EAST COAST CM REPORT

of Recent Decisions

2016 • Vol. 1

Absolving Landowner's Property Liability

Duty Of Care To Third-Persons Under The Launch A Force Or Instrument Of Harm Exception

Exempting Bailees Run Afoul Of UCC 7-204

80th Anniversary Clausen Miller PC

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.

CM EAST COAST REPORT of Recent Decisions

FEATURES

ARTICLES

Court Of Appeals Determines That A Sidewalk Defect Not Abutting A Landowner's Property Does Not Necessarily Absolve The Landowner Of Liability

by ***Ian T. Williamson***

In *Sangaray v. West Riv. Assoc., LLC*, 2016 NY Slip Op 01002 (Court of Appeals, February 11, 2016), the Court of Appeals reversed an order from the Appellate Division, First Department affirming the trial court's decision granting summary judgment to landowner Defendant, West River Associates, LLC ("West River"). The Court of Appeals stated that even though Plaintiff tripped on a defect that was not in front of a landowner's property, that landowner was not necessarily absolved of liability.

Plaintiff alleged that he tripped and fell when his right toe came into contact with a raised portion of a New York City public sidewalk. The sidewalk flag that Plaintiff was traversing ran from the front of a property owned by Defendant West River to a neighboring premises owned by Defendants Sandy and Rhina Mercado ("Mercados"). A photograph contained in the record depicted the sidewalk flag sloping and descending lower than a level flagstone that is in front of the Mercado property. The expansion joint that Plaintiff's toe contacted abutted solely the Mercado property.

Plaintiff commenced the action against West River and the Mercados, and alleged that West River violated Section 7-210 of the Administrative Code of the City of New York. The provision provides:

> (a) It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> (b) Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any . . . personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, negligent failure to . . . repair or replace defective sidewalk flags.

Defendant West River moved for summary judgment arguing that because the area of the sidewalk upon which Plaintiff tripped was located entirely in front of the

Ian T. Williamson
is a senior associate in the New York office of Clausen Miller P.C., where his areas of practice include premises liability, labor law, property damage, automobile accidents and construction. Prior to joining Clausen Miller, Mr. Williamson defended a major utility company in bodily injury cases relating to construction site, premises liability and automobile accidents. He also has extensive experience representing defendants in New York State asbestos litigation.
iwilliamson@clausen.com

Mercado property, the defect did not abut the West River premises, and, therefore, West River could not be held liable for failing to maintain its sidewalk. In support of its motion, West River offered the Affidavit of a land surveyor who conducted a boundary survey of the sidewalk in front of the West River and Mercado properties, and determined that the expansion joint upon which Plaintiff claimed he tripped was wholly in front of the Mercado property. Plaintiff countered that West River breached its statutory duty by allowing its sidewalk flag to fall into disrepair and failed to demonstrate its entitlement to summary judgment because it did not show that it maintained its sidewalk in a reasonably safe condition. The Mercados also opposed West River's motion, arguing that, based on their own survey and an Affidavit submitted by a licensed professional engineer, approximately 92% to 94% of the defective flag (which had settled due to subsidence of the underlying soil) was in front of the West River property, and 6% to 8% of the defective flag fronted the Mercado property.

The trial court granted West River's motion for summary judgment and stated that a landowner's duty to maintain the sidewalk is implicated only where the defect upon which the plaintiff falls abuts the landowner's property. The trial court concluded that because Plaintiff and the Mercados failed to dispute the evidence submitted by West River that the defect was in front of the Mercado's property, Plaintiff and the Mercados failed to raise a question of fact as to whether West River breached a duty owing to Plaintiff. The Appellate Division, First Department affirmed the lower court's decision and held that because West River did not own the property that abutted the sidewalk where Plaintiff tripped and fell, it was therefore not responsible for maintaining the sidewalk in a reasonably safe condition. The Court of Appeals stated that the First and Second Departments have seemingly engrafted onto Section 7-210 a "location requirement," such that if the defect upon which a person trips abuts a particular property, then the owner of that property is deemed liable, without conducting any inquiry as to whether a neighboring owner's failure to comply with its statutory duties may have also been a proximate cause of the accident. In its decision, the Court acknowledged that the location of an alleged defect and whether it abuts a particular property is significant concerning a property owner's duty to maintain the sidewalk in a reasonably safe condition. However, it does not foreclose the possibility that a neighboring property owner may also be liable for failing to maintain its own abutting sidewalk where it appears that such failure constituted a proximate cause of the injury sustained.

The Court of Appeals stated that as part of its *prima facie* showing of entitlement to summary judgment, West River was required to do more than simply demonstrate that the alleged defect was on another landowner's property. Here, West River focused solely on the location of the actual defect upon which Plaintiff allegedly tripped, and ignored its burden of demonstrating that it complied with its own duty to maintain the sidewalk abutting its property in a reasonably safe condition and/or that it was not a proximate cause of Plaintiff's injuries. Therefore, the Court of Appeals reversed the decision of the Appellate Division, First Department affirming the trial court's granting of summary judgment to West River.

