SMS Quarterly

AN INSIDE LOOK AT YOUR LAW FIRM AND
WHAT ITS LAWYERS ARE DOING TO SERVE YOU

Attorneys at Law

Shuman, McCuskey & Slicer PLLC

SMS Welcomes New Attorneys!

SMS is proud to welcome two new associates:

Brett Mayes

Paul Kettering

IN THIS ISSUE:

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SMS News

SMS is pleased to welcome two associates to the firm: Brett Mayes in our Charleston office and Paul Kettering in our Morgantown office.

Brett is originally from Knoxville, TN, but considers home to be Alcoa, TN, where he lettered in golf and baseball during high school. After beginning his undergraduate tenure at Milligan College, he transferred to the University of Tennessee in his sophomore year. At UT, he majored in business with a focus on macro-economics.

Upon graduating from college, he attended law school at Wake Forest University. While in law school, he was invited to join the Wake Forest Law Review and was subsequently asked to serve on the Executive Board as an Articles Editor.

Brett's wife, Casey, is a speech-language pathologist and a native of Boone County. They have been married for a little over three months, and reside in Putnam County with their two beagles, Collins and Maddie.

Paul grew up in Fairmont, WV, and graduated from Fairmont Senior High School in 2003. He earned a degree from the WVU Perley Isaac Reed School of Journalism in 2007, and

earned the school's 2007 Broadcaster of the Year award. This past Spring, he graduated from the WVU College of Law, where he was a member of Phi Alpha Delta and the Sports and Entertainment Law Society. He enjoys playing basketball in his free time. He has a girlfriend, Brigitte, who is a nurse at the Randolph Cancer Center at WVU, and an 11-week old chocolate lab puppy named Flanker.

SMS Lawyer Victories

No Evidence of Consumer Protection Violations.

Congratulations to SMS attorney Joseph Cramer who obtained a complete dismissal of a lawsuit seeking recovery of monetary damages and attorney's fees from an SMS client. The client was a healthcare organization that was sued by a plaintiff who alleged that the healthcare company had violated various state consumer protection laws in its attempts to collect a past due bill for healthcare services. Mr. Cramer requested that the Court dismiss the plaintiff's Complaint as the plaintiff had failed to properly allege a viable cause of action. The Court found that the plaintiff's Complaint had

failed to state a viable claim and dismissed the plaintiff's Complaint without any award of monetary damages or attorney fees.

No Evidence of Construction Defect.

Congratulations to Natalie Schaefer, who obtained summary judgment in favor of her client in a case in which a Third-Party Plaintiff asserted that an SMS client negligently performed construction work at a residence, causing water intrusion and mold.

After the discovery phase of the case, the Court granted our motion for summary judgement, which argued that the Third-Party Plaintiff was unable to set forth any facts that supported a claim of negligent construction.

Dismissal for Healthcare Provider.

Congratulations to SMS attorneys Christopher Sears and Joseph Cramer who successfully obtained summary judgment on behalf of a client who had been sued for allegedly failing to provide a plaintiff with copies of her own medical records in a timely manner. The plaintiff sued a healthcare provider seeking recovery of monetary damages and attorney fees under a state statute that requires healthcare providers to provide a patient with copies of their own medical records within a reasonable period of time. Mr. Sears and Mr. Cramer filed a motion for summary judgment requesting that a court dismiss the claim and not award plaintiff any damages or attorney fees as she had been provided copies of her records in a timely manner. The Court agreed, granted the motion for summary judgment, and dismissed the plaintiff's claims with prejudice.

Summary Judgment on Business Interruption Claim.

Congratulations to SMS member William Slicer for a significant success on a business interruption case. Judge Chambers granted summary judgment in our clients' favor on a $39 million dollar business interruption claim. The Court denied plaintiff's motion for summary judgment on our clients' counterclaim for fraud, and entered an order granting sanctions for egregious discovery violations, destruction of evidence, ignoring a court order to produce documents, lack of candor with the court, and failure to issue litigation hold letters. This is the fourth time in this case that the court has issued significant sanctions against the plaintiff including an award of attorney fees for our filing the motions for sanctions.

Legal Developments

The October 2011 Issue of the SMS Quarterly features multiple decisions from the Supreme Court of Appeals of West Virginia. If you would like more information about these cases or information about other cases recently decided by our high court, please contact an SMS lawyer today.

