CM REPORT
of Recent Decisions

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Wrongful Death Via Suicide Not A Cognizable Action In Illinois

The Problem Of Hindsight Bias

Misrepresentation Gives Insurer Right To Rescission

A summary of significant recent developments in the law focusing on substantive issues of litigation and featuring analysis and commentary on special points of interest.

Clausen Miller PC

CM REPORT
of Recent Decisions

FEATURES

ARTICLES

Illinois Supreme Court Holds That Wrongful Death Via Suicide Is Not A Cognizable Action In Illinois

by ***Melinda S. Kollross****,* ***Kimberly A. Hartman*** *and* ***Edward M. Kay***

On May 21, 2015, the Illinois Supreme Court issued its opinion in *Turcios v. The DeBruller Co.*, 215 IL 117962 (2015). In that case, the Supreme Court had the opportunity to rule on whether an action for wrongful death predicated on a suicide could go forward. The Supreme Court held it could not because wrongful death via suicide was not a cognizable action in Illinois.

Facts

Plaintiff charged that plaintiff's decedent committed suicide as a result of defendant's intentional infliction of emotional distress upon the decedent. Plaintiff and decedent had rented an apartment from defendant but shortly thereafter, defendant sought to evict plaintiff and decedent as defendant began demolition of the apartment premises. The complaint alleged that defendant's conduct caused plaintiff and the decedent fatigue due to lack of sleep, depression, anxiety and anger; further they were upset all the time because their daughters were also very tense and would cry all the time. The complaint also alleged that plaintiff's decedent told his wife that he could not tolerate the situation any longer but did not know what to do. Plaintiff's decedent then committed suicide in the apartment, leaving a note that read: "Please forgive me my daughters, and you also. Sell the land and build the house."

The trial court dismissed plaintiff's complaint, finding that under Illinois law there was no cause of action for wrongful death via suicide. Plaintiff appealed and the Appellate Court reversed, holding that "where a plaintiff can satisfy the elements of the tort of intentional infliction of emotional distress and the emotional distress is a substantial factor in causing a decedent's suicide, such causes of action are cognizable in this State."

Analysis: The Supreme Court's Opinion

The Supreme Court reversed the Appellate Court, holding that where a plaintiff seeks to recover damages for wrongful death based on the decedent's suicide allegedly brought about through the intentional infliction of emotional distress, the plaintiff must do more than plead facts which, if proven, would establish that the defendant's conduct was the cause in fact of the suicide. Instead, the plaintiff must plead facts which, if proven, would overcome application of the general rule that suicide is deemed unforeseeable as a matter of law. According to the Supreme Court: "A plaintiff must plead facts demonstrating that the suicide was foreseeable, *i.e.* that it was a likely result of the defendant's conduct."

In so holding, the Supreme Court rejected plaintiff's view under which

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legal cause would play no role in the liability of an intentional tortfeasor. According to the Supreme Court, plaintiff's view would create "open-ended and limitless liability for injury, no matter how abnormal, extraordinary, irregular or remote the injury may be." The Supreme Court stressed that it would be a "rare case" in which the decedent's suicide would not break the chain of causation and bar a cause of action for wrongful death "even where the plaintiff alleges the defendant inflicted severe emotional distress."

Learning Point: The Supreme Court's discussion in *Turcios* shows that the Court was not willing to hold and adopt a rule of law advanced by plaintiff that if the defendant intends to harm the plaintiff, the defendant is liable for whatever consequences follow, including suicide, whether foreseeable or not, as long as the defendant's conduct was a substantial factor in bringing about that harm. The Supreme Court made clear that a cause of action for wrongful death, predicated on a suicide allegedly brought about by the intentional infliction of emotional distress, is always subject to the general rule that suicide is unforeseeable as a matter of law. Noting the "heavy burden of pleading and proving facts that would overcome application of the rule," the Supreme Court's decision in *Turcios* can be seen as shutting the door, at least in Illinois, for any wrongful death action via suicide.

KEARNEY AND SOBCZAK PUBLISHED IN *TULANE LAW REVIEW*

The *Tulane Law Review* has published "Ancient Duties, Modern Perspectives: Recent Developments in the Law of Maintenance and Cure" by CM partner **Kimbley Kearney** and senior associate **Mark Sobczak**. Kim presented the paper at Tulane's prestigious Admiralty Law Institute earlier this year.

For more information regarding the article or any other admiralty issue, please contact Kim at **kkearney@clausen.com**.

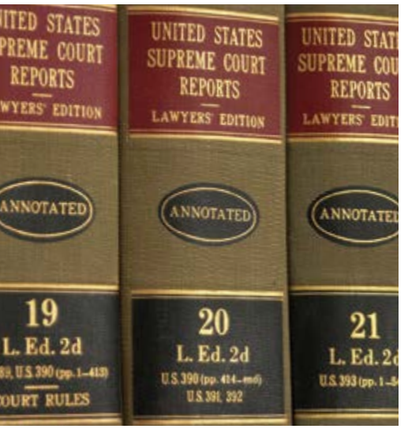
RIORDAN QUOTED IN *LAW360* ARTICLE ANALYZING ILLINOIS SUPREME COURT'S *SKAPERDAS* OPINION

CM partner **Brian Riordan** was quoted in a recent *Law360* article analyzing the Illinois Supreme Court's *Skaperdas* opinion holding that insurance agents owe a duty of care in obtaining coverage requested by policyholders. The Court ruled that the Illinois Code of Civil Procedure imposes a duty on agents, not just insurance brokers, to act with "ordinary care and skill" in obtaining coverage requested by a policyholder. The Court determined that the term "insurance producer" as used in the statute can be read to encompass both agents and brokers.

"The Illinois Supreme Court's decision rejects an argument advanced by captive agents that they merely have to present options to the customer and have no duty to procure specific insurance" Brian explained. "The Illinois Supreme Court recognized that the Legislature has weighed the public policy concerns here and looked at what the original statute intended…. The fact is, insurance producers hold all the information and know all the technical jargon, not the insureds. The Legislature said basically that there was an uneven playing field and that customers rely on insurance producers, so they should owe them a duty of ordinary care."

Brain further noted that "the ruling doesn't increase insurance brokers' or agents' duty in interacting with customers" and that "there shouldn't be a flood of new claims against agents."

"They just need to do what they've always done and provide their clients with what they're asking for," Brian said.



SCANLON PARTICIPATES IN MOCK TRIAL AND TRIAL SEMINAR

CM partner **Christopher Scanlon** recently participated in a mock trial and trial seminar for a client on April 9. Chris was one of six attorneys invited to present and participate before the entire casualty group, including four Claims Managers and the Senior V.P. in charge of casualty claims in addition to an audience of about 30 claims adjusters. The program provided both CLE and CE credits for those in attendance.

For more information on this topic, please contact Chris at **cscanlon@clausen.com**.

HOEY PRESENTS AT WESTERN LOSS ASSOCIATION SPRING SEMINAR ON BUILDERS RISK

Clausen Miller P.C. Chicago partner **Jim Hoey** presented at the annual Western Loss Spring Seminar in Lombard, Illinois on April 17, 2015. Jim's two-hour presentation was titled "Builders Risk Insurance Coverage: Exclusions, Triggers and Indemnification." Jim's presentation included a paper addressing various case law developments related to builder's risk insurance coverage. If you are interested in obtaining the paper, please contact Jim at **jhoey@clausen.com.**

VALENCIC PRESENTS AT ABA INSURANCE COVERAGE LITIGATION COMMITTEE ANNUAL MEETING

CM partner **Michelle Valencic** recently co-authored a paper titled "Municipalities Are Policyholders Too: A Review of Unique Insurance Coverage Issues Faced by Cities and Towns" covering topics which were then presented for Continuing Legal Education credit at the 2015 American Bar Association Insurance Coverage Litigation Committee annual meeting. Michelle presented along with policyholder counsel and the General Counsel for a local municipality.

The presentation focused on the interplay of insurance and local governmental tort immunities, securities claims against municipalities, trigger of coverage issues raised in wrongful imprisonment claims, and the impact of open records laws on insurance settlements.

