CM REPORT

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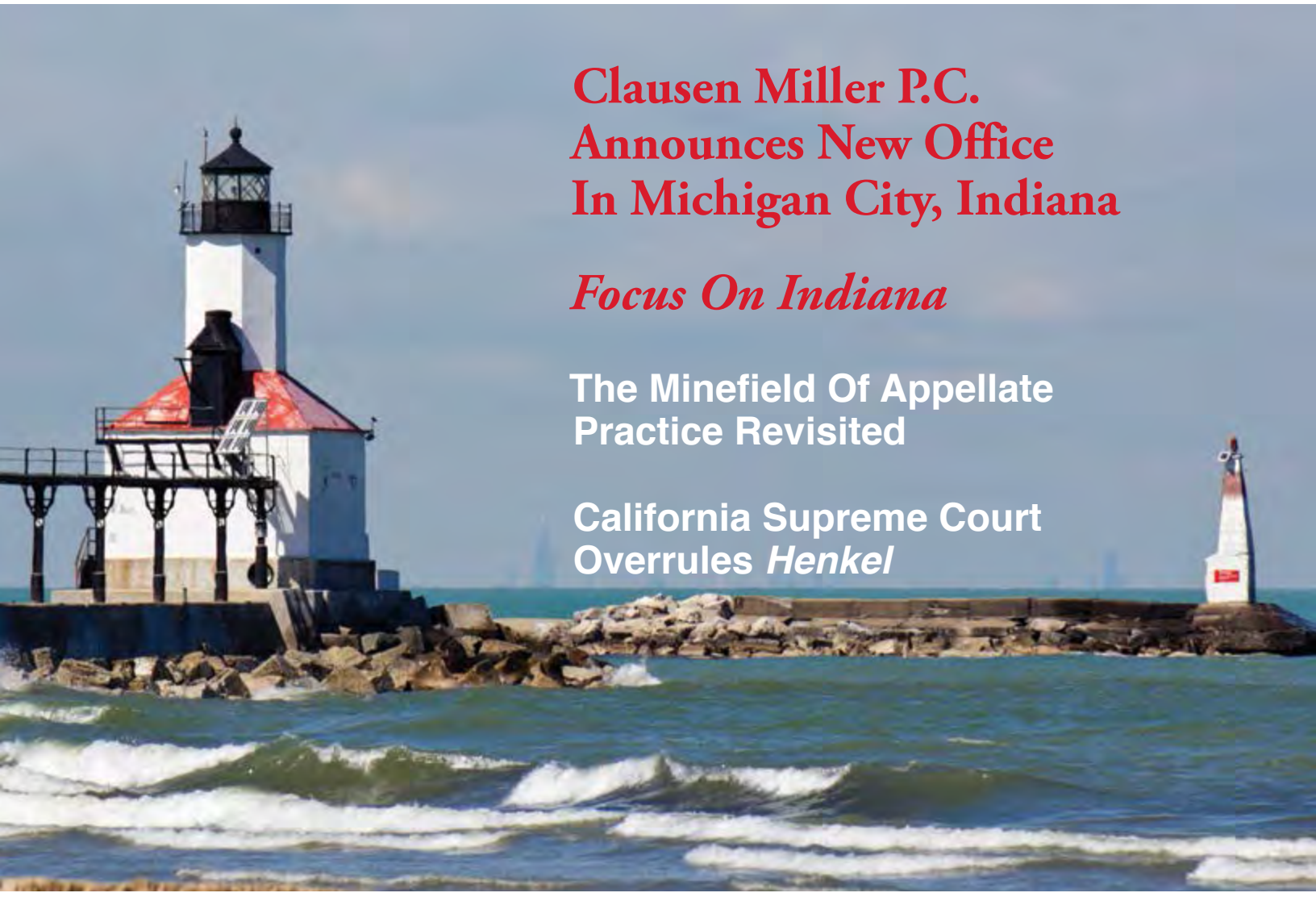

Clausen Miller P.C. Announces New Office In Michigan City, Indiana

Focus On Indiana

The Minefield Of Appellate Practice Revisited

California Supreme Court Overrules *Henkel*

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

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Indiana Supreme Court Resolves Ambiguity In General Wrongful Death Statute Holding That Attorneys' Fees Are Not Recoverable By Surviving Spouses And/Or Dependents

by **Kimbley A. Kearney**

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In *SCI Propane, LLC v. Frederick*, 2015 Ind. LEXIS 716 (October 15, 2015), the Supreme Court of Indiana resolved a matter of first impression under the State's fifty-year old General Wrongful Death Statute ("GWDS"), Indiana Code section 34-23-1-1.

Facts

The GWDS delineates two separate categories of decedents, those who are survived by spouses, dependent children or dependent next of kin and those who have no survivors. The GWDS specifically provides for recovery of attorneys' fees by the personal representatives of decedents without survivors who prosecute an action to recover damages for the exclusive benefit of a person or persons furnishing necessary and reasonable medical or funeral services to the decedent. The GWDS provides survivors with a right to recover damages "including, but not limited to," reasonable medical, hospital, funeral, and lost earnings of the deceased.

Analysis

In *SCI Propane*, the Court acknowledged that the phrase "including, but not limited to" is ambiguous. The ambiguity led the *SCI Propane* trial and appellate courts to award attorneys' fees for the prosecution of a wrongful death action on behalf of the decedent's survivors. The Supreme Court reversed those decisions. In 2011, in *McCabe v. Commissioner*, the Court resolved the same statutory ambiguity in Indiana's Adult Wrongful Death Statute, Indiana Code Section 34-23-1-2 ("AWDS"). The Court concluded that the same statutory construction it employed to interpret the AWDS applied to the GWDS: Both statutes must be "construed narrowly" and cannot be "broadly construed to permit any perceivable damage claim to be available in a wrongful death action."

Additionally, the Court reasoned that the damages recoverable under the GWDS by the decedent's survivors must be limited to those that "evolve from a deprivation to a survivor as a result of the death." *SCI Propane* concluded that attorneys' fees are not recoverable by survivors because they are not the type of "damages" that evolve from the loss of the decedent. Rather, attorneys' fees are attributable to the prosecution of a wrongful death action, and Indiana adheres to the "American Rule" that each party is responsible for paying his or her own legal expenses, unless recovery is specifically allowed by statute. By contrast, the legislature specifically allowed for the recovery of attorneys' fees where the decedent had no survivors to incentivize the prosecution of actions for the benefit of those providing medical and/or funeral services to the deceased.

Learning Point: *SCI Propane* forecloses the recovery of attorneys' fees by survivors in wrongful death actions brought under the GWDS. The Indiana Supreme Court's strong policy statement that the GWDS and AWDS must be strictly construed, and do not "permit any perceivable damage claim to be available in a wrongful action," may provide valuable support in defending against creative theories of recovery in wrongful death actions. Additionally, *SCI Propane* arguably forecloses claims for attorneys' fees under other statutes using the phrase "including, but not limited to" when itemizing recoverable damages. ♦

Indiana School Law: School Corporations Are Not Required To Provide Transportation For Students

by **Paige M. Neel** and **Michael V. Furlong**

The Indiana Supreme Court holds that the Education Clause of the Indiana Constitution does not require school corporations to provide transportation to and from school. *Hoagland v. Franklin Twp. Cmty. Sch. Corp.*, 27 N.E.3d 737.

Facts

In 2010, Franklin Township Community School Corporation ("Franklin") was faced with a large budget deficit and the School Corporation Board voted to discontinue transportation services for the majority of students attending its public schools. Following this decision, a private entity began providing transportation services for students at a cost of $20.00 per student as a registration fee, in addition to an annual fee of $475.00 for a single child and $405.00 for each additional child. Parents were therefore forced to choose between utilizing this private transportation at a significant cost, or to create an alternative means of transportation for their children. A class action lawsuit was filed against Franklin alleging that Franklin violated the Education Clause of the Indiana Constitution. The named plaintiff, Lora Hoagland, sought an injunction and a declaratory judgment asserting that Franklin's discontinuation of bus services was unconstitutional because it denied children an education and that the Education Clause requires school corporations to provide transportation for students to and from school. Franklin argued the Education Clause does not require school corporations to provide any services other than an education without charge.

Analysis

Article 8, Section 1 of the Indiana Constitution provides:

> Knowledge and learning, general diffused throughout a community, being essential to the preservation of a free government; it should be the duty of the General Assembly to encourage, by all suitable means,

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> moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

In this case, the Supreme Court initially observed that the Education Clause does not provide for a free *school system*, but rather that only *tuition* shall be without charge. The Court stated that it is clear the framers did not intend for every aspect of public education to be free, and their approach provided for a "uniform system of public schools that would be supported by taxation."

Interestingly, the Indiana Supreme Court was faced with a similar issue over 100 years prior in *State ex. Rel. Beard v. Jackson*, 168 Ind. 384, 81 N.E. 62 (1907). In that case, a town taxpayer sought to compel a township trustee to use certain funds to provide free transportation for students in the school district. The *Jackson* court found that there was no Indiana statute that required school corporations to provide free transportation. In that case, the court did not believe the issue was appropriate to be decided by the courts, and that such policies must be implemented through the legislature.

The *Hoagland* court also highlighted that there have been several challenges to Indiana's Education Clause, and most decisions have followed the holding in *Jackson* and afforded great discretion to the legislature in this area. However, the plaintiffs here argued that the Court should follow the holding of *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481 (Ind. 2006), which found a violation of the Education Clause by a school corporation. In that case, a school imposed a $20 service fee on all students that covered expenses such as nurses, media specialists, and alternative education. The court found that the fee was unconstitutional because it was essentially charging families tuition for attending public school and receiving a public education.

The *Hoagland* court did not agree with plaintiff and found *Nagy* inapplicable because it did not address in any way whether school corporations are required to provide transportation. Further, the fee in *Nagy* covered several *mandatory* and discretional services whereas the fee in *Hoagland* covered transportation which is a permissive service.

