the Firm Inquiry

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BROWN & JAMES P.C. LAW FIRM

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Brown & James – Once Again Missouri Lawyers Weekly's Top Defense Firm in 2009

Missouri Lawyers Weekly has recognized Brown & James for the second year in a row as the winningest defense firm in Missouri.

Missouri Lawyers Weekly also named four Brown & James lawyers as the winningest individual defense lawyers of 2009. These lawyers – **Joe Swift, Bob Brady, Brad Hansmann,** and **Irene Marusic** – tied for second place in Missouri Lawyers Weekly's top defense lawyer rankings. In addition, two other Brown & James lawyers – **Bob Cockerham** and **John Rahoy** – were recognized for receiving top defense verdicts in cases in which the plaintiffs' demands before trial exceeded $1 million.

Brown & James' continued success as Missouri's top defense firm demonstrates that even in large damage cases jurors will weigh the evidence and return defense verdicts in those cases that are well prepared and properly presented by defense counsel.

Limitations on UIM Coverage Go the Way of the Dinosaurs

Michael Ward

For many years, one of the few certainties in Missouri insurance law was the enforceability of set-off and anti-stacking provisions in underinsured motorist (UIM) policies. Missouri courts, in the absence of a statutory public policy underlying UIM coverage, routinely upheld such limitations on UIM coverage.

Today, this is no longer the case. The Missouri Supreme Court, in a pair of recent decisions, has unleashed a sea change in Missouri insurance law by nullifying UIM set-off provisions and allowing the stacking of multiple UIM coverages.

Jones v. Mid-Century Ins. Co.

The Supreme Court's first significant UIM decision, *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687 (Mo. banc 2009), may sound the death knell for UIM set-off provisions. The Missouri Supreme Court – relying on Missouri's doctrine that any ambiguity between clauses in an insurance policy are to be resolved in the insured's favor – ruled against the insurer in a UIM case. Underlying the Court's decision was its concern over UIM coverage provisions that effectively deny the insured -- or otherwise render illusory -- the stated UIM coverage limit on the policy's declarations page. The Court explained:

> Missouri law is well-settled that where one provision of a policy appears to grant coverage and another to take it away, an ambiguity exists that will be resolved in favor of coverage. This is particularly true where, as here, Mid-Century's interpretation of the policy language would mean that it never actually would be required to pay its insureds the full amount of underinsured motorist coverage its policy ostensibly provides. Such a result is not permitted under Missouri law.

Id. at 689.

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Man's Best Friend No More?: Missouri Adopts Strict Liability for Dog Bites

David P. Bub

On August 28, 2009, Missouri Senate Bill 184, relating to liability of dog owners for injuries caused by their dogs, officially became the "law of the land" in Missouri. The new law provides for one of the most sweeping changes in animal liability law in Missouri in the past fifty years.

Section 273.036.1, R.S.Mo. Cum. Supp. 2009, states:

> The owner or possessor of any dog that bites, without provocation, any person while such person is on public property, or lawfully on private property, including the property of the owner or possessor of the dog, is strictly liable for damages suffered by persons bitten, regardless of the former viciousness of the dog or the owner's or possessor's knowledge of such viciousness. Owners and possessors of the dogs shall also be strictly liable for any damage to property or livestock proximately caused by their dogs. If it is determined that the party had fault in the incident, any damages owed by the owner or possessor of the biting dog shall be reduced by the same percentage that the damaged party's fault contributed to the incident. The provisions of this section shall not apply to dogs killing or maiming sheep or other domestic animals under section 273.020.

With this stroke of the pen, the Missouri General Assembly completely undid longstanding Missouri common-law rules governing negligence and premises liability in favor of a strict liability standard in dog bite cases. Before the enactment of the new law, no strict liability claim could be brought because of a dog bite unless the plaintiff could show the defendant had "actual knowledge of an abnormal dangerous propensity of a domestic animal." *Wilson ex rel. Wilson v. Simmons*, 103 S.W.3d 211, 217 (Mo. App. 2003). This standard was commonly known as the "one-bite rule." Further, Missouri law also recognized in dog bite cases, causes of action based on traditional common-law negligence and premises liability principles. Although "actual knowledge" may not be required in such causes of action, the law still required a finding that the dog owner had some sort of notice (either "actual" or "constructive") of a dog's potentially dangerous propensities in order to hold the dog's owner liable for the plaintiff's injuries.

Section 273.036 completely removes these traditional common-law requirements. Under the newly enacted standard, the fact that a dog owner may not have any "notice" of a dog's potentially dangerous propensities is no longer a defense and arguably no longer relevant or admissible evidence in a dog bite case. Rather, under the new law, a dog-bite claimant need only prove that he was lawfully on the premises at the time of the injury and did not provoke the dog before the injury. If these two elements are met, then the dog's owner will be strictly liable for any injuries (and property damage) caused by the dog.

The new law does not leave the dog owner without any defenses in dog bite cases. The new statute specifically states the dog owner's liability "*shall be reduced by the same percentage that the damaged party's fault contributed to the incident*." The statute also specifically includes "provocation" as a defense.

Another potential defense still available in dog bite cases is trespass. Often times, the claimant is not where he should have been when the injury occurs. That is, the claimant did not have the property owner's permission to be on the property where the dog is located. The statute makes clear the trespass defense is still a viable one in the appropriate circumstances.

What is not clear under the new law is whether other potential defenses to liability are available to reduce the dog owner's liability "by the same percentage that the damaged party's fault contributed to the incident," as set forth in the statute. In general, "strict liability," as set forth in Section 273.036, means there are no available defenses to liability, or defenses are limited, if the elements of strict liability are met.

Consider the following example. The claimant is lawfully at your insured's house. The claimant knows your insured has a dog that is kept in the insured's fenced-in backyard and that the dog has a history of biting. The fence gate to enter the backyard has a sign on it reading "*beware of vicious dog/enter at your own risk*." The claimant reads the sign, proceeds to go right though the gate into the backyard, and gets bit by your insured's dog without provocation. Under the old law, "assumption of risk" would be a very strong

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Missouri Supreme Court Issues Opinion on Constitutionality of MedMal Caps

Christine A. Vaporean

The Missouri Supreme Court has issued its much-anticipated decision in *Klotz v. St. Anthony's Med. Ctr*., No. SC90107 (Mo. banc, March 23, 2010), which addresses the constitutionality of the 2005 tort reform provision establishing a single cap of $350,000 on non-economic damages in medical malpractice actions filed after August 28, 2005. Missouri's previous cap of $579,000 had been adjusted annually for inflation and had been interpreted by courts to apply to multiple parties in a lawsuit.