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Mey v. Pep Boys, No. 101406, filed September 29, 2011. In *Mey*, the plaintiff filed a class action complaint alleging that the defendants, The Pep Boys, Southwest Vehicle Management, Inc., and Lanelogic Inc. ("defendants"), violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, et seq., by leaving an automated voicemail message at her residence in response to a classified advertisement that the plaintiff's son placed on the internet website craigslist.com. The TCPA is a federal statute that broadly regulates the use of automated telephone equipment. The statute prohibits certain unsolicited advertising calls. The TCPA provides for injunctive relief and statutory damages in the amount of $500 per violation. 47 U.S.C. § 227(b)(3). The plaintiff's son was selling a used car and his internet advertisement invited third parties to contact him at the plaintiff's home telephone number. The Court issued a new syllabus point:

Under the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq., a caller responding to a classified advertisement is not making a "telephone solicitation" in violation of the Act, provided the purpose of the call is to inquire about or offer to purchase the product or service advertised, rather than to encourage the advertiser to purchase, rent, or invest in property, goods or services.

The circuit court ruled that the automated call placed in response to this advertisement did not violate the TCPA and granted the defendants' motion to dismiss.

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Loudin v. National Liability & Fire Insurance Company, et al., No. 35763, filed September 22, 2011. Mr. Thomas Loudin was performing maintenance on his 1993 International truck with the assistance of his brother, William Loudin. At some point, William Loudin accidentally backed the truck over Mr. Thomas Loudin. The accident allegedly caused Mr. Thomas Loudin severe and permanent injuries. Mr. Thomas Loudin's truck was insured under a policy issued by National Liability & Fire Insurance Company (hereinafter "National"). After the accident, Mr. Thomas Loudin filed a claim under the Auto Medical Payments provision of the policy. In October 2006, National paid Mr. Thomas Loudin the liability limit of $5,000.00 under the Auto Medical Payments provision of the policy.

In addition to the Auto Medical Payments claim, Mr. Thomas Loudin also filed a claim under the Liability Coverage provision of the policy. This claim was based upon the negligence of William Loudin as a permissive operator of Mr. Thomas Loudin's truck when the accident occurred. After National investigated the claim, it refused to pay Mr. Thomas

Loudin's demand under the Liability Coverage provision.

The *Loudin* Court noted that the observations expressed in *Miller* and *Hayseeds* echo a firm public policy of this State to hold insurers accountable in a court of law when they wrongfully deny coverage to premium-paying insureds. *See Taddei v. State Farm Indem. Co.*, 951 A.2d 1041, 1047 (N.J. Super. Ct. App. Div. 2008). The Loudin Court ultimately held that, when a named policyholder files a claim with his/her insurer, alleging that a nonnamed insured under the same policy caused him/her injury, the policyholder is a first-party claimant in any subsequent bad faith action against the insurer arising from the handling of the policyholder's claim. Two noteworthy syllabus points include:

1. A first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim filed by the insured.

2. When a named policyholder files a claim with his/her insurer, alleging that a nonnamed insured under the same policy caused him/her injury, the policyholder is a first-party claimant in any subsequent bad faith action against the insurer arising from the handling of the policyholder's claim.

The offer of judgment reads, in relevant part: "Pursuant to [Fed. R. Civ. P. 68(a)], the . . . Defendants hereby serve upon [Bosley] an Offer of Judgment in the amount of Thirty Thousand Dollars ($30,000.00) as full and complete satisfaction of [Bosley's] claim against . . . Defendants." The offer of judgment did not mention costs or attorney's fees. This issue was whether the Offer of Judgment included attorney's fees and costs. The Fourth Circuit of Appeals held that "[i]f a defendant intends to make a lump sum Rule 68 offer inclusive of awardable costs, *Marek* makes abundantly clear the means by which to do so: precise drafting of the offer to recite that costs are included in the total sum offered." The Court further noted that "When a Rule 68 offer of judgment is silent as to costs, a court faced with such an offer that has been timely accepted is obliged by the terms of the rule to include in its judgment an amount above the sum stated in the offer to cover the offeree's costs."

The Court continued, "Because the Rule 68 offeree does not have the luxury of refusing the offer to assure that she has not bound herself to any terms that may later become unfavorable, she may construe the offer's terms strictly,. . ., and ambiguities in the offer are to be resolved against the offeror. . ."