The *Hoagland* court's analysis continued with the important observation that an Indiana statute already expressly declares that the providing of transportation is a *permissive* action. Indiana Code section 20-27-5-2 states, "the governing body of a school corporation *may* provide transportation for students to and from school." (emphasis added). Therefore, it is indisputable that Indiana statutory language allows a school corporation to discontinue transportation services. It was then left for the Court to determine whether this statute violated the Establishment Clause.

In holding for Franklin, the Court followed the 100 year-old precedent in *Jackson* that the mandatory provision of free transportation by a school corporation must be provided for by the state legislature, and not the courts. Indiana has enacted laws that allow school corporations to choose whether or not to provide transportation. Although the Education Clause requires the students to attend school, this does not necessarily require the school corporation to also provide transportation under the Education Clause.

The Court also found the North Dakota Supreme Court's decision in *Kadrmas v. Dickinson Public Schools*, 402 N.W.2d 897 (1987) persuasive. The North Dakota Supreme Court found that free transportation was not mandated by its state constitution. Significantly, North Dakota's Education Clause is much broader than Indiana's insofar as it generally provides for "free public schools" as compared to Indiana's Education Clause that only provides for free tuition.

Finally, the *Hoagland* court emphasized the importance of remembering that what may be presented as good policy is not necessarily a constitutional requirement. The Court further stated, "[t]he legislature makes policy decisions regarding exactly what qualifies as a part of a uniform system of public education, and that will not be disrupted unless there is a clear violation of the constitution." The Indiana Constitution requires a uniform system of common schools, the decision to cease transportation services does not "close the schoolhouse doors" and is therefore not in violation of the Education Clause of the Indiana constitution.

Learning Point: Through this decision, the Indiana Supreme Court demonstrates its adherence to a strictly "textual" interpretation of the Indiana Constitution. *Hoagland* indicates that Indiana courts will not impose any obligations on state entities, such as school corporations, that are not expressly mandated by the text of the Indiana Constitution. Further, that the Indiana Supreme Court will continue to afford the state legislature great deference to enact laws that are not explicitly and specifically forbidden by the language of the Indiana Constitutional provisions. ♦

The Minefield Of Appellate Practice Revisited—*In Re: Estate Of York*, 2015 IL App. (1st) 132830

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

The authors of this Sidebar have continually recommended to our friends in the insurance and business industry the necessity of always retaining appellate practitioners to handle any appellate matters. The decision by the Illinois Appellate Court, First District in *Estate of York* reinforces the wisdom of our advice, as shown by the first sentence in the Appellate Court's Opinion:

> The case before us serves as a cautionary tale to litigants to adhere to Illinois Supreme Court Rule appellate filing deadlines, to timely file requests for extensions of time with good cause shown, and to specify all grounds of appeal in the notice of appeal.

Factual Background

The decedent, Mary York, and respondent-appellee Rosemary Mulryan were law firm partners. York loaned Mulryan $60,000, but York died before Mulryan paid the loan back to her. Following York's death, Mulryan stopped making any further payments on the loan claiming that the balance owed on the loan became a "gift".

Thereafter, the executor of York's estate sued Mulryan for the issuance of a citation to discover assets alleging Count I for breach of fiduciary duty, Count II for fraud, Count III for conversion, and Count IV for embezzlement. Mulryan moved for dismissal of the executor's action pursuant to Sections 2-619 and 2-615 of the Illinois Code of Civil Procedure. The trial court granted Mulryan's combined motion to dismiss pursuant to Section 2-619 with prejudice with respect to all allegations in Count I through IV relating to the $60,000 loan. As to the remaining allegations in the counts, the Court granted dismissal based on Section 2-615, without prejudice and with leave to re-plead.

Appellate Court Proceedings

The executor timely filed a notice of appeal and the case proceeded in the appellate court. Mulryan failed to file a response brief, and the Court took the matter under advisement on the executor's brief alone. Mulryan then filed a motion for an extension of time to file a response brief and for leave to file a motion to dismiss the appeal for lack of jurisdiction. On the basis of that motion, the appellate court then discussed why neither Mulryan, nor the executor followed the necessary Supreme Court rules for the proper prosecution and defense of the appeal, leading the appellate court to deny Mulryan's request and to find further that it did not have subject matter jurisdiction over the executor's appeal.

Mulryan's Appellate Failings

Mulryan told the appellate court that she did not timely file any response brief or motion on appeal because she thought there was no jurisdiction, and that no response would be

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necessary. Mulryan argued that the order under review could not satisfy the requirements of Rule 304(b)(1) which permits an immediate appeal without a finding of finality from any judgment or order entered in the administration of an estate which finally determines the right or status of a party. The appellate court disagreed, finding that the circuit court determined that the Estate had no action for the $60,000 under either a breach of fiduciary claim or a fraud claim, and granted the motion to dismiss in its entirety with respect to any and all allegations in Counts I, II, III and IV. This constituted a final determination of the Estate's right to the money in question. Despite rejecting Mulryan's jurisdictional claim, however, the appellate court would not allow Mulryan to file a brief on the merits because of her failure to file any timely motion making that jurisdictional argument or seeking an extension of time upon good cause shown to file her response brief. The Court stated:

> We also reject appellee's argument that she did not timely file any response because she felt the lack of jurisdiction was "obvious." Regardless of how "obvious" a litigant deems an argument, it may be unsuccessful, as in this case, and it still must be timely made before this court. Because appellee provided no good cause for why she did not timely file her motion, or seek an extension of time to file her appellate brief pursuant to Illinois Court Rule 343(c), we abide by our prior order and consider this appeal on appellant's brief only.

The Executor's Appellate Failings

The appellate court then turned to the executor and found that her notice of appeal was so deficient that it lacked the necessary jurisdiction to consider the executor's argument that the trial court erred in dismissing her claim that there was no fiduciary relationship between York and Mulryan regarding the $60,000 loan.

The fatal mistake the executor made in preparing the notice of appeal was in erroneously describing that part of the order she was appealing. The executor never identified in the notice of appeal that she was appealing from the trial court's order dismissing Count I that there was no fiduciary relationship between York and Mulryan regarding the loan of $60,000. Instead, the executor described a different portion of the order pertaining to the trial court's ruling granting the motion to dismiss Count II pursuant to Section 2-615. Although the executor argued for the reversal of the fiduciary count in her brief, the appellate court found that the notice of appeal was the single document that would control the appeal. Since the notice of appeal did not provide that the executor was appealing from the order dismissing her fiduciary relationship count, the appellate court had no jurisdiction to review the merits of that claim:

> This case does not present an excusable example of error merely as to form, such as a wrong numerical

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KEARNEY PRESENTS AT FDCC ANNUAL MEETING

Clausen Miller partner **Kim Kearney** recently spoke at the Federation of Defense and Corporate Counsel's Employment Law presentation at its annual meeting in Banff, Alberta. Kim's paper on "Bringing Your Own Device," co-authored by **Joshua Wolkomir**, is available upon request.

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

KOLLROSS AND SOBCZAK AUTHOR DRI ARTICLE

Clausen Miller partner and Appellate Practice Group Co-Chair **Melinda Kollross** and senior associate **Mark Sobczak** have authored a feature article published in the October 2015 edition of the Defense Research Institute ("DRI")'s "For The Defense" magazine. The article, entitled "Oral Argument: What It Really Takes To 'Please The Court'", is a thorough, practical guide to preparation and presentation of oral argument before reviewing courts nationwide. For more information or to obtain a copy of the article, please contact Melinda at **mkollross@clausen.com** or Mark at **msobczak@clausen.com**.

CLAUSEN MILLER PRESENTS "TIPS AND STRATEGIES FOR THE CLAIMS PROFESSIONAL"

Clausen Miller P.C. was invited to speak at an in-house Insurance Adjusters' Licensing Symposium held on September 29, 2015 at a client's corporate offices in New York City. Partners **Kimberly Hartman** and **Mindy Medley**, and Senior Associate **Mark Sobczak** presented a CE/CLE course titled "Tips and Strategies for the Claims Professional" to a live and remote audience of more than 200 insurance adjusters in New York, New Jersey, Massachusetts and Kansas. The lively discussion touched upon "hot topics" in the insurance industry, including: (1) limiting plaintiffs' claims for future medical costs under the Affordable Care Act; (2) preventing and defending against unilateral settlement agreements between plaintiffs and insureds, collectible only against insurance; and (3) ethics in claims handling.

RYERSON NAMED LEADING LAWYER IN ILLINOIS FOR 2015

The Law Bulletin Publishing Company, through its subsidiary Leading Lawyers of Chicago, has named Clausen Miller's **Thomas Ryerson** as a 2015 Leading Lawyer for Medical Malpractice and PI Defense.

Tom has an AV® Preeminent™ rating with Martindale-Hubbell indicating the highest ranking in legal ability and ethical standards as determined by his peers in the legal community. He has successfully tried and litigated, in state and federal courts, a wide variety of cases, including medical malpractice, products liability, commercial litigation, insurance coverage and employment practices liability. Tom has defended consumer class actions, mass tort class actions, computer security breach class actions and class actions involving insurance practices. In addition to extensive jury trial experience, he has substantial experience in alternative dispute resolution. His clients include product manufacturers, financial services corporations and insurers.

The lawyers selected for the list have been recommended by their peers to be among the top lawyers in Illinois. Less than five percent of all lawyers licensed in Illinois have received the distinction of being a Leading Lawyer.

CLAUSEN MILLER HIRES ANOTHER LATERAL ATTORNEY FOR ITS NORTHEAST SUBROGATION/RECOVERY DEPARTMENT

Clausen Miller P.C. is pleased to announce the hiring of lateral attorney **Terence H. DeMarzo** to work in our East Coast Subrogation/Recovery Department.