Learning Point: The decision is significant because a landowner defendant can no longer set forth its *prima facie* showing of entitlement to summary judgment under Section 7-210 of the Administrative Code of the City of New York by simply demonstrating that an alleged defect is on a neighboring landowner's property. In a summary judgment motion, even if an alleged defect is on a neighboring landowner's property, a landowner defendant now has the burden of demonstrating that it complied with its own duty to maintain the sidewalk abutting its property in a reasonably safe condition and/or that it was not a proximate cause of the plaintiff's injuries. To meet its burden, a landowner defendant should retain a licensed professional engineer as an expert to inspect the subject sidewalk abutting the landowner's property to demonstrate that the sidewalk is in a reasonably safe condition. ♦

Second Circuit Addresses Whether Agency Request For Information Constitutes A "Demand" For Purposes Of Claims Made Policy

by ***Dawn M. Brehony***

In *Weaver v. AXIS Surplus*, 2016 U.S. App. LEXIS 4199 (2d Cir. March 7, 2016), the United States Court of Appeals for the Second Circuit, applying New York law, concluded that an agency letter requesting information and advising of legal consequences of failure to comply constitutes a "demand" for the purposes of a claims made directors and officers liability policy.

Plaintiff Edward Morris Weaver, former President and Chief Executive Officer ("CEO") of Multivend, LLC ("Multivend"), brought suit against Axis Surplus Insurance Company for breach of contract and declaratory judgment, arguing that the insurer wrongfully refused to defend Weaver in a criminal action brought against him by the United States Department of Justice ("DOJ") under a directors and officers liability insurance policy issued to Multivend ("Policy"), which covered the period of February, 2010, through February, 2014.

From 2004 until 2010, Weaver served as the President and CEO of Multivend, a now-defunct vending machine sales company. In October, 2012, Weaver was indicted for conspiracy and fraud in connection with the operation of Multivend. Weaver sought coverage for the criminal prosecution against him under the Policy. In denying coverage, Axis asserted, in relevant part, that the Policy excludes coverage for "any **Claim** . . . in any way involving . . . any demand, suit or other proceeding pending . . . against any **Insured** on or prior to [February 20, 2008], or any **Wrongful Act**, fact, circumstance or situation underlying or alleged therein." *See Weaver*, *supra*, at *2 (internal citation omitted).

In support of its declination, Axis contended that the DOJ proceeding against Weaver was related to an earlier November, 2007, letter issued to Multivend from the Securities Division of the Maryland Attorney General's Office ("November 2007 Letter"), wherein the Securities Division indicated that Multivend "may be offering and selling business opportunities in violation of the disclosure and antifraud provisions of the Maryland Business Opportunities Sales Act." *Id*. at *4. The letter requested certain "information and materials" so that it "may determine the extent of [Multivend's] compliance with the Maryland Business Opportunities Act." *Id*. It further requested Multivend to "acknowledge in writing that it will

Dawn M. Brehony
is a senior associate at Clausen Miller P.C. in the New York office. She is a litigation attorney, representing domestic and foreign insurers in complex insurance coverage matters involving all aspects of general liability. She also prepares coverage analyses and provides counseling on insurance coverage matters involving first- and third-party property and casualty, directors and officers and professional liability claims. Her experience also includes representing a pharmaceutical manufacturer in pharmaceutical pricing litigation.
dbrehony@clausen.com

immediately cease all offers and sales of the Vendstar business opportunity to Maryland residents." *Id.*

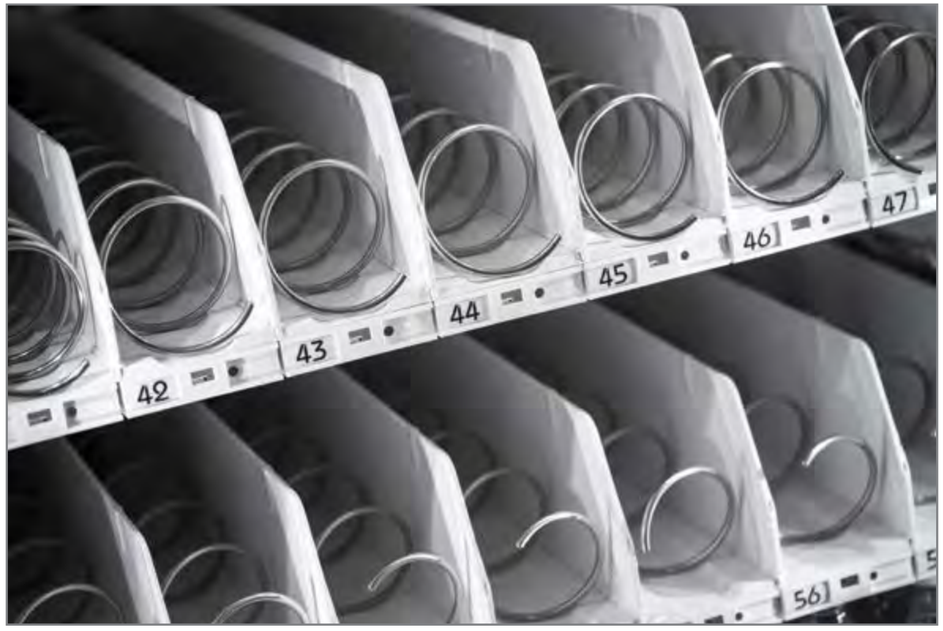
Weaver brought suit against Axis, arguing that Axis wrongfully refused coverage. In support of his argument, Weaver contended that the November 2007 letter did not constitute a "demand" because it requested compliance, rather than demanded, and, as such, the exclusion is inapplicable.

