CM REPORT
of Recent Decisions

2015 • Vol. 4

Six-Person Juror Law Held Unconstitutional By Illinois Trial Court

A Bad Cellular Connection: Employer Vicarious Liability

New Indiana Office Already Servicing Many CM Clients

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

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LIABILITY INSURANCE COVERAGE

Six-Person Juror Law Held Unconstitutional By Illinois Trial Court

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

Introduction

In Volume 4 of our 2014 CM Report, CM partners **Scott Ritchie** and **Sava Vojcanin** alerted our friends in the industry to a new piece of legislation reducing the number of jurors in trials from twelve to six. As Scott and Sava reported, this legislation reducing the number of jurors was opposed by the defense bar—and for good reason, as Scott and Sava pointed out in their report:

> [S]imple math suggests that finding unanimity amongst 6 jurors compared to twelve is easier. It is for this reason that the plaintiffs' bar has advocated this legislation. There is clearly a perception in the plaintiffs' bar that with the burden of proof in civil cases they would rather have to persuade only six jurors than twelve jurors.

On December 21, 2015, Judge William Gomolinski, of the Circuit Court of Cook County, held that this legislation reducing the number of jurors from twelve to six was unconstitutional.

The Trial Court's Analysis

Plaintiffs filed a medical malpractice action against defendants and defendants sought to file an appearance and twelve-person jury demand but the Clerk of the Court refused to accept their payment of the requisite fee for a jury of twelve. Defendants thereupon moved for leave to file a twelve-person jury demand and to declare that the law reducing the number of jurors in civil jury trials from twelve to six was unconstitutional.

The trial court agreed with defendants on several grounds.

Infringement Of The Right To A Jury Trial

Section 13 of Article I of the 1970 Illinois Constitution states: "The right to a trial by jury as heretofore enjoyed shall remain inviolate." Judge Gomolinski found that the only ambiguity in this constitutional provision was the meaning of "heretofore enjoyed." Accordingly, the Judge turned to the history of the jury trial in Illinois as heretofore enjoyed in this state prior to the enactment of the 1970 Illinois Constitution. Based upon the historical record, Judge Gomolinski found that the right to a trial by jury has been a continuous unbroken right in the history of Illinois and has always been understood to mean a jury of twelve persons. Judge Gomolinski also found that the record of the 1970 Constitutional Convention revealed that the delegates to the convention understood that a jury would be composed of twelve members. Judge Gomolinski pointed to the comment made by one delegate after Section 13, Article I was enacted, who summarized

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is a partner in the Chicago office, and co-chair of the firm's Appellate Practice Group. She represents clients during the post-trial and appellate stages of civil litigation. She has prosecuted and defended appeals in federal and state courts throughout the nation, including Illinois, New York, New Jersey, California, Maryland, Indiana, Kentucky, Ohio, Kansas and Montana.
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Edward M. Kay
is a Clausen Miller senior partner and co-chairs the Appellate Practice Group. He is AV® rated (Preeminent) by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed has been chosen as a Leading Illinois Appellate Attorney, a Super Lawyer and has over 30 years experience in trial monitoring and post-trial/ appellate litigation which he regularly brings to bear in significant cases nationwide. Ed has prosecuted over 500 appeals nationwide.
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the provision, stating "So far as the constitution is concerned, the jury must be one of twelve members in criminal or civil cases unless the parties otherwise agree."

Based on this historical record and the proceedings of the 1970 Constitutional Convention, Judge Gomolinski concluded that if the current Article I, Section 13 is to be given effect as guaranteeing the right to a jury trial "as heretofore enjoyed," then the Illinois Legislature could not pass a law that decreases the number of jurors from the amount previously provided, which according to Judge Gomolinski, was twelve and had been twelve jurors for "almost two hundred years." Judge Gomolinski also found, based upon prior Illinois Supreme Court authorities, that the Supreme Court has consistently interpreted the jury trial right under the State Constitution in this way—as providing for a jury of twelve members. Accordingly, anything less than twelve members would infringe the right to a jury trial in Illinois.

Separation Of Powers

Judge Gomolinski also examined whether the legislation reducing the number of jurors from twelve to six violated the separation of powers clause in the Illinois Constitution. According to Judge Gomolinski, even if the Court were to assume that the Illinois Constitution does not provide the right to a twelve-person jury, the legislation would nevertheless be unconstitutional by allowing the legislature to exercise power that exclusively belongs to the judiciary. Judge Gomolinski focused on Supreme Court Rule 285, which provides that parties are allowed to demand a twelve-member jury upon payment of an additional fee. This rule was enacted by the Illinois Supreme Court, as only the Illinois Supreme Court has the authority and power to regulate various aspects of juries and the jury selection process inherent in the power of the judiciary to regulate the conduct at trials. Judge Gomolinski found the legislation reducing the number of jurors from twelve to six to be in direct conflict with Rule 285. Accordingly, the Court found this legislation unconstitutional on its face, pursuant to the doctrine of separation of powers.

Public Policy

Judge Gomolinski also identified various public policy grounds supporting the proposition that cases should be decided by a jury of twelve rather than six:

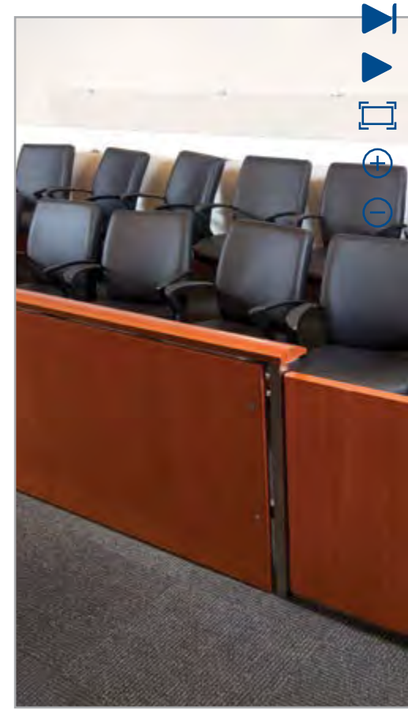
- decreasing the number from twelve to six provides a less accurate cross-section of the public, both in terms of demographic categories like race, age and sex, as well as diversity of opinions and views;
- it is easier for individuals to assert their viewpoints in groups of twelve rather than in groups of six, since a minority opinion in a five-one split is more likely to acquiesce to the majority than if the numbers were doubled to ten and two on a twelve-person jury;
- a twelve-person jury can lead to more accurate verdicts, making those verdicts more predictable, which is crucial in facilitating pre-trial settlement negotiations.

Further Proceedings

Judge Gomolinski's order was not a final judgment but an interlocutory order, as the Court merely granted defendants' motion for leave to file a twelve-person jury demand. The Court did certify the question of the constitutionality of the legislation, pursuant to Illinois Supreme Court Rule 308(a), which allows plaintiffs leave to petition the Appellate Court to take the appeal from this interlocutory order. Illinois Supreme Court Rule 302 allows direct appeals to the Illinois Supreme Court from final judgments in which a state statute has been held invalid and also in cases in which the public interest requires expeditious determination. We anticipate that should plaintiffs seek further review of Judge Gomolinski's order, plaintiffs will attempt to have the Illinois Supreme Court rule on the matter and bypass the Illinois Appellate Court. Then again, given the fact that Judge Gomolinski's order lacks the force of precedent that is carried with an Appellate or Supreme Court decision, the plaintiffs' bar may decide to forego an appeal from this order and "shop around" for another ruling that might provide a more favorable result for this legislation.

Practice Pointer: Regardless of the strategy that the plaintiffs' bar might employ here, we recommend to all our friends in the insurance and business industry that you instruct your panel counsel in Illinois cases to demand twelve-person juries and to object to any attempt to seat a six-person jury, using Judge Gomolinski's order and arguments in support of this demand and objection.

We will continue to monitor these proceedings and report on the same in future issues of the *CM Report*.



HOLMES PRESENTS ON HEXAVALENT CHROMIUM AT ANNUAL FETTI EVENT

CM Chicago senior associate **Emily Holmes** recently presented at the annual FETTI ("Forum for Environmental and Toxic Tort Issues") in Chicago, Illinois. Emily's presentation was titled "Hexavalent Chromium: Emerging Issues in Toxic Tort Litigation" and focused on a State of California regulation passed in 2015 that set the limit for hexavalent chromium in drinking water at 10 parts per billion. The California regulation is significant not only because it is the first time any state has set a regulation to specifically limit *hexavalent* chromium, but also because it is 10 times lower than the US EPA limit on *total* chromium, the long-held standard which includes both the toxic hexavalent chromium (Cr6+) *and* relatively safe trivalent chromium (Cr3+). Emily paired the overview of the new California regulation with emerging case law involving property damage and bodily injury arising from hexavalent chromium contamination and exposure.

Emily's presentation introduces a topic that promises ample controversy, as experts battle in and out of the courtroom to determine sources and causes of hexavalent chromium contamination, its toxicity, and the numerous health problems attributed to hexavalent chromium exposure. On one hand, industries using, manufacturing, or creating hexavalent chromium as a byproduct, maintain that the new standard is too strict given the incidence of natural occurrence of hexavalent chromium and the fact that cleanup is extremely expensive. On the other hand, the toxicity of hexavalent chromium is documented in several well respected studies and presents added complexities when considering sensitive populations such as elderly, people with cancer, pregnant women and their unborn fetus. If you are interested in obtaining the paper or presentation materials, please contact Emily at **eholmes@clausen.com**.

VOJCANIN AND MEDLEY PRESENT ANALYSIS OF HOMEOWNER'S ASSOCIATION INSURANCE COVERAGE ISSUES

CM partners **Sava Vojcanin** and **Mindy Medley** presented "Analysis of Homeowner's Association Insurance Coverage Issues" to a major property and liability insurer. The presentation focused on the interplay of condominium association master policies and individual unit owner's policies in the context of a hypothetical water damage claim. If you'd like to have Sava and Mindy present to your claims examiners on this interesting topic, please contact them at **svojcanin@clausen.com** or **mmedley@clausen.com**.