The paper was also published in a recent issue of the *Coverage Journal* of the ABA.

Michelle routinely counsels and represents insurers in liability coverage disputes with municipalities and other governmental entities. She also handles various CGL, Excess, D&O, E&O and EPL matters within the Liability Coverage Group. For more information regarding the topics discussed in the paper, please contact Michelle at **mvalencic@clausen.com**.

ESPOSITO SELECTED AS KEYNOTE SPEAKER

On April 7, 2015, CM Senior Counsel **Paul Esposito** was one of the keynote speakers for a presentation to the AIG Chicago Claims Advisory Board. The topic of the address was "Evening the Playing Field: Providing the Best Trial and Appellate Counsel for AIG Policyholders." Paul discussed the valuable role that appellate counsel play during trial to help trial counsel win the case and provide the record needed for appellate success.

For more information, please contact Paul at **pesposito@clausen.com**.

CLAUSEN MILLER LISTED AS ONE OF THE 100 BEST LAW FIRMS FOR FEMALE ATTORNEYS

Law360, a publication which covers law firms and recent legal developments, has ranked Clausen Miller as one of the 100 best law firms for female attorneys in its inaugural survey.

Law360 surveyed a total of 308 U.S firms across the country. The firms were ranked on factors including the percentage of partners who are women, the percentage of non-partners who are women, and the number of female attorneys at the firms.

Clausen Miller is committed to the development of diversity through recruitment, mentoring, and promotion and supports the inclusion and advancement of exceptional attorneys with diverse backgrounds who are committed to providing outstanding client service. The collective strength of Clausen Miller attorneys lies in their legal abilities as well as their wide-ranging cultural and life experiences, all of which combine to provide the highest level of service and experience for clients.

Clausen Miller Presents Client-Site Seminars For CLE and/or CE Credit

As part of our commitment to impeccable client service, we are proud to provide client work-site presentations for Continuing Legal Education ("CLE") and/or Continuing Education ("CE") credit. Our currently available courses are listed below. Please view the individual course descriptions at www.clausen.com/index.cfm/fa/home.resources/resources.cfm for information regarding the state specific CE credit hours as well as course and instructor details.

Additional Insured Targeted Tender Issues and Other Emerging Trends Affecting Strategic Claims Determinations

Additional Insured Targeted Tender Issues and Other Legal Considerations Affecting Strategic Coverage and Litigation Determination

Alternatives to Litigation: Negotiation and Mediation

An Ethical Obligation or Simply an Option?: Choose Your Own Adventure When Adjusting a First Party Property Claim

An Insider's Guide to New York Practice

Appellate and Trial Protocols for Resolving Coverage, Casualty and Recovery Issues Facing the Insurance Claims Professional

Attorney-Client Privilege and Work Product Doctrine

Bad Faith Law and Strategy for the Claims Professional and Appellate Protocols for the Resolutions of Such Claims

Breaking Bad Faith, Failure to Settle Within Policy Limits, and Strategy for the Claims Professional

Builders Risk Insurance: Case Law, Exclusions, Triggers and Indemnification

Coverage and Trial/Appellate Litigation— Strategies Affecting Coverage Determinations

Coverage Summer School: "Hot" Insurance Topics for "Cool" Claims Handling

Deep Pockets: Prosecuting & Defending Government Liabilities— US & Municipalities

Developments In Property Insurance Coverage Law

Discovery in the Bad Faith Context

Jumping Over the Evidentiary Hurdles to Victory

Miscellaneous Issues of Interest Relating to Property Insurance

Recent Developments In Insurance Coverage Litigation

Recent Trends In Bad Faith and E-Discovery Issues and Protocols to Resolve Same for the Claims Professional

Subrogation: Initial Recognition, Roadblocks and Strategies

Targeted Tenders, Suits Against Employers, and Other Legal Issues Facing the Claims Professional

Tips and Strategies for the Claims Professional: What You Need to Know about Medicare Reporting, the Affordable Care Act, Targeted Tenders, and Unilateral Settlement Agreements

If you are interested in a course or topic not currently listed in our available courses, please contact the Clausen Miller Marketing Department at marketing@clausen.com

CM TEAM DEFEATS "DUE PROCESS" CLAIM AGAINST PRIVATE MEDICAL ASSOCIATION

CM Appellate Practice Group Co-Chair **Melinda Kollross** won affirmance from the Illinois Appellate Court, First District, of an order denying injunctive relief and dismissing the complaint of a physician whose diplomate status and board certification were revoked by a private medical association after the physician's license was restricted by a state medical board. The Appellate Court found that the medical association complied with its by-laws and satisfied the rudimentary due process standard by affording the physician an opportunity to respond in writing to the potential revocation, which the physician did, and that an in-person hearing was not required. CM partner **Brian Riordan** and associate **Jimmy Arce** successfully defended the claim in the trial court.

KAPLAN AND FLYNN WIN BACK TO BACK DISMISSALS OF TWO LEGAL MALPRACTICE CASES IN TWO COUNTIES IN TWO DAYS

Clausen Miller partners **Rich Kaplan** and **George Flynn** scored dismissals with prejudice of two legal malpractice cases in two days. The first motion was granted by a Lake County, Illinois trial court, dismissing the plaintiff's original complaint with prejudice. Rich and George represented an attorney who was sued by a former client/seller after a real estate closing was terminated by the buyer. In the second case, a Cook County, Illinois trial court also dismissed the original complaint with prejudice. The defendant attorney was sued by a former client after a commercial business purchase.

For more information, please feel free to contact **Rich Kaplan** at 312-606-7488 or **George Flynn** at 312-606-7726.

KOLLROSS WINS THIRD CIRCUIT APPEAL FOR LEGAL MALPRACTICE DEFENDANTS

Clausen Miller Appellate Practice Group Co-Chair **Melinda Kollross** has won affirmance from the Third Circuit Court of Appeals of summary judgment entered in favor of several legal malpractice clients. The Court's unanimous decision upheld the clients' victory against plaintiff's legal malpractice, breach of contract, breach of fiduciary duty and fraud claims. The appeal was decided on the briefs alone, without oral argument, thereby affording the clients a quicker and less costly resolution of the matter. The case was defended in the trial court by CM partners **Tyler Lory** and **Ruth Simon**. For more information about how CM's nationally-renown Appellate Practice Group can assist in prosecuting or defending your next appeal, please contact Melinda at **mkollross@clausen.com**.

FELDMAN AND STEWART OBTAIN SUMMARY JUDGMENT FOR GENERAL CONTRACTOR DEFENDANT

CM partner **Ian Feldman** and associate **Meredith Stewart** recently obtained a favorable result for their general contractor client who was named as a defendant in a personal injury lawsuit. Plaintiff was an employee of a subcontractor hired by CM's client to perform concrete work at a residential remodel project where CM's client served as the general contractor. Plaintiff alleged that CM's client negligently maintained, supervised and controlled the project resulting in the plaintiff's injuries and associated damages, including past and future medical expenses and loss of earnings.

Discovery established that at all times the subcontractor, rather than CM's client, retained control of the manner and method of the subcontractor's and the plaintiff's work at the project. Further, the evidence revealed that CM's client did not promise any safety measures, did not direct plaintiff in the conduct of his work and did not affirmatively contribute to the cause of the plaintiff's injuries. In addition, it was established that there was no latent defect on the property of which CM's client was aware, but failed to reveal to the subcontractor or to the plaintiff so as to to impose liability. Ian and Meredith filed a motion for summary judgment relying on a long line of California case law and demonstrating how exceptions to the general rule that the plaintiff's sole remedy was workers' compensation did not apply to the lawsuit. Ian and Meredith asserted the affirmative defense that since CM's client did not retain control over the subcontractor's work and did not affirmatively contribute to his injuries, liability could not be imposed. After oral argument, the court granted the motion and entered judgment against the plaintiff and in favor of CM's client.

