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Appeals Of Denials Of Summary Judgment In New York

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FEATURES

ARTICLES

Appeals Of Denials Of Summary Judgment In New York: A Powerful Weapon In The Litigation Arsenal

*by **Edward M. Kay, Melinda S. Kollross** and **Joseph J. Ferrini***

New York is a unique jurisdiction of opportunity in that non-final trial court orders, including orders denying summary judgment, are generally appealable. This contrasts with the majority of jurisdictions in which only final orders granting summary judgment are appealable. The benefit of this procedural setup is tremendous. In most jurisdictions, a defendant dissatisfied with a trial judge's summary judgment ruling has no immediate avenue of relief and faces the expense and uncertainty of trial-with less settlement leverage than existed prior to the denial of summary judgment. In New York, however, this does not need to be the case. Clients should take advantage of New York's unique procedures whenever they can benefit. Below is some advice on when and how to make use of this powerful weapon.

What Are The Benefits Of An Appeal From A Denial Of Summary Judgment?

The obvious potential benefit of an appeal is a reversal in which the exposure of the client/insured is extinguished. In just the last six months, the Clausen Miller Appellate Practice Group has twice obtained reversals of denials of summary judgment in New York that completely removed a client/insured from a case. In *Zorin v. City of New York*, for example, we were able to extricate a contractor from a case in which the plaintiff was allegedly injured due to work the contractor had performed on a sidewalk. The reversal defeated any recovery of damages and also avoided the expense of trial.

An appeal may also provide added leverage for a settlement before the merits of that appeal are even reached.

When Does It Make Sense To Appeal?

In every New York case with sufficient financial exposure in which summary judgment has been denied, clients should have a trained appellate practitioner independently assess the prospects of success on appeal. An appellate practitioner will assess the chances of success in relation to the exposure at stake and advise whether an appeal is a worthy endeavor.

A case with a strong chance of success on appeal should probably be appealed regardless of the exposure at stake because 1) there is reputation value in establishing that you are a difficult adversary who will not pay on claims that lack merit; and 2) a strong brief on file creates immediate leverage that can prompt settlement or resolution before the expense of trial. For instance, in *Brock v. Dependable Glass & Mirror Company*, plaintiff sued a company that had performed work on a hotel window a year before the window fell on her. The company was denied summary judgment. Despite the fact that the overall damages exposure was not significant, the client authorized an appeal to the New York Appellate Division, First Department and our Appellate Practice Group placed a compelling opening brief on file. Opposing counsel first requested an extension of time to respond and then, rather than file a responsive brief, took a settlement for a paltry sum.

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The appellate brief created substantial leverage that compelled the settlement and served as the quickest, most cost-efficient route to a satisfactory result for the client.

A case assessed to have a fair to solid chance of success should be pursued where moderate to high financial exposure exists. A case with only a slight chance of success (say 15 to 20%) will generally not merit an appeal unless there is a significant financial exposure, or other case-specific factors warranting the expense.

One further note: if a case has substantial exposure it makes fiscal sense to involve your appellate practitioner before the motion for summary judgment is filed. The practitioner can spot legal theories that the trial attorney should be, but is not, raising and remedy the situation in order to avoid the risk of waiver.

Why Would We Win On Appeal When We Already Lost In Front Of The Trial Judge?

The reasons why an appeal might prove successful are manifold. The trial judge in question may have been one whose personal philosophy is that a jury and not a judge should be resolving the matter. He or she might have simply made a mistake in their interpretation of the law or facts. Judges are human. Also, it is important to remember that different judges are hearing the appeal and different people simply perceive and respond to information differently. Indeed, even at the appellate level, judges sitting on the same panel perceive and respond differently to the information with which they are presented. This is why oftentimes there are dissenting opinions in an appellate decision, even though all the appellate judges had the very same facts and case law in front of them. Furthermore, the persuasiveness in the presentation of the issues can be a difference-maker and lead to a better result on appeal.

Why Choose The Clausen Miller Appellate Practice Group?

The Clausen Miller Appellate Practice Group is a specialized tactical force that focuses on impacting the critical, often dispositive, pressure points that occur during the litigation process. Two attorneys are members of the distinguished American Academy of Appellate Fellows, and every attorney in the Appellate Practice Group has been recognized as a "Super Lawyer" or "Rising Star" in appellate practice. Each attorney has thousands of hours of experience crafting persuasive, easily digestible briefs that maximize the chances of success before the reviewing court. They are trained to recognize and glean all value from the available facts of record and use them as weapons of persuasion by their manner of presentation. Our attorneys have honed their skills over time, developing an ability to spot the best legal angle of attack on a given issue. They are true specialists whose dispositive briefing and appellate oral argument experience dwarfs that of most attorneys working in the trial trenches, who necessarily devote much of their time to other lawyering tasks.

To discuss how our appellate expertise can assist you in successfully resolving cases in New York and beyond, please contact Appellate Practice Group co-chairs **Ed Kay** (**ekay@clausen.com**) or **Melinda Kollross** (**mkollross@clausen.com**), or partner **Joe Ferrini** (**jferrini@clausen.com**).

HILL CO-CHAIRS AND FAHEY SPEAKS AT ABA PROPERTY INSURANCE LAW MEETING

Clausen Miller partner **Celeste Hill** recently co-chaired the Spring Meeting of the ABA Tort Trial & Insurance Practice Section's Property Insurance Law Committee on April 7-9 at the Wynn Resort in Las Vegas, Nevada, on the world-famous Las Vegas Strip. This year's CLE meeting was titled, "Lessons Learned: How Major Catastrophic Losses Shape Property Insurance Law." The meeting agenda included a chronological retrospective of major losses and the prospective impact they have had on the law.

CM partner **Margaret Hupp Fahey** was part of a distinguished group of speakers, comprised of seasoned practitioners, judges, industry professionals and experts, who offered interesting and entertaining panel discussions starting with the 1906 San Francisco earthquake—and the development of ensuing loss coverage—through the legal impact of catastrophic events including the eruption of Mount St. Helens, September 11, the Japanese Tsunami, Hurricane Katrina, and ending with the developing area of property insurance coverage for cybersecurity losses. The program also included a presentation on locating and vetting experts for property disputes involving catastrophic losses. The meeting concluded with an ethics presentation by participants from the ABA Commission on Ethics 20/20 who discussed amendments the ABA has made to the Model Rules of Professional Conduct.

For more information concerning the meeting and the topics presented, contact Celeste at **chill@clausen.com** or Margaret at **mfahey@clausen.com**.

KEARNEY ELECTED FELLOW IN AMERICAN ACADEMY OF APPELLATE LAWYERS

Clausen Miller partner **Kim Kearney** was recently elected a Fellow in the American Academy of Appellate Lawyers.

The American Academy of Appellate Lawyers was founded to recognize outstanding appellate lawyers. Academy membership is open only to a person who possesses a reputation of recognized distinction as an appellate lawyer. Academy membership is by invitation only and is limited to 500 members in the United States.

Kim is licensed in Illinois, Indiana, Louisiana, and New York and is a Managing Partner of Clausen's Indiana office. In addition to her work in the trial courts, Kim has a national appellate practice. Her colleague and partner, **Edward Kay**, is also a Fellow of the American Academy of Appellate Lawyers so Clausen now boasts two Fellows in this august organization representing the "best of the best" appellate lawyers.

PAULUS TO PRESENT AT ACI'S 3RD NATIONAL FORUM ON INSURANCE ALLOCATION

Amy R. Paulus is scheduled to co-present at the ACI's 3rd National Forum on Insurance Allocation taking place June 23-24, 2016 in New York City. Amy's presentation titled "Latest on Stacking, *Viking Pump/Warren*, Non-Cumulation and/or 'Other-Insurance' Clauses, and Anti-Stacking Provisions" will highlight the *Viking Pump/Warren* dispute, the interplay between allocation and non-cumulation and/or other-insurance clauses, and stacking of insurance coverage.

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

For more information regarding the upcoming presentation at the ACI National Forum on Insurance Allocation, please contact Amy at **apaulus@clausen.com**.

CLAUSEN MILLER NAMED IN LAW360'S 100 BEST LAW FIRMS FOR FEMALE ATTORNEYS

Clausen Miller was named as one of the best law firms for female attorneys according to a recent Law360 survey. The rankings were based on the firm's female representation at the partner and nonpartner levels and its overall number of female attorneys.

The law firms listed in the rankings are working to buck the industry's overall trend. According to Law360's 2016 Glass Ceiling Report, just 34 percent of all attorneys and 22 percent of partners at U.S. law firms surveyed by Law360 are women.

Clausen Miller is committed to the development of diversity through recruitment, mentoring, and promotion. The firm supports inclusion and advancement of exceptional attorneys with diverse backgrounds who are committed to providing outstanding client service since 1936.

CLAUSEN MILLER SCORES MAJOR DIACETYL VICTORY

On March 4, 2016, the United States Court of Appeals for the Eighth Circuit issued a decision that may have national implications in the long-running litigation involving use of the ingredient diacetyl in butter flavoring for popcorn. The court affirmed a decision for the defendant flavor manufacturers and against the plaintiffs who claimed injury from the inhalation of microwave butter popcorn fumes. *Stults v. American Pop Corn Co.*, 2016 U.S. App. Lexis 4181 (Mar. 4, 2016).

Clausen Miller monitored the case in the district court as appellate counsel, and it handled the subsequent appeal. The Clausen Miller attorneys working on the case included partners **Tom Ryerson**, **Ed Kay**, **Don Sampen** and **Joe Ferrini**.

As background, the injured plaintiff claimed that he inhaled microwave buttered popcorn aromas on a daily basis for some 20 years. As a result, he contended that he developed the disease bronchiolitis obliterans from the diacetyl used to make the butter flavoring. He brought suit against numerous makers and distributors of the popcorn and butter flavoring. The only claim that made it to trial, however, was for breach of implied warranty against International Flavors & Fragrances, Inc., and its subsidiary, Bush Boake Allen, Inc.

The jury found in favor of the defendants, and the plaintiffs appealed to the Eighth Circuit.

On appeal, the plaintiffs focused on expert testimony that was heard by the jury but that was subsequently stricken by the district court judge due to alleged technical deficiencies. The plaintiffs contended that just by the jurors having heard the stricken testimony in the first instance, reversal was warranted, but the Court of Appeals agreed with the district court that it was not. The Court ruled that the plaintiffs' counsel "forfeited" at least two claimed errors regarding the testimony by not raising sufficient objections, and that the district judge's curative instructions otherwise were proper. Additionally, the Court rejected the argument that the plaintiffs were entitled to a hearing on supposed juror misconduct related to the stricken testimony.

