CM REPORT

of Recent Decisions

2016 • Vol. 2

Separate Appellate Counsel To Prosecute And Defend Your Insurance Coverage Appeals

Indiana Supreme Court Clarifies Standard For Summary Judgment In Employment Discrimination Case

Duty To Defend Terminates With Criminal Conviction

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 REPORT
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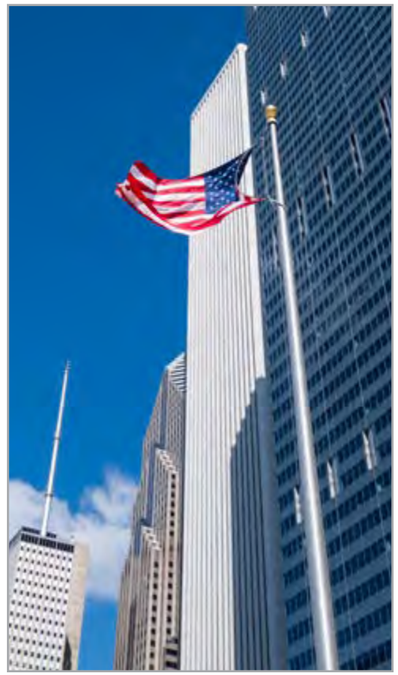

SIDEBAR

The Wisdom And Efficiency Of Having Separate Appellate Counsel Prosecute And Defend Your Insurance Coverage Appeals

by ***Edward M. Kay***

We wish to caution our friends in the industry that now is certainly no time to try to "pinch pennies" and forego the wisdom and efficiency of having separate appellate counsel prosecute and defend your insurance coverage appeals. The thinking that "why not just have trial coverage counsel" do the appeal is a misguided thought in our practice. Former Illinois Appellate Court Justice Robert Cook, in an article entitled "Should the Trial Lawyer Handle the Appeal?" put it this way:

> Some lawyers tell me that clients want their trial lawyers to handle the appeals because they don't want to spend the money to familiarize another lawyer with the case. [D]on't the clients want to win? Cost controls which substantially reduce the chances of success are not cost effective.

The point is, you are not saving money by having trial counsel handle your appeal because you are decreasing the odds that you will be successful in the appeal.

Many scholars and judges have noted that trial attorneys who prosecute their own appeals have tunnel vision. Having handled the case themselves, they become convinced of the merits of their cause. In other words, they lose objectivity and become "married" to the arguments they developed and the way those arguments were presented in trial court briefing. Separate appellate counsel bring no such biases to the table.

Moreover, coverage appeals cannot be done "on the cheap" by slapping an appellate caption on trial court briefing. This was recognized by the California Court of Appeals in the case of *In re: Shaban*, 105 Cal. Rptr. 2d 863 (Cal. App. 2001), wherein the Appellate Court had these observations on appellate practice and brief writing:

> [A]ppellate briefs receive greater judicial scrutiny than trial level points and authorities, because three judges (or maybe seven) will read them, not just one judge. The judges will also work under comparatively less time pressure, and will therefore be able to study the attorney's "work product" more closely. They will also have more staff (there are fewer research attorneys per judge at the trial level) to help them identify errors in counsel's reasoning, misstatements of law and miscitations of authority, and to do original research to uncover ideas and authorities that counsel may have missed, or decided not to bring to the court's attention.

* * *

> [A]ppellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them into an appellate brief, is producing a substandard product. (105 Cal. Rptr. at 870-71)

In other words, according to the California Court of Appeals: "Appellate work is most assuredly not the recycling of trial level points and authorities." (*Id.* at 870)

In *Litigation* magazine, Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit, described the differences and required skills and temperament between trial and appellate lawyers. Judge Silberman stated:

> Effective presentations to a federal court of appeals, or to any appellate court, require a blend of talents not necessarily found in the typical trial lawyer. Appellate advocacy is, in short, a specialty all to itself.

