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Opinion Increases Exposure of IME Doctors to Medical Malpractice Claims

By Jennifer Baker & Christina Kelly Geremia

In *Ritchie v. Krasner,* 2009 WL 1065195 (Ariz. App. April 21, 2009), the Arizona Court of Appeals held that, even absent a formal doctor-patient relationship, a doctor conducting an Independent Medical Examination (IME) owes a duty of reasonable care to his or her patient. In other words, patients may now maintain a medical malpractice action against IME physicians, and the jury will decide whether the IME physician breached the duty owed to the patient.

The factual basis for *Ritchie* is not atypical: the plaintiff suffered a work-related injury and sought treatment for his injured back and bruised spinal cord. The workers' compensation carrier retained Dr. Krasner to perform an IME to determine whether the plaintiff was injured on the job, assess his current condition, evaluate treatment options and assist in determining whether he was entitled to compensation and treatment.

Before Dr. Krasner performed the IME, the plaintiff signed a notice acknowledging that there was no doctor/

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Recent Workers' Compensation Bad Faith Case Will Have Dramatic Impact

By Les S. Tuskai

On July 7, 2009, Division One of the Arizona Court of Appeals issued a stunning decision in *Mendoza v. McDonald's Corp.*, 2009 WL 1939810 (Ariz. App. July 7, 2009), which, if not overruled, will have a fundamental impact on the way all bad faith cases will need to be defended in the future.

Facts

The facts of *Mendoza* are extensive and complicated. The initial injury occurred in 1997, but the case was litigated before the Industrial Commission of Arizona (ICA) through 2006. The employee alleged that she injured her right arm in a work-related accident. The claim was accepted by the employer, which was self-insured. Her treating physician diagnosed carpal tunnel syndrome and possible radial nerve damage and recommended surgery. The employer misinterpreted the physician's report to conclude that the injury was not work-related and requested an Independent Medical Examination (IME). The IME physician found, however, that the employee's carpal tunnel syndrome was work-

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The Economic Loss Doctrine: Recent Developments in Arizona Law

By Nicholas D. Acedo

Often times, particularly in products liability and construction defect cases, a plaintiff will try to sue for negligence despite suffering only economic damages. This is usually because they either lack the requisite privity to bring a breach of contract claim (e.g., a consumer or home buyer), or because the statute of repose for a contract claim has expired. A common defense to such claims is the "economic loss doctrine." Recently, however, the Arizona Court of Appeals has narrowed the doctrine's application, making it easier for plaintiffs to overcome.

A. Construction Defect Cases

The economic loss doctrine precludes a party from recovering in tort if they have suffered only economic damages. Arizona courts have only applied the economic loss doctrine in two types of cases, products liability and construction defect. In the construction defect context, the Arizona Court of Appeals has employed a bright-line rule to determine whether the economic loss doctrine bars recovery: a plaintiff may not recover in tort for economic losses attributable to the defective construction unless the negligence has caused personal injury or damage to property other than the defective structure itself. *Carstens v. City of Phoenix*, 206 Ariz. 123, 75 P.3d 1081 (App. 2003).

Division Two has recently departed from this standard and adopted a three-part test, previously applied only in products liability cases. In *Valley Forge Ins. Co. v. Sam's Plumbing, LLC*, 220 Ariz. 512, 207 P.3d 765 (App. 2009), the court held that three non-dispositive factors should be considered in determining whether contract law or tort law applies: (1) the nature of the defect causing the loss; (2) how the loss occurred; and (3) the type of loss suffered by the plaintiff. Under this test, application of the economic loss doctrine does not rest solely on whether there was a personal injury or damage to secondary property.

The first factor analyzes whether the defect poses an unreasonable danger to a person or property, or whether it merely goes to the quality of the construction. The second factor looks at the manner in which the loss occurred, for example, whether the loss resulted from a slow deterioration or a sudden accident or calamity. The third factor examines the nature of the loss claimed and any other contemporaneous losses. Thus, if damage occurs suddenly and accidentally, and the construction defect poses an unreasonable risk of danger to people or other property, the economic loss doctrine will not preclude a tort claim, even if the *only* loss is damage to the defective structure itself. *Id.*

This test was first articulated by the Arizona Supreme Court in *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 368, 694 P.2d 198 (1984), a products liability case. Although in *Carstens*, Division One of the Arizona Court of Appeals refused to extend its application to construction defect cases, Division Two did so in *Valley Forge*, reasoning that the same policy concerns exist in both contexts. *Valley Forge* recognized that it was at direct odds with *Carstens'* existing rule, creating an apparent split in the divisions.