As predicted by some, the Court held the 2005 cap is unconstitutionally retroactive when applied to parties whose causes of action accrued before August 28, 2005, but whose cases were filed after the effective date of Missouri's 2005 tort reforms. The Court's majority declined to rule on the many other challenges to the statute's constitutionality, including challenges based on the Clear Title and Single Subject clause, the Rational Basis requirement, the Equal Protection clause, the prohibition against special legislation, the Due Process clause, the Open Courts

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Missouri's Merchandising Practices Act: Expansive and Still Growing

Kara Helmuth

Missouri's Merchandising Practices Act is one of the most expansive in the country and its protections were recently extended by the Missouri Supreme Court in *Huch v. Charter Communications, Inc*., 290 S.W.3d 721 (Mo. banc 2009).

The Merchandising Practices Act (MPA) is a piece of paternalistic legislation designed to regulate the marketplace for the protection of consumers, and in so doing, prohibits false, fraudulent, or deceptive merchandising practices. The Act's broad scope comes from the fact that the statute does not define deceptive practices, and in so doing, the legislature gave the courts authority to determine in each case whether fair dealing has been violated.

In *Huch v. Charter Communications*, the Missouri Supreme Court latched onto the wide latitude given to the courts by the Missouri General Assembly in the context of determining whether normal contractual and tort based affirmative defenses were available to defeat a MPA claim. In *Huch*, the issue before the Supreme Court was whether or not the "voluntary payment" doctrine, which is a well-established defense in both England and the United States to the recovery of money damages, could be used to defeat a MPA claim. However, before ultimately holding the defense was unavailable to defeat MPA claims, the Court strictly scrutinized the defense and used extremely broad and sweeping language that could be used and applied to other defenses, making MPA claims potentially very appealing to plaintiffs' attorneys.

The Court held: "The Missouri statutes in question, relating to merchandising and trade practices, are obviously a declaration of state policy and are matters of Missouri's *substantive law*." *Id*. at 726 (emphasis added). As such, the Court made clear that it will strictly examine potential affirmative defenses to MPA claims, and if the application of an affirmative defense violates in any way the public policy behind the statute, the defense will not be allowed to defeat the claim.

By way of example, the Court examined other decisions stripping various affirmative defenses that would have had potential applicability to MPA claims. In discussing a case that declined to enforce a forum-selection clause which would have brought a claim outside the MPA's protections, the Court noted "the public policy involved in Chapter 407 [the MPA] is so strong that parties will not be allowed to waive its benefits." *Id*. at 725 (quoting *High Life Sales Co. v. Brown-Forman Corp*., 823 S.W.2d 493 (Mo. banc 1992)). The Court also noted a contract provision requiring arbitration was unconscionable if it would deny the protections afforded by the MPA because it would "unfairly allow companies … to insulate themselves from the consumer protection laws of this State … and would be in direct conflict with the legislature's declared public policy." *Id*. at 726 (quoting *Whitney v. Alltel Comm'n, Inc*., 173 S.W.3d 300 (Mo. App. 2005)). Furthermore, the Court found estoppel to be another affirmative defense that is unavailable in the context of MPA claims because it cannot be used where it would result in fraud. *Id*.

Ultimately, the Court in *Huch* held the "voluntary payment" doctrine, a defense based upon waiver and consent, was not applicable to MPA claims because it would "nullify the protections of the act and be contrary to the intent of the legislature." *Id*. at 727. In so ruling, the Court could not have been any clearer on its intention to closely examine any and all potential affirmative defenses for violation of public policy.

This broad sweeping language opens the door for plaintiffs' attorneys to assert more MPA claims in hopes that any affirmative defenses asserted by defendants will be stricken. As the Missouri Supreme Court has demonstrated that it is more than willing to fiercely protect the public policy behind the MPA, this is an area of expanding liability and one that needs to be closely monitored. Under the MPA, plaintiffs may recover not only actual and punitive damages but also attorney fees. The Court has now made such recoveries easier.

McCracken v. Wal-Mart: When to Plead Workers' Compensation Exclusivity

Matt Diehr

On March 3, 2008, trial was set to begin for J. Michael McCracken in Greene County, Missouri, on a negligence claim against Wal-Mart for injuries he had sustained over three years earlier. McCracken, an employee for IBC, a company that produced and distributed bread products, was injured while delivering bread to a Wal-Mart store when a Wal-Mart employee apparently pushed a bread rack into McCracken's shoulder. On the day of trial, Wal-Mart asserted the trial court did not have subject-matter jurisdiction because McCracken qualified as Wal-Mart's statutory employee under the Missouri Workers' Compensation Law. The trial court granted Wal-Mart's motion to dismiss for lack of subject-matter jurisdiction.

The Workers' Compensation Law contains an "exclusivity" provision. This provision states the rights and remedies provided to an employee under the Law are exclusive of all other rights and remedies, including rights existing at common law. It is clear under this provision that a civil court does not have the power to grant such an employee a remedy. Rather, this power rests with the Missouri Labor and Industrial Relations Commission.

Until recently, it was the routine and accepted legal practice to assert the employer's "exclusivity" defense as a "jurisdictional" issue, *i.e*., which tribunal had jurisdiction over the plaintiff's claim – the Missouri Labor and Industrial Relations Commission or the civil courts. If a worker filed a civil action against his co-worker

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A Year Under the ADAAA

Michael D. Townsend

It has now been more than a year since the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) became law. The ADAAA, which went into effect on January 1, 2009, and the Americans with Disabilities Act (ADA) before it, prohibit discrimination based on an actual or perceived disability in employment and personnel practices. In passing the Amended Act, Congress substantially changed the way the ADA defined "disabled" and greatly increased the number of individuals who could have a covered disability under the Act. Specifically, the Amended Act determines disability without regard to ameliorating measures such as medication, medical supplies, auxiliary aids, and services. As a result, many practitioners predicted that 2009 would see a sharp rise in the number of discrimination claims filed.

Interestingly, in the year following the ADAAA becoming law, the number of disability claims filed with the United States Equal Employment Opportunity Commission (EEOC) did not increase significantly. According to statistics published by the EEOC, 21,451 claims involving a disability claim were filed with the EEOC in the 2009 fiscal year. This number was only a slight increase from 17,734 and 19,453 in the 2007 and 2008 fiscal years, respectively.

Where the ADAAA appears to have had a significant impact, however, is upon suits that have actually been litigated. While the overall number of EEOC enforcement suits dropped between 2008 and 2009, the number of enforcement suits involving disabilities more than doubled. Likewise, the monetary benefits awarded in EEOC enforcement suits for disability claims nearly tripled from 2008 to 2009. Although there has not been a marked increase in the total number of disability claims, it appears those claims that are brought are more likely to be prosecuted by the EEOC and more likely to result in a monetary award.

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Missouri Supreme Court Issues Opinion on Constitutionality of MedMal Caps

Christine A. Vaporean

clause, the right to trial by jury, and the Separation of Powers doctrine. The Honorable Michael Wolff, in a concurring opinion, concluded the post-August 2005 cap violates the right of trial by jury. The Honorable Richard Teitelman, in his concurrence, emphasized that the new cap violates the Equal Protection clause.