STAGE SET FOR SUPREME COURT REVIEW OF DODD-FRANK WHISTLEBLOWER PROVISION

Congress passed The Dodd-Frank Wall Street Reform and Consumer Protection Act in direct reaction to the financial crisis caused by the collapse of the U.S. housing market in 2008. Clausen Miller is on the cutting edge of legal issues raised by the Act and its attorneys have published scholarly articles on this topic, including an article entitled Whistleblower Retaliation Claims in the Dodd-Frank Era: Defenses That Work and Defenses That Don't. (**http://www.clausen.com/dir_docs/news/8b4d8eb5-53ba-4730-9b3c-3cf91a04af7c_documentupload.pdf**).

Whistleblower retaliation claims have now moved to the forefront of the legal issues surrounding Dodd-Frank. Specifically, the U.S. Court of Appeals for the Second Circuit has now held that an individual's internal company complaint is sufficient to support a claim of retaliation under Dodd-Frank, and that the complaint need not be filed with the SEC to be protected. *See Berman v. Neo@Ogilvy LLC*, 14-4626 (2d Cir. 2015). This decision, however, conflicts with a prior opinion handed down by the U.S. Court of Appeals for the Fifth Circuit, which held that an individual could only be considered a whistleblower under Dodd-Frank by reporting the matter to the SEC. This has now set the stage for Supreme Court review of the issue. Clausen Miller will continue to monitor and update on this matter. If you have questions regarding this topic, please contact Clausen Miller partner **Dan Bryer** (**dbryer@clausen.com**).

STERN RECEIVES SPIRIT OF NASP AWARD

On November 9, 2015, CM partner **Rob Stern** received the Spirit of NASP Award from the President of the National Association of Subrogation Professionals at NASP's 2015 Annual Conference. Rob was awarded this honor recognition of his many contributions to NASP and the subrogation industry.

VALENCIC SPEAKS AT NEW YORK INSURANCE COVERAGE CONFERENCE AND AMERICAN BAR ASSOCIATION CONFERENCE

CM partner **Michelle Valencic** spoke on "Liability Coverage Issues Raised by Police Misconduct" at a major insurance coverage conference held in New York in December.

Michelle also spoke at the American Bar Association's 2015 Women of the Section of Litigation Conference in Chicago on November 12, 2015. Michelle spoke on "Jury Selection in Insurance Coverage Cases: The First Step to Winning at Trial." This presentation addressed general jury selection strategies with a focus on additional considerations when conducting jury selection in coverage litigation.

Michelle handles liability, environmental and toxic tort coverage litigation and other insurance coverage matters within CM's Liability Coverage Group. Clients routinely call upon Michelle for her coverage analysis and advice in cases ranging from personal injury or property damage matters, to professional liability claims, to complex commercial disputes. Michelle's coverage expertise extends to D&O/E&O and EPL matters, construction defect cases, as well as to a variety of mass tort claims. She routinely defends carriers in coverage litigation on these and other matters throughout the country, including coverage cases relating to alleged police misconduct and/or wrongful incarcerations.

Michelle can be reached at **mvalencic@clausen.com**.

WILENS SPEAKS AT NASP ANNUAL CONFERENCE

Chicago partner **Bob Wilens** was a speaker at this year's NASP Annual Conference in Reno, Nevada. The conference took place November 8–11, 2015. Bob presented "Grain Storage Tank Failures: Design, Erection, Collapse and Damages Issues" with Tom Costantini of Madsen, Kneppers, and Todd Roeder of HSNO. The presentation was well attended and received.

The group previously presented at the PLRB 2014 Large Loss Conference in Scottsdale, Arizona.

NEW INDIANA OFFICE ALREADY SERVICING MANY CM CLIENTS

In November 2015, Clausen Miller opened its new office in Michigan City, Indiana. Managing Partners **Paige Neel** and **Kim Kearney** report that the office is already defending clients in cases involving complex insurance coverage disputes, broker/agent liability, employment discrimination, civil rights violations, personal injury, transportation, and appellate law. Due to its central location, the new office enhances the firm's ability to offer its full array of legal services throughout Indiana.

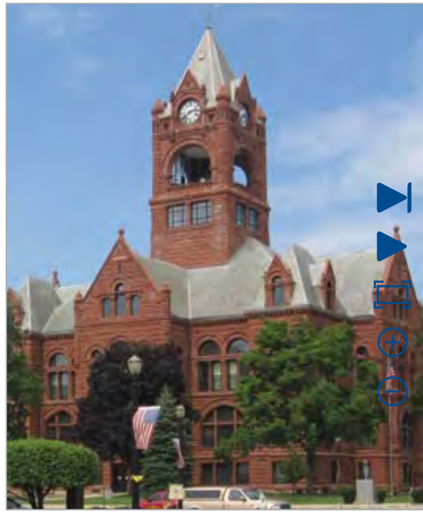
For more information about CM's Indiana office, please contact Paige at **pneel@clausen.com** or Kim at **kkearney@clausen.com**.

LAW360 RANKS CM 11TH IN NATION FOR LARGEST LAW FIRMS WITH INSURANCE PARTNERS

For the second year in a row, Law360 announced **Clausen Miller** as one of the Top 100 Largest Law Firms with the most insurance partners in the nation. Clausen Miller is ranked 11th in the country.

Celebrating its 80th anniversary in 2016, Clausen Miller has created a successful and broad-based insurance practice to serve clients' needs in insurance and complex business litigation from coast to coast and abroad. With a wide array of skill sets, Clausen Miller attorneys collaborate with their clients to provide the most comprehensive and efficient representation required to resolve any issue both in and out of the courthouse.

Law360 survey rankings are based on partner head count data from 283 U.S. based law firms.

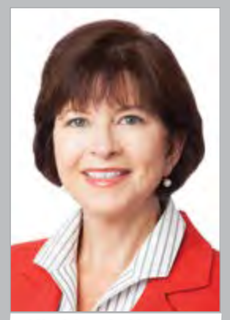


Illinois Super Lawyers 2016

Paul V. Esposito

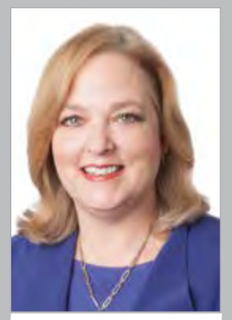
James M. Hoey

Edward M. Kay



Kimbley A. Kearney

Melinda S. Kollross



Amy R. Paulus

Don R. Sampen

Illinois Rising Stars 2016

Daniel R. Bryer

Joseph J. Ferrini

Kimberly A. Hartman

Mark J. Sobczak

Illinois Super Lawyers

Paul V. Esposito
Appellate

Paul is senior council for Clausen Miller P.C. and brings to our clients over 35 years of experience in appellate and trial courts throughout the nation. He has been the primary handling attorney in appeals brought in the United States Supreme Court, the United States Courts of Appeals for the Third, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, and supreme and appellate courts in numerous states. Those appeals have covered a wide range of federal and state issues including constitutional, procedural, personal injury, transportation, employment, insurance coverage, and general commercial law. Among his recent accomplishments, Paul was successful in obtaining the reversal of a multi-million dollar punitive damages award.

James M. Hoey
Insurance Coverage

Jim is a senior partner of Clausen Miller P.C. and is registered and certified to practice before the United States Patent and Trademark Office in patent cases as an attorney (since 1978). Jim has tried cases involving claims under all-risk policies, and named-peril policies involving damage to objects such as turbines, generators, motors and furnaces. He has also tried cases involving other property insurance issues, such as the amount of a business interruption loss, fraud and arson.

Edward M. Kay
Appellate

Ed is a Clausen Miller senior partner and co-chair of the Appellate Practice Group. He is rated AV® Preeminent™ by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed has over 30 years experience in trial monitoring and post-trial/appellate litigation which he regularly brings to bear in significant cases nationwide. Ed has prosecuted over 500 appeals nationwide.

Kimbley A. Kearney
Appellate

Kim is a partner with Clausen Miller P.C. and is AV® Preeminent™ rated by Martindale-Hubbell. She has successfully litigated cases involving catastrophic personal injury, wrongful death, property loss, class actions, mass toxic tort, employment discrimination, insurance coverage and commercial disputes in trial and appellate courts throughout the United States. Kim is a Proctor in Admiralty and a former Member of the Board of Directors of the Maritime Law Association of the United States. She received her Juris Doctor, *cum laude*, and M.B.A. from Tulane University.

Melinda S. Kollross
Appellate

Melinda is a senior partner and Co-Chair of Clausen's Appellate Practice Group, specializing in post-trial and appellate litigation nationwide. She has litigated more than 100 appeals in state and federal reviewing courts, including participation in two appeals before the United States Supreme Court. Melinda has a winning record in appeals, she has argued before the Illinois Supreme Court, and has been named an Illinois Super Lawyer in Appellate practice seven times. Her work spans all areas of firm practice, including commercial, first-party property, liability insurance coverage and liability defense.

Amy R. Paulus
Insurance Coverage

Amy is a partner and member of the Board of Directors of Clausen Miller who concentrates her practice in all areas of liability insurance coverage law, environmental and toxic tort coverage litigation, and reinsurance matters. Amy also regularly assists insurers in drafting new policy forms and coverages.

Don R. Sampen
Insurance Coverage, Appellate

Don has over 30 years of trial and appellate experience in various areas, including insurance coverage and commercial litigation. Don is a *magna cum laude* graduate of Northwestern University College of Law, where he was Executive Editor of the *Northwestern Law Review*, and is currently an Adjunct Professor at Loyola University College of Law teaching a course in Insurance Law. Don is also a prolific writer, authoring articles and book chapters in various areas of the law, including antitrust and whistleblower litigation. He also writes a column in the *Chicago Daily Law Bulletin* which appears twice monthly on insurance coverage matters. He has maintained an AV® Preeminent™ rating (highest possible peer review rating for legal ability and ethical standards) with Martindale-Hubbell for 25 years.

