Volume I, Edition I

CAC Advisor

Missouri and Illinois Updates

Welcome to Our First Edition of CAC Advisor!

David T. Ahlheim

The legal world seems to be continuously changing. Missouri is no different. There are forces challenging the successful defense of our clients throughout the claims process – from the date of the accident through jury verdict. While each case has its unique facts, several open-ended trends emerge. Here are a couple issues which I have found are becoming "hot button" issues affecting claims and pending lawsuits.

Starting January 1, 2010, the "Medicare, Medicaid and SCHIP Extension Act of 2007" or "MMSEA" will start placing additional burdens (and adding additional penalties) on insurers resulting from the Medicare Secondary Payer Statute. Under MMSEA, insurance carriers have new reporting requirements and burdens when settling cases. With MMSEA modifying insurance carrier's obligations to protect Medicare liens, even settling claims has become challenging.

In the past months, we saw the first successful challenge to the 2005 Missouri Tort Reform. In ***Berra v. Danter,*** ED92279, the Eastern District Court of Appeals approved a loophole to allow the full medical charges to be presented to a jury as opposed to the amount paid by health insurers or Medicare or Medicaid. This change could have major effects on valuation of claims in Missouri personal injury claims.

In our attempt to continuously keep our clients up to date with the new changes in the law, we will be periodically publishing our observations on trends in Missouri law and Southern Illinois news. We will also be highlighting recent Court of Appeals and Supreme Court decisions that can affect your claim handling and pending lawsuits. It is my hope the information provided in this newsletter can help you in day-to-day

Ritchie v. Allied Insurance Co. – An Expansion of Underinsured Motorist Coverage *By David T. Ahlheim*

On November 17, 2009, the Missouri Supreme Court, en banc, issued the third in a recent series of cases expanding available limits by restricting insurance carrier's ability to prevent "stacking" underinsured motorist coverage (UIM) and limit available set-offs paid by primary tortfeasors.

In *Ritchie v. Allied Property & Casualty Insurance Company,* No. SC90085, 2009 Mo. LEXIS 536, Kelsey Ritchie, a passenger in a non-owned auto, was killed in an automobile accident. Her parents filed a wrongful death lawsuit against the driver of her vehicle, Noah Heath, and another driver, Adam Tomblin, resulting in a judgment for $1.8 million. Available insurance limits from both drivers totaled $60,000. *Id* at 3.

The Ritchies sought recovery under their UIM policies. Allied charged three separate premiums for three vehicles with limits for each vehicle at $100,000 per person and $300,000 per accident. *Id.* at 2-3 Allied's policy contained a fairly standard "set-off" provision that the declarations page limits are reduced by payments by persons who may be 'legally responsible.' Allied's policy also contained anti-stacking language in the "Other Insurance" clause along with a provision that any coverage Allied "provide[s] with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorist coverage." *Id.* at 8.

Set Off for Tortfeasor Payments

The Supreme Court continued its expansive read of UIM claims by following its rulings in *Seeck v. Geico General Insurance Co.*, 212 S.W.3d 127, 133 (Mo. banc 2007) and *Jones v. Mid-Century Insurance,* 287 S.W.3d 687 (Mo. banc 2009) by holding that policy provisions should not be

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Berra v. Danter– Can You Still Keep Total Medical Charges from a Jury? *By David T. Ahlheim*

In 2005, the Missouri Legislature modified the "collateral source" rule by revising RSMo. § 490.715.5. The reform limited a jury from hearing the total medical charges incurred by the Plaintiff. Missouri's revision provides the amount paid by any health insurer, Medicare, Medicaid or other health insurance provider the "presumptive" amount submitted to a jury.

For example, a Plaintiff incurred $100,000 in medical charges from an injury. Plaintiff's health provider paid her physicians $50,000 and wrote off $50,000. Under RSMo. § 490.715.5, the presumed amount submitted to a jury was $50,000 not $100,000.

In the first substantive ruling on the 2005 Tort Reform, Missouri Court of Appeals has approved a loophole to get around the RSMo. § 490.715.5. In *Berra v. Danter*, ED92279, the Court of Appeals held that the trial court did not abuse its discretion in submitting to a jury the full amount of charges because Plaintiff provided affidavits from the medical providers indicating their charges were reasonable and necessary.

The Plaintiff's bar suggests this effectively and completely undermines the intent of RSMo. § 490.715.5 and many judges are indeed using the *Berra* decision for guidance.

