DLA NEW MEXICO
Defense Lawyers Association

DEFENSE news

The Legal News Journal for New Mexico Civil Defense Lawyers

Fall 2010

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NMDLA

Board of Directors

The New Mexico Defense Lawyers Association is the only New Mexico Organization of civil defense attorneys. We currently have over 350 members. A common misconception about NMDLA is that its membership is limited to civil defense attorneys specializing solely in insurance defense. However, membership in NMDLA is open to all attorneys duly licensed to practice law in New Mexico who devote the majority of their time to the defense of civil litigation. Our members include attorneys who specialize in commercial litigation, employment, civil rights, and products liability.

The purpose of NMDLA is to provide a forum where New Mexico civil defense lawyers can communicate, associate, and organize efforts of common interest. NMDLA provides a professional association of New Mexico civil defense lawyers dedicated to helping its members improve their legal skills and knowledge. NMDLA attempts to assist the courts to create reasonable and understandable standards for emerging areas of the law, so as to make New Mexico case law dependable, reliable, and a positive influence in promoting the growth of business and the economy in our State.

The services we provide our members include, but are not limited to:

- Exceptional continuing legal education opportunities, including online seminars, and self-study tapes, with significant discounts for DLA members;
- A newsletter, the "Defense News," the legal news journal for New Mexico Defense Trial Lawyers;
- Members' lunches that provide an opportunity to socialize with other civil defense lawyers, share ideas, and listen to speakers, discuss a wide range of issues relevant to civil defense attorneys;
- An e-mail network and website, where members can obtain information on judges, lawyers, experts, jury verdicts, the latest developments in the law, and other issues; and
- An Amicus Brief program on issues of exceptional interest to the civil defense bar.

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A Message from the President

by Bryan Garcia, Narvaez Law Firm, P.C.

DLA Members and Colleagues:

I hope this *Newsletter* finds each of the DLA members well and in good spirits. Although we are at the end of a sweltering New Mexico summer, there is a lot to look forward to in the Fall – School, Football, Green Chile, Balloon Fiesta and a slew of innovative DLA CLE programs.

We are reviving the DLA Annual Meeting on October 14, 2010. I encourage each of you to attend. Historically, it has been a good time to reconnect with defense lawyer colleagues, garner a few CLE credits, and congratulate the Defense Lawyer of the Year and the Young Defense Lawyer of the Year.

We are also excited to have James McElheney return with his ever popular Day in Discovery CLE on November 18, 2010, and the annual Civil Rights seminar on December 17, 2010 for those of you in need of some last minute credits. I encourage you to attend one or more of these programs. I also encourage you to participate in the Second Judicial District Court's Law-La-Palooza Legal Fair on October 28, 2010.

Bryan Garcia
Narvaez Law Firm, P.C.
NMDLA President

Share Your Successes!

Over the last few years we have been able to enhance the value of membership in the NMDLA by way of electronic access to a variety of information — especially through the use of email inquiries for information and publication of peer accomplishment. As part of that continuing effort, we ask each of you to bring your accomplishments to DLA's attention. Submissions might include a good result at trial, a favorable appellate decision, a successful motion at the trial court level, or a recommended expert or mediator.

Email your information to nmdefense@nmdla.org, with the subject line "DLA Sharing." In turn, we will use the broadcast email capability of the DLA to quickly and efficiently disseminate your news or information to the rest of the membership. All members benefit from such a system, and it will take input from all members to make it a real success.

Thank You Contributors

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To be recognized for annual contributions, contact nmdefense@nmdla.org.
** A special thank you to these firms who provided additional contributions in fall 2009.*

Interview of The Honorable Sheri Raphaelson, First Judicial District Judge

Interviewed by Holly Agajanian, Montgomery & Andrews, P.A.

AGAJANIAN ("HA"):

Let's begin with you telling the NMDLA about your background?

RAPHAELSON ("SR"):

I was in solo practice in Española for 14 years before coming on the bench. I did a lot of criminal defense and also some civil work. I did personal injury, medical negligence, police misconduct, employment discrimination, and other odds and ends. Before that, I was in Roswell for three years working as a trial attorney for the public defender. I went to law school in Boston, at The New England School of Law, and worked in Boston initially. I did family law at Greater Boston Legal Services, and then was a Hearing Officer for a city Rent Control program. I grew up in New England and most of my family is still there. I am also a Licensed Midwife and have always had a small medical practice along with my law practice. Since becoming a judge, I have had to close my practice because of scheduling constraints. Delivering babies was what I did for fun, and it has been hard to leave that behind. It used to be when the phone would ring in the middle of the night it was someone in labor; now it's a police officer wanting me to sign a search warrant.

HA: **Why did you decide to apply for the District Court Judge position?**

SR: Having lived and worked in Española for such a long time, I really felt like I knew the strengths and weaknesses of the community. There are only a handful of lawyers in Española, and I thought if someone is going to be the judge in Tierra Amarilla, it should be someone from the community. With a background in civil and criminal, I thought I could handle the docket, which is a mixture of both. I had been providing legal services to the community and delivering babies in the community, and being a judge seemed like one more way to give. I have quite a bit of trial experience and knew that experience would be helpful.

HA: **What was your greatest challenge while you were being considered for the position?**

SR: The wait was the hardest part. I originally went through the committee process and was the only name forwarded to the Governor for the nomination. The Governor wanted more names to choose from, so he told the committee to start again. It was about three months from my initial interview with the committee before I had my first interview with the Governor. That was a stressful process. I was in private practice, and didn't know if I should be taking new cases. Added to that was the fact that, shortly before this process began, I had been in Uganda working as a midwife for several weeks, and hadn't taken any new cases before leaving. In total, I went about five months not taking any cases. In a solo practice, that's a very long time to go without new business.