The Supreme Court's opinion suggests the version of the caps in effect before August 28, 2005 would apply to the Klotzes and similarly-situated plaintiffs. As the vast majority of these cases have already been resolved, this long-awaited resolution of the challenge to the non-economic damages caps will ultimately have little impact going forward; however, other aspects of the Court's opinion may have a significant impact on the medical malpractice landscape in Missouri overall.

First, the Supreme Court held the Section 538.225, R.S.Mo. Cum. 2009, definition of "legally qualified health care provider," which establishes who may execute an Affidavit of Merit, does not define the qualifications of an expert witness who may be called to testify at trial. The Court explained that to adopt such a standard would be to re-write Section 490.065, which establishes the standards for admitting expert witness testimony in civil cases. Thus, an expert may be asked questions outside his particular specialty at trial, provided he has sufficient "knowledge, skill, experience, training or education" to respond. This aspect of the Court's decision may permit plaintiffs to retain multiple experts to provide Affidavits of Merit, but then proceed to trial with only one liability expert. Such a practice would minimize the expense of pursuing a malpractice case, which was reportedly a significant cause for the reduction in the number of malpractice case filings after August 2005.

Second, the Supreme Court re-affirmed that although Section 538.215, R.S.Mo. Cum. Supp. 2009, requires a jury to express future damages in present value, the plaintiff is not required to present expert witness testimony on present value because the fact that "a dollar today is not the same thing as a dollar payable some years from now" is well within a lay juror's understanding. Under the Court's decision, should a plaintiff elect not to offer such evidence at trial, the defendant would be left either to not raise the issue and run the risk of not obtaining the statute's benefit or to raise the issue himself and highlight the damages requested by the plaintiff.

Third, on the rebuttable presumption governing the value of medical bills, the Court held the trial court properly found the presumption had been rebutted by the evidence presented at a pre-trial hearing. The Court noted the trial court relied on expert testimony that the bills were reasonable, evidence that liens were being asserted against the plaintiffs for the unpaid bills, and that the medical providers had not provided any release of the plaintiff's obligation to pay the difference between the amount billed and the amount paid by insurance. Presumably, the latter basis arises from the Klotzes' agreement with their providers in which they stated they were responsible for the amounts charged regardless of what their insurance paid. We anticipate in future cases plaintiffs will argue that the lack of such a release is sufficient to rebut the presumption.

Who is an Insured? Illinois Now Requires Uniform "Insured" Definitions in Auto Policies

Gregory Odom

With two landmark decisions in 2009, the First and Third Districts of the Appellate Court of Illinois have altered the way underinsured motorist coverage (UIM) policies will be interpreted in Illinois. More importantly, those decisions may also affect how UIM policies are written. Specifically, UIM insurers must now uniformly define the term "insured" throughout an automobile insurance policy. Previously, Illinois courts allowed insurers to define an "insured" differently for different coverage parts in an auto policy, with a definition specific to each type of coverage provided.

To understand the reasoning of the First and Third Districts, it is important to consider Illinois' statutory scheme for automobile insurance policies. Illinois has statutes governing automobile liability coverage, uninsured motorist (UM) coverage, and UIM coverage. Illinois law requires all vehicles operated or registered in Illinois to be covered by a liability policy with minimum liability limits of $20,000/$40,000. 625 ILCS 5/7-601(a). Additionally, Illinois law requires automobile insurers to provide UM coverage in the policies they issue. 215 ILCS 5/143a. The UM coverage must at least be equal to the $20,000/$40,000 minimum liability limits. If the liability limits under a policy are in excess of the minimum liability limits, the UM coverage must be equal to the amount of liability coverage, unless the insured specifically rejects having UM coverage in excess of the statutory minimum limits. 215 ILCS 5/143(a); 215 ILCS 5/143(a)-2(1). If a policy provides for UM coverage in excess of the statutory minimum limits, the policy also must provide for UIM coverage in an amount equal to the amount of UM coverage. 215 ILCS 5/143a-2(4).

Restated, Illinois requires an insurer to provide UM coverage to an insured in an amount equal to the state's minimum liability limits. If the insured's liability limits exceed the statutory minimum limits, the insurer must then provide UM coverage in an amount equal to the liability limits unless the insured specifically rejects the additional UM coverage. If the insured does not reject the additional UM coverage, the insurer must provide UIM coverage to the insured in an amount equal to the UM coverage.

Because liability, UM, and UIM coverage are statutorily linked, Illinois courts have been forced to address whether insurers must provide uniform policy provisions for each type of coverage. Previously, the First District of the Appellate Court of Illinois concluded that an insurer could define an "insured" more narrowly under the UM portion of the policy than under the policy's liability portion. *Cohs v. Western States Ins. Co*., 329 Ill.App.3d 930 (1st Dist. 2002).

In 2009, the First District reconsidered its previous opinion in *Cohs*, ultimately holding an insurer may not define an "insured" more narrowly in the UIM portion of a policy than in the policy's UM coverage part. *Schultz v. Il. Farmers Ins. Co*., 387 Ill. App.3d 622 (1st Dist. 2009). In that case, the First District consolidated two appeals, both of which addressed whether an insurer could define an "insured" in the UIM portion of a policy more narrowly than in the policy's UM portion. *Id*. at 624-25. The plaintiffs argued their insurer could not provide a more restrictive definition of the term "insured" under their UIM coverage part because UIM coverage must equal the amount of UM coverage selected by an insured. *Id*. at 625.

In contrast to *Cohs*, in *Schultz*, the First District focused its analysis on the Illinois statutory scheme governing automobile insurance. The First District noted under the Illinois UM statute that parties are allowed to initially determine who is an insured under the policy for purposes of liability coverage. Once that determination has been made, Illinois law requires the insurer to provide UM and UIM coverage to the insured in the same amount as liability coverage – subject to the caveat that if an insured's liability coverage exceeds the statutory minimum limits, the insured may reject UM coverage in excess of those limits. *Id*. at 628. Accordingly, once a party has been determined to be insured for purposes of UM coverage, the UIM statute prohibits an insurer from either directly or

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A Year Under the ADAAA

Michael D. Townsend

While it is still too early to tell precisely what effect these amendments will have on the overall number of disability claims brought, including those claims the EEOC chooses not to prosecute because of limited resources, it is clear disability claims now have sharper teeth. In the past, the focus of litigation under the ADA was typically on whether the individual had a qualifying "disability" under the Act. Often times, these cases were resolved by summary judgment because claimants could not overcome the high hurdle of establishing that they had a qualifying disability.

Now, because of the new, broader definition of "disabled," that hurdle is much lower. Under the ADAAA, the focus has shifted to whether the individual can otherwise perform the essential functions of the job and whether the employer has engaged the employee in the process of providing a reasonable accomodation.