FELDMAN AND HARKER SCORE MAJOR VICTORY FOR ATTORNEY CLIENTS

CM partners **Ian Feldman** and **Jay Harker** achieved complete victory for their attorney clients in defending a malicious prosecution action through appeal in California. The complicated, multi-year dispute encompassed several lawsuits. The first lawsuit arose from an attempted real estate transaction. The aspiring purchasers sued an escrow company when their deal fell through, alleging that it failed to ensure timely payment of a tax obligation. When the tax was not timely paid, the government initiated a foreclosure proceeding that thwarted the plaintiffs' purchase. CM's attorney clients obtained a defense verdict for the escrow company. This was upheld on appeal, although the trial court's fee award in favor of the escrow company was reversed.

In the second lawsuit, our clients represented the escrow company in an action for malicious prosecution against the underlying plaintiffs. The trial court granted an anti-SLAPP motion against the escrow company, which was affirmed on appeal.

In the third lawsuit, some of the original plaintiffs and their attorney sued our clients and the escrow company, asserting malicious prosecution in the second lawsuit. We successfully brought an anti-SLAPP motion against these malicious prosecution claims. The trial judge granted the motion, and the plaintiffs appealed. The court of appeal recently issued a comprehensive decision in favor of our clients and allowing our clients to recover their costs on appeal.

Lurking Within: The Problem Of Hindsight Bias

by ***Paul V. Esposito***

Introduction

We're all guilty. We've all said, "I told you so" when we really didn't know the facts beforehand. We've all second-guessed others' decisions, or played Monday-morning quarterback miles from the nearest football field.

We're all guilty of vigorously exercising our "hindsight bias." The term describes the phenomenon by which people exaggerate through hindsight what could have been reasonably anticipated in foresight. In hindsight, people see as inevitable what was really not inevitable at all.

Social psychologists have studied hindsight bias. In one study, participants were given information about two armies and asked to determine the probabilities of four possible outcomes of battle. Some participants were told that one of the outcomes actually occurred; others were not told. Those told the additional information assigned much higher probabilities to the possible outcomes than did those not told. The study data showed that telling participants about an outcome increased their estimate of likelihood by 6.3% to a whopping 44%.

Or we could look at it this way: no one unfamiliar with the end of the story would likely put money on David against Goliath. But knowing the end, people will more likely say, "I knew it all along" even though they didn't have a clue. It's hindsight bias at work.

The problem of hindsight bias becomes especially acute in the trial of a lawsuit. Jurors must determine such things as whether a defendant's conduct was reasonable, whether it was a proximate cause of injury, and whether punitive damages are appropriate. All the while, the jurors know the outcome—someone was hurt. That knowledge taints the result. The problem was discussed in a case in which Clausen Miller's Appellate Practice Group assisted at trial and on appeal.

Facts

In *Jentz v. ConAgra Foods, Inc.*, 767 F.3d 688 (7th Cir. 2014), three workers were seriously injured in a grain bin explosion. They sued bin owner ConAgra and bin cleaning specialist West Side for willful and wanton misconduct. During cleaning operations, the contents of the bin caught fire; the fire department was called. Before firefighters arrived, the West Side crew foreman sent two workers into a tunnel under the bin to retrieve tools. As they entered, the bin exploded. The jury awarded about $180 million in compensatory and punitive damages against ConAgra and West Side.

Analysis

The Seventh Circuit reversed the judgment against our client ConAgra for lack of duty. As to West Side, the Court reversed the punitive award. The issue turned on the crew foreman's knowledge of the likelihood of explosion prior to the firefighters'

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arrival. The Court found no evidence as to the likelihood that the bin would explode within any given time. A jury could only speculate that the foreman acted in gross deviation of the standard of care.

The Court cautioned against the resort to hindsight bias:

> Even a small risk will come to pass if events are repeated often enough, but Illinois has not announced a rule under which punitive damages are proper whenever small or remote risks occur and cause injury. The verdict appears to be a consequence of hindsight bias—the human tendency to believe that whatever happened was bound to happen, and that everyone must have known it. If [the foreman] believed that an explosion was imminent, then he is a monster; but of that there is no evidence. Hindsight bias is not enough to support a verdict.

Learning Points: So how does a defendant combat the human tendency towards hindsight bias? It's not easy, for our biases are often subconscious. But it can be done. Each case must be analyzed for the potential of hindsight bias and the circumstances in which it would occur. For example, was a physician's choice of surgical techniques reasonable? It can greatly help to lay out the variety of options so jurors can see that there was no one way for the physician to reasonably act. Getting the right expert witnesses can be essential in explaining alternatives.

Equally important are the trial lawyers' opening statements and closing arguments. Lawyers need to help the jury understand what often lurks within: a tendency to unfairly judge the facts by the result. If told about a subconscious bias, most people will try to correct it. So jurors need to know how hindsight bias works. They need to understand that their role is not to second guess by looking backwards from the injury. The jury's role is to look forward, to judge whether a defendant acted reasonably *at the time he acted* and whether injury was *foreseeable* based on the *then* known facts. Hindsight must have no place in the analysis.

"Nothing is so easy as to be wise after the event." Jurors armed with the correct method of analysis will have a better chance of reaching a wise result. Let us know if we can help. Contact Paul Esposito (**pesposito@clausen.com**) to learn more about our Appellate Practice Group's national trial monitoring practice and how we can work with your trial counsel to ensure the best possible outcome at trial and on appeal. ♦

Clausen Miller Data Breach Case Cited Prominently In Congressional Investigative Report

by ***Thomas H. Ryerson***

Facts/Analysis

A case successfully defended by CM partner **Tom Ryerson** and our Data Breach Defense team has been cited in a Staff Report of the U.S. House of Representatives, Committee on Oversight and Government Reform. Clausen Miller defended a health care clinic that was sued because of the allegedly unauthorized disclosure of personally protected information including the HIV positive status of hundreds of patients. The case was compromised for a confidential amount after extensive discovery. Information developed in discovery, combined with additional information by Congressman Issa's Committee Staff, resulted in a report which was critical of a company specializing in peer-to-peer monitoring services. That company, according to the Congressional Report and the discovery developed in the defense of the case, was intimately involved in recruiting class action plaintiffs and turning over information to the class action plaintiffs' lawyer.

Learning Point: Aggressive discovery in data breach cases can yield unexpected information that eviscerates plaintiff's allegations and conclude high-stakes litigation at a reasonable price for data breach victims and their insurers. ♦

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Pro Rata Allocation Ruling Certified As Final By Indiana Supreme Court

by ***Elise D. Allen*** *and* ***Mark W. Zimmerman***

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Facts

In a 3-2 decision, the Indiana Supreme Court denied transfer of the appeal in *Thomson Inc. v. Insurance Co. of North America*, No. 49A05-1109-PL-470, 2015 Ind. LEXIS 397 (May 15, 2015), certifying as final the appellate court ruling which rejected all sums allocation and held that, under the policy language at issue, *pro rata* allocation was appropriate. *Thomson* involved an insurance coverage dispute concerning damage claims by Taiwanese factory workers who alleged injury from long term exposure to organic solvents.

Analysis

In adopting *pro rata* allocation, the *Thomson* appellate court distinguished the Indiana Supreme Court ruling in *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001)("*Dana II*"), which applied all sums allocation to an environmental property damage claim. The Indiana Supreme Court reasoned in *Dana II* that the policy at issue provided indemnification for "all sums," not just those sums accruing as a result of damages which arose during the policy period. The *Thomson* appellate court held that *Dana II* was not controlling, finding that the *Thomson* policy language was "decisively different."

The *Thomson* appellate court cited favorably to two Indiana federal district court decisions which applied *pro rata* allocation under similar policy language. *See Trinity Homes LLC v. Ohio Casualty Ins. Co.*, 864 F. Supp.2d 744 (S.D. Ind. 2012); *Irving Materials Inc. v. Ohio Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 18692, 2008 WL 687126 (S. D. Ind. March 10, 2008). Adopting the reasoning of the *Trinity Homes* and *Irving Materials* courts, the *Thomson* appellate court held that the plain meaning of the limiting language "those sums" and "during the policy period" within the policies' insuring agreements only obligated the insurers to pay for those damages attributable to bodily injury during the policy period. The *Thomson* appellate court rejected the policyholder's argument that the policy language mandated all sums allocation. The *Thomson* appellate court remanded the case back to the trial court for determination of the most appropriate *pro rata* allocation method "in light of the factual complexities of the case."