The Honorable Sheri Raphaelson

HA: **Thus far, what have you enjoyed most about serving on the bench?**

SR: Not being a slave to my calendar. For twenty years, I had to check my calendar every night to make sure I knew where I needed to be the next day. Now, I go to work at the same place every day. It was the hardest aspect of my life to change, but it was also the most liberating.

HA: **How demanding has your workload been up to this point?**

SR: It's been very demanding. I have about 1,400 open cases. One third of those are criminal, and the rest are civil. It's a heavy workload, but my staff is really great and very organized. We have worked hard to streamline the process so that now you can almost always get a hearing on a motion within a month, or an emergency hearing within a week. There's a local rule that allows me to decide motions without a hearing if I feel that I have enough information. In those circumstances, I can usually make a ruling within a month of the submission of the motion packets.

It has also been a great challenge familiarizing myself with areas of the law that I did not normally practice, so that I can make appropriate rulings. That adds to the workload, as well.

HA: **What is a misconception you had about judges before you became one?**

SR: I think the biggest misconception that I've realized I had was that I thought of judges as men. Since taking the bench, I've had some impressively disrespectful lawyers in my courtroom. I started my law practice in Boston, and it was much more formal. I constantly have to tell lawyers to stop interrupting me and not to argue with me about rulings I've already made. I had one attorney demand to know "what authority" I had to tell him when to file his motions. I recently had another attorney tell me that the case "had a lot of math" in it and that I might find it too challenging to do the math on my own. More than once, the bailiffs in my courtroom have taken out their handcuffs because they were sure I would hold an attorney in contempt for the way he was behaving, but I haven't done it yet.

HA: **Is there any other advice you would give to lawyers who appear before you?**

SR: Treat the judge with respect. Don't forget, you're asking the judge to rule in your favor, and being rude to the judge doesn't help you. Also, you should be prepared when you come to court. Don't ask for hearings you're not ready for, and don't expect the court to continue taking evidence after the hearing has been completed. Additionally, I don't have a trailing docket. The trial dates I set are firm dates. I rarely grant continuances, so parties should take the trial dates seriously.

Benefits of Volunteering

- Network with civil defense attorneys from all areas of New Mexico.
- Get involved in a committee or task force that interests you and develop leadership skills and peer recognition.
- Share your volunteer contributions for NMDLA with your clients such as published articles or information about your participation as a speaker at a legal seminar.
- Hone speaking skills at seminars and other meetings.
- Meet experienced attorneys and leaders of the defense bar.
- Camaraderie, collegiality, friendships.
- Professional development and growth.
- Get your name and your firm's name out in front of your peer group.
- Gain recognition from the NMDLA Board as a future leader of NMDLA.
- Obtain practice tips and case referrals through meeting with other defense attorneys.

How to Become a Volunteer

- Contact one of the Committee Chairs and get involved in their committee.
- Contact the NMDLA President who can guide you to the volunteer activity that best suits your interests and schedule.
- NMDLA offers volunteer opportunities that range from welcoming members and judges at the annual meeting, to finding a speaker for a one-hour lunch program, to chairing a seminar.

There are opportunities for all time schedules and levels of experience! Contact NMDLA for more information at nmdefense@nmdla.org.

2010

NMDLA Annual Meeting

Thursday - October 14, 2010

11:45 a.m. - 5:00 p.m.
(Includes luncheon and reception)
Hyatt Regency, Downtown
Albuquerque, NM
2.0 General MCLE Credits

DLA NEW MEXICO
Defense Lawyers Association

This event is exclusively for DLA Members and NM Judiciary.

What Constitutes a Valid Rejection of UM/UIM Coverage?

by Kristin J. Dalton, Riley & Shane, P.A.

Recently, New Mexico's appellate courts have again taken up the issue of what constitutes a valid rejection of UM/UIM coverage. In attempts to clarify what constitutes a valid rejection of UM/UIM coverage, the Courts have expanded UM/UIM coverage in cases where the insured admittedly signed a waiver of UM/UIM insurance.

New Mexico law requires that insurers offer UM/UIM coverage under NMSA 1978, Section 66-5-301 (1983). *See Arias v. Phoenix Indem Ins. Co.,* 2009-NMCA-100, ¶ 7, 147 N.M. 14, 216 P.3d 264, *cert. denied,* 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940. In relevant part, Section 66-5-301 provides:

> A. No motor vehicle or automobile liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person and for any injury to or destruction of property of others arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued . . . unless coverage is provided therein or supplemental thereto in minimum limits for bodily injury or death and for injury to or such higher limits as may be desired by the insured, but up to the limits of liability specified in bodily injury and property damage liability provisions of the insured's policy, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, and for injury to or destruction of property resulting therefrom, according to the rules and regulations promulgated by, and under provisions filed with and approved by, the superintendent of insurance.
>
> B. The uninsured motorist coverage described in Subsection A of this section shall include underinsured motorist coverage for persons protected by an insured's policy. For the purposes of this subsection, 'underinsured motorist' means an operator of a motor vehicle with respect to the ownership, maintenance, or use of which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured's uninsured motorist coverage. No motor vehicle or automobile liability policy sold in New Mexico shall be required to include underinsured motorist coverage until January 1, 1980.
>
> C. . . . The named insured shall have the right to reject uninsured motorist coverage as described in Subsections A and B of this section[.]