This shift in focus under the law should be matched by employers. Employers who focus on engaging their employees in a dialog about accommodations reduce the likelihood that any individuals will feel they have been discriminated, whether they are protected under the act or otherwise. Moreover, as the employee's bar realizes the new found potential for discrimination cases and files more claims, employers who find themselves involved in litigation will find that a well-documented accommodation process serves as their best defense.

Where is Your Nerve Center? Establishing Corporate Jurisdiction in Federal Courts

Joshua Stegeman

In February 2010, the United States Supreme Court issued a unanimous decision that clarifies a corporation's state of citizenship for purposes of federal diversity jurisdiction, *Hertz Corp. v. Friend*, No. 08-1107, 2010 WL 605601 (U.S., February 23, 2010). The Court announced a simple test: The "principal place of business" shall be the corporation's "nerve center," which is typically its headquarters. *Id*. at *11.

The Supreme Court held that "headquarters," for jurisdictional purposes, should be construed to refer to the place where a corporation's high level officers direct, control, and coordinate the corporation's activities. *Id*. For all future cases, the Court instructed all federal appellate courts to employ this "nerve center" test.

The Supreme Court's decision is good news for corporations because it should reduce the amount of discovery necessary to establish a corporation's "principal place of business" under the diversity jurisdiction statute. *See* 28 U.S.C. § 1332(c)(1). The diversity statute states "a corporation shall be deemed to be a citizen of any State by which it has been incorporated *and of the State where it has its principal place of business*." *Id*. (emphasis added).

A corporation is still a citizen of any state in which it has been incorporated, but the Supreme Court in *Hertz* has now clarified what is meant by a corporation's "principal place of business." In 1959, Congress enacted a version of the current diversity jurisdiction statute containing the "principal place of business" language. Since that time, the various federal appellate circuits have applied many different tests to determine a corporation's "principal place of business."

The Ninth Circuit, from which the *Hertz* case originated, employed a test that analyzed the "substantial predominance" of a corporation's activities within a state. The Eighth Circuit applied a "total activity" test that analyzed the company's purpose, type of business, and place of operations. Several other circuits used variations of this test. The Third Circuit evaluated the "center of corporate activity." *Hertz*, 2010 WL 605601 at *10. From these many tests, the Supreme Court chose the Seventh Circuit's "nerve center" approach because of its simplicity and identification of "one" place in a state. *Id*. at *11-13.

The Supreme Court cautioned that the burden of persuasion for establishing diversity jurisdiction remains on the party asserting it. *Id*. at *14. However, a corporation must produce proof of its "principal place of business" only when federal jurisdiction is questioned. The corporation will need to demonstrate in such cases that its headquarters is the place where its actual direction, control, and coordination occur.

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Who is an Insured? Illinois Now Requires Uniform "Insured" Definitions in Auto Policies

Gregory Odom

indirectly denying UIM coverage to that insured. *Id*. The First District explained that an insurer's attempt to define an "insured" more narrowly under the UIM portion of a policy than what is provided in the UM portion constitutes an indirect attempt to deny UIM coverage. *Id*. at 629. Thus, the First District held the use of different definitions for who qualifies as an insured for UM and UIM coverage contravenes public policy. *Id*.

Subsequently, the Third District of the Appellate Court of Illinois, relying in part on the *Schultz* opinion, held an insurer cannot define an "insured" more narrowly in the UIM portion of a policy than in the liability portion of the policy. *Desaga v. West Bend Mut. Ins. Co*., 391 Ill.App.3d 1062 (3rd Dist. 2009). In that case, the insured's policy contained an Illinois UIM endorsement that defined an "insured" more narrowly for purposes of UIM coverage than for liability coverage. *Id*. at 1064-65. The insured argued Illinois law requires an "insured," as defined in the liability section of a policy, to be considered an "insured" under the policy's UIM portion as well. *Id*. at 1065.

In reaching its decision, the Third District expanded upon the First District's reasoning in *Schultz* (*i.e*., that Illinois' automobile insurance statutes link UM and UIM coverage) and determined that Illinois' statutory scheme connects liability, UM, and UIM coverage. *Id*. at 1070. The court explained the Illinois legislature intended UM and UIM coverage to complement the insured's liability coverage. *Id*. Accordingly, once an insured has been defined for purposes of liability coverage, the Third District held the insurer must consistently define an insured throughout the policy. Thus, the Third District concluded that an insurer's attempt to define an "insured" differently for UM or UIM coverage than it did for liability coverage would violate Illinois law. *Id*.

Overall, the *Schultz* and *Desaga* opinions are landmark opinions for purposes of interpreting and enforcing automobile insurance policies in Illinois. These decisions suggest that Illinois courts will no longer allow insurers to define an "insured" differently for purposes of liability, UM, and UIM coverage. Perhaps, more importantly, these decisions may force insurers writing automobile policies in Illinois to revisit the language contained in their policies to ensure that an "insured" is defined consistently throughout the policy in order to ensure that their policy language comports with these recent decisions.

The Interpretation of "Occurrence" in Contractors' Insurance Policies

Mario A. Gianino

Most general contractors have Commercial General Liability (CGL) insurance coverage, and these policies frequently contain forms prepared by the Insurance Services Office. In almost every instance, a general contractor's CGL policy requires that damage be caused by an "occurrence" before coverage is afforded under the policy.

Often, general contractors utilize subcontractors to provide the majority, if not all, of the labor and materials they need to carry out a particular project. When a general contractor seeks coverage for damage caused by a subcontractor's faulty workmanship, the term "occurrence" is subject to varying interpretations. In general, the majority of courts have found that faulty workmanship by a subcontractor is not an "occurrence," while some courts have ruled to the contrary.

Courts siding with the majority approach often reason that a subcontractor's poor workmanship, standing alone, is foreseeable and, therefore, does not constitute an "occurrence." For instance, in *French v. Assurance Co. of America*, 448 F.3d 693 (4th Cir. 2006), a subcontractor was hired to install an exterior synthetic stucco system under a construction contract. The system was defectively installed, allowing large amounts of moisture to enter the home, which caused extensive damage to the structure of the home and its walls.

In *French*, the general contractor's CGL policy provided coverage for property damage caused by an "occurrence." The Fourth Circuit of the United States Court of Appeals, in interpreting Maryland law, held the subcontractor's defective workmanship was not an "occurrence" because the insured general contractor's obligation to repair the defective work was not unexpected or unforeseen under the construction contract. *Id*. at 703.

The *French* decision is important because it recognized that damage to the non-defective structure and walls of the home caused by the defective installation of the synthetic stucco system was a covered "occurrence" because the harm was the *result* of the defective workmanship. *Id*. at 704. The court therefore distinguished resulting damage from the faulty workmanship itself. The reasoning behind the court's decision is that the structure and walls of the home were delivered under the construction contract as "defect-free;" therefore, the damage to these materials was unexpected. *Id*. at 704-05.