"With the addition of Terence, Clausen Miller adds another subrogation attorney with trial and recovery experience. Terence's past work in auto, no-fault and property recovery claims, from inception through trial, will be a great benefit for our clients. To effectively handle a subrogation matter, it is important to have recovery experience and a genuine understanding of the clients' economic goals, so as to cost effectively and profitably handle a recovery matter from the clients' perspective. Terence has this experience and understanding," said **Robert A. Stern**, Chair of Clausen Miller's East Coast Subrogation/Recovery Group.

STERN PUBLISHED IN LEXISNEXIS' *NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION*

CM's **Robert A. Stern**, Esq. recently authored Chapter 161 "Limitations On Bringing Subrogation Claims" in the *New Appleman on Insurance Law Library Edition*. *Appleman on Insurance Law* has been considered the most comprehensive source for insurance law, and is published by LexisNexis. According to LexisNexis, *New Appleman on Insurance* "provides authoritative analyses of insurance law across the nation with insights provided by expert practitioners and scholars, searches and references for further research."

Robert's Chapter addresses various subjects, such as subrogating against an insured, actions impairing subrogation rights, waivers of subrogation, voluntary payment doctrine, estoppel, splitting causes of action, unclean hands, laches and invalidity of a tortfeasor's insurance policy. The Chapter not only provides an analysis of recent case law, with citations, but also helpful hints from Robert.

Robert has been handling large loss subrogation claims since the 1993 World Trade Center terrorist attack. He stated: "I was one of the two associates assigned to investigate the damages at the Twin Towers for subrogation potential and then draft the Complaint after a theory of recovery was formulated. Since then, I have primarily handled large loss property subrogation assignments around the globe. I now lead Clausen Miller's East Coast subrogation practice, and am the direct contact for many clients with losses across the US, and other countries. When I was asked to write the Chapter for *Appleman*, I welcomed the opportunity to share my knowledge with others. Judges all the way down to first year law students know how important *Appleman* is as a source of information. **Nathalie Hackett**, one of our subrogation attorneys, was an invaluable contributor to the Chapter."

Dennis Fitzpatrick, President of Clausen Miller, stated: "Clausen Miller has been an industry leader in the subrogation practice for more than 30 years. Our specialty is large property losses, and we are proud of our international subrogation practice. Our subrogation attorneys are highly experienced in handling technical and complex cases, and consistently turn hard-hitting and innovative theories of subrogation into substantial recoveries for our clients. Robert is one of the leaders of our subrogation practice, and is at the forefront of property subrogation claims. His guidance, handling and results for our clients consistently exceed 'industry standards.' We are very pleased that he was invited to write the Chapter for *Appleman*."

If you have any subrogation related questions, or are interested in a copy of Robert's Chapter, please feel free to contact him at 212-805-3900. If you are interested in acquiring a copy of *New Appleman on Insurance Law Library Edition*, go to **www.lexisnexis.com/store** to locate the publication.

CLAUSEN MILLER COMPLETES SUBROGATION RECOVERY OF EMBEZZLED FUNDS IN CHINA

A multi-national electronics company with headquarters in the Midwest and facilities throughout the world suffered a loss when an employee at their Shanghai facility was caught embezzling from the office. A U.S. based insurer stepped in to cover the claim, and then looked to pursue a recovery.

Even before the loss was noticed, the funds had disappeared into real estate and exotic sports cars. Therefore, the problem of recovery became one of working with the local legal system in its prosecution of those who benefited from the theft and turning that prosecution into a reimbursement of insurance proceeds for the insurer. The local legal system was up to the task and the prosecution was successful. In China, even where a recovery is possible, often the difficulty comes in repatriating the funds. Attorney **Brent Sims** of Clausen Miller's California team stepped in and coordinated with local counsel and the State Administration of Foreign Exchange to bring the recovery to the United States following the auction of the assets. For more information, please contact Brent at **bsims@clausen.com**.

THE TRIAL MONITOR'S CORNER: Evidence Of A Plaintiff's Alcohol Consumption In Illinois—A Fertile Trial And Appellate Battleground

by ***Joseph J. Ferrini***

On two separate occasions over the summer months, the Clausen Miller Appellate Practice Group assisted trial counsel in high-stakes trials where the admissibility of evidence of a plaintiff's alcohol consumption was at issue. In both cases, the plaintiff's consumption and inebriation bore greatly on his comparative fault for the injuries he sustained. However, in both cases the trial judge kept out expert testimony regarding whether plaintiff was under the influence as well as a blood-alcohol ("BAC") test showing that the plaintiff was over the statutory limit.

In doing so, both respective judges relied on *Petraski v. Thedos*, 963 N.E.2d 303 (1st Dist. 2011) ("*Petraski II*"), a recent Illinois case discussing alcohol evidence. The trial judges both ruled that Illinois law now requires evidence of physical signs of intoxication for any of the other evidence to be admitted. Without getting lost in the weeds of detail, what *Petraski II* actually holds is that a trial court can prevent an expert from stating that a specific plaintiff was intoxicated (at least when the plaintiff's BAC is only slightly over the legal limit). The decision does nothing to prevent evidence of a BAC level above the legal limit when combined with an expert opining as to the effects of such a BAC level on the average person, which had previously been ruled acceptable by *Petraski v. Thedos*, 887 N.E.2d 24 (1st Dist. 2008) ("*Petraski I*").

The current position of at least some Illinois trial judges appears to be directly at odds with *Petraski I*. The misinterpretation sets up a bizarre circumstance wherein an Illinois citizen may find one judge allowing a BAC test to be used against him or her as evidence in a criminal case that deprives them of the freedoms of driving or their liberty, yet could walk down the hall to a judge in a simple civil matter and be saved from the evidence.

Upon examination of the relevant case law, strong arguments can be made, based on public policy and the text of the *Petraski* decisions, that expert testimony on the effects of alcohol on the average person combined with a bad BAC test is sufficient for such evidence to be admitted against a party at trial. Keeping such evidence out would appear to constitute reversible error. Trial counsel must, however, ensure that any retained expert satisfies these two building blocks when they build their case ahead of trial. In other words, the expert will need to opine as to the effects of the BAC level in question on the average person as a building block opinion. The expert might further try to additionally opine that the specific plaintiff was intoxicated if the BAC is high enough.

Practice Pointer: Ultimately, neither of this summer's trials resulted in an appeal on the alcohol issue due to settlements. Nevertheless, recent Illinois monitoring assignments have made it clear that it is just a matter of time before an appeal occurs on alcohol evidentiary issues. Any active Illinois litigation involving an inebriated plaintiff merits close monitoring given the recent trends in the rulings coming down from the trial bench. The current tact that judges are taking sets up favorably for a challenge on appeal, provided the proper steps have been taken in the trial court.

Do you have a tort case in Illinois where alcohol is at issue? To learn how the Appellate Practice Group's expertise in this area can help you achieve the best results, please contact **Joe Ferrini** at 312-606-7447 or **jferrini@clausen.com**.

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CYBER-SECURITY UPDATE: Seventh Circuit Finds Customers Have Standing To Sue In Cyber-Security Case, *Remijas v. Neiman Marcus Group, LLC*

by ***Mindy M. Medley***

The Seventh Circuit recently considered whether Neiman Marcus credit card holders who were victims of a cyber-attack on the luxury department store had standing to sue it. The central issue in *Remijas v. Neiman Marcus Group, LLC*, 2015 U.S.App. LEXIS 12487 (7th Cir. 2015), was whether the credit card holders suffered a "concrete, particularized injury"—requisite for Article III standing—because of the 2013 Neiman Marcus security breach. The Seventh Circuit held that they had standing, and reversed the United States District Court for the Northern District of Illinois' decision dismissing their class-action lawsuit.

Remijas now affords broad standing to consumers who may be affected by the hacking of entities that hold their personal information.

Facts

Four Neiman Marcus customers filed a class-action complaint against the department store because of a 2013 cyber-attack on the store which exposed the credit card numbers of approximately 350,000 card holders to the hackers' malware. But sensitive information such as social security numbers and birth dates were not compromised. Neiman Marcus then notified all customers who had shopped at its stores between January 2013 and January 2014, and offered one year of free credit monitoring and identity-theft protection.

Class action complaints were then filed sounding in negligence, breach of implied contract, unjust enrichment, unfair and deceptive business practices, invasion of privacy, and violation of multiple state data breach laws. The class action complaints were consolidated in a First Amended Complaint filed by the *Remijas* plaintiffs on June 2, 2014. Neiman Marcus moved to dismiss the lawsuit, principally arguing that Article III standing grounds did not exist. The United States District Court for the Northern District of Illinois agreed, and granted the motion to dismiss. The *Remijas* plaintiffs promptly appealed to the Seventh Circuit, and the Seventh Circuit reversed the district court.

Analysis

The Seventh Circuit in *Remijas* considered whether through the security breach the Neiman Marcus customers had suffered a "[1] concrete and particularized injury that is [2] fairly traceable to the challenged conduct, and is [3] likely to be redressed by a favorable judicial decision," *i.e.*, the three-part test for standing. *Remijas*,*5, citing *Hollingsworth v. Perry*, 133 Ct. 2652, 2661 (2013). The court's focus in *Remijas* was on the injury component of this three-part test.

The *Remijas* plaintiffs alleged both actual injuries and imminent injuries. Whether there was an actual injury sufficient for standing was an easier decision for the Seventh Circuit to reach versus whether an imminent injury was sufficient for standing to exist at all. The *Remijas* court, with regard to the actual injury, noted that "lost time and money protecting themselves [*i.e.*, the Plaintiffs] against future identity theft and fraudulent charges" including credit monitoring "easily qualifies as a concrete injury."

The analysis regarding an "imminent" injury required a more searching analysis because "allegations of possible future injury are not sufficient." *Remijas*, *6, citing, *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013). The Seventh Circuit did not follow the United States Supreme Court's lead in *Clapper*, and instead, distinguished the case.