In addition to the statute, New Mexico has rules and regulations dealing with UM/UIM coverage as well. 13.12.3.9 NMAC provides that:

> The rejection of the provisions covering damage caused by an uninsured or unknown motor vehicle as required in writing by the provisions of Section 66 5 301 NMSA 1978 must be endorsed, attached, stamped or otherwise made a part of the policy of bodily injury and property damage insurance.

The requirement that insurers offer UM and UIM coverage embodies the public policy "to expand insurance coverage and to protect individual members of the public against the hazard of culpable uninsured [and underinsured] motorists." *Arias,* 2009-NMCA-100, ¶ 7. The underlying legislative intent is to put the insured in the same position he or she would have been in if the tortfeasor had liability coverage equal to the UM and UIM protection as provided by the insured's policy. *Id.*

An insurer "may not exclude UM/UIM coverage from an automobile liabililty policy unless it has offered it to the insured, and the insured has exercised the right to reject the coverage." *Marckstadt v. Lockheed Martin Corp.,* 2010-NMSC-001, ¶ 15, 147 N.M. 678, 228 P.3d 462. Without a valid rejection, New Mexico law provides that the statutorily mandated UM and UIM coverage must be read into the insurance policy in amounts equal to the liability limits of the policy. *See Romero v. Progressive N.W. Ins. Co.,* 2010-NMCA-024, ¶¶ 22, 24, 39, 148 N.M. 97, 230 P.3d 844, *cert. granted,* 2010-NMCERT-003, __ N.M. __, __ P.3d __. UM/UIM coverage is "the default when the insured has not exercised the right to reject." *Marckstadt,* ¶ 15.

The earlier cases dealing with the rejection of UM/UIM coverage are *Romero v. Dairyland Ins. Co.,* 111 N.M. 154, 159, 803 P.2d 243, 248 (1990) and *Kaiser v. DeCarrera,* 1996-NMSC-050, ¶ 8, 122 N.M. 221, 923 P.2d 588. In *Romero* and *Kaiser,* the Supreme Court interpreted the UM/UIM statute as requiring insurers to offer UM/UIM coverage to their insureds and, if the insured rejected the coverage, to attach a written rejection of UM/UIM coverage to the policy. *Romero*, 111 N.M. at 159, 803 P.2d at 248; *Kaiser*, 1996-NMSC-050, ¶ 8.

In *Romero*, the plaintiffs knowingly signed a waiver of UM/UIM coverage and had not paid premiums for such coverage, but argued that they were entitled to it because their rejection of the coverage was not made part of the policy pursuant to 13.12.3.9 NMAC. *Romero*, 111 N.M. at 156, 803 P.2d at 245. The Court held in favor of the plaintiffs, stating that "[t]he rejection must be made a part of the policy by endorsement on the declarations sheet, by attachment of the written rejection to the policy, or

by some other means that makes rejection a part of the policy so as to clearly and unambiguously call to the attention of the insured the fact that such coverage has been waived." *Id.* at 156, 803 P.2d at 245.

The Court reasoned that strict compliance with the insurance regulations was required and that the outcome furthered the policy of giving the insured "affirmative evidence of the extent of coverage" in order to enable the insured to make informed choices about coverage. *Id.* Similarly, in *Kaiser*, the Supreme Court held that UM/UIM coverage was not effectively rejected, despite the existence of a signed waiver from the insured, because the policy contained no evidence of the rejection. *Kaiser*, 1996-NMSC-050, ¶¶ 14, 17.

In *Williams v. Farmers Ins. Co. of Arizona,* 2009-NMCA-069, ¶ 2, 146 N.M. 515, 212 P.3d 403, the Court of Appeals addressed whether the insured's insurance contract validly rejected UM/UIM coverage. In *Williams*, the policy contained a declarations page, a page explaining coverage designations and loss payable provisions, other policy provisions and twelve endorsements. *Id.* ¶ 8. The insured had signed a waiver of UM/UIM coverage, but the waiver was not attached to the policy. *Id.* Because the waiver was not attached to the policy, the Court did not consider the waiver to be a valid rejection of UM/UIM coverage. *Id.* (citing *Kaiser*, 1996-NMSC-050, ¶ 14).

In holding that the policy itself was ambiguous, the Court reviewed the declarations page and the endorsements to the policy. *Id.* ¶¶ 10 14. The Court agreed with the insured that the endorsements to the policy were unclear. *Id.* ¶ 12. The Court held that while the coding on the declarations page, indicating "NC" or "NOT COVERED" for UM/UIM insurance coverage was not confusing, it was "at odds" with two of the three attached endorsements to the policy. *Id.* ¶¶ 11, 12.

According to the Court, the first endorsement appeared to amend certain exclusions from general UM/UIM coverage, the second endorsement amended the limits of liability for UM/UIM coverage, and the third endorsement deleted UM/UIM coverage from the policy. *Id.* While the insurer explained that the first endorsement referred to limited UM/UIM coverage carried by the insured on another policy and the second endorsement explained that the UM/UIM coverage carried by the insured was "portable" to the policy at issue, the Court held that an ambiguity existed. *Id.* ¶¶ 13, 14. The Court also held that the statement in the third endorsement deleting UM/UIM coverage, stating that the restriction in the endorsement "supercedes and controls anything to the contrary," failed to clear up the existing ambiguity, because each of the twelve endorsements contained identical language. *Id.* ¶ 15. In concluding that the policy was ambiguous and the rejection was not in accordance with the statutory and regulatory requirements, and in reading the UM/UIM coverage into the policy, the Court stated that "It is reasonable to expect an insurance company to provide its insured with consistent information: either UM/UIM coverage is deleted 'in its entirety' or the coverage is available under some circumstances." *Id.* ¶¶ 16, 17.