The Court noted that although the Policy did not define the term "demand," under New York Law, " 'a demand requires an imperative solicitation for that which is legally owed,' as distinguished from a request carrying no legal consequences." *Id.* at *4 (internal citations omitted).

The Second Circuit agreed with the decision of the district court that the November 2007 letter satisfied these requirements, constituting a "demand" because the letter set forth the Security Division's request under a claim of right, including its entitlement to the documents identified in the letter, and because it notified Multivend of the legal consequences of non-compliance.

The Second Circuit rejected Weaver's argument that the use of polite language indicated a request rather than a demand for compliance. Thus, the Second Circuit agreed that the November 2007 letter is a "demand" as a matter of New York law and, accordingly, concluded that the Policy unambiguously excludes coverage for Weaver's defense in the DOJ action on the grounds that it involved the same facts and circumstances as set forth in the letter. As such, the Second Circuit affirmed the district court's judgment. *Id.* at *6.

Learning Point: An information request issued by an agency pursuant to its authority to investigate violations of law is sufficient to be deemed a "demand" under a claims made policy if it sets forth a claim of right, including its entitlement to the documents identified in the request, and places the recipient on notice of the legal consequences of any failure to comply. ♦



Ready To Launch Or Failure To Launch? Three First Department Decisions Giving Insight As To Whether A Contracting Party Owes A Duty Of Care To Third-Persons Under The Launch A Force Or Instrument Of Harm Exception

by **George Caran**

Generally, a contractual obligation of a party does not extend tort liability in favor of a non-contracting third-party. In plain terms, a party who asserts a tort claim must prove privity in order to recover against a tortfeasor. The Court of Appeals has, however, carved out three exceptions to this rule. A duty of care may be imputed to third-parties: 1) If the contracting party, in failing to exercise reasonable care in the performance of its duties, launched a force or instrument of harm; 2) Where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and 3) Where the contracting party has entirely displaced the other party's duty to maintain the premises in a safe condition.

In a span of five days, three decisions came down from the Appellate Division, First Department that discuss the first exception that may create a duty of care.

In *Jean-Francois v. The Port Authority*, 2016 NY Slip Op 01558, (1st Dep't March 3, 2016), the Appellate Division, First Department, unanimously reversed the lower court's decision denying Plaintiff's motion for partial summary judgment on the issue of liability. It held that Plaintiff was entitled to summary judgment on the theory that Defendant launched a force or instrument of harm thereby causing Plaintiff's injuries.

Plaintiff, while traversing through the British Airways Terminal, was struck by a falling television and metal brackets which were mounted on the wall. British Airways contracted MIC to install the brackets and mount the television on the wall. Plaintiff moved for summary judgment against both British Airways and MIC. Plaintiff proved, through expert and other evidence that the television was improperly mounted by MIC. There is no evidence that British Airways in any way assisted or contributed to the mounting of the television.

The First Department held that MIC's negligent installation of the brackets and failure to adhere to the instructions in the bracket manual launched a force or instrument of harm. The First Department went the additional step and found summary judgment against British Airways as well. It imputed MIC's negligence onto British Airways since MIC was its invitee.

George Caran
is a senior associate in the firm's New York office. His practice is concentrated on the defense of casualty claims and various third-party claims matters. George's experience includes the defense of property owners, businesses, construction companies insurers and other insureds in construction-related litigation, property damage, premises liability and first-party claims.
gcaran@clausen.com

In Board of Mgrs. Of the A Bldg. Condominium v. 13th and 14th Street Realty LLC, 2016 NY Slip Op 01619, (1st Dep't March 8, 2016), the Appellate Division, First Department, unanimously affirmed the lower court's ruling which granted a third-party defendant's motion to dismiss cross-claims against it by a co-defendant. In this action, the issue of duty of care to non-contracting parties did not involve a plaintiff and defendant. But rather, the situation related to contractors and sub-contractors.

Defendant Hudson Meridian Construction Group LLC ("Hudson"), was contracted by Plaintiffs in the capacity of a construction manager to construct a condominium complex. A second company, Magnum Management LLC hired a company named MG to provide mechanical engineering services such as drawing up plans for installations, drafting plans and providing general engineering services. MG and Hudson did not enter into a contract. Subsequently, it was ascertained that there were design and construction defects which caused, among other things, the formation of mold in some of the apartments. The building owners sued Hudson, who cross-claimed against MG. MG in turn moved to dismiss all cross-claims against it arguing that it owed no duty of care to Hudson. Hudson opposed and argued that MG's improper designs, drawings and plans constituted negligent performance of its duties.

The First Department disagreed with Hudson's arguments and stated that Hudson failed in its proof that a "dangerous condition" existed which caused injuries to Plaintiffs. The Court went on to state that MG's failure to properly perform its contractual duties did not amount to the creation or exacerbation of a hazardous condition, and therefore did not launch a force or harm.

In *Trawally v. City of New York*, 2016 NY Slip Op 01600, (1st Dep't March 8, 2016), the First Department reversed the lower court's decision and granted Defendant's cross-motion for summary judgment dismissing all cross-claims against it by the City of New York who contracted with Defendant to perform certain services for the City. The case involved personal injuries sustained by Ali Trawally as he was traveling in his vehicle when a City lamp post, that was severely leaning, fell and injured him. Attached to the lamp post was a City traffic light. Defendant contracted with the City of New York to perform traffic light maintenance and repairs. Defendant appeared on scene, observed the traffic light and the leaning lamp post but did not notify the City of the issue, and took no action with regards to the lamp post or the traffic light. Later on, Plaintiff was driving in the proximity of the lamp post when it fell on his car and injured him. Defendant moved for summary judgment requesting dismissal of all claims made by Plaintiff.

