The Tyra Law Firm, P.C.

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NEW MEDICARE REQUIREMENTS FOR LIABILITY CARRIERS

Effective January 1, 2010, Federal law requires liability, no-fault, and worker's compensation carriers to track and report bodily-injury claim information relating to Medicare-eligible claimants to the Medicare Secondary Payer Recovery Contractor of the Centers for Medicare & Medicaid Services (CMS). Section 111 of Public Law 100-173 (the Medicare, Medicaid and SCHIP Extension Act of 2007), codified in 42 U.S.C. Section 1395(b)(8), as implemented through 42 CFR Sections 411.20, *et seq*.

The carrier is required to register with CMS and to determine each claimant's Medicare eligibility, and for Medicare-eligible claimants, submit to CMS the claimant's name, date of birth, gender, and social security number or health insurance claim number. CMS has produced a sample letter for the carrier to use to request this information from the claimant. The carrier is still in compliance if the claimant refuses in writing the carrier's attempt to secure this information, unless the carrier learns through other means that the claimant is Medicare eligible.

The carrier must also secure medical bills for the details of the diagnostic codes (ICD-9 codes) indicated by the healthcare providers to provide to CMS with settlements with a Medicare eligible claimant.

This statute does not include any new obligations regarding Medicare set-asides, but the pre-existing obligations for set-asides, as well as Medicare's "super lien," continue regarding settlements with claimants who may expect to have future medical expenses borne by Medicare. The carrier and its insurance defense counsel need to consider, among other things, including appropriate language in bodily-injury settlement agreements accounting for Medicare eligibility and future medical expenses.

Non-compliance with the foregoing requirements may expose the carrier to a fine of $1,000 per day, in addition to interest and double damages for failure to reimburse Medicare in a timely manner.

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CONTACT INFORMATION

The Tyra Law Firm, P.C.

334 North Senate Avenue

Indianapolis, Indiana 46204

Phone: 317.636.1304

Fax: 317.636.1343

Website: www.tyralaw.net

EXHAUSTION OF UIM LIMITS

Cincinnati Insurance v. James Trosky, et al.
Indiana Court of Appeals, November 25, 2009

In Florida, claimants Trosky and Culpepper (who were permissive users of the Browns' vehicle) were involved in a collision caused by a Florida Highway Patrol (FHP) trooper. Trosky was killed and Culpepper was injured. FHP was self-insured with a statutory limit of liability of $100K/200K. Culpepper's UIM limit with State Farm was $100K/300K. Trosky's UIM limit with State Farm was also $100K/300K, plus a personal liability umbrella policy (PLUP) that included an additional $2M UIM coverage. The Browns' combined liability/UIM limit with American Select Insurance (ASIC) was $500K, which also covered Culpepper and Trosky. The Browns also had a PLUP with Cincinnati Insurance with excess UIM coverage of $2M.

FHP paid $100K to Culpepper. State Farm paid its $100K UIM limits to Culpepper. ASIC paid Culpepper $35K under its liability coverage.

FHP paid its remaining $90K limits (after also paying $10K to a third party involved in the accident) to the Trosky Estate. State Farm (on Culpepper's policy) paid its $100K liability limits to the Trosky Estate. ASIC paid the Trosky Estate $275K on its liability policy that covered Culpepper.

The Trosky Estate then pursued UIM coverage with Trosky's State Farm policy, and the $2M each on the State Farm PLUP and the Cincinnati Insurance PLUP. Culpepper then intervened to also pursue UIM coverage under the Cincinnati Insurance PLUP. Cincinnati Insurance moved for summary judgment, which the trial court denied and the Court of Appeals affirmed.

Cincinnati Insurance argued that its excess UIM coverage was not available because the underlying ASIC UIM coverage was not exhausted, because the ASIC payment from its combined liability/UIM limit was for liability exposure, not UIM exposure.