The Indiana Supreme Court has now denied transfer and certified the *Thomson* appellate court ruling as final, albeit with a rare published dissent. Two justices stated they would have accepted transfer, and opined that there was no material difference between the *Dana II* and *Thomson* policy language. The dissenters noted that the policy at issue in *Dana II* included the qualifier "during the policy period," and further stated that the "subtle" differences in the *Thomson* policy language "fall far short of unambiguously 'prorating' coverage."

Learning Point: *Thomson* is a key victory for insurers, and changes the insurance coverage landscape in Indiana for long tail liability claims. Prior to *Thomson*, policyholders routinely argued that, under *Dana II*, Indiana was an "all sums" jurisdiction and that excess insurers in particular could face significant liability exposure. *Thomson* also exemplifies the importance, for allocation purposes under Indiana law, of the language contained in a policy's insuring agreement, as contrasted from the definitions of terms *referenced* in the insuring agreement. The *Thomson* policy explicitly stated, within the body of the insuring agreement, that coverage only applied to bodily injury and property damage taking place during the policy period. It should be noted that most older (pre-1986) policy forms do not contain this type of coverage limitation within the insuring agreement itself. As to these older policies, all sums risk still exists under the *Dana II* decision.

Other Holdings By The *Thomson* Appellate Court

The *Thomson* appellate opinion addressed and decided a number of other coverage issues in addition to allocation, and it is worth noting several now that the Indiana Supreme Court has certified this opinion as final. First, the *Thomson* court rejected application of the known loss defense to the claims at issue, even though the workers began filing suits against Thomson during the 1990s, years before the first policies were issued in 2000. Although the *Thomson* appellate court acknowledged that the known loss doctrine provides that an insured may not obtain insurance for a loss that has already taken place, it stressed that the "loss" at issue was the insured's liability for bodily injury to the factory workers, not whether there was actual bodily injury or environmental contamination itself. The *Thomson* appellate court held that Thomson did not have actual knowledge of its liability for these injuries before the effective date of the policies, reasoning that the Taiwanese court had originally dismissed these actions in 1998.

The *Thomson* court also rejected the insurers' late notice defense, which was based on evidence that the insured had known of bodily injury claims since the early 1990s, as well as the filing of a class action in 2004, yet failed to provide notice until 2008. The Court held that the insurers had failed, as a matter of law, to establish that Thomson unreasonably delayed in providing notice or that the insurers were actually prejudiced thereby. The Court reasoned that the 2004 suit was dismissed in 2005, not reinstated until 2006, and that no substantive hearing had taken place until 2009, after notice was given.

Finally, addressing a number of occurrences dispute, the *Thomson* court rejected the policyholder's position that each injury claim was a separate occurrence, holding that the underlying class action claimants' bodily injury claims resulted from two factually distinct "occurrences": (1) hazardous workplace conditions and (2) illegal chemical dumping into the local water stream. In so holding, the appellate court found two Indiana federal court decisions instructive—*Irving Materials, Inc. v. Zurich American Ins. Co.*, 2007 WL 1035098 (S.D. Ind. March 30, 2007) and *Indiana Gas Co., Inc. v. Aetna Cas. & Sur. Co.*, 951 F. Supp.773 (1996), *vacated, Indiana Gas Co. v. Home Ins. Co.*, 141 F. 3d 314 (7th Cir. 1998). The *Irving Materials* and *Indiana Gas* decisions evaluated the number of occurrences resulting from continuing injury under the "cause" theory, which examined whether there was "one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage." *Thompson*, 11 N.E.3d at 1001-02. Applying this cause theory, the *Thomson* appellate court concluded that even though hazardous chemical exposure was the underlying cause of all the injuries, there were two factually distinct practices which led to these injuries. Rejecting the policyholder's argument that the claimants each had unique, factually distinct exposures, the *Thomson* appellate court reasoned that multiple occurrence cases often involved exposures in multiple geographical locations, a circumstance not present here.

The *Thomson* appellate court rulings on known loss and late notice, as applied, could make it more difficult for insurers to successfully establish these defenses as a bar to coverage in future cases decided under Indiana law. By contrast, the *Thomson* appellate court's number of occurrences ruling, which embraces a broad interpretation of the "deemer clause," can be viewed as limiting coverage for long tail environmental and toxic tort claims under certain policies, especially those which do not contain applicable aggregate limits. ♦

LIABILITY INS.
COVERAGE

"Suit" Standard In *Dana* Applied By Northern District Of Indiana To CERCLA Requests

by ***Ilene M. Korey*** *and* ***Emily N. Holmes***

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Introduction

In June of 2015, the Northern District of Indiana held under Indiana law that any proceeding with an "entry-level cognizable degree of coerciveness or adversariness" constitutes a "suit," thus implicating the insurer's duty to defend. *American Chemical Services, Inc. v. United States Fid. & Guar. Co.*, 2015 U.S. Dist. LEXIS 72228, *2 (N.D. Ind. June 4, 2015) *citing Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 296-297 (Ind. Ct. App. 1997)("*Dana*"); *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 934–936 (Ind. Ct. App. 1999); *1100 West, LLC v. Red Spot Paint & Varnish Co.*, 2008 U.S. Dist. LEXIS 16811, *30–31 (S.D. Ind. 2008). In this case, American Chemical Services, Inc., ("ACS") had been served with CERCLA §106 orders, §107 demands from the U.S. EPA, and sought coverage from its insurer, United States Fidelity and Guaranty Company ("USF&G").

Following *Dana*, the court found that Information Requests under CERCLA Rule §104(e) from the U.S. EPA "coupled with a specific allegation of liability, §106 orders, §107 demands, and §122(e) offers, as well as analogous proceedings by state and local agencies, are 'suits' which trigger an insurer's duty to defend."

Facts

ACS is a chemical manufacturing company that supplied oil and chemicals to various industries. From 1976-1981, ACS conducted solvent reclamation and chemical processing from which ACS sent reclamation byproduct to one of four landfills in Indiana, Illinois and Michigan, including the Gary Development Landfill ("Gary Landfill"). During the 1980s, ACS received a letter from Indiana Department of Environmental Management ("IDEM") for information to assist in the closure of the Gary Landfill as a hazardous waste disposal facility. U.S. EPA sent a similar request in 1986. In 1987, the president of ACS testified before the EPA. ACS had no further contact regarding the site until 2011.

In 2011, the U.S. EPA sent ACS two letters. First, U.S. EPA sent ACS a General Notice Letter on November 7, 2011 that stated that ACS may be liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for the cleanup of improperly released hazardous materials at the Gary Landfill. Second, on February 25, 2013, ACS received a Special Notice Letter from the U.S. EPA identifying ACS as a Potentially Responsible Party (PRP) for the improper release of hazardous materials at the Gary Landfill. That letter included a formal demand for reimbursement of $628,813.29 for costs already incurred by the U.S. EPA at the Gary Landfill.

USF&G provided general liability insurance coverage to ACS from 1955 to 1984. ACS sought coverage for the CERCLA letters from USF&G under the 1980 and 1981 CGL policies. When USF&G refused coverage on a myriad of grounds, including the critical issue of whether the CERCLA letters met the standard of a "suit," ACS filed a declaratory complaint alleging that USF&G breached its duty to defend and indemnify ACS when USF&G refused to provide ACS with a defense to the CERCLA §106 and §107 letters. USF&G maintained that their insurance policies only require a defense to any "suit" which was not satisfied by the letters issued by U.S. EPA under Rules §§106 and 107 of CERCLA and corresponding administrative proceedings. Both parties cross moved for summary judgment on the issue.