In *Clapper*, the Court "decided that human rights organizations did not have standing to challenge the Foreign Intelligence Surveillance Act because they could not show that their communications with suspected terrorists were intercepted by the government. The plaintiffs only suspected that such interceptions might have occurred." *Remijas*, *8. The Seventh Circuit, however, held that unlike the plaintiffs in *Clapper* who were only suspicious of wiretapping, the plaintiffs in *Remijas* actually knew that their credit card numbers had been hacked. The Seventh Circuit stated that the possibility of a stolen card number being misused is high enough that the harms are neither "highly speculative" nor "highly attenuated," which is insufficient for Article III standing. *Id.*

Learning Point: In short, the Seventh Circuit determined that the injuries involved when dealing with fraudulent charges and protecting against possible future identity theft is sufficient to satisfy Article III standing—there is a "substantial" enough risk to consumers once their information is hacked. ♦

Tenth Circuit Refuses To Extend Duty To Initiate Settlement Negotiations To Excess Insurer

by ***Mark J. Sobczak***

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Pursuant to Oklahoma law, a primary liability insurer is obligated to initiate settlement negotiations with a third-party claimant if liability is clear and the insured is likely to owe that claimant more than the limits of the primary policy. In *SRM, Inc. v. Great American Insurance Company*, 798 F.3d 1322 (10th Cir. 2015), the Tenth Circuit was asked to decide whether that same duty extended to excess liability insurers. Relying on the plain language of the excess policy and the specific facts of the case, it held that no such duty exists. The decision is a clear victory for excess carriers and reaffirms the fundamental distinction between excess and primary liability insurance.

Facts

The case stems from a collision at a rural Oklahoma railroad crossing. A dump truck owned by SRM, Inc. tried to cross the tracks and collided with an oncoming Union Pacific freight train. The collision killed the truck driver and derailed the train, causing extensive property damage and injuries to three Union Pacific employees.

The injured employees filed suit in Oklahoma against Union Pacific, SRM, and SRM's automobile liability insurer, Bituminous Casualty, which provided $1 million in primary coverage. Union Pacific and SRM then cross-claimed again each other. SRM notified its insurer, Great American, which provided $5 million in additional excess coverage. Bituminous defended SRM in the underlying action. SRM's appointed attorneys estimated potential damages of approximately $4.2 million with a settlement value of $2.25 million. They also concluded there was no chance for a defense verdict. SRM then demanded that Bituminous and Great American tender their respective policy limits to try to settle the case, even though the underlying plaintiffs had not made a demand. SRM viewed the potential exposure for the injured employees alone as exceeding the $6 million in available coverage. Bituminous agreed to make its $1 million available, but Great American refused. After a pre-trial hearing that went decidedly against SRM, it renewed its request to Great American, which again declined and requested additional discovery as to damages.

Before a scheduled mediation, the attorneys retained by Bituminous to defend SRM revised their damages analysis upward; estimating a potential exposure between $4.5 and $7 million. An attorney retained by Great American estimated economic damages at around $8 million, but predicted a jury award in the $2 million to $4.65 million range. At mediation, the plaintiffs ultimately reduced their initial $20 million demand down to $6.5 million. Over Great American's objection, SRM stated that it would personally contribute $500,000 in addition to the $6 million in available coverage to settle the case. A week later, the case settled. Bituminous would pay its $1 million, Great American its $5 million, and SRM would personally contribute $500,000.

SRM then sued Great American in state court alleging that Great American breached the policy and its implied covenant of good faith and fair dealing by "failing to proactively investigate the railroad's and railroad workers' claims and failing to initiate settlement negotiations." Great American removed the case to federal court and secured summary judgment, with the District Court concluding that Great American did not owe SRM a duty to investigate or to initiate settlement negotiations until Bituminous tendered its policy limits at the time of settlement.

Analysis

On appeal, SRM contended that Great American's actions forced it to pay $500,000 out-of-pocket to settle the underlying claims. It argued that if Great American had investigated the claims and initiated settlement negotiations by tendering its limits earlier in the proceedings, the case would have settled for the $ 6 million in available insurance. Thus, according to SRM, Great American breached its implied duty of good faith and fair dealing.

The Tenth Circuit began its analysis by acknowledging that a liability insurer's implied duty of good faith and fair dealing under Oklahoma law includes an affirmative duty to initiate settlement negotiations when liability is clear and a judgment in excess of the policy limits is likely, as well as a duty to thoroughly investigate the claim. However, noting a lack of any Oklahoma cases applying this rule to an excess insurer, it turned to the language of the Great American policy. According to the Great American policy, which the court characterized as a "classic" excess policy, Great American had the right and duty to defend SRM only when either of two conditions were met: Bituminous's primary policy limits were exhausted by actual payment of claims, or the Great American policy provided coverage for an occurrence that the Bituminous policy did not (i.e. the Great American policy would "drop-down"). Additionally, the court noted that the Great American policy contained a consent-to-settle provision, whereby SRM had to secure approval from Great American before entering into any settlement for which it would pursue Great American for reimbursement. Finding these policy provisions clear and unambiguous, the court determined that "Great American's contractual duties to investigate, settle, or defend claims against SRM did not kick in until SRM's primary insurer exhausted its policy limits by actually paying claims" and "[t]his did not happen until Bituminous and Great American simultaneously paid their respective policy limits to settle the claims against SRM." Accordingly, "at the same time that Great American's contractual duties to SRM took effect, Great American fully discharged its contractual obligations by contributing its policy limits toward settling the case."

Recognizing that SRM's position was an attempt to sidestep the clear language of the policy, the court clarified that any implied duty of good faith and fair dealing owed by Great American to SRM was necessarily limited "to act fairly and in good faith *in discharging its contractual responsibilities*." Thus, any implied duty could not arise until Great American, pursuant to the terms of its policy, took control of settlement and defense of the claims against SRM. In so concluding, the Tenth Circuit distinguished an excess carrier's duty to act reasonably when considering a settlement demand by an underlying plaintiff to settle within the policy limits. In such cases, the excess carrier, by rejecting a demand within limits, could breach its duty to the insured by exposing it to personal liability. However, neither the injured workers nor Union Pacific ever made a settlement demand for less than the $6 million in total available coverage. Moreover, any principle that requires an excess carrier to act reasonably in evaluating a settlement demand does not support imposing an affirmative duty on the excess carrier to go further and initiate settlement negotiations. Accordingly, the court affirmed summary judgment in Great American's favor.

Learning Points: *SRM, Inc.* reiterates the point—a point that cannot be overemphasized—that coverage cases turn on policy language. The Court rejected SRM's invitation to extend an implied duty to initiate settlement negotiations to Great American not because of public policy concerns or because it thought imposing such a duty was unwise in-and-of itself, but simply because it would not align with the clear and unambiguous language in the Great American policy. In confining its analysis to basic contract interpretation, the Court recognized that excess insurers are not primary insurers, and the duties owed by one are not necessarily the same as those owed by the other because the contracts giving rise to those duties are fundamentally different. ♦

Employee On Way To Work Entitled To Employer's Coverage

by ***Don R. Sampen***

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Introduction

Under the so-called "coming and going" rule, employees on their way to or from work typically are said not to be acting within the scope of employment for purposes of any tort that might be committed that might otherwise result in employer liability incurred vicariously. A recent First District Illinois Appellate Court decision nevertheless held, based on policy language, that an employee on his way to work in his mother's automobile was entitled to his employer's automobile liability coverage because the employee was using the automobile "in connection with" his employer's business. The court also addressed the adequacy of notice of the occurrence to the employer's broker. *First Chicago Insurance Co. v. Molda*, 2015 IL App (1st) 140548.

Facts

In 2005, on his way to the work site of his employer, Metrolift, Inc., Molda was involved in an automobile accident with Wilson. Molda was driving an automobile owned by his mother, with whom he did not live. He had insurance coverage through State Farm with a $20,000 policy limit.

Wilson sued Molda in 2007, and he forwarded the suit papers to State Farm. He was not aware at that time of Metrolift's coverage through First Chicago.

The commercial automobile policy issued by First Chicago to Metrolift provided coverage for various categories of autos. One category, "Category 9," was described as "nonowned autos," *i.e.*, those not owned, leased, hired or borrowed by Metrolift but which were nevertheless used "in connection with" its business. According to the policy description, this category "include[d] autos owned by your [*i.e.*, Metrolift's] employees or members of their households but only while used in your business …."

Shortly following the accident, the person in charge of insurance for Metrolift, Stephen Harrison, contacted Metrolift's broker, Associated Specialty Insurance, to report the accident. Harrison discussed with the Associated agent whether to report the accident to First Chicago, but they agreed to hold off to see whether a lawsuit was filed and because the accident happened during Molda's lunch hour and he had his own personal insurance. As a result, First Chicago did not receive its first notice of the accident until 2008.

First Chicago then brought a declaratory action seeking a determination that it owed no coverage to Molda. One count alleged late notice of the lawsuit, although First Chicago did not press that count on appeal. A second count alleged late notice of the occurrence. A third count alleged that Molda was not an insured under the policy.

Molda filed a counterclaim seeking coverage, and following a bench trial, the trial court found that he was an insured and that notice was timely. First Chicago brought this appeal.

Analysis

Coverage

In an opinion by Justice Robert E. Gordon, the First District affirmed. The Appellate Court first addressed whether Molda's vehicle qualified as a covered auto under the First Chicago policy. Analyzing the description of Category 9 autos, the Court observed that it would qualify if it was not owned, leased, hired or borrowed by Metrolift, which it was not, and if it was used in connection with Metrolift's business.

With respect to the language that the category "included" autos owed by Metrolift's "employees or members of their house-holds," the Court found it not a limitation and, in the circumstances here, "superfluous," so the fact that Molda was not living with his mother was inconsequential.

