CM EAST COAST REPORT of Recent Decisions

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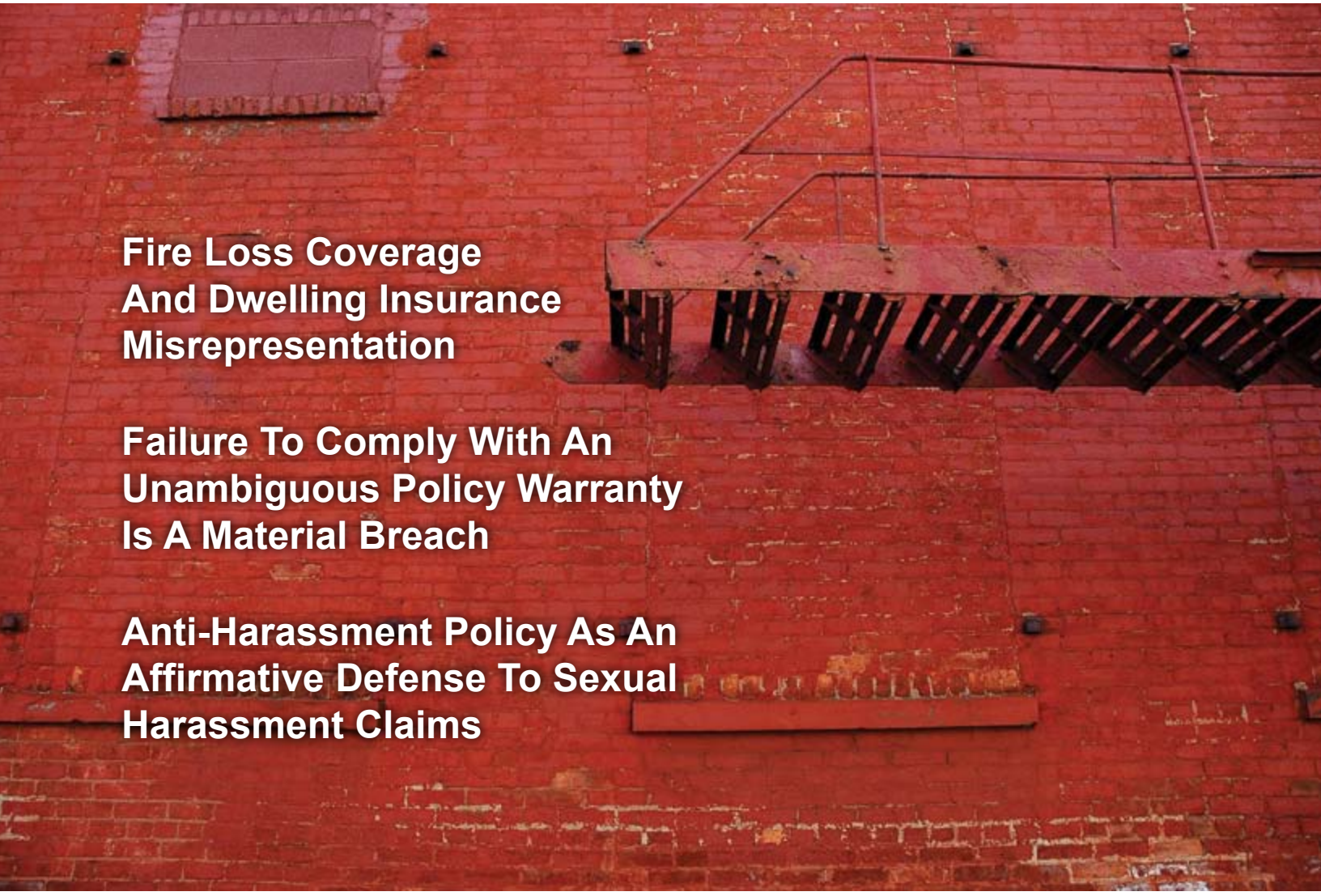

Fire Loss Coverage And Dwelling Insurance Misrepresentation

Failure To Comply With An Unambiguous Policy Warranty Is A Material Breach

Anti-Harassment Policy As An Affirmative Defense To Sexual Harassment Claims

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 EAST COAST REPORT of Recent Decisions

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No Coverage For Fire Loss When Application For Dwelling Insurance Misrepresented That Premises Would Be Owner-Occupied

by ***Dawn M. Brehony***

In *Morales v. Castlepoint Insurance Company*, 2015 NY Slip Op 01618 (2d Dep't Feb. 25, 2015), the Appellate Division, Second Department, reversed an order from the trial court denying the insurer defendant's motion for summary judgment. The Appellate Court stated that the insurance company does not have to provide coverage for a fire loss due to a material misrepresentation in the policy application, even if the insured property owner did not make or authorize the misrepresentation. The Court explained that even if the application for insurance had been submitted without the property owner's actual or apparent authority, the owner ratified the representations by accepting the policy and allowing it to be renewed for several years on the same conditions and terms.