Illinois Rising Stars

Daniel R. Bryer
Appellate, Employment Law

Dan is a partner in the Chicago office of Clausen Miller P.C. He concentrates his practice in the areas of employment law, professional liability, products liability, insurance coverage and business/commercial litigation. Dan has significant experience litigating these matters before state and federal trial courts, as well as administrative agencies such as the EEOC, Illinois Human Rights Commission, Illinois Educational Labor Relations Board and Illinois Board of Education. Dan obtained his law degree from The John Marshall Law School, where he graduated *magna cum laude*, and holds an LL.M. degree from Loyola University School of Law. Dan is licensed in Illinois, New Jersey and New York.

Joseph J. Ferrini
Appellate

Joe is a partner in the Chicago office of Clausen Miller P.C. and is a member of the Appellate Practice Group. Joe concentrates his practice in appellate work and has litigated appeals in federal and state courts, including Illinois, Indiana, New York and New Jersey. His work has covered many of the firm's practice areas, including Coverage, Property, Business/Commercial Litigation, Personal Injury Defense and Product and Professional Liability. Joe joined Clausen Miller following graduation from Loyola University Chicago School of Law, where he received his J.D., *magna cum laude*, finishing 3rd out of a class of over 200.

Kimberly A. Hartman
Appellate

Kim is a partner in Clausen Miller's Appellate Practice Group. She has prosecuted and defended appeals across the nation in a variety of practice areas, including construction, first-party property, insurance coverage, products liability, professional liability, wrongful death/survival and bankruptcy. Kim also partners with trial counsel in a monitoring/advice capacity to prevent and preserve error and ensure a complete record on appeal.

Mark J. Sobczak
Appellate

Mark is a Clausen Miller partner whose practice has encompassed a wide variety of appellate, trial-level, and administrative cases in the areas of casualty defense, employment discrimination, professional negligence, school law, toxic tort, and insurance coverage. Mark received his J.D., *magna cum laude*, from Northern Illinois University College of Law. Prior to law school, Mark spent several years in the claims department for a national liability insurer, where he handled litigated and non-litigated personal injury and subrogation claims in Illinois and other midwestern jurisdictions, gaining a unique insight into the insurance claims handling process and an insurer's perspective on pending litigation.

CM PARTNERS VICTORIOUS ON APPELLATE REHEARING

In *Stuckey v. The Renaissance at Midway*, CM partners **Rodd Elges**, **Melinda Kollross**, and **Mark Sobczak** recently succeeded in the difficult task of convincing an appellate court to reverse itself on rehearing. The case involved interpretation of the Illinois Mental Health and Developmental Disabilities Confidentiality Act. CM trial attorney Rodd Elges argued to the trial court that the Act precluded discovery of certain confidential long-term healthcare records. The trial court disagreed and ordered production. CM pursued an interlocutory appeal and the Illinois Appellate Court, First District affirmed based on an exception to the Act. Rodd, Melinda, and Mark immediately petitioned for rehearing; arguing that the Plaintiff had waived reliance on any exceptions, that the exception that the appellate court relied upon in affirming was inapplicable, and that, in any event, the trial court had not made the requisite findings to invoke the exception. The appellate court agreed, vacated its initial ruling, and reversed the trial court's order requiring production of the documents at issue. The published opinion is available at 2015 IL App (1st) 143111.

KEARNEY WINS SUMMARY JUDGMENT IN NEW YORK APPELLATE DIVISION

The decision of New York's Appellate Division, First Department in *Atkins v. Flat Rate Movers* exemplifies the success that can be achieved by appealing the denial of summary judgment in those jurisdictions that permit it. **Kim Kearney**, a Managing Partner of the firm's Indiana Office and senior member of the CM Appellate Practice Group who is licensed in New York, Illinois, Indiana and Louisiana, recently won summary judgment in favor of the defendant and dismissal of a defamation action in its entirety by unanimous order of the Appellate Division, First Department. Less than one month after oral argument, the Appellate Division flatly rejected the trial court's ruling that issues of material fact precluded summary judgment in favor of an employer and against a former employee discharged after allegedly being falsely accused of theft by fellow employees. The Appellate Division considered issues of absolute and qualified immunity, as well as vicarious liability, in concluding that the evidence offered by the plaintiff was insufficient to warrant a jury trial. CM partner **Carl Perri** and associate **Serena Skala** wrote and argued the motion for summary judgment in the trial court.

For more information, please feel free to contact **Kim Kearney** at **kkearney@clausen.com** or **Carl Perri** at **cperri@clausen.com**.

RYERSON AND SHINKAN OBTAIN DEFENSE VERDICT IN COOK COUNTY—PLAINTIFF ASKED JURY FOR OVER $7 MILLION

CM partners **Tom Ryerson** and **Scott Shinkan** earned a jury verdict in favor of their client in a recent trial in Chicago. The pain management physician allegedly failed to timely diagnose a vertebral infection in a hospitalized patient. That resulted in a lengthy incapacitation which caused a lethal pulmonary embolism. The three week plus trial involved numerous nationally known experts in infectious disease, forensic pathology, and pain management. Able plaintiff's counsel asked the jury for over $7 million dollars. The jury returned a verdict in favor of the defendants in 45 minutes. For more information on successfully defending high exposure cases, please contact Tom (**tryerson@clausen.com**) or Scott (**sshinkan@clausen.com**)

on the
LITIGATION FRONT

NY CASUALTY DEFENSE GROUP OBTAINS DECISION DISMISSING LABOR LAW THIRD-PARTY AND CROSS-CLAIMS

CM partners **Carl Perri** and **Matthew Van Dusen** were retained to represent defendant/fourth third-party defendant Celtic Sheet Metal, Inc. ("Celtic"), an air conditioning duct installation company. Celtic was hired by defendant/fourth third-party plaintiff Admore Air Conditioning Corp. ("Admore"), to install metal duct work in a newly constructed high rise building in New York City. Plaintiff, an employee of a first third-party defendant curtain window installation company, was walking backwards moving materials on a poor lighted floor and stepped into an uncovered hole injuring his back and knee. Plaintiff filed a New York Labor Law action in the New York Supreme Court, Bronx County. Admore was brought into the case and ultimately brought a third-party action against Celtic based upon their contract. Thereafter, Plaintiff filed a direct claim against Celtic.

After completion of document and deposition discovery, Plaintiff realized that neither Admore, nor Celtic created or had anything to do with the hole in question. Thus, Plaintiff voluntarily dismissed with prejudice his claims against Celtic, Admore and many other defendants that discovery revealed had nothing to do with the hole. The defendant owner/general contractor and the defendant carpentry company who failed to cover the hole would not agree to release their cross-claims against any defendants who Plaintiff voluntarily dismissed against. Plaintiff's employer would not dismiss its cross-claims either, because it remained in the case, so all third-party and cross-claims amongst the many defendants remained. Celtic was forced to move for summary judgment to have the third-party and cross-claims dismissed or go to trial.

Perri and Van Dusen moved for summary judgment pursuant to New York CPLR § 3212 seeking to have the third-party and cross-claims dismissed. They argued, based upon the evidence, that Celtic did not create the hole, had no involvement with the hole, and could not have physically used the hole in any way. In the Decision and Order, dated December 10, 2015, Justice Howard H. Sherman summarily dismissed all third-party and cross-claims against Celtic.

If you would like to learn more about New York Labor Law, construction litigation and personal injury issues, please feel free to e-mail **Carl Perri** (**cperri@clausen.com**) or **Matthew Van Dusen** (**mvandusen@clausen.com**) or call them at 212-805-3900.

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. Some of our currently available courses are listed below. Please view the complete list and 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

A Bad Cellular Connection: Employee Work-Related Cell Phone Usage At The Time Of An Accident Is Generally Sufficient Grounds For Employer Vicarious Liability

by ***Joseph J. Ferrini***

Introduction

Vicarious liability is a form of strict, secondary liability that arises under the common law doctrine of agency—*respondeat superior*—the responsibility of the superior for the acts of the subordinate. Through the doctrine an employer can be held responsible for the actions of an employee when the employee is found to have been acting within the scope of employment at the time of their conduct. Most jurisdictions adhere to the Restatement (Second) of Agency § 228, or a close approximation, and require three elements to be present for an employer to be responsible for its employee's actions: 1) that the employee be at least partially motivated by a desire to benefit his/her employer at the time they act; 2) that the employee's conduct take place within authorized time and space limits of the employment; and 3) the employee's conduct is of the kind he/she is employed to perform.

In most jurisdictions, if an employee is simply driving to or from work, they are not yet considered within the scope of employment (commonly referred to as the "coming and going" rule). Likewise, someone who is off the clock and running personal errands would not fall within the Restatement scope of employment parameters outlined above. However, what happens when an employee uses their cellphone while driving to work to call their boss and let them know they are running late? How about when the employee is running to the cleaners on the weekend, but calls his/her supervisor to find out their work schedule for Monday morning? Could the employee's conduct at these moments give rise to liability for the employer? The answer may surprise you. Today, when cellphone use in car travel is standard practice and texting and emailing while driving are pervasive problems, the question of whether an employer will be vicariously liable for accidents where employee cell phone use has occurred is becoming a more commonly litigated issue in courtrooms nationwide and should be of concern to employers and their insurers alike. This article examines the current state of the law and suggests some creative angles to explore in accident cases where cell phone usage has occurred.

