements of actual negligence claims formalized into a consent judgment qualify as a final judgment.” Herrod v. Wilshire Ins. Co., 737 F. Supp. 2d 1312, 1319 (D. Utah 2010); see also Hawthorne v. Lincoln Gen. Ins. Co., 08-12325, 2009 WL 304742, at *6 (E.D. Mich. Feb 9, 2009).

Upon receipt of a final judgment, a claimant can invoke the MCS-90 endorsement and request payment from the insurer. After paying the judgment, the MCS-90 endorsement grants the payor of the judgment the right to demand payment or reimbursement from the insured. Underwriters at Lloyd’s London, 435 F. 3d at 442 n.4. In other words, the motor carrier may be required to reimburse the MCS-90 insurer for any payout the insurer would not otherwise have been obligated to make under the policy of insurance (because, for example, the tractor-trailer was not listed a scheduled vehicle). Stated succinctly, the endorsement is not meant to be a “windfall” for the motor carrier. Bobac Trucking Inc., 107 F. 3d at 736.

Again, under the MCS-90 framework, an MCS-90 insurer acts as a surety for the motor carrier. The MCS-90 endorsement obligates the insurer to be answerable for a public liability judgment against the motor carrier. The surety obligation, therefore, does not alter the underlying insurance policy and does not preclude the insurer from seeking reimbursement for its surety-based payments on behalf of the motor carrier. Underwriters at Lloyd’s London, 435 F. 3d at 442 n.4 (“The peculiar nature of the MCS-90 endorsement grants the judgement creditor the right to demand payment directly from the insurer, and simultaneously grants the insurer the right to demand reimbursement from the insured.”).

Because a motor carrier may be required to reimburse the MCS-90 insurer for any payout the insurer would not otherwise have been obligated to make, the endorsement thereby presents neither a windfall for the motor carrier, nor does it alter the motor carrier’s coverage under its other insurance policies. See Bobac Trucking Inc., 107 F. 3d at 736.

Insurer Failure to Pay or Insolvency

Courts have rendered decisions on such issues as the impact of an insurer’s failure to pay or in the event of insolvency in cases involving an MCS-90 endorsement. In the event of insurer insolvency, courts have held that an umbrella policy is required to step up and satisfy a judgment. See, e.g., Kline v. Gulf Ins. Co., 2005 U.S. Dist. LEXIS 30809, at *14 (W.D. Mich. Sept. 12, 2005) (“The Court is mindful of public policy goals behind a MCS-90 endorsement, but nevertheless is not of the opinion that the endorsement operates to force an umbrella insurer to cover gaps made by the insolvency of underlying carriers”) (citing Reo Co. D.S. Inc. v. Gov’t Employees Ins. Co., 984 F. 2d 154, 155 (6th Cir. 1992)). See also Carolina Casualty Ins. Co. v. Yeates, 584 F. 3d 868, 886 (10th Cir. 2009) (“MCS-90 financial responsibility obligation may be implicated when a motor carrier’s insurer, which is obligated to pay a judgment in favor of an injured member of the public, is either insolvent or refuses to pay under its policy. In that instance, the MCS-90 insurer may be called on to satisfy the federally-prescribed minimum amount. However, as we have stated above, the MCS-90 insurer would then be free to seek reimbursement from both the motor carrier as well as the defaulting liability insurer.”).

Duty to Defend

If a vehicle is not listed in the policy’s schedule of vehicles and no coverage is therefore afforded under that policy to which a MCS-90 endorsement is attached, a duty to defend under the policy does not arise because an MCS-90 endorsement only creates a duty to indemnify in the event of a final judgment. It does not create a duty to defend. Accord OOIDA Risk Retention Group, Inc. v. Williams, 579 F. 3d 469, 478 n.6 (5th Cir. 2009) (MCS-90 endorsement relates solely to duty to indemnify, not duty to defend); Canal Ins. Co. v. P.S Transp. Inc., 2010 WL 817290, at *5 (N.D. Miss. Mar. 4, 2010) (“[I]f Canal has a duty to defend PST in the state court action--as Coleman urges--it must stem from the PST policy itself, rather than the MCS-90 endorsement.”); Harco Nat’l Ins. Co. v. Bobac Trucking, 107 F. 3d 733, 735-36 (9th Cir. 1997) (policy did not provide coverage because involved vehicle was not listed on policy); Canal Ins. Co. v. First General Ins. Co., 889 F. 2d 604, 610 (5th Cir. 1989) (where accident did not involve a listed vehicle, no duty to defend); National Am. Ins. Co. v. Central States Carriers, Inc., 785 F. Supp. 793, 797 (N.D. Ind. 1992); Carolina Casualty Ins. Co. v. Insurance Co. of N. Am., 595 F. 2d 128, 144 (3d Cir. 1979) (nothing in endorsement alters otherwise existing duties to defend).

Conclusion

Federal regulatory laws pertaining to the MCS-90 endorsement and its coverage of a “final judgment” were enacted to address widespread concerns over financial responsibility for injuries sustained in accidents involving motor carriers which operate vehicles transporting property in interstate commerce. Despite the absence of uniform interpretation and application of MCS-90 law, the judiciary does consistently recognize the public’s interest in ensuring that authorized interstate carriers will satisfy a judgment in the event of injuries sustained due to negligent acts. John Deere Ins. Co., 229 F. 3d at 867; Harco Nat’l Ins. Co., 107 F. 3d at 736 (citing Canal Ins. Co., 889 F. 2d at 611) (“purpose of the MCS-90 is to protect the public, not create a windfall for the insured”). This is the crux of MCS-90 law. Recognition of this simple principle will provide the foundation upon which the transportation litigator may acquire an understanding of the law and competently apply it in the appropriate cases.
NOTE: The following decisions are provided to our readers as quickly as possible and some may not have been released for publication in the permanent law reports. These summaries were prepared by William E. Whitfield, III, Esq.

DAMAGES

Prejudicial Arguments of Counsel


Loyacono was struck by Watacha Shelby in an automobile accident in July 2005. Shelby was uninsured. Loyacono filed suit against Shelby and her UM carrier, Travelers, seeking damages for some injury occurred as a consequence of the accident, but reserved the right to contest the proximate cause and damages due to the accident. The plaintiff’s expert argued at trial that the injuries of Loyacono were proximately related. The experts of the defendant testified that the back/neck injury alleged by the plaintiff was due to pre-existing orthopedic conditions and that, at most, Loyacono sustained minimal personal injury that would have resolved within weeks. The jury held that the plaintiff had sustained no damages as a result of the accident. The plaintiff filed post-trial motions arguing that the verdict of the jury was against the overwhelming weight of the evidence and requested a new trial on damages. The trial court denied all post-trial motions. The plaintiff appealed and the matter was assigned to the Court of Appeals. The Court of Appeals reversed the trial court finding that the evidence at trial confirmed that some injury occurred as a consequence of the accident, and that the trial court should have ordered a new trial on the issue of damages. The defendant appealed by certiorari.

On certiorari appeal, the Mississippi Supreme Court reviewed the standard applicable to considerations of motions for directed verdict and JNOV’s noting their “de novo” standard of review. “If a verdict for the nonmoving party can possibly be supported by the evidence – when viewed in the light most favorable to that party – then neither a directed verdict nor a JNOV is appropriate. [Thompson v. Dung Thi Hoang Nguyen, 86 So. 3d 232, 236 (Miss. 2012)]. A motion for a new trial, on the other hand, may be granted when the jury returns a verdict against the overwhelming weight of the evidence. [Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass’n, 560 So. 2d 129, 132 (Miss. 1989)]. A jury award in particular ‘will not be ‘set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous’.” [Downs v. Ackerman, 115 So. 3d 785, 790 (Miss. 2013)].