Unfortunately, a petition for review was not filed in *Valley Forge*, leaving the state of the law in this area uncertain. But recently, Division Two decided *Hughes Custom Building, L.LC. v. Davey*, 2009 WL 1260171 (Ariz. App. May 7, 2009), and reaffirmed its holding in *Valley Forge*. A petition for review has been filed in that case, which squarely presents the issue of whether the three-part test articulated in *Salt River* extends beyond product liability cases. Hopefully, the Supreme Court will grant review and resolve this conflict. In the meantime, defendants will need to be prepared to defend against both tests.

B. Professional Negligence Cases

As noted above, Arizona courts have only applied the economic loss doctrine in products liability and construction defect cases. In *Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance Inc.*, 2009 WL 755285 (Ariz. App. Mar. 24, 2009), the Court of Appeals addressed whether the economic loss doctrine applies to a claim for professional negligence against a design professional. The court held that the doctrine does not apply to "design defect" claims. This is because design professionals have a special, professional duty independent of any contractual obligation.

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Waiver of the Fifth Amendment Privilege in the Context of Civil Litigation

By Eric L. Cook

The Fifth Amendment privilege is an "essential mainstay" of our "American system of criminal prosecution." *Malloy v. Hogan*, 378 US. 1, 7 (1964). Hollywood movies portray and have caused many of us to think of the Fifth Amendment as arising solely in criminal matters. Yet, issues involving the privilege are not limited to criminal proceedings. "It is well recognized under the law that a party may invoke his or her Fifth Amendment privilege against self incrimination in a civil case." *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him to not answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz. v. Turley*, 414 U.S. 70, 77 (1973). The "privilege against self-incrimination does not depend upon the likelihood, but upon the **possibility** of prosecution" and also covers circumstances where disclosures would not be directly incriminating, but could provide an indirect link to incriminating evidence. *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000).

The potential for invoking the Fifth Amendment privilege must be considered at the outset of any civil case involving potential criminal charges. Counsel must evaluate anticipated potential testimony, discovery responses, disclosure statements, and even pleadings filed with the court, to guard against the risk of a client inadvertently waiving the Fifth Amendment privilege. If potentially incriminating statements are divulged in discovery responses, disclosure statements and pleadings, counsel should assume that the government will have access and will use any incriminating information and statements against one's client to prove criminal liability. For that reason, counsel must evaluate a client's potential need to invoke the Fifth Amendment privilege when undertaking representation in a civil proceeding.

The Fifth Amendment privilege is triggered when a party is asked a question for which the answer might incriminate him. In fact, the only way the privilege can be asserted in a civil case is on a question-by-question basis. Thus, as to each question asked, the party has to decide whether or not to assert his Fifth Amendment right. *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000). In order to find a waiver, the court **must** find an "express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment" before compelling a party to testify in a civil proceeding and thereby subjecting him to the possibility of criminal prosecution. *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980). Where the court seeks to compel a party to respond to a discovery request, despite the invocation of his/her Fifth Amendment privilege, there is a temptation to answer such discovery requests on the mistaken assumption that such answers would be excluded in a subsequent criminal trial because

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Announcements & Speaking Engagements

JS&H is pleased to announce that **Daniel O. King** has joined the firm as an associate. He will concentrate his practice on general civil litigation, including commercial and business litigation.

Eileen GilBride will be speaking on case law updates regarding the Notice of Claim Statute at the Western Regional Conference for the Public Risk Management Association of Arizona and the Arizona Central Risk & Insurance Management Society on July 30, 2009 in Flagstaff, AZ.

Georgia Staton presented "Opening Statements to Closing Arguments," at the State Bar Trial Advocacy Today seminar on June 4, 2009. **Georgia** was also a panel member for the State Bar Convention session entitled, "Courtroom Ethics--Ethical Dilemmas of Trial Lawyers Inside the Courtroom," on June 24, 2009.

Jennifer Holsman will be one of 50 members of Valley Leadership's Class XXXI for 2009-2010.

To Remove or Not to Remove: The Effect of Federal Preemption on Federal Removal Jurisdiction

By Matthew G. Hayes

A defendant may remove a case to federal court from state court only if the district court would have jurisdiction over the case had it been brought there originally. A federal district court has original jurisdiction over cases arising under federal law and diversity cases (i.e., citizens living in different states and amount in controversy is $75,000 or more). Federal question jurisdiction is also called "subject matter" jurisdiction. A federal district court is a court of limited jurisdiction, which means there must be subject matter jurisdiction (either a federal question or diversity) for a federal court to hear a given case.

A case does not "arise under" federal law for purposes of removal to federal court unless a federal question is presented on the face of the plaintiff's complaint. This is known as the "well-pleaded complaint rule." Where a plaintiff elects to bring only state law causes of action in state court, no federal question will appear in the complaint to satisfy the well-pleaded complaint rule, and the case cannot be removed. This makes the plaintiff the master of the complaint, as the plaintiff may simply avoid federal jurisdiction by relying exclusively on state law.