Analysis

Cell Phone Use For Business Purposes At The Time Of The Accident Generally Is A Sufficient Basis For Liability

Case law from across the country presents a general consensus that evidence of actual phone usage for work-related purposes at the very time of an accident will provide a sufficient basis for the fact finder to impose

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vicarious liability. The case law almost uniformly holds that—at least when an employee is on his or her cellphone for work-related purposes at the time of an accident— at minimum a fact question exists for the jury as to vicarious liability. *See, e.g., Miller v. American Greetings Corp.*, 161 Cal. App. 4th 1055, 1063 (Cal. App. Ct. 2008) ("Sometimes the link between the job and the accident will be clear, as when an employee is on the phone for work at the moment of the accident."). One court even found that an employer was liable as a matter of law under such circumstances. *Ellender v. Neff Rental, Inc.*, 965 So. 2d 898, 902 (La. Ct. App. 2007); *but see contra, Clickner v. City of Lowell*, 422 Mass. 539 (1996)(no *respondeat superior* liability as a matter of law where off-duty police officer used a cell phone to respond to a business-related page while driving to work).

Given the three Restatement scope of employment components, this outcome makes some sense: when an employee calls their employer regarding a work issue he/she is almost assuredly 1) seeking to further the interests of the employer. Furthermore, if the employee is calling their employer on a work-issued cell phone it would seem reasonable to conclude that such use was 2) within authorized time and space limits; and 3) contemplated as part of the employee's employment. Why issue the phone if you are not contemplating its use to call work as part of the employee's employment and unless you are authorizing the employee to do so as necessary? Certainly the defense should argue that these Restatement requirements are not met in the foregoing factual situation, as was successfully done in *Clickner*, *supra*, but again courts have uniformly been holding, in more recent decisions, that such circumstances are enough to place the matter in the hands of a jury. The question thus turns to what factual differences might exist in a given case involving cell phone usage that might help avoid a finding that the employee was acting within the scope of employment. The following are some potential fact differences that should be developed where available.

Potential Defenses

(1) The Employee Was Not On The Phone At Time Of Accident

One helpful factual counter to a scope of employment finding is proof that an employee was on the phone before, and not at, the time of the accident. The employee's testimony will be critical in establishing whether he or she was on the phone minutes before (or after) impact as opposed to at the time of impact. Cellphone records also are obviously a critical piece of evidence that may help substantiate that the employee in fact was not on the phone at the time of a collision. Keep in mind that unless the evidence reflects a clear time gap between the phone usage and the reported time of an accident, such evidence will probably not result in a successful motion for summary judgment. However, a solid proven gap in time can lead to dismissal of an action. *See, e.g., Miller*, 161 Cal. App. 4th at 1063 (employee who used his cell phone to call his crew chief for one minute approximately 8 or 9 minutes before accident on a day off of work held not within scope as matter of law). Moreover, even if summary judgment is not obtained, the evidence can present an invaluable trial theory for the defense team to use with the jury.

(2) The Employee Was On The Phone But For Personal Reasons

If an employee was on a phone, even a work-issued one, but making calls for personal reasons, he/she almost certainly was not acting within the scope of employment. Using the phone for personal reasons would fail the Restatement requirement that the employee's conduct be borne of a desire to further the interest of his/her employer and should result in summary judgment for the employer. *See Steele v. Cingular Wireless LLC*, 2007 Cal. App. Unpub. LEXIS 7056 (Cal. Ct. App. 2007) (employee not within scope of employment where undisputed evidence established that at the time of the accident he was on his cell phone discussing a personal matter, not a work issue, and where he had already driven to complete two personal errands unrelated to his employment); *but see State Farm Mutual Auto Ins. Co. v. DuPage County*, 2011 IL App (2d)100580 (noting trial court had allowed a complaint alleging *respondeat superior* liability to proceed against a County State's Attorney's Office for an accident a county employee was involved in while driving in a County car and making a business call on her cell phone shortly before the accident and trying to use her cell phone to make a call (unspecified as business or personal) at the time of the accident).

Indeed, regardless of the recipient, if the call was not made to further the employer's interests, it does not satisfy the Restatement requirements. Thus, even a call to a co-worker or supervisor, if purely personal in nature, should not sustain a liability finding. However, a judge may be more inclined to allow the factfinder to assess whether a call to a co-worker was, in fact, only in furtherance of personal matters.

(3) The Employee Was Unauthorized To Work Or To Use The Phone At The Time Of The Work Call

Another possible basis for avoiding a finding that the employee was acting within the scope of employment is if the employee was in violation of some company policy at the time of his/her conduct whereby they could not be within the scope of employment. The comments to § 228 of the Restatement make clear that the "manifestations of the master determine what conduct may be within the scope of employment, since [the scope] includes only acts of the kind authorized." For example, perhaps the employee was inebriated at the time of cellphone usage and his/her workplace prohibited employees from being on duty while drunk. This would allow the employer to argue that the employee was not within the scope of employment. Or perhaps the workplace had a specific policy that employees were never ever to use their cellphones for work purposes while driving; a court could rule that a violation of such an explicit policy rendered the employee not within the scope of employment.

Learning Points: An employee's cell phone use for business purposes at the time of an accident will generally be sufficient to at least present a question of fact for the jury on scope of employment/*respondeat superior* liability, even where the employee is technically off-duty or commuting to or from work. For more information on defense theories in cell phone cases or to obtain a more lengthy and detailed analysis of this topic, please contact **Joe Ferrini** (312.606.7447 or **jferrini@clausen.com**). ♦

Insurer That Fails To Accept Additional Insured's Defense Within 30 Days Of Complaint Filing Breaches Duty To Defend And Loses Right To Control Defense

by ***Maryam Gilak***

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The Northern District of California rules that an insurer has 30 days from the date the complaint is filed against the additional insured to accept the defense, otherwise it breaches the duty to defend and loses the right to control the defense. *Travelers Indem. Co. v. Centex Homes, et al.*, U.S. Dist. LEXIS 137898, Case No. 11-CV-03638-SC (N.D. Cal. Oct. 7, 2015).

This ruling is the latest in the ongoing battle between Travelers Indemnity Company ("Travelers") and Centex Homes ("Centex") which started in 2011. On Centex's motion for reconsideration of the court's prior order finding that the delay in accepting the defense did not deprive Travelers of the right to control the defense and appoint counsel, the court determined that its previous order was in error.

The court phrased the issue as follows: "whether an insurer loses its right to control the defense of its insured if it fails to provide the insured with a defense immediately after its duty to defend has been triggered, where the insurer subsequently accepts the insured's tender and offers to provide a defense, and where the insurer reimburses the insured for any legal costs incurred prior to its acceptance of the insured's tender." The court answered the question in the affirmative, and found that Travelers' delay amounted to a breach of the duty to defend, as well as the right to control the defense.

Facts

Centex was an additional insured on CGL policies issued to various Centex subcontractors insured by Travelers. Numerous construction defect actions were filed against Centex in state court.

The *Acupan* action was tendered to Travelers on January 21, 2011, although the complaint against Centex was not filed until April 19, 2011. Travelers accepted Centex' defense on June 1, 2011, after requesting and receiving additional information related to the claim. From the date of tender to when Travelers accepted the defense, 131 days elapsed.

The *Conner* action was tendered to Travelers on September 8, 2010, approximately one month before complaint was filed. On September 22, 2010, Travelers requested additional information regarding the claim. Centex responded that very day and provided the requested information. Travelers accepted Centex' defense on January 21, 2011, 135 days after the date of tender.

On April 8, 2013, the court considered cross-motions for summary judgment and found that "an insurer cannot lose its right to control the defense of its insured through delay alone. Rather, it may only lose the right through waiver, forfeiture, or estoppel, none of which have been proven by Centex." Centex moved for reconsideration.

Analysis

The court, relying on *J.R. Mktg., L.L.C. v. Hartford Cas. Ins. Co.*, 216 Cal. App. 4th 1444 (2013), *aff'd in part*, *rev'd in part, Hartford Cas. Ins. Co. v. J.R. Mktg.*, 61 Cal. 4th 988 (2015), found that "Travelers breached its duty to defend by failing to provide Centex with a defense at least 30 days after the complaints were filed in the *Acupan* and *Conner* actions." Further, upon such a breach, Travelers was divested of its right to control Centex's defense.

Travelers argued that it did not breach the duty because: (1) it had a right to conduct a reasonable investigation before accepting the tender; and (2) it reimbursed Centex for the legal costs incurred before Travelers accepted the tender. The court rejected Travelers' arguments and stated that "[a] failure to provide counsel or to guarantee the payment of legal fees immediately after an insurer's duty to defend has been triggered constitutes a breach of the duty to defend, even if the insurer later reimburses the insured." The court further determined that while an insurer "is free to conduct an investigation beyond the point at which its duty to defend has been triggered[,]" "[a]n insurer may not… deprive an insured of the security implicit in the duty to defend."

The *Acupan* action was tendered on January 21, 2011, and the complaint was not filed until April 19, 2011. "Travelers' duty to defend was not triggered until May 19, 2011." Travelers accepted the defense on June 1, 2011. "[T]here were at least 13 days during which Travelers had a duty to defend but did not provide a defense."

The *Conner* action was tendered on September 8, 2010 and the complaint was filed on October 15, 2010. "Travelers' duty to defend therefore arose on November 15, 2010, the date on which a responsive pleading was due from Centex." The court reasoned that Travelers' acceptance "was made 67 days after its duty to defend was triggered" which amounted to a breach of the duty to defend and a loss of the right to control the defense.

The court reasoned that although insurers generally have the right to control the defense, when they breach that duty, they forfeit such right. Specifically, the court found that "*J.R. Marketing* stands for the proposition that an insurer loses its right to control the insured's defense upon breach of its duty to defend." Even though there is no clear delineation point as to when a delay amounts to breach of the duty to defend and neither the parties nor the court found any case authority addressing the issue, the court found that Travelers' delay, in this case, amounted to a breach and divested Travelers of the right to control the defense.

Learning Points: An insurer has 30 days from the date the complaint is filed against the additional insured to accept a tender of defense or risk losing the ability to control the defense. In this case, the insurer had job file and related contract documents well before the underlying actions were filed. Thus, this was not a case where an insurer receives only a complaint, with no further documentation and then is required to make a coverage determination.

