CM REPORT

of Recent Decisions

2015 • Vol. 1

The Minefield Of Summary Judgment Practice

Medicare Advantage Organization Wins Against Liability Insurer

Timing Of Malicious Prosecution Implicates Coverage

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

Clausen Miller PC

CM REPORT
of Recent Decisions

FEATURES

ARTICLES

The Minefield Of Summary Judgment Practice—Building A Record Means Strict Compliance With The Rules

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

In *Lucasey v. Plattner*, 2015 IL App (4th) 140512, the Illinois Appellate Court, Fourth District, teaches that lackadaisical compliance with Supreme Court Rules regarding summary judgments is fraught with danger.

Facts

Plaintiff sued defendants for injuries received after falling from a retaining wall in defendants' back yard while he was performing a real estate appraisal of defendants' property. Defendants moved for summary judgment on plaintiff's cause of action, contending that the risk posed by the retaining wall was open and obvious and neither the distraction nor the deliberate-encounter exception to the open and obvious doctrine applied. In response, plaintiff filed an affidavit by a licensed architect and structural engineer, James Peterson, who opined that the retaining wall violated various residence and building codes, resulting in a hazardous condition. Peterson further deposed upon affidavit that: "I have reviewed the complaint, and the documents attached to the summary judgment pleadings, including photos of the retaining wall, and deposition transcripts of [plaintiff] and [defendants], and I have reviewed the building and residential codes." Plaintiff, however, did not attach to Peterson's affidavit any of the pleadings, documents, exhibits, deposition transcripts, or building codes that Peterson reportedly relied upon in coming to his opinion set forth in his affidavit.

Defendants moved to strike Peterson's affidavit, which the trial court granted, and the trial court then entered summary judgment for the defendants.

Analysis

On appeal, the Appellate Court affirmed the trial court's decision striking Peterson's affidavit and granting defendants summary judgment, finding that Peterson's affidavit failed to comply with the requirements for affidavits set forth in Illinois Supreme Court Rule 191(a), which states in pertinent part:

> Affidavits in support of and in opposition to a motion for summary judgment … shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; *shall have*

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attached thereto sworn and certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.

Plaintiff argued that while the documents Peterson relied upon were not actually attached to his affidavit, the documents were included elsewhere in the record and the building codes Peterson relied upon were publicly available. Plaintiff therefore described the omission as a "technical deficiency" because substance not form controls and further contended that since affidavits in opposition to summary judgment are to be liberally construed, Peterson's affidavit was sufficient to pass muster and should have been considered by the trial court before granting defendants' motion for summary judgment. The Appellate Court flatly disagreed, stating: "[w]e emphatically reject all of these arguments."

The Appellate Court explained that an affidavit submitted in a summary judgment context serves as a substitute for testimony at trial. In light of this purpose, there must be strict compliance with Rule 191(a) to ensure that trial judges are presented with valid evidentiary facts upon which to base a decision. The Appellate Court found that Illinois jurisprudence on the subject mandated that documents upon which an expert relied be attached to the affidavit as that requirement was inextricably linked to the provisions requiring specific factual support in the affidavit itself.

Learning Point: *Lucasey* illustrates that there can be no "cutting of corners" in summary judgment practice. The rule requires that all documents relied upon by the expert be attached to the affidavit; it is immaterial that those documents are otherwise "in the record" or are "publicly available." The failure to adhere strictly to the rule can lead to disastrous consequences, as illustrated by the *Lucasey* case. We note that other states also have such rules that are strictly enforced. For example, in New York, CPLR Section 2214 requires the moving party to furnish "all other papers not already in the possession of the court necessary to the consideration of the questions involved." Thus, on a motion to renew/reargue the denial of summary judgment, all the underlying summary judgment briefing and exhibits must be refiled with the motion for leave to renew/reargue. If that material is not provided, there may be no basis for a court to grant leave to renew/reargue.

Clausen Miller's Appellate Practice Group is often retained in Illinois and elsewhere to "eyeball" motions for summary judgment, and in New York to review motions to renew/reargue, to make sure all the points have been made and the rules followed. Perhaps had such review been done in *Lucasey*, the error would have been caught and striking of the expert's affidavit avoided because, as appellate lawyers, we are always mindful of making sure that all of the "i's" are dotted and the "t's" are crossed.

HILL CO-AUTHORS ARTICLE RECENTLY PUBLISHED IN *THE BRIEF*

Clausen Miller partner **Celeste A. Hill** has co-authored an article titled "Considerations for a Strong Settlement Agreement that Best Resolves Your Property Insurance Case" which appears in the 2015 winter edition of *The Brief*, a publication of the American Bar Association. The article provides a practical guide and checklist of items to consider in negotiating and drafting settlement agreements at the close of mediation.

Celeste has broad experience handling complex commercial litigation matters, including the representation of domestic and foreign markets in major property insurance disputes. She is Vice Chair of the TIPS Property Insurance Law Committee of the American Bar Association and is a Fellow in the American Bar Foundation.

For more information regarding the article, please contact Celeste at **chill@clausen.com**.

KIM KEARNEY SPEAKS AT 25TH ANNIVERSARY OF TULANE'S ADMIRALTY LAW INSTITUTE

Clausen Miller partner **Kimbley A. Kearney** recently presented her paper "Ancient Duties, Modern Perspectives: Recent Developments in the Law of Maintenance & Cure" at the 25th Anniversary of the prestigious Tulane Admiralty Law Institute. The paper, co-authored by CM associate **Mark J. Sobczak**, will be published in the *Tulane Law Review* in June.

HOEY PRESENTS BUILDER'S RISK AND CGL INSURANCE FOR CONSTRUCTION

Clausen Miller partner **James M. Hoey** presented a Live Teleconference through National Business Institute (NBI) on January 20, 2015. The program topic was "Builder's Risk Insurance Coverage: Exclusions, Triggers and Indemnification." CLE credit was available.

On March 17, 2015, Jim was a co-presenter for Strafford Publications, a national provider of CLE Webinars. The program was entitled "Builder's Risk and CGL Insurance for Construction Projects: Mitigating Developer and Contractor Risks."

Please contact Jim directly at **jhoey@clausen.com** if you are interested in learning more about these topics.

CLAUSEN MILLER NAMES THREE ATTORNEYS TO PARTNER AND TWO NEW SHAREHOLDERS

Elise D. Allen

Daniel R. Bryer

Thomas D. Jacobson

Ian R. Feldman

Joseph W. Szalyga

Clausen Miller P.C. recently elected Chicago attorneys **Elise D. Allen**, **Daniel R. Bryer** and New York attorney **Thomas D. Jacobson** to Partner.

Elise Allen focuses her practice in the area of liability insurance coverage. She primarily concentrates on environmental and asbestos litigation. Elise received her B.A. in Speech Communication with a concentration in Public Relations from Miami University and a J.D. from The John Marshall Law School.

Daniel Bryer concentrates his practice primarily in the areas of professional liability, employment law, casualty/liability defense, products liability and business/commercial litigation. Daniel received his B.A. in Political Science from Indiana University Bloomington and earned his law degree from The John Marshall Law School, where he graduated *magna cum laude*.

Thomas Jacobson focuses his practice in the areas of first-party property, liability insurance coverage and subrogation. Thomas received his B.A. from Hartwick College and his J.D. from the Valparaiso University School of Law. While attending law school, he was elected to the Moot Court Honor Society where he participated in several interscholastic Moot Court competitions across the nation.

Additionally, Clausen Miller P.C. recently elected Partners **Ian R. Feldman** and **Joseph W. Szalyga** as equity Shareholders.

Ian Feldman has extensive litigation and trial experience defending contractors, design professionals, property managers, retail businesses, manufacturers, landowners, lawyers, accountants and brokers in all areas of professional, products, premises and construction liability matters. He is a member of the Orange County Bar Association, the Southern California Defense Counsel Association and the Los Angeles County Bar Association.

Joseph Szalyga concentrates his practice in the areas of general and professional liability defense. Joseph is routinely called upon to defend property owners, contractors, developers and other commercial clients in catastrophic bodily injury and wrongful death cases. He also has vast experience in leading liability investigations in high profile property damage cases, including large fires, explosions, structural collapses and matters involving damage to adjacent structures during demolition, excavation, underpinning and construction.