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is a Clausen Miller partner and co-chairs the Appellate Practice Group. He is AV® rated (Preeminent) by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed has been chosen as a Leading Illinois Appellate Attorney, a Super Lawyer and has over 30 years experience in trial monitoring and post-trial/ appellate litigation which he regularly brings to bear in significant cases nationwide. Ed has prosecuted over 500 appeals nationwide.
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Clausen Miller has long recognized what the scholars and judiciary have said about appellate practice—it is indeed a specialty all to itself. This is why Clausen Miller has long been a proponent of maintaining a separate Appellate Practice Group and its appellate attorneys routinely handle the firm's coverage matters on appeal. Senior partners **Melinda Kollross** and **Don Sampen** have successfully handled dozens of insurance coverage appeals nationwide for our friends in the industry over the past two decades:

CLAUSEN MILLER APPELLATE PRACTICE GROUP INSURANCE COVERAGE APPEALS NATIONWIDE

LIABILITY INSURANCE MATTERS

Case Name	Citation	Year
Century Indemnity v. Viking Pump	No. 518, 2014 (Del. S.Ct./NYCA) (insurance allocation, certified question to NY Court of appeals, case pending in Delaware Supreme Court)	2015-16 (pending)
Illinois Emcasco v. Nationwide Mutual	2015 IL App (1st) 140928-U (duty to settle and other issues)	2015
Michigan Millers v. Asoyia, Inc.	793 F.3d 872 (8th Cir.) (late notice, other issues)	2015
Erie Ins. Co. v. Radtke,	126 A.D.3d 757 (N.Y. App. 2d Dep't) (business risk exclusions)	2015
FSLM Associates LLC v. Arch Insurance Group	122 A.D. 3d 493, 997 N.Y.S.2d 48 (NY App. 1st Dep't) (application of exclusion)	2014
Starr Indemnity v. Boys and Girls Club	No. 13-3221 (7th Cir.) (settled) (application of exclusions)	2014
Karen Manor Assoc. LLC v. Virginia Surety Co. Inc.	116 A.D.3d 439 (N.Y. App. 1st Dep't) (insured time period)	2014
Auto-Owners Insurance Co. v. Yocum	2013 IL App (2d) 111267, 987 N.E. 2d 494 (2d Dist.) (application of premiums and other issues)	2013
Essex Insurance Co. v. Mondone	106 A.D. 3d 1045, 965 N.Y.S. 2d 616 (N.Y. App. 2d Dep't) (application of exclusion)	2013
Vindas v. Toll Bros., Inc.	No. 2011-08939 (N.Y. 2d App. Dept.) (settled) (duty to disclaim)	2012
Robert Pitt Realty, LLC v. 19-27 Orchard Street, LLC	101 A.D. 3d 404, 955 N.Y.S. 2d 563 (N.Y. App. 1st Dep't) (additional insured and other issues)	2012

Case Name	Citation	Year
Johnson Controls, Inc. v. Employers Insurance of Wausau	No. 12 AP 001851 LV (Wis.) (PLA) (excess-umbrella duty to defend and other issues)	2012
Northport Land Corp. v. Zurich N. Am. Ins.	99 A.D.3d 683 (N.Y. App. 3d Dep't) (environmental coverage)	2012
Penford Products v. C.J. Schneider	808 N.W.2d 443 (Ia. App.) (arbitration issues)	2011
Farmers Insurance v. Bacci Café	No. 11-2781 (Ill. App. 1st Dist.) (308 petition) (duty to defend)	2011
Northern States Power Co. v. Continental Insurance Co.	805 N.W. 2d 734, 337 Wis. 2d 427 (Wis. App.) (claim preclusion issues)	2011
Illinois Tool Works v. Commerce & Industry	2011 Ill. App. (1st) 093084 (assignment issues)	2011
In re: Heating Oil Partners, LP	422 Fed. Appx. 15 (2d Cir.) (bankruptcy-related issues)	2011
Markel v. Biro	406 Ill. App. 3d 1204 (1st Dist.) (duty to defend)	2010
Century Surety Co. v. Valet Chicago, Inc.	399 Ill. App. 3d 1215 (1st Dist.) (assault/battery exclusion)	2010
Colmore v. Royal Indemnity	321 Fed. Appx. 595 (9th Cir.) (duty to defend)	2009
BASF AG v. Great American Assur. Co.,	522 F.3d 813 (7th Cir.) (advertising injury)	2008
Gabriele v. Lyndhurst Residential Comm.	No. 62,514 (N.J. S.Ct.) (petition for certification)	2008
Stoneridge Development Co v. Essex Insurance	No. 106675 (Ill. S.Ct.) (PLA response)	2008
Essex Ins. Co. v. Wright	862 N.E.2d 1194 (Ill. App. 1st Dist.) (spoliation of evidence)	2007
Lexington Ins. Co. v. Chicago Hospital	372 Ill. App. 3d 1093 (1st Dist., table) (arbitration issues)	2006
Schultz v. Atlantic Mut. Ins. Co.	853 N.E.2d 94 (Ill. App. 1st Dist.) (policy limits)	2006
Sokol & Co. v. Atlantic Mut. Ins. Co.	430 F.3d 417 (7th Cir.) (business risk exclusions)	2005
Essex Ins. Co. v. Young	796 N.Y.S.2d 204 (N.Y. App. 4th Dep't) (assault/battery exclusion)	2005
Whitehead v. Continental Cas. Co	2004 WL 1397628 (Ohio App.) (UM/UIM coverage)	2004
Taco Bell Corp. v. Continental Cas. Co.	388 F.3d 1069 (7th Cir.) (prior publication exclusion)	2004

