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TORT AND INSURANCE NEWSLETTER

Fall 2009 Issue

HE SAID, SHE SAID: The Importance of Preserving Recorded Statements

The Tennessee Supreme Court recently enacted a new exception to the hearsay rule, effective July 1, 2009. Under Rule 803(26), certain prior inconsistent statements of a testifying witness can now be admitted at trial as substantive evidence.

Under previous evidence rules, the use of prior inconsistent statements was governed by Rule 613, and attorneys could only use prior statements for impeachment purposes (i.e., to show that a witness had changed his or her story and was possibly being untruthful). Under the new Rule 803(26), a prior inconsistent statement can now be admitted into evidence as substantive proof of what actually happened. To be admissible as substantive proof, the prior inconsistent statement must satisfy the following three conditions:

- (a) The witness must testify and be able to be cross-examined concerning the prior statement;
- (b) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath; and
- (c) The judge must determine that the prior statement was made under circumstances indicating trustworthiness.

This new rule is particularly important for insurance professionals to be aware of because a claims adjuster often has the opportunity to speak with claimants or witnesses soon after the event at issue and before attorneys become involved. Because an unrepresented claimant tends to be more open regarding the facts of his or her claim, the ability to now use statements as substantive evidence at trial will be very helpful when a claimant attempts to change his or her story as the case progresses.

For example, a claimant's recorded statement taken two days after an accident in which he states that he has not suffered any back pain could present problems for the claimant if he later attempts to prove that he actually sustained a back injury in the accident. In addition, the recorded statement of an eyewitness stating that she saw the insured leaving the residence premises in a rush immediately before a suspicious fire was ignited could be used at trial as substantive evidence in an arson case if the witness unexpectedly changes her story during the progression of the case or during the trial itself. Another added benefit of this new rule is that it will enable counsel to more accurately predict what the actual proof at trial is likely to be.

It is critical, however, that insurance professionals preserve the original recordings of recorded statements, rather than rely on transcripts. The Advisory Commission Comment to Rule 803(26) notes that an insurance investigator's *transcription* of a recorded statement does not satisfy the requirements of Rule 803(26) because it is not literally the witness's own words contained on audio or video media. Thus, obtaining and preserving the original recorded statements from all involved parties and witnesses is critical to ensure admissibility as substantive evidence at trial.



TORT AND INSURANCE NEWSLETTER

Fall 2009 Issue

UM SET-OFFS: You're Not Seeing Double

The Tennessee Court of Appeals recently clarified the types of compensation received by an insured that an uninsured/underinsured motorist carrier will be able to set off from its potential liability. Many insurance policies contain provisions similar to the following:

The limits of liability under this Part for bodily injury will be reduced by all sums. . .paid or payable because of bodily injury under any of the following or similar laws. . . workers' compensation law.

This language allows UM carriers to offset any amounts payable under their policies for amounts the insured has received for workers' compensation coverage. Also, UM carriers are allowed to offset any liability insurance available to the tortfeasor. The typical policy provision seemingly suggests that a UM carrier could offset both the workers' compensation coverage received by an insured and the total amount of the liability coverage of the individual at fault.

In Bayless v. Pieper, 2009 WL 2632763 (Tenn. Ct. App. Aug. 26, 2009), the court denied an offset for both workers' compensation benefits and liability insurance coverage against the insured's UM limits. In Bayless, the plaintiff received workers' compensation benefits in the amount of almost \$85,000, and the tortfeasor's estate had \$100,000.00 in liability insurance coverage. The plaintiff used \$67,000 of his recovery from the tortfeasor's liability insurance coverage to satisfy the workers' compensation subrogation lien, then continued to pursue an action against the UM carrier. The parties stipulated to total damages of \$225,000.00. The UM carrier argued that it was entitled to offset the entire workers' compensation benefits and the total sum of the liability benefits paid, and argued it should only pay the remaining sum. The plaintiff claimed that the UM carrier was prohibited from a double offset. Id. at *2-3.

At the heart of the issue was the language of Tenn. Code Ann. § 56-7-1205, which states, in pertinent part, that "[t]he forms of coverage may include terms, exclusions, limitations, conditions, and off-sets that are designed to avoid duplication of insurance and other benefits." This section appears to allow UM policies to contain provisions reducing liability by the amounts an insured received from workers' compensation claims and amounts received from a tortfeasor's liability insurance coverage.

The Bayless court weighed the UM policy coverage available to the plaintiff against the statutory language authorizing offsets to prevent duplication of insurance. The court determined that despite the plain language of the UM policy, the UM carrier was not entitled to receive a double offset pursuant to the statute. Therefore, the UM carrier was only allowed to offset plaintiff's \$33,000 net recovery from the tortfeasor's liability policy (the \$100,000 liability limits less the \$67,000 workers' compensation subrogation satisfaction) and the \$85,000 workers' compensation benefits. In other words, the UM carrier was not allowed an offset for the portion of liability coverage used to satisfy the workers' compensation subrogation lien.

This case makes it clear that although the plain language of the UM policy may, on its face, seem to allow a UM carrier to set off all benefits received under workers' compensation laws and other applicable liability insurance coverage, the UM carrier may not set off amounts that are used to satisfy workers' compensation subrogation liens in order to prevent double offsets.

RAINEY • KIZER • REVIERE & BELL PLC

is pleased to announce that

MICHAEL BURNETT JOINER
AND
JOSHUA B. DOUGAN



JOINER



DOUGAN

have joined the Firm and are the newest members of the Firm's Tort and Insurance Practice Group. Michael practices in the Firm's Memphis office, and Joshua practices in the Firm's Jackson office.

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TUESDAY, DECEMBER 8, 2009

4:30 PM - 7:00 PM

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JOIN US FOR AN EVENING OF
FOOD, DRINK & CONVERSATION

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