Finally, the plaintiffs contended that the defendants had not adequately rebutted the plaintiffs' evidence. The Court, however, agreed with Clausen Miller's argument that the defendants had no obligation to do so. The Court said that the burden of proof was on the plaintiffs, and the jury might simply have disbelieved the plaintiffs' witnesses.

The Court thus unanimously affirmed in favor of the defendants. To learn more, please feel free to contact **Tom Ryerson** at **tryerson@clausen.com** or **Don Sampen** at **dsampen@clausen.com**.

PERRI AND LEIS OBTAIN EARLY DISMISSAL OF CLAIMS IN CONSTRUCTION DEFECT LITIGATION

Carl Perri and **Matthew Leis**, partners of the New York and New Jersey offices of Clausen Miller's Professional Liability and Casualty Defense Practice Group, recently won summary judgment on behalf of our paving company client in a construction defect action after lengthy motion practice. This case involved the design and construction of a major New York area sports arena. Our client participated in constructing walkways leading to and from the arena. After the project was completed, plaintiff was one of many thousands of people who attended a baseball game at the arena. Plaintiff claims he slipped and fell while walking toward the arena on a sunken tree bed due to a height differential between the walkway and dirt tree bed.

Our initial investigation of this claim revealed plaintiff had filed an earlier action arising out of the same incident against the owners of the arena. The earlier action was dismissed due to plaintiff's inability to show that the claimed condition was a defect, or if it was, that his inattention was not the sole proximate cause of his injuries. Upon learning this, we prepared a motion to dismiss plaintiff's complaint before discovery commenced. Our motion argued that the theory of collateral estoppel warranted the dismissal of the claim against our client in light of the prior decision. Collateral estoppel precludes a party from relitigating in a subsequent action an issue clearly raised in a prior action and decided against that party, whether or not the tribunals or causes of action are the same. The court agreed with our arguments and dismissed plaintiff's complaint against our client. In obtaining this early dismissal, our client incurred minimal fees in what would have been a lengthy and costly litigation.

Our client and its insurer were very pleased with this outcome, which emphasizes the benefits of an early investigation which may provide opportunities to bring claims to a timely, cost-effective conclusion. If you would like to learn more about casualty defense or professional malpractice defense, please feel free to e-mail **Carl Perri** (**cperri@clausen.com**) or **Matthew Leis** (**mleis@clausen.com**), or call them at 212-805-3900.

RYERSON AND SOBCZAK ACT AS MONITORING COUNSEL AT TRIAL AND OBTAIN A DEFENSE VERDICT

Clausen Miller partners **Tom Ryerson** and **Mark Sobczak** recently assisted in securing a defense verdict for the City of Chicago in a high-exposure claim against two city paramedics. The plaintiffs alleged that the paramedics acted willfully and wantonly in treating a young lady who experienced a serious allergic reaction after eating take-out food containing peanuts. The plaintiff sustained serious brain injuries, requires around the clock care, and presented future damages well into eight-figures. Tom and Mark joined the defense several days into trial and immediately assisted in crafting jury instructions and helping to ensure preservation of any error for a possible later appeal. Ultimately, the jury held that the paramedics neither acted willfully nor wantonly, nor proximately caused the plaintiff's injuries. For more information, please contact Tom (**tryerson@clausen.com**) or Mark (**msobczak@clausen.com**).

INSURER NOT RESPONSIBLE FOR SUBCONTRACTOR'S UNDERLYING SETTLEMENT FOR ITS FAULTY WORK

Metro North, the governing body of a condominium in Chicago, filed suit against the developer, multiple contractors and multiple subcontractors for defective construction that caused, among other issues, water infiltration. CSC Glass, one of the subcontractors, was issued a CGL policy by Allied Insurance and a commercial umbrella policy by AMCO, both effective from March 30, 2006 to March 30, 2007. Allied provided CSC a defense in the underlying matter under a reservation of rights.

Metro North entered into a settlement agreement with the CSC entities for "$700,000, to be satisfied solely through the assignment of all rights to payment, if any, from Allied under the policy issued to CSC by Allied, or rights under any other insurance policy issued to CSC as arising out of the claims asserted against CSC in the underlying lawsuit or this Settlement thereof." Per the agreement, the settlement represented a "reasonable amount of a portion of the damages incurred by Metro North as caused in part by CSC's alleged improper installation of the windows that caused damage to parts of the Building, other than the windows themselves, and damage to Metro North's and its members personal property."

The U.S. District Court for the Northern District of Illinois held that Allied and AMCO's policies did not cover Metro North's claim against CSC. The Court found that the damages Metro North sought included damage to personal property and for the cost of repairing parts of the building on which CSC did not work. The Court noted that the measure of damages available for breach of implied warranty of habitability is the cost of correcting the defective conditions. Therefore, there was no reasonable anticipation of liability or reasonable potential for the award of damages covered by the insurance policies.

The Court also ruled that there could be no recovery for damage to the personal property of unit owners, because the individual owners were not participants in the underlying litigation or in the settlement agreement. The Court also determined that a construction defect is not an "accident", and as CGL policies only cover damage caused by an "occurrence" which is defined as an "accident", they do not cover the natural and ordinary consequences of defective workmanship. Therefore, "when a contractor who installs windows performs defective work, the natural and ordinary consequence is water infiltration that will damage the building." As written in the opinion, "There is no accident, so there is no occurrence, so there is no coverage."

For more information contact **Paul Daugherity** (**pdaugherity@clausen.com**).

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

Indiana Supreme Court Strikes Down Statute Of Repose In Asbestos Cases

by ***Kimbley A. Kearney***

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The Indiana Supreme Court recently held that the section of the Indiana Product Liability Act (the "Act"), I.C. §34-20-3-1 *et. seq.*, exempting certain asbestos victims from the Act's statute of repose violates the Rights to Remedy Clause and the Equal Privileges and Immunities Clause of the Indiana Constitution. That section of the Act states that it is void in its entirety if any part of it is held invalid. Therefore, *Myers v. Crouse-Hinds Div. of Cooper Industries*, 2016 Ind. LEXIS 156 (March 2, 2016), struck down the section, applied the precedent that controlled before the section was enacted, and held that the Act's statute of repose no longer applies to cases "involving protracted exposure to an inherently dangerous foreign substance," including asbestos claims.

Facts

Section 1 of the Act requires plaintiffs to bring an action for damages (1) within two years after the cause of action accrues; or (2) within ten years after delivery of the defective product to the initial user or consumer. Section 2 of the Act omitted the ten year repose limitation for plaintiffs claiming an asbestos related disease or injury, but only in an action brought against "persons who mined and sold commercial asbestos."

Analysis

In its 3-2 decision, the *Myers* Court overruled its prior landmark decision in *Allied Signal, Inc. v. Ott*, 785 N.E.2d 1068 (Ind. 2003), which held that the statute of repose applies to asbestos claims unless the defendant both mined *and* sold the asbestos that caused injury. *Ott* considered and rejected the same constitutional challenges to Section 2 raised by the plaintiffs in *Myers*. *Myers*, however, concluded that Section 2 created disparate treatment of asbestos victims who are injured by defendants who both mine and sell raw asbestos, and victims who are injured by defendants who did not. To pass constitutional muster, Indiana law requires that disparate treatment for different classes of persons must be reasonably related to the inherent differences that distinguish the classes. *Myers* found that no such characteristics exist amongst asbestos victims, noting that virtually all class members suffer from diseases with latency periods of more than ten years.

Finding Section 2 to be unconstitutional in its entirety, *Myers* held that all asbestos claims now fall under the statute of repose provision in Section 1. Consequently, the Court stated that its decision in *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989), "is restored as the Court's controlling precedent." *Covalt* held that Section 1's statute of repose "does not apply to cases involving protracted exposure to an inherently dangerous foreign substance."

Learning Point: Asbestos claims brought under Indiana's Product Liability Act are no longer subject to the ten year statute of repose. *Myers* is expected to give rise to more asbestos claims in Indiana. The dissent in *Myers* criticized the narrow majority's willingness to "avoid the confines of *stare decisis*" by overturning *Ott*, even though Indiana's General Assembly had seen fit to let *Ott* stand for 13 years without amending Section 2 of the Act. Commentators have observed that *Myers* may signal growing disfavor with statutes of repose in several jurisdictions. ♦

Evaluating, Negotiating, And Effectuating Settlements On Appeal

by ***Melinda S. Kollross*** *and* ***Mark J. Sobczak***

Editor's Note: *This article also appears in the March 2016 edition of the Defense Research Institute (DRI)'s* For The Defense *magazine.*

While the vast majority—approximately 90 percent—of civil cases settle prior to trial, most cases that reach the appellate stage do not. Many believe that once an appeal is taken, the opportunity to settle has passed and final resolution must come from the reviewing court rather than the litigants themselves. But that is not always so. Many cases can and do settle on appeal. This article examines what it takes to settle a case during an appeal, from evaluating the likelihood of success on the merits before an appellate tribunal to accurately budgeting the time and expense of prosecuting or defending the appeal through decision. We review the use of court-ordered mediation, private mediation, and direct-settlement negotiations at various stages of the appellate process, as well as the nuts and bolts of effectuating a settlement while an appeal is pending. This analytical framework may be used by appellants and appellees alike in determining whether their interests are best served by continuing to battle in an appeal, or by buying final peace through a settlement.

Appellate-Level Settlement Evaluation

To evaluate the settlement option properly, counsel must consider the time and the expense involved in obtaining appellate resolution of a dispute; the likelihood of success on appeal, and in future proceedings if remand is sought, and in some instances, the possibility of creating "good" or "bad" law for future cases.

Appeal Time And Expense

As a general rule, appeals are neither quick nor cheap. In many jurisdictions, the average appeal runs 18–24 months from start to finish. If a case involves a money judgment, the judgment holder will be deprived of the use of that money during the life of the appeal, while the judgment debtor may be paying a hefty annual premium for an appeal bond to stay execution of judgment. In federal and many state jurisdictions, a prevailing appellant can recover appeal bond premiums; thus, an appellee in such cases must also consider potential liability for bond premium costs in evaluating a possible settlement. Post-judgment interest will also accrue, and in some states that may run as high as 9, 10, or even 12 percent annually. An appellant's post-judgment interest burden is far less onerous in federal appeals because the post-judgment interest is based upon U.S. Treasury bond interest rates, which have been quite low in recent years.