LIABILITY INSURANCE MATTERS (cont.)

Case Name	Citation	Year
In re Silicone Implant Ins. Coverage Litigation	667 N.W.2d 405 (Minn.) (trigger of coverage)	2003
Legros v. Atlantic Mut. Co.	2002 WL 31867719 (Minn. App.) (umbrella endorsement)	2002
Atlantic Mut. Ins. Co. v. American Academy of Orthopedic Surgeons	734 N.E.2d 50 (Ill. App.) (intentional acts exclusion)	2000
Decker v. Atlantic Mut. Ins. Co.	1997 Ohio App. LEXIS 1829 (UM/UIM coverage)	1997

FIRST PARTY PROPERTY INSURANCE MATTERS

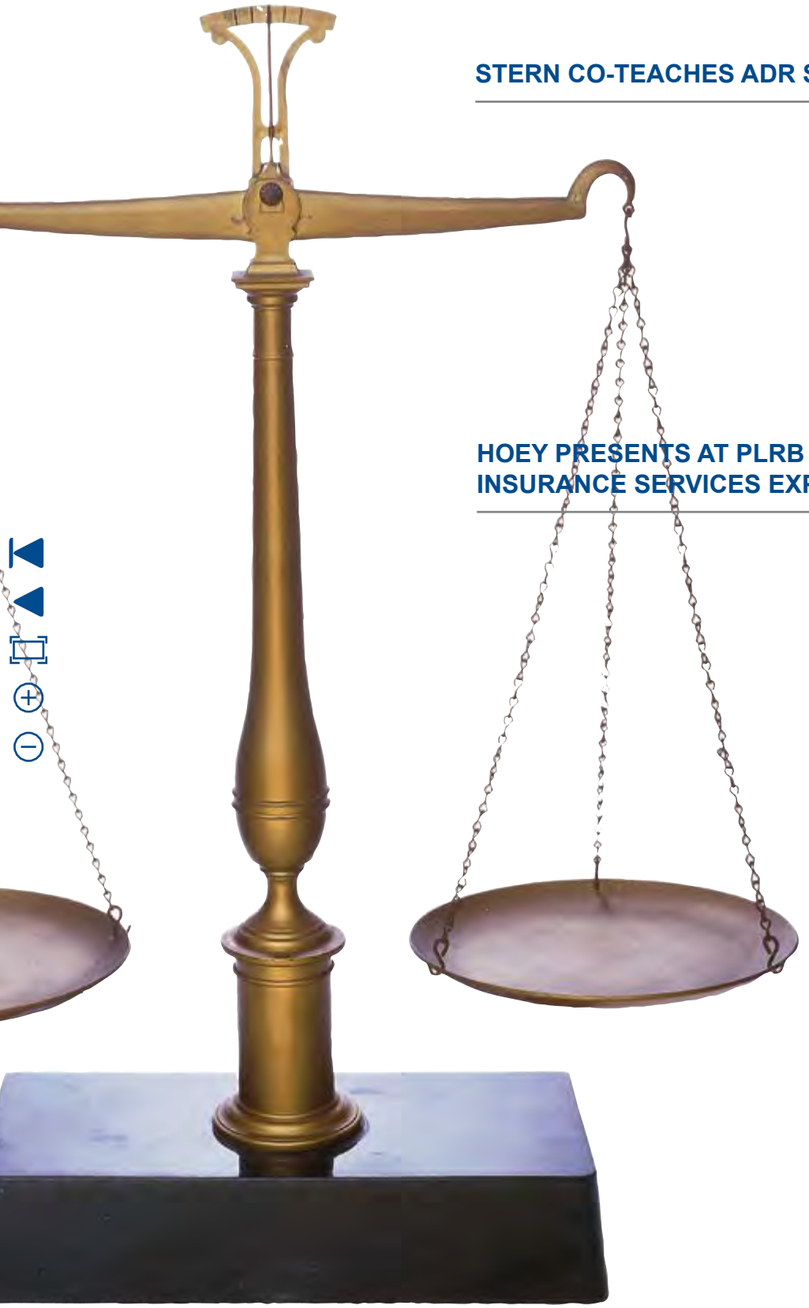
Case Name	Citation	Year
State of Wisconsin Local Gov't Property Insurance Fund v. Lexington	No. 15-1973 (7th Cir.) (arbitration)	2016 (pending)
Weitz Co. v. Lexington	786 F.3d 641 (8th Cir.) (late notice, subrogation)	2015
United States Dredging Corp v. Lexington Insurance Co.	952 N.Y.S. 2d 60 (N.Y. App. 2d Dep't) (fortuity, covered loss)	2012
Bleznak Black, LLC v. Allied World Nat'l Assur. Co.,	2012 N.J. Super. Unpub. LEXIS 879 (N.J. App. Div.) (Madoff investment losses)	2012
Universal Mortgage v. Wurttembergische	651 F.3d 759 (7th Cir.) (employee dishonesty)	2011
Traynor v. Lexington Ins. Co.	420 Fed. Appx. 674 (9th Cir.) (suit limitation provision, punitive damages)	2011
Landmark American v. Moulton	440 Fed. Appx. 788, 2011 WL 3962636 (11th Cir.) (rescission, misrepresentation)	2011
Hickory Props. v. Am. Zurich Ins. Co.	409 Ill. App. 3d 1148 (Ill. App. 1st Dist.) ("building" definition)	2011
City of Elmira v. Selective Ins. Co. of N.Y.	83 A.D.3d 1262 (N.Y. App. 3d Dep't) (law and ordinance coverage)	2011
Council Tower Ass'n v. Axis Specialty Ins.	630 F.3d 725 (8th Cir.) ("collapse")	2011

