VERDICT

INSURANCE

Spring/Summer 2006

A Publication of the Georgia Trial Lawyers Association

VERDICT

The Journal of the Georgia Trial Lawyers Association

Volume 29, Number 7 Spring/Summer 2006

Officers:

President
Robin Frazer Clark

President-Elect
Joseph W. Watkins

Executive Vice President
W. Fred Orr, II

Secretary
Michael A. Sullivan

Treasurer
H.J.A Alexander

Parliamentarian
Geoffrey E. Pope

Executive Director of Member Services
Lynn Colston

Co-Editors
Elizabeth Pelypenko
David Webster

Articles:

13 **Surviving the Bankruptcy Funhouse: Protecting your Client and Protecting your Fee in Chapter 7 and Chapter 13**
By: Guy Gupton

16 **Interview With Dennis Caniglia**
By: Raymond J. Doumar

19 **Revisions to the UM Statute by the 2005-2006 General Assembly**
By: Michael L. Goldberg & Brian "Buck" Rogers

23 **Treating Physicians' Testimony Under Daubert**
By: Kenneth L. Shigley

Columns:

2 **Presidents Message**
By: Robin Frazer Clark

3 **A Legislative Report**
The 2006 Session Of The Georgia General Assembly
By: Political Affairs Director, William T. Clark

11 **A National Perspective**
By: Robert S. Peck President, ATLA Center for Constitutional Litigation

Departments:

26 **GTLA New Members**

28 **Verdicts & Settlements**

44 **Civil Justice PAC, Inc. Membership**

VERDICT (ISSN 1057-0152) (USPS No. 006-537) is published quarterly by the Georgia Trial Lawyers Association, 1250 The Hurt Building, 50 Hurt Plaza, SE, Atlanta, GA 30303-2916. VERDICT is the official publication of the Georgia Trial Lawyers Association. Periodical Postage PAID at Atlanta, Georgia 30303, and additional offices. The Verdict is the copyright of the Georgia Trial Lawyers Association with all rights reserved. Reprints may be requested at 404-522-0552.

POSTMASTER: Send address changes to the VERDICT, 1250 The Hurt Building, 50 Hurt Plaza, SE, Atlanta, GA 30303-2916, USPS #006-537.
VERDICT ©2005 Georgia Trial Lawyers Association.

Interview With Dennis Caniglia

By Raymond J. Doumar

Verdict: Tell us what we can do to get to the maximum recovery for our clients?

Caniglia: *I think it is important for the plaintiff's attorney to keep the claim representative up to date on the client's medical condition. Any change of condition, surgeries, medical specials, medical reports, expert witness reports, etc. will be helpful. This documentation will help the claim representative in the reserving and evaluation process. Remember, the claim representative is the one that makes the final recommendation for dollar authority to settle the case. Surprises are often difficult for the claim representative to explain up the ladder. I feel that open communication can keep the adversarial issues at a minimum once the case is in a position to be settled.*

Verdict: What are some of the biggest mistakes you see plaintiff's lawyers make in handling cases?

Caniglia: *At times I see more focus on liability and not on damages. Failing to properly document damages on an ongoing basis, and even at mediation, is a problem in evaluating the claim for settlement authority. This is especially true in medical negligence cases. Also, taking an adversarial position with the claim representative doesn't make things easier for either side. On larger cases, the failure to follow up on coverage issues such as the amount of the policy limits, excess coverage available, and exclusions that might affect coverage can result in a surprise at mediation, or even further as the case progresses. Also, is the party named a "named insured" or an additional insured under the policy? Does the professional corporation have coverage and are there additional limits available? A response to interrogatories that just gives you the policy limits may not tell you everything. Certainly this is not true on all cases but it is important on the larger cases, or cases that look as if there could be some policy exclusions.*

Verdict: Explain the reserve process.

Caniglia: *Obviously, reserving is not an exact science. In medical malpractice cases there are a number of factors that go into the reserving process. While this may differ from carrier to carrier, the following is a list of some of the major factors that insurers consider in setting a reserve: liability (percentage chance of winning or losing), injury, causation, jurisdiction, medical experts (both plaintiff and defense), verdict range, and defense counsel's evaluation and recommendations. Evaluation of the plaintiff is a major factor in all cases. Is the plaintiff believable? Does the plaintiff make a good witness? These are important factors. The plaintiff attorney's track record is also considered. Most companies have a different philosophy on different types of cases. Some try and reserve to maximum exposure, while others set the reserve based on their assessment of liability. If there is a verdict, the reserve should be the amount of the verdict unless the chances of getting it overturned are overwhelming. Reserving for expense varies from carrier to carrier. Some companies use a lode factor using the reserve as the denominator. Other carriers have the claim handler make an estimate of expenses depending on whether or not suit has been filed.*

(Continued on Page 17)

DENNIS CANIGLIA Employment & Experience:

- Mediator, Henning Mediation & Arbitration Services, Inc., 1999- present; Mediated approximately 400 cases of all types. Successfully mediated several cases in the eight figure range.
- St. Paul Fire & Marine Insurance Company, 1966-1999 (retired). Numerous positions including Claim Manager, Corporate Headquarters Regional Liability Claim Manager, Southeast Medical Claim Manager, and most recent National Directory of Major Litigation. Involved in resolution of major cases over $1,000,000 country wide, mostly by mediation.
- Appointed to a three year term, Supreme Court of Georgia's Commission on Alternative Dispute Resolution, also served on the ethics subcommittee that helped develop ethical guidelines for mediators, and review panel for any complaints on registered mediators and arbitrators, 1992-1995.
- Speaker at numerous State Bar of Georgia Continuing Legal Education, and Georgia Trial Lawyers Association Seminars, on various topics: case evaluation, mediation, medical malpractice, negotiation.
- Communication Coordinator for Representative John Y. McCollister, Nebraska, 1971-1972.
- 13 years in Army National Guard, Captain.

(Continued from Page 16)

Verdict: In good cases where you have a solid client with little or no baggage, do you feel that insurance companies typically pay more money after suit is filed and discovery completed than they would have paid pre-suit?

Caniglia: *I don't necessarily agree that this is true in all cases. Certainly on cases where liability is questionable some discovery has to occur to properly evaluate the case. Settlement is much more possible if the plaintiff's attorney shares the information addressed earlier in this interview. Many professional liability insurance contracts require permission of the insured. Some discovery may be required for the insured to understand the liability issues in order to secure the permission. On routine cases where liability is clear to both sides, cases should be able to be settled without filing suit.*

Verdict: Do you find that some insurance companies use mediation merely as a discovery tool?

Caniglia: *I do not see this happening. Sometimes something comes out at mediation that the insurance carrier and defense counsel are not aware of, i.e. recent surgery, new medicals, new experts. This affects the evaluation of the case and creates a surprise that was discussed earlier in the interview. These surprises can cause a mediation to break down. I just do not see mediation being used as a discovery tool.*

Verdict: Do you have any suggestions on what plaintiff's lawyers should do when the insurance company wants to "bracket" settlement amounts in mediation?

Caniglia: *"Bracketing" can be an excellent tool in mediation if used appropriately. Timing is very important in the process. I do not see it working early in the process. Parties read a median number once that occurs. This may not be the intention of the party. Counter bracket offers can allow the process to continue. It is very important for the mediator and the party making the offer to clarify, if accepted, whose move is next. While it would appear obvious, I have encountered several situations where this created a problem.*

Verdict: Take us through the process of an insurance company evaluating a claim.

Caniglia: *Many of these factors have been or will be addressed in this article. The factors are basically the same in the reserving process. In all cases, the named defendant plays a major role in evaluation. This is true whether the defendant is an individual or corporation. How does the local community view the defendant? Does the defendant have a good or bad reputation? I have been involved in many cases where the poor reputation of a hospital in a medical negligence case significantly increased the value of a case.*

Verdict: Do insurance companies consider plaintiff's counsel and his/her track record in evaluating a case?

Caniglia: *As mentioned earlier, the plaintiff attorney's track record is considered when an insurer evaluates a case. On the other hand, the defense team must be aware of the fact that some large verdicts have occurred with a relatively unknown plaintiff's attorney who has not necessarily specialized in that type of case. The insurance company must rely upon the local claim personnel and defense counsel when considering plaintiff's counsel.*

Verdict: Do you find that more cases are being tried now than before or vice-versa? Why?

Caniglia: *This changes from time to time. The trend seems to be that automobile insurance companies are defending more of the typical soft tissue cases because it seems they have had more success on those types of cases. In medical cases, it seems to be more and more difficult to get the insured to consent to a settlement. The reporting requirement on medical cases has made it more difficult to get permission to settle.*

Verdict: Are there specific documents plaintiff's lawyers should be asking for from insurance companies that we typically do not? If so, what are they? I typically request the insurance company's underwriting file when handling a trucking case. This request is often met with resistance. Is there anything in the underwriting file that we should specifically ask for in trucking and other cases?

Caniglia: *The underwriting process varies widely from carrier to carrier. Many times underwriting will get their risk management department to do a survey on a risk. This may be done on an ongoing basis depending upon the size of the risk. The survey often reveals some interesting facts. For instance, there could be a recommendation that a MVR be run on each driver once a year or that a driver's medical condition should be monitored every six months. In premises cases, there could be recommendations regarding various improvements the insured should undertake to help minimize the risk of a claim. These "recommendations" can be very helpful to a plaintiff's case when the insured doesn't implement them and an adverse event occurs that could have been prevented.*

Verdict: How much weight do insurance companies place on settlement packages? Is it worth our time and effort to prepare elaborate settlement packages? What works? What doesn't work?