In addition to the potential appeal bond premium and post-judgment interest costs, every appeal will involve

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attorney fees and litigation expenses such as filing fees, record preparation costs, and brief-printing costs. A detailed appeal budget should be prepared estimating each category of cost and expense over the projected life of an appeal. An appeal budget should give litigants a good idea of the cost to prosecute or to defend an appeal through decision. If an adverse intermediate appellate court decision is expected to generate a petition for rehearing or a petition for a high court review, or both, the costs associated with pursuing further appellate relief must also be factored into the time and expense equation. Experienced appellate practitioners are usually adept at preparing such budgets, and thus they provide an invaluable resource in estimating the true cost of litigating an appeal through final resolution by the reviewing court or courts.

Likelihood Of Success On The Merits

The time and expense of pursuing or defending an appeal through decision must be weighed against the likelihood of success on the merits. This part of the equation involves two main considerations: defining what constitutes "success" for a particular litigant, and determining how likely it is that that result will be achieved. "Success" may be as straightforward as affirmance or reversal of a particular judgment or order. Or it might involve several potential forms of full or partial relief, such as a complete reversal, reversal and remand, or a new trial on damages only, among other scenarios.

A formal or an informal appeal assessment is frequently used to answer these questions, especially in cases involving more than one issue. An appeal assessment typically identifies the issue or issues on appeal, the applicable standard of review, the relief available if the appellant prevails, and the likelihood of winning each issue—usually expressed as either a straight percentage, such as 40 percent, or a range, such as 25–50 percent or "better than 50 percent, for example. For cases involving a potential remand, the likelihood of success below—whether a complete victory or simply a better result than the previous one—should also be addressed. Appeal assessments vary considerably in depth of analysis depending on the complexity of the issues and the dollar values at stake.

General statistics regarding overall affirmance and reversal rates for a particular court or judge are of limited use in most cases. Of far greater importance in assessing the likelihood of prevailing with a particular appeal are the specific legal issues presented, the applicable standard of review, the key facts, and the governing law or lack of precedent. These factors, especially the standard of review, are central to estimating a percentage chance of success on appeal.

Making "Good" Or "Bad" Law

Unlike trial court decisions, which affect only the parties to a lawsuit, appellate decisions are usually precedential. Thus, they will shape the law and affect future cases beyond the present one. For some litigants—such as the typical personal injury plaintiff who might never enter another courtroom after their case is resolved—that may be of little concern. To others, such as a manufacturer defendant in a product liability action, or an insurer in a coverage action, the precedential value—positive or negative—of a prospective appellate decision may be much more important than the dollars at stake in a particular case. In these instances, a litigant may decide to pursue or to forgo settlement primarily based on the desire to make good law—or to avoid making bad law—for future cases. Litigants should ask two key questions in deciding to litigate or to settle an appeal with potentially significant precedential value: (1) is this the right court; and (2) are these the right facts? A "no" answer to either question should prompt serious settlement consideration.

Appellate-Level Settlement Negotiation

Settlement opportunities exist throughout the appeal process. Some may be offered by a court, while others may be suggested by the appellate parties themselves.

Appellate-Level Settlement Forums

Appeal level settlements generally involve three settlement forum types: (1) court-ordered mediation and settlement conferences; (2) private mediation; or (3) direct party-to-party negotiation.

Court-Ordered Mediation And Settlement Conferences

Many appellate courts provide court-ordered mediation or settlement conferences free of charge to facilitate the settlement of civil appeals. In the federal system, Federal Rule of Appellate Procedure 33 authorizes circuit courts of appeal "to direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement." Under Federal Rule of Appellate Procedure 33, a judge or another person designated by a court may preside over a settlement conference, which may be held in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and secure as much authority as feasible to settle the case. As a result of a settlement conference, a court may enter an order controlling the course of the proceedings or implementing a settlement agreement. The circuit courts of appeal conduct settlement conferences in accordance with Federal Rule of Appellate Procedure 33 and their own local rules. Some settlement conference attorneys and mediators are exceptionally adept at obtaining settlements even in highly contentious cases and will work tirelessly over multiple settlement conference sessions to achieve that result.

State appellate courts vary considerably in the extent to which they encourage court-ordered mediation and settlement conferences. Some state appellate courts use it regularly, some use it infrequently, and some do not use it at all. Generally speaking, the settlement conferences conducted in the state appellate courts tend to be less aggressive in pursuing settlement than those in the federal circuit courts of appeal.

Private Mediation

Appellate litigants may choose to pursue private mediation just as they may at the trial court level. Indeed, many appellants file a notice of appeal to buy time and increase leverage for settlement. Private mediation may be sought in jurisdictions that do not provide court-ordered appellate mediation or settlement conference services, or when such services have been unsuccessful in resolving the case.

Direct Negotiations

Regardless of whether or not court-ordered or private mediation is available or has been attempted, appellate parties are always free to engage in direct settlement discussions and negotiations. It is not unheard of for the appellate parties themselves to settle an appeal after court or privately assisted mediation or settlement conferences have failed. This is especially true when the mediated attempts were conducted early on in an appeal process, and subsequent briefing, oral arguments, or both make one of the parties considerably more eager to settle than before. Direct dealings may also make the most sense in jurisdictions that do not have court-run mediation or settlement conferences and when private mediation would be cost-prohibitive given the dollar value of a case.

Appellate-Level Settlement Timing

At the trial court level, many cases settle "on the courthouse steps" immediately prior to or during the course of trial. Appeals are different. Rarely, if ever, does an appeal settle immediately before or during an oral argument, which lasts only minutes. Most appellate settlements are instead achieved at one of four key junctures in the appeal process: (1) before any briefing takes place; (2) shortly after an appellant files its brief, (3) after all the briefing concludes but before a court schedules the oral argument, and (4) shortly after the oral argument happens and before a court issues a decision.

Consider these four "pressure points" the appellate equivalent of the courthouse steps.

Pre-Briefing

Most court-ordered mediation or settlement conferences take place before briefing. The rationale is that appellate parties are more likely to settle before they incur the additional—and often significant—expense of appellate brief preparation. Many courts stay briefing until after court-ordered mediation or settlement conferences have been conducted so that the parties can focus on a potential settlement while avoiding brief-related appeal costs.

After Filing the Appellant's Brief

The filing of a compelling appellant's brief will often make an appellee respondent reconsider the benefits of settlement. First, an appellee will not have to spend time and money on a respondent's brief and oral argument preparation and presentation. Second, an appellee will not have to face the prospect of losing its trial court victory. Wise appellants recognize this key pressure point and will often contact an opponent a few days after filing their opening brief to broach settlement. Allow just enough time for the other side to have read your client appellant's brief—and hopefully dread responding to it. Do not wait until the other side has likely begun work on the appellee respondent's brief, at which point the appellee will usually recommit to the correctness of the order or judgment below and be less interested in making the appeal just go away.

Post-Briefing And Pre-Argument

Sometimes both sides want to "see the other's hand" before seriously pursuing settlement. In such cases, the completion of appellate briefing provides a positive settlement opportunity. Each side knows what the other has and may wish to avoid additional expense and delay in awaiting an oral argument date, preparing for and presenting oral argument, and then waiting weeks or months for an appellate decision.

Post-Argument

An unfavorable (or in some cases disastrous) oral argument is likely to prompt settlement overtures from

previously disinterested parties and to encourage more reasonable settlement numbers than might otherwise have been offered. This is especially true of appellees respondents who suddenly realize that an 80 percent general affirmance rate means nothing in their particular case, and that getting something in settlement is better than losing everything with an adverse appellate decision. Having already lost below, appellants tend not to react quite as dramatically to a negative oral argument; however, they too will often reassess their likelihood of success after hearing from a court, and they will become more anxious to pursue settlement. The specter of an impending appellate decision also tends to impart an air of urgency to settlement discussions that may not have previously existed.

Settlement Amount And Terms

Regardless of the forum or the timing, appellate parties must reach an agreement on the terms—the most important of which is usually (but not always) a dollar amount—to settle their case on appeal. When an appeal is taken from a money judgment, the dollar value of the case has already effectively been set: the judgment amount plus post-judgment interest plus the cost of the appeal equals the dollar value of a case. Multiplying this dollar amount by the estimated likelihood of success on appeal provides a simple means of identifying a potential target number for settlement. However, many other factors may raise or lower a target settlement number in a case, especially its potential "precedential value" to the parties and whether an appellate decision is expected to end a case or result in further proceedings below. As in a trial court, settlements on appeal are usually achieved after several rounds of negotiations.

Appellate-Level Settlement Effectuation

Once a settlement in principle has been reached, it must be effectuated by the parties and properly recognized by the court or courts involved. This involves not only the obvious steps of drafting and executing a proper settlement agreement and release, but also effectively communicating with an appellate court, making a proper record of the settlement, and wrapping up loose ends such as the return of unearned bond premiums.

Notifying An Appellate Court

After appellate parties reach an agreement in principle to settle a case, the next step is to immediately notify the reviewing court and request a stay of proceedings. This is especially true when a settlement occurs after briefing or oral argument has taken place and a decision from the reviewing court is pending. The time that an appellate court might take to issue a decision can vary widely from case to case and court to court, so once a court takes a matter under advisement, there is no guarantee that it will not decide that case quickly. If a decision comes out before settlement is finalized, there is obviously a significant risk that the prevailing party will have second thoughts or attempt to extract additional concessions from the losing party because of the decision. Thus, when a case has settled—or even perhaps when there is a strong likelihood that it will—counsels' first step should be to halt the appellate court proceedings to maintain the status quo while finalizing the settlement. The simplest method for doing so is to present a stipulation or agreed upon motion explaining the circumstances and requesting a stay pending finalization of a settlement. Courts are generally receptive to such requests, especially if it comes before a court has devoted significant time and resources to crafting a decision.

Settlement Documents

After informing the reviewing court about a settlement, the next step is to draft and to execute the appropriate settlement documents. This step is largely no different from the steps involved in settling a case pending in a trial court; attorneys draft and oversee the execution of an appropriate settlement agreement and release. There are no special tricks to completing settlement agreements on appeal, but counsel should be careful to indicate in the release documents the procedural posture of the case at the time of settlement, typically through a procedural background discussion in the declarations portion of the agreement, simply to make an appropriate record of the case as it stood when it settled during the appeal. In addition, a settlement agreement should be clear about the ultimate fate of the appeal, typically dismissal with prejudice. In the case of a money judgment, counsel for an appellant should also be careful to verify that the language in the settlement documents adequately releases any sureties providing supersedeas bonds from liability.