The Appellate Court further found that the "in connection with" requirement was met because Molda testified that he was on his way to Metrolift's construction site and was performing his job duties. It was not necessary, moreover, that the accident occur in the course of Molda's employment such that Metrolift could be held vicariously liable. The policy required only that Molda operate the vehicle "in connection with" Metrolift's business, and that language was broad and vague and would be construed against the insurer.

The Court then turned to whether Molda qualified as an insured under the policy. Among others defined as insureds were "anyone liable for the conduct of an 'insured' … but only to the extent of that liability." First Chicago argued that since Metrolift, the named insured, had been dismissed from the lawsuit, and since Molda could be an insured only "to the extent" of Metrolift's liability, Molda could not qualify as an insured.

The Court, however, took the position that coverage had to be determined as of the time of the accident. And as of that time, it said, Metrolift had "potential" vicarious liability. Thus, if Wilson obtained a judgment against Metrolift, it would be entitled to common law indemnification against Molda. Based on this reasoning, the Court concluded that Molda was liable for conduct of an insured—Metrolift—and therefore himself qualified as an insured.

[The court does not explain how Metrolift could have potential vicarious liability if Molda was not operating within the scope of employment.]

Late Notice

Addressing the late-notice-of-occurrence issue, the trial court found that Associated, Metrolift's broker, received timely notice of the accident from Metrolift as an apparent agent of First Chicago. The Appellate Court agreed that the evidence so established.

The factors on which the Court relied included the evidence that (1) First Chicago encouraged policyholders to report claims to their brokers, (2) First Chicago's policy documents provided Associated's contact information and expressly referred to Associated as "agent," and (3) Metrolift's course of dealings with Associated and First Chicago involved contacting Associated, not First Chicago, whenever there was a potential claim.

The Court also commented on various factual circumstances pointing to the timeliness of notice and rejected First Chicago's argument that the agreement between Metrolift and Associated not to notify First Chicago prevented the notice from being imputed to First Chicago. The Court noted that, while fraud and collusion can negate the effectiveness of notice, no evidence existed here that Associated had an adverse interest to First Chicago or otherwise engaged in fraud.

The Court therefore affirmed in favor of coverage for Molda.

Learning Points:

(a) Language in a commercial automobile policy requiring that an auto be used "in connection" with an insured's business does not necessarily require that the driver be operating within the scope of employment for vicarious liability purposes.

(b) According to this Court, coverage extending to persons "liable for the conduct of an insured" may afford coverage even when the "insured" whose conduct is in question has been dismissed and incurred no liability.

(c) Timely notice may be imputed to an insurer based on notice to an apparent agent of the insurer. ♦

Pennsylvania Supreme Court: Insurer Bound By Insured's Unauthorized Settlement

by ***Amy R. Paulus***

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The Pennsylvania Supreme Court recently issued a much-watched ruling that undermines liability insurers' ability to control indemnity payments under their policies. In *The Babcock & Wilcox Co. v. American Nuclear Insurers*, 2015 Pa. LEXIS 1551 (Pa.), the court held that a policyholder's $80 million settlement bound its liability insurer, despite the insurer's refusal to authorize the settlement. In reaching that conclusion, the court held that a policyholder can bind its insurer to "reasonable" settlements when the insurer defends under a reservation of rights, regardless of the basis for the reservation. The holding essentially overrides provisions in liability policies that allow the insurer to decide whether to settle a claim.

Babcock Facts and Holding

The *Babcock* policyholder faced multiple claims alleging harm as a result of exposure to emissions from the its nuclear facilities. American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters agreed to defend the claims under a reservation of rights. According to the court's opinion, the insurer reserved rights on these non-controversial grounds:

- The policy did not cover damages not caused by a nuclear energy hazard;
- The policy did not provide indemnity for damages in excess of the policy limits; and
- The policy did not indemnify the policyholder for injunctive relief or punitive damages.

The insurers paid approximately $40 million to defend the policyholder. Although defense costs eroded the available limits, the policyholder had about $280 million in limits remaining when it received an $80 million settlement offer.

The insurer refused to authorize the proposed settlement. As outlined in the appellate briefs, the insurer had grounds to believe that the policyholder could mount a successful defense against the claims. Nonetheless, the policyholder demanded that its insurer agree to the settlement. When the insurer refused, the policyholder settled with the claimants and demanded that the insurer pay the $80 million.

The policy unambiguously provided that the policyholder "shall not, except at his own cost, make any payments, assume any obligations or incur any expense." Despite that language, the policyholder argued that when an insurer defends under a reservation of rights and is found to owe coverage, it must pay any fair, reasonable, and non-collusive settlement, even if it objects. The insurer argued that the court should interpret the language literally, and that an insurer must pay a non-consensual settlement only when the insurer acts in bad faith by failing to accept a reasonable settlement offer. The insurers contended that the insured's rights are protected by the insurer's obligation to act in good faith in deciding whether to accept the offered settlement, and that the reservation of rights does not change the insurer's obligation to act in good faith.

The Pennsylvania Supreme Court sided with the policyholder, and in doing so, arguably ignored a long line of Pennsylvania precedent that promotes the use of reservation of rights. The court adopted a modified version of the holding in the much-criticized decision of *United Services Auto Assoc. v. Morris*, 741 P.2d 246 (Ariz. 1987). The Pennsylvania Supreme Court held that an insurer is liable for a fair and reasonable settlement when it defends its policyholder under a reservation of rights and refuses to accept the fair and reasonable settlement. Whether a settlement was in fact fair, reasonable, and non-collusive is a fact issue.

Implications of the *Babcock* Holding

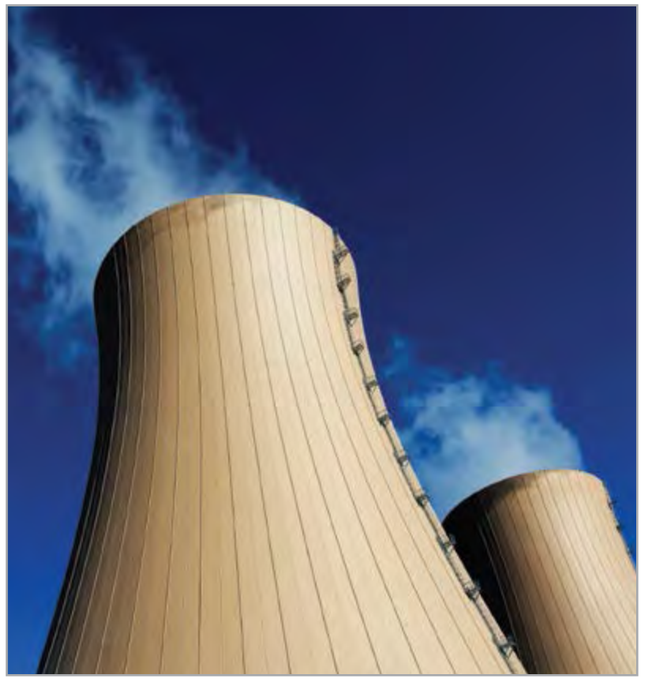
Babcock has certain obvious impacts, including that Pennsylvania courts will not enforce clear and unambiguous policy provisions that prohibit settlements without the insurer's consent.

However, like many difficult cases, *Babcock* will also likely have various unintended consequences. As the *amicus* briefs in *Babcock* discussed, insurers face an almost impossible risk calculation during the underwriting process when they cannot control the terms of payment under liability policies. Insurers, particularly those that write policies with exposure to high-value claims, must evaluate how *Babcock* impacts premiums and the limits they are willing to offer.

Insurers also may face more situations like that found in the Iowa case of *Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637 (Iowa 2000), cited with approval in *Babcock*. In *Kelly*, the policyholder entered into a settlement of $507,500, with the claimant agreeing to attempt to collect $500,000 of that amount from the insurer. Under *Babcock*, a reservation of rights incentivizes policyholders to try to reach deals similar to the one in *Kelly*—in essence agreeing to spend the insurer's money to eliminate uncertainty about personal exposure.

Babcock also may cause insurers to recalculate their risks when weighing whether to defend under a reservation of rights or deny coverage. If anything, defending under a reservation of rights worked to the detriment of the insurer in *Babcock*. *Babcock* can be viewed as an instruction to deny coverage and file declaratory judgment actions in close cases, rather than risk exposure to a non-consensual settlement by defending under a reservation of rights. If so, policyholders may see fewer insurers willing to defend under a reservation of rights, and more coverage litigation may be the result.

Any insurer that issues policies subject to Pennsylvania law should familiarize itself with *Babcock* and consider it before agreeing to defend under a reservation of rights, and during its underwriting process. Please contact Amy Paulus (**apaulus@clausen.com**) with questions about this important decision. ♦



California Supreme Court Overrules *Henkel*: Liability Insurers Barred From Enforcing Consent To Assignment Clauses After Loss Has Occurred

by **Melinda S. Kollross**

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In a unanimous 59-page opinion, the California Supreme Court has overruled *Henkel Corp. v. Hartford Accident and Indemnity Company*, 29 Cal. 4th 934 (2003)("*Henkel*")'s oft-criticized holding allowing liability insurers to enforce "consent to assignment" clauses to preclude an insured's post-loss assignment of the right to invoke policy coverage (defense and indemnification) for third-party losses which have not been reduced to a sum of money due or to become due under the policy as contrary to Insurance Code Section 520—a statute neither cited to nor considered by the Court in deciding *Henkel. Fluor Corp. v. Superior Court of Orange County*, No. S205889, ___Cal. 4th ___ (2015).

Facts

For many decades the original Fluor Corporation ("Fluor-1") performed engineering, procurement and construction ("EPC") operations through various corporate entities and subsidiaries. Hartford issued eleven CGL policies to Fluor-1 from mid-1971 to mid-1986. Each policy covered "personal injury liability" and contained a consent to assignment clause reading "[a]ssignment of interest under this policy shall not bind the Company until its consent is endorsed hereon." Fluor-1 operated at sites where asbestos allegedly was used. Beginning in the mid-1980s and continuing until the present, various Fluor entities were named as defendants in numerous lawsuits alleging liability for personal injury caused over many preceding years by exposure to asbestos. Fluor tendered these early lawsuits to Hartford and its other liability insurers. Hartford led the defense and settlement of those actions, paying millions of dollars in defense and indemnity costs over the course of more than 25 years.