In reversing the lower court's order and granting Defendant summary judgment, the First Department held that, contrary to Plaintiff's assertions, Defendant did not launch a force or instrument of harm by failing to remove the traffic light from the leaning lamp post. The First Department elaborated further and stated that a force or instrument cannot be launched if there is no affirmative act that would create a dangerous condition.

Learning Point: The First Department reiterated in the cases that the "force or instrument" exception applies only when the contracting party launches an act that is more than just passive in nature. As was demonstrated in *Trawally*, Defendant's awareness of the leaning lamp post, its likely awareness that it could fall down, possibly due to the weight of the street light, and its failure to warn anyone or take remedial measures did not launch a force or instrument. Going further, it is also not enough to launch a force or instrument, even if a contracting party designs faulty plans and drawings upon which other parties rely to their detriment and an actual hazard develops. The First Department requires an affirmative act, such as improper negligent installation. Therefore, when litigating a case where there is no contract or duty of care between the plaintiff and defendant, and the plaintiff seeks to invoke the "force or instrument" exception, it is incumbent on defense counsel to show that its client did not commit any affirmative acts which launched the harm. On the other hand, showing that the defendant's acts, even if negligent, were only passive in nature, then the defendant does not owe a duty of care. ♦

New "Shocking" Addition To Labor Law § 240's Already Broad Reach

by **Serena A. Skala**

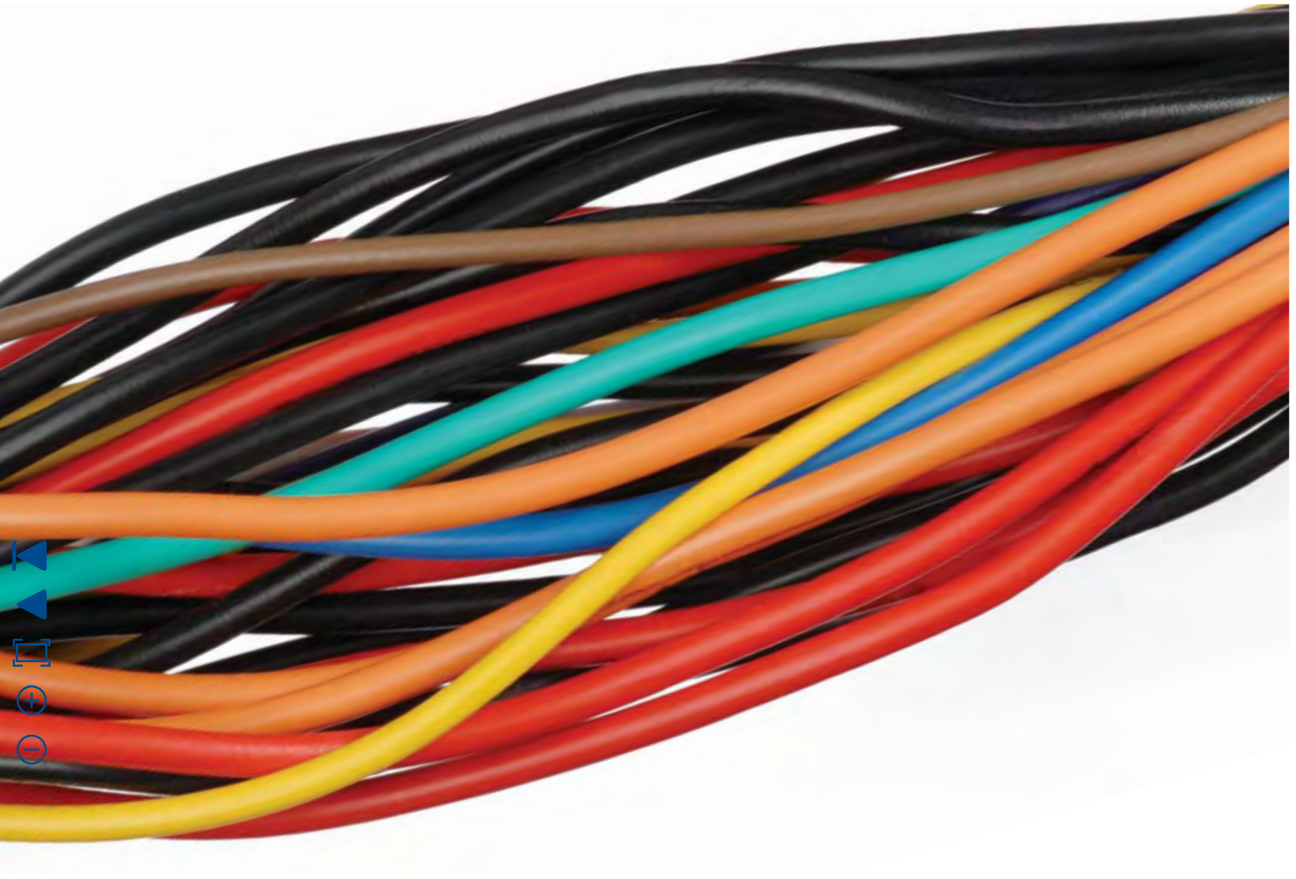
In *Nazario v. 222 Broadway, LLC*, 135 A.D.3d 506, 2016 N.Y. App. Div. LEXIS 246, 2016 NY Slip Op 00251, a construction worker who was injured in a fall on a construction site brought a cause of action against the site's owner and general contractor alleging violation of New York Labor Law §§240, 241(6) and 200, and common law negligence. Plaintiff specifically alleged that a ladder which was provided to him was inadequate because it was not sufficiently secured to prevent it from falling. Plaintiff was allegedly injured when he was electrocuted by a hanging wire; although he hung onto the ladder after being electrocuted, it and he fell to the ground because the ladder was not secured to something stable.