One possible concern with appellate-level settlements that does not commonly surface in trial court-level settlements has to do with the status of the underlying orders, the appealed-from judgments, or the already issued appellate decisions, if a settlement does not occur until after an appellate court has issued one. In many cases, when the appellate parties have not completed the briefing and the order appealed from is not published or otherwise generally available, all that is needed is to execute and file a simple voluntary dismissal of the appeal with the appellate court. However, in other circumstances this might not sufficiently address an appellant's goals because simply dismissing an appeal generally will not affect the propriety of the underlying order that lead to the appeal. If that underlying order contains an analysis that is unfavorable to an appellant's interests beyond the litigation in question, or if it could collaterally estop the appellant from pursuing a similar position in related or successive litigation, the appellant's main concern may not be the payment of any money, but rather preventing the dissemination of unfavorable law. This is especially true when an underlying order is a published memorandum order, as is common with decisions by the federal district courts, or when a settlement follows a decision by an intermediate appellate court and pending review by a court of last resort because these decisions are much more likely to be cited in later litigation.

The law governing whether or not and under which circumstances vacatur of an underlying order or a previous decision is proper, as well as the procedural mechanisms for securing such a vacatur, is complex, nuanced, often conflicting, and well beyond the scope of this article. However, if vacatur or a similar remedy is a primary settlement consideration for an appellant, counsel should thoroughly research and address the topic early in the settlement process. Courts will not automatically vacate a decision or order simply because a case has settled and the parties have agreed to vacatur as a condition of the settlement. Counsel should make sure that he or she has a solid legal basis for including vacatur language in settlement documents and that his or her client understands the uncertainty involved in including such language. Specifically, a client should understand that despite the parties agreement, counsel cannot guarantee vacatur of the underlying order or decision. Vacatur language should not simply be inserted into a settlement agreement as a matter of course without discussing the role that courts assume when it comes to vacatur.

Finalizing An Appellate-Level Settlement

After appellate parties have executed all the necessary documents and made any necessary settlement payments, it is time to dismiss the appeal. This is typically no more complicated than filing a unilateral voluntary dismissal, or in federal court, filing a stipulation signed by all parties to the appeal as contemplated by Federal Rule of Appellate Procedure 42(b). The dismissal or the stipulation should make sure to address how costs will be allocated, if at all.

Additionally, though perhaps not strictly necessary, as a matter of good practice, counsel should make sure to file a stamped copy of the dismissal order with the trial court simply to ensure that it makes its way into the record, especially when dealing with state courts that lack a sophisticated electronic filing system similar to the federal court system. This prophylactic measure will ensure that all levels of the court system are at least aware that a case has settled.

Wrapping Up An Appellate-Level Settlement

After completing these steps, if an appeal involves a money judgment, then counsel for an appellant should contact the surety that provided the supersedeas bond to notify it of the settlement and arrange for a refund of any unearned bond premiums. Appellants typically pay premiums on supersedeas bonds in yearly advanced installments, and an appellant should be entitled to a refund for any unearned premiums. A surety will typically require a stamped copy of a dismissed order and perhaps other documents before releasing any such refund. Additionally, failure to notify a surety that a case has settled may result in automatic renewal of the bond after one year, regardless of the status of the case. After agreeing to a settlement, this is certainly an unneeded cost that a client will expect to avoid.

Conclusion

The filing of a notice of appeal does not necessarily sound the death knell for settlement, despite common perceptions to the contrary. However, settling a case on appeal does involve some differing considerations than settling a case in a trial court. The analytical framework explained in this article can assist appellate litigants in assessing whether or not settlement is a desirable option in a case, and if so, how it might be successfully pursued and achieved during the course of their appeal. As in prosecuting or defending an appeal all the way through to a decision, retaining experienced appellate counsel to guide parties in evaluating, negotiating, and effectuating a desired settlement is also highly recommended. ♦

EMPLOYMENT LAW UPDATE: EEOC Issues New Rule On Respondent Position Statements

by ***Paul W. Daugherity***

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Effective January 1, 2016, the Equal Employment Opportunity Commission ("EEOC") instituted a new national rule on respondent position statements.

Generally, a position statement is the response to a claim of discrimination submitted by an employer. Position statements often include documents supporting respondent's position. Prior to January 1, 2016, the position statement remained with the EEOC investigator. Charging parties would not see the position statement and its exhibits until *after* the investigation was closed and a Freedom of Information Act request for the EEOC investigation file was made by one of the parties.

This procedure changed as of January 1, 2016. Now, a respondent position statement, and non-confidential exhibits, will be provided to the charging party upon request.

The charging party will also be given an opportunity to respond to the position statement within 20 days. The charging party's response will not be provided to respondent during the investigation.

The EEOC has established a procedure for confidential material contained in the position statement or its exhibits. Per the EEOC website, "If the respondent relies on confidential information in its position statement, it should provide such information in separately labeled attachments." Further, that after review, EEOC staff "may redact confidential information as necessary."

Practice Pointer: When submitting a position statement, respondent should assume that anything submitted, including exhibits, will be provided to the charging party. Consequently, respondents should review all materials to insure that no confidential information is provided and that any arguments made in the position statement are accurate and sufficiently detailed, so that the charging party's response is ineffective, as the facts and documents used in the position statement cannot be contradicted. ♦

HR Managers Could Be Held Individually Liable For FMLA Violations

by ***Paul W. Daugherity***

In determining who owes employees a duty under the FMLA, and who may be held liable for violations of the FMLA, courts have consistently held that it is the entity or organization that employs the employee. Generally, individuals making FMLA decisions (*e.g.* human resources personnel, managers) have not been held individually liable for any violations of the FMLA. The Second Circuit's decision in *Graziadio v. Culinary Institute of America, Shayan Garrioch, in her individual capacity, and Loreen Gardella, in her individual capacity*, No. 15-888-cv (Mar. 17, 2016), is a break from that general rule.

Facts

Plaintiff, Cathleen Graziadio ("Graziadio"), worked as a payroll administrator of defendant, Culinary Institute of America ("Culinary"). On June 6, 2012, one of her minor sons was hospitalized with previously undiagnosed Type I diabetes. Graziadio promptly informed her supervisor, Defendant Loreen Gardella ("supervisor Gardella") that she would need leave from work to take care of her son.

Graziadio sought to have her absence designated as leave under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §2601. Graziadio requested the necessary FMLA paperwork from the Culinary employee who processed FMLA documentation. Graziadio returned to work on June 18, 2012. On or about June 27, 2012, she submitted a medical certification supporting her need to care for her diabetic son.

Also on June 27, 2012 Graziadio's second minor son fractured his leg and underwent surgery. Graziadio promptly notified supervisor Gardella that she would need immediate leave to care for her son, and expected to return the week of July 9, 2012, "at least part time."

On July 9, 2012, supervisor Gardella inquired as to Graziadio's return to work. Graziadio stated that she could return on July 12, 2012, if a modified work schedule was approved. Specifically, that she would need to work 3 days per week until mid to late August. Graziadio asked supervisor Gardella via email if Culinary needed any further documents from her. Gardella sought advice from Culinary Director of Human Resources, defendant Shayan Garrioch ("HR Garrioch") concerning the request and an appropriate response.

Graziadio continued to e-mail and call to find out when she could resume work. HR Garrioch did not respond until July 17, 2012 (five days later) by letter, stating that Graziadio's FMLA paperwork did not justify her absences from the work place and that Graziadio must "provide updated paperwork to this office which addresses this deficiency." She noted that Graziadio had continued to be absent due to the health condition of another one of her children, and Graziadio would "need to submit paperwork for this time off from work." Graziadio was advised that this paperwork had to be submitted within 7 days for the absences to be approved.

Upon receipt of the letter, Graziadio sent a series of e-mails to HR Garrioch attempting to explain her situation and to determine what "paperwork" Culinary required. Graziadio noted that she previously repeatedly asked if Culinary needed further paperwork, but had received no reply, she had not received any FMLA forms from Culinary to provide to her son's physician, and she was unclear as to the paperwork needed. Graziadio informed Culinary that she would contact her son's physician for a note regarding her three (3) day work schedule, as she had not been told by Culinary what paperwork was needed. Graziadio also stated she would return to work on the reduced schedule the following week.

On July 20, 2012, HR Garrioch responded by e-mailing "an informational brochure from the Department of Labor to assist you in understanding the FMLA statute and the CIA's [Culinary Institute of America] position with respect to your leave." HR Garrioch reiterated the assorted deficiencies in the certification for Graziadio's diabetic

minor son stating that the certification submitted for him "stated only that there would be doctor's appointments every three months" but "you have been absent from the workplace since early June, save for a few partial days near the end of June." HR Garrioch continued by asking, "if there is other documentation pertaining to your other son and absences required from the office for his care, … as we have no paperwork on any medical need pertaining to your absence for his care."

Graziadio replied later on July 20, 2012 reaffirming her need for a reduced schedule, promising a doctor's note, and requesting, "for I believe at least the sixth time now FMLA paperwork for him [younger minor son]" if specific paperwork was needed.

On July 23, 2012, three (3) days later, HR Garrioch responded that Culinary continued not to have paperwork justifying Graziadio's return to work, and that she would not approve any schedule until new paperwork was submitted. HR Garrioch rejected the physician note from the younger son's doctor, as failing to establish a "medical necessity" for Graziadio to provide full time medical care. HR Garrioch concluded by writing that she would, "no longer be able to discuss this matter over e-mail" and requested Graziadio "provide three dates/times for this week that you are available to come into work and meet with me."

Over the course of the next several days, Graziadio and HR Garrioch e-mailed back and forth about scheduling a meeting, but never actually scheduled it. The exchange consisted of HR Garrioch asking for specific dates and times, Graziadio would respond that she was "available whenever." Early in this exchange, Graziadio forwarded HR Garrioch an updated FMLA certificate for her oldest son. HR Garrioch did not respond to that email or acknowledge its receipt. Graziadio attempted to end this exchange by requesting to return to work on a full time regular schedule. HR Garrioch rejected this request and insisted that Graziadio appear for a meeting before she could return to work.

With no meeting set, and facing persistent involuntary leave, Graziadio retained an attorney.

On August 7, 2012, her attorney sent a letter to Culinary's president reiterating that Graziadio wanted to return to work, but could not do so because HR Garrioch found her FMLA documentation deficient but would not identify what documentation was needed.

On August 30, 2012, counsel for Graziadio and Culinary had a discussion where Culinary continued to take the position that Graziadio would not be returned to work because she had not provided sufficient support to justify her absences, and that "it is not the employer's obligation to explain what was missing from the paperwork and instead that it was Ms. Graziadio's obligation to comply with the statute." Culinary further advised that any and all further communication must occur between counsel.