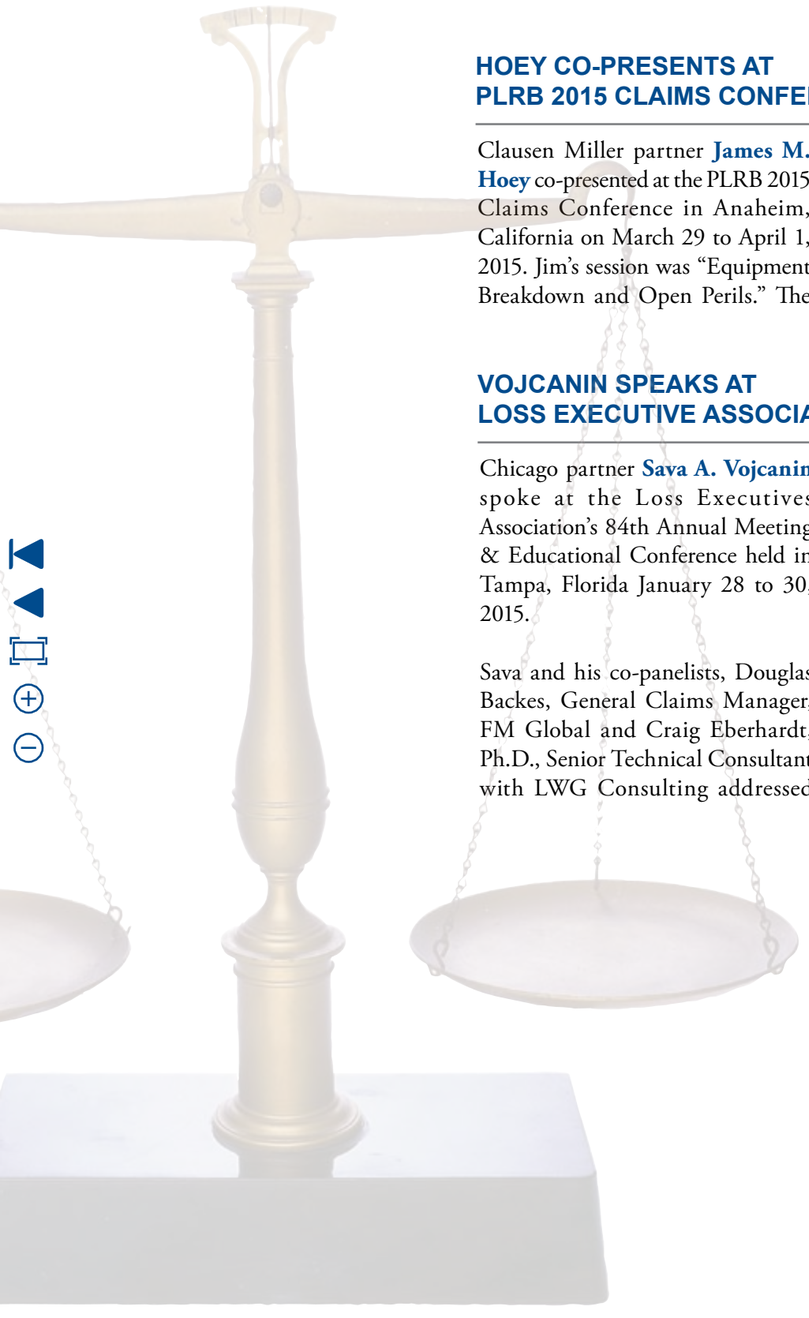
CM ATTORNEYS PREPARE LOYOLA'S JESSUP INTERNATIONAL LAW MOOT COURT TEAM FOR COMPETITION

Ed Shin, Vice President, General Counsel & Secretary of Clopay Building Products has served as a coach of Jessup International Law Moot Court team for the Loyola University School of Law. Ed called CM senior partner, **P. Scott Ritchie**, whom he has worked with on product liability issues for many years to see if Scott and the lawyers at Clausen Miller might be able to help him and his team gain an "extra edge" in the competition. Ed and Scott decided that a couple of "practice moot court rounds" might help the Jessup team sharpen their skills and give them the extra experience needed to succeed in their competition.

Seasoned litigators and former moot court participants were culled from the Clausen Miller attorney ranks, and they generously offered their time and experience to help Ed and Loyola's Jessup team. **Jimmy L. Arce**, **John D. Kendzior**, **Matthew E. Schweiger**, and **Joshua M. Wolkomir** all volunteered to serve as judges over two nights of practice rounds conducted at the Firm's Chicago office.

Ultimately, the Loyola Jessup Moot Court team took the lessons they learned in practice and placed 9th out of 22 teams in the competition, with team member Alex Moe finishing as the 6th best oralist out of approximately 100 competitors.

Congratulations to Ed and his team on a job well done!



HOEY CO-PRESENTS AT PLRB 2015 CLAIMS CONFERENCE

Clausen Miller partner **James M. Hoey** co-presented at the PLRB 2015 Claims Conference in Anaheim, California on March 29 to April 1, 2015. Jim's session was "Equipment Breakdown and Open Perils." The session addressed how Open Perils and Equipment Breakdown policies interface with each other. Please contact Jim at **jhoey@clausen.com** if you are interested in learning more about these topics.

VOJCANIN SPEAKS AT LOSS EXECUTIVE ASSOCIATION CONFERENCE

Chicago partner **Sava A. Vojcanin** spoke at the Loss Executives Association's 84th Annual Meeting & Educational Conference held in Tampa, Florida January 28 to 30, 2015.

Sava and his co-panelists, Douglas Backes, General Claims Manager, FM Global and Craig Eberhardt, Ph.D., Senior Technical Consultant with LWG Consulting addressed 600 senior-level executives meeting in General Session on the topic of "Nanotechnology: Prospects for the World's Smallest Claim." The trio discussed some of the technical, claims handling, and legal issues that are likely to arise in a first party property claim involving losses caused by, or damage to, nanotechnology.

For further details, please contact Sava directly at **svojcanin@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. Our currently available courses are listed below. Please view the individual course descriptions at www.clausen.com/index.cfm/fa/home.resources/resources.cfm for information regarding the state specific CE credit hours as well as course and instructor details.

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

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

Alternatives to Litigation: Negotiation and Mediation

An 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

CLAUSEN MILLER WINS SCHOOL CODE CASE BEFORE ILLINOIS SUPREME COURT

In *Lutkauskas v. Ricker*, 2015 IL 117090, the Illinois Supreme Court unanimously affirmed dismissal of a politically charged lawsuit brought by four taxpayers against Lemont-Bromberek Combined School District 113A. The taxpayers alleged that various School District officials, including the District's former superintendent, violated the Illinois School Code by failing to obtain board approval to transfer monies out of the District's working cash fund. They sought to recover millions of dollars in damages personally against the District officials, even though there were no allegations that District funds were improperly spent.

Facing an issue of first impression regarding interpretation of the School Code, Clausen Miller partner **Paige M. Neel** and associate **Mark J. Sobczak**, representing the former School District superintendent, successfully moved for dismissal of the suit before the Circuit Court of Cook County, Illinois. The taxpayers appealed. Paige and Mark briefed the case before the Illinois Appellate Court, First District, which affirmed. The Illinois Supreme Court granted the taxpayers leave to appeal. Clausen Miller partner and Appellate Practice Group Co-Chair **Melinda S. Kollross** briefed and argued the case before the Illinois Supreme Court. Throughout the litigation, Melinda, Paige, and Mark concentrated their arguments on the "windfall" recovery that would result if the taxpayers were allowed to pursue damages where they had not, and could not, allege that any District funds were spent on anything other than legitimate expenses. Writing for a unanimous court, Illinois Supreme Court Justice Charles R. Freeman agreed, stating that reading the School Code in the manner suggested by the taxpayers' "cannot be what the legislature intended." The case should prove instrumental in future school financing litigation.

This unanimous Illinois Supreme Court decision illustrates how Clausen Miller achieves superior results for our clients—through teamwork, and the breadth and depth of our collective trial, litigation and appellate skills and experience.

RYERSON PROVIDES COMMENTARY FOR *LAW360*

Clausen Miller P.C. senior partner **Thomas H. Ryerson** recently provided *Law360* with commentary regarding the Illinois Supreme Court's ruling in the case of *Illinois State Bar Ass'n Mutual Ins. Co. v. Law Office of Tuzzolino and Terpinas.*

Regarding the ruling, Tom Ryerson said "This is a long overdue pro-insurance industry opinion... This... should embolden the insurance industry to stand up for the integrity of the application process."

"Responsible law firms poll their partners annually, asking for real or potential malpractice claims," Ryerson said. "If anything, this sends a message to law firms to upgrade their internal polling and due diligence processes."

Tom also provided commentary regarding an Illinois Appeals court's recent ruling in *Illinois Tool Works, Inc*. According to *Law360*, the court ruled that three insurers must defend Illinois Tool Works Inc. in toxic tort suits, even if the underlying claims are unfounded, clarifying duty-to-defend standards under state law which give policyholders an edge in seeking coverage for suits containing vague and ambiguous allegations.

In the article, Tom gave insight into how the ruling should not discourage insurers from seeking relief in similar situations.

"In the underlying case, these are plaintiff's lawyers trolling for coverage by making the most vague allegations as possible in hopes of gaining insurance coverage"

Ryerson also noted that the ruling did not result in an expansion of established Illinois law on insurer's duty to defend.

Tom Ryerson is a senior partner of Clausen Miller P.C. and AV Preeminent rated. He has successfully tried and litigated, in state and federal courts, a wide variety of cases, including cyberliability, medical malpractice, professional liability, design professional liability, products liability, construction, commercial litigation, insurance coverage, municipal liability, employment practices liability and civil rights. In addition to extensive jury trial experience, he has substantial experience in alternative dispute resolution, mediation and arbitration.

KOLLROSS WINS NY COVERAGE APPEAL

Clausen Miller senior partner and Appellate Practice Group co-chair **Melinda S. Kollross** obtained a unanimous affirmance of summary judgment for her insurer clients in *Erie Ins. Co. v. Nick Radtke, et al*, No.2013-03493, ___ A.D.3d ___. The New York Appellate Division, Second Department held that a homeowner's mid six-figure claim for the costs of replacing defectively constructed retaining walls at his property on the Hudson River were excluded by the "Damage to Property" exclusions (2(j)(5) and 2(j)(6)) in the CGL policies issued to the general contractor and one of its subcontractors.

DICKINSON OBTAINS SUMMARY JUDGMENT FOR ENGINEERING FIRM IN PROPERTY DAMAGE CASE

CM attorney **William C. Dickinson** obtained summary judgment in favor of a civil engineering firm on claims arising out of extensive damage to two homes during a drainage pipe replacement project undertaken in the Village of Buffalo Grove. The plaintiffs alleged significant damage to their properties, including multiple cracks to their foundations.

Will presented evidence to Judge John Callahan, Jr. that many of the allegations brought by the four plaintiffs were not duties contracted for by the engineering firm. He also successfully demonstrated that the engineering firm complied with its contractual duties in preparing plans and specifications for the pipe replacement project, and that the firm's plans and specifications were not the cause of the alleged damages.

