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The Forgotten Insurance Coverage You Cannot Afford Not to Have

New Court of Appeals Case Expands Coverage

— Ted A. Schmidt

Just about everyone knows that the law requires them to carry automobile liability insurance. Most also appreciate that they should additionally purchase uninsured motorist coverage to protect themselves and their family when they are injured by other drivers without insurance. However, there is a third coverage that costs very little yet is frequently overlooked, if not ignored, by folks. It's called Underinsured Motorist Coverage.

The insurance required by state law is liability insurance. This coverage pays other people injured by you or your family's negligent driving. The problem with this mandatory coverage is that the amount that is required by law has not changed for 50 years. The law only requires motorists have $15,000 coverage per person and $30,000 coverage per accident. With the ever increasing cost of medical care this is a woefully inadequate amount of insurance to reasonably compensate folks seriously injured or killed in an automobile accident.

You may be a responsible driver and smartly choose to buy more liability coverage than required by law. But what do you do when you or your family is injured by another driver who has not? This is where Underinsured Motorist Coverage comes in. **UIM** coverage pays **YOU** and **YOUR FAMILY MEMBERS** when another driver is at fault in the accident and that driver has inadequate insurance. It is there to make up the difference between the other driver's insurance and the true amount that would fairly compensate you and your family for their injuries. It is not very expensive and you can purchase it in very large amounts.

Recently the Arizona Court of Appeals made the purchase of this coverage even more desirable. *In State Farm Mut. Ins. Co.v. White*, 231 Ariz. 337, 295 P.3d 435 (App. January 3, 2013) grandma's grandchild was riding as a passenger in the car she was driving when another driver negligently caused a wreck, killing the child. Grandma's daughter, the mother of the child, brought a claim against the careless driver only to find his insurance was inadequate. She then made a claim against grandma's Underinsured Motorist Coverage which provided coverage to the "named insured" (grandma) and any "relative" of the named insured. State Farm argued there was no coverage because the grandchild did not live with grandma. The Arizona Court of Appeals disagreed and demanded State Farm pay.

So the lesson to be learned is check your own auto coverage now and be sure you have Underinsured Motorist Coverage and that you have high limits to assure that in a serious accident, you and your family are protected. If not, call your agent and ask for a quote. You will be surprised at how much protection you can buy for so little in premium.

Medical Malpractice Reform
Has Only Confused The Rules of The Road

— Jim Campbell

What if you did not know how fast you were allowed to drive on the highway? What if despite your best efforts to drive safely, you got your license revoked because the rules had suddenly changed based on a whim of a particular police officer? You would be tentative in your driving, and you would probably refuse to drive some of the time. In 2005, the legislature confused the rules of the road for medical malpractice cases, which has impaired the rights of persons injured by medical mistakes.

In 2005, the Arizona legislature added Arizona Revised Statutes §§ 12-2603 and 12-2604. These laws added the requirements that an expert provide an affidavit early in a case and further restricted the types of medical experts that could testify in medical malpractice cases. The purported purpose behind these laws was to curtail the filing of frivolous lawsuits against medical professionals. Now that we have battled over these laws for the last 8 years, it has become crystal clear they failed to live up to this purpose and have only increased confusion, and expense.

Before 2005, medical malpractice attorneys ***already*** policed themselves before filing medical malpractice cases. In the vast majority of cases, before an attorney launched into a prohibitively expensive medical malpractice case, that experienced attorney had the case reviewed by the best of medical experts. When selecting the best experts, the attorney would thoroughly vet their expert's background. For example, if a pediatrician's care was at issue, a good attorney would make sure that they had a well-qualified pediatrician to review the case and be ready to testify about the medical errors and how these mistakes harmed the patient.

> ...it has become crystal clear they failed to live up to this purpose and have only increased confusion, and expense.

When the legislature enacted A.R.S. §§ 12-2603 and 2604, it included language that the plaintiff retain experts in the "same specialty or claims' specialty" and "same health profession" as the defendant. The legislature, however, failed to define these ambiguous terms.

Over the last 8 years, medical

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Legislative Update:
The Collateral Source Bill

— Matt Schmidt

As of right now, it is inadmissible in trial for a jury to hear any evidence regarding how much insurance a plaintiff has to cover their medical treatment and other expenses due to injuries caused by the negligence of another person. Many members of our Arizona State Legislature are trying to change that.