Also on August 30, 2012, Culinary's attorney sent Graziadio's attorney an email stating that, "Culinary understood Graziadio wants to return to work," but if she wanted to return to work, "she must contact her supervisor [Garrioch] to arrange for her return to work." Further, that Graziadio had an obligation to submit FMLA medical certifications. The e-mail proceeded to reiterate the alleged FMLA paperwork deficiencies. Culinary demanded that Graziadio, "provide two (2) sufficient and complete FMLA medical certification forms" within four (4) days (by September 3).

Due to a hospitalization for injuries sustained in a motorcycle accident, Graziadio's attorney did not see the email until September 4, 2012.

On September 11, 2012, before Graziadio had responded to Culinary's email, Culinary terminated Graziadio. HR Garrioch sent a letter to Graziadio stating that she was terminated for abandoning her position as she had not responded to the email of August 30, 2012.

Graziadio sued Culinary, HR Garrioch and supervisor Gardella for, among other things, interference with FMLA leave and FMLA retaliation. The trial court granted defendants' motion for summary judgment in its entirety, ruling that HR Garrioch and supervisor Gardella, individually, were not an "employer" subject to liability under the FMLA; that Graziadio's claims of interference could not be sustained because she had not been denied leave, and having failed to submit a medical certification form, had no entitlement to leave to care for her younger son; and that there was no retaliation under the FMLA because defendants proffered legitimate reasons for her termination—failure to comply with FMLA certification requirements and failure to contact her supervisor to return to work.

Analysis

Individual Liability

The Second Circuit first examined whether or not an individual could be held liable for violations of the FMLA.

The FMLA definition of "employer" is "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." [See 29 USC §2611(4)(A)(ii)(1) and 29 CRF §825.104(d). Other courts have noted that the FMLA definition of "employer" tracks the definition of "employer" used in the Fair Labor Standards Act ("FLSA"), and have determined that the standards used to evaluate "employers" under the FLSA should be applied to govern the FMLA. Consequently, the Second Circuit applied the "economic reality analysis"—whether the alleged employer possessed the power to control the worker, with an eye to the "economic reality" presented by the facts of each case. To do this, the court considers a "nonexclusive and overlapping set of factors intended to encompass the totality of circumstances, which includes whether the alleged employer: (1) has the power to hire and fire the employee; (2) supervised and controlled employee work schedules or condition of employment; (3) determined the rate and method of payment; and (4) identified employment records. No single factor standing alone is dispositive in the FMLA context, as courts have construed this test as asking whether the employer "controlled in whole or in part the employee's rights under FMLA."

The Second Circuit determined that there was "substantial evidence from which a rational trier of fact could find that Garrioch was an 'employer' in economic reality and under the FMLA." First, the Second Circuit noted that while termination authority formally rested with Culinary's Vice President of Administration and Shared Services ("VP"), he testified that he conducted no independent investigation concerning Graziadio's leave dispute, but merely directed the issue to HR Garrioch for handling. Further, that HR Garrioch described Graziadio's termination as a joint decision she made with the VP. Consequently, a jury could conclude that, but for the substantial authority wielded by HR Garrioch, the VP would not have exercised his ultimate authority to fire Graziadio. Therefore, HR Garrioch held substantial power over Graziadio's termination.

The Court also noted that HR Garrioch, as Director of Human Resources, exercised control over Graziadio's schedule and condition of employment with respect to return from FMLA leave. Both supervisor Gardella and VP testified that human resources alone handled any employee's return to work after FMLA leave. While the Court noted that there was no evidence concerning rate and method of payment and the maintenance-of-records factors, there was "ample evidence to support the conclusion" that HR Garrioch controlled Graziadio's rights under the FMLA.

The Second Circuit found that the evidence demonstrated that:

a) HR Garrioch reviewed Graziadio's FMLA paperwork;

b) HR Garrioch determined its adequacy;

c) HR Garrioch controlled Graziadio's return to work and under what conditions; and

d) HR Garrioch sent Graziadio nearly every communication regarding her FMLA leave and employment.

FMLA Interference

To succeed on an FMLA claim of interference, a plaintiff must establish that the defendant denied or otherwise interfered with a benefit to which the plaintiff was entitled under the FMLA. (See 29 USC §2615(a)(1)). To prevail on a claim of interference, a plaintiff must establish: (1) that she is an eligible employee under the FMLA; (2) defendant is an employer as defined by the FMLA; (3) she was entitled to take leave under the FMLA; (4) plaintiff gave notice to defendant of intent to take leave; and (5) plaintiff was denied benefits to which she was entitled.

The Second Circuit noted that under the FMLA, an employee seeking leave need not submit a medical certification *unless and until one is specifically requested by an employer*. (See 29 CRF §825.305(a).) Further, an employer must give notice of a requirement for certification each time a certification is required. Given these statutory requirements, neither the fact that Culinary maintained a handbook stating that it required medical certification nor the fact that it provided Graziadio a Notice of Rights and Responsibilities which explained the medical certification requirement sufficed to put Graziadio on notice that medical certification was required.

The Court also observed that HR Garrioch made vague requests for paperwork, which did not suffice to give Graziadio adequate notice that Culinary was requesting a medical certification, particularly when Graziadio made repeated requests that Culinary state precisely what "paperwork" it required and to provide her with any specific forms it wanted her to complete.

The Second Circuit stated that HR Garrioch avoided responding to any of Graziadio's requests for clarification on what paperwork was needed. The Court found that such unresponsiveness may run afoul of the FMLA's explicit requirement that employers "responsively answer questions from employees concerning their rights and responsibilities under the FMLA, including the obligations regarding medical certification (29 CRF §825.300(c)(5))." The Court also found that HR Garrioch rejected Graziadio's request for leave as the physician note did not state there was any medical necessity for her to provide full time medical care." While this was a reasonable rejection, HR Garrioch immediately cut off communication by expressly refusing to further discuss the matter, and she never reopened the lines of communication. Therefore, a jury could conclude that Graziadio made sufficient good faith efforts to comply with Culinary's requests, and that Defendants' conduct relieved her of any unsatisfied obligation to provide a medical certificate to support her leave.

FMLA Retaliation

Given the conclusion that a jury could find that Culinary interfered with Graziadio's leave, her failure to provide a medical certification could not constitute a legitimate basis for termination.

The Second Circuit also found Defendants' claim that Graziadio abandoned her job was dubious, especially in light of its August 30, 2012 email wherein Culinary wrote that it understood that Graziadio wanted to return to work.

Learning Points: *Graziadio* indicates that individual supervisors and/or HR personnel involved in the FMLA process may be brought into litigation as additional named defendants. Thus, employers who have Employment Practices Liability Insurance ("EPLI") may want to review the policy to ensure it covers supervisors and other personnel sued individually.

This case also highlights the need for clear, non-adversarial communication. Defendants would have been better served by: (1) providing the FMLA certification forms Culinary required; (2) responding in a more timely manner to plaintiff's requests, and (3) not making repeated unrelated and unnecessary requests/requirements.

Finally, re-certification and review of FMLA policies with HR personnel is a good practice. It is important to remember that FMLA is a statutorily created right. In this case, it appears that Defendants took the requests for leave personally, taking an extremely adversarial position, which ultimately hurt their defense. FMLA is intricate and complex enough as written, there is no need to create additional issues by failing to clearly and cordially communicate with employees in a good faith attempt to resolve any issues. ♦

Trigger Of Coverage For §1983 Claim Based Upon Self-Incrimination

by ***Michelle R. Valencic***

In recent years, state and federal courts in Illinois have addressed the debate regarding the appropriate trigger of liability coverage in the context of police misconduct cases. These cases have reached conflicting decisions in the context of claims for malicious prosecution and/or wrongful imprisonment. *Compare, Indian Harbor Ins. Co. v. City of Waukegan*, 2105 IL App (2d) 140293 and *St. Paul Fire & Marine Ins. Co. v. The City of Zion*, 2014 IL App (2d) 131312 (coverage triggered at the time of prosecution); with *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 678 F.3d 475 (7th Cir. 2012) and *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124 (7th Cir. 2012) (coverage triggered at the time of exoneration).

In one of several cases involving the City of Waukegan, the United States District Court for the Northern District of Illinois most recently addressed a motion for reconsideration regarding a similar trigger of coverage decision, but in the context of a claim alleging a violation of the claimant's Fifth Amendment right against self-incrimination. *Westport Ins. Co. v. City of Waukegan*, 2016 U.S.Dist. LEXIS 5216 (Jan. 15, 2016). The court held that a covered "offense" and/or "personal injury" occurred when a coerced confession was used against the claimant in an underlying retrial of a criminal case. While the retrial was not the first or only time the coerced confession was used against the claimant, the court found it triggered a duty to defend under the policy in place at the time of the retrial.

Facts

Westport filed suit seeking a declaratory judgment that it owed no obligation to provide coverage to the City and others in connection with a civil rights lawsuit filed by Juan Rivera, Jr. Westport had issued both CGL and law enforcement liability coverage to the City for annual policy periods from 1997 to 2000.

Rivera was interrogated by Waukegan law enforcement officers in 1992 for a rape and murder of a young girl, and signed a statement implicating himself in the crime. Rivera was ultimately charged, and was later tried and convicted in 1993, based in part on his statement. Following an appeal from the initial conviction, Rivera was retried and convicted in 1998, during the Westport policy period. Rivera continued to appeal the criminal case and in 2011 his conviction was reversed. Rivera was released from prison in 2012, and subsequently filed a civil rights lawsuit against the City and others stemming from his prosecution and imprisonment. Among the allegations, which included claims for malicious prosecution and violations of 28 U.S.C. §1983, Rivera asserted a claim for a violation of his Fifth Amendment right against self-incrimination based upon the use of his coerced confession against him. Because the coerced confession was used at the 1998 retrial, the court found that Westport owed a duty to defend. The parties in the underlying civil case ultimately settled Rivera's claims. However, Westport challenged the prior duty to defend ruling, citing

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the state or federal decisions referenced above in support.

Analysis

The Westport policies at issue covered "personal injury," meaning "injury" arising out of certain enumerated "offenses" within the applicable policy period. These offenses included malicious prosecution and more generally violations of 42 U.S.C. Sec. 1983 and similar laws.