Case Name	Citation	Year
Aztar Corp. v. U.S. Fire Ins. Co.	224 P.3d 960 (Az. Ct. App.) (business interruption)	2010
Terminal Freezers v. U.S. Fire	345 Fed. Appx. 305 (9th Cir.) (application of exclusions)	2009
Nussbaum Diamonds v. Hanover Insurance	883 N.Y.S.2d 509 (N.Y. App. 1st Dep't) (jeweler's block policy)	2009
ANC Rental Corp. v. Lexington Ins. Co.	**http://www.4dca.org/opinions/Pcas/Nov2007/11-21-07/4D07-1256.pca.pdf** (Fla. App.) (business interruption)	2007
Zahran v. Frankenmuth Mut. Ins. Co.	1995 U.S. App. LEXIS 9553 (7th Cir.) (bad faith)	1995

FIDELITY/SURETY

Case Name	Citation	Year
RBC Mortgage Co. v. National Union Fire Ins. Co.	812 N.E.2d 728 (Ill. App. 1st Dist.) ("direct" loss)	2004

As this impressive array of reported insurance coverage decisions illustrates, savvy insurers choose separate appellate counsel to prosecute and defend their coverage appeals in state and federal reviewing courts nationwide.



STERN CO-TEACHES ADR SKILLS & ETHICS COURSE

CM is proud to report that CM partner **Rob Stern** was selected to co-teach a New York "Bridge the Gap" course on ADR Skills & Ethics along with several other highly respected and knowledgeable NY attorneys. For more information on ADR, please contact Rob (**rstern@clausen.com**).

HOEY PRESENTS AT PLRB CLAIMS CONFERENCE AND INSURANCE SERVICES EXPO

James M. Hoey was a speaker at the PLRB Claims Conference and Insurance Services Expo on April 17-20, 2016 in San Antonio, Texas. Jim presented the topic "Equipment Breakdown and Open Perils." The presentation included identifying how open perils and equipment breakdown policies interface with each other. Please contact Jim at **jhoey@clausen.com** or 312-606-7493 if you are interested in this topic.