There were no cases "clearly delineating the point at which an insurer's delay amounts to a breach of its duty to defend," and it remains to be seen how and when California Courts of Appeal and/or ultimately the California Supreme Court will address the district court's interpretation. Nonetheless, at this time, the decision provides guidance for measuring timeliness in responding to additional insured tenders.

Finally, this ruling is not the last in the battle between Travelers and Centex. On November 20, 2015, Travelers filed a motion for reconsideration. The matter is fully briefed, so we await the court's ruling. ♦

Timing Of Certificate Of Insurance Not Relevant To Additional Insured Status

by ***Don R. Sampen***

Introduction

Blanket additional insured endorsements to CGL policies usually require that the named insured enter into a written agreement to add the prospective additional insured to the policy prior to the occurrence giving rise to coverage. If the necessary writing is otherwise lacking, an issue is sometimes presented whether a certificate of insurance fulfills the requirement—typically not, at least in Illinois. In a recent Seventh Circuit Court of Appeals decision, however, the facts were slightly different. The policy required only that an oral agreement to add the prospective additional insured be made prior to the occurrence, but that, in addition, a certificate of insurance issue identifying the additional insured. The question facing the Court was whether, under Illinois law, the certificate had to issue, like the agreement, before the occurrence. *Cincinnati Ins. Co. v. Vita Food Products*, 2015 U.S. App. Lexis 21878 (7th Cir. Dec. 16, 2015).

Facts

Cincinnati issued a CGL policy to Painters USA in 2011. The policy permitted Painters to add an additional insured to the policy by oral agreement, so long as the agreement preceded the occurrence and so long as "a certificate of insurance showing that person or organization as an additional insured has been issued."

While the policy was in force, Painters was hired by Vita to do painting on Vita's premises and orally agreed to add Vita as an additional insured. Soon after the work began, one of Painters' employees was injured and sued Vita for negligent maintenance of the premises. It was only after the injury that Painters requested a Cincinnati agent to issue a certificate of insurance showing Vita as an additional insured. The agent issued the certificate within a day.

Vita tendered to Cincinnati, which denied coverage, and Cincinnati thereafter brought this declaratory action for a determination that it owed no coverage to Vita. The district court granted summary judgment in favor of Cincinnati, and Vita filed this appeal.

Analysis

In an opinion by Judge Richard Posner, the Seventh Circuit reversed. The Court pointed out that conflicting evidence existed whether the oral agreement to add Vita was entered into before or after the accident, so that summary judgment would not have been appropriate on that issue. But Cincinnati maintained that it was still entitled to summary judgment because no fact issue existed concerning the fact that the certificate of insurance did not issue until after the accident.

The Seventh Circuit disagreed. The Court said that the policy clearly required that the oral agreement have been entered into prior to the accident. The policy was not, however, explicit as to when the certificate had to be issued.

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IMG Worldwide Revisited: Equitable Indemnity In Favor Of Excess Insurer Against Settled Primary Insurer The Only Rational Result

by ***Amy R. Paulus*** *and* ***Michael L. Duffy***

As we previously reported, the Sixth Circuit Court of Appeals issued an opinion in July 2014 with adverse implications for excess insurers, when it required an excess insurer to pay to a policyholder nearly $8 million in defense costs for a claim that the primary insurer covered but wrongfully denied. *See IMG Worldwide, Inc. v. Westchester Fire Ins. Co.*, 572 Fed. Appx. 402 (6th Cir. 2014). Among other things, the *IMG* decision was particularly troubling because it involved neither exhausted primary coverage nor a claim not covered by the primary policy. (While relevant facts are summarized below, please see our prior article for a more complete discussion: *Sixth Circuit Imposes Defense Obligation On Excess Insurer Based On Denial Of Coverage By Primary Insurer, Potentially Creating Extracontractual Duty To Police and Pursue Primary Insurers,* at **http://bit.ly/1u0c81B**). In a recent decision highly critical of the Sixth Circuit, the U.S. District Court for the Northern District of Ohio on remand held that the excess insurer was entitled to full recovery of defense costs from the primary insurer, pursuant to a theory of equitable indemnity.

Facts

A Brief Recap of the Sixth Circuit's Decision

In *IMG*, the underlying lawsuit involved 270 plaintiffs seeking over $300 million in damages in Florida state court against IMG and real estate developers, in connection with a failed real estate development project (the "*Gastaldi* suit"). Great Divide Insurance Company ("Great Divide") provided primary insurance to IMG, with limits of $1 million, while Westchester Fire Insurance Company ("Westchester") issued an excess policy with limits of $25 million excess of the Great Divide limits. Both Great Divide and Westchester denied coverage to IMG for alleged property damage. IMG ultimately settled the *Gastaldi* suit for nearly $5 million, after having incurred defense costs of over $8 million. Subsequently, IMG settled with Great Divide for $1.25 million, exhausting the $1 million policy limits and providing $250,000 toward the $8 million in defense costs, in exchange for a full release. Westchester continued to deny coverage.

Among other things, the trial court ruled that Westchester was not required to reimburse IMG for defense costs in connection with the *Gastaldi* suit, reasoning that Westchester's defense obligation expired when IMG settled with Great Divide, and also was conditioned on its contractual retention of subrogation rights, which IMG arguably had released in its settlement with Great Divide. The Sixth Circuit reversed on this point, focused on Westchester's defense obligation when the underlying insurance *does not provide coverage*, and concluded that wording included *does not "undertake to deliver" coverage*. Thus, due to Great Divide's (wrongful)

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denial of coverage, Westchester was contractually obligated to defend IMG. The Sixth Circuit rejected Westchester's set-off argument, and while recognizing that Westchester had not anticipated the risk of funding IMG's defense costs without the possibility of reimbursement from Great Divide, the *IMG* court referred to IMG as "the non-breaching party," which "must not be left holding the bag." While remanding the case to the district court with instructions to enter judgment in favor of IMG, the Sixth Circuit explicitly found that Westchester could still seek reimbursement from Great Divide under various equitable principles including equitable contribution and subrogation.

Analysis

The District Court's Recent Decision on Remand: Criticisms of the Sixth Circuit and Applying Equitable Indemnity to the Benefit of the Excess Insurer

1. The District Court's Criticisms of the Sixth Circuit

The district court's decision is openly critical of the Sixth Circuit's opinion. Among other things, the district court took issue with the Sixth Circuit's treatment of the following Conditions in the Westchester policy: "This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis. . . . When this insurance is excess, we will have no duty . . . to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.' If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers."

Regarding the second sentence of those Conditions ("When this insurance is excess . . . "), the district court on remand noted that the Sixth Circuit "did not even address" this limitation, and was "still convinced that this plain language" clarified that Westchester owed no duty to defend when a primary or other insurance policy had a duty to defend. Regarding the third sentence of those Conditions ("If no other insurer defends . . ."), the Sixth Circuit held that this wording did not create a limiting condition on or "condition precedent" to Westchester's defense obligation; however, the district court on remand took issue with this as well, stating that the assessment of nearly $8 million in defense costs against Westchester would seem to prove the prejudice required under Ohio law to establish the conditional aspect of Westchester's subrogation rights.

The district court also took issue with the Sixth Circuit's portraying IMG as the "victim." The district court reasoned that IMG had every right and ability to protect its own interests and force both Great Divide and Westchester to trial. Instead, recognizing that it faced some risk at trial, IMG "decided to hedge its bets and settle with its primary insurer so that it was guaranteed at least some recovery." At the time of its settlement with Great Divide, IMG was aware of the total defense costs, yet "made a rational business decision" and acted "as any other rational business acts when entering into a settlement agreement" when it accepted the $1.25 million payment as full payment of any liabilities owed by Great Divide. The district court noted that a policy of promoting settlement should not force that settlement on unwilling parties, "which could be the result if excess carriers will forever be at risk of bearing defense costs otherwise attributable to a settling primary insurer."

The district court also disputed the Sixth Circuit's conclusion that it had "no legal basis" to apply a credit or set-off. Even if Westchester's defense obligation was not conditioned on maintenance of its subrogation rights to recover from the primary insurer, the district court noted that in Ohio, the right of subrogation is recognized by statute and by the courts. By the time Westchester's breach of contract was legally established, IMG also had breached its obligations under the policy language by extinguishing Westchester's subrogation rights in its settlement with Great Divide. The district court noted that federal courts in Ohio and other state courts have found that an insured may not shift the risk of settling for a reduced amount with the primary carrier to the excess carrier. With further critical comments, the district court stated that had the Sixth Circuit not ruled on the issue of set-off/settlement credits, the district court would have found that Westchester was entitled to a settlement credit or a set-off of its obligation to front defense costs in the full amount of those costs.

2. The District Court's Substantive Ruling

Following this critical commentary and analysis of the Sixth Circuit's decision, and after noting it "dutifully if somewhat reluctantly issued" a revised judgment assessing all defense costs against Westchester as directed by the Sixth Circuit, the district court identified the issue it had to determine: Is Great Divide liable to Westchester under any equitable principles for the defense costs Westchester must pay to IMG?

Westchester sought reimbursement under alternate theories of contribution, indemnity, equitable subrogation, and unjust enrichment, or as otherwise allowed under the principles of equity. Great Divide's leading argument in opposition was that "Ohio law favors the resolution of litigation by compromise and settlement." While generally recognizing this principle, the district court stated that the settlement agreement could be upheld between IMG and Great Divide, but could not eviscerate Westchester's contractual right of subrogation, absent Westchester's agreement, which was not present here.