Recognizing that Illinois (and federal) courts have addressed the timing of a "personal injury" arising out of malicious prosecution, the issue before the *Westport* court was whether Westport owed a duty to defend triggered by any potentially covered claim asserted by Rivera, not only the malicious prosecution count. In his complaint, Rivera included an alleged Fifth Amended violation stemming from the use of his coerced confession against him. A privilege against self-incrimination protected by the Fifth Amendment is a *trial right*, and a violation only occurs when self-incriminating testimony is used in a *courtroom* setting. The court reasoned that the "tortious act" which is the essence of the claim is the courtroom use of the compelled, self-incriminating testimony. Thus, the court found that a covered "offense" occurred and Rivera suffered "personal injury" caused by the "offense" when his coerced confession was used against him at the 1998 retrial, which occurred within Westport's policy period. As such, Westport was found to have owed a duty to defend.

While the *Westport* case did not require the court to address multiple self-incriminating statements by Rivera, it noted in *dicta* that the Illinois Supreme Court could "conceivably" conclude that each courtroom use of a self-incriminating statement in a criminal case is a separate triggering occurrence or offense, or alternatively, that repeated use of a self-incriminating statement is a continuing occurrence or offense that triggers coverage in each policy period in which the statement is used in a court room proceeding.

Learning Point: *Westport* is the only case to address the trigger of coverage for a civil rights claim stemming from an alleged Fifth Amendment violation of the right against self-incrimination under Illinois law. While insurers have been successful in avoiding a continuous trigger in the context of malicious prosecution and police misconduct cases, the court's *dicta* will no doubt be cited by policyholders or civil rights claimants seeking a multiple if not continuous trigger in cases where a criminal defendant's allegedly coerced confession has been used in multiple courtroom settings. Practically speaking, civil rights cases based upon allegedly coerced criminal confessions often follow many rounds of underlying criminal proceedings, appeals and/or challenges to an underlying criminal conviction. If each use of a coerced confession is a separate trigger or a continuing occurrence or offense, the number of potentially applicable insurance policies could increase exponentially. This could also lead to increased disputes between and among insurers as to the order and priority of any such coverage. Michelle often handles liability coverage cases involving wrongful imprisonment, malicious prosecution and other police misconduct claims. For more information, she can be reached at (312)606-7905 or **mvalencic@clausen.com**. ♦

Illinois Supreme Court Splits Along Party Lines To Strip Municipalities Of Protection Against Tort Suits

by ***Kimbley A. Kearney***

Introduction

In a 4-3 decision, the Illinois Supreme Court handed down its opinion in *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952 (2016), abolishing the "public duty rule" that historically protected local governmental entities from tort suits based on alleged failure to provide individual members of the public with adequate police, fire and emergency protection services. The Justices aligned along political party lines, with the Democratic majority deciding to strip Illinois local governments of one of their long-held protections against tort liability.

Analysis

The *Coleman* opinion, authored by Justice Kilbride, recognizes that the majority of states continue to adhere to the public duty rule because it is considered both "sound and necessary" to shield local governments from tort liability to individual members of the public in connection with services provided to preserve the well-being of the community as a whole. The Court also acknowledged that, in previous cases, it consistently upheld the continued viability of the rule. Nevertheless, the Court concluded that the rule is now "obsolete" and "incompatible" with the limited immunity that the state legislature has granted to municipalities.

In a scathing dissent, Justice Thomas (joined by Chief Justice Garman and Justice Karmeier), strongly criticized the justices who decided to do away with the public duty rule for making a "mockery" of the well-established principle that the Court must adhere to its prior rulings. He stated that the decision "demonstrates that power, not reason, is the new currency of this court's decision making," and warned that, if the Court's prior decisions are to be casually disregarded, "the common law of Illinois sits on the verge of wholesale collapse." Justice Thomas also opined that there is "absolutely nothing" about the legislature's enactment of limited statutory immunities in favor of municipalities "that renders the public duty rule obsolete" because the legislative action predated the cases in which the Court previously confirmed the public duty rule to be alive and well in Illinois.

Justice Thomas also strenuously disagreed that the public duty rule is obsolete. He stated that the facts of the case make the point. Coretta Coleman placed a 911 call for medical assistance while eight tornadoes were touching down in Will County and the local emergency response teams could not reach her in time to save her life because they "were so overwhelmed" by other calls for help from the community. Coleman's husband sued the municipalities that combined their efforts to respond to

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her call. Justice Thomas opined that "[u]nder circumstances such as mass disaster, local public entities must have the flexibility to prioritize and respond to community emergencies without having their judgment questioned." He stated the decision "does not bode well for the future." It will discourage local public entities from providing services and "cause municipalities to be mired hopelessly in civil lawsuits."

Learning Point: Clausen Miller partner **Tyler Jay Lory** won summary judgment in favor of defendant Orland Fire Protection District in the trial court and partner **Kimbley Kearney** briefed and argued the case before the Illinois Appellate Court and the Illinois Supreme Court. Despite the blow to municipalities wielded by the Court, they and the firm's other seasoned municipal law attorneys believe that *Coleman* leaves room for a municipality's duty to the plaintiff to be aggressively challenged in each individual case. ♦

The Malfunction Theory: Product Liability's Saving Grace

by ***Nathalie C. Hackett***

Introduction

Property damage cases arising from a failed product, such as a failed appliance or other item causing a destructive fire, are fairly typical. While a traditional negligence cause of action requires the plaintiff to prove the defendant manufacturer, distributor and/or retailer (collectively referred to in this article as "defendant" or "defendant manufacturer") breached a duty owed to plaintiff, which then resulted in (or proximately caused) plaintiff's damages, a sustainable product liability cause of action only requires proof: 1) that the defendant supplied a defective product, and 2) this defect resulted in injury to the plaintiff.

A plaintiff can generally make a claim of strict product liability if plaintiff can establish:

- the defendant was engaged in the business of selling the product;
- the product was in a defective condition at the time of plaintiff's purchase;
- the product was expected to and did reach the consumer without substantial change in condition; and
- the defect was a substantial factor in causing plaintiff's injuries.

Thus, a product liability plaintiff is relieved of the burden of proving privity of contract with defendant manufacturer and negligence on the part of defendant manufacturer in causing the defect.

Analysis: Using The Malfunction Theory To Prove A Products Liability Claim

A product liability plaintiff may present its case under any one of three categories: 1) manufacturing defect; 2) defective design; and 3) failure to warn. A product may be defective in its manufacturing, if it did not perform as intended, while another product of identical design did not fail. A product may be defective in its design, if it is unreasonably dangerous due to the substantial likelihood of harm. Finally, failure to warn occurs if defendant failed to adequately warn plaintiff of the product's dangerous propensity, whether arising from foreseeable uses of the product, or arising out of unintended uses of the product that are reasonably foreseeable.

Plaintiff's burden of proof in strict product liability cases may appear to be somewhat relaxed, insofar as plaintiff need only establish the defect, plaintiff's injury and that the product's defect proximately caused plaintiff's injury. Nevertheless, an insurer's pursuit of

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recovery against the manufacturer of a failed product is often derailed by its inability to prove that the product was, in fact, defective.

The destruction of a suspected failed product as a hindrance to recovery is a common obstacle in subrogation actions against a product's manufacturer or distributor. In the case of a fire, for example, the product is always the first to burn and often burns to the point of having no useful investigative value. Defendants often successfully challenge plaintiff's lack of specificity linking them to the loss, due to the absence of so-called direct evidence of the existence of a product defect. However, product liability cases in which the offensive product is either unavailable or unexaminable due to destruction or damage caused by the loss itself are not necessarily without hope, as plaintiff may rely upon circumstantial evidence in formulating its product liability case against defendant.

In the traditional product liability action, plaintiff must present evidence "directly demonstrating that some part of a product was either defectively manufactured or designed and that the defectively designed or manufactured part caused the product to fail." The "malfunction theory" of product liability, however, permits plaintiff to prove the existence of a product defect by satisfying two elements: "(1) the incident that caused the plaintiff's harm was of a kind that ordinarily does not occur in the absence of a product defect, and (2) any defect most likely existed at the time the product left the manufacturer's or seller's control and was not the result of other reasonably possible causes not attributable to the manufacturer or seller."

The malfunction theory mirrors the doctrine of *res ipsa loquitur*, which is an evidentiary doctrine that permits an inference of negligence to be drawn solely from the happening of an accident. "Similar to the logic of *res ipsa loquitur*, the malfunction theory permits a plaintiff to prove a defect in a product with evidence of 'the occurrence of a malfunction and eliminating abnormal use or reasonable, secondary causes for the malfunction.'" Where the two differ is *res ipsa* requires proof that the instrumentality causing injury was in defendant's exclusive control. Thus, the doctrine of *res ipsa loquitur* is not available to product liability plaintiffs in most jurisdictions.

The "malfunction theory" is generally accepted by a "substantial and growing majority of American jurisdictions (typically without the 'malfunction doctrine' label)." Under the "malfunction theory" of products liability, which is sometimes referred to as the "malfunction doctrine," "indeterminate defect theory," "general defect theory," or "a principle of circumstantial evidence," a plaintiff can successfully assert a strict product liability claim in situations where direct evidence of a product's malfunction is unavailable.

For example, in *Liberty Mut. Fire Ins. Co. v. Sharp Elecs. Corp.*, 2011 U.S. Dist. LEXIS 71890 (M.D. Pa. July 5, 2011), a fire occurred in a restaurant and was later determined to have originated in a Sharp cash register, which the insured purchased in an Office Depot. Liberty, as subrogee of the restaurant, sued Sharp and Office Depot asserting claims of strict products liability, breach of warranty and negligence. Defendants moved for summary judgment, arguing, among other things, that plaintiff failed to establish that the fire was caused by a defect in the register. The court denied defendants' motions, finding enough evidence to sustain plaintiff's cause of action under the malfunction theory of product liability. While plaintiff's expert was unable to specify the precise mode of the register's failure, as "the fire consumed all the internal evidence that started the fire," he was nevertheless able to conclude that "the fire was caused by an assembly defect to the Sharp cash register because all of the items in evidence pointed to the Sharp cash register." Further, the fire investigator, Fire Marshal and his assistant all concluded that the fire originated at the cash register.

The seemingly relaxed nature of the "malfunction theory" can sometimes mislead the products liability plaintiff into falling short of its evidentiary burden. An important, sometimes overlooked, element of the "malfunction theory" of product liability requires plaintiff to prove that the product was in the same basic condition at the time of the occurrence as when it left the hands of the defendants, such that the claimed defect existed when the product left the manufacturer's control. In *Metropolitan Property and Casualty v. Deere and Company*, 25 A.3d 571 (Conn. 2011), for example, the Connecticut Supreme Court reversed a plaintiff's verdict due to plaintiff's inability to meet this element.