> What industry is this bill really trying to protect?

The proposed bill (HB2239) has passed in the House and is currently waiting to be voted on in the Senate. If passed, it will permit admissibility of collateral source evidence to show a plaintiff's reimbursement or indemnification of claimed damages from third parties. In other words, it will permit defendants to tell the jury how much insurance the plaintiff has to cover her injuries. The bill does not, in return, allow the plaintiff to disclose how much insurance the defendant has to cover the damages his negligence has caused.

The theory for those that promote the bill is a simple one: if the injured person has insurance to cover her medical bills, she should not be entitled to recover money for damages somebody else (aka her insurance) is paying for. The logic behind this theory, however, not only violates the principles of our tort system, but is flawed.

The bill punishes the injured person for buying her own protection (as we all know, insurance is not free) while rewarding the defendant for negligently injuring someone who coincidentally has insurance—essentially, the bill gives the defendant the benefit of the doubt by providing him with a discount for irresponsibly injuring a responsible person and allows him to benefit from insurance he did not pay a dime for. Instead of applying the logical principle that a negligent person should be held accountable for the full value of the damage he has caused another person—regardless of irrelevant collateral sources available—the bill instead turns this on its head, protecting the defendant from being responsible for protection purchased by someone else.

Finally, the defendant will in most situations have insurance to cover him for his liability, which begs the question: what industry is this bill really trying to protect?

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malpractice lawyers have been forced to argue these ambiguous terms in an effort to comply with the statute. Plaintiffs' lawyers endeavored to find experts that fit into these vague terms, and Defense lawyers used these terms to try to knock out otherwise meritorious claims. Rather than providing certainty and clarity to this field, the legislature's efforts added expense and ambiguity. As a result, the cost of litigating medical malpractice cases has increased.

A recent case, *Baker v. University Physicians Health Care*, (2013) provided little clarity to this muddy situation. In *Baker*, seventeen-year-old Tara Baker was treated for blood clots which ultimately contributed to her death. Her father brought a claim for wrongful death asserting that her doctor, Dr. Brenda Wittman, negligently treated the blood clots. Dr. Wittman was certified as a specialist in pediatrics with a subspecialty in pediatric hematology-oncology. Mr. Baker's testifying expert was certified as a specialist in internal medicine, with a subspecialty in hematology and medical oncology. Both doctors had subspecialties that allowed them to provided the type of care given to Tara Baker. Dr. Wittman's lawyers argued that despite the fact that Mr. Baker's expert routinely gave the type of care at issue to patients just like Tara Baker, he was not qualified under A.R.S. §§ 12-2604 to provide expert testimony.

First, the Supreme Court noted the qualifications of the testifying expert must be evaluated based on the type of treatment provided to the patient. If a defendant doctor has many areas of specialization the only area that matters is the specific area involved in the care of the patient. For example, if a defendant doctor is board certified in plastic surgery and ophthalmic surgery (eye surgery), but the allegedly negligent care provided to the patient involved a tummy tuck, then only the plastic surgery specialty is at issue. Because only the plastic surgery specialty is at issue, the testifying expert need not have both certifications.

Everyone is in favor of elimination of frivolous lawsuits.

Next, it addressed the definition of a "specialty." The court held the definition of "specialty" depends on the circumstances. If the care at issue was within a broad specialty, like pediatrics, then the testifying expert must be certified by the same board as the defendant doctor. If, however, the care at issue also involved a subspecialty, like pediatric hematology-oncology, then the testifying expert must also be certified in this subspecialty. The court said this analysis must be done on a case-by-case basis.

The conclusion of the *Baker* case resulted in more confusion. Now for each medical malpractice case the plaintiff must consider these questions: Was the defendant doctor certified in a subspecialty? If so, was the care provided in this subspecialty or just within the broader field?

Because of *Baker*, injured parties are further limited in their ability to seek just compensation. Despite that doctors from several different specialties are perfectly competent to describe how another doctor made a mistake that harmed the patient, the plaintiff is forced to find a doctor that matches the defendant doctor's qualifications. It is hard enough to find a doctor that is willing to testify against another doctor, but when the pool of available doctors is artificially shrunken this task becomes even harder. As a result, the ability of a patient to obtain fair compensation dwindles.