Very often a plaintiff will file a complaint in state court alleging exclusively state law claims that are preempted by federal law. When this occurs a defendant may desire to remove the case to federal court on the ground of "federal preemption." Preemption is the power of federal law to substantively displace state law. This power derives from the Supremacy Clause of Article VI of the U.S. Constitution. The federal preemptive power may be "complete" preemption, providing a basis for jurisdiction in the federal courts, or it may be what has been called "ordinary" or "conflict" preemption, providing a substantive defense to a state law action on the basis of federal law. *Geddes v. American Airlines, Inc.* 321 F.3d 1349, 1352 (11th Cir. 2003). In other words, a federal law may substantively displace state law under ordinary preemption, but lack the extraordinary force to create federal removal jurisdiction under complete preemption.

To explain further, ordinary preemption may be invoked in both state and federal court as an affirmative defense to the allegations in a plaintiff's complaint. *Metropolitan Life Ins. v. Taylor*, 481 U.S. 58, 63 (1987). Under ordinary conflict preemption, state laws that conflict with federal laws are preempted, and preemption is asserted as a federal defense to the plaintiff's suit. Because ordinary preemption arises as a defense, it does not appear in the plaintiff's well-pleaded complaint. Thus, when ordinary preemption is asserted as a defense to a state law claim, the state claim is not converted into a federal claim, and there is no federal question giving rise to removal jurisdiction.

In contrast, complete preemption is a narrowly drawn jurisdictional rule for assessing federal question removal jurisdiction when a complaint asserts only state law claims. *Metropolitan Life*, 481 U.S. at 63. It looks beyond the complaint to determine if the suit is, in reality, purely a creature of federal law, even if state law would provide a cause of action in the absence of the federal law. It transforms the state claim into one arising under federal law, thus creating the federal question jurisdiction required for removal to federal court.

Unlike ordinary preemption, complete preemption serves as an exception to the "well-pleaded complaint rule." It provides that, in some instances, the preemptive force of federal statutes is so strong that it completely preempts an area of state law, and any claim purportedly based on that preempted state law is considered, from its inception, a federal claim arising under federal law. *See Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1183 (9th Cir. 2002). Complete preemption occurs, however, only when Congress intends not to merely preempt a certain amount of state law, but actually intends to completely transfer jurisdiction of the subject matter from state court to federal court. The test is whether Congress clearly manifested an intent to convert state law claims into federal-question claims.

Only complete preemption statutes provide a basis for federal question jurisdiction when pled as a defense; ordinary preemption statutes do not. *See Haller v. Kaiser Foundation Health Plan of the Northwest*, 184 F.Supp.2d 1040, 1045 (D.Or. 2001). Consequently, it is possible for some or even all of the plaintiff's claims in a particular action to be preempted by federal law, yet federal question jurisdiction is absent. Complete preemption has been found in several federal statutes, including ERISA, the

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You're Not in Kansas Anymore: A Cautionary Tale of a Buyer's Market in Arizona Real Estate

By Eric L. Walberg

The current downturn in the real estate market, combined with the credit crunch, has severely reduced the number (but increased the importance of the impact) of real estate transactions. The value of a ready, willing and able Buyer has never been higher. But neither has the risk of potential litigation regarding the real or perceived use of the Buyer's leverage to avoid a closing in favor of the "better deal." Arizona is not unique in experiencing this phenomena, but the combination of two Arizona contract interpretation rules significantly alters the risks of purchasing real estate in Arizona, which may not be fully appreciated even by a sophisticated Buyer or Seller outside of our state. This may be so even if that Buyer or Seller has previously bought and sold real estate in Arizona.

The first of these two unique contract interpretation rules is that the judge or arbitrator is forbidden from rewriting the terms of the agreement. The second allows into evidence oral or other extraneous evidence outside the "four corners of the contract" in interpreting an agreement (i.e., a broad interpretation of the "parole evidence rule"). This article explores these Arizona-unique contract interpretation rules in the context of a real estate purchase agreement in what a person might expect outside of Arizona. The ready, willing and able Buyer cannot maximize its leverage in the down market without an appreciation of the impact of these two Arizona-unique rules on the following "boiler plate" provisions:

> This agreement constitutes the entire agreement of both parties, and all previous communication between both parties whether written or oral with the reference to the subject matter of this agreement is canceled and superseded.
>
> In the event that any provision of this agreement is deemed vague or unenforceable, the parties agree that the [judge/arbitrator] shall rewrite the provision to be enforceable and/or to reflect the intent of the parties.

Including the latter provision in an effort to insert "flexibility" and maximize a Buyer's leverage in a down market could have the unintended consequence of bogging the Buyer down in litigation, thanks to the two Arizona-unique contract interpretation rules.