Caniglia: *I think a settlement package makes sense, especially in large and complicated cases. Video settlement packages are very effective. Do not overkill. For example, don't overdo a "day in the life" part of the video. Show the highlights to get the point across with as short a video as possible so it doesn't get repetitive.Interviews with family members and friends are helpful if not overdone. Showing portions of damaging testimony from videotape depositions along with comments can be helpful. This is much more appealing to the decision makers as opposed to submitting reams of paper outlining depositions. This can be a good tool in assisting*

(Continued on Page 18)

(Continued from Page 17)

the local claim personnel and defense counsel in documenting their recommendations. The content and professionalism that goes into the settlement package are very important. The process of putting together such a package also focuses the plaintiff's attorney in evaluation of the case.

Verdict: Can you give us some other general tips on how to better negotiate our cases?

Caniglia: *A lot of my thoughts are outlined earlier in the interview. Establishing a line of communication with the claim representative is important. I realize this can't be done all the time. Some companies are quick to reassign a case at certain reserve levels or when a case goes into litigation. I have seen hesitation from plaintiff's attorneys going directly to a claim person without going through the defense attorney. This depends on the claim representative. If the claim representative is doing his job, he should make the contact and keep the defense attorney apprised of what transpired. In my previous life as a Regional Claim Manager, I encouraged claim representatives to handle claims in this manner. It is important to keep the defense attorney involved in the process. I have seen a number of cases where the defense attorney is kept in the dark as to settlement authority going into the mediation.*

It is important for the defense attorney to keep the insured up to date on the process as the case develops. This is especially true if an excess situation develops. Sometimes, off the cuff settlement discussions take place between the attorneys without any offers or demands being made. I personally request that any previous settlement discussions are not mentioned in the opening overview of the case during mediation. Sometimes these off the cuff discussions have not been relayed to the insurance company and could cause a problem during the mediation. This could also be a hurdle to the plaintiff when an unrealistic demand and offer occurs during the early stages of the mediation. As a mediator, I feel it is important to be up front in the process if a confidentially agreement is sought. I have seen cases get to the dollar figure agreeable and side issues become a hang up in finalizing the settlement. Demands by the carrier that a structured settlement must be used, time frame of when the check will be issued, and release issues are all items that can be a stumbling block once a settlement is reached. Addressing these issues early on makes the process run much more smoothly.

Verdict: What other stumbling blocks have you observed in the mediation process?

Caniglia: *Settlement demands that are increased at the time of mediation are a real stumbling block. Many times it takes hours to get back to the figure sought in the original demand letter. If things have changed in the case, then the defense should be aware of them before the mediation. Some plaintiff's attorneys insist that there be some money on the table before they will agree to mediation. I have mixed feelings about that. I don't think it is necessary. If both parties are agreeable to mediation, then obviously there is a desire to offer money and settle the case. Some insurance companies claim decision makers are reluctant to offer money until they are at the mediation. Plaintiff's attorneys often wonder if the company will make their top offer at mediation. I think in many cases the carrier will in fact offer their top dollar figure, and I have seen offers lowered if not accepted at the mediation. If both sides want to resolve the case, then they should try to get to the bottom line at mediation. A big stumbling block is an extremely unrealistic opening demand. This causes the mediation to drag out in getting the parties to a mutually agreeable figure. It also causes a ridiculously low initial offer. I have also seen realistic original demands and offers, and then both sides feeling what they did was a mistake. There is no answer to this issue. The decision varies from case to case and often depends upon the parties involved. The original demand and offer often sets the tone for the mediation. There is not a correct answer to this problem. I think both sides can appreciate this factor in the process and if they are more realistic to begin with the case will resolve sooner rather than later.*

Verdict: Give us your thoughts on why you ask the plaintiff to speak at mediation.

Caniglia: *I always ask the plaintiff if they have anything to add that the attorney did not mention in the opening. I think it is important for the plaintiff and family to voice their side of the case. More often than not the plaintiff has nothing to say. I suspect that their attorney has not prepared them to speak. I have found it to be very effective when plaintiffs do come forward and describe in their own words how the injury has affected them. The attorney should prepare his client for this as it is well worth the time. The way in which a plaintiff comes across is so important and this provides a good opportunity to increase the evaluation of a case. Some plaintiff's attorneys are reluctant to let their clients speak at mediation. This is a mistake in my opinion. I have seen the value of cases increase based upon the way the plaintiffs present themselves at mediation. This gives the insurance representative a chance to see the human side of the case when expressed by the injured party or his/her relatives.*

Verdict: Do you find that insurance companies are becoming less reliant on their defense counsel's opinions when it comes to evaluating a claim?

Caniglia: *I think this is true in the minority of cases, and that is a mistake. If they value the defense attorney's capability when assigning a case for defense, then they certainly should put a heavy weight on their evaluation of a case. This occurs at times from someone in corporate headquarters that sees files from all jurisdictions. They must rely to some extent on the local claims people, and defense counsel's recommendations.* ❖