This is the exact result intended by the legislature when it passed these laws in 2005. A.R.S. §§ 12-2603 and 2604 artificially shrink the pool of experts from which an injured party with a meritorious claim can choose. The confusion of these laws also makes the selection of a qualified expert uncertain, which increases costs and adds another barrier to the filing of meritorious claims. As a result, meritorious medical malpractice cases are substantially more difficult to bring, which limits the rights of injured persons.

Everyone is in favor of elimination of frivolous lawsuits. But, it is not fair to change the rules of the road so unfairness and uncertainly limit the rights of injured patients to bring valid and appropriate medical malpractice claims.

If the Agreement Governs, the Agreement Governs:

ERISA Liens in light of *U.S. Airways v. McCutchen*

— Dev Sethi

Navigating our client's repayment obligations to their own health insurance plans that have paid for care continues to be an area of significant uncertainty and disagreement. In 2006 the United States Supreme Court made it clear that under the Employee Retirement Income Security Act (ERISA) a plan contract that requires the insured individual to reimburse the plan for paid medical expenses if the insured later recovers monetary damages from a third party is valid. But how much the plan is entitled to be repaid has remained an open question.

> But how much the plan is entitled to be repaid has remained an open question.

In *U.S. Airways v. McCutchen*, the Supreme Court returned to the question and offers some – albeit incomplete – guidance. The McCutchens were injured in a car accident and their health insurance plan paid their treatment expenses. The McCutchens filed a lawsuit against the driver who hit them, and shortly thereafter their plan

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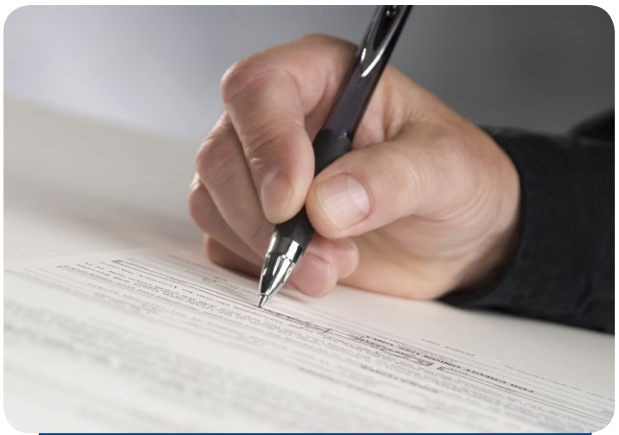

EST 2000 TSA EXPECT THE BEST

Tucson Soccer Academy FC begins its inaugural season in Tucson this summer. This team of women college players and superior older teen players, mostly from Tucson, is the equivalent of FC Tucson on the women's side. Support these local superstars in their home games at Kino which will be played as double headers with FC Tucson games.

Just wrapped up the first day of TSAFC tryouts.

June 8, 5:15 p.m. v. St. George United

June 15, 5:15 p.m. v. Salt Lake Real

June 28, 5:15 p.m. v. Salt Lake Starzz

July 6, 5:15 p.m. v. SC Del Sol

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asserted lien rights under a provision in the plan "Acts of Third Parties," which required the insured to reimburse the plan for all benefits paid out of any recovery from a third party (the negligent driver). The plan language further stated that the repayment amount would not be reduced even though the McCutchens did not receive full compensation and incurred attorney's fees in collecting the money.

The McCutchens challenged the plan's right to full reimbursement. They argued that principle of equity should apply to reduce their repayment obligation. Specifically, they argued that the plan was only entitled to recover money they received to specifically compensate for the same loss already paid for by the insurance. In other words, the plan could only look to the portion of money representing claimed medical expenses for reimbursement. That would make a big difference in calculating repayment because money for general damages, pain and suffering or lost wages would be outside the grasp of the plan. They also argued that the "common fund doctrine" applied to reduce the repayment amount by a reasonable portion of the attorney's fees incurred.

The Supreme Court disagreed. It held that existing law allowed the plan to include a repayment provision in its contract, and because the McCutchens had, at least in theory, agreed to that language, the agreement held. The plans clear terms authorized repayment, it went on to conclude that parties must be held to their mutual promises.

While rejecting the notion that equitable rules can override the plain language of the plan, the Court did conclude that they may assist in interpretation. In this case the plan language was silent on a common fund reduction – it said nothing about reducing for legal fees. The Court concluded that in the face of ambiguity, the common fund doctrine provided the clearest indication of the parties' intent and sent the case back to the trial court for a determination on appropriate reduction.