Please contact Will at **wdickinson@clausen.com** if you would like to discuss this matter.

on the
LITIGATION FRONT

THE TRIAL MONITOR'S CORNER: "What Else You Got?"— Potentially Unpreserved Error

by ***Joseph J. Ferrini***

Trial attorneys are gifted specialists, experts at how to conduct a trial through repeated exposure and repetition. With increasing specialization in the legal field, however, they rarely have exposure to the various pitfalls or missteps that can result in unpreserved error on appeal.

An example of this occurred in one of our recent assignments acting as appellate monitoring counsel at trial. Plaintiffs' counsel presented what the defense team considered to be a bloated package of life care damages. Defense counsel raised specific objections to the various components deemed objectionable. The problem arose in the judge's response on each item, which varied from "What else you got?," to "Next?," to "Ok…" The judge, however, never stated "denied" or "overruled" and his responses did not deliver a ruling on the merits on any of these issues. The general rule is that a party needs not only to object, but to obtain a definitive ruling on the record in order to preserve a claim of error. Without a definitive ruling on the record, there is nothing for the appellate court to review. After alerting defense counsel to the issue and discussing how to handle the matter, he subsequently spoke with the judge on the record, getting him to clarify that he had indeed denied all of the objections on the damages issue. By such action, a potential waiver involving hundreds of thousands of dollars in damages was averted.

Practice Pointer: Making a timely and specific objection is only one part of the "preservation of error" equation. The second equally important part of that "equation" is to always obtain a definitive ruling from the court on the record to preserve issues for appeal. As the foregoing shows, appellate trial strategists can assist in preserving error and in ensuring defense arguments and theories are in the best position for success on appeal. To learn how the Appellate Practice Group's trial monitoring expertise might assist you in eliminating and/or reducing liability exposure at trial, please contact **Joe Ferrini** at **jferrini@clausen.com**.

Medicare Advantage Organization Wins Double Damages Against Liability Insurer

by Amy R. Paulus and Matthew E. Schweiger

Claims for reimbursement of conditional payments from Medicare Advantage Organizations ("MAOs") represent a growing concern for liability insurers and self-insureds. A recent Florida federal court decision demonstrates this trend. In *Humana Medical Plan, Inc. v. Western Heritage Insurance Co.*, No. 12-20123, 2015 U.S. Dist. 31875 (S.D. Fla. Mar. 16, 2015), the court awarded double damages to the MAO (Humana) after the claimant refused to reimburse Humana out of the liability insurer's settlement payment.

The insurer defendant, Western Heritage Insurance Co., issued liability insurance to a condominium in Florida. The claimant fell on the condominium's premises and later filed a personal injury lawsuit. Western Heritage settled the personal injury lawsuit for $115,000. In the release, the claimant represented that there were no outstanding Medicare liens. Further confusing matters, Medicare sent a letter confirming that it did not process payments on the claimant's behalf.

However, Western Heritage learned that Humana made payments for the claimant's medical care. Western Heritage attempted to include Humana as a payee on its settlement check, but the claimant refused. The personal injury court ordered Western Heritage to issue a check without additional payees, but the claimant's counsel had to hold sufficient funds in a trust account to resolve any liens.

The claimant and Humana could not agree on a reimbursement amount, and they entered into litigation over the amount of Humana's claim. Separately, Humana filed a private cause of action in the Florida federal court against Western Heritage for reimbursement of conditional payments under the Medicare Secondary Payer ("MSP") statute. Humana sought double damages.

The Florida federal court first addressed the issue of whether MAOs like Humana can bring a private cause of action under the MSP statute. Following the decision in *In re Avandia*, 685 F.3d 353 (3d Cir. 2012), the court held that Humana could bring a private cause of action. After reaching that conclusion, the outcome was academic.

The MSP statute allows recovery of double damages if a primary

Continued on page 35

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The Minefield Of Appellate Practice Poses Dangers To Even "Silk Stocking" Law Firms—MISSED FILING DEADLINE SINKS $40 MILLION APPEAL

by ***Melinda S. Kollross***

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The Federal Circuit Court of Appeals holds that AT&T Inc. cannot appeal a nearly $40 million patent infringement judgment against it because its attorneys missed the appeal deadline, rejecting the "silk stocking" law firm's argument that the District Court did not properly notify it of orders which started the appeal time running. *Two-Way Media LLC v. AT&T, Inc.*, No. 2014-1302, ___ F.3d ___ (Mar. 19, 2015).

Facts

Two-Way Media ("TWM") sued AT&T for patent infringement. At trial, the jury found in favor of TWM and awarded $27.5 million in damages, to which over $11.3 million in prejudgment interest was added. The District Court entered final judgment consistent with the jury's verdict on October 7, 2013. On October 4, 2013, AT&T timely filed four motions for renewed judgment as a matter of law ("JMOL") or a new trial, thereby staying the 30-day time period for AT&T to file any notice of appeal from the final judgment. Because three of the four JMOL motions were confidential, AT&T moved to file those under seal.

On November 22, 2013, the court denied all of AT&T's JMOL motions and granted TWM's request for costs, entering judgment against AT&T on all pending claims. When the court initially docketed the denials of AT&T's motions, it labeled the three orders addressing the confidential motions as orders granting the motions to seal, not indicating that the same orders denied the relief sought in the underlying motions. The parties (through counsel) received notice of electronic filings ("NEFs") for each of those orders labeled "ORDER GRANTING [] Motion For Leave to File Sealed Document." However, the underlying orders, which could be accessed by clicking on the hyperlink in the NEFs, clearly denied the merits of AT&T's JMOL motions. At the same time, the court docketed its order denying the fourth, non-confidential JMOL, and its order on TWM's Bill of Costs. Both of these orders were included and properly identified in the November 22 NEFs to the parties. On November 25, the court updated the description of the orders on the docket, but did not send new NEFs to the parties.

On January 15, 2014, after the appeal period had expired, AT&T asserts that it first discovered that the November orders actually denied all of its post-trial motions.

Analysis

In a 2-1 decision, the Federal Circuit affirmed. Applying Fifth Circuit law, the Court of Appeals reviewed the District Court's decision denying relief under FRAP 4(a)(5) and (6) for abuse of discretion.

No Excusable Neglect Or Good Cause Shown Under FRAP 4(a)(5)

In order to qualify for an extension of the appeal period under FRAP 4(a)(5), the moving party must show "excusable neglect or good cause." The Appellate Court held that the District Court did not abuse its discretion in finding that AT&T had failed to make the requisite showing. Although the NEFs communicated an arguably incomplete description of the orders, even a total lack of notice, standing alone, would not be enough to justify extending the time for filing an appeal. Also, the NEFs were sent to 18 attorneys at the two firms representing AT&T, and legal assistants at those firms actually downloaded copies of the orders onto the firms' internal systems. Moreover, the District Court on the same day also issued orders denying the unsealed JMOL motion and entered a bill of costs—both of which produced accurately labeled NEFs. In addition, although it did not issue updated NEFs, the District Court promptly corrected the docket entries to state that the orders denied the underlying JMOL motions. "The civil docket, therefore, had a complete description of those orders had AT&T bothered to check the docket as it should have done."

No Reopening The Appeal Period Pursuant To FRAP 4(a)(6)

In order to obtain relief under FRAP 4(a)(6), the movant must demonstrate that they did not receive notice of the judgment and that reopening the appeal time would not prejudice any other party. The District Court found that AT & T did receive notice of the entry of judgment when it received and downloaded those judgments from the electronic docket, and that TWM would be prejudiced by reopening the appeal period. The Appellate Court found no error in the District Court's fact findings and no abuse of discretion in its refusal to grant AT&T's motion simply because AT&T did not receive an NEF of the corrected docket entry. The Appellate Court explained:

> Rule 4(a)(6) does not apply when a party simply shows it did not read a court order—justifiably or not. It only applies when a party receives *no notice* of that order….AT&T's argument that it never read the underlying orders because it was confused by the NEFs it received, is, therefore, irrelevant; the only question for purposes of Rule 4(a)(6) is whether it *received* notice of the order….Where an order is actually received, but ignored, Rule 4(a)(5) is the procedural vehicle counsel must pursue to seek relief from its failure to read or digest the order.

Rejecting AT&T and the dissent's reliance on much older case law, the majority reaffirms counsel's obligation to keep tabs on the electronic docket, stating "[in] this era of electronic filing—post-dating by some 60 years the era in which the cases cited by the dissent were issued—we find no abuse of discretion in the district court's decision to impose an obligation to monitor an electronic docket for entry of an order which a party and its counsel already have in their possession and know that the clerk at least attempted to enter."

Learning Points: (1) Attorneys have a duty to keep apprised of the status of their litigation. Failure to receive notice of entry of a judgment or order is not a sufficient excuse to justify a missed deadline for filing a notice of appeal. Attorneys should regularly check the docket and/or otherwise communicate with the court as to the status of pending motions. Don't "wait to be notified." The Clausen Miller Appellate Practice Group routinely checks dockets to ascertain whether orders/judgments have been entered so we can avoid the costly mistake that occured in *AT&T*.

(2) Attorneys must read the substance of each order received from the court. Relying on email notifications received from an electronic filing system is not sufficient, as such notifications may contain errors or be incomplete.