The Court then compared their decision in Herring v. Poirrier, 797 So. 2d 797, 808-09 (Miss. 2000), and observed that in this case, they now evaluate the decision of the jury to reject uncontradicted testimony that confirmed some injury. Yet, the Court stated that it is the plaintiffs’ burden of proof to establish damages and that the defendant need not prove anything. Additionally, the jury is free to accept or even reject the opinion testimony of experts. “[Expert opinions are] not obligatory or binding on triers of fact but [are] advisory in nature. The jury may credit them or not as they appear entitled, weighing and judging the expert’s opinion in the context of all of the evidence in the case and the jury’s own general knowledge of affairs.” Downs v. Ackerman, 115 So. 3d 785, 790 (Miss. 2013). The Court reviewed the testimony of the plaintiff’s expert acknowledging that he knew nothing about the accident and the photographs of the accident which reflected very minimal damages. The Court of Appeals erred by finding that the verdict of the jury was against the overwhelming weight of the evidence. The Court next reviewed the arguments of the defendant that featured the income of the plaintiff’s husband, a successful plaintiff’s attorney, and suggesting that her employment with him made her familiar with the practice of amassing unnecessary medical bills in order to maximize litigation recovery.

The decision of the trial court to admit or exclude evidence is subject to an abuse of discretion standard and will not serve as a reversal of his decision unless it affects a “substantial right” of a party. “Relevant evidence is that which has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” [MRE 401]. Mississippi Rule of Evidence 402 precludes the admission of irrelevant evidence”. MRE 402. MRE 403 provides for an evidentiary balancing test that the trial court should have applied in allowing this testimony. Further, the “collateral source” rules serves to exclude testimony that will impermissibly deduct from the amount of damages caused by the defendant simply because the plaintiff has been otherwise compensated for those injuries. Eaton v. Gilliland, 537 So. 2d 405, 407 (Miss. 1989). The trial judge impermissibly allowed this testimony because it was more prejudicial than probative and should have been excluded. The Court of Appeals was in error for reversing the decision of the trial court on the grounds that it did, but this matter should be reversed and remanded due to the testimony that was allowed that commented upon the wealth and income of the plaintiff’s husband. Reversed and remanded.

Comment: Justice Kitchens dissented but agreed with the majority that the trial court improperly allowed the testimony of the wealth and resources of the plaintiff’s husband. He contended that the jury was simply wrong in not allowing some damages to the plaintiff since the uncontradicted testimony at trial was that Loyacono sustained some personal injury and should have been compensated to
some amount. The dissent though omits the references to the majority’s opinion that featured the uninformed context of the plaintiff’s expert or the uncontradicted minimal damages to the plaintiff’s vehicle amount to no more than “paint scrapes.”

The majority in the context of this case gave great value to the finding of the jury, even to ignoring the testimony of all experts, clearly here, the Court was buttressed by the minimal nature of the damages. The glaring difference between the majority and the dissent is that when an expert testifies to “some damages,” Justice Kitchens considers this “uncontradicted” proof and a jury is compelled to find some jury, while the majority adheres to orthodox legal precedent that the jury may even reject that. The portion of the decision that all justices seem to agree on is that the trial court should not have allowed comments by defense counsel that somehow evolved into arguments at trial that the jury should not find any damages because of the affluence of the plaintiff’s husband. Given the comments featured by Justice Dickinson in the main opinion, it is somewhat hard to find fault with the Court’s conclusion remanding the matter back to the trial court.

Premises Liability / Rule 11 Sanctions


Blackmon, Dexter Booth and Jharoski Davenport left Hamp’s Place Night Club (operated by Hampton), and proceeded to a parking lot next door where they parked their car. Their car was parked on property owned by Malaco, Inc., not Hampton. While in the Malaco parking lot, they were assaulted and shot. Davenport was killed, while Blackmon and Booth were injured. When they arrived at the club earlier, they were “motioned” to the Malaco parking lot where they were charged $5. Blackmon and Dexter Booth sued Malaco, Inc., N.J. Pockets, Inc. Callop Hampton (d/b/a Hamp’s Place Night Club) for a premises liability claim. When suit was filed, Hampton demanded that the plaintiffs dismiss Hampton because the shooting occurred on Malaco’s property, not on Hampton’s. When he refused, Hampton filed a motion for summary judgment. The motion was denied by the trial judge, finding an issue of fact. Hampton pursued an interlocutory appeal which was denied by the Supreme Court. Malaco, Inc. and N.J. Pockets settled with the plaintiffs prior to trial. The matter went to trial against Hampton resulting in a jury verdict in his favor. Hampton filed a post-trial motion, seeking sanctions and costs against Blackmon and Booth and their lawyer, Joe Tatum, for filing a frivolous lawsuit against him under Rule 11 and the Litigation Accountability Act (LAA). The trial court denied the motion. Hampton appealed the denial of his request for sanctions and fees.

On appeal, the Mississippi Supreme Court noted that their review of a grant/denial of sanctions is based upon an “abuse of discretion.” “In the absence of a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors, the judgment of the court’s imposition of sanctions will be affirmed.” In re Spencer, 985 So. 2d 330, 337 (Miss. 2008). The Court observed that the standard for sanctions or costs under the LAA is whether the plaintiff has “no hope of success.” Leaf River Forest Prods. v. Deakle, 661 So. 2d 188, 196-97 (Miss. 1995). When presented with the issue, a trial court must determine whether the plaintiff had “some hope of success” in evaluating the imposition of sanctions or costs for filing a frivolous lawsuit. Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove, 965 So. 2d 1041, 1044 (Miss. 2007). Hampton argued that it was indisputable that the shooting occurred on Malaco’s property and not his, and therefore, Blackmon had “no hope of success” in pursuing a premises liability claim against Hampton. Blackmon argued that other states have permitted recovery against a premises owner for injuries similar to this and that the event didn’t necessarily need to occur on the owners’ property for a cause of action to be pursued. Further, there was testimony by Booth and Blackmon that suggested that an employee of Hamp’s flagged them to the Malaco parking and that Hampton nonetheless enjoyed the benefits of their patronage. The Court reviewed authority cited by Hampton [Gatewood v. Sampson, 812 So. 2d 212 (Miss. 2002), and Alqasim v. Capitol City Hotel Investors, 989 So. 2d 488 (Miss. 2008)], and found that the plaintiffs’ claim was not so conclusive such that the plaintiff had “no hope of success.” “Although this Court has generally held owners could be held responsible for attacks that occur on their premises, neither Gatewood nor Alqasim expressly held a premises - liability claim could never be maintained against an individual who does not own, operate, or possess the premises where the assault takes place.” The Court concluded by noting that the parties did not designate the record that reflected what type of proof that was put on by the plaintiffs, and therefore it was not possible to evaluate the quality of the proof that Hampton complains of. As the appellant, Hampton had the responsibility to designate that portion of the record that would support his position. The trial court did not abuse his discretion in denying the motion for sanctions. Affirmed.