In the end, the Court is clear. "If the agreement governs, the agreement governs." If the plan language specifies how repayment obligations will be calculated, those terms will be imposed.

In support of their holding, the majority noted the deep historical roots of the common fund doctrine and stressed the essential fairness of the approach. Rejecting it would essentially allow the plan to be a free rider, obtaining benefits for which the McCutchens paid significantly.

In the end, the Court is clear. "If the agreement governs, the agreement governs." If the plan language specifies how repayment obligations will be calculated, those terms will be imposed. If there is ambiguity, certain equitable reductions may be available. In light of this new decision, expect to see revised plan documents that make it clear that repayment obligations start with the first dollar recovered, and that there will be no deductions for legal expenses incurred by insured individuals who are hurt and go to time, effort, expense and risk of holding third parties responsible.

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Ben's Bells Celebrates 10 Years of Kindness

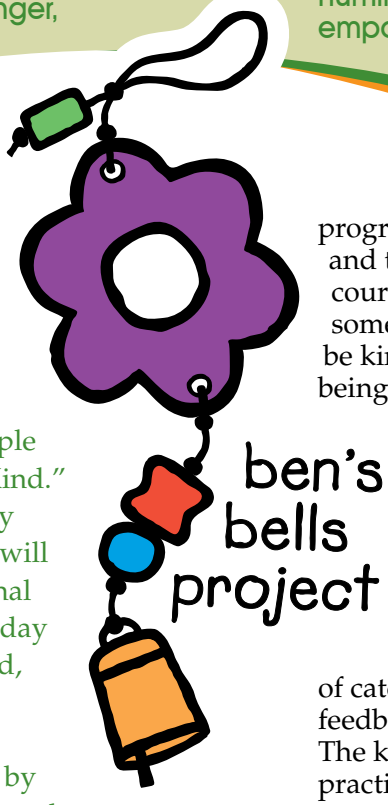
An old Cherokee is teaching his grandson about life. "A fight is going on inside me," he said to the boy.

"It is a terrible fight and it is between two wolves. One is evil - he is anger, envy, sorrow, regret, greed, arrogance, self-pity, guilt, resentment, inferiority, lies, false pride, superiority, and ego." He continued, "The other is good - he is joy, peace, love, hope, serenity, humility, kindness, benevolence, empathy, generosity, truth, compassion, and faith. The same fight is going on inside you - and inside every other person, too."

The grandson thought about it for a minute and then asked his grandfather, "Which wolf will win?"

The old Cherokee simply replied, "The one you feed."

— Dev Sethi



Drive through any Tucson parking lot, and you are sure to see Ben's Bells' iconic green flower and simple message, "Be Kind." Open the Friday paper and you will read inspirational stories of everyday folks recognized, or "belled," for their acts of kindness. Pass by the old bunker on the corner of Broadway and Stone, downtown, and you will be amazed at its transformation into a beautiful public art mosaic. Born out of the tragic death of 3-year old Ben, Ben's Bells is rooted in recognizing the positive impact of intentional kindness. The bumper stickers, and the brightly colored bells and tile mosaics that pop up around town, remain the symbol of the organization, but Ben's Bells is firmly focused on education and programming that is making a measurable difference.

I became involved with Ben's Bells after seeing the impact the Kind Kids program was having on my two elementary school age kids. Several thousand students in 150 elementary, middle and high schools across town are part of the Ben's Bells Kind Kids and Kind Campus programs, which give kids practice and tools helping them find the courage and the power to look somebody in the eye and either be kind to them or thank them for being kind.

There is no organized curriculum or lesson plan. Instead, the focus is on incorporating the concept of choosing to be kind into every aspect of interaction. At the foundation of the program is the simple idea of catching them being kind. That feedback is exceptionally powerful. The kids involved are actively practicing – and improving – the essential skill of kindness.

While kindness for kindnesses sake deserves to be celebrated I continue to be impressed by the anecdotal and measurable benefits of kindness. Teachers report real changes in how classmates interact with each other. It ranges from simply helping someone open a carton of milk to saying thanks for brightening an otherwise sad day. Those interactions create the foundation for a healthy, happy school experience, which we know is necessary for success.

The division and categorization of kids, by their own peers, is a destructive thing. I want my kids to grow up in an environment where good triumphs. Kindness is not weakness, sympathy or even tolerance. It is a skill that requires understanding and practice. It's not easy, either. But it's becoming clearer every day that kindness is an important life skill.