KOLLROSS SECURES DISMISSAL OF APPEAL BASED ON JURISDICTIONAL DEFECT

CM partner and Appellate Practice Group co-chair **Melinda Kollross** recently secured the dismissal of a property insurance coverage appeal pending in the Illinois Appellate Court, First District. The plaintiff mistakenly believed that her filing of an amended complaint against the defendant property insurer—who had already been dismissed with prejudice and against whom leave to file an amended complaint had not been expressly sought or obtained—extended the time for filing a notice of appeal after the last remaining co-defendant was dismissed. Melinda identified the jurisdictional defect and moved to dismiss, arguing that the amended complaint against the previously dismissed insurer was a legal nullity that did not extend the 30-day deadline for filing a notice of appeal once the last remaining co-defendant had been dismissed. The Appellate Court agreed and dismissed plaintiff's appeal prior to appellate briefing and oral argument, saving Melinda's client thousands of dollars in appellate defense costs. For more information on CM's appellate practice, please contact Melinda at **mkollross@clausen.com**.

FELDMAN OBTAINS FAVORABLE VERDICT FOR STUCCO CONTRACTOR

CM partner **Ian Feldman** secured a favorable verdict in a recent jury trial in Yolo County, California (right next to Sacramento). CM represented a stucco subcontractor that allegedly misapplied its one-coat stucco system on 25 homes in a higher-end tract development. We took the case over in December 2015 from a well-regarded CA insurance defense firm, while we were in the midst of a year-long arbitration. The pre-trial demand was $1.5 million. We had no client as the insured was a suspended corporation. We served offers of judgment for a collective amount of $175,000, allocated equally amongst all of the homes. Plaintiffs asked the jury for $1.2 million. After 3 ½ weeks of trial, the jury awarded $128,525 for all of the homes. We beat our offers of judgment on 21 of 25 homes and are entitled to statutory costs. A huge victory under challenging circumstances. For more information on our construction defect practice, please contact Ian (**ifeldman@clausen.com**).

NEW YORK CASUALTY DEFENSE GROUP OBTAINS DECISION DISMISSING TRIP AND FALL NEGLIGENCE CLAIM AND CROSS-CLAIMS

CM partners **Carl Perri** and **Matthew Van Dusen** were retained to represent defendant Wild Ginger NYC Corp. ("Wild Ginger"), a Manhattan Chinese restaurant that rented space from its co-defendant landlord, New York Pacific Realty Corp. ("NYPRC"), in a trip and fall action. Plaintiff contended that she fell on the sidewalk between the building owned by NYPRC and the neighboring co-defendant landlord. Plaintiff also sued the neighboring landlord and its salon tenant.

Wild Ginger and NYPRC obtained a property survey and moved for summary judgment prior to depositions based upon the survey and discovery materials. Plaintiff never opposed the motion. The neighboring co-defendants opposed the motion upon speculation and arguments but failed to produce a competing property survey that revealed otherwise. In the Decision and Order, Justice Julia Rodriguez summarily dismissed all direct claims and cross-claims against Wild Ginger and NYPRC.

If you would like to learn more about New York personal injury issues, please feel free to e-mail Carl (**cperri@clausen.com**) or Matthew (**mvandusen@clausen.com**) or call them (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. You will find available courses listed below. Please view the complete list of individual course descriptions at http://clausen.com/education/ for information regarding the state specific CE credit hours.

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

Jumping Over the Evidentiary Hurdles to Victory

Miscellaneous Issues of Interest Relating to Property Insurance

Negotiation: Methods For Determining Settlement Values And Strategies For Acquiring Movement

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 Claims Professionals: The Affordable Care Act, Unilateral Settlement Agreements, And Ethics In Claims Handling

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

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

Indiana Supreme Court Clarifies Standard For Summary Judgment In Employment Discrimination Case

by ***Kimbley A. Kearney***

Kimbley A. Kearney
is a Managing Partner of Clausen Miller P.C.'s Indiana Office who maintains practices in both Indiana and Chicago. She is AV® Preeminent™ rated by Martindale-Hubbell and a Super Lawyer® 2016. She has successfully litigated cases involving catastrophic personal injury, wrongful death, property loss, class actions, mass toxic tort, employment discrimination, admiralty, insurance coverage and commercial disputes in trial and appellate courts throughout the United States. Kim is a Fellow in the American Academy of Appellate Lawyers, a member of the Federation of Defense & Corporate Counsel, and a Proctor in Admiralty. She received her Juris Doctor, *cum laude*, and M.B.A. from Tulane University.
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Facts