Comment: It is a little curious why this claim was pursued, even at the trial court level. The opinion notes that the parties agreed that the plaintiffs offered to dismiss Hampton but that Hampton refused, for some reason, because he “wanted to clear his name.” Not real sure that this is a logical reason for “refusing” a dismissal. Nevertheless, the record is absent of any exchanges that would illustrate the justification for this refusal. Additionally, the Court more than once queried as to why the record showing the actual testimony was not transcribed and submitted to the Court, which perhaps would enable them to determine whether there was any proof put on against Hampton. Since he was the only defendant at trial, it would be strange indeed for the testimony not to be pointed at Hampton and the plaintiffs’ arguments that he encouraged patrons to park elsewhere. The lack of a trial record on appeal coupled
with the inability of Hampton to show case law that would clearly make this a case of “no hope of success,” suggests that there was a personal dynamic at play. Hope it was worth it!

**Premises Liability / Service of Process**


On June 14, 2009, Carl Brady slipped and fell at the Extreme Skate Zone (owned by Lewis Entertainment Inc.). On the day before the limitations period expired, Brady filed her complaint against “Oak Grove Skating, Inc.,” “Extreme Skate Zone” and Does A-Z. On October 12, 2012, the plaintiffs attempted to serve Oak Grove. The process server, an individual unknown to the parking lot where Melva Maples was the registered agent for Oak Grove, but that Oak Grove had not owned the skating rink in many years, but that her son owned the skating rink. Thereafter, the process server attempted to serve the widow of Maples on October 13, 18 and 25, 2012, but she would not accept the process. There is no record of any attempt to serve process on Lewis or Extreme Skate Zone. After 167 days of no service of process since the filing of the complaint, the clerk moved to dismiss the case for lack of prosecution. Twenty-three days later, Brady filed a motion to extend time to serve process. No order was entered on the motion. On January 8, 2013, Brady’s process server delivered the process for both Oak Grove and Extreme on Stacey Graves, the manager at Extreme Skate Zone. On February 7, 2013, Lewis, the owner of Extreme Skate Zone, filed a motion to dismiss the complaint. The trial court denied this motion finding that Brady’s multiple attempts to serve Oak Grove constituted “good cause” for her failure to serve process on Lewis or Extreme. On August 6, 2013, Lewis filed a motion for interlocutory appeal. On appeal, the Mississippi Supreme Court noted that a dismissal of a claim for lack of process is a “discretionary” ruling of the trial judge and reviewed based upon an “abuse of discretion.” The assignment of “good cause” to a court’s ruling to extend time to serve process is a matter of law and reviewed “de novo” by the Supreme Court. Inasmuch as Lewis Entertainment could only be served upon it under Rule 4(d)(4), the rule requires that service can only be made on a manager, corporate officer or registered agent for the company. But, service must still be made within the time period provided by Rule 4(h) - within 120 days of the filing of the complaint, unless “good cause” exists for this failure. Lewis was not served within 120 days of the filing of the complaint. Unless she can show “good cause” for her failure to serve Lewis/ Extreme, then the suit against it should be dismissed. “To establish good cause, the plaintiff has the burden to show ‘at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules does not suffice’.” Watters v. Stripling, 675 So. 2d 1242, 1243-1244 (Miss.1996). Good cause is determined by considering: “the conduct of a third person, typically the process server, the defendant has evaded service of the process or engaged in misleading conduct, the plaintiff acted diligently in trying to effect service or there are understandable mitigating circumstances, or the plaintiff is proceeding pro se or in forma pauperis.” Holmes v. Coast Transit Auth., 815 So. 2d 1183, 1186 (Miss. 2002). Brady argues that her attempts to serve Oak Grove justify her inability, and thus “good cause,” to serve Lewis/Extreme. Brady never attempted to properly name or serve Lewis when she knew that Oak Grove did not own the skating rink, failed to timely secure additional time and even after filing a motion for additional time, and failed to secure a ruling by the trial court allowing service on Lewis. Since the plaintiff never even attempted to name or serve Lewis under the Rules, “good cause” did not exist for allowing service on them, as the owner of the skating rink. Since the statute of limitations had run on her claim and the owner of the rink was not properly named or served, the claim was dismissed, with prejudice. Reversed and rendered.

**Comment:** The actions of the plaintiff in naming the correct defendant and attempting service on it were quite simply a fiasco. It is curious with the multiple cases illustrating this outcome, that any lawyer would allow this to happen. While the “subtext” can never be fully known, there was definitely a lack of diligence on the part of the plaintiff’s counsel in prosecuting this matter against the correct defendant by this opinion. The outcome of this matter perhaps would have been different had there been some record of an effort to substitute a “Doe” defendant and then secure additional time to serve process on the substituted defendant. There is no doubt that this decision is correct.

**Setting Aside of Default**

BB Buggies, Inc., et al. v. Vincent Leon, et al. _____So. 3d _____, No. 2012-IA-01876-SCT (Miss. July 31, 2014). Panel: En banc, Coleman for the Court; Pierce concurs in result only, joined by Randolph and Waller; appeal from Circuit Court of Adams County, Judge Lillie Sanders; reversed and rendered.

In June 2011, Jean’ah Leon, then 14 years of age, was injured while operating a Bad Boy Buggy. The buggy was primarily used as an off road vehicle for recreation and hunting. In June 2012, Jean’ah’s parents, Vincent and Mandi Leon, filed suit in Louisiana against the owner of the buggy, as well as his insuror, BB Buggies and Textron and others. Several days later, all except the owner and his insuror were dismissed. On June 11, 2012, suit was filed in Adams County, Mississippi, against BB Buggies, Textron and the other parties sued in the Louisiana litigation. BB Buggies and Textron were served by service on their registered agent in Mississippi on July 16, 2012. On July 25, 2012, the Leon’s amended their complaint to allege gross

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negligence and punitive damages. The amended complaint was sent by certified mail to the headquarters of BB Buggies and Textron. Counsel for BB Buggies/Textron in Louisiana was sent an e-mail copy of the summons and amended complaint. On August 23, 2012, the plaintiffs sought an entry of default and default judgment based upon the amended complaint against Textron and BB Buggies. Default Judgment was entered, but the issue of damages was reserved until a liquidated damages hearing could be conducted. On August 27, Textron counsel learned of the default judgment and contacted the attorney for the plaintiffs. On August 31, a motion to set aside the default judgment was filed and a few days later, a motion was filed to vacate the default judgment. The trial court denied the motions to set aside the default judgments against BB Buggies and Textron and they filed this interlocutory appeal.