At the time of the incident, Plaintiff was employed by third-party defendant Knight Electrical Services Corp. ("Knight"). Knight had been hired by the general contractor to perform retrofitting/renovation electrical work. Plaintiff was performing electrical work pursuant to his employment with Knight and was reaching up while standing on the third or fourth rung of a six-foot A-frame wooden ladder, when he received an electric shock from an exposed wire. He presumably lost his balance and fell to the floor, holding the ladder, which remained in an open, locked position when it landed. Plaintiff was not given a safety harness of any kind nor was the ladder secured. At the emergency room, Plaintiff claimed injuries as result of electrocution and did not claim any back injuries until months later. When he did allege back injuries, Plaintiff could not be sure whether the back injuries were the result of the fall from the ladder, from lifting a heavy machine or a combination of the two.

The Appellate Division, First Department upheld the lower court's decision and held that Plaintiff was entitled to summary judgment on his Labor Law §240 claim. Specifically, the First Department held that Plaintiff submitted sufficient evidence demonstrating that Defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of his injuries, despite Plaintiff's own admission that the back injuries may have been caused by lifting a heavy machine. The First Department pointed to past decisions which dealt with similar fact patterns; *i.e.*, plaintiffs who fell off of ladders after being struck by live electrical wires. The Court noted that in those decisions, it was held that the inadequacy of the ladder was found to be enough of a contributing factor to the injury to warrant summary judgment as to Labor Law §240.

In his concurring opinion, Justice Peter Tom stated that although he is constrained to agree with the majority based upon the overwhelming precedent, he believes that such precedent challenges the holding of

Serena A. Skala
is a senior associate with Clausen Miller P.C. in the New York office's professional liability department where her practice is focused primarily on the areas of casualty/liability defense, construction litigation, legal malpractice, employment law, real estate, premises and products liability, professional negligence and personal injury matters. These areas involve the defense of a variety of professionals in both the State and Federal Courts, including attorneys, business owners, accountants, real estate management companies, architects, engineers, contractors, developers, directors and officers.
sskala@clausen.com



Blake v. Neighborhood Hous. Servs. of N.Y. City (1 NY3d 280, 288, 803 N.E.2d 757, 771 N.Y.S.2d 484 [2003]), in which the Court of Appeals cautioned against "the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party." Justice Tom based the bulk of his concurring opinion on the fact that issues of fact exist as to the proximate cause of the injury. Specifically, Justice Tom noted that the ladder itself was not defective, simply that an intervening cause (the wire) caused Plaintiff to lose his balance and fall. He remarked that whether a violation of section 240(1) was a contributing cause of the accident is generally a jury question and "a directed verdict on the issue of liability is appropriately limited to those cases in which the only inference to be drawn from the evidence is that a failure to provide appropriate protective devices is the proximate cause of the plaintiff's injuries." Justice Tom opined that the majority was overreaching and expanding Labor Law §240 to fact patterns which the legislature did not intend it to reach.

Learning Point: Electrocution cases seem to carve out an additional instance where liability under Labor Law §240 is assumed, as proof of proximate cause continues to become a less important factor. ♦

Bailees Who Purport To Exempt Themselves From All Liability, Even For Their Own Negligence, Run Afoul Of UCC 7-204

by ***Rebecca Ahdoot***

In *XL Specialty Ins. Co. v. Christie's Fine Art. Stor. Servs., Inc.*, 2016 N.Y. Slip Op. 01901 (First Dep't Mar. 17, 2016), the Appellate Division reversed the lower court's holding that held that a waiver of subrogation was enforceable and barred the action where the bailment agreement purported to exempt defendant bailee from all liability.

Plaintiff was an insurer for a private fine art gallery, Chowaiki & Co. Fine Art Ltd. ("Gallery"). Gallery entered into a storage agreement with Defendant Christie's Fine Art Store Services, Inc. ("Christie's"), the bailee, which stored artworks in its Red Hook, Brooklyn facility.

In its storage agreement with Christie's, Gallery elected an option making it responsible for purchasing an insurance policy to insure against "All Risks of loss or physical damage" for goods deposited with Christie's, and absolving Christie's of responsibility for loss or damage to the goods. It also required Gallery to notify the insurer of the waiver and arrange for the insurer to waive rights of subrogation. Gallery insured the goods with Plaintiff.

In 2012, Superstorm Sandy struck New York. Prior to the hurricane, Christie's notified Gallery that it would take extra precautions with respect to Gallery's goods, including moving goods from the first floor to upper floors. However, the goods were damaged after they were left on the first floor. Plaintiff insurer reimbursed Gallery for its losses and commenced the action as subrogee.