In *Romero v. Progressive,* 2010-NMCA-024, ¶ 2, the Court of Appeals held that an insured's choice to purchase UM/UIM coverage in an amount less than that available in liability coverage constituted a rejection of UM/UIM coverage. *See also Gulbransen v. Progressive Halcyon Ins. Co.,* 2010-NMCA-___, ___ N.M. ___, ___ P.3d ___ (No. 29,087, filed May 7, 2010) (holding that absent a valid rejection of UIM property damage coverage, coverage in the amount of the policy liability limits will be read into the policy). Because the insureds rejected some of the coverage available to them, the Court held that the provisions in Section 66-5-301 and 13.12.3.9 NMAC applied to the rejection. *Romero*, 2010-NMCA-024, ¶ 28. In holding that the insureds had not validly rejected UM/UIM coverage, and in reading UM/UIM coverage into the policy in an amount equal to the liability coverage, the Court stated that the insureds' policy "did not contain any affirmative evidence of the amount of UM/UIM coverage rejected[.]" *Id.* ¶ 29.

The Court first analyzed the declarations page of the insureds' policy and noted that it "did not contain a notification that UM/UIM coverage could be increased to equal the liability limits of the Policy" nor did it contain "any indication that the insured . . . rejected an amount of UM/UIM coverage that they [had] a statutory right to purchase." *Id.* ¶ 31. Without that information, the Court of Appeals held that the declarations page did not meet the objective of a valid rejection of UM/UIM coverage: of providing affirmative evidence of rejection sufficient for the insured to reconsider the decision to reject some or all of the UM/UIM coverage available. *Id.*

In *Marckstadt*, *supra*, our Supreme Court considered whether the Appellants' employers had properly rejected UM/UIM coverage and whether such coverage should be read into the employers' policies. *Marckstadt*, 2010-NMSC-001, ¶ 1. Appellants, employees that had been injured on the job, argued that the insured must provide the insurer with a written, signed rejection, which must be attached to the policy in order to be effective. *Id.* Answering the question presented in the case consolidated with *Marckstadt*, the Supreme Court held that "the written rejection itself need not be made part of the policy" and that "neither the statute nor the regulation requires that the insured's written rejection be signed." *Id.* ¶ 4.

In addressing the facts presented in *Marckstadt*, the Supreme Court outlined the following: the insurance policy included liability coverage for the employees and an endorsement entitled "Limits of Liability – Uninsured Motorists" listed all the states and next to each state, either an "x" or a dollar amount reflected the state's minimum limits. *Id.* ¶ 5. Next to New Mexico, the endorsement contained an "x" which indicated rejection of the coverage. *Id.* The employer, Lockheed, maintained that it intended to reject the UM/UIM coverage. *Id.*

Appellees argued to the Court that because the employers intended to reject UM/UIM coverage and endorsements to the policies evidenced the rejection, the statute's and regulation's requirements had both been met for rejection of UM/UIM coverage. *Id.* ¶ 13. Appellants argued that the following was necessary in order for the rejection to be valid: written rejection by the insured, signature of the rejection, and attachment of the rejection to the policy. *Id.*

In coming to the conclusion that the written rejection itself need not be made part of the policy nor signed, the Supreme Court stated:

> Section 66-5-301 does not explicitly address the manner in which the offer or rejection of UM/UIM coverage must take place. However, under the statute's

> plain language and the unambiguous policies embodied within it, we believe that certain implications can be clearly discerned. For example, in order for the offer and rejection requirements of Section 66-5-301 to effectuate the policy of expanding UM/UIM coverage, the insurer is required to meaningfully offer such coverage and the insured must knowingly and intelligently act to reject it before it can be excluded from a policy."

Id. ¶ 16. The Supreme Court found that a requirement that a rejection be made in writing is found in 13.12.3.9 NMAC. It held that "[u]nless the rejection requirements of 13.12.3.9 NMAC are strictly met, UM/UIM coverage will be read into an automobile liability policy." *Id.* ¶ 18.

Further, the Court explained that "[t]he written rejection requirement furthers the policy of expanding UM/UIM coverage by assuring that the insured is sufficiently informed before rejecting coverage, alerting the insured to the importance of the decision, and providing clear evidence of a decision to reject, reducing litigation after the fact." *Id.* ¶ 21. In addition to the fact that a written rejection must be obtained, the Supreme Court affirmed the holding from *Kaiser* that the rejection notice must also be endorsed, attached, stamped or otherwise be made part of the policy. *Id.* ¶ 23. However, the Court did not hold that the written rejection be attached to the policy in order to be effective. *Id.* ¶ 25. The Court found the regulation allows for other forms of compliance – the rejection be endorsed, attached, stamped or otherwise be made part of the policy – in addition to the written rejection. *Id.* ¶ 26.

Following *Marckstadt*, our Court of Appeals held that when a valid rejection of UM/UIM coverage is not obtained by the insurer, the UM/UIM coverage will "be read into the policy at the liability limits, regardless of the intent of the parties or the fact that the premium has not been paid." *Farmers Ins. Co. of Ariz. v. Chen,* 2010-NMCA-031, ¶ 27, 148 N.M. 151, 231 P.3d 607 (emphasis added) (Vigil, J., dissenting), *cert. granted,* 2010-NMCERT-___, ___ N.M. ___, ___ P.3d ___.