Clausen Miller's Appellate Practice Group is frequently retained during trial or at the post-trial motion stage to ensure that issues are properly preserved and jurisdiction successfully transferred from the trial to the appellate court. Our experience navigating the "minefield of appellate practice" helps clients avoid the disastrous loss of appeal rights which befell AT&T in this case. ♦

Captive Insurance Agents Owe Duty Of Care To Insureds

by ***James M. Hoey***

James M. Hoey
is a senior partner of Clausen Miller P.C. and is AV® Preeminent™ rated. He is a member of the American Bar Association and is active in the Property Insurance Law Committee. He has lectured extensively on matters relating to property insurance and has authored and coauthored articles concerning such topics as boiler and machinery insurance, builder's risk insurance, business interruption and appraisal. Jim is active in the Property Loss Research Bureau and is a frequent lecturer and workshop panelist.
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The Illinois Supreme Court holds that captive insurance agents are insurance producers and owe a duty of ordinary care to insureds within the meaning of 735 ILCS 5/2-2201. *Skaperdas v. Country Casualty Ins. Co.*, 2015 IL 117021.

Facts

In 2006, Country Casualty, through its agent Tom Lessaris, issued an automobile insurance policy to Skaperdas. Skaperdas's fiancée, Valerie R. Day, was subsequently involved in an accident while driving one of his vehicles. Country Casualty covered the loss but required Skaperdas to change his policy to include Day as an additional driver.

Skaperdas met with Lessaris to request coverage for Day under the policy. Lessaris prepared the policy, but identified only Skaperdas as a named insured. Day was not included as a named insured. The declarations page for the policy, however, identified the driver as a "female, 30–64."

Following issuance of the policy, Day's minor son, Jonathon Jackson, was struck by a vehicle while riding his bicycle and seriously injured. The driver's $25,000 auto policy limit was insufficient to cover Jackson's medical expenses. Plaintiffs, therefore, made a demand for UIM coverage under the Country Casualty policy. Country Casualty denied the claim on the ground that neither Day nor Jackson was listed as a named insured on the policy.

Skaperdas and Day sued Lessaris and Country Casualty. Count I alleged that Lessaris was negligent in failing to procure the insurance coverage requested by Skaperdas. Plaintiffs alleged Lessaris breached his duty to exercise ordinary care and skill in renewing, procuring, binding, and placing the requested insurance coverage as required by Section 2–2201 of the Illinois Insurance Code (735 ILCS 5/2–2201 (West 2010)). Count II alleged Country Casualty was responsible for the acts or omissions of its agent under the doctrine of *respondeat superior*. Count III sought reformation of the policy to include Day as an additional named insured, while Count IV sought a declaration of coverage.

Lessaris moved to dismiss the negligence claim asserting that he did not owe plaintiffs a duty of care in procuring the requested insurance coverage. Country Casualty also moved to dismiss the *respondeat superior* claim, asserting that it was not liable for Lessaris' alleged negligence because he did not owe plaintiffs a duty. The circuit court granted the motions to dismiss Counts I and II.

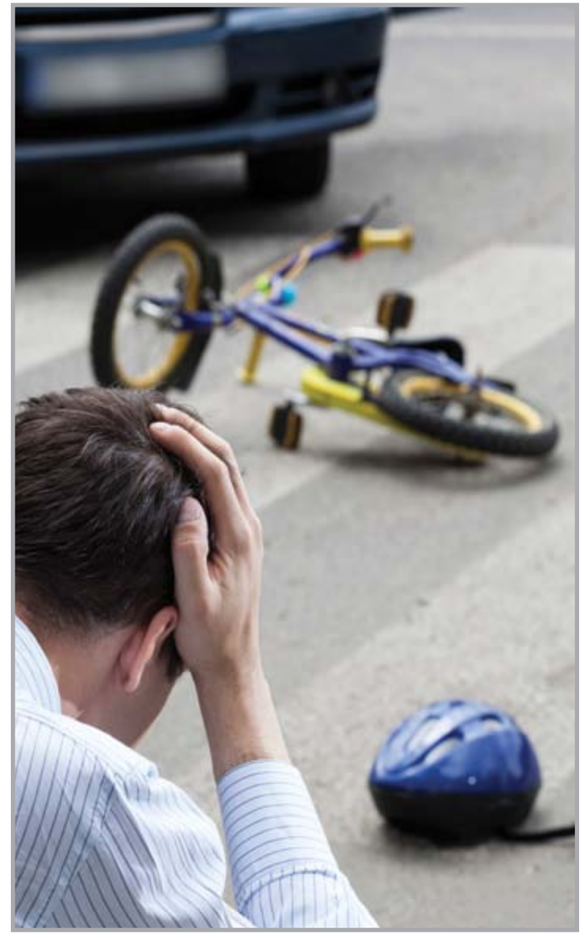
The appellate court reversed and remanded. It held that a plain reading of Section 2–2201 together with the definition of "insurance producer" in Section 500–10 of the Code (215 ILCS 5/500–10 (West 2010)), established that "any person required to be licensed to sell, solicit, or negotiate insurance has a duty to exercise ordinary care in procuring insurance." Thus, as an insurance producer, Lessaris owed plaintiffs a duty of care in procuring insurance coverage for them.

Analysis

The Illinois Supreme Court unanimously affirmed, holding that captive insurance agents are insurance producers and owe a duty of ordinary care to insureds within the meaning of 735 ILCS 5/2-2201.

The Supreme Court discussed the nature of the duty imposed, which is tied to the statutory language. The Court stated that the statute does not require an agent to obtain the best possible coverage for a customer, but only requires the agent to exercise ordinary care in obtaining the coverage requested by the insured or proposed insured. If a captive agent's company does not offer the coverage requested, the duty may be satisfied by advising the customer that he or she should look elsewhere. The Court further stated that "a duty may not be imposed under Section 2-2201(a) based on a vague request to make sure the insured is covered."

Learning Point: Section 2-2201 of the Illinois Code imposes a duty on an insurance producer to exercise ordinary care and skill in reviewing, procuring, binding, or placing the coverage requested by the insured or proposed insured. An insurance producer includes captive agents. ♦



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Illinois Follows Majority That Timing Of Malicious Prosecution Is What Implicates Coverage

*by **Thomas H. Ryerson** and **Ilene M. Korey***

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Several Illinois courts have recently considered what policy year is implicated for damages claimed for personal injuries arising out of a malicious prosecution. The majority of courts around the country have followed the rule that although a party must be exonerated in order for a claim of malicious prosecution to accrue, for purposes of implicating coverage, a "maliciously prosecuted criminal defendant suffers injury and damage immediately upon being prosecuted." Therefore, policies in effect at the time of the prosecution and not the exoneration may be implicated to provide coverage. Illinois has now indicated it is following the majority approach in a recent appellate court decision, *Indian Harbor v. City of Waukegan*, 2015 IL App (2d) 140293 (March 6, 2015).

Facts

In 1992, after an eleven year-old girl was raped and murdered, Juan Rivera was arrested and interrogated at Lake County jail. While under interrogation, Rivera alleges that the defendant police officers coerced his confession by depriving him of sleep and other physical and psychological abuse, failing to give him his *Miranda* warnings or allowing him an attorney despite requesting one. The defendants allegedly coerced Rivera to sign a false confession even though they knew there was no evidence connecting him to the murder and in spite of their knowledge that Rivera was wearing an electronic ankle tracking device that placed him at home on the night of the murder.

The defendants, including the investigating task force, officers, and prosecutors also allegedly continued to prosecute Rivera for the victim's murder despite the fact that DNA evidence demonstrated that another man raped and killed her. The defendants also allegedly hid physical evidence related to the murder weapon and offered impermissible incentives to jailhouse snitches to fabricate evidence against Rivera.

In November 1993, Rivera was tried and convicted for the murder and sentenced to life in prison without the possibility of parole. Rivera was retried and convicted in September and October 1998, and sentenced again to life in prison without the possibility of parole. Based on exonerating DNA evidence, the Illinois Appellate Court Second District reversed and acquitted Rivera's conviction on December 9, 2011, after Rivera served twenty years. Rivera filed a complaint against Lake County and others on October 30, 2012 alleging that the City and six former police officers, and county personnel were responsible for denying him a fair trial and the loss of liberty that resulted from his wrongful conviction. He alleged a number of claims, including state claims for malicious prosecution, false imprisonment and due process claims pursuant to 42 U.S.C. §1983. Rivera also alleged that certain officers later defamed him to newspapers insisting that he committed the crimes.

Indian Harbor Insurance Company filed a declaratory judgment action and motion for judgment on the pleadings seeking a ruling that none of Rivera's claims were covered by its policies because no "wrongful acts" occurred within the Indian Harbor policy periods. The City and officers claimed that Rivera's lawsuit was covered by the law enforcement liability policies issued during the years of the exoneration, November 1, 2011 to November 1, 2013, because insurance coverage for malicious prosecution is triggered by the termination of the prosecution in the accused's favor. The insureds argued that Rivera's purported injuries were ongoing and continued until his conviction was reversed on December 9, 2011, a date that fell within the first policy period. The trial court granted the motion and this appeal followed.

Analysis

The Court held that Indian Harbor did not owe coverage under the two policies it issued to the City years after the malicious prosecution took place but in the time frame of the exoneration. Under the policies' identical insuring language, the policies limited the scope of coverage to pay on behalf of the insured all damages if an insured's wrongful act occurs during a policy period and results in injury, including "malicious prosecution." While a malicious prosecution cause of action does not accrue until the claimant is exonerated, it is the initiation of the alleged malicious prosecution that is the triggering event for coverage of a malicious prosecution claim. This is because a typical occurrence based policy reflects the intent to insure only for the insured's acts or omissions that happen during a policy period. In following the majority of decisions that have considered the issue, the *Indian Harbor* court held that the "wrongful act" and the "injury" that trigger coverage must be in the policy period in order for the policy to be implicated.