On interlocutory appeal, the Mississippi Supreme Court reviewed the service of process issue as a jurisdictional issue reviewed “de novo.” If the trial court had jurisdiction, then the issue of setting aside the default will be reviewed for an abuse of discretion. BB Buggies and Textron argued that the trial court erred by not setting aside the default since: (a) they were not properly served with the amended complaint, (b) Textron and BB were not given proper notice of the entry of the default, and (c) the Leon’s failed to state a claim in their amended complaint. Further, Textron and BB argued that the trial court failed to properly apply the criteria in considering the setting aside of a default judgment since they had a colorable defense to the claim and the plaintiffs would not be prejudiced. As to the service issue, the Court restated the provisions of Rule 4 and 5(a) and noted that the latter only requires additional service on a “party” in default if new claims are added. Since both BB and Textron were not in “default” when they were “provided” with the amended complaint, new service was not required and providing a copy to them at their respective headquarters was sufficient. Therefore, service of process was not required as it related to the amended complaint. The trial court had jurisdiction over BB and Textron and the default judgment was not “void” as they assert. BB/Textron next argued that they were entitled to notice of the entry of default since they had “appeared” in the matter for purposes of Rule 55(b), citing an e-mail that was sent to plaintiffs’ counsel by the Louisiana lawyer representing BB and Textron. The e-mail indicated that the Louisiana lawyer had been hired to represent these defendants and asked for a copy of the amended complaint. This, BB and Textron argued, was an “appearance” under Rule 55(b) and demonstrates an intent to defend. “For Rule 55(b) purposes, the appearance requirements are ‘relaxed considerably,’ and a formal filing in court or a court appearance is not required for one to be entitled to notice under Rule 55(b).” American States Ins. Co. v. Rogillio, 10 So. 3d 463, 475 (¶30) (Miss. 2009). The Court then reviewed several cases where correspondence and even a telephone call was sufficient to constitute an “appearance” and a “clear intent to defend and held here that “[t]he one phone call and one email from the Textron Parties’ Louisiana attorney, who did not represent them in the Mississippi case, did not indicate a clear intent to defend and did not constitute an appearance for Rule 55(b) purposes." BB and Textron, simply because of one e-mail, did not indicate a clear intent to defend. These defendants were, therefore, not entitled to “notice” of the default judgment. BB and Textron then argued that the claim against them is void because it failed to state a claim upon which relief can be granted, citing to the fact that they did not manufacture the “buggy,” therefore, their liability can only be based upon “successor liability.” The Leon’s argued that they alleged in their complaint enough to assert multiple theories of liability against BB and Textron, including successor liability. “We have said that Rule 8 does not require any magic words, ‘it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief which is sought.’” Estate of Stevens v. Wetzel, 762 So. 2d 293, 295 (¶ 11) (Miss. 2000). The Court held that the amended complaint stated sufficient facts to place BB and Textron on notice of a cause of action and it satisfied Rule 8. The Court concluded that as to the arguments of BB and Textron, the circuit court had jurisdiction over them. The Court then reviewed the request of BB/Textron to set aside the default based upon the “three prong” factors set out in Rogillio, 10 So. 3d at 468 (¶ 10) (“i.e. whether the defendant has good cause for default, (2) whether the defendant in fact has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside.”). The Court noted that “default judgments” are not favored under Mississippi law and that the trial “should not be grudging in . . . vacating such judgment where showings within the rules have arguably been made.” McCain v. Dauzat, 791 So. 2d 839, 843 (¶ 10) (Miss. 2001); Guar. Nat’l Ins. Co. v. Pittman, 501 So. 2d 377, 387-88 (Miss. 1987). Textron and BB admitted that they did not have “good cause” under Rule 55(b) for their failure to answer the complaint within 30 days and therefore this element would be held against them. But, the remaining two elements, colorable defense and lack of prejudice to the plaintiff, were valid and the trial court “abused its discretion in failing to set aside the default. “We have held unequivocally that ‘the second factor, the presence of a colorable defense, outweighs the other two, and we have encouraged trial courts to vacate a default judgment where ‘the defendant has shown that he has a meritorious defense.’” Allstate Ins. Co. v. Green, 794 So. 2d 170, 174 (¶ 9) (Miss. 2001). The Court reviewed the relatively short period of time between the original filing of the complaint and the motion of Textron/BB to set aside the default and “[t]he mere fact [that] the plaintiff may have to try and prove his case does not stay the judicial hand. That is not the sort of prejudice the rule contemplates.” Rush v. North American Van Lines, 608 So. 2d 1205, 1211 (Miss. 1992). Since Textron and BB acted promptly in joining issue that the plaintiff was not prejudiced in setting aside the default. Even so, and notwithstanding that the Court was finding error with the trial court’s failure to set aside the default, it must be recognized that “the duty to answer must be taken seriously.”

Comment: Justice Pierce (joined by Waller and Randolph) wrote separately, commenting that while he agreed with the Court that the default judgment should be set aside, he observed that the plaintiffs filed an amended complaint which added claims to the original complaint and that since BB and Textron had not “appeared,” they should have been served. This view represents a more compliant view of the rule that accepts service only to the extent that they otherwise do not add parties or claims in situations where the other parties are not in default. The majority apparently adopted a more “non-literal” view of Rule 5(a) since they were going to reverse for an “abuse of discretion” anyway. The specially concurring opinion seems to adhere to the Rules more closely.

Castle Doctrine

Mark Matthews v. City of Madison, ___ So. 3d ____, No. 2012-CT-01528-SCT (Miss. July 31, 2014). Panel: En banc, Waller for the Court; King specially concurs, joined by Dickinson, Randolph, Lamar, Kitchens and Chandler; Coleman concurs in result only; appeal from Madison County Circuit Court, Judge John Emfinger; affirmed.

Matthews and Brittany Sullivan had a daughter together, Marcie Kate, in 2008. A judgment of filiation was entered by the Madison County Chancery Court, providing that Matthews would have custody of Marcie Kate on Wednesday evenings until the following morning at 7:30 am. On Thursday morning, May 26, 2011, Matthews arrived to drop Marie Kate off at Brittany’s residence, where Brittany’s mother, Pam Sullivan, also lived. Matthews asked Pam where Brittany was and was told by Pam that she spent the night at her grandparent’s house because she did not want to see Matthews. Pam went to the rear car door and began to unstrap Marcie Kate from her car seat, when Matthews pinned her in the door. Pam ultimately freed herself and took Marcie Kate into her house. Due to a prior trespass conviction, Matthews was not allowed to go onto Brittany’s property so he did not follow. Pam later brought charges against Matthews for simple assault and disorderly conduct. Matthews was convicted of both in the Municipal Court of Madison County. He appealed to the County Court, where he was convicted there as well. Matthews asserted the “Castle Doctrine” as a defense to the simple assault charges in Municipal and County Court, arguing that he was attempting to prevent his child from being “kidnapped.” Matthews appealed to the Circuit Court. The conviction was affirmed with the court, finding that the “Castle Doctrine” did not apply. Matthews appealed to the Supreme Court, who assigned it to the Court of Appeals. The Court of Appeals held that the Castle Doctrine did not apply because Matthews was not in imminent fear of bodily harm. Matthews appeals to the Mississippi Supreme Court via certiorari

On certiorari appeal, the Mississippi Supreme Court held that the trial court, sitting without a jury, will be upheld unless manifestly wrong and based upon substantial evidence. Matthews argued on appeal that the Castle Doctrine applied and that, when applied, he is entitled to the presumption that he was in fear of bodily harm and was therefore entitled to use resistive force. The City argued that the doctrine would not apply because its applicability is limited to cases of “justifiable homicide.” The Court reviewed the history of the Castle Doctrine noting that it was codified by the Legislature in 2006 [§ 97-3-15(3)-(4)] and that the Court has applied it only in cases of deadly force. White v. State, 127 So. 3d 170 (Miss. 2013); Sanders v. State, 77 So. 3d 484 (Miss. 2012); May v. State, 49 So. 3d 1124 (Miss. 2010); Newell v. State, 49 So. 3d 66 (Miss. 2010). The Court observed that § 97-3-15(3) applies to the use of any defensive force if it is used as proscribed by the provision of the statute and if applicable, authorizes the presumption of a finding of imminent fear of bodily harm. Matthews states that the statute’s presumption justifying defensive force has no requirement for proof that he be in “reasonable fear” before using defensive force.” See, e.g., Newell v. State, 49 So. 3d 66, 68-69 (Miss. 2013). Since Matthews argued at trial that he was fearful that his daughter was being “kidnapped” by her grandmother, that he was justified in using force against her and that the Castle Doctrine authorizes the presumption that he was in immediate fear dispensing with obligation to establish it. The Court of Appeals held that the statute did not apply because Matthews was not in imminent fear of bodily harm to him or Marcie Kate. The Supreme Court though noted that “[w]e find the application of the presumption does not depend on the existence of reasonable fear in the defendant; rather, the presumption applies if one of the circumstances in subsection (3) is met.” See, Newell v. State, 49 So. 3d 66 (Miss. 2010). The Court observed that the proof at trial was that Matthews had dropped Marcie Kate off on many occasions before and that not only had Brittany given permission for Pam to retrieve Marcie Kate, she had done it many times before. The trial court, therefore, did not abuse its discretion in finding Matthews guilty of simple assault. While Matthews was correct that statute did not require that he be in “imminent fear” for the presumption to apply, the prosecution rebutted that presumption, met their burden that Matthews was not in imminent fear of bodily harm and therefore he was not entitled to the presumption. Affirmed.