In *Chen*, the plaintiffs purchased two insurance policies – each provided for liability coverage in the amount of $100,000 for each person, $300,000 each occurrence and UM/UIM limits of $30,000 for each person and $60,000 for each occurrence. *Id.* ¶ 3. Mrs. Chen had signed two "Uninsured Motorist Election" agreements, which defined UM coverage and stated that the opportunity to purchase UM/UIM coverage had been provided. *Id.* An endorsement explaining that UM/UIM coverage had been rejected was attached to the policy and the declarations page referred to the endorsement by number. *Id.* ¶ 4. The form of the endorsement was generic, and indicated that the insureds had purchased UM/UIM coverage in an amount lower than the liability coverage. *Id.* The endorsement referred the insured to the declarations page for the liability limits. *Id*.

The Court first held that New Mexico law requires insurers to offer UM/UIM coverage up to the liability limits in an automobile insurance policy and that the plaintiffs' selection of coverage in an amount less than the liability policy was a rejection of the UM/UIM coverage equal to the difference between the two types of coverage. *Id.* ¶¶ 2, 10, 11. The Court then turned to whether or not the plaintiffs had validly rejected the UM/UIM coverage. *Id.* ¶ 12. In making a determination of whether the plaintiffs had validly rejected UM/UIM coverage, the Court analyzed the two requirements as defined by the Court as the "written rejection requirement" and the "attached notification requirement." *Id.* ¶18.

The Court first addressed whether the declarations page, the policy's s1655 forms and the election agreements met the written rejection requirement. *Id.* ¶ 20. The Court held that "at a minimum, insureds must be clearly informed as to: the amount of coverage that they are entitled to purchase; the amount of coverage they have in fact purchased; and the fact that they have rejected some amount of coverage." *Id.* ¶ 21. The Court analyzed the forms provided to the insured and held that out of the three documents, "no single document contain[ed] all the information the [insureds] would have needed in order to understand what, if any, UM/UIM coverage they had rejected." *Id.* ¶ 22.

> The election agreements list the amount of UM/UIM coverage purchased by [the insureds] but do not list the amount of UM/UIM coverage [the insureds] were permitted to purchase or the amount they had rejected by choosing to purchase less coverage. The declarations pages list both the amount of liability coverage and the amount of UM/UIM coverage purchased by the [insureds] but do not list the amount of UM/UIM coverage rejected or the amount of UM/UIM coverage available for purchase. The s1655 forms are generic forms that do not state the amount of UM/UIM coverage selected, the amount of UM/UIM coverage rejected, or the amount of UM/UIM coverage available for purchase.

Id. ¶ 22. "Based on these facts, we find that the documents do not meet the written rejection requirement because they do not provide sufficient information regarding the [insureds'] UM/UIM coverage to ensure the [insureds] knowingly and intelligently rejected that coverage." *Id*.

The Court then addressed whether the declaration pages and the s1655 forms satisfied the attached notification requirement defined in *Marckstadt*, as the election agreements were not attached to the policy. *Id.* ¶ 23. "In order to meet the requirement, the attached notification must clearly and unambiguously call to the attention of the insured the fact that some amount of UM/UIM coverage has been rejected and provide affirmative evidence of the amount rejected, sufficient to permit the insured to reconsider the rejection at a later date." *Id.* ¶ 24. In holding that the forms did not comply with the attached notification requirement, the Court reiterated that neither form contained all the "information necessary to fully inform [the insureds]" about their UM/UIM decision because neither document specifically stated the amount of UM/UIM coverage rejected nor the amount of coverage permitted under New Mexico law. *Id.*

The Court held that Farmers did not obtain a valid rejection of UM/UIM insurance coverage and read the UM/UIM coverage into the policy at the liability limits. *Id.* ¶¶ 26, 27.

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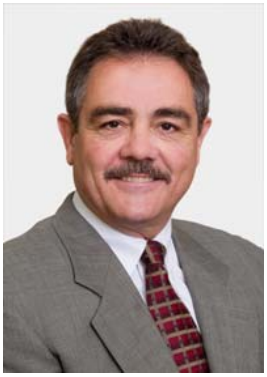

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The Judges' Forum

Compiled and Reported on by Andrew Johnson, Johnson Law Firm, L.C.

We are initiating a new program at the *Defense News* in what we have termed "The Judges' Forum." This last quarter we sent out two questions to all judges in the state to give them an opportunity to share their opinions, from a judicial perspective, about the practice of law in New Mexico and how that may affect the practice of the law by all members of the bar. Each quarter we will send out a list of questions to those members of the judiciary that are willing to participate in the forum and will publish the results we receive as part of the *Defense News.* Thank you to all of the judges who answered our initial survey; we received input from Municipal Court judges, District Court judges, Court of Appeals judges and Supreme Court justices.

The first question we asked this quarter was **"What changes can lawyers and their clients expect in your District as a result of the judiciary's 2010 budget?"**

- Eight judges responded by saying that we can expect changes. The Clerk's Office will be specifically impacted, we may see reduced hours, employee furloughs, longer wait times for service and increased backlogs. One judge specifically noted that it is likely to get worse before it gets better. One judge stated that there will be court closures and monthly furloughs for employees. Another stated that we can expect long delays in the administration of justice. We may see an increase in filing fees and jury fees or cessation of trials on an intermittent basis.
- Three judges stated that the drug court will either be eliminated or face a substantial reduction in funding.
- Four judges noted that no changes have happened as of yet, but if furloughs are eventually required, we may see longer waits to have cases heard, closure of municipal courts for furlough time, delays in issuing opinions by the appellate courts, and the ability of the public to access dispute resolution may be impacted.
- Eight judges explained that no changes are expected. One judge noted that beneficial programs have been cut but essential programs have not been affected. Another judge stated that no changes are expected so long as there are no further cuts and that they are hopeful to maintain services and avoid furloughs.