For example, a common issue addressed in a real estate purchase contract is a financing contingency for the Buyer. The ready, willing and able Buyer might wish to keep its "options open" by requiring that the financing contingency language be drafted in such a manner that it can "escape" the deal if another more advantageous deal comes along. The ready, willing and able Buyer in this market can demand and receive a rather vague financial contingency provision that on its face places little or no parameters on the source or terms of financing it might be required to pursue, believing that providing such terms might require the Buyer to provide more information about its efforts than it might want to divulge to the Seller. By insisting in this flexibility, however, it may unwittingly open itself up to litigation in Arizona because the Seller is able to press the ready, willing and able Buyer to provide more detail about its efforts to secure financing than the Buyer is accustomed to providing in other states. If the ready, willing and able Buyer balks at providing this information, the unique contract interpretation rules in Arizona can provide the leverage to the Seller against the Buyer by asserting that either the brokers or parties involved in the negotiation of the agreement envisioned that the ready, willing and able Buyer would pursue a certain type of financing. In the end, the Seller can claim that although the explicit terms of the agreement do not set forth what efforts the Buyer must undertake or agree to, the parties cannot let the Buyer out of the contract by claiming a failure to obtain acceptable financing for the purchase of the real estate.

In the example above, the next move by the ready, willing and able Buyer might be to point out to the Seller that the financing contingency language in the contract is so broad that the Buyer need only claim the inability to obtain "acceptable" financing, and the contract is terminated. The problem with this approach is that it opens the door to the second Arizona-unique rule of contract interpretation: that the judge or arbitrator cannot rewrite the contract, notwithstanding inclusion of a contract term expressly providing to the contrary. The Seller will counter that the ready, willing and able Buyer is simply trying to insert certainty into a contract that did

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Appellate Highlights

Sage v. Blagg Appraisal Company, LTD
AZ Court of Appeals
An appraiser retained by a lender to appraise a home in connection with a purchase-money mortgage may be liable to the prospective buyer for failure to exercise reasonable care in performing the appraisal.

Brethauer v. General Motors Corporation
AZ Court of Appeals
When consumers have expectations as to how safely a product will perform, a "consumer expectation test" jury instruction should be given.

Arnulfo Santa Maria et al. v. Rafael Najera
AZ Court of Appeals
A trial court's denial of a motion for new trial from a grant of partial summary judgment is not an appealable order in Arizona state court.

Howell v. Hodap & Johnson
AZ Court of Appeals
Where a subsequent civil action arises out of the same "nucleus of facts" and all of the claims could have been addressed in the first action, claim preclusion will apply even where the court considering the second action has more expansive remedies or protections available to a plaintiff.

Quintero v. Rodgers
AZ Court of Appeals
Damages for loss of enjoyment of life (hedonic damages) equate to damages for pain and suffering, which are not recoverable under Arizona's Survival Statute. Punitive damages survive death, however, and are not precluded under the survival statute.

Jilly v. Rayes (Carter)
AZ Court of Appeals
The statute requiring a plaintiff in a medical malpractice case to serve a "preliminary expert opinion affidavit" with the initial Rule 26.1 disclosures does not conflict with the Arizona Rule of Civil Procedure requiring simultaneous disclosure of expert witnesses thirty to ninety days after the pretrial conference, and is therefore constitutional.

Joseph M. Arpaio v. The Hon. Normal J. Davis, et al.
AZ Court of Appeals
Where blanket requests for public records would require an unreasonable expenditure of resources and time, the public entity's denial of the records is proper.

Top Ten Ways to Commit Bad Faith

By Donald L. Myles, Jr.

In a recent article in the Bad Faith Reporter, there was a list of 10 things insurance companies do to "mess up" their files. I've modified the list somewhat and present it to you in the Top Ten "Letterman" format with explanation. Although hopefully humorous, it is meant to be a reminder of conduct to avoid lest you be deposed on the file someday.

10. Forms

The public loves them. Never mind that many of them have nothing to do with the claim at hand. If you have a form, ask that it be filled out, preferably twice. For the best results, send out all the forms one by one spaced 2-3 weeks apart.

9. Disparagement

Never miss an opportunity to insult the insured or the insured's lawyer with notes in the file. Brainstorming with co-workers at lunchtime and making entries later is the best way to come up with the funniest insults.

8. Inconsistency

Life can sometimes be boring. Why miss the opportunity at work to treat similar claims or insureds differently? Make every effort to interpret coverages differently or value similar claims differently. If possible, enter incorrect figures into a computer program that evaluates claims and never waver from what the computer tells you. Computers are always right.

7. Alzheimer's

Why make an effort to write down important information in the claim file? Rely on your superior intellect and ability to re-create the file years later under the pressure of a deposition.

6. Savings

Try to make the underwriting department look good by underpaying claims or making low-ball offers to improve the loss ratio of the Company. The CEO will be impressed and give you a big raise and stock options.