During the 1980s Fluor-1 acquired A.T. Massey Coal Company, a mining business outside Fluor's core EPC operations. In 2000, Fluor-1 undertook a "reverse spinoff" whereby Fluor incorporated a newly formed subsidiary ("Fluor-2") to which it transferred all of its EPC-related assets and liabilities. The transition of Fluor-1's EPC operations to Fluor 2 purportedly caused no discernable impact to customers, employees, or creditors of the original and successor corporations. Fluor-1 then changed its name to Massey Energy Company and retained A.T. Massey's coal mining and related business.

After the reverse spinoff, Hartford continued for approximately seven years to defend Fluor-2 against claims triggered by occurrences during the terms of Fluor-1's long-expired policies, and provided defense and indemnity payments concerning those claims on Fluor-2's behalf. Hartford did not deny coverage based on the reverse spinoff, and continued to collect nearly $5 million in retrospective premiums from Fluor-2.

In 2009, Hartford filed a cross-complaint in a declaratory judgment action filed by Fluor-2 for the first time alleging that the reverse spinoff reflected a purported assignment of insurance rights to Fluor-2, and that the attempted assignment was ineffective because it was done without Hartford's consent. Hartford accordingly sought a declaration that it had no obligation to defend or indemnify Fluor-2. Fluor-2 moved for summary adjudication of Hartford's cross-complaint. Fluor-2 argued that Insurance Code Section 520, which bars an insurer "after a loss has happened" from refusing to honor an insured's assignment of the right to invoke policy coverage for such loss, applied to preclude Hartford from enforcing the consent to assignment clause because the "loss" (continuing exposure to asbestos during the policy periods leading to bodily injury) had already happened and thus coverage was properly assignable by Fluor-1 to Fluor-2.

The trial court denied Fluor-2's motion. It declined to consider or apply Insurance Code Section 520 on the ground that *Henkel* had definitively addressed and resolved the enforceability of the same consent to assignment clause. The Court of Appeal denied Fluor-2's writ petition seeking a determination whether *Henkel* or Section 520 controls in this case. The Court of Appeal found that Section 520, which was first enacted in 1872 as Civil Code Section 2599, applied only to first-party property and not third-party liability insurance, which "did not even exist as a concept" at that time.

Analysis

The California Supreme Court reversed, holding that Section 520 applies to third party liability insurance and bars an insurer from refusing to honor an insured's assignment of policy coverage regarding injuries that predate the assignment.

Section 520 Applies To Third Party Liability Insurance

Section 520 of the Insurance Code states: "[a]n agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss except as otherwise provided in Article 2 of Chapter 1 of Part 2 of Division 2 of this code." The exception referred to in the concluding clause concerns life and disability insurance, neither of which is involved in this case. After reviewing the legislative history of Section 520, including the 1935 creation of the Insurance Code and the 1947 amendment of Section 520, the Supreme Court concluded that the Legislature viewed Section 520 as a "General Rule" "covering all classes of insurance, even those not specifically identified by the 1872 Legislature" and that the 1947 amendment, which exempted only life and disability insurance from its purview, triggered the well-established rule that "if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent [to do so]." The Supreme Court therefore rejected the Court of Appeal's threshold conclusion and held that Section 520 "applies not only to first party property policies, but also to third-party liability policies."

"After A Loss Has Happened" Refers To A Loss Sustained By A Third Party That Is Covered By The Policy And For Which The Insured May Be Liable

The Supreme Court next considered the meaning of the phrase "after a loss has happened" as used in the statute. The Court found the phrase ambiguous when viewed in the context of liability policies. It could refer to the time period after the injury to a third party has happened—an occurrence for which the insured may be potentially liable and for which the insured obtained and paid for liability coverage. Or it could refer not to the event leading to the underlying bodily injury, but to the period after the insured has incurred a direct loss by virtue of the entry of a judgment or finalization of a settlement, fixing a sum of money due on a claim against the insured by a person or entity injured by the insured.

In order to decide the most reasonable interpretation, the Court undertook an exhaustive review of the legislative history of Section 520 and extensive discussion of case law nationwide bearing on the issue. The court found *Ocean Accident & Guarantee Corp. v, Southwestern Bell Telephone Co.*,100 F.2d 441 (8th Cir. 1939), which voided consent clauses as applied to post-loss assignment of rights to

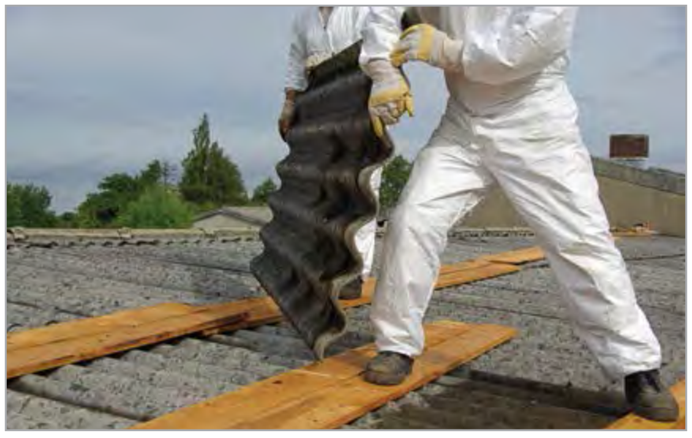
invoke liability insurance coverage, and imposed no requirement that the matter first be reduced to a sum of money due, particularly instructive. As the Court stated, "*Ocean Accident's* influence has continued and indeed grown." The Court further noted that the fundamental premise underlying *Ocean Accident* and its progeny—that an insured "loss" happens at the time of injury during the policy period and well before there might be any judgment or approved settlement for a sum of money—has also been recognized in California cases addressing related aspects of long tail insurance coverage.

As the Court additionally explained, the post-loss exception to the general rule restricting assignability recognized in the many cases discussed and codified in Section 520 "is itself a venerable rule that … has been acknowledged as contributing to the efficiency of business by minimizing transaction costs and facilitating economic activity and wealth enhancement." The post-loss rule "prevents an insurer from engaging in unfair or oppressive conduct—namely, precluding assignment of an insured's right to invoke coverage under a policy attributable to past time periods for which an insured has paid premiums."

The Court accordingly holds that the phrase "after a loss has happened" in Section 520 should be interpreted as referring to a loss sustained by a third party that is covered by the insured's policy and for which the insured may be liable. The statutory phrase does not contemplate that there must have been a money judgment or approved settlement before such a claim concerning the loss may be assigned without the insurer's consent. Only this interpretation "protects the ability of an insured, in the course of transferring assets and liabilities to another business entity in connection with a corporate sale or reorganization, to assign rights to claim defense and indemnification coverage provided by prior and existing insurance policies concerning the business's prior conduct."

The Court herein expressly overrules *Henkel*, which was based on the common law rather than Section 520, and conflicts with the rule prescribed by that statute.

Learning Point: California Insurance Code Section 520 applies to third-party liability insurance. Under that provision, after personal injury (or property damage) resulting in loss occurs within the policy's time limits, an insurer is precluded from refusing to honor an insured's subsequent assignment of the right to invoke defense or indemnification coverage regarding that loss. This result obtains even without consent by the insurer—and even though the dollar amount of the loss remains unknown or undetermined until established later by a judgment or approved settlement. ♦



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ATTORNEYS' FEES

INSURER ENTITLED TO SEEK RECOVERY OF "UNREASONABLE AND UNNECESSARY" ATTORNEY FEES DIRECTLY FROM INDEPENDENT COUNSEL

Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C., 61 Cal. 4th 988 (Cal.)

Plaintiff carrier defended under a reservation of rights and provided its insured independent *Cumis* counsel. The carrier alleged that independent counsel "padded" their bills and sought to recover the overbillings directly from independent counsel. Independent counsel argued that the carrier could only recover any such amounts from its insured. ***Held:*** The carrier could recover the overbillings directly from independent counsel. If independent counsel sought and received payment from the carrier for fraudulent or otherwise wasteful or useless fees, then independent counsel was unjustly enriched and should be directly responsible for repayment. Moreover, responsibility for any overbillings should not be born by the insured, independent counsel's clients.

BAD FAITH

FAILURE TO DEFEND RENDERS INSURER LIABLE FOR JUDGMENT

Boyle v. Zurich Am. Ins. Co., 472 Mass. 649 (Mass.)

Insurer did not defend suit after insured notified it of injury and plaintiff's attorney told it about suit. ***Held:*** Insurer breached its duty to defend notwithstanding insured's failure under the policy to forward pleadings and other papers. To avoid liability, insurer must show that it suffered prejudice by insured's breach of notice provision. Insurer could have filed an appearance, sought a postponement of damages hearing, and offered to pay policy limits to settle claim that ultimately exceeded limits. ***Further held:*** Insurer's conduct was not unfair or deceptive so as to warrant imposition of multiple damages.

CONTRACTS

FLORIDA CHOICE OF LAW PROVISION VIOLATES NEW YORK PUBLIC POLICY

Brown & Brown, Inc. v. Johnson, 25 N.Y.3d 364 (N.Y.)

An employer entered into an employment agreement with an employee in New York. The agreement stated that Florida law applied and had a provision preventing the employee from soliciting any customers of the company for two years after leaving her employment. The appellate court held that the Florida choice-of-law provision was unenforceable as against public policy. ***Held:*** Florida law entailed different elements and degrees of proof than New York. Specifically, Florida focuses almost exclusively on the employer's interests, prohibits narrowly construing restrictive covenants, and refuses to consider the harm to the employee. Application of Florida law would be offensive to a fundamental public policy of New York.