People all over are taking notice. There is tremendous interest from all parts of the country in the work that Ben's Bells is doing. From Idaho to Newtown, CT, champions in different communities are working to bring the message of Ben's Bells to their towns, schools and workplaces. Here in Tucson we are currently rolling out a Kind Colleagues workplace program and are growing the immensely popular Be Kind Step Up program, where people trade individually numbered hand-made bracelets as thanks for acts of kindness. The journey of each bracelet can be tracked online.

Kathleen Bowman, a teacher at Manzanita Elementary School, puts the impact of Ben's Bells succulently, "Kindness really changes things for the better and it has to start with the individual, and by empowering the kids with kindness and the ability to do that, you're empowering them to change the world."

For more information, or to order your own Ben's Bells gear, visit www.bensbells.org

Summer is the perfect opportunity to spend some time at the studio, helping to make bells. No artistic experience is necessary. It's a terrific way to get involved. There are two studios: 816 E. University Blvd. 40 W. Broadway Blvd.

happenings

Get ready to show off your golf game.

It's time for the Children's Museum Tucson's 9th Annual Father's Day Weekend Golf Classic. This year the four person scramble tournament will take place at the gorgeous La Paloma Country Club.

For more information, visit
www.childrensmuseumtucson.org

Roxanne Nolan

has joined our paralegal team. She has nine years of experience in civil litigation with an emphasis on personal injury matters and takes pride in her powerful advocacy skills on behalf of clients. In addition, Roxanne has a two year background in administrative issues with Blue Cross/Blue Shield's TriCare division handling health benefits, lien and insurance claim matters. Roxanne has lived in Tucson for nine years and enjoys her time out of the office reading, cooking, and spending time with her family.

Burt Kinerk is Honored at the C.A.T.S. Banquet

The legal team at Kinerk, Schmidt & Sethi, PLLC is proud to announce that one of our very own, Attorney Burt Kinerk, was recently honored with the Silver Anniversary Award at the Commitment to an Athlete's Total Success (C.A.T.S.) Banquet. The event was held at the McKale Center on April 15, 2013. While there, Mr. Kinerk proudly accepted an award that is only given to University of Arizona Letter winners who had competed at least 25 years ago. What makes this recognition truly special, however, is that it exemplifies the impact that one has had on the community through their chosen profession—which, in this case, is Mr. Kinerk's unwavering dedication to the practice of personal injury law.

Since his days as a letterman on the University of Arizona baseball team, Mr. Kinerk has distinguished himself as a leader in the Tucson community. Not only has he dedicated his professional life to assisting the wrongfully injured, but he has concurrently dedicated his personal life to serving as the founder of the Copper Bowl, the president of the Arizona Foundation and Tucson's Man and Father of the Year. For this reason, he was an obvious candidate for the Silver Anniversary Award. We at Kinerk, Schmidt & Sethi, PLLC believe that his tenacity, compassion and professionalism have led him to become one of the most highly respected attorneys in Tucson, AZ, so we could not be more excited to share in this most recent accomplishment.

Everyone Runs:

Rosie Fernety and her daughter Gabby recently volunteered at the April 6, 2013 Everyone Runs Catalina St. Park 5.2 & 103 Mile Trail Race. This was one of many races produced by Everyone Runs Everyone Walks throughout the year. The events are sponsored by notable community organizations and proceeds help to benefit worthy charities such as, TMC Foundation Fit Kid's Fund, Arizona Cancer Center, Girls on the Run, Casa de los Niños, and Life Donor USA to name a few. Rosie and Gabby (and her son Kyle when she can get him up early on a Saturday) have been volunteering since 2009 and plan to continue… Check out the Everyone Runs website for information on volunteering or upcoming races. www.everyoneruns.net

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We are dedicated to providing the strongest representation for our clients in a wide range of cases involving serious injury or death. We are grateful for the opportunity to work with referring lawyers from Arizona and around the country. We appreciate the trust those lawyers have in allowing us to assist their clients. We welcome the chance to talk. If you have a case to discuss or simply want to know more about us, please give us a call.

Are you interested in our thinking? If you would like to be added or removed from our mailing list for the KSS newsletter, please contact Bea Flesher at 520.545.1674 or bflesher@kss-law.com.