The motion court found that the agreement between Gallery and Defendant created a bailor/bailee relationship under Article 7 of the Uniform Commercial Code and that the limitation of liability was unenforceable pursuant to UCC 7-402(2) (currently UCC 7-204[b]) because it purported to exempt Defendant from all liability. UCC 7-204(a) provides that a warehouse is liable for damages for loss to goods caused by the failure to exercise reasonable care, and limitations of liability are limited by UCC 7-202(c) providing that the terms must not impair a warehouse's duty of care under Section 7-204, and that any contrary provision in a bailment contract is ineffective.

The Appellate Division held that there was a question of fact as to whether Defendant, in failing to move Gallery's goods to another floor, acted reasonably under the circumstances. It further held that the lower court erred in finding that the waiver of subrogation was enforceable, as the waiver ran afoul of UCC 7-204.

Learning Point: Provisions purporting to exempt a bailee from liability for damage to stored goods from perils against which the bailor had secured insurance, even where there is a waiver of subrogation, and even when caused by the bailee's negligence, run afoul of the statutory scheme of UCC Article 7. ♦

Rebecca Ahdoot
is a senior associate in the New York office of Clausen Miller P.C. doing general practice. She received her Juris Doctor, *cum laude*, from Brooklyn Law School in May of 2010. Rebecca is a board member of the Iranian American Bar Association of New York.
rahdoot@clausen.com

Maryland Appellate Court Extinguishes Insurer's Fire Claim By Applying Spoliation Doctrine In A Ruling Of First Impression

by **Terence H. DeMarzo**

Terence H. DeMarzo
is an associate in the New York offices of Clausen Miller P.C., and practices in the field of subrogation. He has practiced civil litigation handling subrogation cases, including auto, No-Fault and property damage. Mr. DeMarzo has tried several cases to verdict as well as engaging in numerous arbitrations, mediations and hearings. Also, he has negotiated hundreds of cases to resolution.
tdemarzo@clausen.com

In *Cumberland Insurance Group v. Delmarva Power*, 2016 Md. App. LEXIS 12 (Md. Ct. Spec. App. Feb. 1, 2016), the Maryland Court of Special Appeals, in an issue of first impression, employed the Spoliation Doctrine and held that Cumberland Insurance ("Cumberland") could not pursue its claim against Delmarva Power. Delmarva Power successfully argued it had no opportunity to investigate the fire scene to try to refute Cumberland's argument that the blaze was caused by Delmarva's careless electrical work.

The Spoliation Doctrine under Maryland Law is well-established. According to case law, four elements must be met in order to determine whether spoliation occurred. This "Spoliation Test," first articulated in *Klupt v. Krongard*, laid forth the elements as follows: 1) An act of destruction; 2) Discoverability of the evidence; 3) An intent to destroy the evidence; and 4) Occurrence of the act after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent. *See Klupt v. Krongard*, 126 Md. App. 179 (1999). However, the *Cumberland* Court noted that Maryland appellate courts have not established how to apply the Spoliation Doctrine in a situation where the physical object that was destroyed is itself the subject of the case.

Cumberland provided homeowner's insurance for David Wickwire. In May, 2013, a fire erupted at Mr. Wickwire's house, which caused significant property damage. Delmarva Power provided electrical power to the home. Cumberland retained a fire origin and cause expert who inspected the scene three days after the fire. A Fire Marshal who investigated the house concluded the fire started in the electric meter box, based on burn patterns and witness statements. Cumberland came to the same determination with its experts theorizing that the fire was caused by faulty wiring in the meter box. According to deposition testimony, Delmarva never sent any personnel to inspect or view the fire scene or meter box.

Cumberland issued a check for the demolition of the property on May 30, 2013, and the house was demolished ten days later. Cumberland proceeded to file a subrogation claim against Delmarva in Maryland state court to recover the amount it paid out to Wickwire. In December, 2014, the trial court granted Delmarva's motion for summary judgment on the grounds that Cumberland had allowed the fire scene to be destroyed and "irreversibly crippled" the power company's ability to "mount a meaningful defense." *Id.* at 5.

On appeal, the Court of Special Appeals was required to decide whether Cumberland had destroyed the evidence to a point where Delmarva could not mount a reasonable defense. And, if so, whether dismissal was the appropriate sanction. Applying the *Klupt* test, the Court of Specials Appeals found that Cumberland had destroyed discoverable evidence with an intent to destroy the evidence when the filing of suit was imminent. With the spoliation of evidence being fairly self-evident, the Court focused on the degree of prejudice to Delmarva.

Cumberland argued that it had not destroyed the main evidence of the loss since the meter box, which Cumberland claimed was the cause of the fire, was retained for investigative purposes. Delmarva countered with the argument that the destruction of the home and related fire scene deprived them of the opportunity to look into other possibilities. Delmarva argued this lost opportunity so severely prejudiced its defense that it lost any and all chance to disprove Cumberland's case. Unwittingly, Cumberland's own expert reinforced Delmarva's argument when he stated that Delmarva's fire report was entirely "speculation and conjecture." *Id.* and 21. The Court found that this highlighted the entire argument of Delmarva that it could not mount a reasonable defense because of the destruction of the house.