5. Surprise

Don't inquire as to the experience of defense counsel. I mean, we all started somewhere. It's much more fun to find out after an adverse result that the attorney for the insured never tried this type of case before.

4. Bias

Make it appear that the insurance company is looking for a way not to pay the claim. Later you can convince the jury that it was just a coincidence that everything you highlighted or underlined in the file was adverse to the insured's interest.

3. Prejudgment

(See also bias) This one is so good I had to bring it up again. Investigations will go quicker and you will save time if you first come up with a theory and then do only the investigation necessary to support your theory (i.e., fire = arson).

2. Reservation of rights

Do it early and often. More is better. The longer you can string cite provisions of the policy, the stronger your basis for denial. *Damron* and *Morris* agreements should not be feared ….. so what if the insured stipulates to a $1 million judgment on a $15,000 policy?!

1. Delay

Everyone knows that if you wear down the insured you pay less on the claim. The jury will not hold it against you in a bad faith trial. They simply see this as a game. Call the insured at lunchtime. Call him at home when you know he is at work. Whenever possible, mail letters. This gives you additional time which will help in accomplishing the objectives set forth in number 6 above.

I hope you enjoyed my attempt to put a little humor into reminding us all what obligations exist in complying with the duties of good faith and fair dealing. Although rephrased to be funny, all of these scenarios are taken from actual cases. Needless to say, such conduct can produce significant hurdles in defending a bad faith case. It can also prove to be detrimental to an adjuster's health and overall longevity. ◆

BAD FAITH continued from Page 1

related, suggested conservative treatment rather than surgery, and indicated that the employee was able to perform light-duty work.

The parties disagreed about the employee's ability to perform light-duty work and her course of treatment, so the ICA set the case for hearing. The adjuster for the employer believed surgery was warranted, but on the advice of counsel, the employer took a contrary position and also contested that the claim was work-related. A second IME was set "to support the denial." The second IME was inconclusive, however, so the employer accepted the claim but denied surgery. A third IME was set to determine the course of treatment, and it indicated that surgery was warranted.

Surgery was performed, and although technically successful, the employee complained of persistent pain. A fourth IME was performed to determine its cause. The IME physician believed the pain was related to the work injury and wanted to refer the employee to other physicians to conservatively treat the pain. The employer refused to refer the employee and sent her to yet another IME with a different doctor. The second doctor confirmed the prior doctor's findings, but felt that a second surgery was warranted. He requested the employer to approve the surgery, which it refused to do because the matter was "in litigation." Another IME was performed and the doctor found the employee's symptoms "disproportionate" and wanted further diagnostic studies. Following those studies, another IME was conducted but the employee was unaccompanied by her English-speaking relative and could not understand the doctor's questions. The doctor terminated the IME, causing the employer to terminate benefits.

Subsequently, a second surgery was performed, after which the employee still complained of pain and an inability to work. Her lawyer then requested benefits for psychological care and treatment, but the employer refused. A hearing was held and the ALJ found in favor of the employee and awarded her compensation benefits and treatment for psychological injury.

In 2000, the employee sued the employer for bad faith in its handling of her workers' compensation claim. Eventually, the case went to trial where the jury awarded the employee $250,000 in compensatory damages, but did not award punitive damages. Both parties appealed. The Court of Appeals reversed the trial court's decision and remanded the case for a trial on the issue of compensatory and punitive damages.

<u>The Court of Appeals Ruling</u>

In reversing and remanding, the Court of Appeals, Division 1, held that:

1. A plaintiff in a workers' compensation bad faith case is entitled to seek pain and suffering, lost earnings and decrease in future earning capacity, and future medical expenses, so long as she can show the injuries were a result of the defendant's bad faith conduct (i.e. delay) and not the original injury;

2. A self-insured corporation implicitly waives the attorney-client privilege by asserting that its claim adjusters acted reasonably in the handling of the workers' compensation file. This defense necessarily implicates the advice and judgment the corporation receives from defense counsel;

3. A self-insured corporation is not only responsible for the actions of its claims adjuster employees, it is also responsible for its attorneys' actions;

4. The trial court erred in finding that the issue of punitive damages should not have been considered by the jury.

<u>Analysis</u>

The Attorney-client privilege

Relying on *State Farm v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (2000),[1] the employer asserted it had not waived the attorney-client privilege because it never relied on the "advice of counsel," and never argued its adjusting was "subjectively reasonable based upon its understanding of the law." The Court of Appeals rejected that argument, however, finding that the employer in *Mendoza* implicitly waived the attorney-client privilege

[1] *Lee* involved a class action by policyholders claiming that the insurer unreasonably prohibited stacking of Uninsured Motorist and Underinsured Motorist benefits. The carrier defended, claiming its interpretation of law was "subjectively" reasonable. The Arizona Supreme Court determined that the carrier had implicitly waived the attorney-client privilege because its defense incorporated what it learned from its lawyers.

because "when an insurer raises a defense based upon factual assertions that, either explicitly or implicitly, incorporates the advice and judgment of counsel, it cannot deny an opposing party the opportunity to discover the foundation for those assertions in order to contest them." *Mendoza* at *11 (citing *Lee* at 61, 13 P.3d at 1178).