Plaintiff property owner obtained a mortgage in connection with purchasing a parcel of property in Brooklyn, New York. In the process of securing his mortgage, he represented and signed documents stating that the premises would be occupied by the owner. He also authorized the mortgage company to obtain property insurance on his behalf. In turn, the mortgage company forwarded the information received from Plaintiff to a broker, who completed the application for insurance. The application represented that the premises would be owner-occupied and that the premises would serve as Plaintiff's primary residence. Based on the application submitted, Defendant insurer issued a dwelling policy to Plaintiff, the first page of which indicated that the premises was owner-occupied. This policy was renewed annually without Plaintiff requesting any changes in terms.

On January 14, 2011, the premises was damaged by fire and a claim was made under the policy. During the course of its investigation, Defendant insurer learned that Plaintiff never lived at the premises. As such, Defendant disclaimed coverage on the ground that Plaintiff made a material misrepresentation on the application for insurance that the premises would be occupied by the owner.

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Plaintiff brought suit against the insurer, alleging breach of the insurance contract. The insurer moved for summary judgment, asserting that the policy was void *ab initio* as a result of Plaintiff's material misrepresentation that he occupied the premises. The trial court denied the insurer's motion on the basis of an issue of fact. In reversing the trial court's decision, the Appellate Court held that the application contained a misrepresentation regarding whether the premises would be owner-occupied and that this representation was material. Importantly, the Court noted that the insurer established that the material misrepresentation is attributable to Plaintiff because, even if the application was submitted without his authority, he ratified the representations contained in the application by accepting the policy for owner-occupied premises and allowing the policy to be renewed for years on the same terms.

Learning Point: This decision is significant because it reaffirms an insured's responsibility to ensure that accurate information is submitted on an application for insurance—even if the application is completed by a third-party. ♦

Court Of Appeals Holds That Insured Has Burden Of Proof Regarding Exception To Policy Exclusion, And That Ensuing Loss Provision Does Not Trump Unambiguous Policy Exclusion

by **John P. De Filippis**

In *Platek v. Town of Hamburg*, 2015 LEXIS 252, the New York Court of Appeals reversed prior rulings by the Supreme Court and the Appellate Division which essentially held that the "sudden and accidental" exception to the "water loss exclusion" contained in a homeowners policy issued by Allstate Indemnity Company was applicable. The Court of Appeals did not agree, holding that the exception did not over-rule the exclusion.

Plaintiff homeowners suffered property damage when a water main abutting their property ruptured, and water came onto their property, flooding their basement. Their homeowners insurance policy, issued by Allstate Indemnity, contained an exclusion which barred coverage for, among other things:

> 4. Water … *on or below the surface of the ground, regardless of its source*, including water … *which exerts pressure on, or flows, seeps or leaks through any part of the residence premises.*

Id. at *2 (emphasis in original). An exception to the foregoing exclusion sets forth that "[w]e do cover sudden and accidental direct physical loss *caused by fire, explosion or theft resulting from items 1 through 4 listed above.*" *Id.* (Emphasis in original).

After Allstate disclaimed coverage, Plaintiffs sued for coverage based under a breach-of-contract theory. Plaintiffs argued in their Summary Judgment Motion that they suffered damage from "a water intrusion caused by an explosion of the water main," and that, therefore, their claim fell within the exception to the above exclusion. *Id.* at *3. Allstate countered that the policy exclusion applied, but the exception to it did not because the water damage did not "result from the explosion," but, rather, the explosion occurred off of the insured property, and prior to when the water seeped onto the property.

The trial court granted Plaintiffs' motion and denied Allstate's cross-motion. Allstate appealed. The Appellate Court modified the lower court's judgment, holding that the language of the policy's exclusion and exception were ambiguous, and that, therefore, the policy should be construed in favor of Plaintiffs.