Analysis

Typically under CERCLA, the EPA enforces an environmental cleanup in one of two ways. It can either issue an administrative order or pursue court action to force a PRP to clean up the site, or EPA cleans the site and pursues reimbursement of costs and penalties from the PRP. In many instances, the process commences with an effort by the EPA to garner information from a party as to its potential involvement in the site, and encourage voluntary participation of the PRP in the site cleanup. 42 U.S.C. § 9622(e). A PRP notification letter results in three possible options for the PRP: (1) engage in a voluntary settlement; (2) force the government to order cleanup; or (3) have the government unilaterally implement cleanup and litigate for reimbursement later.

The issue of whether EPA communications rise to the level of a "suit" for coverage purposes was addressed by the Indiana appellate court in *Dana*. In *Dana*, an insured sought coverage after receiving various EPA letters. The carriers denied coverage was implicated because there was no "suit" against the insured. The *Dana* court found that where the U.S. EPA can "enforce" pursuant to 42 U.S.C. §9604 (hereinafter "§104"), or demand information or documents that will subject a party to a $25,000.00 fine or higher if they fail to comply, or subject a party to treble damages for failure to comply with a §104 or §106 order under 42 U.S.C. § 9607(c)(3), there is a "cognizable degree of coerciveness or adversariness in the administrative body's actions" that are the equivalent to a "suit" for purposes of implicating coverage. Thus, the *Dana* court held that an insurer's duty to defend was triggered by EPA CERCLA enforcement actions.

Despite that holding, USF&G here argued that the *Dana* court incorrectly held that requests for information under §§104(e) and 107 are coercive, as they did not rise to the level of a threatened suit. Rather "mere notification or investigation when no enforcement action is contemplated" does not rise to the level to be considered a "suit." USF&G maintained that where the EPA letters communicated to the insured that it 'may' have 'potential liability' and that the letters qualified that "[t]he factual and legal discussions contained in this letter are intended solely for notification and information purposes," did not indicate that the EPA would be initiating, or was even contemplating initiating, an 'enforcement action' against [the insured]. USF&G urged the court to apply instead, a standard that strictly construes the unambiguous terms of the insurance contract requiring a "suit" before a duty to defend is imposed.

The *ACS* court examined the requests to ACS by the U.S. EPA and found them to fall within a "suit" as described in *Dana*. First, the EPA notified ACS of it potential liability under §§106 and 107 of CERCLA. The EPA then made a formal demand to ACS for reimbursement for costs already incurred at the site which totaled $628,813.29, and explained in the same letter how ACS can negotiate a settlement and cooperate with EPA, or face penalties. This demonstrated that the EPA was engaged in more than mere notification or investigation. Thus, consistent with *Dana*, the court found that USF&G's duty to defend was triggered, and subsequently denied USF&G's request for certification to the Indiana Supreme Court.

Learning Point: Insurers should be aware that what may appear as only a request for information under a CERCLA §104(e) "Information Request" may implicate a duty to defend in Indiana, and potentially other states that follow the same analysis. Information requests made under §104, coupled with a specific allegation of liability, §106 orders, §107 demands, and §122(e) offers (42 U.S.C.S. §§9606, 9607, 9622(e)), may rise to the level of "suits" implicating a duty to defend where there is a "cognizable degree of coerciveness in the administrative body's actions." ♦

Misrepresentation Gives Insurer Right To Rescission, Even As To Innocent Insured

by ***Don R. Sampen***

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The Illinois Insurance Code, 215 ILCS 5/154, provides the circumstances under which an insurer may seek rescission based on a misrepresentation in an application for coverage. Similar to many other states, the circumstances include a statement made on an application that is false and that materially affects the acceptance of the risk assumed by the insurer. In *Illinois State Bar Association Mutual Insurance Co. v. Law Office of Tuzzolino and Terpinas*, 2015 IL 117096 (2015), the Illinois Supreme Court found that an insurer was entitled to rescind a legal malpractice policy under Section 154, notwithstanding the fact that the rescission would impact the rights of an "innocent" insured.

Facts

In 2008, one of the two partners in the Law Office of Tuzzolino & Terpinas ("T&T"), Tuzzolino, submitted a renewal form for malpractice coverage to the firm's malpractice carrier, ISBA, on behalf of himself, Terpinas and the firm. In it, Tuzzolino affirmatively represented that he was not aware of any circumstances that could give rise to an unreported claim. In fact, a malpractice claim already had been asserted against Tuzzolino that was not reported.

Terpinas did not sign the form. He first became aware of the claim against Tuzzolino about a month later and reported it to ISBA. ISBA filed this suit for rescission against T&T and its partners in March of 2009. After briefing, the parties filed cross summary judgment motions, and the trial court granted ISBA's motion. The court found that ISBA was entitled to rescission of the policy in its entirety, and that it had no duty to defend Terpinas or the firm.

Terpinas and the claimant appealed, and the appellate court reversed. That court held that the innocent insured doctrine preserved Terpinas's coverage even though Tuzzolino's coverage was properly rescinded. ISBA then appealed to the Illinois Supreme Court.

Analysis

Innocent Insured Doctrine

In an opinion by Justice Charles E. Freeman, the Supreme Court reversed the appellate court. The Court pointed out that, under Section 154 of the Insurance Code, a misrepresentation, even if innocently made, can serve to void a policy, and that intent to deceive is not necessary. Here, moreover, the defendants did not dispute that the misrepresentation on the application materially affected acceptance of the risk.

The defendants nonetheless contended that the use of Section 154 in these circumstances is contrary to Illinois public policy, and that that section should not be used as a sword to vitiate insurance coverage. They thus believed that the appellate court properly relied on the innocent insured doctrine to protect the interests of Terpinas.

In the Court's view, however, the public policy of the state is properly expressed through legislation, such as Section 154. The Court further observed that the case law authority on which the appellate court relied for the innocent insured doctrine, *Economy Fire & Casualty Co. v. Warren*, 71 Ill. App. 3d 625 (1979), did not involve rescission of a policy under Section 154. Rather, it involved the rescission of a settlement agreement between insureds and an insurer, in which one of the insureds misrepresented facts leading to the settlement.

The Court further noted, moreover, that the innocent insured doctrine may have relevance where one insured's conduct triggers a policy exclusion, and a dispute arises whether the insurer has an obligation to an innocent insured. On the other hand, the doctrine has no relevance on the issue of whether a policy should be enforced in the first place, which is a matter governed by statute. The appellate court therefore erred in applying the doctrine here.

Other Issues

The Supreme Court said that the appellate court further erred in partially severing the policy to facilitate application of the innocent insured doctrine, pursuant to the ISBA policy's severability clause. That clause effectively created a separate insurance agreement with each insured, through language stating, among other things, that the "particulars and statements contained in the application will be construed" separately as to each insured.

Even if the policy were treated separately as to each insured, according to the Court, there was nothing to permit the application, or the misrepresentation it contained, to be split off from any individual contract.

The defendants further argued that it was impossible to return Terpinas to his status quo existing at the time the contract for insurance was made. Freeman acknowledged that rescission law requires a restoration of the status quo ante, but that is typically accomplished by the insurer refunding the premium it received, which the ISBA did here. The Court quoted authority holding that, where restoration of the status quo ante is impossible but not due to the party seeking rescission, such restoration may not be required.

Finally, the defendants argued that the renewal form on which the misrepresentation was made was not really an "application" under Section 154. But the Court pointed out that the form referred to itself as an "application" and required an attestation to the validity of the answers.

The Court therefore reversed the judgment of the appellate court and affirmed the trial court's rescission in favor of the ISBA.

Justice Thomas L. Kilbride dissented, arguing that the innocent insured doctrine should be applied because Terpinas had a reasonable expectation of continuing coverage.

Learning Points:

(1) Section 154 of the Illinois Insurance Code does not require an intent to deceive and may give rise to an insurer's right to rescind based on an innocent but material misrepresentation in an application.

(2) The innocent insured doctrine does not apply to an insurer's right to rescind a policy pursuant to Section 154.

(3) Illinois public policy with respect to insurance policies may be found in statutes passed by the legislature.