The Court of Appeals also noted that in *Mendoza*, the employer affirmatively asserted that its actions in investigating, evaluating and paying the claim were subjectively reasonable and taken in good faith. Throughout the litigation, the employer claimed it was acting in the employee's best interest and using information from IMEs to determine her best course of treatment. By doing so, said the court, the employer affirmatively placed at issue its subjective motives. *Mendoza* at *12.

Punitive Damages

The Court of Appeals determined that the issue of punitive damages should have gone to the jury for several reasons. There was evidence in the claim file that the employer sought IMEs for the purpose of cutting or closing claims. Further, the employer knew from the outset that the employee was Spanish-speaking and needed an interpreter. It nonetheless terminated benefits after its IME physician halted the examination because the employee could not understand or answer his questions. Additionally, there was evidence that the employer ignored warnings of the employee's treating physician that a delay of surgery could lead to permanent injury. The evidence also showed that the employer terminated temporary total disability benefits without determining if it could actually provide light-duty work. It also claimed that the employee had not timely protested its denial of surgery, a position it knew was without merit.

Moreover, the Court of Appeals held that although the employer's liability for bad faith was no longer an issue, the state of mind of its adjusters was relevant to the issue of punitive damages. Thus, the material redacted as attorney-client privileged could have been relevant to the punitive damage claim.

Conclusion

It is unknown at this time if the employer will petition the Arizona Supreme Court for review or if the Supreme Court would accept review if a petition is filed. Regardless, the *Mendoza* decision will have an immediate impact, not just in the workers' compensation context, but in all bad faith cases. The opinion appears to have significantly undercut the Supreme Court's holding in *Lee* in that the attorney-client privilege will likely be deemed waived in **all** cases in which an insurer raisers a defense based upon factual assertions that implicitly incorporate the advice and judgment of its defense counsel.

Furthermore, based upon *Mendoza's* ruling on punitive damages, it will probably be more difficult to convince trial courts to dismiss punitive damage claims in similar contexts on summary judgment. Trial courts will likely be more willing to allow such claims go to the jury.

We urge all of our clients who are currently engaged in bad faith cases to immediately reassess defense strategies to avoid the harsh consequences the employer was faced with in *Mendoza*. ◆

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This approach is consistent with Arizona courts permitting negligence claims against other professionals such as attorneys and accountants. Although federal courts in Arizona are split on this issue, the recent trend is to allow such claims to proceed. *See Evans v. Singer*, 518 F.Supp.2d 1134 (D. Ariz. 2007). The reasoning and analysis of these cases are persuasive. At least for now, it appears that the economic loss doctrine is restricted to products liability and construction defect cases. ◆

IME DOCTORS continued from Page 1

patient relationship between he and Dr. Krasner. Dr. Krasner then performed the IME and reviewed plaintiff's records and MRI results. Dr. Krasner concluded that plaintiff's injury was stationary, and there was no need for further care. The workers' compensation carrier then terminated plaintiff's benefits, and the plaintiff, relying on Dr. Krasner's findings, did not immediately seek further medical care.

Approximately eight months later, the plaintiff sought additional treatment and was diagnosed with a cervical spinal cord compression and underwent immediate spinal cord surgery. There was evidence that the failure to diagnose the spinal cord compression earlier contributed to an increasing and ongoing injury to plaintiff's spinal cord. The plaintiff sued Dr. Krasner (among others), and the jury rendered a verdict for plaintiff, finding Dr. Krasner 28.5% at fault.

The Court of Appeals affirmed in a published opinion, finding that Dr. Krasner owed a duty of care to the plaintiff, despite the absence of a formal doctor/patient relationship between the IME doctor and the patient. The court thus limited the ruling in *Hafner v. Beck*, 185 Ariz. 389 (App. 1995), which had held that a duty arises only when a doctor/patient relationship exists. The court limited *Hafner* to the proposition that a doctor owes no duty to a patient only when the doctor has no intent "to treat, care for or otherwise benefit the employee." *Ritchie* at ¶ 13 (quoting *Hafner*, 185 Ariz. at 392).