Comment: Justice King wrote separately to clarify that he believed that the statute
requires the use of “defensive force” before the Castle Doctrine applies, that the statute never applied and that Matthews had the initial burden to demonstrate that he was in fear of imminent “bodily harm” before applying the presumption of the statute. Justice Coleman argued that the statute, because of its context, only applies when the killing of a human being occurs. The Castle Doctrine may apply to the civil practitioner in a limited context. See, § 97-3-15(5). Inasmuch as the Court has determined that the statute would apply in non-death related claims, be sensitive to the fact that this statute may apply in a limited context where death might not be the outcome. Since Matthews was nonetheless convicted of the crimes charged, this decision probably needlessly extended the application of the Castle Doctrine to non-death claims as argued by Justice Coleman. As such, the majority opinion does seem to blur the concept of “pari materia” in that it should be read the context that it appears. In the final analysis, the Court held that a presumption of “imminent fear” was presumed if he was fearful of bodily injury which does seem to do away with the need to prove the conduct that should be “presumed.”

Default Judgment / Specific Performance

Sam Woodruff v. Rita Thames, et al. ____ So. 3d _____. No. 2013-CA-00815-SCT (Miss. July 31, 2014). Panel: Randolph, King & Coleman; King for the Court; no dissent; appeal from Chancery Court of Rankin County, Judge John Grant; reversed and remanded.

Sam Woodruff, at the age of 80, ostensibly sold property to Larry Collins and Rita Thames, a daughter of his first cousin for $9,750.00. Woodruff claims that he intended to sell and discussed with Collins and Thames the sale of a one acre piece of property, while Collins and Thames contend that they entered into a contract of sale to purchase a 6.53 acre tract of property. Woodruff claims that he signed the agreement to sell property contemplating that they had agreed on the sale of the 1 ac. tract, while Thames contends that the land description was attached to the contract and identified the 6.53 ac property. At the signing of the contract in November 2010, Woodruff claims that Thames and Collins began pointing to the wrong acreage, and he wrote void in the earnest money check and cancelled the “sale.” Thames contends that Woodruff wrote void on the check because he obtained a “better offer.” In December 2010, Thames and Collins filed an action for specific performance and served discovery and requests for admissions. Thames and Collins attached the agreement to the complaint, with an exhibit, but the contract of sale contained multiple blanks describing the property and references no exhibits, contains multiple hand writings, fails to reflect a closing date or who is to pay for certain described costs, reflects multiple unacknowledged changes from the original text, and the original does not appear to have ever been presented to the trial court nor was it a part of the record on appeal. The complaint, discovery and requests for admission were served on Woodruff in January 2011. In late February 2011, over 45 days after service, Thames and Collins, took an entry of default against Woodruff, and in March 2011, the trial court entered default judgment and ordered “specific performance” on the “sale.” Woodruff claims that he took the complaint to his attorney, William Smith, also in his 80’s, after he was served, but dismissed him when he learned of the entry of default. Woodruff secured new counsel in May 2011 who wrote Smith to find out why he had not protected Woodruff’s interest. In June 2011, Woodruff’s new counsel filed a motion to set aside the default judgment, a Rule 60 motion and an answer to the complaint. The matter was heard and the trial court denied the motion to set aside the default judgment, finding that there was no reasonable cause why Woodruff failed to timely answer the complaint and that his arguments concerning a “colorable defense” were simply not compelling. Woodruff appeals.

On appeal, the Mississippi Supreme Court first noted their standard of review in setting aside a default judgment under an “abuse of discretion” standard. Default Judgments may also be set aside under Rule 60 for the reasons contained in the rule. “This Court has noted that ‘[a] scertaining the meaning of the provisions of Rule 55(c) and Rule 60(b)(5) and (6) with any degree of precision simply may not be done for the language is hopelessly open textured.” Am. States Ins. Co. v. Rogillio, 10 So. 3d 463, 467 (Miss. 2009). The Court then reviewed the “three part balancing test” that required the trial court to determine “1) whether the defendant has good cause for the default; 2) whether the defendant has a colorable defense to the merits of the claim against him; and 3) the prejudice, if any, that the plaintiff may suffer if the court sets aside the default judgment. Id. at 468. As to the first element, the Court noted that there was no allegation of any “deficiency” in the mental capacity of either Woodruff or Smith, and therefore, the first element would not be considered in Woodruff’s favor. The Court then reviewed the “colorable defense” element and held that it need not be “proven” to “trial standards,” but must appear to be “true, valid or right.” Even a defense of “questionable” strength, can be “colorable” and may outweigh the other elements in the balancing test. The Court then reviewed the requirements of a “contract” and observed that “specific performance” must be determined to be an appropriate remedy. The Court then held that the contract was too ambiguous and insufficient to justify a finding of a valid contract and one certainly that would not be capable of “specific performance.” The trial court was incorrect in finding that the “colorable defense” suggested by Woodruff was not compelling. As to the final element of “prejudice,” the Court noted that the trial court did not address this issue. But, since the property was “not going anywhere,” the element of “prejudice” was in Woodruff’s favor. “Default judgments are not favored in the law, and reasonable doubt should be resolved in favor of opening the judgment and allowing the case to proceed on the merits. A balancing of the equities in this case clearly mandates that the default judgment should be set aside.” The trial
court abused its discretion by not setting aside the “default judgment.” Reversed and remanded.

Comment: Justice King’s opinion articulated competently the elements necessary to set aside a default, the necessity of a valid contract, the concept of “ambiguity” in a contract and the potential effect that “silence” would have on the construction of the agreement. The Court effect that “silence” would have on the “ambiguity” in a contract and the potential

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Mississippi Motor Vehicle Warranty Enforcement Act

Terri Broome, et al. v. General Motors, So. 3d , No. 2013-CA-01580-SCT (Miss. August 14, 2014). Panel: Waller, Chandler & King; King for the Court; appeal from Circuit Court of Jackson County, Judge Robert Krebs; reversed and remanded.

In April 2010, the Broome’s purchased a new Chevy “Equinox” that came with a 3 year/36,000 mile warranty. The Broome’s had a variety of repair issues with the car that they had attempted to handle through the dealership. In 2011, the Broome’s sued General Motors [GM] in County Court under the Magnuson Moss Warranty Act for breach of express and implied warranties. GM moved to dismiss the complaint for failure to comply with the one year statute of limitations, arguing that since Magnuson Moss did not have a specific limitations period, the statute of limitations would be that most similar under state law, the Mississippi Motor Vehicle Warranty Enforcement Act (MMVA). The MMVA incorporates a period of limitations of one year or eighteen months from the date of delivery. The Broome’s filed their complaint greater than eighteen months. The County Court Judge held that the most analogous law under Mississippi is the MMVA and therefore, he dismissed their complaint. The Broome’s appealed to Circuit Court. The Circuit Court Judge affirmed. The Broome’s appealed.