The Court of Appeals agreed with the trial court that ASIC's UIM limits were exhausted even though the combined-limit payment was characterized as liability rather than UIM. The Cincinnati Insurance PLUP, according to the terms of that policy, is excess of underlying insurance "provided," not "paid." When the ASIC combined limit was exhausted, even through liability payment rather than UIM payment, underlying UIM insurance was provided, even though it was not paid.

Cincinnati Insurance also argued that there was no excess UIM coverage because of an exclusion of "government vehicles" from the definition of "underinsured motor vehicle" in the State Farm and ASIC policies. The Court of Appeals held that the governmental-vehicle exclusion is void against Indiana public policy.

Finally, Cincinnati Insurance argued that Culpepper and the Trosky Estate could not collect an excess UIM payment because the FHP's statutory limit had been satisfied, so the claimants were not "legally entitled to collect" any more money on the claim. But the Court held that "legally entitled to recover" or "legally entitled to collect" just means that the insured established fault on the part of the uninsured or underinsured motorist, and established the amount of his or her damages. The existence of a sovereign immunity defense or statutory cap favoring the tortfeasor does not bar or limit UIM coverage.

The Court of Appeals therefore upheld the trial court's ruling that Cincinnati Insurance's PLUP and State Farm's PLUP should provide coverage on a pro rata basis until the policy limits are exhausted.

Keypoint: Indiana courts will look closely at the exact policy language for exhaustion of UIM limits, including whether it refers to insurance "provided" or "paid," and what constitutes money the claimant is "legally entitled to recover," and will likely interpret such language so

as to maximize recovery for the insured, consistent with Indiana public policy.

Kevin C. Tyra
kevin.tyra@tyralaw.net

FALSIFIED MEDICAL CHART

Dharam Bhatia v. Anuradha Kollipara, M.D.
Indiana Court of Appeals, November 10, 2009

Dharam Bhatia's wife, Parminder Kaur, died of cervical cancer in 2004. Dharam brought a medical malpractice action against Dr. Kollipara, Parminder's physician, alleging that Dr. Kollipara had failed to properly advise his wife to schedule a Pap smear between 2000 and 2004, despite symptoms of irregular menses and fatigue. Parminder was diagnosed with cervical cancer on May 3, 2004 and succumbed to the disease on December 6, 2004.

Dharam alleged medical malpractice on several grounds, including an alleged failure to advise Parminder to receive Pap smears. The medical review panel ("MRP") unanimously opined that "the evidence does not support the conclusion that Dr. Kollipara failed to comply with appropriate standard of care as charged in the Complaint."

One of the MRP members stated that if the medical records were not accurate and that Parminder had in fact never been advised to receive Pap smears, then Dr. Kollipara's care would've fallen below the appropriate standard.

Dharam presented affidavits from himself and one of their children, indicating that one or the both of them attended all of Parminder's appointments with Dr. Kollipara, was never outside of her presence during those appointments, and never heard Dr. Kollipara advise Parminder to have a Pap smear. He also presented evidence showing that the ink used to make the advice notations was different than that used to make the other notations in the chart, suggesting that the advice notations were falsified. Despite these evidentiary showings, the trial court granted summary judgment to Dr. Kollipara.

The Court of Appeals overturned the trial court decision, ruling that Dharam's designated evidence did in fact raise a genuine issue of material fact as to whether Dr. Kollipara advised Parminder to have a Pap smear. Though not specifically stated, it appears that the trial court may have questioned the sufficiency of expert testimony from the MRP member because it was based on hypothetical questions and did not explicitly establish the relevant standard of care. But the Court of Appeals reasoned that although the testimony did not specifically mention or establish the relevant standard of care, the standard could be inferred from it, i.e. that a reasonable physician treating Parminder would have advised her to have a Pap smear performed during the relevant time frame.

Keypoints: (1) Simply raising the suspicion of falsified records probably will not defeat summary judgment for the physician, but specific evidence of falsification will. (2) Expert testimony need not explicitly establish the standard of care in order to be sufficient to preclude summary judgment in medical malpractice cases.