In *Gaff v. Indiana—Purdue University of Fort Wayne*, 2016 Ind. LEXIS 287 (April 22, 2016), the Indiana Supreme Court affirmed summary judgment in favor of Purdue on a cause of action for alleged retaliatory termination from employment due to discrimination brought under Title VII of the Civil Rights Act of 1964. In doing so, the Court clarified the standard for granting summary judgment on federal statutory claims brought in Indiana state court. Gaff claimed that Purdue terminated him on account of his sexual orientation and in retaliation for making a complaint against a co-worker who claimed that Gaff behaved inappropriately toward him. The Supreme Court agreed with the Court of Appeals that Purdue was entitled to summary judgment. Recovery under a Title VII retaliation claim requires that a plaintiff prove (1) he engaged in a statutorily protected activity; (2) he suffered a material adverse action; and (3) a causal link between the two. The Court found that the only arguably "protected activity" was Gaff's complaint to his supervisor that his co-worker called him derogatory names related to his weight and sexual orientation but those complaints did not demonstrate that discrimination occurred because of sex, race, national origin, or some other protected class under the statute.

Analysis

While the Supreme Court approved dismissal of the Title VII claim, it disagreed with the summary judgment standard employed by the Court of Appeals. It instructed that, even though Indiana Trial Rule 56 is "nearly identical" to Federal Rule of Civil Procedure 56, Indiana summary judgment procedure is different from federal practice which permits the moving party to "merely show that the party carrying the burden of proof lacks evidence on a necessary element" of his cause of action. Indiana imposes "a more onerous burden" by requiring the party moving for summary judgment to "affirmatively negate an opponent's claim." Under Indiana's methodology, the moving party must demonstrate the "absence of any genuine issue of fact as to a determinative issue, at which point the burden shifts to the non-movant to come forward with contrary evidence showing an issue for the trier of fact." The Court went on to clarify that, where a federal statutory claim is brought in Indiana State court, the Indiana methodology, rather than the federal, must be used to determine if summary judgment is appropriate.

Learning Point: Even where a plaintiff relies on a federal statute as the basis of recovery, summary judgment will not be granted in Indiana unless the defendant can affirmatively show that there is a complete absence of any genuine issue of fact material to the cause of action asserted. As in *Gaff*, Indiana courts will focus exclusively on the parties' Agreed Statement of Material Facts and the parties' Designation of Evidence to determine whether a genuine issue of material fact exists. A party considering bringing a summary judgment motion must be mindful of the "onerous burden" it will face in Indiana and must be sure that no material fact disclosed in its Designation of Evidence is subject to challenge.

For more Indiana practice information, please contact Kim (**kkearney@clausen.com**). ♦

Employer Provided Leave Pursuant To The FMLA And ADA Issues

by ***Paul W. Daugherity***

Introduction

In May 2016, the Equal Employment Opportunity Commission ("EEOC") issued a new resource document addressing the rights of employees with disabilities who seek leave as a reasonable accommodation under the American with Disabilities Act ("ADA"). The EEOC released this resource document in response to a trend that the EEOC identified in ADA charges, specifically, the prevalence of employer policies that deny or unlawfully restrict the use of leave as a "reasonable accommodation" for employees with disabilities. The EEOC issued the resource document to prevent discriminatory denials of leave from occurring and to explain how existing EEOC policies and guidance apply to specific situations, consolidating existing guidance on the ADA and leave in one place. While there are other reasonable accommodations besides leave, this article will focus solely on leave as that was the focus of the recent EEOC resource document.

Analysis

The EEOC defines reasonable accommodation as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."

This definition includes modifying existing leave policies and providing leave when needed for a disability, even where the employer does not offer such leave to other employees.

The leave issue, by its nature, encompasses the Family Medical Leave Act ("FMLA"). The FMLA requires that covered employers (those employers engaged in commerce or in any industry or activity affecting commerce who employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year – see 29 CFR 825.104) provide eligible employees (those employees who have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles) with up to twelve work weeks of unpaid leave in a 12-month period. If the employee is unable to or does not return to work at the end of unpaid 12 weeks of FMLA leave, the employee is no longer entitled to any further job restoration rights under the FMLA and may be terminated. (This is commonly referred to as a "no fault" leave policy—where employees are automatically terminated if their leave lasts longer than 12 weeks.)