Significantly, the district court also noted that the settlement agreement was enforceable so long as there was no evidence of collusion or bad faith to the detriment of the non-settling party, and here there was such evidence, at least on the part of IMG. Both Great Divide and IMG knew or should have known that Westchester was the excess carrier, and at least IMG knew it had contracted with Westchester to preserve Westchester's right of subrogation against Great Divide in the event Westchester was required to pay any defense costs. Nevertheless, IMG had represented to Great Divide in the settlement agreement that IMG "owned" the rights released therein, and that IMG had not assigned any such rights to any other entity. This was despite IMG's having agreed that Westchester had a subrogation right to collect from Great Divide in the event it had to pay any defense costs covered by the Great Divide policy, and despite IMG's repeatedly arguing to the Court that Westchester maintained its right of subrogation even following the settlement. The upshot of this commentary was that such a settlement agreement is not automatically upheld, and equitable relief may be considered.

Amongst various equitable theories of recovery against Great Divide, the district court ultimately settled upon equitable indemnity. First, equitable contribution was found inapplicable because Westchester had no duty to provide a defense when a primary carrier had that duty, Great Divide was responsible for all defense costs incurred before its policy limits were exhausted, and all defense costs were incurred prior to exhaustion of the primary policy.

Second, unjust enrichment was not applicable because Westchester did not confer any benefit upon Great Divide that would support such a claim. Instead, it was IMG which had received the benefit of both the reduced risk and payoff obtained through the settlement agreement, and of the payment of defense costs by Westchester.

Third, equitable subrogation, which is concerned with the prevention of frauds and relief against mistakes, did not apply because it did not appear to be the proper mechanism for enforcing a contractual subrogation right that had been eliminated or compromised by the actions of the party who held the original right to recover. Ohio courts generally have held that contractual and equitable subrogation rights do not survive when an insured has released the subrogated rights through a settlement agreement, as IMG did here.

Of the various equitable remedies considered, the district court found equitable indemnity was applicable because indemnity is understood as the right of a person who has been compelled to pay what another should pay, to obtain reimbursement, and the right of an excess insurer to obtain reimbursement from a primary insurer may arise when an excess insurer has been compelled to pay what a primary insurer should have paid. While Great Divide argued that no Ohio or federal court applying Ohio law has allowed equitable recovery against a settling primary insurer by an excess insurer, the district court distinguished those decisions as contribution cases involving two insurers with joint or overlapping coverage. That contribution scenario was distinct from the situation involving an insurer with secondary/indirect liability who is being held fully liable for the losses attributable to an insurer with primary/direct liability.

Accordingly, the most equitable outcome based on the particular facts of this case was to find Westchester entitled to recover from Great Divide under a theory of equitable indemnity, and thus Great Divide was ordered to reimburse Westchester for the nearly $8 million in defense costs it was ordered to pay IMG (as well as more than $1 million in pre-judgment interest).

Significantly, the district court acknowledged that this result assessed liability against Great Divide for costs it had been absolved of paying pursuant to its settlement with IMG, "which, in and of itself, may be inequitable," but

it would be less equitable to shift that burden to Westchester by means of an agreement to which Westchester was not a party. Further, Great Divide "easily" could have determined that Westchester was an excess carrier and that it held subrogation rights in the event it was held liable for defense costs. Great Divide also could have asked IMG to indemnify it in the event of a future contribution or indemnification action by another insurer. Moreover, to the extent Great Divide relied on IMG's representations and those were shown to be false, Great Divide had the right to pursue a remedy for any misrepresentations IMG made to it in the negotiation and execution of the settlement agreement.

Further, the district court noted that allowing IMG to profit from its false representations and avoidance of contractual representations and obligations would create a situation in which an insured could settle with a primary insurer with no risk whatsoever to itself, and then simply pass that risk on to an excess insurer who is left no recourse whatsoever.

Learning Points:

Impact of District Court's Ruling

Despite the district court's ruling that effectively placed Westchester in the position it should have been, the Sixth Circuit's ruling remains, thus obligating certain excess insurers to provide a defense when the primary insurer has wrongfully denied coverage for a covered claim. Moreover, the Sixth Circuit seems to have eliminated the application of settlement credits and/or set-offs to this particular scenario. Accordingly, we reiterate our prior suggestions for insurers with an excess policy containing language similar to the excess policy at issue in *IMG* to consider the following alternatives: (1) if the underlying policy is exhausted or the underlying insurer has denied coverage for a claim that is covered by the excess policy, consider providing a defense and/or reimbursing defense costs immediately, subject to a reservation of rights; (2) if providing a defense to the insured and/or reimbursing defense costs, consider instituting an action against the underlying carrier for contribution; and (3) if denying coverage, consider filing a declaratory judgment action against the policyholder and underlying insurer. Further, we suggest that an excess carrier consider seeking reimbursement of any defense costs it extends to the policyholder relating to claims that are not covered.

Meanwhile, primary insurers in positions similar to Great Divide in *IMG*—namely those which deny coverage and do not participate in the defense of the insured—should be prepared to face a potential declaratory judgment action by the insured and/or an excess insurer. In the event this primary insurer enters into a settlement agreement with the insured for an amount less than what the primary insurer should have paid (*e.g.*, paying $250,000 in defense costs as opposed to $8 million), then it should anticipate a potential action by the excess insurer pursuing various equitable remedies, including but not limited to equitable indemnity. This is one of the most critical points, as settlement may not achieve the desired finality. Further, this primary insurer should consider including as much protective wording as possible in the settlement, including that the insured indemnify it in the event of a future contribution or indemnification action by another insurer, so that it can obtain the full benefits of settlement and shift these potential inherent risks to the insured. This primary insurer also might request a copy of any applicable excess policy, to assess whether the insured has agreed to the excess insurer's subrogation rights under these circumstances. Finally, this primary insurer might consider challenging the settlement agreement itself, based on any material misrepresentations by the insured in connection with the negotiation and execution of the settlement agreement.

We also note these decisions have the presumably unintentional effect of perpetuating, if not encouraging, litigation. In fact, additional litigation was suggested by both the Sixth Circuit (Westchester could seek reimbursement from Great Divide) and the Northern District of Ohio (Great Divide could pursue a misrepresentation claim against IMG). Ultimately, based on the facts of this case and timing of IMG's settlement with Great Divide, Great Divide should have paid all defense costs; and in the end, Great Divide paid all defense costs. However, to reach that end, IMG, Westchester and Great Divide engaged in several rounds of litigation, consuming the time and resources of the parties, courts and counsel. On balance, though, both the primary and excess insurer paid their respective contractual defense costs for which they bargained.

We note these suggestions are subject to any jurisdiction-specific rules and case-specific facts, and we encourage you to consult us with any related issues or questions. Please contact **Amy Paulus** at **apaulus@clausen.com** or (312) 606-7848, or **Michael Duffy** at **mduffy@clausen.com** or (312) 606-7573. ♦

AGENCY

THIRD-PARTY TOUR GUIDE POTENTIAL AGENT OF RESORT

Taylor v. The Point at Saranac Lake, Inc., 2016 N.Y. App. Div. LEXIS 236 (N.Y. App. Div. 3d Dep't)

While staying at, and with the help of defendant resort, decedent booked an off-site snowmobile tour. During the excursion, decedent crossed the highway and was struck and killed by a motor vehicle. ***Held:*** Resort was not entitled to summary judgment on guest's negligence claim because the hotel's promotion materials and conduct created a question of fact as to whether the guest could have reasonably believed that the excursion company possessed authority to conduct the snowmobile tour as the resort's agent.

ARBITRATION

FAILURE TO PROVIDE ACCURATE TRANSLATION OF CONTRACT DOOMS MOTION TO COMPEL

Ramos v. Westlake Services LLC, 242 Cal. App. 4th 674 (Cal. App. 1 Dist.)

Plaintiff, a Spanish speaker, purchased a used automobile from defendant's auto dealership. He also purchased a so-called "GAP" insurance policy designed to cover any difference between the actual cash value of the vehicle and the remaining balance on the purchase loan should the vehicle somehow become a total loss. Plaintiff sued the dealership alleging that its failure to provide him a copy of the GAP policy in Spanish violated various California consumer protection statutes. The dealership moved to compel arbitration based on the terms of the underlying sales contract, which was in English. ***Held:*** The trial court correctly refused to compel arbitration. Plaintiff negotiated the purchase of the vehicle in Spanish and, although the signed copy of the sales contract contained an arbitration provision, the Spanish translation provided to plaintiff at the time of the sale did not. Accordingly, there was no mutual assent to the arbitration provision and the sales contract was void under the doctrine of fraud in the execution.

ATTORNEY'S FEES

ATTORNEY'S FEES NOT AVAILABLE TO VICTORIOUS INSURED

MacDonald v. Webb Ins. Agency, Inc., 2015-Ohio-4623 (Ohio App.)

After winning declaratory judgment action regarding coverage, insureds brought separate action to recover attorney's fees incurred. ***Held in a case of first impression:*** Attorneys' fees are not damages in a negligence action. Under the "American Rule," litigants may not recover attorney's fees absent a contract, statute, or an opponent's bad faith. Nothing in the insurance contract or statutes allowed recovery of fees. Allowing insureds to recover fees under a negligence theory analogous to legal malpractice would violate the American Rule.

DISCOVERY

COURT CONFIRMS RULES REGARDING SOCIAL MEDIA DISCLOSURE

Forman v. Henkin, 2015 N.Y. App. Div. LEXIS 9353 (N.Y. App. Div. 1st Dep't)

Plaintiff sued for injuries sustained when she fell from a horse. Defendant sought disclosure of plaintiff's social media information, such as photos and messages, which the trial court denied. ***Held:*** A majority of the court adhered to precedent and rejected the dissent's desire to open such information to discovery. There must be a factual predicate for requesting such information. Mere speculation that the requested information might be relevant to rebut plaintiff's claims of injury or disability is not a proper basis for requiring access to a plaintiff's social media account.

EXCESS INSURANCE

USE OF PUBLIC FUNDS FOR POOLED SELF-INSURANCE DID NOT CONVERT UMBRELLA COVERAGE TO PRIMARY COVERAGE

Ill. Mun. League Risk Mgmt. Ass'n v. State Farm Fire & Cas. Co., 2015 IL App (1st) 143336-U (Ill. App.)