Cumberland attempted to persuade the Court that even though it had destroyed the house, Delmarva was put on sufficient notice of Cumberland's claim and the destruction of the house. Cumberland pointed to the fact that it had sent notice letters to Delmarva alluding to a potential claim. However, Delmarva argued that these notice letters simply stated that a claim may be made against it and was altogether devoid of any notice of the house's imminent destruction. The Court of Special Appeals sided with Delmarva that the notice letters said nothing about the fire scenes impending demolition and, therefore, Delmarva was not put on notice of its destruction.

Here, it was clear that Cumberland destroyed the home without giving Delmarva appropriate notice of its destruction. This destruction fatally prejudiced Delmarva's ability to raise a defense. Specifically, the Court found that the defense never had the opportunity to affirmatively rule in or rule out other parts of the house as the area of origin, which irreparably prejudiced its ability to defend. *Id.* at 23. Finally, the Court believed this fatal prejudice warranted dismissal. Thus, the Court of Special Appeals affirmed the lower Court in dismissing the case based upon the Spoliation Doctrine. The decision marked the first time a Maryland appellate court applied the Spoliation Doctrine to a situation in which the evidence destroyed was itself the subject of the case.

Learning Point: *Cumberland* should be a warning to insurers regarding their actions during the beginning of a subrogation investigation. The preservation of evidence is vital to any subrogation matter. A misstep at the outset of an investigation can result in ramifications well down the line when the parties enter into formal litigation. Insurers usually retain experts for their investigation; however, it is vitally important for that expert to take advice from an attorney. The experts themselves, although well-versed in origin and cause investigations, may not know the legal intricacies required in the early stages of a subrogation investigation.

Using the Court's rationale in Cumberland, any insurer allowing a scene, or a piece of evidence, to be destroyed or manipulated may end up costing the insurer any chance at recovery. This may be the case even where an insurer or expert believes the evidence or scene has no bearing on the outcome of a potential court case. Retaining attorneys early on in any investigation may save an insurer in the long run in the preservation of its claim and, hopefully, a recovery for the insurer. ♦

The Malfunction Theory: Product Liability's Saving Grace

by ***Nathalie C. Hackett***

Nathalie C. Hackett
is a senior associate in the New Jersey and New York offices of Clausen Miller P.C., and practices exclusively in the field of subrogation, handling a wide range of property damage cases. While in law school, she was a Research Editor for the *Delaware Journal of Corporate Law*. Ms. Hackett has a B.S. in Business Administration from Monmouth University, and a J.D. from Widener University School of Law.
nhackett@clausen.com

Introduction

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

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

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

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

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

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

Plaintiff's burden of proof in strict product liability cases may appear to be somewhat relaxed, insofar as plaintiff need only establish the defect, plaintiff's injury and that the product's defect proximately caused plaintiff's injury. Nevertheless, an insurer's pursuit of recovery against the manufacturer of a failed product is often derailed by its inability to prove that the product was, in fact, defective.

SUBROGATION

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

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

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

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

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

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

In *Metropolitan*, the insureds purchased the subject lawn tractor in April, 1998. It performed without

incident until the spring of 2003, when it underwent maintenance by both the dealer that sold the tractor and by the insured. On the date of loss, the insured attempted to mow the lawn with the tractor, but was unable to complete this task as the tractor's engine was "running roughly." The insured parked the tractor in its garage, and, approximately one and one-half hours later, the insured's home caught fire. The insured admitted that the tractor "had been running roughly and backfiring repeatedly for several months prior to the fire."

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

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

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

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

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

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

DEFENSE DEPARTMENT' S SUCCESS IN NEW YORK CONTINUES

Summary Judgment Granted In Favor Of Clausen Miller's Client In Construction Defect Litigation

Carl M. Perri (NY/NJ Shareholder) and **Matthew T. Leis** (NY/NJ Partner) in Clausen Miller's Professional Liability and Causality Defense department, recently won summary judgment on behalf of our Client in a construction defect/engineering malpractice litigation after lengthy motion practice. This case involved the design and construction of a major New York area sports arena. Our Client participated in constructing walkways leading to and from the arena. After the project was completed, Plaintiff was one of many thousands of people who attended a baseball game at the arena. Plaintiff claims he slipped and fell while walking toward the arena on a sunken tree bed due to a height differential between the walkway and dirt tree bed.

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

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

Clausen Miller Presents Client-Site Seminars For CLE and/or CE Credit

As part of our commitment to impeccable client service, we are proud to provide client work-site presentations for Continuing Legal Education ("CLE") and/or Continuing Education ("CE") credit. Some of our currently available courses are listed below. Please view the complete list and individual course descriptions at www.clausen.com/index.cfm/fa/home.resources/resources.cfm for information regarding the state specific CE credit hours as well as course and instructor details.