EVIDENCE

EVIDENCE OF SETTLEMENT ADMISSIBLE AT TRIAL WHERE SETTLING DEFENDANT REMAINS IN THE CASE

Diamond v. Reshko, 239 Cal. App. 4th 828 (Cal. App., 1 Dist.)

Following a traffic collision, plaintiffs, a taxi passenger and her husband, sued the owners and drivers of both vehicles for negligence. Plaintiffs settled with the taxi owner and driver. Pursuant to the settlement, the taxi defendants appeared and participated at trial of plaintiffs' remaining claims against the owner and driver of the other vehicle. The trial court excluded evidence of the settlement and the remaining defendants appealed. ***Held:*** The trial court erred in excluding evidence of the settlement. Under California law, "evidence of a pretrial settlement between the plaintiff and one or more defendants who participate fully in the ultimate trial is relevant and ordinarily should be disclosed to the jury." Absent such evidence, the jury was prevented from "fully assessing the credibility of the witnesses" and "from evaluating the tactical motivations underlying the presentations and arguments" by the settling parties.

EXCESS INSURANCE

OTHER INSURANCE CLAUSE APPLIES

Moroney Body Works, Inc. v. Central Ins. Cos., 87 Mass. App. Ct. 774 (Mass. App.)

Commercial property insurer invoked its excess "other insurance" clause to decline coverage for fire loss. ***Held:*** Primary and excess policies covered the insured's interest in the same property against the same risk, which rendered the "other insurance" provision applicable. The language difference in the policies was insubstantial. ***Further held:*** Excess insurer's loss payment provisions limited its exposure to insured's repair costs.

FIRST-PARTY PROPERTY

INSURER NOT LIABLE FOR PERSONAL PROPERTY RESTORATION PROBLEMS

Missler v. State Farm Ins. Co., 2015 Ind. App. LEXIS 594 (Ind. App.)

Following home fire, insureds became dissatisfied with work of company retained to restore personal property. ***Held:*** Insurer did not breach its duty of good faith and fair dealing. Insurer did not sign contract with company, nor did it require insureds to retain that company. Although company was one of insurer's preferred providers for dwelling restoration, it was not a preferred company for personal property restoration. When the dispute arose between company and insureds, insurer tried to get it resolved. ***Further held:*** Insureds had viable claim against company for unconscionable conduct. The contract was vague and gave insureds little ability to protect their interests.

ACCEPTANCE OF LATE PAYMENT AFTER CANCELLATION DATE REINSTATES POLICY

Zeller v. AAA, Inc. Co., 2015 Ind. App. LEXIS 544 (Ind. App.)

Insurer received insured's late premium payment two days before fire loss. ***Held:*** Policy did not make reinstatement contingent on insurer's sending or insured's receiving reinstatement notice. Insured's tender of payment was an offer to reinstate the policy and a contract was formed when insurer accepted payment. Insurer's policy expiration form document containing conditions not met by insured was not part of the policy. Provisions in policy that would have terminated coverage were irreconcilable with insurer's acceptance of payment. Insurer could have drafted specific deadlines and requirements for reinstatement or refused to accept insured's payment.

COMPUTER FRAUD CLAIM PROPERLY DISMISSED

Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pitts., PA., 25 N.Y.3d 675 (N.Y.)

Plaintiff, a health insurance company that sells health insurance to eligible individuals, sued its insurer seeking recovery of over $18 million in losses for payment of fraudulent claims submitted by insurance customers for services never actually performed. The insuring agreement for computer systems fraud applied to "a fraudulent entry of electronic data or computer program." The trial court dismissed the action. ***Held:*** The clause in question did not encompass losses caused by an authorized user's submission of fraudulent information into the insured's computer system. The language was unambiguous and "fraudulent entry" referred to unauthorized access into the computer system rather than submissions by authorized users. The trial court correctly dismissed.

LABOR LAW

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW CLAIM

Caceres v. Standard Realty Assoc., Inc., 131 A.D.3d 433 (N.Y. App. Div., 1st Dep't)

Plaintiff sued for personal injuries following a fall from a ladder at a construction site after his helper was called away by the construction supervisor. The trial court denied his request for summary judgment. ***Held:*** It was undisputed that no equipment was provided to plaintiff to guard against the risk of falling from the ladder while operating the drill, and that plaintiff's coworker was not stabilizing the ladder at the time of the fall. This entitled him to summary judgment under Labor Law § 240(1).

LIABILITY INSURANCE COVERAGE

NO COVERAGE FOR NEGLIGENCE CLAIM ALLEGING INJURIES RESULTING FROM FALL FROM UPPER DECK OF YACHT

Westfield Ins. Co. v. Vandenberg, 796 F.3d 773 (7th Cir.)

Passenger who sustained injuries when he fell from the upper deck of a yacht filed negligence suit against the yacht's management company. The passenger settled with the management company, pursuant to which the management company agreed to pay the passenger $25 million through

the assignment of its claims against its insurer. The insurance company disputed that coverage existed for the underlying action, asserting that the policy covered only construction related activities engaged in by the management company as part of a separate enterprise. ***Held:*** The policy was intended only to provide coverage for construction related activities and not for management of the yacht. The policy lists the business of the insured as "concrete construction" and the general liability schedule provides coverage for work done "in connection with construction, reconstruction, repair or erection of buildings." Additionally, the insurance application states that the insured was in the business of construction and the schedule of hazards is consistent with this representation. The policy therefore clearly provided coverage only for the insured's construction related business.

INSURED'S FAILURE TO GATHER DOCUMENTS TO SUPPORT INSURER'S COVERAGE DEFENSES DID NOT VIOLATE COOPERATION CLAUSE

Lytle v. Country Mut. Ins. Co., 2015 IL App (1st) 142169

Relying upon the policy's cooperation clause, an insurer sought a declaration that it was not obligated to defend or indemnify its insured in an underlying action arising out of an automobile accident. The insurer alleged that it requested certain documents from its insured in order to support coverage defenses and that the insured failed to provide the documents. ***Held:*** In order to relieve an insurer of its contractual obligations based on a cooperation clause there must be a showing of substantial prejudice. Here, the insurer did not allege that the insured refused to cooperate in the investigation of a claim. Rather, it simply alleged that the insured did not provide documents that may have supported a coverage defense. The insurer was therefore seeking to penalize the insured for refusing to gather data against herself. Additionally, the defenses the insurer was attempting to assert were speculative and therefore there could be no showing of substantial prejudice.

INSURER NOT JUDICIALLY ESTOPPED FROM DENYING COVERAGE

Castlepoint Ins. Co. v. Hilmand Realty, LLC, 130 A.D.3d 475 (N.Y. App. Div., 1st Dep't)

Insurer sought declaration that it had no duty to defend or indemnify its insured based on noncompliance with the notice provisions of the insurance policy. The insured argued that the insurer took inconsistent positions in hiring counsel to represent its insureds in vacating their default in the underlying personal injury action and preserving a defense, while at the same time seeking to vitiate coverage. The trial court granted the insurer summary judgment. ***Held:*** The insurer was not a party to the underlying personal injury action and thus could not be taking inconsistent positions in different legal actions. Summary judgment was proper.

WASHINGTON COURT BROADENS DUTY TO DEFEND IN READING OF TOWNHOME EXCLUSION

Xia v. Probuilders Specialty Ins. Co., 2015 Wash. App. LEXIS 2026 (Wash. App.)

A homeowner who suffered from carbon monoxide poisoning in her townhome filed a declaratory judgment action against the townhome builder's insurer seeking a ruling that the insurer had a duty to defend and indemnify the builder in connection with the homeowner's personal injury action. ***Held:*** The insurer owed no duty to defend the builder as carbon monoxide is a pollutant falling within the policy's pollution exclusion. However, the court agreed with the homeowner that the "townhome project" exclusion did not apply because that term was not defined, even though the homeowner repeatedly referred to her dwelling as a townhome in the complaint. Thus, the court held in examining the "eight corners" of the homeowner's amended complaint and the policy that it was unclear whether the "townhome project" exclusion applied, apparently imposing an obligation upon an insurer to further investigate even though the complaint referred to homeowner's dwelling as a townhome.

MEDICAL MALPRACTICE

NO RIGHT OF ACTION FOR FAILURE TO REPORT CHILD ABUSE

Sprunger v. Egli, 2015 Ind. App. LEXIS 620 (Ind. App.)

Baby placed in foster care with a relative died from injuries consistent with child abuse. ***Held:*** Indiana does not recognize a private right of action for failure to report child abuse. A medical malpractice claim cannot be created by alleging that on initial examination, physician failed to recognize abuse. The premise of such claim is that had a correct diagnosis been made, the physician would have been required to report child abuse.

PIECE OF CATHETER HELD FOREIGN OBJECT BY HIGHEST COURT

Walton v. Strong Mem. Hosp., 25 N.Y.3d 554 (N.Y.)

Plaintiff sued his doctors for damages stemming from a piece of catheter that broke and was allowed to remain in his heart after surgery in 1986, when he was 3 years old. The defendants moved to dismiss on statute of limitations grounds, arguing the catheter was a fixation device. Plaintiff argued the catheter was a foreign object. The statute provided that "where the action is based upon the discovery of a foreign object in the body of the patient, [it] may be commenced within one year of the date of such discovery." The lower and intermediate courts dismissed the action. ***Held:*** The broken catheter piece was not a fixation device like a suture or stent, which are intentionally placed for a continuing treatment purpose. Rather, it served no purpose and was a foreign object, implicating the limitations exception. Dismissal was inappropriate.

MUNICIPAL LAW AND CORPORATIONS

TOWN FACES LIABILITY FOR BULLPEN ACCIDENT

Murray v. Town of Hudson, 472 Mass. 376 (Mass.)