Citing with approval the same appellate district's earlier decision of *St. Paul Fire and Marine Ins. Co. v. The City of Zion*, 2014 IL App (2d) 131312, *leave to appeal denied*, 388 Ill. Dec. 9, 23 N.E.2d 1207 (Ill. Jan. 28, 2015), the Court determined that an injury from a malicious prosecution action "happened" at the time of the prosecution, and not at the time of the exoneration. Like the *St. Paul* court, the *Indian Harbor* panel found it difficult to see how a criminal defendant's release from prison could be described as an "injury." Instead, because the "injury flows immediately from the tortious act of filing a criminal complaint with malice and without probable cause," that is the wrongful act that triggers coverage.

In rejecting the argument that Rivera's malicious-prosecution suit included other "wrongful acts" such as conspiracy, intentional infliction of emotional distress and failure to intervene that triggered coverage within multiple policy periods, the Court held that all of the acts or omissions alleged to have occurred were really continuations of the same alleged harm caused by the original malicious prosecution. The purported ongoing acts of conspiracy that prolonged Rivera's incarceration were not new harmful acts. Rather, they were the continuing effects of Rivera's arrest and convictions of rape and murder. On the one claim for defamation, however, the Court relied on the notion the defamation was outside of law enforcement activity and therefore was outside the coverage provided by the policy.

Learning Point: There is a split of authority nationally over when an insurance policy is triggered by a malicious prosecution claim. The majority view appears to be that the crucial event for insurance coverage purposes is the filing of the purportedly malicious suit rather than its ultimate

termination. Under the *Indian Harbor* holding and arguably the *St. Paul* decision, Illinois appears to be joining the majority of jurisdictions that find that occurrence policies requiring injury in the policy period are not implicated at the time of exoneration but rather, when the "injury" from the malicious prosecution occurs. Additionally, a strong argument can be made that any other causes of action arise from the unbroken and uninterrupted continuum of a single occurrence of malicious prosecution. Applying this theory, only the policies in effect at the time when the damage is sustained from the malicious action may be implicated.

It should be noted that the *Indian Harbor* decision is in direct contrast with a recent federal court decision addressing the same set of facts and parties. In *Westport Ins. Corp. v. City of Waukegan*, __ F.Supp.3d __, 2014 WL 7051374 (N.D. Ill. 2014), the federal district court determined that Westport owed a duty to defend the City of Waukegan defendants because arguably, Rivera alleged a separate injury when his false confession was used in violation of the self-incrimination clause of the Fifth Amendment when Rivera was retried and convicted in October 1998.

With the state appellate courts in conflict with the federal court, it is possible that the conflict may prompt the Illinois Supreme Court to accept review. The City of Waukegan has petitioned for leave to appeal. ♦

Clausen Miller Obtains Significant Seventh Circuit Victory In TCE Contamination Suit

by ***Timothy F. Jacobs***

On January 23, 2015, the Seventh Circuit affirmed summary judgment in favor of an insurer in an environmental insurance coverage dispute venued in the U.S. District Court for the Southern District of Indiana. *Visteon Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, No. 14-2725, 777 F.3d 415 (7th Cir. 2015). The policyholder (Visteon) sued National Union seeking to recover $8 million related to third party and governmental claims arising from TCE contamination at its former manufacturing facility in Connersville, Indiana.

Facts

Initially, Visteon alleged that Indiana law should apply to the coverage litigation, as the claim arose in Indiana. Under Indiana law, National Union's pollution exclusion would be deemed ambiguous and ineffective to exclude coverage. National Union argued that Michigan law applied because, among other things, Visteon had more facilities in Michigan and had its headquarters in Michigan. Under Michigan law, National Union's pollution exclusion would exclude coverage for the claims against Visteon. After the District Court found that Michigan law applied, Visteon asserted that the contamination arose from a "completed operation." Under the applicable policy language, the pollution exclusion did not apply to losses arising out of a completed operation. Entering judgment in favor of National Union, the District Court disagreed with Visteon's argument, holding that the pollution exclusion applied because Visteon's pollution did not arise from the completed operations hazard so as to fall within the exception to the pollution exclusion. Visteon appealed.

Analysis

Judge Posner writing for a unanimous panel that included Chief Judge Wood and Judge Easterbrook, held that: (1) Michigan law applied to the interpretation of the National Union policies; (2) the products and completed operations exception to the pollution exclusion did not apply to Visteon's TCE contamination liability; and (3) the pollution exclusion barred coverage so that National Union did not owe any duty to defend Visteon's claims. Therefore, National Union had no duty to defend or indemnify Visteon against the underlying environmental claims.

Choice Of Law

The *Visteon* court began its choice of law analysis by looking to the choice of law rules for the forum state, Indiana. Under Indiana choice of law rules, it applied Indiana's uniform contract interpretation approach to choice of law. *See National Union Fire Ins. Co. of Pittsburgh, PA v. Standard Fusee Corp.*, 940 N.E.2d 810 (Ind. 2010). Noting that the insurance coverage case was a contract action distinct from the underlying claims that gave rise to the insurance coverage

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action, the *Visteon* court explained that the use of the uniform contract interpretation approach to choice of law was "eminently sensible," and noted the great diversity of Visteon's products and locations around the world as justification for applying this approach.

Under the uniform contract approach, the law of a single state is applied to all risks under the policy. Although it did not apply the choice of law factors for the uniform contract approach in rote fashion and stated that "multifactor tests" were the "bane of modern jurisprudence," the Court cited *Standard Fusee* in enunciating the factors it evaluated: namely principal location of insured risk; the location of Visteon's headquarters; the place of performance; and the location where the contract was created. In comparing Michigan and Indiana, the Court noted Michigan had more manufacturing facilities, was the location of Visteon's world headquarters, and was where its insurance personnel, who administered and negotiated its insurance contracts, were located. Although it did not use the same terms, the Court concurrently identified and discounted the place of performance factor by noting "in the present case the risk materialized in Indiana, but that could not have been foreseen." Finally, the Court found that the location where the contract was created was indeterminate.

Visteon had advocated that a new choice of law analysis—the location of the specific risk—should control the choice of law determination. Under this theory, when the principal location of the insured risk is indeterminate, the location where the specific risk at issue in the litigation is greatest should control the determination. Here, Visteon argued that 1) there was no principal location of the insured risk due to its numerous multinational facilities and worldwide operations; and 2) the risk of TCE contamination was greatest at the Connersville facility. However, the Court found this position was fundamentally inconsistent with the uniform contract interpretation approach. This would illogically result in Indiana law applying to all subsequent coverage disputes, wherever they occurred, an outcome the Court thought "cannot be intended." Further, although neither party raised this issue, the Court suggested that Visteon's approach could lead insurers to charge multiple premiums to the same insured for the same insurance simply because its operations were located in many jurisdictions whose laws governing contract interpretation may differ.

Application Of The Pollution Exclusion Under Michigan Law

The Court initially held that the core language of the National Union pollution exclusion "obviously encompassed the TCE leak" and that Michigan enforced this exclusion. Distilling Visteon's argument to its core, the Court defined Visteon's argument as "whether the TCE leaked by the Connersville Plant was a result of completed work." Visteon argued that its work was complete each time it completed a contract to supply goods to its customers, and National Union argued that operations at the plant were not complete until 2007, when Visteon shuttered the plant. The Court held "Visteon's interpretation can't be right, because it erases the line between completed and ongoing operations." While it described the definition of "complete" as "murky," the Court concluded an interpretation where all work was deemed complete upon satisfaction of each individual contract was not plausible, as it would erase the exclusion for all pollution at the plant. Essentially, Visteon's argument would interpret the "clause as swallowing the entire pollution exclusion clause—the exception becoming the rule." Visteon's interpretation also failed to acknowledge that TCE leak expenses needed to be apportioned between products the Connersville plant made under contract and those that it hoped to sell.

The Court then observed that other courts had interpreted the completed operations hazard "narrowly – more narrowly indeed than required to decide this case in favor of the insurance company." Specifically, the Court noted that the Fourth Circuit had ruled, in *Liberty Mutual Ins. Co. v. Triangle Industries, Inc.*, 957 F.2d 1153 (1992), that the completed operations hazard was a form of protection for insureds "who provide a service in addition to or instead of a particular product" and that "[c]ommentators are in complete agreement that this exclusion refers to accidents caused by defective workmanship which arise after completion of work by the insured on construction or service contracts." It then cited multiple state and federal courts in different jurisdictions that held pollution arising from ongoing operations, including manufacturing operations, did not fall within the completed operations hazard clause, "even though [the] insureds were completing their performance of particular sales contracts with customers."

Learning Points: *Visteon* is important to insurers doing business in Indiana. It is an instance where an Indiana court refused to automatically apply Indiana law, but, instead, undertook a thoughtful analysis leading to the application of another jurisdiction's law, even though the result was likely to be adverse to the insured. The latter aspect of the ruling, which analyzed the contours of what constitutes completed operations hazard vs. ongoing operations, will likely be cited in future coverage disputes. The completed operations hazard/ongoing operations dispute promises to be an area of significant litigation as pollution exclusions with completed operations exceptions are incorporated into insurance policies.

Editor's Note: Clausen Miller successfully defended National Union in this case before the federal district court and the Seventh Circuit Court of Appeals. For more information, please contact **Mark Zimmerman** (**mzimmerman@clausen.com**) or **Tim Jacobs** (**tjacobs@clausen.com**). ♦

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Second Circuit Rejects Belated Attempt To Address Medicare Reimbursement In Settlement

by ***Amy R. Paulus*** *and* ***Matthew E. Schweiger***

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A recent Second Circuit decision serves as the latest example of parties failing to address Medicare reimbursement during settlement negotiations. The unpublished case demonstrates that defendants should consider Medicare reimbursement a material settlement term in all cases where an injured plaintiff is or will soon be Medicare eligible.