The second question we presented to the judges was **"Do you require participation in mediation by the parties in all civil cases? If not, please identify reasons you have excused the parties from otherwise mandatory mediation?"**

- Nine judges stated that they do require participation in mediation or settlement facilitation. One judge stated that "all parties and their agents, indemnitors, etc. must attend." Several judges noted that mediation is usually required, but they would excuse mediation if mediation has already been attempted or it is obvious that mediation would be a complete waste of time and money. Another judge noted that an exception would be prisoner *pro se* plaintiffs. Another exception would be purely equitable actions such as declaratory actions. One judge stated that they have not excused any parties from mediation but that is because they have not received such a request; the decision would be made on a case-by-case decision.
- Eight judges stated that they do not require participation in mediation. Several judges noted that they rely on the attorneys; if the parties believe it would be helpful, then mediation is encouraged. One judge stated that mediation is only successful if the parties are ready and willing to participate in good faith. Any party can request a settlement conference in a civil case on appeal and any judge on the appeals panel can refer a case to a settlement conference. Several judges stated that in their district, upon their request, other judges will conduct mediation or settlement facilitation which has the advantage of not costing the parties anything for a mediator. One judge stated that mediation is rare and voluntary.
- Two judges stated that appellate mediation is encouraged but not mandatory. The appellate mediation is handled in-house by Robert Rambo.

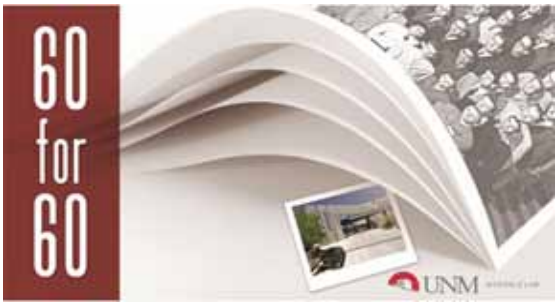
Once again, we thank all the members of the judiciary that were willing to participate in "The Judges Forum." If you have any questions that you would like to address to members of the judiciary, please send those questions to the *Defense News.*

The University of New Mexico School of Law Celebrates its 60th Anniversary

As reported by Cassandra R. Malone, Keleher & McLeod, P.A.

The University of New Mexico School of Law ("UNMSOL") enrolled its first class in 1947. This first class consisted of fifty-three students and was taught by four professors in a classroom on the second floor of the grandstand at Zimmerman Field, the University of New Mexico's football field. In May of 1950, UNMSOL graduated this first class. To commemorate the 60th Anniversary of this event, UNMSOL is putting out a book entitled **60 for 60,** with its release occurring on November 12, 2010 at the **60 for 60** Celebration.

60 for 60 came about because of a conversation between Dean Kevin Washburn and David Myers. Dean Washburn is the Dean of UNMSOL and Mr. Myers is its archivist. Sometime in the summer of 2009, Dean Washburn and Mr. Myers were talking about the history of the school. Mr. Myers stated that he was concerned that UNMSOL would lose its history as professors retired, because the archives that had been kept in the past were fairly lean. Dean Washburn stated that they should do something about that, especially in light of the upcoming 60th anniversary of the UNMSOL's first graduating class, and they came up with the idea of **60 for 60.**



60 for 60 includes a total of 60 notable people, places, events, and transformational legislative changes that have occurred in the past sixty years in New Mexico. The book is not a comprehensive history of the law school. UNMSOL's goal in creating **60 for 60** was to create an enjoyable book for lawyers and non-lawyers alike, which serves as a snapshot of some of the highlights of these years. However, in creating **60 for 60**, Mr. Myers has obtained more documented history of UNMSOL, which is a benefit to the school. The contents of **60 for 60** are confidential until its release date on November 12, 2010.

Numerous people at the UNMSOL were involved in supporting **60 for 60**, including Dean Washburn, David Myers, Nancy Harbert, faculty and staff. The most significant input came from the project's advisory committee, a committee of fifteen people, consisting of alumni, friends, New Mexico law firms, Bar and Legislative representatives, and faculty, all of whom were responsible for reviewing nominations and selecting the final content for the **60 for 60** book. In order to create **60 for 60,** UNMSOL requested nominations from the public, by sending requests to the legal community, including attorneys, alumni, UNMSOL supporters and beyond, and by advertising its requests for nominations. Nearly one hundred and fifty nominations were submitted. The committee then met every two weeks and thoroughly reviewed and selected ten entries at each meeting, until there were a total of sixty entries. According to Ms. Harbert, the UNMSOL editor and **60 for 60** editor, it was very difficult to choose among the nominations, but the committee did an excellent job in their commitment to meaningfully reviewing and debating the nominations and making final selections.

According to Ms. Harbert, working on **60 for 60** was both a fun and challenging experience. Ms. Harbert and Mr. Myers spent hours investigating the nominations for details of people and events that occurred in the more distant past, because of the lack of archived history. They spoke with many individuals to obtain more comprehensive information about the entries and to obtain pictures and information.

The release of **60 for 60** will occur on November 12, 2010. UNMSOL will commemorate this event with a significant celebration at the School of Law, to which everyone involved and the public is invited. At this event, **60 for 60** will be released and will be available for purchase for $24.95. As the release date approaches, UNMSOL will make an announcement as to the time. UNMSOL requests that everyone attend and join in the celebration of UNMSOL's contributions to New Mexico. To stay informed, please visit the **60 for 60** webpage at http://lawschool.unm.edu/60for60/index.php.