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

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

Alternatives to Litigation: Negotiation and Mediation

An Ethical Obligation or Simply an Option?: Choose Your Own Adventure When Adjusting a First Party Property Claim

An Insider's Guide To New York Practice

Appellate and Trial Protocols for Resolving Coverage, Casualty and Recovery Issues Facing the Insurance Claims Professional

Attorney-Client Privilege and Work Product Doctrine

Bad Faith Law and Strategy for the Claims Professional and Appellate Protocols for the Resolutions of Such Claims

Breaking Bad Faith, Failure To Settle Within Policy Limits, And Strategy For The Claims Professional

Builders Risk Insurance: Case Law, Exclusions, Triggers And Indemnification

Coverage and Trial/Appellate Litigation— Strategies Affecting Coverage Determinations

Coverage Summer School: "Hot" Insurance Topics for "Cool" Claims Handling

Deep Pockets: Prosecuting & Defending Government Liabilities— US & Municipalities

Developments In Property Insurance Coverage Law

Discovery in the Bad Faith Context

Jumping Over the Evidentiary Hurdles to Victory

Miscellaneous Issues of Interest Relating to Property Insurance

Recent Developments In Insurance Coverage Litigation

Recent Trends In Bad Faith And E-Discovery Issues And Protocols To Resolve Same For The Claims Professional

Subrogation: Initial Recognition, Roadblocks and Strategies

Targeted Tenders, Suits Against Employers, And Other Legal Issues Facing The Claims Professional

Tips And Strategies For The Claims Professional: What You Need To Know About Medicare Reporting, The Affordable Care Act, Targeted Tenders, And Unilateral Settlement Agreements

If you are interested in a course or topic not currently listed in our available courses, please contact the Clausen Miller Marketing Department at marketing@clausen.com

Get Ready...

The CM Report is going fully digital in 2017!

In a move toward more environmentally-conscious practices, we will be discontinuing distribution of our PRINT versions.

The CM Report of Recent Decisions is currently readily available for downloading in Interactive PDF format to your mobile devices, tablets and desktops from our website. Those of you who still subscribe to PRINT will have the rest of 2016 to change your subscriptions to our convenient email alerts. Just sign up at **www.clausen.com**.

Thank you to all our readership. We look forward to continuing service to our digital subscribers.

CM REPORT of Recent Decisions

EXPERTS

EXPERTS BARRED FOR LACK OF SCIENTIFIC METHODOLOGY

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

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

INSURANCE CLAIMS PRACTICES

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

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

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

LIABILITY INSURANCE COVERAGE

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

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

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

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

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

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

STRIP SEARCHES CONSTITUTE SEPARATE OCCURRENCES UNDER POLICY

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

Dispute between county and insurer whether over 400 illegal strip searches were one occurrence or 400 separate occurrences. The policy defined "occurrence" as "an event, including continuous or repeated exposure to substantially the same general harmful conditions, which results in . . . 'personal injury' . . . by any person or organization and arising out of the insured's law enforcement duties." The lower courts held the definition was unambiguous and that each strip search was a separate occurrence. ***Held:*** Affirmed. The language of the insurance policies made clear that it covered personal injuries to an individual person as a result of a harmful condition. The definition does not permit the grouping of multiple individuals who were harmed by the same condition, unless that group is an organization, which was clearly not the case.

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

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

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

MEDICAL MALPRACTICE

WRONGFUL BIRTH CLAIM ACCRUES UPON BIRTH OF BABY

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

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

NEGLIGENCE

LANDOWNER NOT IMMUNE UNDER RECREATIONAL USE STATUTE

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

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

HOTEL OWNER AND INSURER NOT LIABLE FOR EMPLOYEE ASSAULT

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

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

TORTS

NO TORTIOUS INTERFERENCE IN RETENTION OF SOFTWARE DESIGN FIRM

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

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

WORKERS' COMPENSATION

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

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

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

Clausen Miller P.C.

10 South LaSalle Street
Chicago, IL 60603
Telephone: (312) 855-1010
Facsimile: (312) 606-7777

200 Commerce Square
Michigan City, IN 46360
Telephone: (219) 262-6106

28 Liberty Street
39th Floor
New York, NY 10005
Telephone: (212) 805-3900
Facsimile: (212) 805-3939

100 Campus Drive
Suite 112
Florham Park, NJ 07932
Telephone: (973) 410-4130
Facsimile: (973) 410-4169

17901 Von Karman Avenue
Suite 650
Irvine, CA 92614
Telephone: (949) 260-3100
Facsimile: (949) 260-3190

Clausen Miller LLP
34 Lime Street
London EC3M 7AT U.K.
Telephone: 44.20.7645.7970
Facsimile: 44.20.7645.7971

Clausen Miller International:

Grenier Avocats
9, rue de l'Echelle
75001 Paris, France
Telephone: 33.1.40.20.94.00
Facsimile: 33.1.40.20.98.00

Studio Legale Corapi
Via Flaminia, 318
00196-Roma, Italy
Telephone: 39.06.32.18.563
Facsimile: 39.06.32.00.992

van Cutsem-Wittamer-Marnef & Partners
Avenue Louise 235
B-1050 Brussels, Belgium
Telephone: 32.2.543.02.00
Facsimile: 32.2.538.13.78

Wilhelm Partnerschaft von Rechtsanwälten mbB
Reichsstraße 43
40217 Düsseldorf, Germany
Telephone: 492.116.877460
Facsimile: 492.116.8774620

CMI CLAUSEN MILLER INTERNATIONAL

Clausen Miller Speakers Bureau

Clausen Miller Offers On-Site Presentations Addressing Your Business Needs

As part of Clausen Miller's commitment to impeccable client service, our attorneys are offering to share their legal expertise by providing a client work-site presentation regarding legal issues that affect your business practice. If you are interested in having one of our attorneys create a custom presentation targeting the specific needs of your department, please contact our Marketing Department:

Stephanie Lyons
Clausen Miller P.C.
10 South LaSalle Street
Chicago, IL 60603
(312) 855-1010

marketing@clausen.com
www.clausen.com