The court in *Ritchie* also followed the Arizona Supreme Court's lead set forth in *Stanley v. McCarver*, 208 Ariz. 219 (2004), which found that a formal relationship is not the only source of a doctor's duty toward a patient. In *Stanley*, the doctor performed a pre-employment screen on behalf of the plaintiff's employer. In examining the x-rays, the doctor found abnormalities in the plaintiff's lungs but did not report them to the plaintiff, and ten months later the plaintiff was diagnosed with lung cancer. The court held that even though there was no formal relationship between the plaintiff and the doctor, the doctor did agree to examine the plaintiff's medical records and accurately report them to the employer, and by doing so, he was in a "unique position" to prevent future harm. *Stanley*, 208 Ariz. at 223. The court reasoned that when a patient places "oneself in the hands of a medical professional, even at the request of one's employer or insurer, one may have a reasonable expectation that the expert will warn of any incidental dangers of which he is cognizant due to his peculiar knowledge of his specialization." *Id.*

Adopting the rationale of *Stanley*, the court in *Ritchie* held that "an IME doctor has a duty 'to conform to the legal standard of reasonable care in the light of the apparent risk.'" *Ritchie* at ¶ 18 (quoting *Stanley*, 208 Ariz. at 224). The court noted "we can envision no public benefit in encouraging a doctor who has specific individualized knowledge of an examinee's serious abnormalities to not disclose such information." *Id.* at ¶ 19.

Surprisingly, the court gave only short shrift to the "chilling effect" their decision would have on the willingness of physicians to perform IMEs. In *Hafner*, the court very seriously contemplated that "[i]f an IME practitioner's evaluations, opinions, and reports could lead not only to vehement disagreement with and vigorous cross-examination of the practitioner in the claims or litigation process, but also to his or her potential liability for negligence, the resulting chilling effect could be severe." *Hafner*, 185 Ariz. at 391. The *Ritchie* court, to the contrary, noted that the ethical standards governing physicians would likely limit the threatened flood of litigation. They also noted that IME doctors do not have a duty to perform a thorough enough IME to discover every potentially harmful condition to a patient's health. The court clarified it was not holding that every IME physician has a duty of care in every situation. But because Dr. Krasner was hired to determine the extent of the plaintiff's work-related injury and make treatment recommendations, the court found that he assumed a duty of care, and it was for the jury to decide whether he breached that duty.

Yet the "chilling effect" is not, and cannot be, so easily dismissed. In light of this holding, it is hard to imagine any situation where an IME doctor would not subject himself to a medical malpractice claim when performing an IME. Those who perform IMEs in workers' compensation cases are especially at risk, because there, an IME can often determine whether benefits are extended or terminated. Although there is a smaller risk in the third-party liability context, given that those IME opinions do not generally dictate whether a surgery will be performed or treatment is rendered, the overriding concern for every IME physician after *Ritchie* will be: what will happen if I disagree with the treating physician?

Imagine the following: a woman involved in a car accident claims she herniated a cervical disc. The defense attorney obtains an IME, which concludes that the

herniated disc pre-existed the accident. At trial, the jury agrees with plaintiff and awards her full damages. Under *Ritchie*, is the IME physician now subject to a medical malpractice claim? Is the notion that reasonable minds can differ simply a thing of the past? Is the jury verdict no longer the end of the road, but rather merely the beginning? Where do we draw the line? These are questions which we for now have no answers. What is clear is that by virtue of this holding, a number of greatly respected and skilled physicians will decide in light of these unanswered questions that the risk is simply too great and decline to perform IMEs at all. Unfortunately, this is the very "chilling effect" *Hafner* sought to avoid.◆

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the information was compelled by the court. The United States Supreme Court in *Maness v. Meyers*, 419 U.S. 449 (1975), warned, however, that a client who divulges information in response to a court order without testing that order on appeal, does so at his/her own peril.

Although the foregoing highlights some of the dangers regarding waiver of the Fifth Amendment privilege in cases where parallel proceedings are occurring or may yet occur, there are some options to help avoid such perils. For example, counsel may attempt to obtain a stay of the civil proceedings while the criminal proceedings are pending. This is by far the most preferred situation. In the alternative, it is advisable to at least consider the possibility of settling the civil litigation before any responsive pleading is due. Otherwise, counsel must navigate a client through civil proceedings fraught with the risk of waiving the privilege, at least so long as the potential for criminal prosecution remains. ◆

REMOVAL continued from Page 4

Labor Management Relations Act, the Federal Railroad Safety Act, the Railway Labor Act, and in the possessory interest of Indian tribes to lands obtained by treaty.[1] Preemption under 42 U.S.C.A. § 1983, the Federal Labor Standards Act, the Federal Food Stamp Act, the Racketeer Influenced and Corrupt Organizations Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Toxic Substances Control Act have been held not to be completely preempted.[2]

In summary, when a plaintiff files a complaint in state court and alleges exclusively state law claims that are preempted by federal law, a defendant cannot remove the case to federal court on the grounds of federal preemption unless plaintiff's claims are brought under federal statutes that completely preempt an area of law, or where diversity jurisdiction exists. ◆

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[1] *Gaming Corp. of America v. Dorsey & Whitney,* 88 F.3d 536, 543 (8th Cir. 1996).