Denise W. Chavis
denise.chavis@tyralaw.net

FIREMAN'S RULE

Babes Showclub, et al. v. Patrick Lair, et ux.
Indiana Supreme Court, December 15, 2009

Patrick Lair, a police officer in Indianapolis, responded to a report of an unruly customer at Babes Showclub. Shortly after Lair arrived, he sustained injuries in a physical attack by an underage male who had been drinking at Babes.

Lair filed a lawsuit as a result of this incident, but Babes moved to dismiss the complaint for failing to state a claim upon which relief can be granted based on Indiana's "Fireman's Rule." The trial court denied Babes' motion. The Court of Appeals reversed, and the Indiana Supreme Court granted transfer. The Supreme Court subsequently affirmed the Court of Appeals.

The Fireman's Rule in Indiana states an emergency responder may not recover for injuries sustained as a result of the negligent act that created the situation to which that person was responding. Whether a claim may be excluded by the Fireman's Rule is not based on whether the case involves premises liability or the defense of incurred risk. Rather, public policy provides the basis for the Fireman's Rule.

However, the Supreme Court also stated the emergency responder still retains the right to sue for damages that result from negligent and/or intentionally tortious conduct that is separate and independent from the conduct that contributed to the emergency. And, as the Supreme Court further noted, this separate conduct does not need to occur after the emergency responder arrives on the scene of the incident, but still must be independent of the negligent act that brought the responder to the scene.

Because the evidence suggested nothing other than the negligent act that brought Lair to Babes Showclub in the first place led to Lair's injuries, the Fireman's Rule barred his claims.

Keypoint: The Fireman's Rule will preclude recovery for professional emergency responders who are injured as a result of the negligent act to which they are responding. However, if a separate incident other than the initial negligent act leads to an injury to the emergency responder, the emergency responder still retains the right to sue for damages.

Jerry M. Padgett
jerry.padgett@tyralaw.net

HOSPITAL PATIENT KILLED BY HER EX-HUSBAND

Ava McSwane ex rel. Estate of Vandeneede v. Bloomington Hospital and Healthcare System, et al.
Indiana Supreme Court, November 30, 2009

Malia Vandeneede presented to Bloomington Hospital for treatment of lacerations to her thigh and hand. Also present with Malia was her ex-husband Monty, who was still living with her. With Monty present, Malia informed the hospital staff she had fallen off a horse, but the circumstances and injuries led the triage nurse to conclude these injuries were more consistent with domestic violence. The triage nurse reported these concerns to the surgery nurse on duty.

Malia was ultimately referred to the on-call orthopedic surgeon that day, and Malia again informed him that her injuries were a result of falling off the horse. However, Monty was also present during this examination as well. Malia was then taken to surgery, and while she was in recovery, the nurses noted she was alert and oriented. Ava McSwane, Malia's mother, arrived at the hospital while Malia was still in recovery, and she informed the nurses that she believed Monty had caused the injuries. Ava then called the local and state police agencies to report this potential incident.

However, during this same time, Malia began informing the nurses she was ready to be discharged. While they were leaving the surgery area,

two security guards stopped Monty to search for weapons and to conduct a sobriety test, both of which were negative. Then as Malia was exiting the hospital, one of the nurses told her she did not have to leave with Monty. Ava also asked Malia not to leave with Monty, but Malia made it explicitly clear she wanted to leave with him, and told Ava to "stay out of our business." A few blocks from the hospital, Monty shot and killed Malia, and then killed himself.

Ava filed a complaint for medical malpractice on behalf of Malia's estate and on behalf of Malia's daughter, and alleged the Hospital allowed Malia to leave the hospital with Monty even though they had information that suggested the possibility of further violence. The trial court entered judgment for the Hospital, but the Court of Appeals reversed. The Indiana Supreme Court granted transfer, and affirmed the judgment of the trial court.

The Supreme Court found the Hospital, short of physically restraining Malia from leaving with Monty, likely could not have prevented Malia from leaving with Monty. Therefore, to say the Hospital's duty extended to restraining Malia would run counter to the important principles of patient autonomy and informed consent.