Facts

In *Cole-Hoover v. New York Dept. of Correction & Community Services*, No. 13-4555, 2015 U.S. App. LEXIS 2107 (2d Cir. Feb. 11, 2015), the parties settled the case in November 2012. The parties orally placed the terms of the settlement on the record, but informed the trial court that issues related to Medicaid or Medicare were not material to the settlement. Accordingly, the court stated that the settlement would be effective that day consistent with the material terms read into the record. Of course, the parties failed to finalize the terms of the settlement.

Analysis

According to the Second Circuit's unpublished decision, the parties could not agree on terms related to potential future Medicare benefits that the plaintiff might receive. The plaintiff refused to provide a physician's letter demonstrating that the injuries required no further treatment. The plaintiff also refused to agree to set aside money from the settlement funds to reimburse Medicare for any future payments. Although those terms were important enough to prevent finalization of a written settlement agreement, the trial court ruled that the terms were not material based on counsel's prior statement on the record. Thus, the court held that a settlement agreement existed, and the Second Circuit affirmed.

Learning Point: *Cole-Hoover* demonstrates the consequences of failing to treat reimbursement of Medicare benefits paid on the plaintiff's behalf as a material settlement term. The defendants ended up with a settlement agreement that failed to address their concerns about Medicare reimbursement. Perhaps worse, the litigation dragged on for over two years after the original "settlement" in November 2012. Thus, the parties spent significant time and money negotiating, arguing before the trial court, and appealing to the Second Circuit because they failed to address Medicare's interests during settlement negotiations.

Defendants cannot assume that the parties will agree on Medicare issues after they come to terms on a settlement amount. Cases continue to arise in which Medicare issues thwart settlements or result in courts imposing unfavorable terms. To prevent this, defendants must make issues related to Medicare material terms of any personal injury settlement. ♦

AGENTS/BROKERS

FIRE LOSS RAISES "SPECIAL RELATIONSHIP" QUESTIONS

Indiana Restorative Dentistry, P.C. v. Laven Ins. Agency, Inc., 2015 Ind. LEXIS 173 (Ind.)

Insured sued insurance agent to recover $500,000 fire coverage shortfall. ***Held:*** Agent may owe tort duty to procure adequate insurance but lacks duty to advise about adequacy absent a "special relationship." More than a long-term relationship is needed. Factors include whether agent exercises broad discretion as to insured's needs, counsels regarding specialized coverage, claims to be highly skilled so as to win insured's reliance, and is compensated above customary premiums for expert advice. ***Further held:*** Insured and agent had no meeting of the minds sufficient to impose contract liability. There must be agreement as to the subject of insurance, risk insured, the amount of coverage, the limit and duration of risk, and expected premium. An implied contract may be based on past dealings if insured gave sufficiently definite directions. There is no evidence that insured requested full coverage or that a meeting of minds occurred.

BAD FAITH

INSURER'S ASSERTION OF GOOD FAITH NOT WAIVER OF ATTORNEY-CLIENT PRIVILEGE

Everest Indemnity Ins. Co. v. Rea, 342 P.3d 417 (Ariz. App.)

Insureds alleged that insurer committed bad faith by entering into a settlement agreement exhausting liability coverage to the detriment of certain insureds. Insurer asserted that its decision to settle was made in good faith based on its subjective beliefs as to the merits of the case and with advice of counsel. Insureds contended that insurer waived the attorney-client privilege by asserting its subjective good faith as a defense and sought communications between the insurer and its attorneys. ***Held***: The insurer did not impliedly waive the attorney-client privilege because it did not assert a claim or defense that it depended upon the advice of counsel in forming its subjective beliefs about settlement.

CIVIL PROCEDURE

NO NOTICE OF CLAIM NECESSARY FOR HUMAN RIGHTS LAW CLAIM AGAINST A MUNICIPALITY

Margerum v. City of Buffalo, 2015 N.Y. LEXIS 250 (N.Y.)

City firefighters brought disparate treatment racial discrimination claim under the New York State Human Rights Law, alleging reverse discrimination by the City in the selection of firefighters. The City unsuccessfully moved to dismiss the complaint because no Municipal Law § 50 notice of claim had been filed by the firefighters. ***Held:*** Human rights claims are neither tort actions nor personal injury, wrongful death, or damage to personal property claims and thus do not require notice under § 50.

CONDOMINIUM LAW/ BUSINESS JUDGMENT RULE

BUSINESS JUDGMENT RULE PROTECTS BOARD OF DIRECTORS' CONDUCT

Pomerance v. McGrath, 124 A.D.3d 481 (N.Y. App. Div. 1st Dep't)

Plaintiff sued condominium board alleging various violations regarding board elections, use of condominium funds, and imposition of assessments. ***Held:*** Under the business judgment rule, the court should defer to the board's determinations so long as the board acts in good faith, within the scope of its authority under the bylaws, and to further a legitimate interest of the condominium.

DAMAGES

EVIDENCE OF A COMPROMISED TRADE-OFF ON LIABILITY AND DAMAGES VOIDS JURY VERDICT

Nakasato v. 331 W. 51st Corp., 124 A.D.3d 522 (N.Y. App. Div. 1st Dep't)

Restaurant patron sustained severe brain and spinal injuries when he fell down a staircase that had no upper landing. The jury entered a verdict for the plaintiff, but found him to have been 75% liable for the accident. It awarded him $88,797.27 in stipulated past medical expenses, but provided no additional amount for past or future pain and suffering or economic loss. ***Held:*** The extensiveness of plaintiff's injuries could not be reconciled with the low damages award and signaled an improper compromise verdict, requiring a re-trial.

EVIDENCE

CLIENT CAN'T PROVE MALPRACTICE WITH MEDIATION EVIDENCE

Amis v. Greenberg Traurig LLP, 2015 Cal. App. LEXIS 247 (Cal. App. 2 Dist.)

Plaintiff filed a legal malpractice action against his attorneys arguing that they failed to properly advise him of the risks associated with entering into a settlement agreement in the underlying case. Plaintiff admitted all "discussions," "explanations," and "recommendations" that he had with or received from his attorneys regarding the settlement agreement occurred during mediation of the underlying case. ***Held:*** California's broad mediation confidentiality privilege prohibits introduction into evidence of any statements made during a mediation or arbitration proceedings. Accordingly, plaintiff could not prove his malpractice claim through the acts of his attorneys during mediation, nor could a jury be allowed to infer negligence from the surrounding circumstances because the attorneys could not rebut the inference by offering evidence of what actually occurred at mediation.

TESTIMONY OF NAPRAPATH ADMISSIBLE

Walnut Creek Nursery, Inc. v. Banske, 26 N.E.2d 648 (Ind. App.)

A licensed Illinois naprapath testified for plaintiff during slip-and-fall trial. ***Held in a case of first impression:*** If connected to injury, naprapath's testimony is admissible. Naprapathy is soft tissue manipulation designed to help the body heal itself. Witness's Illinois license required her to be at least 18 and of good moral character, a graduate of a two-year college program, a graduate from an approved naprapathy program, and to have passed a fitness examination. The naprapath testimony was unscientific but helpful for the jury's understanding of plaintiff's injuries and treatment.

EXCESS INSURANCE

EXCESS CARRIER'S ALLOCATION OF SETTLEMENT PROCEEDS FAILS TO TRIGGER REINSURANCE COVERAGE

New Hampshire Ins. Co. v. Clearwater Ins. Co., 2015 N.Y. App. Div. LEXIS 2452 (N.Y. App. Div. 1st Dep't)

Excess carrier entered into a settlement agreement with its insured regarding asbestos-claims worth hundreds of millions of dollars. The agreement ascribed 100% of the settlement amount to asbestos product liability claims within the coverage of the reinsurer, and no amount to other settled claims. ***Held:*** The record did not establish that the allocation of settlement passed muster even under the forgiving standard that applies under the "follow the settlements" doctrine. A triable issue was raised regarding the reasonableness of the excess carrier's allocation of 100% of settlement proceeds to a single category of claims covered by the reinsurer.

FIRST-PARTY PROPERTY

NO COVERAGE FOR RECALLED GROUND BEEF UNDER CONTAMINATION POLICY

Windsor Food Quality Co., Ltd. v. Underwriters of Lloyds of London, 2015 Cal. App. LEXIS 195 (Cal. App. 4 Dist.)

Plaintiff sought coverage under its first-party contamination products policy related to a voluntary recall of ground beef contained in its products. The carrier denied coverage on grounds that the beef was not an insured product under the policy and that, even if it was, it was not "tampered with" so as to give rise to coverage. ***Held:*** Over a dissent, the Court of Appeals affirmed. After noting that the policy at issue was not a product recall policy, it concluded that the policy's definition of "insured product" clearly did not encompass an ingredient obtained from a supplier, like the ground beef, before it was incorporated into the insured's product. It also held that there was no evidence that the supplier's employees had "tampered" with the beef and that any claims for accidental contamination were untimely under the policy's terms.

EXCLUDED WATER MAIN BREAK DAMAGE NOT RESURRECTED BY POLICY EXCEPTION

Platek v. Town of Hamburg, 2015 N.Y. LEXIS 252 (N.Y.)

A subsurface water main abutting plaintiffs' property burst, causing

water to flood into and damage their finished basement. Plaintiffs made a claim under their homeowners' policy and the insurer disclaimed based on an exclusion for "[w]ater …, regardless of its source, which … flows, seeps or leaks through any part of the residence." In response, the plaintiffs cited a sudden and accidental exception in the policy and submitted an engineer affidavit, stating the water main "suddenly exploded from the internal water pressure." ***Held:*** The exclusion clearly barred coverage and the sudden and accidental exception was an ensuing loss exception. Such an exception "at least requires a new loss to property that is of a kind not excluded by the policy," which was not the case here.

JURY TRIALS

IMPROPER ADMISSION OF ANSWERS TO REQUESTS TO ADMIT LEADS TO NEW TRIAL

Gonsalves v. Li, 182 Cal. Rptr. 3d 383 (Cal. App. 1 Dist.)