Upcoming Events

2010 CLE Schedule

- **Annual NMDLA Meeting,** October 14, 2010, Hyatt Regency, Nancy Franchini, Esq., Chair
- **Day in Discovery,** November 18, 2010, with special guest speaker, James McElheney, Esq.
- **Civil Rights 2010,** December 17, 2010, Bryan Garcia, Esq., Chair

Workers' Compensation Update

by Carlos Martinez, Butt Thornton & Baehr P.C.

The New Mexico Supreme Court, on April 30, 2010, handed down a decision in the case of *Theresa Ortiz for the Estate of Robert Baros, deceased worker, Respondent v. Overland Express and the New Mexico Workers' Compensation Administration Uninsured Employers' Fund.*

This was an appeal from the New Mexico Court of Appeals in which the New Mexico Court of Appeals found that, even though the worker was under the influence of methamphetamine and amphetamine at the time of his accident, in the Court of Appeals' opinion, these drugs were not covered by §52-1-12 NMSA, which otherwise operates to reduce allowable benefits.

The Supreme Court found that, in fact, methamphetamine and amphetamine were covered by §52-1-12. It reversed the decision of the Court of Appeals on that issue. In the Opinion written by Justice Petra Maes, the Supreme Court found that substantial evidence was not presented to support W.C. Judge Griego's earlier finding that the sole cause of the accident was the result of the worker being found to be under the influence of methamphetamine and amphetamine. Evidence showed that the worker was working two jobs at the time of his accident and death, and immediately prior to the accident, had very little sleep. Medical evidence was presented showing that prolonged use of amphetamines could, in fact, cause a worker to become fatigued.

Rather than base its decision on the facts and law, the Court based its decision on what it thought would be the best result for the worker, or in this case, the worker's widow and small children. It appears to the author that, clearly, when you have conflicting evidence, as was the case in this situation, it is up to the trier of fact (here, Judge Griego) to determine which evidence is more credible. While, in fact, there was evidence the worker could have been fatigued, there was also substantial evidence that the worker's use of methamphetamine and amphetamine could have been the sole cause of the worker's accident. In this case, the accident occurred when the worker rear-ended another vehicle, flipped, and rolled several times.

While the good news is that methamphetamine and amphetamine are covered by §52-1-12, the bad news is that the Supreme Court has chosen to overrule the finding of a judge who was faced with conflicting evidence and whose function is to sort out the evidence and determine which is more credible.

Medicare Update: Discovery to Assist in Statutory Compliance and Medicare Set Asides

by April D. White, Yenson, Lynn, Allen & Wosick, P.C.

As many of you may already be aware, Congress has enacted sweeping changes to the Medicare laws in recent years that have a dramatic impact on the way defense attorneys should be managing our cases. This article is designed to provide an overview of the Medicare Secondary Payer statute and to provide attorneys with some practical tips for managing the discovery process in an effort to stave off claims by the Centers for Medicare and Medicaid Services ("CMS") that the parties and their counsel have failed to adequately consider Medicare's interests.

The Medicare Secondary Payer ("MSP") statute prohibits Medicare from paying for medical services or prescription drugs when "payment has been made or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance." 42 U.S.C. §1395y(b)(2)(A)(ii).

The MSP requires attorneys to gather information regarding two distinct issues before settling any claims involving medical expenses:

(1) Whether Medicare has paid for any injury-related medical care received by this claimant in the past; and
(2) Whether it is possible Medicare could become obligated to pay for injury-related medical care received by this claimant in the future.

CONDITIONAL PAYMENTS AND DISCOVERY OF MEDICARE ELIGIBILITY

Medicare will provide injury-related care to its beneficiaries even if it appears that an employer or third-party liability insurer is ultimately going to be responsible for paying for some or all of that care. Medicare refers to payments made on behalf of beneficiaries under these circumstances "conditional payments" because they are made by Medicare upon the condition that they will ultimately be recovered from the employer or third-party liability insurer.

The MSP includes strict penalties that are designed to ensure that conditional payments are recovered at the time of settlement. Indeed, Medicare does not have a mere lien against settlement proceeds; instead, the MSP authorizes the

Department of Justice to pursue a direct cause of action against not only the claimant, but against the claimant's attorney, the employer or third-party liability insurer and its attorneys for double the amount of the original conditional payment made plus interest.

In light of the possibility of subsequent prosecution by the DOJ, it is critical that defense attorneys enact procedures for gathering information regarding conditional payments before settling a claim involving a Medicare-eligible claimant. It is advisable to submit a Medicare information form along with your initial discovery requests as a matter of course, just as you would submit medical and employment releases. CMS has not developed any standard form for use in discovery. However, our firm has developed a form that we use in our practice. *See* attached form *infra* pp. 14-15. It is important to elicit information regarding Medicare in every case, regardless of the age of the claimant, because Medicare eligibility can arise in other circumstances, as when the claimant has been receiving Social Security Disability Insurance Benefits ("SSDIB") or Children's Disability Benefits ("CDB") for 24 months, or has end-stage renal disease ("ESRD") and has been on dialysis for three months.

If it appears the claimant may have been Medicare eligible at the time of the accident, you must request information from the Coordination of Benefits Contractor ("COBC") regarding the amount of conditional payments Medicare believes it has made. CMS has a specific procedure for gathering this information. *See* www.cms.gov/COBGeneralInformation. You must have a release from the claimant in order to obtain conditional payments information, though it is possible the claimant's attorney may have already made the request.