[2] *See Hogan v. Transamerica Commercial Finance Corp.,* 1992 WL 225565, 2 (N.D.Ill.1992); *Hurt v. Dow Chemical Co.,* 963 F.2d 1142 (8th Cir. 1992); *Chappell v. SCA Services, Inc.,* 540 F. Supp. 1087 (C.D. Ill. 1982); *Wolfe v. Tackett,* 2009 WL 973442, 8 (S.D.W. Va. 2009).

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not contain certainty, something an Arizona arbitrator or judge cannot do. This would require an Arizona arbitrator or judge to delve deeper into the "real intentions" of the parties, and to look to oral or other evidence outside the "four corners" of the contract. Ultimately, this results in a potentially vicious cycle of investigation into the contract that the ready, willing and able Buyer may never have envisioned when signing the sales contract. Because the Arizona arbitrator or judge cannot re-write the contract, there is no clear end game for either side.

The value of the ready, willing and able Buyer's leverage is a function of how many deals it can be involved with at any one time, and how motivated the Seller is to close the deal to possibly become the ready, willing and able Buyer himself. The dynamics of the real estate deal are rarely known by the parties and can change quickly, but often the parties (including brokers) fool themselves by believing they understand these dynamics. For example, the respective brokers or other agents (including legal counsel) of the Buyer and Seller can be fully informed of the motivations of both parties in entering the deal, but in the course of due diligence, the Seller or Buyer might be introduced to a totally unrelated third deal that they simply cannot pass up, making the closing (or failure to close) so important that they are willing to risk the relationship by killing (or forcing) the deal.

The moral to this story? Drafting clear contracts (including well-drafted amendments) will significantly reduce the risk of becoming bogged down in litigation or the threat of litigation in an Arizona real estate transaction.◆

About The Authors

Nicholas D. Acedo
Mr. Acedo joined Jones, Skelton & Hochuli in 2008 and concentrates his practice on federal and state appeals. He received his law degree from Creighton University School of Law and is admitted to practice in Arizona, the United States District Court, District of Arizona, the U.S. Supreme Court and the U.S. Court of Appeals, Ninth Circuit.

Jennifer A. Baker
Ms. Baker joined Jones, Skelton & Hochuli in 2007 and concentrates her practice on federal and state appeals and governmental liability. She received her law degree from the University of Arizona College of Law in 2006 and is admitted to practice in Arizona.

Eric L. Cook
Mr. Cook joined Jones, Skelton & Hochuli as an associate in 2004. He concentrates his practice on insurance coverage. Mr. Cook received his law degree from the University of the Pacific, McGeorge School of Law in 1997. He is admitted to practice in Arizona.

Matthew G. Hayes
Mr. Hayes joined Jones, Skelton & Hochuli as an associate in 2008 and concentrates his practice on governmental liability, insurance defense and retail law. He has conducted bench and jury trials and numerous hearings in State Courts throughout Arizona. Mr. Hayes received his law degree from the University of Tulsa College of Law in 2005 and is admitted to practice in Arizona.

Christina Kelly Geremia
Ms. Geremia practices in the area of insurance defense. She received her law degree in 1998 from the McGeorge School of Law, where she was awarded the Order of the Barristers. Ms. Geremia is admitted to practice in all state and federal courts in Arizona.

Donald L. Myles, Jr.
Mr. Myles has been a partner with Jones, Skelton & Hochuli since 1987 and concentrates his practice on insurance coverage and bad faith, professional liability, products liability and commercial litigation. He is admitted to practice in all state and federal courts in Arizona as well as the Ninth and Tenth Circuit Courts of Appeal, and the United States Supreme Court.

Les S. Tuskai
Mr. Tuskai has been a partner with Jones, Skelton & Hochuli since 2007. He concentrates his practice on insurance bad faith/extra-contractual liability, insurance consulting, insurance coverage and disputes, professional malpractice, and other areas of complex civil litigation. Mr. Tuskai is admitted to practice in Arizona and Missouri state courts and received his law degree from Drake University Law School in 1988.

Eric L. Walberg
Mr. Walberg joined Jones, Skelton & Hochuli as an associate in 2003 and practices in the areas of civil and commercial litigation, corporate and transactional law, and municipal liability. He received his law degree and Certificate in International and Comparative Law from the Chicago-Kent College of Law. He is admitted to practice in both state and federal courts in Arizona and Illinois.

Notes

JONES, SKELTON & HOCHULI, P.L.C.
2901 NORTH CENTRAL AVENUE, SUITE 800
PHOENIX, AZ 85012

PRESORTED
STANDARD MAIL
US POSTAGE PAID
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PERMIT 774

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