ANIMALS

LANDOWNER NOT LIABLE FOR ACCIDENT CAUSED BY TENANTS' DOG

Byers v. Moredock, 31 N.E.2d 1016 (Ind. App.)

Motorcyclist sued landowner after tenants' Rottweiler ran into a road. ***Held:*** A landowner has no duty to confine or restrain dog that it neither owns nor keeps. Damage caused by escaped dog resulted from negligent confinement, not a condition of the land. To establish liability, a landowner must retain control over property and have actual knowledge of animal's dangerous propensities. Landowner's placement of post in yard to confine dog did not establish control. It is not reasonably foreseeable that an animal will escape confinement. Motorcyclist failed to prove liability under local ordinance.

COURT OVERTURNS FAVORABLE VERDICT FOR DOG OWNER FOLLOWING DOGGIE DART-OUT

Warrick v. Stewart, 29 N.E.3d 1284 (Ind. App.)

Plaintiff motorcyclist was injured in collision with dog that had slipped its collar. ***Held:*** Allocation of 70% fault to plaintiff was excessive. Evidence conflicted as to motorcyclist's actual speed but showed that he was driving under the limit. The circumstantial evidence as to the length of the motorcyclist's slide did not establish speeding. Even if motorcyclist failed to keep a proper lookout, the greater weight of evidence was that the owner failed to properly chain the dog.

HORSE OWNER NOT LIABLE FOR INJURIES IN HORSE FIGHT

Wemer v. Walker, 2015-Ohio-1713 (Ohio App.)

Helper sustained injuries trying to stop a fight between horses tied to same ring. ***Held:*** Horse owner's conduct was not willful and wanton, the predicate for liability under equine activity statute. The owner had warned the helper that the horses would fight.

DOG OWNER NOT LIABLE FOR FAILURE TO CONTROL ANIMAL

Doerr v. Goldsmith, 2015 N.Y. LEXIS 1332 (N.Y. Ct. App.)

Plaintiff sued alleging defendant negligently "controlled and directed their dog into the path of the plaintiff" in Central Park. Defendant argued that plaintiff could not bring an action based on injuries caused by a domestic pet under *Bard and Petrone v. Fernandez*, 12 N.Y.3d 546 (2009). The trial court denied the motion, accepting plaintiff's theory that liability is premised on the owner turning the animal into an "instrumentality of harm" and the Appellate Division affirmed, stating that the Court recently had "recognized that an accident caused by an animal's aggressive or threatening behavior is fundamentally distinct" from one caused by an animal owner's negligence in permitting the animal to wander off the property where it was kept. ***Held:*** The Court of Appeals held that the *Bard* rule applies, stating "the dogs' choice does not result in negligence liability for the owner."

COMPARATIVE FAULT

SEATBELT DEFENSE UNAVAILABLE IN POLICE VEHICLE ACCIDENT

City of Fort Wayne v. Parrish, 2015 Ind. App. LEXIS 406 (Ind. App.)

Woman not wearing seatbelt was thrown from her vehicle in collision with police car. ***Held:*** Although Comparative Fault Act was inapplicable to accidents involving municipalities, Seatbelt Act was unavailable to establish woman's fault. Common law does not require use of a seatbelt, and the Seatbelt Act is unclear as to whether the seatbelt defense is available when the CFA is inapplicable.

DECLARATORY JUDGMENT

DUTY TO INDEMNIFY DECLARATORY JUDGMENT ACTION NOT RIPE UNTIL JUDGMENT IN UNDERLYING ACTION

St. John's Hospital v. Nat'l Guardian Risk Retention Group, 2015 IL App (4th) 140181-U (Ill. App.)

Hospital sued insurer seeking a declaration that insurer had a duty to indemnify the hospital in a medical malpractice action. Since insurer refused to provide coverage over $1 million total for the incident, hospital argued that insurer was obligated under the policy to cover $1million per defendant doctor, or $3 million total for the incident, or else hospital would be held vicariously liable for anything over $1 million. Insurer argued that the issues were not ripe for adjudication because liability had not

yet been established in the underlying case. ***Held:*** The declaratory action brought by the hospital was premature and not ripe for adjudication since—unlike a duty to defend—a duty to indemnify is not ripe until "an insured becomes legally obligated to pay damages in the underlying action" and any legal obligation on the hospital with respect to damage payments had not yet been determined in the underlying case.

ERISA

NO ERISA CLAIM IF CLAIMANT FAILS TO EXHAUST OR MISTAKENLY INTERPRETS ADMINISTRATIVE REMEDIES PROVIDED BY INSURER

Orr v. Assurant Employee Benefits, 786 F.3d 596 (7th Cir.)

Beneficiaries of an accidental death and dismemberment policy filed an action against the insurer challenging the insurer's denial of benefits based on an intoxication exception in the policy. In its denial letter, the insurer notified the beneficiaries of the two-level process for having this decision reviewed—the first review requested is performed by a separate claims adjuster and, if a second review is requested, then by the insurer's Life Claims Appeals Committee (LCAC). Prior to completion of the two-level review process, the beneficiaries filed suit. ***Held:*** The beneficiaries failed to exhaust all of their administrative remedies with the insurer before bringing suit, and the facts of their case do not fit any of the exceptions to the ERISA exhaustion requirement. Failure to properly interpret or misinterpreting the insurer's review procedure is not an exception to ERISA excusing a failure to exhaust remedies.

FIRST PARTY PROPERTY

NO COVERAGE FOR WATER DAMAGE UNDER POLICY'S SUDDEN AND ACCIDENTAL ENDORSEMENT

Platek v. Town of Hamburg, 24 N.Y.3d 688 (N.Y.)

A water main abutting insureds' property burst and flooded their basement. ***Held:*** The insurer did not err in denying coverage under the homeowner policy's water loss exclusion. The sudden and accidental exception endorsement did not resurrect coverage for the excluded peril.

HEALTH INSURANCE

INSURER NOT LIABLE TO PPO NETWORK PROVIDER FOR DISCOUNTING PAYMENTS WITHOUT STEERING PATIENTS TO PROVIDER

Bemis v. Employers Mutual Cas. Co., 2015 IL App (5th) 130402 (Ill. App.)

Chiropractor brought action against insurer for breach of contract, unjust enrichment, and a violation of the Illinois Consumer Fraud Act (ICFA) arguing that, after entering into contracts with an intermediary to participate in a preferred provider agreement in which the Chiropractor agreed to accept reduced reimbursements from insurance companies that had contracted with the intermediary, the insurer reduced its payments to the chiropractor without steering patients to him through the use of financial incentives to its insureds for utilizing chiropractor. ***Held:*** The chiropractor cannot state a cause of action for: (1) breach of contract because the chiropractor could not prove that a contract existed between it and the insurer "under either an incorporation by reference theory or a third-party beneficiary theory;" (2) unjust enrichment because the insurer "cannot be said to have retained a benefit" to the detriment of the chiropractor; nor (3) a violation of the ICFA because representations by insurer that it was part of the intermediary's network did not rise to the level of being actionable under ICFA.

INDEMNITY

PREMISES OWNER ENTITLED TO SUMMARY JUDGMENT ON INDEMNITY CLAIMS AGAINST DECEDENT'S EMPLOYER

Melito v ABS Partners Real Estate, LLC, 2015 N.Y. App. Div. LEXIS 4638 (N.Y. App. Div. 1st Dep't)

Decedent electronic mechanic fell to his death down an unguarded elevator shaft. His wife sued the owner and manager of the premises. The trial court entered summary judgment in defendant's favor against the plaintiff but denied it with respect to defendant's third-party common law and contractual indemnity claims against the elevator company, decedent's employer. ***Held:*** There was no evidence that defendant was negligent as its liability is solely statutory which is covered by the protections of Labor Law 240 (1), which releases owners from liability for failing to provide protection to a worker during the performance of labor such as erection, demolition, repairing of a building or structure. This accident was caused by decedent's employer allowing decedent to perform his job near the unguarded shaft way without providing him with any safety equipment, and therefore summary judgment should have been granted in defendant's favor on its indemnity claims.