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On appeal to New York's highest court, the Court of Appeals applied three separate principles. First, "in determining a dispute over insurance coverage, [Courts must] first look to the language of the policy." *Id*. at *7. Thus, all the language of the subject provision must be fairly applied. Second, while the *insurer* has the burden of proving that a policy application is applicable, the *insured* must establish the existence of coverage. This means that "where the existence of coverage depends entirely on the applicability of an exception to the exclusion, the insured has the duty of demonstrating that it has been satisfied." *Id*. (Citations omitted). Third, "where a property insurance policy contains an exclusion with an exception for ensuing loss, courts have sought to assure that the exception does not supersede the exclusion by disallowing coverage for ensuing loss directly related to the original excluded risk." *Id*. at 7-8.

The Court of Appeals agreed with Allstate that the sudden and accidental exception was "properly characterized as an ensuing loss provision which provides coverage when, as a result of an excluded peril, a covered peril arises and causes damage." *Id*. at *9. "Ensuing Loss" exceptions arose out of the 1906 California earthquake, where earth movement exclusions were utilized by insurers to deny coverage for fires sparked when gas pipes were destroyed by seismic vibrations. Thus, in reversing the Appellate Division, the Court of Appeals noted that "an ensuing loss at least requires a new loss to property that is of a kind not excluded by the policy; it does not resurrect coverage for an excluded peril." *Id*. at *10 (citations omitted).

The Court further noted that Plaintiffs' expert actually determined that an explosion was caused by highly pressurized water exerting pressure from *inside* the water pipe which was buried off of Plaintiffs' property. He *did not* find that an explosion was caused by subsurface water exerting pressure on Plaintiffs' residence premises. *Id*. at *11-12.

Taking the subject provision as a whole, the Court concluded that the Allstate policy's water loss exclusion was unambiguous, and that it was improper to apply the ensuing loss exception to create coverage that "would subvert the intent of the parties," and that would force Allstate to insure a loss it did not contemplate covering, and that it had, in fact, actually excluded. *Id*. at *13.

Thus, judgment was reversed; Plaintiffs' motion for summary judgment was denied, and Allstate's cross-motion for summary judgment was granted.

Learning Point: The Court of Appeal's holding recites previously well-established rules of construction for insurance contracts, but further clarifies two particular points: First, the insured's burden of establishing its entitlement to coverage under an insurance policy also extends to proving that an exception to an otherwise applicable exclusion will apply. Second, ensuing loss provisions are not intended—and should not be applied—to create coverage that was not contemplated by the subject policy, or where coverage was actually excluded under the policy. ♦

New York Appellate Division Affirms That An Insured's Failure To Comply With An Unambiguous Policy Warranty Is A Material Breach

by ***Michael W. Jacobson***

The Appellate Division, Second Department, recently affirmed that: a provision in the "special conditions" section of an insurance policy that required a fully operational security system met the definition of a warranty pursuant to New York Insurance Law § 3106(a); the provision was not ambiguous; and the insured's failure to comply with the warranty was a material breach that merited summary judgment for the insurer. *Triple Diamond Café, Inc. v. Those Certain Underwriters at Lloyd's London*, 124 A.D.3d 763, 764 (2nd Dep't 2015).

The insured was an owner of a bar/lounge that was broken into and subsequently destroyed by fire. The insured notified its insurer of the loss. The insurer denied coverage on the grounds that the insured failed to comply with a policy condition and this failure was a material breach of the policy that barred coverage.

The policy contained the following provision on the declaration page: "Warranted Automatic extinguishing system and hood and duct cleaning, central station fire and burglar alarms will be [f]ully operational throughout the period of the policy." *Id*. at 764. The insurer's investigation found that the insured's alarm system was not activated at the time of the loss. The insurer moved for summary judgment to dismiss the Complaint on the grounds that the insured's breach of the policy warranty was a material breach that barred coverage. The lower court awarded the insurer summary judgment.

On appeal, the insured put forth two arguments. First, the insured argued that the relevant provision did not constitute a warranty. Second, the term "fully operational" did not require the alarm to be activated and set, or in the alternative, that the term was ambiguous. *Id*.

In addressing the insured's first argument, the Court highlighted that in the context of insurance law "warranties represent a promise by the insured to do or not to do something that the insurer considers significant to its risk of liability under an insurance contract." *Id*. at 765 quoting *Commercial Union Ins. Co. v. Flagship Mar. Servs.*, 190 F.3d 26, 31 (2d Cir. 1999). Warranty is a term that is specifically defined under New York Insurance Law. Insurance Law § 3106(a) provides:

> In this section warranty means any provision of an insurance contract which has the effect of requiring, as a condition precedent of the taking effect of

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such contract or as a condition precedent of the insurer's liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract.