Upon review, the real effect is uncertain. Plaintiffs must present actual testimony, live or by affidavit, that the total charges are indeed reasonable under the circumstances. This evidence is subject to discovery and cross examination. Defendants can present expert testimony on the issue also. On certain cases, we have retained medical experts to counter any of Plaintiff's evidence of reasonableness.

In the end, the *Berra* decision alters the landscape and presumptions of judges on the issue of total medical special damages presented to a jury. However, this issue is far from over. Defendants should consider deposing custodian of records affiants, detailed cross examination of medical experts or even retaining their own experts to present evidence of medical bills paid versus charged.

On the right case, the total medical bills can make the difference in jury verdicts.

Missouri Case Briefs *By David T. Ahlheim*

Sovereign Immunity

The Eastern District of Missouri recently held that the City of St. Louis Emergency Medical Services (EMS) was still entitled to protections of sovereign immunity despite charging a fee for services rendered. The Court determined the fact the City of St. Louis charged a fee for services does not necessarily mean the agency was not providing typical governmental services. Even though potentially operating for profit, the EMS provides a "general public benefit" and serves the "public health and welfare."

Richardson v. City of St. Louis, 293 S.W.3d 133 (Mo. Ct. App. 2009)

Sovereign & Official Immunity

In a special school district, a student with disabilities and propensities harmful to himself, died after choking on food items. Parents of the deceased child alleged teachers were negligent because they had actual or constructive knowledge of child's propensities, failed to warn or remove dangerous items under these circumstances.

Official immunity protected the teachers and aides because teachers were not performing a statutory or department mandated duty. Sovereign immunity protected the school district because there was no dangerous condition on the property and failure to warn is not an exception to sovereign immunity.

Finally, insurance exception to sovereign immunity statute did not apply because policy had an exclusion for events to which sovereign immunity applied.

Boever v. Special School District of St. Louis County, 2009 Mo. App. LEXIS 1318 (Mo. Ct. App. 2009)

Southern Illinois News and Case Briefs *By David T. Ahlheim*

Madison and St. Clair County named on "Judicial Hellhole" report

The American Tort Reform Association released its 2009 "Judicial Hellholes" report that has Madison County and St. Clair counties on the group's "watch" list.

In Madison County, the report observes, "The outlook generally remains positive, but there are those in Illinois and elsewhere who are discouraged by recent developments and still consider it a Judicial Hellhole."

Madison County's asbestos docket has been increasing since 2006. New filings already exceed the total number of asbestos cases filed in 2008. And, regarding class action lawsuits, at least one more case has been filed in 2009 than in 2008.

"Judges interested in reform can only do so much; the lawyers practicing in the local court rooms *(Continued on back cover)*

Underinsured Motorist Coverage (*continued from page 1*)

Using this rationale, the *Ritchie* Court found that the Allied "set-off" provision conflicted with the limits of liability on the declarations. In its holding, the Court stated that an insurance carrier could never pay the policy limits as stated in the declarations page because there would always be a tortfeasor set-off in a UIM claim. *Ritchie* at 14-15. The Court suggests a carrier can only have a "set-off" if it plainly states that the UIM will be the difference between tortfeasor liability limits and policy limits. *Id* at 15, Fn. 10.

To address potential concerns about double recovery by the insured, the *Ritchie* Court harmonized its reasoning with its decision in *Jones* by allowing a set-off when the damages are less than the total available tortfeasor insurance and UIM coverage. For example:

If the Ritchies had suffered only $140,000 in damages and had recovered $60,000 from other tortfeasors, then the $60,000 would be deducted from the total damages and Allied would be responsible for the remaining $80,000, thereby avoiding a double recovery. *Id.* at 15

Therefore, early valuation of a claim becomes essential. Missouri Court of Appeals for the Eastern District followed this decision in *Keck v. American Family Mutual Insurance Co.,* 2009 Mo. App. LEXIS 1681 on November 24, 2009.

Disclaiming Anti-Stacking Provisions

Missouri has long held multiple uninsured motorist coverage limits may be combined or "stacked" in the event of an uninsured loss. Since the mid-1990s, Missouri Courts ruled that any co-mingling of UIM and uninsured motorist coverage (UM) subjects UIM coverage to the public policy rigors of the Missouri Financial Responsibility Act (RSMo. § 303.010, et seq.) and the same standard as UM claims. *Niswonger v. Farm Bureau Town & Country Insurance,* 992 S.W. 2d 308 (1999)

The *Ritchie* Court pays lip service to the traditional notion that "anti-stacking" provisions found in most insurance policies are still valid and enforceable. However, it then found that the language in the "Other Insurance" clause created an ambiguity overcoming any anti-stacking language.