INVITEES

BAR OWNER OWED DUTY TO PROTECT PATRONS FROM SHOOTING

Goodwin v. Yeakle's Sports Bar & Grill, Inc., 28 N.E.3d 310 (Ind. App.)

Three patrons were shot during an early morning barroom incident. ***Held:*** A court need not apply a foreseeability test to determine whether a duty exists when the law has already imposed a duty. Because a landowner owes a duty of ordinary care to protect invitees from criminal acts, foreseeability analysis only applies to the bar's alleged breach of duty.

STORE OWNER NOT LIABLE TO HEROIC PATRON

Smallwood v. MCL, Inc., 2015-Ohio-1235 (Ohio App.)

Store patron was injured pursuing criminal who robbed cashier. ***Held:*** Owners generally owe a duty of care to invitees but are not expected to guard against unforeseeable risks. No reasonable person would foresee that a customer would chase a robber. The danger was obvious, making a warning unnecessary. Owner had no duty to prevent patron from pursuing robber, which could have caused more harm than good.

LIABILITY INSURANCE COVERAGE

NO COVERAGE FOR PRUNING NEIGHBOR'S TREES

Albert v. Mid-Century Ins. Co., 187 Cal. Rptr. 3d 211 (Cal. App. 2 Dist.)

Insured sued homeowner's liability carrier after it denied coverage for an underlying suit brought by her neighbor alleging the insured negligently damaged his property by erecting a fence and pruning nine mature olive trees on his property. ***Held:*** The insurer was entitled to summary judgment. Whether the insured intended to damage the trees is irrelevant. The undisputed evidence established that she intended to cut them, and therefore the policy's intentional acts exclusion precluded coverage.

FAILURE TO DISCLOSE POTENTIAL CLAIMS LEAVES SECURITIES FIRM WITH NO COVERAGE

Crown Capital Securities, L.P. v. Endurance American Specialty Ins. Co., 186 Cal. Rptr. 3d 1 (Cal. App. 2 Dist.)

Investment firm brought contract and bad faith actions against professional liability insurer after it denied coverage for claims brought by its customers because the firm did not disclose the possibility of such claims as required by the insurance application. ***Held:*** The application, which became part of the policy, clearly required the firm to disclose facts and circumstances that might result in a claim or claims being made against it. The firm had knowledge of such facts and circumstances because one claim had already been made for the same investment property that resulted in the claims for which coverage was denied. The firm knew other customers also invested in the property and was therefore required to disclose those potential claims to the insurer in the application.

CONNECTICUT SUPREME COURT: NO COVERAGE UNDER CGL FOR DATA BREACH

Recall Total Info. Management, Inc. v. Federal Ins. Co., 317 Conn. 46 (Conn.)

The policyholder lost tapes containing information about IBM employees when the tapes fell off a truck during transport. IBM never filed suit, but it demanded reimbursement of sums spent because of the breach. ***Held:*** IBM's claim against the policyholder did not trigger the insurer's duty to defend under a general liability policy. Additionally, the lower court held that the loss of the computer tapes did not meet the definition of "personal injury" in the policy.

FAILURE TO SIGN SUBCONTRACT DOES NOT DEFEAT ADDITIONAL INSURED COVERAGE

West Bend Mut. Ins. Co. v. DJW-Ridgeway Building Consultants, Inc., 2015 IL App (2d) 140441 (Ill. App.)

A general contractor sought additional insured coverage under a subcontractor's policy. The insurer denied coverage because the contractors

failed to sign the relevant subcontract, despite affixing a signed copy of the proposal for work to the subcontract. The policy granted additional insured coverage to parties with an "executed" contract with the named insured. ***Held:*** The signed proposal satisfied the "executed" requirement. The court also held that the insurer owed primary coverage to the additional insured absent specific language in the subcontract stating that the insurer only owed excess coverage.

PERSONAL INJURY TRIGGERING DUTY TO DEFEND IN MALICIOUS PROSECUTION ACTION IS WRONGFUL CONVICTION, NOT EXONERATION

County of McLean v. States Self-Insurers Risk Retention Grp., 2015 IL App (4th) 140628 (Ill. App)

County sought declaration that insurer was obligated to pay the cost of the County's legal defense in a federal 42 U.S.C. § 1983 action arising from a wrongful murder conviction. In 1994, subject was arrested by County authorities, convicted for murder by a County jury, and sentenced to 50 years in prison by a County trial judge. In 2008, the Illinois Supreme Court overturned his conviction due to the State wrongfully withholding exculpatory evidence, and in 2009, all charges were dismissed against the subject. The insurer argued that the "occurrence" of the subject's "personal injury" as understood under the insurance policy was the subject's 1994 arrest and prosecution (outside of the policy's coverage period), not his 2009 exoneration (within the coverage period). ***Held:*** No "personal injury" occurred during the insurer's 2008-2009 policy coverage period. The "occurrence" that triggers coverage under the policy is the "actual injury suffered by the prosecuted party, not the actual tort of malicious prosecution," and to say that the subject suffered his "personal injury" at the time he was exonerated "would be to ignore the plain and ordinary meaning of the term 'injury.'"

SEPARATE PROCEEDINGS PRECLUDE APPLICATION OF EXCLUSION

American Casualty Co. of Reading, P.A. v. Gelb, 2015 N.Y. App. Div. LEXIS 4643 (N.Y. App. Div. 1st Dep't)

Plaintiff insurers moved for summary judgment seeking a declaration that liability policy did not cover defense costs for an adversary proceeding commenced by bankruptcy creditors against company and its officers. Liability policies had been issued for two separate policy periods: (1) from 2006 to 2007, and (2) from 2007 and 2013. Plaintiffs argued that both the merger litigation initiated in 2007 and the adversary proceeding initiated in 2009 arose out of the same transaction, constituting a single claim under the 2006-2007 period. The 2006-2007 policy excluded claims brought by or on behalf of the company against any of its own directors or officers whereas the 2009 policy did not. The trial court denied the motion and granted defendants' cross motion seeking a defense in the adversary proceeding. ***Held:*** The merger litigation and the adversary proceeding are two separate proceedings as they involved different parties, allegations and causes of action, even if they arose from the same merger transaction. Thus, the adversary proceeding claim arose in 2009 and is not subject to the exclusion.

UNDER NONCUMULATION CLAUSE, EXPOSURE TO LEAD PAINT BY TWO SUCCESSIVE TENANTS CONSTITUTED ONE ACCIDENTAL LOSS

Nesmith v. Allstate Ins. Co., 24 N.Y.3d 520 (N.Y.)

Members of two different families—who were successive tenants—were exposed to lead paint in the same apartment. The landlord's insurance policy contained a noncumulation clause which stated that "[a]ll bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss." ***Held:*** The successive tenants were injured by exposure to the same general conditions which were part of a single accidental loss, and thus only one policy limit was available to the two families.

NOTICE OF CLAIM TO INSURANCE BROKER WAS NOT IMPUTED TO CARRIER

Strauss Painting, Inc. v. Mt. Hawley Ins. Co., 24 N.Y.3d 578 (N.Y.)

Policyholder provided notice of claim to its insurance broker, but not to its carrier. ***Held:*** An insurance broker is normally the agent of the insured, and not the carrier. Notice of a claim made to the broker did not, therefore, constitute notice to the carrier.

LIABILITY WAIVERS

POSSIBLE GROSS NEGLIGENCE AND FRAUD RENDERS LIABILITY WAIVER UNENFORCEABLE ON SUMMARY JUDGMENT

Jimenez v. 24 Hour Fitness USA, Inc., 2015 Cal. App. LEXIS 494 (Cal. App. 3 Dist.)