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SER Erie Insurance Property & Casualty Company, Memorandum Decision, filed June 14, 2011. The Court found that prohibition was an appropriate remedy because, although the circuit court referenced in its class certification order each of the prerequisites to class certification established by Rule 23 of the West Virginia Rules of Civil Procedure, the court did not conduct the attendant detailed analysis that we have directed courts to perform incident to the certification of a class.

The Court emphasized that "[c]onclusory summations, without further explanation, do not constitute the "detailed and specific . . . showing" required and are not sufficient to confer class status.

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In *Barr v. NCB Management Services, Inc. et al.*, No. 35709, filed June 14, 2011, the West Virginia Supreme Court answered a certified question presented by the United States District Court for the Northern District of West Virginia. Specifically, the Court held that private debt collectors are subject to suit under the West Virginia Consumer Credit and Protection Act:

W. Va. Code § 46A-5-101(1) (1996) (Repl. Vol. 2006) allows a consumer to assert a private cause of action against a professional debt collector who has engaged in debt collection practices that are prohibited by the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101, *et seq*.

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Clayton Brown, et al. v. Genesis Healthcare Corporation, et al., No. 35494, filed June 29, 2011. In *Brown*, the Court, in a very comprehensive 99-page opinion, addressed the enforceability of an arbitration provision in a nursing home admission agreement. First, the Court addressed whether Section 2 of the Federal Arbitration Act ("the FAA") preempts Section 15(c) West Virginia Nursing Home Act (which prohibits "any waiver by a resident or his or her legal representative of the right to commence an action" under the Act, declaring that such waivers are "null and void as contrary to public policy."). The Court issued several new syllabus points, including:

-Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.

-The purpose of the Federal Arbitration Act, 9 U.S.C. § 2, is for courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms.

-A state statute, rule, or common-law doctrine, which targets arbitration provisions for disfavored treatment and which is not usually applied to other types of contract provisions, stands as an obstacle to the accomplishment and execution of the purposes and objectives of the Federal Arbitration Act, 9 U.S.C. § 2, and is preempted.

-Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or

unconscionability—may be applied to invalidate an arbitration agreement.

-Under the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.

-To the extent that the West Virginia Nursing Home Act, W.Va. Code, 16-5C-15(c) [1997], attempts to nullify and void any arbitration clause in a written contract, which evidences a transaction affecting interstate commerce, between a nursing home and a nursing home resident or the resident's legal representative, the statute is preempted by the Federal Arbitration Act, 9 U.S.C. § 2.

-The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.

-Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the Federal Arbitration Act.

Therefore, the Court held that, although the FAA preempted Section 15(c) of the Nursing Home Act, as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.

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The Centers for Medicare and Medicaid Services (CMS) released a policy memorandum on September 29, 2011 pertaining to liability Medicare set-aside (L-MSA) arrangements.

Per CMS, "[t]he purpose of this memorandum is to provide information regarding proposed Liability Medicare Set-Aside Arrangement (LMSA) amounts related to liability insurance (including self-insurance) settlements, judgments, awards, or other payments ('settlements')." CMS stated in its memo that:

"Where the beneficiary's treating physician certifies in writing that treatment for the alleged injury related to the liability insurance (including self-insurance) "settlement" has been completed as of the date of the "settlement", and that future medical items and/or services for that injury will not be required, Medicare considers its interest, with respect to future medicals for that particular "settlement", satisfied. If the beneficiary receives additional "settlements" related to the underlying injury or illness, he/she must obtain a separate physician certification for those additional "settlements."

"When the treating physician makes such a certification, there is no need for the beneficiary to submit the certification or a proposed LMSA amount for review. CMS will not provide the settling parties with confirmation that Medicare's interest with respect to future medicals for that "settlement" has been satisfied. Instead, the beneficiary and/or their representative are encouraged to maintain the physician's certification."

The CMS memorandum was effective upon publication.

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If you would like more information about these cases or other WVSC decisions, please contact an SMS lawyer who can provide you with a detailed discussion of the issues and holdings.

Quarterly Quote: "Action is the foundational key to all success." - Pablo Picasso

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(Natalie C. Schaefer is the Attorney responsible for this publication. This publication is an advertisement for Shuman, McCuskey & Slicer, PLLC).