Insurance Law § 3106[a]. The Court found that the provision on the declaration page that stated "warranted…burglar alarm[] will be [f]ully operational through the period of the policy" met the warranty definition of Insurance Law, and that there was no requirement that a warranty be set forth in a particular manner. *Id.* at 765.

In addressing the insured's second argument, the Court affirmed the long held position that whether a term is ambiguous will be determined by looking within the four corners of the document, and simply applying a subjective meaning to a term that has a plain meaning does not render a term ambiguous. *Id.*, citing *Kass v Kass*, 91 N.Y.2d 554, 566 (1998); *Moore v Kopel*, 237 A.D.2d 124, 125 (1st Dep't 1997).

In rejecting the insured's argument that the term "fully operational" did not require the alarm to be set and activated, the Court stated that it was only logical that an insurance policy that required an insured to have a fully operational security system would require that the system be activated and used in order to limit the risk undertaken by the insurer writing the policy. *Id.* at 766. The Court also stated that giving credence to the insured's position would nullify the provision.

Learning Point: Failure to comply with a warranty provision in an insurance policy constitutes a material breach of the policy and bars coverage. Moreover, a clear and unambiguous policy provision will be enforced in favor of the insurer. ♦

New York's Appellate Division Broadens A First-Party Policy's Pollution Exclusion

by **Lyndsey C. Bechtel**

In *Broome County v. The Travelers Indem. Co.*, 2015 NY Slip Opp 01697 (3d Dep't 2015), the Third Department broadened the scope of a defendant insurer's pollution exclusion. Defendant The Travelers Indemnity Company issued a first-party insurance policy to Plaintiff Broome County for a building it owned within a government complex. The pollution exclusion within the policy stated that Defendant would not cover any losses resulting from the "[d]ischarge, dispersal, seepage, migration, release or escape of pollutants." Pollutants were further defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste and any unhealthy or hazardous building materials (including but not limited to asbestos and lead products or materials containing lead)."

During construction of a parking garage beneath Plaintiff's building, construction work caused a high concentration of silica particulates to migrate up an elevator shaft and disperse to the floors above, necessitating containment and repairs. Crystalline silica is a basic component of soil, granite and many other building minerals. When objects that contain crystalline silica are cut, drilled, or otherwise handled in an abrasive fashion, silica dust can enter the lungs causing scar tissue, which in turn reduces breathing capacity. It is classified as a human lung carcinogen and can cause silicosis. "Crystalline Silica Exposure Health Hazard Information," Occupational Health and Safety Administration Fact Sheet, 2002.

Citing silica exposure's relation to lung disease, the Third Department in *Broome County* determined that silica falls under the policy's definition of pollutant as a "hazardous building material," "solid," and "irritant." As such, Defendant's policy was not read to cover the silica migration event due to the applicability of the pollution exclusion.

The Third Department disagreed with Plaintiff's argument that its case was similar to *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 (2003), whereby the Court of Appeals held that the defendant's pollution exclusion in a commercial general liability policy did not apply "to ordinary paint or solvent fumes that drifted a short distance from the area of the insured's intended use and allegedly caused inhalation injuries to a bystander."

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New Jersey Supreme Court Holds That Employers May Offer Evidence Of Anti-Harassment Policy As An Affirmative Defense To Sexual Harassment Claims

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In *Aguas v. State of New Jersey*, 2015 N.J. Lexis 131, No. 072467 (N.J. Sup. Ct. Feb. 11, 2015), the New Jersey Supreme Court held that an employer may offer evidence of the company's anti-harassment policies and programs as an "affirmative defense" to an employee's claims of negligence or vicarious liability brought under the New Jersey Law Against Discrimination (NJLAD). The Court's decision on this important issue reshapes an employer's liability, but also results in increased protection for employees.

Aguas involved a female corrections officer claiming she was sexually harassed by two of her male supervisors at the New Jersey Department of Corrections (DOC) facility where she was employed. In recent years, the DOC instituted a written anti-discrimination policy, and provided training to its employees. Aguas, herself, had received this same training in each year of her employment, and had even utilized the policy on two prior occasions. However, in this instance, instead of filing a written complaint as was required under the DOC's policy, Aguas verbally complained about the alleged behavior. Nevertheless, the DOC's Equal Employment Division (EED) commenced an investigation subsequent to Aguas's verbal complaint. The investigation was completed after several weeks and roughly twenty interviews. The EED concluded that Aguas's claims lacked merit. However, just two days after her initial verbal complaint, Aguas bypassed company policy and filed suit against the DOC, asserting negligence and vicarious liability claims pursuant to NJLAD.