Plaintiffs sued for personal injuries after husband fell backwards off a treadmill at defendant's gym and struck a steel beam on an adjacent piece of equipment, suffering serious head injuries. Relying on a waiver of liability provision in wife's membership agreement, defendant successfully moved for summary judgment. ***Held:*** Summary judgment was improper. Liability waivers do not apply to gross negligence under California law. Defendant might have acted with requisite "extreme departure from the ordinary standard of conduct" to support standard of care where plaintiff introduced evidence that defendant failed to meet industry safety standards in placing exercise equipment too close together. Additionally, the evidence could support a finding that defendant procured the wife's signature through fraud and misrepresentation by making certain non-verbal hand gestures and not referring the wife to a Spanish-speaking employee as per store policy.

LIMITATION OF ACTION

WARNING LETTER SUFFICIENT TO TRIGGER RUNNING OF LIMITATIONS PERIOD

Matter of Banos v. Rhea, 2015 N.Y. LEXIS 1035 (N.Y.)

Petitioner alleged that she never received a warning letter from Respondent New York City Housing Authority about termination of her Section 8 benefit. Respondent moved to dismiss the proceeding as time barred, but the lower court denied the motion, reasoning that Respondent failed to show that it strictly adhered with the consent judgment's requirement to send three notices. ***Held:*** The statute of limitation begins to run as soon as the tenant receives a "T-3 letter," regardless of whether Respondent has proven that it sent the other notice mailings mandated by the consent judgment. The Court identified the T-3 letter as the only relevant notice, and held that there is no indication in the consent judgment that all of the procedural requirements are conditions precedent to the commencement of the statute of limitation.

MEDICAL MALPRACTICE

PATIENT PERMITTED TO RELY UPON THE THEORY OF *RES IPSA LOQUITUR* IN MEDICAL MALPRACTICE ACTION AGAINST MULTIPLE DEFENDANTS

Frank v. Smith, 127 A.D.3d 1301 (N.Y. App. Div. 3d Dep't)

Plaintiff sustained numbness and loss of flexibility in his fingers following shoulder surgery. There was evidence that the injury occurred during the procedure, but the cause was disputed. Plaintiff's expert opined that injury was caused by negligence on the part of either the surgeon or anesthesiologist. ***Held:*** In a multiple defendant action in which plaintiff relies on the theory of *res ipsa loquitur*, a plaintiff is not required to identify the negligent actor, a rule that is particularly appropriate in a medical malpractice case in which the plaintiff has been anesthetized.

HOSPITAL COULD BE HELD VICARIOUSLY LIABLE FOR ACTS OF EMERGENCY ROOM CONTRACT PHYSICIAN

Smolian v. Port Auth. of N.Y. & N.J., 128 A.D.3d 976 (N.Y. App. Div. 2d Dep't)

Plaintiff alleged malpractice in relation to psychiatric care he received from a contract physician working in hospital's emergency room. Hospital denied vicarious liability for the alleged malpractice of a doctor who was not its employee. ***Held:*** Hospital could be held liable for contract physician's conduct where patient sought emergency room treatment from center and not from a particular doctor of his/her choosing.

PRODUCT LIABILITY

FAILURE-TO-WARN CLAIM NOT PREEMPTED BY FEDERAL DRUG LAW

Reckis v. Johnson & Johnson, 28 N.E.3d 445 (Mass.)

Parents sued manufacturer of over-the-counter Children's Motrin for failure to warn of possibly life threatening diseases if allergic reactions occur. ***Held:*** Claim was not preempted by the federal Food Drug & Cosmetic Act. Conflict preemption occurs when compliance with state law would conflict with requirements of federal law. Although FDA did not require manufacturer to identify the life-threatening diseases in warnings,

it did not preclude manufacturer from warning about their possible onset. ***Further held:*** Qualified pharmacologist may opine on the cause of child's injury even though he had never diagnosed or treated a patient with the disease. Expert's opinions were consistent with existing medical literature and testimony of treating physicians.

UNFORESEEN RECKLESS CONDUCT OF SECOND DRIVER HELD SUPERSEDING CAUSE

Bowman v. Kennedy, 126 A.D.3d 1203 (N.Y. App. Div. 3d Dep't)

Driver stopped vehicle and waived pedestrian across street and in front of vehicle. A second vehicle failed to slow down and drove around the stopped vehicle, onto the shoulder of the highway, and struck the pedestrian. ***Held:*** The conduct of the second driver constituted an unforeseeable, superseding cause of plaintiff's injuries, severing any causal nexus between plaintiff's injuries and any alleged negligence on the part of the stopped driver.

SALVAGE NOT REASONABLY FORESEEABLE USE

Hockler v. William Powell Co., 2015 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 1st Dep't)

Plaintiff brought strict products liability and negligence claims against defendant, who manufactured valves that had asbestos, alleging that he developed peritoneal mesothelioma as a result of his exposure to asbestos in the course of dismantling and salvaging scrap metal work from the steam systems. Plaintiff's claims were based on the defective design of the valves. ***Held:*** Dismantling and salvaging do not constitute a reasonably foreseeable use of the valves. Even if defendant's valves were defectively designed, plaintiff did not use the product in a reasonably foreseeable manner, and therefore the complaint should have been dismissed.

TORTS

POTENTIAL LIABILITY WHERE PASSENGER URGED EXCESSIVE SPEED

Navarrete v. Meyer, 2015 Cal. App. LEXIS 539 (Cal. App. 4 Dist.)

Plaintiffs sued defendant alleging that she encouraged a driver to drive at an excessive speed knowing the road conditions were such that the vehicle could become airborne, which occurred and resulted in a fatal accident. The trial court entered summary judgment in defendant's favor. ***Held:*** The evidence was sufficient to create fact questions whether defendant "aided and abetted" the driver in an "exhibition of speed" so as to subject her to civil liability; whether she and the driver entered into "an express or tacit agreement" to commit a civil wrong or tort to support a claim of civil conspiracy; and whether she interfered with operation of vehicle in violation of California statute.

SURVEILLANCE CAMERAS DID NOT CREATE NUISANCE

Scott v. Nameth, 2015-Ohio-1104 (Ohio App.)

After homeowner installed privacy fence and security cameras around his property, adjoining neighbors sued for nuisance. ***Held:*** Recovery for a qualified public nuisance caused by the negligent maintenance of a condition requires a "real, material, and substantial" injury. Neighbors' emotional discomfort in using their home and yard was insufficient. Nuisance must cause physical discomfort. No physical reason prevented neighbors' use of property.

SOCIAL HOST NOT LIABLE FOR DRUNK-DRIVING ACCIDENT

Tomasheski v. Ryan, 2015-Ohio-1593 (Ohio App.)

After drinking at defendant's home, intoxicated driver killed two people and injured two others. ***Held:*** Social host is not liable for injuries to the public at large caused by intoxicated guests as long as drinker had been served in a non-commercial capacity. A commercial proprietor has proprietary interest and motive to exercise greater supervision than others. Any change in law must come from the legislature.

UM/UIM COVERAGE

DUTY ON POLICY HOLDER TO ASSURE LIVERY POLICY IS PROPER UNDER ILLINOIS STATUTE

American Service Ins. v. Gray, 2015 IL App (1st) 141161-U (Ill. App.)

Insurer sought a declaration that it was only obligated to provide state minimum UIM coverage of $20,000 per person and $40,000 per occurrence related to an accident in which a vehicle of the insured, a "railroad livery business transporting railroad employees" was struck by another vehicle causing injuries to the defendants. The insurer argued that: (1) the livery business was sufficiently advised of what UM and UIM motorists were covered under the policy and that it may elect for coverage in excess of minimum statutory limits, but chose not to elect; and (2) the plain terms of the proof of financial responsibility law cited by defendants, 625 ILCS 5/8-101, indicate that it applies only to owners and operators of transportation businesses and provides no "mandate or responsibility upon insurance carriers." ***Held:*** The insurer and the livery business "clearly contracted for the limits stated within the parameters of the statute for . . . livery policies," and the "policy clearly states minimum coverage limits for [UM/UIM] coverage." Under Section 8-101, the duty is on the owner or policy holder to assure the policy is proper, the insurer has no duty to cover every single loss possible, and the court "cannot place a duty on a party where a statute does not in order to comport with the notions of public policy."

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