A municipal employee caused a traffic collision while driving his employers' vehicle. The municipality was a member of a risk pooling association, which reached a settlement with the underlying plaintiffs. The pooling association then sought subrogation from the employee's personal umbrella insurer, State Farm, alleging breach of contract for State Farm's refusal to contribute the limits of the umbrella policy towards settlement. ***Held:*** The trial court correctly entered summary judgment in State Farm's favor. The unambiguous language of the State Farm umbrella policy stated that its coverage was "excess over all other insurance and self insurance." Because the risk pooling association provided coverage to the municipality under a self-insurance pooling arrangement that exceeded the settlement amount, State Farm owed no coverage. Additionally, the use of public funds for the pooled self-insurance did not convert umbrella coverage to primary coverage.

FIRST-PARTY PROPERTY

NO "COLLAPSE" MEANS NO RECOVERY FOR HOMEOWNERS

Grebow v. Mercury Ins. Co., 241 Cal. App. 4th 564 (Cal. App. 2 Dist.)

Plaintiffs sued their homeowners carrier after it denied coverage for repairs needed to prevent further collapse of a portion of their home. The trial court entered summary judgment in favor of the carrier. ***Held:*** The loss did not meet the definition of "collapse" as used in the policy because there was no "sudden and complete breaking down or falling in or crumbling into pieces or into a heap of rubble or into a flattened mass," but instead gradual deterioration of the home's structural support. Additionally, the carrier had no duty to reimburse the homeowners for costs needed to prevent or mitigate further loss because that would, in effect, convert the insurance policy into a maintenance agreement.

INCREASED RISK OF FUTURE SPOILAGE EXCLUDED UNDER "ALL RISKS" POLICY

H.P. Hood, LLC v. Allianz Global Risks U.S. Ins. Co., 39 N.E.3d 769 (Mass. App.)

After customer rejected insured's production run because of faulty bottle seals, insured claimed coverage under its "all risks" property policy. ***Held:*** Even if loss qualified as "property damage," coverage was excluded as "faulty workmanship, material, construction or design, from any cause." The bottle cap liners were faulty because of material, workmanship, and/or design and the failure to meet customer demands is not within all-risk coverage. Coverage was unavailable through the "resulting loss provisions" of the exclusion. The initial property damage did not lead to different other property damage. The entire loss was bound up in the increased risk of future spoilage caused by faulty seals.

LABOR LAW

SOLE PROXIMATE CAUSE DEFENSE AGAINST STRICT LIABILITY UNDER NEW YORK'S SCAFFOLD LAW

Gillis v. Brown, 133 A.D.3d 1374 (N.Y. App. Div. 4th Dep't)

While securing roofing material to trusses on defendants' barn, the plywood beneath plaintiff shifted, causing him to fall and injure himself. A question arose as to whether plaintiff disregarded instructions to use a "man-lift," and whether use of such equipment would have prevented the accident. ***Held:*** Plaintiff was not entitled to summary judgment on his Labor Law § 240(1) claim insomuch as there were issues of fact as to whether plaintiff was the sole proximate cause of his injures.

BACK INJURY SUSTAINED WHEN WORKER LIFTED BEAM FROM SCAFFOLD TO WALL NOT PROTECTED UNDER LABOR LAW § 240(1)

Cardenas v. BBM Constr. Corp., 133 A.D. 3d 626 (N.Y. App. Div. 2d Dep't)

Plaintiff filed a Labor Law § 240(1) claim for injuries he allegedly sustained while installing a 500-pound beam into the wall of a house, while standing on a scaffold 14-15 feet off of the ground. ***Held:*** The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of elevation risks, and not to all perils that may be connected in some tangential way to the effects of gravity. Plaintiff's claim did not arise from a protected elevation-related activity, but was the result of a general construction site danger.

LEGAL MALPRACTICE

MOTHER'S LOSS OF LIFE ESTATE CONSTITUTES ACTUAL DAMAGES

Brissette v. Ryan, 40 N.E.3d 554 (Mass. App.)

After attorney told client to trust her children as to transfer of house to them, children denied her a life estate. ***Held:*** Failure to receive a life estate is actual damages supporting legal malpractice action. A life estate is a property right giving holder possession of property and the right to freely alienate it during estate. Allowing mother to live on property at sufferance merely pertains to the extent of damages, not the actual loss.

LIABILITY INSURANCE COVERAGE

DECLARATORY JUDGMENT ACTION PREMATURE WHERE NO UNDERLYING SUIT FILED

Direct Auto Ins. Co. v. Enas Mustafa, 2015 IL App (1st) 150469-U (Ill. App.)

Insurer sued seeking a declaration that it had no obligation to defend or indemnify the insured for an underlying motor vehicle accident.

The insured moved to dismiss the complaint asserting that the declaratory judgment action was premature because no lawsuit had yet been filed relating to the motor vehicle accident. ***Held:*** The insurer's declaratory judgment action was premature. The allegations in the underlying complaint must be compared to the insurance policy provisions to determine whether a duty to defend exists. Similarly, the duty to indemnify will not be defined until adjudication of the underlying action. Here, no underlying action has been filed and therefore no comparison to the policy or adjudication can take place.

LIQUOR LIABILITY EXCLUSION PRECLUDES COVERAGE FOR ALCOHOLIC DRINK MANUFACTURER

Phusion Projects, Inc. v. Selective Ins. Co., 2015 IL App (1st) 150172 (Ill. App.)

Insured sued seeking a declaration that its insurer had a duty to defend and indemnify it in six underlying lawsuits alleging that the consumption of "Four Loko," an alcoholic beverage manufactured by the insured, caused or contributed to injuries allegedly sustained by the underlying plaintiffs. The insurer responded by citing a liquor liability exclusion within the policy, which provided that it was not required to defend or indemnify the insured against any causes of action wherein it was alleged the insured may be held liable for bodily injury by reason of causing or contributing to the intoxication of any person. ***Held:*** Each plaintiff alleged that their injuries were caused by individuals who became intoxicated after consuming Four Loko. Although most of the complaints alleged that the stimulants added to Four Loko masked or added an additional element to the consumer's intoxication, each underlying complaint alleged that Four Loko was an alcoholic beverage that caused or contributed to the consumer's intoxication. None of the underlying lawsuits alleged injuries that were independent from the intoxication caused or contributed to by the consumption of Four Loko. Therefore, the liquor liability exclusion precludes coverage for the underlying actions.

OPERATION OF VEHICLE BY EXCLUDED DRIVER TERMINATES COVERAGE

Commerce Ins. Co. v. Gentile, 36 N.E.3d 1243 (Mass. App.)

Grandson involved in a vehicle accident was an "excluded operator" under policy. ***Held:*** Policy violation relieved insurer from duty to pay the optional coverage for victims' injuries. The operator-exclusion unambiguously stated that grandson could not drive vehicle "under any circumstances whatsoever." Insurer reduced its premium in exchange for the exclusion.

LIMITATIONS OF ACTIONS/FIRST-PARTY PROPERTY CLAIMS

REQUEST FOR ARBITRATION DID NOT TOLL STATUTE OF LIMITATIONS

Hawley v. Preferred Mut. Ins. Co., 36 N.E.3d 1284 (Mass. App.)

Five days before two-year limitations period expired on water damage claim, insured requested arbitration. ***Held:*** Request did not give insurer adequate time to respond. Insured could have sued within the limitations period and requested a delay to allow arbitration to proceed. ***Further held:*** By waiting nearly two years following the denial of arbitration, insured did not promptly file suit. Insurer disputed coverage and did not mislead insured as to the timing of suit. ***Further held:*** Insurer acted in good faith because policy exclusion for constant or repeated leakage of water may have precluded coverage.

DISCOVERY RULE INAPPLICABLE TO WATER DAMAGE CLAIM

Nurse v. Omega U.S. Ins., Inc., 38 N.E.3d 759 (Mass. App.)

Insured filed suit exactly two years after discovering water damage in his apartment building. ***Held:*** The discovery rule on commencement of actions does not extend to cases governed by the insurance code's statute of limitations. The statute required the commencement of actions within two years from "the time the loss occurred." The plain language of the statute did not require a determination of when the cause of action accrued. Insured's dwelling policy also required the filing of suit within two years "after the date loss or damage occurs." The loss occurred nine days before insured discovered it.

MEDICAL NEGLIGENCE

DOCTORS OWED DUTY TO THIRD PERSONS TO WARN PATIENT OF DRUG'S EFFECTS

Davis v. South Nassau Communities Hosp., 2015 N.Y. LEXIS 3897 (N.Y.)

A hospital patient crashed into a bus soon after discharge from the hospital, causing injuries. The patient had been given medications that caused drowsiness, but the doctors had not informed her that the drugs caused impairment. The injured persons sued the doctors, who moved to dismiss based on a lack of duty. ***Held:*** Defendants had a duty to plaintiffs to warn the patient that the drugs administered to her impaired her ability to safely operate an automobile. "[T]o take the affirmative step of administering the medication at issue without warning [the patient] about the disorienting effect of those drugs was to create a peril affecting every motorist in [the patient's] vicinity."

WRONGFUL BIRTH CLAIM ACCRUES UPON BIRTH

B.F. v. Reproductive Medicine Assoc. of N.Y., LLP, 2015 N.Y. App. Div. LEXIS 9367 (N.Y. App. Div. 1st Dep't)

Plaintiffs sued doctors alleging negligent screening for birth defects. The doctors unsuccessfully moved to dismiss on statute of limitations grounds, arguing that plaintiffs filed suit more than 3 years after the doctors had finished implanting the embryo. ***Held:*** Affirmed. "Whether [a] legally cognizable injury will befall potential parents as the result of the gestation of an impaired fetus cannot be known until the pregnancy ends. Only if there is a live birth will the injury be suffered." Thus, the birth of the baby was the proper start point for the running of the statute of limitations on the medical negligence claim and suit had been timely filed.