On appeal to the Mississippi Supreme Court, the issue was phrased as to which limitations period would be applicable to a Magnuson Moss claim under Mississippi law, either that provided for by the MMVA, or alternatively, the provisions of the UCC at § 75-2-101 which provide for a six year limitations period. The Court noted that “[t]he Magnuson-Moss Act does not contain a specific statute of limitations. When a federal law creates a cause of action but does not include a statute of limitations, the statute of limitations contained in the most analogous state law applies.” See Del Costello v. Int’l Bhd. of Teamsters, 462 U.S. 151, 103 S. Ct. 2281 (1983). The case of Wheeler v. Chrysler Motors Corporation, 1996 WL 408059 (N.D. Miss. 1996) was cited by GM as controlling on the issue. The Supreme Court observed that the Wheeler did indeed conclude that the MMVA was the most analogous to a Magnuson Moss claim in Mississippi, but observed that the trial judge in Wheeler held as he did by misinterpreting and misapplying a Pennsylvania case which actually held the opposite. As such, Wheeler would not be applied inasmuch as it did not analyze Mississippi law appropriately. The Court then observed that the interpretation of a statute is a question of law for the Court to consider “de novo.” The provisions of the MMVA were reviewed with the Court noting that the statute is limited to express warranties and the Act specifically provides that the MMVA does not limit the other remedies available to the consumer under Mississippi law. The UCC is broader in scope than the MMVA and applies to express and implied warranties as it relates to “consumer goods.” “The Magnuson-Moss Warranty Act governs written warranties on consumer products. The purpose of the [Magnuson-Moss] Warranty Act is to regulate written warranties on consumer goods and to provide injured consumers with a cause of action against manufacturers who fail to comply with its requirements.” Edwards v. Hyundai Motor Am., 163 S.W. 3d 494, 499 (Mo. App. 2005). The Court then compared the various claims of the plaintiff with the provisions of the UCC against the arguments made by GM that the MMVA was the most applicable, and held that the UCC, with its 6 year limitation period would be the most applicable. “Clearly, both the Motor Vehicle Warranty Enforcement Act and the UCC have elements in common with the Magnuson-Moss Act. When other courts have considered the question presented in today’s case, they have found consistently that their states’ UCC is the most analogous state statute to the Magnuson-Moss Act.” The trial court was in error for dismissing the claim. Reversed and remanded.

Comment: The Court went to great lengths to distinguish and at the same time harmonize the MMVA with Magnuson Moss, and the Miss. UCC. In the end, the Court held that the Legislature likely intended for the MMVA to “co-exist” with the UCC on express and implied warranty claims for automobiles. This is so, according to the Court, even though the Legislature clearly provided for a much shorter limitations period as it related to suit against a manufacturer for an automobile. While the “remedies” under the MMVA reveal some differences with the UCC (attorney’s fees, arbitration, reasonable opportunity to repair), clearly the UCC remedies are perceptively more flexible and provide a much broader applicability to “consumer goods.” While the Court did observe that the Legislature did not intend for the MMVA to be the exclusive remedy for suit against an automobile manufacturer, this Court held that “every” remedy sought by the plaintiffs in this case for the deficiencies of their automobile were maintainable under the UCC – and it is in fact what the statute provides. Yet, it is slightly curious then why the Legislature enacted the MMVA for claims of warranty for automobiles, if it was their intent to also provide for a remedy, albeit slightly different, under the UCC. The remedies of the UCC apply to both express and implied warranties and are maintainable by this opinion within six years. Other than the possible availability
of attorney’s fees after a season of “reasonable cure” opportunities, not much. Something not seen out of the Court often is their announcement of application of Mississippi law by a Federal District Judge was “wrong.” The Court did exactly this in this opinion as to the District Court holding in Wheeler.

Claim Splitting


Jeanette Carpenter alleges that she tripped over some “striping tape” in the parking lot of the “Welcome Station” located off of I-10 in Jackson County. Suit was originally filed against the Mississippi Transportation Commission (MDOT), who owned and maintained the rest stop, and certain “doe” defendants, in June 2008. [Carpenter I]. This case was assigned to Judge Kathy Jackson. Malette Brothers Construction Inc. and J.J. McCool Contractors were added as party defendants a year later, but within the limitations period. Based upon discovery responses of other parties, the plaintiff filed a second motion to amend the complaint in March 2010 to join Kenneth Thompson Builders (“KTB”), Coastal Masonry (“CM”), Pro Mow Lawncare (“PM”) and Capital Security (“CS”). The plaintiff attempted to set the motion for hearing before the statute of limitations ran on August 15, 2010, but were unable to set it before then due to scheduling conflicts. The trial court ultimately heard the matter and allowed the amendment in November 2010. However, the plaintiff filed a second complaint on July 22, 2010 naming KTB, CM, PM and CS since it appeared that the first complaint could not be amended before August 15- when the statute of limitations would run. The second case was assigned to Judge Robert Krebs. Carpenter II. The plaintiff filed a motion to consolidate the two claims. KTB and the other new defendants filed a motion to dismiss in both cases. Judge Jackson dismissed Carpenter I as it was filed against KTB, CS, CM and PM on June 11, 2011, since the complaint joining them was beyond the statute of limitations. Judge Krebs dismissed Carpenter II on June 28, 2011, holding that the second suit was an attempt to impermissibly “split” the claims contrary to Wilner v. White, 929 So. 2d 315 (Miss. 2006). Carpenter appealed both dismissals which was assigned to the Court of Appeals. That Court reversed the decisions of the trial courts, finding that the plaintiffs did not engage in impermissible “claim splitting.” Jeanette Carpenter v. Kenneth Thompson Builder, et al., 2013 WL 2180136 (Miss. Ct. App. 2013). The defendants filed an appeal to the Supreme Court via certiorari.

On certiorari appeal, the Mississippi Supreme Court reviewed the standard of reviewing holding that it was subject to a “de novo” review. Scaggs v. GPCH-GP, Inc., 931 So. 2d 1274, 1275 (Miss. 2006). The Court, however, reviews arguments of “claim splitting” under an “abuse of discretion” standard. “Therefore, ‘[w]e will review for abuse of discretion when a [trial] court’s ‘dismissal for claim-splitting was premised in significant measure on the ability of the district court to manage its own docket,’ and will reverse the [trial] court only if we find its judgment ‘exceeded the bounds of the rationally available choices given the facts and the applicable law in the case at hand.’” Katz v. Gerard, 655 F. 3d 1212, 1217 (10th Cir. 2011). By definition, the Court noted that “claim splitting” occurs when “…a plaintiff attempts to duplicate a duplicative action involving claims arising from a single body of operative facts against the same defendants.” Wilner v. White, 929 So. 2d 315 (Miss. 2006). The Court stated that “[t]he rule against claim-splitting requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit. By spreading claims around in multiple lawsuits in other courts or before other judges, parties waste ‘scarce judicial resources’ and undermine ‘the efficient and comprehensive disposition of cases’.” Katz, 655 F.3d at 1217. The plaintiff may not “split” a cause of action to obtain a tactical advantage that he would not otherwise enjoy. The rule against “claim splitting” exists to allow the trial court to manage its docket so as to prevent duplicating claims and if the case were tried to finality, whether the doctrine of “res judicata” would apply preventing the second suit. The Court reviewed its holding in Wilner, determining that it was procedurally identical to this claim and highlighted that KTB and the other parties were formally a party in two causes of action at the same time, when Judge Jackson dismissed them from Carpenter I. “Both a judgment on the substantive merits of the case and a dismissal of parties with prejudice due to procedural bars are final judgments that will preclude the parties from further litigation on the same set of facts. The rules governing timely addition of defendants would be meaningless if that procedural bar could be sidestepped by simply filing a second action in anticipation of an adverse ruling.” Since Carpenter attempted to “side step” the application of the trial court’s anticipatory ruling in Carpenter I by filing Carpenter II, she attempted to gain a tactical advantage by “splitting” her claim. “But ‘the rules nowhere contemplate the filing of duplicative law suits to avoid the statutes of limitations’.”