Baseball player from visiting high school injured knee in bullpen of town's public park. ***Held:*** The recreational use statute does not reduce the standard of care owed by school to its own students or visiting students as to school-related activities. ***Further held:*** A notice of injury raising only negligent-design theory was adequate to provide notice of negligence claims under all theories.

LETTER TO MAYOR INSUFFICIENT NOTICE OF NEGLIGENCE CLAIM

Rodriguez v. City of Somerville, 472 Mass. 1008 (Mass.)

Attorney sent mayor a letter advising him of student's injury at school and requesting incident report. ***Held:*** The letter was insufficient for failing to advise mayor of legal basis of claim. The letter could be read as request for public records and mere precursor to claim.

NEGLIGENCE

FRANCHISOR NOT LIABLE FOR MURDER OF FRANCHISEE'S EMPLOYEE

Lind v. Domino's Pizza LLC, 87 Mass. App. Ct. 650 (Mass. App.)

Employee of a Domino's franchisee was murdered while delivering a pizza during early morning hours. ***Held:*** Franchisor is vicariously liable for franchisee's conduct only if franchisor has right to control the specific policy or practice resulting in harm. Domino's did not control circumstances involved in delivery. Domino's gave discretion to franchisees as to deliveries. Franchisee has its own policy with regard to sending workers on deliveries. Domino's policies as to non-carrying of weapons, limitation on carrying money, and placement of lighted sign on vehicle had only speculative relevance to murder. ***Further held:*** Domino's did not have direct liability because it did not exercise control over franchisee's daily operations. ***Also held:*** Decedent was not third-party beneficiary of Domino's/Justice Department agreement as to pizza deliveries in racially diverse areas. The agreement benefitted customers, not delivery staff. ***Finally held***: Domino's had no duty to supervise franchisees as to implementation of safety guidelines for employees.

DOUBLE-PARKED VEHICLE MERE CONDITION, NOT CAUSE

Barry v. Pepsi-Cola Bottling Co. of N.Y., Inc., 130 A.D.3d 500 (N.Y. App. Div., 1st Dep't)

Plaintiff sued defendant company, whose vehicle he ran into. The vehicle had been illegally double parked on the street. The trial court denied the defendant's motion for summary judgment. ***Held:*** The mere fact that a car is illegally parked does not mean there is causation. Here, the double parked vehicle "given the road conditions at the time of the accident, namely, the favorable weather, the time of day, and the relatively minimal amount of traffic on the road at the time, 'merely furnished the condition or occasion for the occurrence of the event but was not one of its causes.'" Defendant was entitled to summary judgment.

NEGLIGENCE ACTION NOT AVAILABLE TO DOG BITE VICTIMS

Doerr v. Goldsmith, 25 N.Y.3d 1114 (N.Y.)

Plaintiffs in companion actions brought negligence actions against the owners of dogs who had bitten them. ***Held:*** The dogs at issue were not domestic farm animals subject to an owner's duty to prevent such animals from wandering

unsupervised off the farm. Therefore, there was no basis for a negligence action against the owners. Further, as to one of the plaintiff's strict liability claims, the owners met their burden on summary judgment of establishing that they did not know of any vicious propensities on the part of their dogs.

ASSUMPTION OF RISK APPLIES TO GO-CART ACTIVITIES

Garnett v. Strike Holdings LLC, 2015 N.Y. App. Div. LEXIS 6587 (N.Y. App. Div., 1st Dep't)

Plaintiff was injured when her go-cart was run into by another cart. She sued the go-cart facility. The facility moved for summary judgment, which the motion court denied. ***Held:*** Common-law assumption of risk applied. In riding the go-cart, the plaintiff assumed the risks inherent in the activity, which included the risk that vehicles racing around the track may intentionally or unintentionally collide with or bump into other go-karts. That inherent risk negated any duty on the part of the defendant to safeguard plaintiff from the risk. Defendant was entitled to summary judgment.

REPAIR COMPANY DID NOT CREATE OR ADD TO DANGER FOR NON-PARTY TO REPAIR CONTRACT

Medinas v. MILT Holdings LLC, 131 A.D.3d 121 (N.Y. App. Div., 1st Dep't)

Plaintiff, an attendant in a parking garage, was injured when the freight elevator he was using to transport a vehicle suddenly descended in free fall for three stories. He sued a maintenance company that had responded to an emergency call regarding the elevator four months prior. ***Held:*** Even accepting the repair company's potential negligence in inspecting the elevator, it could not be shown "to have launched a force or instrument of harm." There simply was no evidence the company "increased the risk or made the elevator's condition any more dangerous," whereby the company would owe a duty of care to plaintiff, a nonparty to the emergency call contract.

PREMISES LIABILITY

CALIFORNIA SUPREME COURT CLARIFIES SCOPE OF PUBLIC LIABILITY FOR DANGEROUS CONDITIONS

Cordova v. City of Los Angeles, 61 Cal. 4th 1099 (Cal.)

Decedents were killed when a vehicle driven by a third-party struck the vehicle they were traveling in, causing it to lose control and strike a magnolia tree located in the center median of the roadway. Plaintiffs filed wrongful death actions against the City of Los Angeles contending that the placement of trees in the center median created a dangerous condition. ***Held:*** Reversing both the intermediate appellate court and the trial court, the California Supreme Court held that the City was not entitled to summary judgment on grounds that the negligence of the third-party driver caused the accident, and that his negligence was unrelated to the placement of the tree in the median. Section 835 of the California Government Code, which addresses liability for dangerous conditions on public property, does not require plaintiffs to establish that "the allegedly dangerous condition also caused the third party conduct that precipitated the accident."

MODE-OF-OPERATION APPROACH EXTENDS BEYOND SELF-SERVICE ESTABLISHMENTS

Sarkisian v. Concept Restaurants, Inc., 471 Mass. 679 (Mass.)

Patron was injured in fall on wet dance floor where patrons were allowed to bring drinks. ***Held:*** A plaintiff need not prove possessor's notice of unsafe condition on premises where dangerous condition was reasonably foreseeable and resulted from possessor's mode-of-operation. Although the mode-of-operation approach arose out of incidents in self-service establishments, it applies to other businesses. It does not impose strict liability because a plaintiff must prove the possessor failed to exercise reasonable care. Because possessor allowed patrons to carry drinks onto dance floor, the mode-of-operation approach applied.

PRODUCTS LIABILITY

INSUFFICIENT EVIDENCE TO SUPPORT SUMMARY JUDGMENT FOR COMPONENT PARTS SUPPLIER

Johnson v. U.S. Steel Corp., 240 Cal. App. 4th 22 (Cal. App., 1 Dist.)

Plaintiffs sued various manufacturers, suppliers, and retailers alleging that husband, a former auto mechanic, contracted leukemia through exposure to products containing benzene. Summary judgment was entered in favor of defendant U.S. Steel based on the "component parts" doctrine, which holds that a "manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm." ***Held:*** The appellate court reversed. There was insufficient evidence in the record to establish that U.S. Steel's component part was not, in and of itself, defectively designed under the consumer expectations test, thereby precluding summary judgment.

TORTS

FIREFIGHTER'S RULE INAPPLICABLE TO MARIJUANA FIRE

Zang v. Cones, 2015-Ohio-2530 (Ohio App.)

Two firefighters died in home fire sparked by fan possibly used to grow marijuana. ***Held:*** A general issue exists as to whether homeowners' conduct was willful and wanton, which overrides the firefighter's rule. Generally, property owner or occupier is not liable to a firefighter injured while performing his job. An exception exists if owners are guilty of willful or wanton misconduct. Fire was sparked by fan used to grow orchids, done as homeowners' subterfuge while they hid their marijuana crop.

UM/UIM COVERAGE

REGULAR USE EXCLUSION PRECLUDES COVERAGE FOR INJURIES SUSTAINED BY POLICE OFFICER WHILE DRIVING PATROL CAR

Lozada-Reyes v. State Farm Auto. Ins. Co., 2015 IL App (1st) 150714-U

Insured sought a declaration that UIM coverage existed for an automobile collision that occurred while she was operating a police car in the course of her duties as a police officer. In denying coverage, the insurer relied upon a "regular use" exclusion, which precluded coverage for bodily injury that occurs while the insured is "occupying a motor vehicle owned by, leased to, or furnished or available for the regular use of you." ***Held:*** The regular use exclusion is clear and unambiguous and does not contravene public policy. Further, the exclusion applies to preclude coverage because the vehicle the officer was driving was part of the pool of vehicles "furnished or available to" the officer for her regular use while on duty as a patrol officer.

WRONGFUL DEATH

MENTAL HEALTH CENTER IMMUNE FROM LIABILITY FOR PATIENT DEATH

Davis v. Edgewater Systems For Balanced Living, Inc., 2015 Ind. App. LEXIS 595 (Ind. App.)

Patient at mental health center murdered another patient one week after center had asked police to place first patient in emergency detention. ***Held:*** The center was entitled to statutory immunity from claim of failing to warn victim of possible patient violence. Pursuant to statute, center had obtained emergency detention order and advised police of it. Center had no duty to follow up on its notification to ensure police response.

SIDEBAR
cont. from pg. 8

> designation or the wrong date of the order. Here, the error is entirely as to the very substance of the notice of appeal [because] she only appealed from the dismissal of Count II in her notice of appeal.

Learning Point: *Estate of York* demonstrates that the minefield of appellate practice should only be navigated by appellate practitioners. The manner in which cases might be litigated in other forums is not the way cases are litigated in the reviewing courts. It is imperative to meet all deadlines set by the appellate court rules. If deadlines cannot be met, it is critical to timely move for extensions of time and to show the appellate court good cause why an extension should be granted. *Estate of York* also highlights the intricacies in preparing what is the single most important document in any appeal—the notice of appeal. Although the notice of appeal may only be a one or two page document, extreme care must be taken in its preparation, lest, as shown by the *Estate of York*, your appeal becomes doomed from the outset.

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