Under Indiana's medical malpractice laws, a claimant whose own negligence is even slightly causal of the alleged injuries is barred from recovery. While Ava argued Malia could not be contributorily negligent due to her questionable state of mind after recovering from surgery and being on pain medications, the nurses had noted Malia was alert and oriented and that the surgeon concluded she was very capable of making her own decisions. As such, the Supreme Court found the trial court did not err in finding that Malia's insistence on leaving with Monty, contrary to the wishes of both the nurses and her mother, contributed to her injury.

Keypoint: A hospital will not be liable for negligence when a patient is injured after discharge from the hospital, even if that patient demonstrated signs of domestic abuse while at the hospital, if the patient has the mental capacity to make an informed decision, and leaves the hospital on her own volition.

Jerry M. Padgett
jerry.padgett@tyralaw.net

"OCCURRENCE"

Indiana Farmers Mut. Ins. Co. v. North Vernon Drop Forge, Inc.
Indiana Court of Appeals,
December 5, 2009

The defendant insureds provided "clean fill" dirt from their steel forge to a third party, who later sued them, alleging the fill dirt was contaminated, and the insureds sought liability coverage from their CGL carrier. In summary judgment proceedings on the coverage issue, the steel forge owner submitted an affidavit that he did not know the fill dirt was contaminated. The trial court entered summary judgment to the insureds on both defense and indemnification.

The Court of Appeals affirmed the trial court that the forge owner's affidavit could be considered along with the underlying complaint when assessing the carrier's duty to defend; the factual allegations sufficiently disclosed an unintended "occurrence" requiring the carrier to defend the underlying suit; coverage is not foreclosed by the policy's intentional acts exclusion; and the carrier was not prejudiced by untimely notice of occurrence. However, the Court also held that the trial court erroneous ordered indemnification before the conclusion of the underlying litigation.

The Court distinguished coverage in this case from the analysis in *Tri-Etch v. Cincinnati Ins. Co.*, 909 N.E.2d 997 (Ind. 2009), in which the Supreme Court had held that there was no CGL coverage for a claim for breach of a contractual obligation, which is not an "occurrence" (in that case, failure to properly perform security services). In this case, the fill dirt was a "gift," and the steel forge was not in the business of supplying fill dirt. Giving the third party the fill dirt was therefore "a collateral, gratuitous undertaking performed incident to the cessation of NVDF's forging operations."

Also, the Court found as a matter of law that the insured's one-and-one-half-year delay in notifying Indiana Farmers was unreasonably delayed. However, there was no prejudice to Indiana Farmers. The "prejudice" Indiana Farmers claimed (the scope of contamination and IDEM-mandated cleanup increased in the time it was not notified) went to the extent of indemnification, not prejudice in defending the insured.

Keypoint: The courts continue, for purposes of determining whether there was an "occurrence" for liability-coverage purposes, to distinguish between the failure of a business to meet its contractual obligations (usually not an "occurrence") and just about any other circumstance (usually an "occurrence," unless the insured intended the harmful result).

Kevin C. Tyra
kevin.tyra@tyralaw.net

POLLUTION COVERAGE

National Union Fire Ins. Co. of Pittsburgh v. Standard Fusee Corp.
Indiana Court of Appeals, December 3, 2009

Standard Fusee Corp. (SFC) sought defense and indemnification from its CGL carriers for investigation of suspected discharge of perchlorate (which is used in its manufacture of signal flares) into groundwater in California and Indiana, and potential future environmental liability. The trial court granted partial summary judgment to SFC, holding that the CGL carriers have a duty to defend SFC.

On the choice of law issue, the Court of Appeals applied the "site specific approach;" that is, it is possible that more than one body of law will apply to a single insurance contract if the implicated sites are in different jurisdictions. Therefore, although the place of contracting for the CGL policies was clearly Maryland, the Court of Appeals held that Indiana law would apply to adjudication of coverage for the Indiana sites, and California law would apply to adjudication of coverage for the California sites.