Yet, some courts limit the amount of coverage under a general contractor's CGL policy even further, requiring the subcontractor's defective workmanship to cause damage to the property of a third-party before affording coverage. For example, in *General Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co*., 205 P.3d 529 (Colo. Ct. App. 2009), a homeowners' association sued its general contractor alleging construction defects. The general contractor, in turn, sued its subcontractors for indemnity. The Colorado Court of Appeals ruled the subcontractors' faulty work did not constitute an "occurrence" under the general contractor's CGL policy because there was no indication that "consequential damage" went beyond the subcontractors' work. *Id*. at 538. The court reasoned that policyholders should bear the burden of taking remedial measures to repair poor workmanship, as business risks, and clarified that CGL policies are not the equivalent of performance bonds. *Id*. at 535.

However, other courts, representing the minority view, take the approach that CGL policies essentially guarantee the satisfactory completion of a project by a contractor, affording broad coverage to general contractors for the faulty workmanship of their subcontractors. The minority view holds that general contractors presume their subcontractors will complete their tasks properly. In *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co*., 137 P.3d 486 (Kan. 2006), the Kansas Supreme Court considered the issue, which was one of first impression before the court. In that case, a subcontractor installed windows in a home and, due to a factory defect, water leaked into the exterior walls of the home, causing the stucco exterior to crack.

In *Lee Builders*, the general contractor's CGL policy provided coverage for an "occurrence," defined under the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id*. at 859. The court held the resulting damage was an "occurrence" because the faulty materials provided by the subcontractor allowed *continuous* exposure of moisture to the home, which, in turn, caused damage to the home that was "both unforeseen and unintended." *Id*.

In Missouri, courts do not differentiate between cases where damage was the result of a general contractor or subcontractor. *Compare Hawkeye-Security Ins. Co. v. Davis*, 6 S.W.3d 419 (Mo. Ct. App. 1999) (holding a general contractor was not covered under its CGL policy despite the fact that subcontractors performed the majority of work), *with American States Ins. Co. v. Mathis*, 974 S.W.2d 647 (Mo. Ct. App. 1998) (holding a general contractor was not covered for the faulty work it performed).

Missouri courts also do not consistently adhere to the majority or minority approaches outlined above, but instead analyze the facts presented to determine whether the underlying case discloses an unintended "occurrence." *Compare Missouri Terrazzo Co. v. Iowa Nat'l Mut. Ins. Co*., 566 F.Supp. 546 (E.D. Mo. 1983) (holding the failure to properly test concrete flooring was an "occurrence"), *with Cincinnati Ins. Co. v. Venetian Terrazzo, Inc*., 198 F.Supp.2d 1074 (E.D. Mo. 2001) (holding the negligent pouring of a cement sub-floor was not an "occurrence"). Therefore, Missouri cases are decided on a case-by-case basis to determine whether the insured contractor intended, expected, or desired the damage to occur.

When analyzing scenarios where damage is caused by a subcontractor's faulty workmanship, it is important to be aware of the differing jurisdictional approaches to the interpretation of the term "occurrence" under CGL policies. While some jurisdictions have clarified whether they side with the majority or minority approaches, there are other jurisdictions (like Missouri) that analyze each claim on a case-by-case basis, indicating the fluidity of this area of the law. For this reason, it is imperative for insurers and their counsel to keep acquainted with the developments in the law in their state or federal jurisdictions.

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Limitations on UIM Coverage Go the Way of the Dinosaurs

Michael Ward

In *Jones*, Morris Jones and Pamela Brown were injured in an accident, each sustaining more than $150,000 in damages. The tortfeasor's insurer paid each of them $50,000, which was the insurer's per person limit. Subsequently, Jones and Brown applied for UIM benefits from Mid-Century Insurance Company, which had a per person limit of $100,000.

Based on the sums recovered from the tortfeasor's insurer, Mid-Century paid Jones and Brown $50,000 each, relying on the policy's limit-of-liability provision that authorized a reduction of the policy's UIM limit by any amount paid or payable to the insured. Jones and Brown sued Mid-Century, which prevailed in the trial court and the Missouri Court of Appeals. The result reached by these courts was not unexpected. Before the advent of the *Jones* decision, almost all UIM set-off provisions had been upheld by Missouri's appellate courts.

Following the adverse ruling in the court of appeals, Jones and Brown appealed to the Missouri Supreme Court, which ruled in their favor. Despite past precedent upholding similar UIM set-off provisions, the Court refused to enforce Mid-Century's offset provision based on a perceived ambiguity between the policy's limit-of-liability provision and its offset provision. The limit-of-liability provision stated the most the company would pay for UIM coverage was the lesser of the policy's $100,000 per person limit or the difference between the insured's damages and the payments already made to the insured for those damages.

The Supreme Court held a reasonable construction of this language required Mid-Century to pay the full UIM limit of $100,000 per person if that sum is lesser than the two damage amounts listed. 287 S.W.3d at 691. Accordingly, the Court refused to uphold the policy's offset provision, which provided that "[t]he amount of Underinsured Motorist Coverage [the company] will pay shall be reduced by any amount paid or payable to or for an insured person…." *Id*. The Court held this provision conflicted with the clear intent of the limit-of-liability provision, which promised the insured a maximum of $100,000 in UIM coverage, explaining an insurer would never be called upon to pay its full UIM limit if it were entitled to deduct any amounts received from the tortfeasor because, in the case of UIM coverage, some amount always will have been recovered from the tortfeasor. *Id*. at 691-92.

Ritchie v. Allied Property & Cas. Ins. Co.

If there was any doubt whether the *Jones* decision had heralded a new era in Missouri UIM law, the Missouri Supreme Court put those doubts to rest in *Ritchie v. Allied Prop. & Cas. Ins. Co*., No. SC90085 (Mo. banc, November 17, 2009). In *Ritchie*, the Supreme Court reaffirmed its ruling in *Jones* and nullified another UIM offset provision. As in *Jones*, the Court's decision turned on its view that the insurer would never have a duty to pay the full amount of its UIM coverage if the offset provision were enforced. Instead, the Supreme Court held it would interpret the insurer's offset provision as permitting a set-off against the insured's total damages only, and not against the insurer's UIM limit.

After reaffirming the rule in *Jones* concerning offset provisions, the Supreme Court went on to address in *Ritchie* whether the insured would be permitted to stack UIM coverage. Before *Ritchie*, aside from a few exceptional cases, Missouri's courts routinely enforced UIM anti-stacking provisions. However, as was the case in *Jones*, the Court did deem itself constrained by prior precedent and permitted the insured to stack UIM coverage by holding the interplay of the insurer's "anti-stacking" provision and "other insurance" clause resulted in an ambiguity that had to be construed in the insured's favor.