MUNICIPAL LAW

"DESIGN IMMUNITY" ENTITLES MUNICIPALITY TO SUMMARY JUDGMENT

Hampton v. County of San Diego, 2015 Cal. LEXIS 9854 (Cal.)

Plaintiff sustained serious injuries in an intersection traffic collision. He sued the County of San Diego alleging visibility at the intersection was inadequate according to County design standards and constituted a dangerous condition on public property. The County successfully moved for summary judgment based on the "design immunity" afforded by § 830.6 of the California Government Code. ***Held:*** The California Supreme Court affirmed. Approval of the intersection's design was "discretionary" and therefore invoked the protections afforded by § 830.6 even though the intersection deviated from County design standards at the time of approval.

GOVERNMENT IMMUNITY BARS SUIT FOR HAZARDOUS ACTIVITY AT LOCAL PARK

County of San Diego v. Superior Court, 242 Cal. App. 4th 460 (Cal App. 4 Dist.)

High school student was "rope swinging" at a park operated by the County of San Diego. The rope broke and the student fell down a ravine, where the County's maintenance crews had left debris such as cut tree limbs and other brush. The student sued the County alleging that the debris constituted a dangerous condition on the property. The County unsuccessfully moved for summary judgment on immunity grounds. ***Held:*** The trial court should have entered summary judgment in favor of the County. None of the exceptions to California Government Code § 831.7, which precludes the imposition of liability on a public entity for hazardous recreational activities, including rope swinging, applied.

ODOT IMMUNE FROM LIABILITY FOR HIGHWAY IMPROVEMENT DECISIONS

Risner v. Ohio Dep't of Trans., 2015-Ohio-4443 (Ohio)

Decedent was killed at intersection not protected by traffic lights. ***Held in a split decision:*** ODOT had immunity arising from decisions whether to improve portions of highway. ODOT is the most authoritative decision maker in the area and enjoys statutory discretion. ODOT may be liable for negligently implementing a decision, but once it decides to improve a portion of highway, it has no duty to improve surrounding areas.

NEGLIGENCE

ASSUMPTION OF RISK ENTITLES AMUSEMENT PARK TO SUMMARY JUDGMENT

Griffin v. The Haunted Hotel, Inc., 242 Cal. App. 4th 490 (Cal. App. 4 Dist.)

Amusement park patron sued the park on theories of negligence and assault after he slipped and fell while fleeing from an actor wielding a prop chainsaw at the conclusion of the park's "Haunted Trail" attraction. The patron claimed that he had exited the attraction when the actor appeared. The trial court granted summary judgment in the park's favor based on assumption of risk. ***Held:*** Affirmed. The park, not the patron, defines the boundaries of its attractions and there was no question of fact that plaintiff fell

within the boundaries of the attraction as defined by the park. Assumption of risk therefore applied and barred the patron's suit.

FATHER'S NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ACTION BARRED

Clifton v. McCammack, 2015 Ind. LEXIS 798 (Ind.)

After learning on television about a vehicle accident, a father went to the accident scene and discovered his son covered by a sheet. ***Held:*** To recover for negligent infliction of emotional distress, a claimant must be at the scene when incident occurs or soon thereafter. The scene and the victim must be unchanged, and a claimant must not have been informed prior to arrival. Assuming father met the timing requirement, neither the accident scene nor decedent's position remained unchanged. Decedent had been removed from his moped, unsuccessfully resuscitated, and covered. Father indirectly learned of accident through a television report. Public policy requires a bright-line standard to eliminate open-ended liability and fraud.

APARTMENT OWNER NOT LIABLE FOR SHOOTINGS

Belizaire v. Furr, 36 N.E.3d 1261 (Mass. App.)

One person was shot dead and three others injured at party in owner's apartment building. ***Held:*** Owner could not foresee the shootings. There had been no prior criminal history at the property. Owner neither knew nor reasonably should have known that a physical attack might occur. Prior drug activity did not demonstrate a reasonable foreseeability of murder. Owner was not affiliated with assailant and unaware of dispute between assailant and decedent.

CONNECTION OF INJURIES TO CRANE COLLAPSE TOO ATTENUATED

Matter of 91st St. Crane Collapse Litig., 133 A.D.3d 478 (N.Y. App. Div. 1st Dep't)

Plaintiff heard loud bangs and got up to run out of his work shanty at a construction site to investigate. He tripped and fell over a tool en route to the source of the ruckus and was injured. He subsequently sued the construction defendants, alleging violations of Labor Law § 240, § 241, § 200 and common law negligence. The trial court denied defendants' motions for summary judgment. ***Held:*** Reversed in part. Plaintiff's injury was so attenuated that it could not be reasonably connected to the crane's collapse. Therefore, the Labor Law § 240 claim should have been dismissed.

PROPERTY OWNERS NOT HARBORERS OF TENANT'S DOG

Morris v. Cordell, 2015-Ohio-4342 (Ohio App.)

While walking dog, plaintiff was injured when another dog darted out of nearby building to wrestle plaintiff's dog. ***Held:*** Building owners lacked possession or control of premises where the dog lived and plaintiff needed to establish liability as harborers. Owners had oral agreement with tenant/niece to pay rent and utilities. Niece took care of property. Owners did not have keys and only entered with niece's permission. There were no common areas shared by owners and niece.

PREMISES LIABILITY

DEFECT ON NOSING OF STAIR DOES NOT PRECLUDE LIABILITY

Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66 (N.Y.)

Plaintiff tripped and fell on a staircase, sustaining injuries. Defendant moved to dismiss on the basis that the asserted defect was trivial. The trial court denied the motion. However, the appellate court reversed since the defect was on the nosing, where a person does not usually step, as opposed to the walking surface of the stair. ***Held:*** Reversed. Regardless of the fact that the defect was in a place where some people would not step, the defect was "in a place where a person may in the normal course of events place the weight of his or her body, resting on a foot." Therefore, summary judgment should have been denied.

OUT-OF-POSSESSION LANDLORD NOT LIABLE FOR SLIP AND FALL ACCIDENT

McLaughlin v. New Scotland Ave, LLC, 132 A.D.3d 1190 (N.Y. App. Div. 3d Dep't)

Out-of-possession defendant landlord, upon leasing premises, transferred possession and control of premises to tenant. He did not retain any contractual obligation to perform snow or ice maintenance, and was unaware of any dangerous condition on the property at the time of plaintiff's pedestrian accident. ***Held***: Landlord was entitled to summary judgment on plaintiff's slip and fall claim.

PRODUCTS LIABILITY

FAILURE TO ESTABLISH MINERAL SPIRITS WERE NOT INHERENTLY DANGEROUS PRECLUDES SUMMARY JUDGMENT

Brady v. Calsol, Inc., 241 Cal. App. 4th 1212, 1225 (Cal. App. 2 Dist.)

Plaintiffs alleged that workplace exposure to a mineral spirits-based cleaning solvent containing benzene caused leukemia and sued multiple defendants involved in the manufacture, sale, and distribution of the solvent. A supplier successfully moved for summary judgment based on the "components parts" doctrine. ***Held:*** The trial court improperly granted summary judgment. Under the components part doctrine, the supplier had to prove there was no issue of material fact that the mineral spirits supplied to it for inclusion in the cleaning solvent were not inherently dangerous. Plaintiffs presented expert evidence that the mineral spirits were inherently dangerous. The suppliers' reliance on the Restatement (Third) of Torts was misplaced.

UM/UIM

TIME FOR UM ARBITRATION DEMAND NOT TOLLED BY ILLINOIS INSURANCE CODE

State Farm Mut. Auto. Ins. Co. v. Guerrero, 2015 IL App (1st) 151079-U (Ill. App.)

Insurer sought a declaratory judgment that it was not required to pay or arbitrate insured's UM claim because she did not demand arbitration within two years of her accident as required by her insurance policy. The insured asserted that the policy's two-year clause for demanding arbitration was tolled by § 143.1 of the Illinois Insurance Code because she gave her insurer enough information early on to determine its liability, in satisfaction of her obligation to provide proof of loss. ***Held:*** Section 143.1 tolls the two-year period for demanding arbitration only if the insured submits a proof of loss that complies with the terms of the policy. The insured submitted only a preliminary proof of loss at the time of her accident, which did not provide all required information about her medical care and lost wages, and the two-year period for demanding arbitration was not tolled.

LIABILITY INS. COVERAGE cont. from pg. 20

Thus, the policy could be construed as requiring the certificate merely to memorialize the agreement, in which case the date of issuance would not matter. Another possibility was that the certificate had to be issued only before the insured could file a claim.

The Court thus found the policy ambiguous, and noted the rule typically requiring ambiguous policy provisions to be construed against the insurer as the drafter of the policy.

Cincinnati nonetheless argued that the purpose of requiring the certificate was to help protect the insurer against fakery by the insured, and the Seventh Circuit agreed that it could. Cincinnati further contended the certificate served as a precondition to coverage for Vita.

The Seventh Circuit observed that the policy explicitly provided that oral agreements were a sufficient basis for adding an additional insured. The certificate of insurance, moreover, was not an agreement and, by its own terms, stated that it did not confer rights or extend or alter coverage. If the certificate was a precondition to the extension of additional insured coverage, as Cincinnati claimed, then it would, in fact, have the effect of altering the rights of the parties. Given the language on the certificate, the Seventh Circuit said it could not be construed as a precondition, and it simply constituted information.

Consequently, if Vita could prove that an oral agreement to add it as an additional insured was entered into prior to the accident, Vita would be entitled to coverage, regardless of the fact that the certificate of insurance was issued later.

The Court therefore reversed the summary judgment in favor of Cincinnati and remanded for further proceedings.

Learning Point: A policy requiring that an insured's oral agreement to add an additional insured take place before the accident triggering coverage, and also requiring issuance of a certificate of insurance reflecting the additional insured status, will not be construed as requiring the issuance of the certificate prior to the accident. ♦

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