Automotive salesperson sued a prospective vehicle purchaser for injuries he sustained during a test-drive. At trial, the salesperson introduced into evidence the driver's negative responses to certain requests to admit and argued in closing that they proved the driver's negligence and failure to take responsibility for his actions. The jury returned a verdict for the salesperson. ***Held:*** The trial court erred in admitting the negative responses into evidence and a new trial was warranted. Litigation conduct is not generally admissible at trial and the negative responses were not admissible for impeachment purposes because they were not inconsistent with the driver's trial testimony.

JUDGE ERRED IN INFORMING PROSPECTIVE JURORS THAT PLAINTIFF WAS UNDOCUMENTED IMMIGRANT

Velasquez v. Centrome, Inc., 183 Cal. Rptr. 3d 150 (Cal. App. 2d Dist.)

Plaintiff, an undocumented immigrant, brought products liability and negligence actions against food-flavoring manufacturers contending that workplace exposure to the chemical compound diacetyl caused lung disease. Defendants intended to introduce evidence of plaintiff's immigration status as relevant to his candidacy for a lung transplant. During *voire dire*, the judge informed the prospective jurors that plaintiff was an undocumented immigrant, but later ruled evidence of his immigration status was inadmissible. ***Held:*** The trial court erred in informing prospective jurors of plaintiff's immigration status. Evidence of immigration status is highly prejudicial and irrelevant where an undocumented immigrant plaintiff is not claiming damage for lost earnings or earnings capacity.

LEGAL MALPRACTICE

TIME FOR CLAIM HAD EXPIRED DESPITE CONTINUOUS REPRESENTATION DOCTRINE

Alizio v. Ruskin Moscou Faltischek, P.C., 2015 N.Y. App. Div. LEXIS 1898 (N.Y. App. Div. 2d Dep't)

Plaintiff brought a legal malpractice action in 2013 against a defendant firm he had hired in 2004 to represent him in certain litigation. The alleged malpractice occurred in 2007 and the firm was removed from representation of plaintiff in 2010. The firm moved to dismiss the complaint based on statute of limitations grounds, which the lower court denied. ***Held:*** While the record clearly established that defendant continued to represent plaintiff until 2010, tolling the limitations period for a time, the record reflected that more than 3 years had passed since the representation ceased in 2010, and the lower court erred in denying defendant's motion.

LIABILITY INSURANCE COVERAGE

LATE NOTICE BARS COVERAGE FOR ASBESTOS CLAIMS

Anco Insulations, Inc. v. National Union Fire Ins. Co., 2015 U.S. App. LEXIS 2973 (5th Cir.)

Insured sought coverage for a number of asbestos-related suits against it since 1987. It was undisputed that the insured tendered the underlying suits in 2009. ***Held:*** The insurer had no obligation to reimburse the insured for defense costs prior to the date the insured first began forwarding asbestos lawsuits to the carrier. Further, the insured cited no precedent for its contention that the insured's late notice was excused because the insurer did not search for all policies at issue when the insured tendered a claim under another policy.

NO ESTOPPEL WHERE INSURER HAD NO DUTY TO DEFEND

Illinois Ins. Guar. Fund v. Chicago Ins. Co., 2015 IL App (5th) 140033 (Ill. App.)

Plaintiff Insurance Guaranty Fund brought a declaratory judgment action against a health care clinic's liability insurer to determine whether a claims-made policy provided coverage for a physician who was no longer employed by the clinic. ***Held:*** The insurer did not owe a duty to defend or indemnify the formerly employed physician because he did not qualify as an insured under the policy. While plaintiff contended that insurer was estopped from raising coverage defenses, the estoppel doctrine applies only where an insurer has breached its duty to defend. Because the physician did not qualify as an insured under the terms of the policy, insurer had no duty to defend, and therefore the estoppel doctrine did not apply.

RETAIL DISPLAYS MAY TRIGGER COVERAGE FOR ADVERTISING INJURY UNDER CGL POLICIES

Selective Ins. Co. of the Southeast v. Creation Supply, Inc., 2015 Ill. App. (1st) 140152-U (Ill. App.)*

Plaintiff issued a business owners' policy to defendant retailer. The retailer was sued in an underlying lawsuit alleging trademark infringement, trade dress, and unfair competition based on its import and sale of colored markers which were sold and displayed in retail stores throughout the United States and on various websites. Plaintiff sought a declaratory judgment that it owed no defense because the policy excluded coverage for infringement of copyright, trade dress, or slogan unless such infringement was in the insured's advertisement. The policy defined "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." ***Held:*** The product displays "serve[d] as an announcement disseminating the product to the public" and therefore met the definition of an "advertisement" under the policy language. In addition, the posters at issue were deemed to affirmatively function to attract customers and were therefore more than a bare display of the product itself, and the shape and design of the markers were prominently depicted in the retail display.

*Unpublished decision, not precedential

EMPLOYMENT EXCLUSION BARS COVERAGE IN BROTHER-SISTER BATTLE

Peerless Indemn. Ins. Co. v. Moshe & Stimson, LLP, 22 N.E.3d 882 (Ind. App.)

After sister sued her brother and former law partner for defamation, brother made claim for coverage under his and his sister's former firm's liability policy. ***Held:*** Policy did not cover injuries arising out of "employment-related practices" including "defamation." It was irrelevant that the sister was a partner rather than an employee and that defamation occurred after sister's resignation announcement.

INSURER NOT LIABLE TO INDEMNIFY AGAINST INTENTIONAL TORT

Cincinnati Ins Co. v. DTJ Enterprises, Inc., 2015 Ohio LEXIS 595 (Ohio)

Following injury to insured's employee in scaffolding accident, insurer refused to indemnify insureds. ***Held in a split decision:*** Even if employee proves employer's intent to injure, insurer did not owe duty. The policy excluded coverage for "liability for accidents committed by or at the direction of an insured with the deliberate intent to injure." Removing equipment safety guards created a rebuttable presumption of the intent to injure. Job superintendent's refusal to use assembly bolts because of time involved would allow the factfinder to find requisite intent. The dissent claimed that the decision effectively immunized employers from civil liabilities for intentionally injuring employees.

LIABILITY INSURANCE COVERAGE/ ENVIRONMENTAL

WISCONSIN SUPREME COURT CONSIDERS MANURE A POLLUTANT

Wilson Mutual Ins. Co. v. Falk, 857 N.W.2d 156 (Wis.)

Insured farmers operated a dairy firm in Wisconsin and spread liquid cow manure onto their fields for fertilization. The insureds' neighbors alleged that their private wells were made unusable by reason of the liquid manure leaching into the water. The insurer denied coverage based on the policy's pollution exclusion. ***Held:*** A reasonable insured would consider manure infiltrating a well to be a pollutant under the facts at hand, and therefore the pollution exclusion would bar coverage. However, the incidental coverages section of the policy nevertheless provided coverage to indemnify the neighbors for each occurrence of well contamination.

LIABILITY WAIVERS

LIABILITY WAIVER PRECLUDES INJURY CLAIM BY HEALTH CLUB PATRON

Grebing v. 24 Hour Fitness USA, Inc., 2015 Cal. App. LEXIS 153 (Cal. App. 2 Dist)

Plaintiff brought negligence and products liability actions against his health club after sustaining injuries while working out on a piece of exercise equipment. Incident to his health club membership, he signed two releases stating that he understood and assumed the risk of injury associated with using health club equipment and releasing the health club and its agents from liability. ***Held:*** Summary judgment was properly granted to the health club. Plaintiff clearly waived his right to bring negligence claims against the health club and, although California will not uphold such releases where gross negligence is at issue, plaintiff offered no evidence to create a triable issue of fact that the health club was grossly negligent. Additionally, while waivers do not apply to product liability claims, plaintiff's product liability claims failed because the dominant purpose of the defendant's transaction with plaintiff was providing services rather than supplying a product.

MEDICAL MALPRACTICE

WHETHER PHYSICIAN TRANSFERRED PATIENT'S CARE TO ANOTHER DOCTOR RAISED A TRIABLE ISSUE OF FACT

Agosto v. Nercessian, 124 A.D.3d 562 (N.Y. App. Div. 1st Dep't)

The day after surgery, patient's doctor advised that he was leaving for a conference. He purportedly left the patient in the care of another hospital surgeon. Patient was not seen by another doctor before being discharged. Fifteen hours later she was found dead. ***Held:*** There was a question of fact as to whether patient's care had been "orally transferred" to another doctor who never examined the patient, was not employed by the operating hospital, and only surfaced after the statute of limitations had expired.

NEGLIGENCE

FAILURE TO TAKE MEDICATION NOT COMPARATIVE NEGLIGENCE

Barb v. City of Bakersfield, 183 Cal. Rptr. 3d 59 (Cal. App. 5 Dist.)

Plaintiff motorist suffered a stroke and drove onto a sidewalk. Responding emergency personnel took his slurred speech, vomiting, and disorientation as signs of intoxication and did not secure immediate medical care. Plaintiff sued alleging that the delay in care caused irreversible brain damage. Defendants argued that plaintiff was comparatively negligent for failing to take his blood pressure medication before the accident. ***Held as a matter of first impression:*** because a "tortfeasor takes the plaintiff as he finds him," the trial court erred in instructing the jury that they could consider plaintiff's failure to take his medication where it occurred before emergency personnel arrived. ***Further held:*** Jury instruction as to emergency personnel immunity was misleading.

STORE OWNER NOT LIABLE FOR ATTACK BY SECURITY GUARD

Barnard v. Menard, Inc., 25 N.E.3d 750 (Ind. App.)