The insured, in *Ritchie*, was injured while riding in a non-owned auto. The Supreme Court, in ruling for the insured, focused on the non-owned vehicle prong of the "other insurance" clause in the UIM coverage part. This clause provided the policy's UIM coverage would apply as excess insurance if the insured were injured in a non-owned auto. The Court held this provision resulted in an ambiguity when read in conjunction with the policy's "anti-stacking" provision. The Court explained that an ordinary person of average understanding reasonably could interpret the "other insurance" provision to mean that when an injured insured is occupying a non-owned vehicle and there are multiple UIM coverages, then each of the UIM coverages is excess to the other, and, therefore, may be stacked.

The Supreme Court's disregard for past precedent on the question of stacking UIM coverage is telling. In a 1991 decision, the Supreme Court upheld an indistinguishable UIM anti-stacking provision in *Rodriguez v. General Acc. Ins. Co. of Am*., 808 S.W.2d 379, 381 (Mo. banc 1991). Reviewing that provision, another court noted that "[i]t is hard to imagine clearer language." *Grinnell Select Ins. Co. v. Baker*, 362 F.3d 1005, 1006 (7th Cir. 2004). Yet, sometime during the eighteen-year interval during which such language had been upheld in Missouri, the language morphed into an ambiguous provision incapable of clear meaning and ready application.

Section 379.204, R.S.Mo. 2000

In addition to the recent decisions in *Jones* and *Ritchie*, the Missouri General Assembly has legislatively rewritten UIM policies with minimum liability limits by enacting Section 379.204, R.S.Mo. 2000. Section 379.204 provides "[a]ny underinsured motor vehicle coverage with limits of liability less than two times the limits for bodily injury or death pursuant to section 303.020, RSMo, shall be construed to provide coverage in excess of the liability coverage of any underinsured motor vehicle involved in the accident."

Under Section 379.204, a policy providing UIM coverage with limits less than two times the limits for bodily injury or death -- $50,000 per person / $100,000 per accident -- as required by the Missouri Motor Vehicle Financial Responsibility Law, must be interpreted to provide excess coverage over the tortfeasor's available liability coverage. When applicable, Section 379.204 nullifies any provision requiring an offset or the reduction of UIM coverage based on the amounts paid under the liability insurance available to the underinsured vehicle.

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McCracken v. Wal-Mart: When to Plead Workers' Compensation Exclusivity

Matt Diehr

or employer, the defendant would simply file a motion to dismiss for lack of subject-matter jurisdiction and the burden of moving forward then shifted to the plaintiff employee to show the civil court did have jurisdiction. The losing party then had the right to seek an interlocutory appeal by filing a petition for an extraordinary writ.

However, the Missouri Supreme Court in *McCracken v. Wal-Mart Stores East, LP*, 296 S.W.3d 473 (Mo. banc 2009), turned thirty years of Missouri law on its head when it reversed the trial court's decision to sustain Wal-Mart's motion to dismiss. The Supreme Court explained that the circuit court's ability to grant a remedy for such a claim is not a jurisdictional one because Missouri's constitution provides that circuit courts have original jurisdiction over "all cases and matters, civil and criminal." MO. CONST., art. V, § 14. Rather, the Court held the issue raised by the "exclusivity" provision is whether a circuit court has the statutory or common-law authority to grant relief in a particular case. Accordingly, the Court held the question whether the Missouri Workers' Compensation Law provides an exclusive remedy in a given case "should be raised as an affirmative defense to the circuit court's *statutory authority to proceed* with resolving the claim."

As the Missouri Supreme Court noted, the distinction "is far more than a semantic one" because while subject-matter jurisdiction cannot be waived, a non-jurisdictional defense such as the workers' compensation "exclusivity" defense can be waived if not timely and properly pleaded in the circuit court as a defense. *Id*. at *4. Accordingly, under the Supreme Court's *McCracken* decision, the issue of workers' compensation exclusivity must now be raised as an affirmative defense, and the failure to timely raise this issue may result in its waiver. The Supreme Court in *McCracken* further noted that because of the confusion presented by this issue, where the "exclusivity" provision was raised in a motion to dismiss in pending cases, courts should treat the matter as properly preserved and be liberal in permitting amendment to the pleadings "during the transition back to treating this matter as an affirmative defense."

Under *McCracken*, defendants will bear a heavier burden to defeat a civil claim by asserting the workers' compensation "exclusivity" defense. Defendants must now advance the defense by summary judgment motion, a more burdensome procedure based on fact discovery rather than the face of the plaintiff's pleadings. Only in cases in which the material facts are undisputed will a defendant prevail on the defense. In the past, as the "exclusivity" defense was deemed jurisdictional, the defendant needed only to show that it "appeared" that the civil court lacked jurisdiction over the claim

In the future, attorneys representing defendants must act at the early stages of the litigation to preserve the "exclusivity" defense by pleading the defense as an affirmative defense in their client's initial responsive pleading. In addition, counsel must develop the necessary facts to support the defense and file a summary judgment motion raising the defense at the earliest possible stage in the case.

Finally, in the event of an adverse decision, counsel must be prepared to seek interlocutory appellate review, if possible. In the past, before the *McCracken* decision, defendants had the right to seek interlocutory appellate review by extraordinary writ because the question was a jurisdictional one. Now that the matter is deemed one for resolution by summary judgment motion, it is an open question whether interlocutory appellate review is possible. As a general rule, the denial of a summary judgment motion is not subject to interlocutory appeal.

In several cases, we have advanced the position that the denial of a summary judgment motion raising the "exclusivity" defense is subject to interlocutory appeal by extraordinary writ. However, no Missouri appellate court has yet decided the question. Presently, we are awaiting decisions from the Missouri Court of Appeals on this very question.

Stay tuned. We will keep you posted as this very fluid area of the law continues to evolve.

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Where is Your Nerve Center? Establishing Corporate Jurisdiction in Federal Courts

Joshua Stegeman

A corporation cannot simply submit an SEC filing form identifying its headquarters as the nerve center. *Id*. The corporation must provide proof with sworn executive affidavits concerning the location of its headquarters or "nerve center." Upon a showing that a corporation has deceived by creating a "nerve center," such as an executive retreat location, the courts will reexamine the corporation's principal place of business by determining where its direction, coordination, and control actually occur.

The Supreme Court's *Hertz* ruling effectively eliminates the various tests employed by the different circuits and establishes a single test for the determination of a corporation's "principal place of business." The "nerve center" test should make determining diversity jurisdiction less complicated for the courts and less burdensome for litigants.

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Case Results

Amica Mut. Ins. Co. v. Gary Willard. United States District Court, Eastern District of Missouri. Amica sought a declaratory judgment that there was no coverage under its homeowner's policy for a fire loss because the insureds intentionally destroyed their house, misrepresented and concealed material facts, engaged in fraudulent conduct, made false statements, and failed to comply with policy conditions. The insureds counter-claimed for breach of contract and vexatious refusal to pay. After a five-day trial, the jury returned a unanimous verdict for Amica on all counts. Tried by Robert W. Cockerham and Christopher J. Seibold.