In *Metropolitan*, the insureds purchased the subject lawn tractor in April, 1998. It performed without incident until the spring of 2003, when it underwent maintenance by both the dealer that sold the tractor and by the insured. On the date of loss, the insured attempted to mow the lawn with the tractor, but was unable to complete this task as the tractor's engine was "running roughly." The insured parked the tractor in its garage, and, approximately one and one-half hours later, the insured's home caught fire. The insured admitted that the tractor "had been running roughly and backfiring repeatedly for several months prior to the fire."

The plaintiff insurer, as subrogee of its homeowner, sued the tractor's manufacturer, Deere & Co., claiming that the tractor's electrical system was defective when it left the defendant's control and this defect caused the fire. Unable to prove the exact nature of the tractor's defect due to the severity of burn damage, plaintiff relied on the malfunction theory to "bridge the gap" between its argument of a defect and that such defect proximately caused the fire. While plaintiff prevailed in the trial and appellate courts, the Connecticut Supreme Court reversed the plaintiff's verdict. The Supreme Court explained:

> [T]he plaintiff's own evidence pointed to the possibility of other causes of an electrical failure not attributable to the defendant, namely, the possibility of improper maintenance and improper use. . . In addition, the plaintiff's evidence failed to link an electrical failure in the tractor to a defect attributable to the defendant. . . [T]here were no problems reported with the tractor's electrical system during the first four years of use. . . [P]rior to the fire, the tractor had been inspected by a technician . . . [who] identified no problems with the tractor's electrical systems. . . . Furthermore, because the evidence established that the tractor was not new or nearly new when it malfunctioned, the plaintiff was required to present additional evidence to explain how the tractor could have had a defect in the electrical system when it left the defendant's manufacturing facilities yet functioned without problems for several years before failing.

In short, plaintiff failed to present sufficient evidence to eliminate other reasonably possible secondary causes of the defect and to establish that the fire in the tractor most likely resulted from a defect attributable to the defendant.

Competent and credible expert testimony is critical to plaintiff's ability to establish that an event does not ordinarily occur in the absence of a defect. The malfunction theory "is not an alternative to expert testimony, nor is it proven simply on the basis of the expectations of the consumer." Instead, it presents an "alternative to proving the existence of a specific defect that is based on the argument that a malfunction resulted from an unspecified defect in the product," an argument that is based, in part, on the absence of any other "reasonably possible cause of the malfunction."

Expert testimony is invaluable to supplement a jury's understanding of whether an injury would normally occur in the absence of a defect, to the exclusion of all other potential causes. "If lay witnesses and common experience are not sufficient to remove the case from the realm of speculation, the plaintiff will need to present expert testimony to establish a *prima facie* case." Plaintiff's failure to present such testimony where it is needed to establish a causal nexus between the loss and plaintiff's argument that an unspecified product defect caused the loss, will result in a defense verdict or dismissal of plaintiff's case.

Learning Point: As advantageous as the malfunction theory is for a plaintiff unable to present direct evidence of a defect, application of the doctrine does not wholly relieve a plaintiff of the burden of proof. It is an evidentiary doctrine that merely permits the jury to infer a defect based on a well-founded understanding, as presented by plaintiff, that all other possible causes for the loss were excluded, and the injury-causing event would not normally occur absent the presence of a defective product. The inferences permitted by the malfunction theory, if not well supported by plaintiff, may be rebutted with evidence from defendant that tends to cast doubt on plaintiff's proof and can result in an unfavorable outcome for the products liability plaintiff. ♦

ADMIRALTY/MARINE

SHIPS NOT "PRODUCTS" FOR PURPOSES OF STRICT PRODUCT LIABILITY

McIndoe v. Huntington Ingalls Inc., 2016 U.S. App. LEXIS 5893 (9th Cir.)

Plaintiff's decedent died of mesothelioma caused by asbestos exposure while he served on two naval warships. She sued the manufacturers of the ships on various strict product liability theories. ***Held:*** On an issue of first impression, the Ninth Circuit Court of Appeals held that a custom-designed warship was not a "product" for purposes of maritime strict products liability law. Warships are often designed by the government, not the shipbuilders, and contain various component parts not manufactured by the shipbuilder. Imposition of strict product liability under such circumstances would not align with the primary goal of maritime law—"to protect and to promote the smooth flow of maritime commerce."

AGENTS/BROKERS

CAUSE OF ACTION FOR BROKER NEGLIGENCE ASSIGNABLE UNDER CALIFORNIA LAW

AMCO Ins. Co. v. All Solutions Ins. Agency, LLC, 244 Cal. App. 4th 883 (Cal. App. 5 Dist.)

After a policyholder negligently caused a fire that damaged his neighbor's property, he assigned his action against his insurance broker for failing to procure liability insurance to his neighbor and his neighbor's property insurance carrier. ***Held:*** Adopting the majority position of the states, the court held that a cause of action for broker negligence is assignable. Additionally, because the neighbor and its carrier were never subrogees of the policyholder, they were not subject to the doctrine of superior equities as developed through California's equitable subrogation case law.

ARBITRATION

COURT REJECTS ONLINE RETAILER'S ATTEMPT TO COMPEL ARBITRATION

Long v. Provide Commerce, Inc., 2016 Cal. App. LEXIS 199 (Cal. App. 2 Dist.)

Defendant moved to compel arbitration of a putative class action consumer fraud suit brought by individuals who purchased flowers through the defendant's online business, ProFlowers.com. The trial court held that the hyperlinks to the website's terms of use, which contained the arbitration provision, were too inconspicuous to put a reasonably prudent internet consumer on inquiry notice. ***Held:*** The hyperlink to the website's "terms of use," contained in a "browsewrap" format on the website (i.e. via a link at the bottom of the webpage), were neither sufficiently conspicuous to put a reasonable user on inquiry notice of their existence nor descriptive enough to indicate that the "terms of use" constituted binding contract terms. Accordingly, the consumers did not consent to arbitration and the trial court properly denied the motion to compel.

EXPERTS

EXPERTS BARRED FOR LACK OF SCIENTIFIC METHODOLOGY

Sean R. v. BMW of N. Am., LLC, 2016 N.Y. LEXIS 134 (N.Y.)

Plaintiff sued for congenital mental and physical deficits, which he attributed to his mother's continual prenatal exposure to gasoline vapors from a defective car hose. Expert witnesses submitted reports attributing the injuries to the gasoline exposure and the defendant car manufacturer moved to bar those experts, arguing that the methods the experts employed in arriving at their opinions were not generally accepted in the scientific community. ***Held:*** It was the plaintiff's burden to show that the methodology his experts employed was generally accepted in the scientific community. The experts did not identify any text, scholarly article or scientific study that would allow them to link plaintiff's birth issues based on headaches, dizziness, and other ailments reported by the mother when driving the vehicle.

INSURANCE CLAIMS PRACTICES

INSURER NOT ENGAGED IN CONSUMER TRANSACTION FOR SPECIFYING AFTER-MARKET REPLACEMENT PARTS IN REPAIR ESTIMATES

Dillon v. Farmers Ins. of Columbus, Inc., 2015-Ohio-5407 (Ohio App.)

Pursuant to its policy, insurer's repair estimate included the use of after-market parts. ***Held in a split decision:*** An insurer does not engage in a "consumer transaction" by adjusting a claim for damages. The consumer statute exempts transactions between insurers and insureds from the definition of "consumer transaction." Although insurers must follow procedures regarding estimates for use of after-market parts, the statute does not impose financial remedies against insurers for violations. An insured may seek other remedies. Providing an estimate did not mean that insurer acted "in connection with" a consumer transaction. The insurer's role is only to provide money.

LEGAL MALPRACTICE

FAILURE TO LIST MALPRACTICE CLAIM IN BANKRUPTCY SCHEDULE BARS PURSUIT OF CLAIM

Dotlich v. Tucker Hester, 2015 Ind. App. LEXIS 779 (Ind. App.)

Client who sued attorney for wrongly recommending bankruptcy did not list his malpractice claim on his bankruptcy schedule. ***Held:*** Client's failure to list the claim barred further pursuit of it. Because the malpractice was sufficiently rooted in client's pre-bankruptcy past, it was property of his bankruptcy estate. A debtor who denies owning an asset may not take action regarding it after his bankruptcy ends.

LIABILITY INSURANCE COVERAGE

DELAWARE HIGH COURT SAYS BAD FAITH CLAIM ACCRUES ONLY AFTER FINAL JUDGMENT AGAINST INSURED

Connelly v. State Farm Mutual Auto. Ins. Co., 2016 Del. LEXIS 126 (Del.)

Following entry of excess judgment, insured assigned causes of action against his liability carrier to the underlying plaintiff, who then sued the carrier for bad faith refusal to settle. Defendant moved to dismiss claiming that suit was barred by a three-year statute of limitations, which accrued either when the underlying plaintiff made the settlement offer or when the insurer rejected it. ***Held:*** The Delaware Supreme Court reversed the lower court's dismissal, holding that "a claim against an insurer for acting in bad faith by failing to settle a third-party insurance claim accrues when an excess judgment against an insured becomes final and appealable."

QUESTIONS REGARDING HOUSEHOLD STATUS PREVENT PRE-TRIAL DETERMINATION OF COVERAGE

Secura Supreme Ins. Co. v. Johnson, 2016 Ind. App. LEXIS 42 (Ind. App.)

Coverage dispute arose after a neighbor was bitten by dog owned by insureds' sister, who rented insureds' second house. ***Held:*** The word "household" does not require members to live under a single roof or have a dependent relationship. However, a factfinder may conclude that a landlord-tenant relationship between insureds and sister was incompatible with being a member of a household. Final resolution must be left to a jury.

KENTUCKY APPEALS COURT SAYS LOWER COURT APPLIED WRONG LAW IN COVERAGE ROW

Jamos Capital LLC v. Endurance Am. Specialty Ins. Co., 2016 Ky. App. Unpub. LEXIS 123 (Ky. App.)

Insured brought a declaratory judgment action in Kentucky state court against its insurer seeking defense and indemnity under a professional liability policy for underlying suit seeking compensatory and punitive damages for alleged unfair practices in pursuing payment of delinquent tax bills. Even though Ohio has the most significant contacts, the lower court applied Kentucky law. Kentucky's public policy exception applied because Ohio law does not allow for coverage of punitive damages while Kentucky law does. ***Held:*** Overruling the trial court, the Court of Appeals held that Kentucky does not have a "strong public policy regarding the coverage of punitive damages in insurance contracts to override Ohio's insurance laws regarding punitive damages."

STRIP SEARCHES CONSTITUTE SEPARATE OCCURRENCES UNDER POLICY

Selective Ins. Co. of Am. v. Cty. of Rensselaer, 2016 N.Y. LEXIS 133 (N.Y.)