After the completion of pre-trial discovery, the trial court granted summary judgment to the DOC. On appeal, the New Jersey Supreme Court determined that Aguas had established a *prima facie* showing of sexual harassment, and the Court found that the State had established an affirmative defense to liability because Aguas failed to follow her employer's written anti-harassment policy. In doing so, by a 5-2 vote, the New Jersey Supreme Court expressly adopted the two-part "*Ellerth-Faragher*" affirmative defense to hostile work environment claims, which was established by the U.S. Supreme Court in 1998. *See Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The *Ellerth-Faragher* framework establishes that an employer involved in a hostile work environment sexual harassment case may assert the affirmative defense if it can show, by a preponderance of the evidence, that it: 1) "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and 2) "the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Aguas*, No. 072467, at 41-42. In *Aguas*, it was clear to the Court that the DOC had exercised reasonable care to prevent any sexually harassing behavior through its implemented policies, and that Aguas had unreasonably failed to take advantage of these corrective opportunities. As such, the DOC could not be held vicariously liable.

In addition, the *Aguas* Court adopted a new, more expansive, definition of the term "supervisor" in relation to hostile work environment claims under NJLAD. Rather than implementing the stricter definition recently adopted by the U.S. Supreme Court in *Vance v. Ball State University*, 133 S.Ct. 2434 (U.S. 2013), the Court chose to adopt the Equal Employment Opportunity Commission's (EEOC) broad definition of "supervisor," which includes employees who are granted the authority to make tangible employment decisions, and those placed in charge of the complaining employee's everyday employment activities. *Aguas*, at 46-47. As a result, the adoption of the EEOC definition broadens the scope of employees whose conduct may result in vicarious liability on the part of the employer.

Learning Point: The *Aguas* decision is important for a number of reasons, not the least of which is strengthening the overall goal of deterring sexual harassment. By allowing employers to assert the aforementioned affirmative defense, it encourages all employers to maintain effective anti-harassment policies and procedures, as no benefit is afforded under the law to those who do not. Additionally, the *Aguas* decision gives employers the important knowledge that they may avail themselves of the affirmative defense *even if* the alleged harassment comes from a supervisor, removing the fear that employers can be held strictly liable for a supervisor's actions. However, as the Court has broadened the definition of "supervisor," employers should make efforts to expand their anti-harassment training to all employees who may now be deemed a supervisor under New Jersey law.

STERN PRESENTS AT NASP LITIGATION SKILLS AND MANAGEMENT CONFERENCE

CM Partner **Robert A. Stern** presented, "Strategies for Increasing Property Damage Settlement Offers Before and During Trial," at NASP's Litigation Skills and Management Conference. This Seminar covered: different techniques to increase a settlement offer, strategies for getting movement, steps to follow in getting the best deal, preparing for negotiating and other important topics addressed at increasing a settlement offer. This Seminar also addressed how to deal with another party's (*i.e.*, Mediator or Judge) statement that this is a subrogation case and, thus, should start at 50%. If you are interested in a similar seminar, please contact Mr. Stern (**rstern@clausen.com**).

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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

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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.

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

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.

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

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.

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

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.

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 (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 A 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:*** JC 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.

WORKERS' COMPENSATION

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.

POLLUTION EXCLUSION

cont. from pg. 9

Id. at 387-388. In *Belt Painting*, the policy's pollution exclusion stated that the insurer would not cover any losses resulting from the "discharge, dispersal, seepage, migration, release or escape" of pollutants. The Court of Appeals reasoned that since discharge and disperse are "terms of art in environmental law" that refer to damage caused by hazardous waste disposal, not short-term paint fume migration, the policy's pollution exclusion would not apply. The Third Department distinguished the holding in *Belt Painting,* reasoning that the policy at issue in *Broome County* was for first-party coverage, as opposed to a third-party policy. Specifically, the words "discharge, dispersal, seepage, migration, release or escape" must be read to describe short migratory events where the pollutant remains on and damages the plaintiff's property, or else they would have no meaning in the first-party context.

Learning Point: Because first-party policies contemplate damage to the insured's property, the terms "discharge" and "disperse" within pollution exclusions can be read to include short-term migrations of pollutants that stay within the property's boarders. These same terms, within pollution exclusions of third-party policies, are read more narrowly to only include migrations of pollutants off the respective property or related to hazardous waste disposal. ♦

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