Goree v. Allstate Ins. Co. United States District Court, Eastern District of Missouri. Plaintiff presented a fire claim under his homeowner's policy. Allstate concluded Plaintiff intentionally set the fire and refused to provide coverage. Plaintiff filed suit, alleging breach of insurance contract and vexatious refusal to pay. Jury verdict for Allstate. Tried by Bob Brady and Jon Morrow.

Mary E. O'Neal v. Asif Habib, M.D., et al. St. Louis City, Missouri. Mary O'Neal filed an action for her husband's allegedly wrongful death. She claimed the defendant physicians had failed to undertake adequate fall precautions, causing her husband to fall out of bed and fracture his hip. Defendants denied the allegations and claimed that fall precautions were primarily a nursing function. Further, Defendants argued they were not advised of any changes in the husband's condition that would have merited fall precautions beyond those that were initially ordered. After a five-day trial, the jury returned a unanimous verdict for Defendants after deliberating only thirteen minutes. Tried by David P. Ellington and Halle L. Dimar.

Klocke v. Thirsty's Tavern, Inc. and Stephen Wilson d/b/a Bawana's. Jersey County, Illinois. The jury, in this dram shop action brought following a fatal motorcycle accident, returned a verdict for our client, Stephen Wilson d/b/a Bawana's, but found the co-defendant, another dram shop defendant, liable and awarded $550,000 in damages. Tried by John Cunningham, who represented Bawana's.

Donald and Jaime Williams v. Mark Twain Center Partnership. Marion County, Missouri. Plaintiff alleged she slipped and fell at Defendant's shopping center due to ice that formed in a sidewalk depression and, as a result, she claimed she suffered a number of cartilage tears in her knee for which she underwent surgery and months of physical therapy. Plaintiff's medical specials totaled over $110,000. Her husband also made a loss of consortium claim. The jury awarded Plaintiff $65,000, but she recovered a net award of $3,250 because the jury found her to be 95% at fault. An offer of judgment for $13,200 had been filed early in the case, which rendered Plaintiff liable for all court costs because the judgment did not exceed the offer. The jury also found for Defendant on the husband's claim. Tried by Irene Marusic.

Herbert Mullins v. Tri Huu Truong v. Safeco Ins. Co. of Ill. St. Louis City, Missouri. Plaintiff, an uninsured motorist, alleged Truong, rear-ended him. Truong alleged Plaintiff cut in front of him and stopped suddenly and sued Safeco for UM coverage. Truong went to the ER and then received a course of chiropractic treatment. The jury assessed fault at sixty percent to Plaintiff and forty percent to Truong. Truong had $4,229.39 in medical specials for which the jury awarded him $5500 in damages, which were reduced to $3,300 by his fault. Tried by Rebecca Schubert, who represented Safeco.

Jeremy Sanfilippo v. Firestone/Bridgestone Complete Auto Care. The Missouri Labor & Industrial Relations Commission. The employee, in this workers' compensation claim, alleged a work injury resulting from an auto accident that occurred on the public parking lot adjacent to his employer's premises after work hours. The administrative law judge found the employee's injury to be compensable due to the employer's placement of a storage container on the parking lot and the proximity of the accident to the container. On appeal, the Labor and Industrial Relations Commission reversed in favor of the employer and denied compensation. Briefed and argued by William E. Paasch.

Rebstock v. Evans Production Eng'g Co. United States District Court, Eastern District of Missouri. Plaintiff, a truck driver, delivered steel to Defendant's dock. Defendant's forklift driver was unloading the steel when the steel became unstable and crushed Plaintiff's ankle. Plaintiff claimed Defendant's forklift driver was negligent; Defendant claimed Plaintiff, himself, caused the steel to become unstable and, therefore, he was the sole cause of his injury. The jury returned a verdict for Defendant, finding Plaintiff 100% at fault. Tried by Bradley R. Hansmann.

Tonya Horn v. Pallop Siripipat, M.D., et al. Audrain County, Missouri. Plaintiff alleged in this medical malpractice action that her minor son suffered shoulder dystocia as the result of excessive traction applied during his delivery. Plaintiff further claimed her son suffered a physical deficit from his injury and would suffer future economic and medical damages. Defendants denied the allegations and claimed the child's injuries were due to natural maternal labor forces. After a four-day trial, the jury returned a verdict for Defendants. Tried by David P. Ellington and Brenda K. Hamilton.

Angela Lake v. Southern Hills Apartments. Macon County, Illinois. Plaintiff alleged Defendants negligently maintained a sidewalk at their apartment complex upon which Plaintiff tripped and fell. Plaintiff claimed she had soft tissue damage and aggravation to several pre-existing conditions, including fibromyalgia. Defendant obtained summary judgment on the ground the expansion joint upon which Plaintiff fell was an open and obvious condition. Tried by James Craney.

Doe v. Great Rivers Council, Boy Scouts of America, Inc. Lewis County, Missouri. Local scout council obtained summary judgment on a sexual abuse/failure to supervise claim. Plaintiff, a minor, claimed a scout leader had molested him over the course of several years. The council obtained summary judgment for want of agency, amongst other grounds. Tried by Michael B. Maguire.

Bonita Edwards v. Frank Nowicke. Franklin County, Missouri. Plaintiff brought a damage action following a rear-end auto accident, claiming soft tissue injury with $16,000 in specials and $1,000 in property damage. Judgment returned for only $1,925.00. Tried by Michael B. Maguire.

Tamara Woodfork v. Barton Mut. Ins. Co. St. Louis City, Missouri. Plaintiff obtained a $1 million judgment against Barton's insured for damages incurred from lead paint exposure and filed an equitable garnishment action against Barton to collect the judgment. Barton denied coverage based on the lead liability exclusionary endorsement in its policy. Plaintiff argued the endorsement was void because Barton used a ratings organization to file the endorsement on its behalf. Summary judgment for Barton, finding no coverage and that the endorsement had been properly filed by the ratings organization of which Barton was an affiliate. Tried by David P. Bub and Kenneth R. Goleaner.

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Limitations on UIM Coverage Go the Way of the Dinosaurs

Michael Ward

Conclusions

The Missouri Supreme Court's decisions in *Jones* and *Ritchie* have ushered in a new era in Missouri UIM law. Insurers and their counsel must carefully reconsider old assumptions concerning UIM coverage in light of the following lessons that may be drawn from the Supreme Court's recent UIM precedent:

• The Supreme Court's decisions in *Ritchie* and *Jones* make clear that in the non-owned vehicle context, when an insurance policy states its UIM coverage is excess over any other "collectible insurance," "similar insurance," or "underinsured insurance," this language will very likely be held to create an ambiguity that prevents the enforcement of anti-stacking and set-off provisions.