Focusing on the fact the subject car was not owned by the insured, the Court found conflict between the two provisions of the "Other Insurance" clause. In so finding, the Court states:

"… an ordinary person of average understanding reasonably could interpret this other insurance provision to mean that when an injured insured is occupying a non-owned vehicle and there are multiple underinsured motorist coverages . . . then they are excess to each other and, therefore, may be stacked." *Id.* at 9.

Conclusion

Missouri Courts have greatly expanded the available coverages under UIM coverage by voiding anti-stacking statutes due to its parallels to UM insurance. The *Ritchie* and *Jones* cases appear to be a continuation of the earlier trend by disallowing anti-stacking based upon ambiguities – this time via the "Other Insurance" clause. The trend appears to be moving against insurers on stacking.

However, even the *Ritchie* and *Jones* Courts state that "anti-stacking" exclusions are not against public policy. As such, insurers should carefully analyze their policies to ensure each policy is unambiguous as defined by these decisions.

At this point, set-offs for tortfeasor payments are no longer allowed when damages exceed combined policy limits but are allowed when damages are below the combined thresholds. Therefore, early and accurate valuation of a potential UIM claim is essential.

Firm Updates

Jim Childress selected to Missouri & Kansas Super Lawyers for 2009

Jim Childress obtained a defense verdict for a medical device manufacturer in a two week wrongful death medical product liability trial in St. Louis County.

Jim Childress and ***Ryan Dickherber*** represented landowner in a premises liability wrongful death lawsuit in St. Louis County, Missouri. Jim and Ryan successfully negotiated a settlement of all issues for $5,000.00.

Joe Lesinski successfully tried subrogation lawsuit on behalf of landlord against a tenant for property damage and personal injury payments in the Circuit Court of St. Louis County, Missouri.

Jim Childress and ***Tom Lewis*** represented a safety glasses manufacturer against an employee who lost an eye in a work place accident. The initial demand exceeded policy limits of $2,000,000. After substantial investigation, Jim and Tom negotiated a settlement for $50,000.

The information provided is for general information and discussion only. It should not be construed as complete legal analysis for the matters presented and is not considered legal advice. This material is considered advertising material and has not been approved by the Missouri Bar Association or the Supreme Court of Missouri.

CAC Advisor

Inside This Issue

Childress Ahlheim Cary LLC
Attorneys at Law

At Childress Ahlheim Cary LLC we have not forgotten that the practice of law is a service profession. Our firm is committed to providing an unsurpassed level of representation and personal service to our clients. We believe maintaining close ties and providing open lines of communication with our clients ensure the quickest and most efficient handling of cases. Our lawyers provide thorough and prompt services in all aspects of our defense practice.

Childress Ahlheim Cary LLC
1010 Market Street, Suite 500 ■ St. Louis, MO 63101
Attorneys at Law

Southern Illinois News and Case Briefs

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determine much of the local activity. Madison County remains almost twice as litigious as Cook County and more than four times as litigious as the average of the other 101 Illinois counties."

St. Clair County is noted to be on the "other areas to watch" list. "Madison County's neighbor shares a reputation as inhospitable to corporate defendants, but its standing has improved along with the rest of the Metro East in recent years. Still, it remains a place to watch with some decisions of concern."

Premises Liability

In a case of first impression, rural landowner of 360 acres may be liable for wrongful death of motorcyclist because a "defective tree" fell onto Illinois Route 2. The Court of Appeals held the trial court should look at the size and type of the road, the traffic patterns of the road, the nature of the surrounding land, the condition and location of the tree, the nature of the danger posed to travelers, and the burden of inspecting and removing the danger before determining if a landowner has a duty to decedent.

Eckburg v. Presbytery of Blackhawk of the Presbyterian Church, 2009 Ill. App. LEXIS 1106

For Questions or Additional Information

Jim Childress	314.584.4570	jchildress@jchildresslaw.com
David Ahlheim	314.584.6437	dahlheim@jchildresslaw.com
Rebecca Cary	314.584.6440	rcary@jchildresslaw.com

1010 Market Street, Suite 500 St. Louis, MO 63101
www.jchildresslaw.com • 314.621.9800

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