The Court then discussed the sufficiency of an affidavit from SFC's counsel that notice was sent to the carriers regarding the claims. The affidavit was sufficient although the actual notices were not attached thereto, especially because the carriers provided no evidence to contradict the affidavit, although the Court commented that notice would have been more easily established if the notices had been attached. The Court therefore concluded the trial court had sufficient evidence that SFC had provided proper notice of the claims to the carriers.

Next, the Court affirmed the trial court's decision that, as in *American States v. Kiger*, 662 N.E.2d 945 (Ind. 1996), the carriers' pollution exclusion clauses were ambiguous and unenforceable. As in *Kiger*, the exclusion "cannot be read literally as it would negate virtually all coverage" and thus required interpretation strictly against the insurer. The Court was unpersuaded by the carriers' arguments that SFC is a sophisticated insured, and the carriers' attempt to distinguish the types of pollution in *Kiger* (gas station leakage) and in the SFC case (a chemical which is a necessary ingredient of the insured's business).

Finally, the Court held that SFC's entry into the voluntary remediation program constitutes a "suit," and is therefore covered by the CGL policies and the carriers have a duty to defend SFC. The Court remanded to the trial court on the sole issue of determining the carriers' duty to defend regarding the California sites under California law.

Keypoint: The courts continue to rule against CGL carriers on the pollution exclusion, presumably the result of an unspoken policy that they need a private source of funding for extremely expensive environmental remediations.

Kevin C. Tyra
kevin.tyra@tyralaw.net

13-YEAR OLD'S CONTRIBUTORY NEGLIGENCE

Clay City Consol. School Corp. v. Ronna Timberman, et ux.
Indiana Supreme Court, November 30, 2009

Thirteen-year-old Kodi Pipes, a student at Clay Jr. High School (the "School"), blacked out during basketball practice; the team's coach notified Kodi's mother of the incident. Kodi's mother contends that following the incident, she told the coach that Kodi could walk through plays, but was not to participate in running or other strenuous activity.

Kodi attended school on Tuesday and Wednesday without incident. Kodi returned to practice on Wednesday though he had not been cleared to do so by a physician. Kodi participated in Wednesday nights practice without restriction. During the practice Kodi's coach required the players to perform a running drill. Early in the drill, Kodi collapsed and died.

The wrongful death action ensued. The School defended arguing that Kodi's own negligence contributed to his death. Under Indiana law, "contributory negligence" is an absolute defense available to governmental entities, including public schools. The jury returned a verdict and damage award in favor of Kodi's parents. The Court of Appeals reversed and remanded the case for a new trial. It found that the trial court had committed reversible error when it gave a jury instruction "that Indiana law recognizes a rebuttable presumption that children from the age of 7 to 14 years of age are rebuttably presumed to be incapable of contributory negligence."

The Supreme Court ruled that Indiana law does in fact recognize a rebuttable presumption that children between the ages of 7 and 14 are incapable of contributory negligence.

However, the Court emphasized that the holding related only to the evidentiary presumption in contributory negligence cases and the burden of going forward. The holding had no impact on the standard of care applicable to a child between the ages of 7 and 14, which is that children in that age group are required to exercise due care for their own safety under the circumstances of children of like age, knowledge, judgment and experience.

The Court ruled that the trial court's final instructions were not in error. Though a rebuttable presumption existed in Kodi's favor, the School was entitled to rebut the presumption with evidence showing Kodi's capacity i.e. offering proof that Kodi, based on his age, mental capacity and intelligence and experience. Once such proof was offered, the question of contributory negligence would become a question of fact for the jury to determine. The presumption had a continuing effect, regardless of any contrary evidence regarding Kodi's particular decision-making level.

Keypoint: A school may not simply use a 13-year old's inappropriate acts as an excuse for allowing harm or injury to occur to that student. In particular, the mere fact that a 13-year-old says he is capable of engaging in an activity does not insulate the school or other entity from potential liability if the child in fact is not capable of safely engaging in the activity.

Denise W. Chavis
denise.chavis@tyralaw.net

THANKS FOR A GREAT SEASON COLTS!

The Tyra Law Firm, P.C.

334 North Senate Avenue

Indianapolis, Indiana 46204