The EEOC interprets the FMLA in conjunction with the ADA and holds that the ADA requires that employers make exceptions to leave policies that establish a maximum amount of leave

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that an employer will provide or permit, and that employers may have to grant unpaid leave beyond this amount as a "reasonable accommodation" to employees who require it because of a disability, unless the employer can establish that granting additional leave will cause an undue hardship. In other words, the EEOC holds that employers may ***not*** apply a "no fault" leave policy to an employee with a ***disability*** who needs leave beyond the set FMLA period. The EEOC's position is that compliance with the FMLA does not necessarily meet an employer's obligation under the ADA, and the fact that any additional leave exceeds what is allowed under the FMLA, by itself, is not sufficient to show undue hardship.

The EEOC generally holds that the individual with the disability must inform the employer that an accommodation such as an extension of leave is needed. When an employee makes such a request, the employer must treat the request as one for a reasonable accommodation under the ADA. At this point, the employer should engage in an "interactive process" (the process for identifying reasonable accommodations under the ADA involving conversations between employers and employees with disabilities in order to identify accommodations) with the employee. The information required by the employer will vary based on the employee, the job functions and the disability. However, much of the focus will be on:

- The specific reason the employee needs leave (*e.g.* surgery and recuperation, adjustment to new medication, doctor visits);
- Whether the leave will be a block of time or intermittent; and
- When the need for leave will end.

Depending on the information provided, the employer should consider whether the leave would cause an undue hardship. (Please note that this is generally a high bar, and the EEOC in general does not view undue hardship as a strong argument for failing to grant additional leave.) An exception to providing additional leave exists if the employer can show that: (1) there is another effective accommodation that would enable the employee to perform the essential functions of their position; or (2) granting additional leave would cause an undue hardship to the employer's business operations.

A determination of undue hardship should be based on several factors, including:

- The amount and/or length of leave required;
- The frequency of the leave;
- Whether there is any flexibility with respect to the days on which leave is taken;
- Whether the need for intermittent leave on specific dates is predictable or unpredictable;
- The impact of the employee's absence on coworkers and on whether the specific job duties are being performed in an appropriate and timely manner; and the overall financial resources, size, number of employees, and
- The impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which also takes the size of the employer into account.

While undue hardship cannot be based ***solely*** on the existence of a no fault leave policy, the employer may be able to show undue hardship based on an individualized assessment of the position which shows the disruption to the business if additional leave is provided and how much additional leave is needed, if leave is granted beyond the period allowed by the policy.

Additionally, leave as a reasonable accommodation includes the right to return to the employee's original position. However, if an employer determines that holding the position open will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work.

Given the EEOC's interpretation of the ADA and leave polices, and its guidelines, it is clear that FMLA and other leave policies must be read in conjunction with the ADA in order to avoid potential liability issues for disability discrimination for failure to accommodate and/or interfering with FMLA rights. It is also apparent that a "no fault" policy cannot be implemented without exception. Leave requests should be reviewed on an individual basis. The key issues are whether or not the employee making the request has a disability, and if the request is in any way related to the disability.

Another issue is how long of an extension of leave must be granted. The general answer is a "reasonable" amount—but what is "reasonable" is undefined. However, courts have ruled that an employer is not required to provide an employee with an indefinite leave of absence. Nor can an employee request an open-ended, indefinite leave of absence. The employee must provide a reasonable estimate of when they will be able to perform their essential job duties. (*See, Minter v. District of Columbia*, 809 F.3d 66 (D.C. Cir. 2015)).

Learning Points: Given these issues, there are a few things employers should do when/if an employee seeks additional leave beyond the 12 weeks provided for by the FMLA.

First, determine if the employee has a disability (as defined by the ADA) and if the request for additional time is in any way related to the disability.

Second, engage in an interactive process with the employee to understand his/her medical condition, how it affects the employee's ability to perform essential job functions, and if there are accommodations aside from leave that could be used to help the employee perform the essential job functions.

Third, employers should review correspondence used to communicate with employees nearing the end of leave. These letters often warn of the nearing end of their leave, and instruct the employee to return to work by a certain date or face discipline or termination. Such a letter sent to an employee requiring additional leave as an accommodation will present a problem.