• The decisions in *Ritchie* and *Jones* demonstrate that Missouri's courts will likely find ambiguities in many existing UIM policy set-off provisions. They will do so based on the Missouri Supreme Court's view that UIM coverage, as presently written, is illusory in nature because an insured will *never* recover the full UIM limit stated on the policy's declarations page if such provisions are enforced.

• Although offsets against UIM limits may often be impermissible, the Missouri Supreme Court has suggested that the insured's total damages -- for which the UIM coverage is sought -- may be reduced by the amounts already collected from the tortfeasor's liability carrier.

• Under *Jones* and *Ritchie*, the Missouri Supreme Court has suggested that set-off and anti-stacking provisions may be upheld in certain circumstances, provided the provisions are plainly and unambiguously written. Insurers preparing revised UIM forms for Missouri should carefully study these decisions for guidance as to what kind of language might survive the Court's scrutiny and present distaste for limitations on UIM coverage.

• The *Jones* and *Ritchie* decisions evince a trend in Missouri's appellate courts to hold policy provisions ambiguous whenever possible in order to "create" coverage that the policies were never intended to provide.

For the future, it remains uncertain what further directions Missouri insurance law, in general, and UIM law, in particular, will take. Insurers, in response to the *Jones* and *Ritchie* decisions, should take care to revise their policy language to eliminate the "ambiguities" discerned by the Missouri Supreme Court. They should also ensure their claims personnel are made aware of these decisions so that proper claims evaluations may be undertaken.

As to the long-term consequences in Missouri, the Supreme Court's recent decisions well may impact the availability and cost of auto insurance. Observing the impact of the *Ritchie* decision on UIM coverage, one Supreme Court judge, the Honorable Raymond Price, dissented, writing: "[The Court's decision] will inextricably lead to a commensurate premium increase for all Missourians. Moreover, if insurance companies cannot write their policies with confidence that our courts will enforce their plain language, that risk will have to be placed into our policies." *Ritchie*, No. SC900085 (Price, J., dissenting). Only time will tell if Judge Price's forecast proves true.

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Man's Best Friend No More?: Missouri Adopts Strict Liability for Dog Bites

David P. Bub

liability defense to this hypothetical claim. Under the new statute, it is not so clear and could be potentially argued either way.

A couple of other interesting comments about Section 273.036 also deserve mention. First, the statute, by its terms, applies only to dogs. Although dogs likely make up the vast majority of the animal liability claims, there are other domesticated animals that produce liability claims against insureds. Horses are one example, especially in rural areas. It appears fairly clear from the explicit language of Section 273.036 that the "old rules" of Missouri common law applicable to animal liability will still apply to any non-dog, animal liability claim.

Also, the application of Section 273.036 should be considered. The statute is silent as to whether it may be applied retrospectively. The statute took effect on August 28, 2009. Most likely, the statute has prospective application only. Under Missouri law, there is a presumption that new statutes apply prospectively unless the legislature demonstrates a clear intent to apply a statute retroactively or the statute at issue is procedural or remedial in nature. *Ball-Sawyers v. Blue Springs School Dist*., 286 S.W.3d 247, 256 (Mo. App. W.D. 2009). Since Section 273.036 is silent on this issue and this statute is not procedural or remedial in nature, it is fairly clear that the statute will only apply to dog bite claims after August 28, 2009, and will not affect pending dog bite claims or cases.

In summary, Section 273.036 constitutes one of the most drastic changes in Missouri animal liability law in the past fifty years. The statute is a pro-claimant one and will place a much higher burden on dog owners and their insurers. The new strict liability cause of action will almost certainly result in more and higher payouts in dog bite claims. Unfortunately, whether we like it or not, Section 273.036 is now the "law of the land" in Missouri. Therefore, we in Missouri need to ask ourselves whether the dog is still "man's best friend"? Clearly not, in the eyes of our state's legislature.

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Firm Inquiry Announcements

Beth Kamp Veath has been named as one of Illinois' top lawyers by **Illinois Super Lawyers**, an annual peer-review publication. Ms. Veath practices in the areas of transportation, premises, mass tort, and medical malpractice defense and is a shareholder in the Brown & James Belleville office.

On December 3, 2009, **Bradley Hansmann** spoke at the National Business Institute seminar on "**Cost Efficient Discovery**" and "**How Insurance Companies Value and Process Personal Injury Claims**."

Michael Ward spoke on "**The Use and Abuse of Section 537.065 Agreements and Consent Judgments**" at a Missouri Bar Continuing Legal Education Seminar in St. Louis on December 10, 2009.

Teresa M. Young moderated a Missouri Bar Continuing Legal Education Seminar on **Insurance Coverage and Litigation** in St. Louis on December 10, 2009. The seminar addressed agent and broker liability, Section 537.065 agreements, bad faith, and excess insurance.

On January 28, 2009, **Brown & James** held its **Annual General Defense & Insurance Law Seminar** at the Marriott West in St. Louis. Over 150 clients attended the event.

James Howard, on February 11, 2010, spoke on "**Defending UM/UIM Cases and Avoiding Ethical Potholes**" at a National Business Institute seminar, "Settling Uninsured and Underinsured Motorist Claims."

Joe Swift moderated a panel discussion entitled "**Product Recalls in a Global Economy**" on March 13, 2010, in Palm Desert, California, at the **ALFA International 2010 International Client Seminar**. The expert panel included representatives from Schneider Electric North America, W.W. Grainger, Inc., and Cracker Barrel Old Country Stores.

Joe Swift was a guest speaker at the spring 2010 meeting of the **American Ladder Institute** in Scottsdale, Arizona. Mr. Swift spoke on product liability issues, electronically stored information, and the implications of the **Consumer Product Safety Improvement Act of 2008**.

On March 25, 2010, **Russell Watters** and **Tim Wolf** spoke at the annual **CLM Conference** in Ponte Vedra, Florida on "**Class Actions: Plaintiffs' Attorneys' Dream, Insurance Carriers' Nightmare**."

Robert W. Cockerham spoke at the annual Missouri Chapter for the **National Society of Professional Insurance Investigators** 2010 Advanced Insurance Seminar on April 22, 2010 in St. Louis, Missouri. Mr. Cockerham presented Legal Updates for Missouri, Illinois, and Kansas and a session on "Arson: No Fire!"

Robert W. Cockerham spoke at the **Seventh Annual National Property Subrogation Strategies ExecuSummit** in Uncasville, Connecticut, on April 27, 2010. Mr. Cockerham presented important information and practical solutions concerning subrogation roadblocks, including proper large loss handling, waivers of subrogation, exculpatory clauses, and spoliation of evidence.

Joe Swift gave a presentation on the **Comprehensive Safety Analysis 2010**, a Federal Motor Carrier Safety Administration initiative, at the **2010 ALFA International Transportation Seminar**. The seminar took place on April 28-30, 2010, in Marco Island, Florida.

On August 26, 2010, **James Howard** will speak on "**Managing Liens and Subrogation in Auto Accident Litigation**" at a National Business Seminar.