Dispute between county and insurer whether over 400 illegal strip searches were one occurrence or 400 separate

occurrences. The policy defined "occurrence" as "an event, including continuous or repeated exposure to substantially the same general harmful conditions, which results in . . . 'personal injury' . . . by any person or organization and arising out of the insured's law enforcement duties." The lower courts held the definition was unambiguous and that each strip search was a separate occurrence. ***Held:*** Affirmed. The language of the insurance policies made clear that it covered personal injuries to an individual person as a result of a harmful condition. The definition does not permit the grouping of multiple individuals who were harmed by the same condition, unless that group is an organization, which was clearly not the case.

LETTER FROM GENERAL CONTRACTOR TO SUBCONTRACTOR CONSTITUTED NOTICE OF AN "OCCURRENCE"

Spoleta Constr., LLC v. Aspen Ins. UK Ltd., 2016 N.Y. LEXIS 387 (N.Y.)

Plaintiff general contractor sought a declaration that its subcontractor's insurer was obligated to defend and indemnify it in a personal injury action. Insurer objected, claiming it had not received timely notice of the occurrence as it had only received a forwarded letter from the subcontractor that did not clearly state that defense and indemnification was being sought. The trial court granted summary judgment to the insurer but the appellate court reversed. ***Held:*** Appellate court affirmed. The letter asked the subcontractor to "place [its] insurance carrier on notice of this claim" and provided information about the identity of the injured employee, as well as the date, location and general nature of the accident. Thus, the defense of late notice was not established as a matter of law.

MEDICAL MALPRACTICE

DOCTOR OWES DUTY TO SUPERVISE NURSE PRACTITIONER

Collip v. Ratts, 2015 Ind. App. LEXIS 780 (Ind. App.)

Mother sued physician for failure to supervise nurse practitioner's prescription of drugs to deceased son. ***Held in a case of first impression:*** Even absent a physician-patient relationship, a physician owes a duty to supervise a nurse practitioner's prescription of drugs to third persons. Physician had contracted with nurse to oversee her prescriptive practices. Nurse did not go to medical school or serve as a medical resident, so harm to her patients was reasonably foreseeable. The legislature, in encouraging the use of nurse practitioners, expected them to be adequately supervised. Having agreed to supervise 11-12 nurse practitioners, physician was required to be more than a rubber stamp. ***Further held:*** Voluntary undertaking rule also supported the imposition of a duty to supervise.

WRONGFUL BIRTH CLAIM ACCRUES UPON BIRTH OF BABY

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 filed suit against doctors alleging negligent screening of their embryo for birth defects. The trial court denied the doctors' motion to dismiss on statute of limitations grounds, which had argued that suit was filed 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, therefore, the suit had been timely filed.

MUNICIPAL LAW AND CORPORATIONS

NON-PROFIT AMBULANCE SERVICE NOT IMMUNE FROM LIABILITY

Sharpsville Cmty. Amb., Inc. v. Gilbert, 2015 Ind. App. LEXIS 766 (Ind. App.)

Plaintiff was injured in a collision with an ambulance owned by a non-profit emergency service operated to assist a county. ***Held:*** The service was not a "governmental entity" entitled to immunity. A governmental entity must be a state or a political subdivision. Although the service contracted with the county to provide rides for a nominal fee, all contractual restrictions were self-imposed. The service was not part of a volunteer fire department, nor was it bound to restrictions by law. A service may not become a governmental entity by contract.

NEGLIGENCE

LANDOWNER NOT IMMUNE UNDER RECREATIONAL USE STATUTE

Amaral v. Seekonk Grand Prix Corp., 44 N.E.3d 145 (Mass. App.)

Mother standing behind fence at go-cart facility was injured when a cart crashed through it. ***Held:*** Although mother was not charged to watch carts, landowner was not immune under the recreational use statute. Regardless of whether watching is a recreational use, mother paid for children's use of facility. Granting immunity would undermine the goal of encouraging the free recreational use of land.

SIDEWALK DEFECT CASE LAW OVERTURNED

Sangaray v. W. Riv. Assoc., LLC, 2016 N.Y. LEXIS 135 (N.Y.)

Plaintiff tripped on a sidewalk and sustained injuries. He sued the defendant landowner, alleging that it violated Administrative Code § 7-210 by failing to maintain a sidewalk abutting its property. Defendant moved for summary judgment, claiming the sidewalk defect did not abut its property. The court granted summary judgment, which was affirmed on appeal. ***Held:*** The Court of Appeals reversed. Prior appellate decisions interpreted as holding that only the landowner whose property abuts the defect upon which the plaintiff trips may be held liable should no longer be followed. Here, the defendant focused solely on the location of the actual defect upon which plaintiff allegedly tripped, and ignored its burden of demonstrating that it complied with its own duty to maintain the sidewalk abutting its property in a reasonably safe condition and/or that it was not a proximate cause of plaintiff's injuries.

HOTEL OWNER AND INSURER NOT LIABLE FOR EMPLOYEE ASSAULT

Hudson v. Flores, 2016 Ohio-253 (Ohio App.)

Guest was injured when hotel employee pushed him. ***Held:*** Hotel is not vicariously liable. Conduct must be the type employee is hired to perform, substantially within the authorized time and space, and actuated in whole or part to serve employer. If intentional, it must be calculated to promote the business. An employer may ratify an act if it knows the facts and thereafter benefits. Employee was involved in a purely personal matter. Though the employee was not fired, the employer was unaware of incident and did not benefit. ***Further held:*** By acting outside the scope of employment, employee was not an "insured" under liability policy.

STATUTES OF LIMITATION

AGREED ORDER TO STAY PROCEEDINGS DOES NOT TOLL TIME TO BRING CASE TO TRIAL

Gaines v. Fidelity National Title Ins. Co., 62 Cal. 4th 1081 (Cal.)

Plaintiffs sued a title insurance company after a real estate sale went wrong. The case languished and eventually the trial court dismissed pursuant to California Code of Civil Procedure § 583.310, which requires an action "be brought to trial within five years after the action is commenced against the defendant." ***Held:*** A 120-day stay of proceedings entered by the trial court to allow the parties to attempt stipulated mediation did not toll the time for plaintiffs to bring their suit to trial. The stay did not completely suspend proceedings because it allowed for ongoing discovery. Accordingly, it did not qualify as a stay tolling the running of the five-year period pursuant to the Code.

TORTS

NO TORTIOUS INTERFERENCE IN RETENTION OF SOFTWARE DESIGN FIRM

Definitive Solutions Co. v. Sliper, 2016-Ohio-533 (Ohio App.)

Defendant hired software design firm staffed by ex-employees of defendant's previous design firm. ***Held:*** Defendant did not maliciously or improperly interfere with relationship between previous firm and its employees. Defendant did not hire the employees. It only retained a new firm staffed by previous firm's employees. Nor did defendant act in bad faith. It had been told that the old firm was financially shaky. ***Also held:*** Defendant did not breach the no-direct-solicitation clause of its contract with previous firm.

UM/UIM

FOLLOWING FORM EXCESS POLICY DOES NOT PROVIDE UM/UIM COVERAGE

Haering v. Topa Ins. Co., 244 Cal. App. 4th 725 (Cal. App. 2 Dist.)

Plaintiff suffered on-the-job injuries in a motor vehicle accident. He settled with the tortfeasor for the tortfeasor's policy limits, then with his employer's primary carrier for underinsured motorist coverage limits. He then pursued his employer's excess carrier, arguing that because the excess policy "followed form" to his employer's primary policy, it provided excess underinsured motorist coverage. ***Held:*** The excess policy's insuring agreement unambiguously limited coverage to "losses for which the insured is liable." This provided coverage only for third party claims, not first party claims like uninsured or underinsured motorist.

WORKERS' COMPENSATION

MULTIPLE SUBSIDIARIES MAY BE VIEWED AS JOINT EMPLOYERS

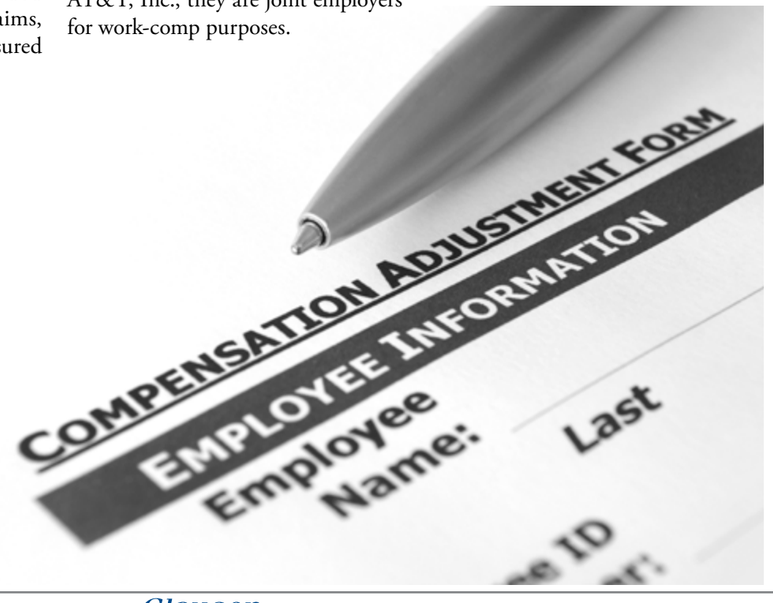
Hall v. Dallman Contr's, LLC, 2016 Ind. App. LEXIS 25 (Ind. App.)

After receiving worker's compensation settlement from Ameritech, plaintiff brought negligence claim against AT&T Services. ***Held:*** Under the statutory definition of "employer," a parent corporation and its subsidiaries are joint employers. The definition is not limited to an immediate parent, nor does it exclude higher tiered corporations. The definition of "subsidiary" includes all corporations majority-owned by a domestic corporation. Because Ameritech and AT&T Services are subsidiaries of AT&T, Inc., they are joint employers for work-comp purposes.

WORKER'S COMPENSATION LIEN DOES NOT COVER AMOUNTS ALLOCATED FOR PAIN AND SUFFERING

DiCarlo v. Suffolk Const. Co., Inc., 45 N.E.3d 571(Mass.)

Worker's compensation insurer asserted liens on employee's settlements with third-parties. ***Held:*** Liens did not attach to amounts allocated for pain and suffering. Under the workers' compensation statute, a lien only attaches to injuries "for which compensation is payable." Pain and suffering is not compensable. Insurers will be protected from excessive allocation to pain and suffering because settlements must be approved by court or administrative agency.



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