“…Serlin v. Arthur Andersen & Co., 3 F. 3d 221, 224 (7th Cir. 1993). Additionally, since Judge Jackson had previously dismissed KTB [et al] from Carpenter I, the doctrine of “res judicata” would serve to justify the dismissal of Carpenter II. For “res judicata” to apply, there are four elements necessary, “(1) identity of the subject matter of the action; 2) identity of the cause of action; 3) identity of the parties to the cause of action; and 4) identity of the quality of character of a person against whom the claim is made.” Hill v. Carroll County, 17 So. 3d 1081, 1085 (Miss. 2009). Since the parties in Carpenter II were the same in Carpenter I, the doctrine would apply and KTB, CS,
CM and PM were properly dismissed. The decision of the trial court dismissing the complaints as to the KTB defendants is reinstated and the decision of the Court of Appeals is reversed.

Comment: Justice Lamar in part dissents and agrees that the claim as to KTB et al was properly dismissed in Carpenter I, but that since they were properly sued in Carpenter II, the claim against KTB et al could proceed as they were no longer “parties” for a “claim splitting” analysis and she was not maintaining two causes of action against the same defendants at the same time. Justice Lamar noted that the reliance of the majority on Wilner was misplaced because it relied on “dicta” from that case that in turn relied on authority that was inapplicable to the facts of this case. Further, there is no demonstration in the record that Carpenter was attempting to “side step” a ruling of Judge Jackson as it related to the joinder of KTB and the remaining defendants. As to “res judicata,” there is no demonstration that the doctrine would apply in this case because there was no ruling on the liability of KTB on the “merits.” The practice pointer on this case is clear – obtain a ruling on any outstanding motions to amend before the limitations period runs. The majority correctly ruled that this was claim splitting notwithstanding the “intent” of the plaintiff. It is claim splitting because there were two claims filed and pending that relate to the same facts. This is clearly the definition of “claim splitting” under Mississippi law, regardless of the reasons for doing so. In this case, it appeared to be a matter of “scheduling,” yet the Court noted that the identity of the parties being sought for joinder was not a surprise to Carpenter, but had been otherwise known for approximately a year. It is a little curious that Justice Lamar takes the position that a dismissal for violation of the statute of limitations does not result in a “merits” dismissal, when the claim, “on its merits” is simply barred. Res judicata unquestionably applies regardless since it was the plaintiff that forfeited the right to pursue the claim on its “merits.” The dismissal of a claim in Mississippi for failure to comply with the limitations period is not a “matter of form” which would be one of the few reasons to allow the later pursuit of a dismissed claim.

Construction of Insurance Contract

Dr. Steven Hayne v. The Doctors Company, et al. ____So. 3d ____, No. 2013-CA-00252-SCT (Miss. August 28, 2014). Panel: Dickinson, Chandler and Kitchens; Kitchens for the Court; no dissent; appeal from Circuit Court of Hinds County, Judge William Gowan; affirmed.

Dr. Hayne obtained a medical malpractice insurance policy with The Doctors Company (TDC) in 1987 that provided for coverage for his medical practice of pathology. Dr. Hayne also did work as a pathologist for the state of Mississippi and occasionally testified in criminal trials as to his findings. In 1992, Dr. Hayne conducted an autopsy on a murder victim, three-year-old Christine Jackson, and found that Jackson had been raped and bitten several times. Hayne and a dentist, Dr. Michael West, testified at the criminal trial that the bite marks were those of an imprint of Kennedy Brewer, the accused. Brewer was later released in 2007 when DNA testing on semen found on the victim confirmed that it was not Brewer but another suspect, Albert Johnson. In 2008, Brewer filed a claim and then a suit against Dr. Hayne seeking damages for the fifteen years that he was incarcerated – half of which was on death row. Hayne’s insurance policy with TDC ran through 2003. He purchased “tail coverage” on the policy for claims that would arise thereafter during the period of the policy. When Hayne was placed on notice of the claim, he submitted it to TDC asking that they defend him under his medical negligence coverage. TDC denied the claim and ultimately denied that it had an obligation to protect Dr. Hayne for this suit. Hayne asserted that when he originally procured the policy, that TDC was well aware of his work as a pathologist for the state of Mississippi and that TDC had a duty to defend him in the Brewer lawsuit. In 2011, Hayne filed suit against TDC asserting that they owed coverage to him under the policy for the Brewer matter. TDC filed a motion to dismiss/summary judgment, arguing that the policy limited coverage for claims made against Dr. Hayne by a “patient.” Hayne filed a motion under Rule 56(f) to allow discovery. In April 2012, the trial court conducted a hearing and later entered an order granting summary judgment to TDC. A motion for reconsideration was filed and heard in September 2012 and denied. The trial court held that TDC was entitled to summary judgment based upon the clear and unambiguous language of its policy that the “claim” had to be pursued against Dr. Hayne by a “patient.” Since Brewer was not Dr. Hayne’s patient, the trial court held that there was no coverage. Hayne appeals.

On appeal, the Mississippi Supreme Court note their “de novo” standard of review of the judgment of the trial court dismissing the claim. Further, whether an insurance policy is “ambiguous” is a question of law for the Court to determine and it is likewise reviewed “de novo.” The Court restated the standards of review of an insurance policy as a contract and reiterated that an “unambiguous” insurance contract would be enforced as written. If “ambiguous” then it would be construed against the drafter. The Court then reviewed the provisions of the policy of insurance featuring that the definition of a “claim” required that it be brought against the doctor as the insured due to a claim of a “patient.” Hayne does not argue that his testimony against Brewer occurred as a consequence of his care of him as a “patient” nor does Brewer. Since Brewer was not Hayne’s “patient,” there can be no coverage by the very definition of “claim” under the insurance policy. “We are constrained to agree with The Doctors’ position that Brewer simply cannot, by any stretch of the imagination, be considered Hayne’s patient. The language of the policy is unambiguous in this regard. Further, ‘an insured is charged with the knowledge of the terms of the policy upon which he or she relies for protection.’” Mladineo v. Schmidt, 52 So. 3d 1154, 1161 (¶ 26) (Miss. 2011). The plain language of the policy does
not provide coverage for a claim of an exonerated third party criminal defendant. “As it is written, Hayne’s insurance policy does not cover him for suits brought by exonerated non-patient criminal defendants alleging injury to themselves due to his negligence.” Dr. Hayne’s policy unambiguously applies to claims that arise from his medical activities to patients. Kennedy Brewer was not a “patient” of Dr. Hayne and therefore, the suit brought against Dr. Hayne by Brewer was not a claim by a “patient” and therefore, there was no coverage. Affirmed.