Customer sued Menard, and Menard sued its insurer after security guard assaulted a suspected shoplifter. ***Held:*** Menard did not owe a duty to protect customer because the attack was not readily foreseeable to it. The security services had not previously caused injury at a Menard location. ***Further held:*** Menard did not have vicarious liability. Menard neither exercised control nor had a right to control performance of security services, which outweighed factors supporting an employment relationship. ***Also held:*** Menard did not a owe duty to protect customer from an independent contractor. The assault was not reasonably foreseeable, only possible. ***Lastly held:*** Insurer owed a duty to defend Menard and security service. Although policy contained an assault-and-battery exclusion, plaintiff alleged false imprisonment and slander, neither of which was excluded. Excluding coverage because injury stemmed from "the use of force to protect persons or property" would render policy illusory. Coverage was available even though specific store location was not listed. The intent was to cover all stores.

EMPLOYER LACKS DUTY TO PROTECT PUBLIC FROM SLEEP-DEPRIVED EMPLOYEE

Rodriguez v. U.S. Steel Corp., 24 N.E.3d 474 (Ind. App.)

Decedent was killed in vehicle accident involving employee who fell asleep. ***Held:*** Employer lacks duty to prevent employees from working long hours on consecutive days or to provide policy or training as to employee fatigue. Decedent and employer did not have a direct relationship because employer did not control the employee's hours so as to cause fatigue. Many outside factors can contribute to fatigue, and employee had the ability to take breaks from work if and when he became tired. Although it is reasonably foreseeable that an employee suffering from work-induced fatigue may cause injury, public policy disfavored imposition of a duty. The employee was in the best position to prevent injury. He controlled his sleep schedule and the time he worked. He could take breaks from work if tired. Imposing a duty on employers would lead to unworkable, *ad hoc* industry-specific decisions setting bright-line caps on work hours. Substantial burden on employer management practices would result.

CONDUCT OF OTHER DRIVER CONSTITUTED UNFORESEEABLE SUPERSEDING CAUSE

Bowman v. Kennedy, 2015 N.Y. App. Div. LEXIS 2234 (N.Y. App. Div. 3d Dep't)

Plaintiff, an injured pedestrian, sued Driver A for negligence in stopping and waving plaintiff to cross the street in front of Driver A's vehicle. Plaintiff was injured when Driver B, who was behind Driver A, drove onto the shoulder and passed Driver A, striking the pedestrian in the process. ***Held:*** The reckless manner in which Driver B operated his vehicle constituted an unforeseeable, superseding cause of the pedestrian's injuries, severing any causal nexus to Driver A's conduct.

PREMISES LIABILITY

FACT QUESTIONS PRECLUDE SUMMARY JUDGMENT ON MUSICIAN'S SLIP AND FALL CLAIM

Fazio v. Fairbanks Ranch Country Club, 183 Cal. Rptr. 3d 566 (Cal. App. 4 Dist.)

Musician sued performance venue after he fell from a stage riser. The trial court granted summary judgment in favor of the venue based on the musician's assumption of risk of falling off stage. ***Held:*** The appellate court reversed. The venue did not adduce sufficient evidence that its erection of the stage did not increase the risk to the musician, and whether it did so presented questions of fact precluding summary judgment.

TITLE INSURANCE

NO TITLE INSURANCE COVERAGE FOR MECHANICS' LIENS ARISING AFTER CONSTRUCTION LENDER DISCONTINUES FUNDING

BB Syndication Services, Inc. v. First Am. Title Ins. Co., 2015 U.S. App. LEXIS 3956 (7th Cir.)

Construction lender brought action in state court against title insurer, seeking defense and indemnification in an adversary bankruptcy proceeding, after the lender cut off loan disbursements to a construction project, and the project's developer declared bankruptcy. ***Held:*** In the context of a failed construction

project due to insufficient funding, exclusion stating that liens that are "created, suffered, assumed or agreed to" by the insured lender will not be covered under the title policy precluded coverage. The exclusion assigned the risk of loss associated with unpaid subcontractors arising from a lender's decision to stop funding to the construction lender, not the title insurer.

TORTS

FALSE REPORTING THAT SOMEONE HARBORS ILLEGAL ANIMALS CANNOT SUSTAIN AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

Lawrence v. North Country Animal Control Ctr., Inc., 2015 N.Y. App. Div. LEXIS 1857 (N.Y. App. Div. 3d Dep't)

Plaintiffs sued an animal control center alleging, among other things, intentional infliction of emotional distress arising from the center filing a false accusation with authorities accusing plaintiffs of illegally harboring raccoons on their property. The trial court denied the motion to dismiss this claim. ***Held:*** Intentional infliction of emotional distress requirements are "rigorous … and difficult to satisfy." The conduct was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious" and the trial court should have dismissed it.

"RELENTLESS EFFORTS" TO INDUCE BREACH OF CONTRACT CONSTITUTED TORTIOUS INTERFERENCE AND UNFAIR COMPETITION, BUT DID NOT ENTITLE PLAINTIFF TO PUNITIVE DAMAGES

Macy's Inc. v. Martha Stewart Living Omnimedia, Inc., 2015 N.Y. App. Div. LEXIS 1710 (N.Y. App. Div. 1st Dep't)

J.C. Penny's "relentless efforts" to pursue Martha Stewart—despite the strict loyalty clause in Martha Stewart's contract with competitor Macy's—were "over the top" and "exceeded the minimum level of ethical behavior in the marketplace." Such conduct wrongfully induced Martha Stewart to breach its contract with Macy's. ***Held:*** J.C. Penny could be held liable for tortious interference and unfair competition, but because there was no pattern of morally corrupt conduct directed at the public generally, punitive damages were not warranted.

UM/UIM COVERAGE

LIMITS OF UIM COVERAGE INAPPLICABLE WHERE PLAINTIFF HAS BEEN FULLY COMPENSATED

Williams v. Allstate Property and Cas. Ins. Co., 2015 IL App (5th) 140269-U (Ill. App.)*

Plaintiff sued to confirm a UIM arbitration award, for declaratory judgment, and for judgment as a result of alleged unreasonable delay by insurer. The circuit court entered judgment in insurer's favor. On appeal, plaintiff argued that the anti-stacking clause in the parties' insurance contract was ambiguous and when construed against insurer, allowed stacking of the UIM coverages and provided $300,000 of UIM liability coverage. Insurer argued that the plaintiff's arbitration award was fully satisfied without reference to whether the per-accident UIM coverage limit for each of the three autos stacked. ***Held:*** Pursuant to the policy, the plaintiff insured's total damages were determined through arbitration. Subsequent payments by the underinsured, at-fault driver, and medical payments by the insurer reduced the amount recoverable as UIM benefits, and the insurer tendered the remaining balance of damages. Plaintiff was fully compensated, regardless of whether the UIM limits stacked or not.

*Unpublished decision, not precedential

WORKERS' COMPENSATION

FAILURE TO CHECK CONTRACTOR'S COMPLIANCE WITH WORKERS' COMPENSATION ACT CAUSES PROBLEMS FOR BUSINESS

Young v. Hood's Gardens, Inc., 24 N.E.3d 421 (Ind.)

Employee of contractor retained to remove tree was rendered a paraplegic in the process. ***Held:*** $1,000 trigger for determining whether a business' secondary liability for workers' compensation includes both actual contract value and additional consideration received by contractor. A non-employing business is liable under the Workers' Compensation Act for failing to ensure that contractor has complied with it. The business hired a contractor to cut down a tree for $600 and allowed the contractor to keep the wood. An issue existed as to the value of the wood.

OHIO REJECTS DUAL-PURPOSE DOCTRINE

Friebel v. Visiting Nurse Ass'n of Mid-Ohio, 2014 Ohio LEXIS 2712 (Ohio)

Visiting nurse was injured while driving children to mall on her way to patient's home. ***Held:*** A compensable worker's compensation injury must have occurred "in the course of, and arising out of, the injured employee's employment." The first prong limits benefits to injuries sustained in a required activity consistent with and logically related to employer's business. The second refers to the causal connection between employment and injury based upon the totality of circumstances. Under the dual-purpose doctrine, employee may recover for injuries sustained on a personal errand so long as the business travel was necessary. The rule creates an unsatisfactory blanket rule ignoring the totality of circumstances. An employee's subjective intent as to the dual purposes distracts from the core analysis required by the law.

CM SPECIAL ALERT

cont. from pg. 15

payer (*e.g.*, a liability insurer) fails to reimburse conditional payments. Western Heritage's settlement payment qualified it as a primary payer under the MSP statute. Because Western Heritage failed to reimburse Humana, the court awarded double damages. Therefore, Western Heritage must now pay over $38,000 to Humana, in addition to the $115,000 that it already paid. If Western Heritage pays the judgment, it will have paid for the medical expenses three times over—the settlement, plus double damages to Humana—not to mention the litigation costs of the post-settlement proceedings.

Western Heritage found itself in a difficult position when the personal injury court forced it to pay the settlement amount without including Humana on the settlement check. There are a few steps liability insurers can take to avoid a similar situation:

1. **Investigate not only whether Medicare directly made conditional payments, but also whether the claimant has a Medicare Advantage Plan.** Liability insurers cannot take plaintiffs or their attorneys at their word regarding MAOs, particularly if the plaintiff is 65 or older.

2. **Make the method of payment a term of the settlement.** Western Heritage tried too late to issue a check with Humana as a payee. Avoid this situation by including as a term of the settlement that the liability insurer will issue a separate check to Medicare or an MAO for the final conditional payment amount.

3. **Obtain indemnity from the plaintiff and include private causes of action.** Even if the plaintiff lacks the financial ability to fulfill the indemnity promise, the insertion of this provision in the release will cause plaintiff and plaintiff's attorney to investigate the Medicare issue more thoroughly. ♦

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