FUTURE PAYMENTS FOR INJURY-RELATED MEDICAL CARE AND MEDICARE SET ASIDES

The MSP also requires parties to consider Medicare's interest when settling claims for future medical expenses. A Medicare Set Aside ("MSA") is a packet of information that is transmitted to CMS contractors to demonstrate that Medicare's interests have been reasonably considered as part of a settlement that includes payment for the claimant's future medical expenses. MSAs are prepared and submitted by Medicare Set Aside Certified Consultants ("MSCC").

At its core, an MSA has four component parts: (1) medical records and bills that demonstrate the claimant's past injury-related medical care and reasonably establish the type of future care that will be required; (2) an "allocation" that calculates the expected cost of future injury-related medical care and prescription drugs that would otherwise be covered by Medicare; (3) a description of the method of funding the allocated amount; and (4) a description of the method of administering the allocated amount.

There is no statutory or regulatory authority that requires or even authorizes CMS to review and approve MSAs. However, CMS has issued a number of policy memoranda that establish the circumstances under which parties are expected to submit MSAs, as well as the procedure and requirements for the submission of MSAs.

1. Worker's Compensation

Due to its workload, CMS has established a "review threshold" for MSAs. CMS only requires the submission of MSAs in worker's compensation cases and only when one of the following circumstances is met:

a. The claimant is a Medicare beneficiary and the total amount of the settlement (including payments for indemnity benefits, past medical expenses and future medical expenses) exceeds $25,000;

OR

b. The claimant is reasonably expected to become a Medicare beneficiary within 30 months of the settlement and the total amount of the settlement (including payments for indemnity benefits, past medical expenses and future medical expenses) exceeds $250,000.

CMS has cautioned that these are only *review thresholds*. The parties have an obligation to consider Medicare's interests in all cases in which future medicals are settled, even if the worker has never enrolled in the program.

2. Third-Party Liability Cases

There is currently no requirement that MSAs be submitted in third-party liability cases. However, the regional office that currently serves New Mexico is one of only a few that is currently willing to review MSAs outside of the worker's compensation context. Additionally, the MSP does not distinguish between worker's compensation and third-party liability cases. The parties are required to consider Medicare's interests equally in both contexts. In any case, it is important to remember that the limitations CMS has placed on its review of MSAs is solely due to its workload and not to any statutory or regulatory limitations.

It is entirely possible CMS will begin requiring MSAs in third-party liability cases in the very near future. The mandatory reporting requirements for insurers, once implemented, will give CMS all of the information it needs to go after insurers, claimants, and attorneys when liability settlements fail to reasonably consider Medicare's interests. For this reason, it may be advisable to prepare, fund and administer an MSA in cases involving catastrophic injuries and accompanying large settlements, regardless of whether CMS approval is sought or obtained.

Whether an MSA should be prepared in third-party liability cases that meet the MSA review thresholds for worker's compensation cases is anybody's guess. However, if CMS were to inquire, the parties must be able to demonstrate that they have taken Medicare's interests into account when entering into every settlement.

MEDICARE INFORMATION REQUEST FORM

Name: _____

Social Security No.: _____

Date of Birth: _____ Current Age: _____

1. Have you been enrolled in Medicare at any time in the past five years?

   _____ YES _____ NO

   1a. If the answer to #1 is YES, indicate:

   Date(s) of Enrollment: _____

   Medicare Claim Number: _____

2. Have you ever applied for Social Security Disability ("SSDI") benefits?

   _____ YES _____ NO

   2a. If the answer to #2 is YES, have you ever or are you currently receiving SSDI benefits?

   _____ YES _____ NO

   2b. If the answer to #2a is YES, indicate:

   The conditions for which you are receiving or have received SSDI benefits: _____
   _____

   The dates for which you received or are receiving SSDI benefits:
   _____

3. Have you ever been denied SSDI benefits?

   _____ YES _____ NO

   3a. If the answer to #3 is YES, have you appealed or do you anticipate appealing that decision?

   _____ YES _____ NO

   3b. If the answer to #3a is YES, please describe the status of any pending appeal and/or your plans to appeal in greater detail below:
   _____
   _____

4. Have you been diagnosed with End Stage Renal Disease?

   _____ YES _____ NO

5. Did Medicare pay for any medical treatment received by you as a result of the incident alleged in your Complaint?

   _____ YES _____ NO _____ UNSURE

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF _____)

I, _____, being first duly sworn upon my oath, deposes and state:

That I have read over, know and understand the contents of the foregoing Medicare Information Request Form, and that the statements therein made are true and correct to the best of my knowledge.

_____

This instrument was acknowledged before me this _____ day of _____, 20__, by _____.

_____
Notary Public

My Commission Expires:

_____

NMDLA AWARD RECIPIENTS

2010 Awards for Outstanding Civil Defense Lawyer and Young Lawyer of the Year to be announced at the NMDLA Annual Meeting on October 14, 2010, at the Hyatt Regency.

OUTSTANDING LAWYER OF THE YEAR AWARD

Awarded to attorneys who have, by their ethical, personal, and professional conduct exemplified for their fellow attorneys the epitome of professionalism and ability.

2008: Al Green
2007: Thomas Sandenaw
2006: William Gralow
2005: Charles Pharris
2004: Robert Sabin
2003: Bruce Hall

YOUNG LAWYER OF THE YEAR AWARD

Awarded to attorneys who have not practiced more than five years or are under the age of 36 and have, by their ethical, personal, and professional conduct, shown exemplary achievement in the legal profession and/or who have contributed time and expertise to the NMDLA.

2008: Jessica Hernandez
2007: Raul P. Sedillo