Comment: Justice Kitchens chastised TDC in the opinion apparently for filing a motion for summary judgment during the pendency of discovery, but also observed that the plaintiff failed to raise this issue on appeal, noting that the trial court effectively denied the plaintiffs attempt to conduct discovery under Rule 56(f) by entering summary judgment. “This Court looks with disfavor upon ‘the practice of parties resisting discovery on the one hand and moving for summary judgment on the other.’ Smith v. H.C. Bailey Companies, 477 So. 2d 224, 234 (Miss. 1985). In this particular case, the Doctors’ reliance upon the plain language of the insurance policy while denying discovery is troublesome.” In the end though, the Court observed that “further discovery would not have altered this Court’s inevitable conclusion that the plain language of the policy precludes coverage.” Notwithstanding the gratuitous excoriation by the Court of the reluctance of TDC to engage in “discovery” when its policy clearly precluded coverage, the Court acknowledged the very thing that TDC had argued all along, that the policy simply did not provide for coverage that Hayne insisted that he purchased and that he was bound by the clear unambiguous language of the policy. The Court seems to suggest that “discovery” beyond the unambiguous language of the insurance policy would have somehow changed the language of the policy when the “unambiguity” of the insurance policy was the point all along. Even though the trial court perhaps should have actually ruled that “discovery” was not necessary, the implicit edict of the trial court unquestionably determined otherwise. The “fiction” that additional discovery would have somehow changed this outcome given the Court’s holding, suggests that the Court would have preferred “needless” discovery, even when their own case law would have rendered such an economic commitment a clear act of “futility,” and designed to satisfy some cathartic sense of “fairness.” Clearly the rules provide that a motion for summary judgment may be filed “at any time” contrary to the “preference” of the Court, subject only to the ability of the “other party” to convince the trial court under Rule 56(f) that discovery is appropriate or even necessary. The Court’s holding is clearly the correct one in spite of the diverting criticism about TDC’s “resistance” to “discovery” without the synchronous vitriol that should have featured the plaintiff’s failure to urge this as a basis for the appeal. The “dicta” of the Court concerning TDC’s “premature” motion suggests that the Court was looking to criticize the fact that TDC apparently didn’t represent itself and also the plaintiff. This “complaint” was needless and unnecessary except to “condition” the bar to ignore some rights under the “rules” for fear of excoriation.

Toxicology and Pharmacology Expert Witness

Dr. James C. Norris
Ph.D., D.A.B.T., EURT

Experience:

Litigation/Arbitration in the United States, the United Kingdom, and Hong Kong; and testimony to governmental agencies.

Areas of Expertise:

Chemicals
Combustion / Fire
General Toxicology
Inhalation Toxicology
Pesticides
Pharmaceuticals

Contact Information:

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Website: norrisconsultingservices.com
Application for Membership
(Please type or print)

Name ____________________________________________
(Full Name - Last Name First)

Firm Name ________________________________________

Business Mailing Address ____________________________
(P.O. Box or Street, City, State, Zip)

Business Telephone __________________ Fax __________________

E-mail __________________________________

DRI Member (circle) YES NO

Date of Birth ___________________________

Date Entered Practice ____________________

MS Bar #_______________________________

Please indicate your primary area of practice:

☐ Alternative Dispute Resolution
☐ Business Litigation
☐ Construction Law
☐ Drug and Medical Device
☐ Employment and Labor Law
☐ Governmental Liability
☐ Industry-wide Litigation
☐ Insurance Law
☐ Medical Liability and Health Care Law
☐ Product Liability
☐ Professional Liability
☐ Toxic Torts and Environmental Law
☐ Trial Tactics
☐ Trucking Law
☐ Workers’ Compensation
☐ Other: ______________________________

In compliance with the MDLA Bylaws, I hereby declare that my representation in the handling of litigated cases is primarily for the defense and I meet the requirements as listed on the reverse side of this application.

_________________________________  ______________________________________
(Date) (Signature of Applicant)

For General Membership:
(Signatures of two nominators required)

_________________________________
(Signature of Nominator – MDLA General Member)

_________________________________
(Signature of Nominator – MDLA General Member)

Mail to: Mississippi Defense Lawyers Association, P.O. Box 5605, Brandon, MS 39047-5605
MISSISSIPPI DEFENSE LAWYERS ASSOCIATION

Application for Membership

I desire to become a member of the Mississippi Defense Lawyers Association, and if approved by the Membership Committee and Board of Directors, agree to abide by the association’s bylaws. Further, I certify that I meet the requirements of the class of membership for which I apply, in accordance with Article III of the bylaws.

My check covering initiation fee and annual dues is enclosed.

Class of membership for which you are applying:

[ ] GENERAL (In Practice for Ten or More Years)

Requirements: (1) Member in good standing of the Mississippi State Bar; (2) In private practice and engaged, primarily for the defense and/or on behalf of management in handling and conducting litigation involving, by way of example and not in limitation, tort actions of all types, so-called Title VII and similar actions of labor, anti-trust and other commercial actions, or if not in private practice, then engaged in supervising or otherwise administratively dealing with such litigation for insurance carriers, utilities, railroads, manufacturers, and other industrial and commercial entities; (3) Continuously engaged in the activities described in (2) for ten consecutive years immediately prior to acceptance for general membership; and (4) Manifested a genuine interest in, or sympathy with, the purposes of this association as expressed in Article II of the bylaws.

Initiation Fee: $ 30.00
Annual Dues: 200.00
Total Due: $230.00

[ ] ASSOCIATE (In Practice for Less Than Ten Years)

Requirements: All of the requirements for general membership above except have practiced for less than ten years; and officially sponsored by a general member in good standing who is charged with the responsibility of notifying the association’s executive director if the associate member ceases to meet the qualifications for membership described herein.

Associate members shall be entitled to full benefits of membership except they shall not be eligible to vote or to hold office.

Initiation Fee: $15.00
Annual Dues: 0.00 First year waived (subsequent annual dues of $125.00)
Total Due: $15.00

Revised June 2014
The Annual Meeting is DRI’s premier educational event that allows you to enhance your network of defense attorneys and in-house counsel from across the country. We have secured an exceptional line-up of key speakers and multiple networking opportunities, including a private event at AT&T Park, dine-arounds, cocktail receptions, and other committee planned activities.

**Key Speakers**

- **David C. Drummond**  
  Google Senior Vice President, Corporate Development

- **Mika Brzezinski and Joe Scarborough**  
  Co-Hosts of MSNBC’s *Morning Joe*

- **Tani G. Cantil-Sakauye**  
  Chief Justice, State of California

- **P. David Lopez**  
  United States Equal Employment Opportunity Commission

- **Jeffrey Toobin**  
  Senior Analyst, CNN Worldwide, Staff Writer, *New Yorker*

- **Michael Chertoff**  
  Former Secretary of Homeland Security, The Chertoff Group

- **Vernice “FlyGirl” Armour**  
  America’s First African-American Female Combat Pilot

- **Dan Harris**  
  Journalist, ABC News and Co-Anchor, *Nightline*

- **John Rizzo**  
  Author of *Company Man*, Former Chief Legal Officer at the CIA

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Table 100 Conference Center
Flowood, Mississippi
October 16, 2014

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San Francisco Marriott Marquis
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2015 Deposition Academy
Mississippi College School of Law
Jackson, Mississippi
February 2015

MDLA 50th Anniversary Celebration
Old Capitol Inn
Jackson, Mississippi
May 1, 2015