The best practice to avoid litigation and/or liability issues is to engage in an open, non-adversarial dialog with the employee to come to a resolution that works for both parties.

Finally, be sure to document the entire process. ♦

Duty To Defend Terminates With Criminal Conviction

by ***Don R. Sampen***

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is a Clausen Miller partner and has over 30 years of trial and appellate experience in various areas, including insurance coverage and commercial litigation. Don is a *magna cum laude* graduate of Northwestern University College of Law, where he was Executive Editor of the *Northwestern Law Review*. Don is an Adjunct Professor at Loyola University College of Law teaching a course in Insurance Law.
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Introduction

When allegations of negligence are combined in an underlying complaint with allegations that the insured committed intentional bodily injury, questions sometimes arise concerning the extent of the insurer's duty to provide a defense to the insured. In *Country Mutual Insurance Co. v. Dahms*, 2016 IL App (1st) 141392, the First District Appellate Court held that the insurer was required to defend, but that the duty to defend terminated once the insured was criminally convicted of the alleged conduct.

Facts

The insured, Dahms, got into an altercation with a cab driver in October of 2011. The cab driver sued Dahms in October of 2012. In an amended complaint, the driver alleged negligence in one count and intentional battery in the second count.

The cab driver's counsel notified Dahms of the potential lawsuit prior to filing the underlying lawsuit, and Dahms tendered to his homeowners carrier, Country Mutual. Country Mutual denied coverage. After the filing of the underlying complaint, it brought this coverage action. It contended it had no duty to defend because of the absence of an "occurrence" or accident, and also based on the intentional acts exclusion in the policy.

In March of 2013, Dahm was convicted of aggravated battery in connection with the underlying civil lawsuit's allegations. In October of 2013, he answered the underlying amended complaint and asserted self-defense as an affirmative defense.

Country Mutual and Dahms filed cross motions for summary judgment in this coverage action. The trial court found that Country Mutual had a duty to defend but one that began only after the filing of Dahms's self-defense affirmative defense. Dahm appealed, and Country Mutual cross appealed.

Analysis

Pre-Conviction Duty

In an opinion by Justice David Ellis, the Illinois Appellate Court, First District affirmed in part and reversed in part. The Court initially addressed the duty to defend up until the time of Dahms's criminal conviction. Country Mutual argued that, just because the underlying complaint used the term "negligence" in one of the underlying counts, that did not mean that the actual conduct alleged was not intentional.

The Appellate Court noted that Illinois courts cannot decide the ultimate fact of an insured's intent in an underlying lawsuit during a declaratory-judgment action addressing the duty to defend that lawsuit. On the other hand, it pointed out that courts are not blind to the fact that a claimant may have an incentive to draft pleadings in a way that triggers insurance coverage.

The Court thus cited several cases where an underlying complaint characterized actions as "negligent" but where the allegations set forth what could only be deemed an intentional act. In such cases, like *Allstate Insurance Co. v. Carioto*, 194 Ill. App. 3d 767 (1990), the courts have held that substance controls over the moniker placed on the claim by the plaintiff.

These types of cases, though, are rare, and in the instant case the Court could not say that, as a matter of law, the allegations clearly supported an inference of intent to the exclusion of all other possible inferences.

Thus, prior to the time that Dahms was convicted, and based on the allegations of the complaint, the First District found that neither the intentional-acts nor criminal-acts exclusions eliminated the possibility of coverage, and Country Mutual had a duty to defend.

Post Conviction Duty

Dahms's conviction, however, meant that a jury had found, beyond a reasonable doubt, that Dahms had committed a crime, and the applicability of the criminal-acts exclusion became clear and free from doubt. At that point, no question existed about the coverage court deciding an issue prematurely that could be binding in the underlying tort case. Nor could Country Mutual be accused of using its self-serving discretion in determining that Dahms's conduct was criminal.

Thus, upon Dahms's conviction, Country Mutual's duty to defend terminated. This was so, moreover, even though the fact of the conviction was beyond the four corners of the underlying complaint. The Appellate Court said that looking beyond the complaint was appropriate in this case to acknowledge an undisputed fact that had the effect of triggering a policy exclusion.

Finally, an issue arose concerning allegations in the cab driver's complaint about Dahms damaging the windshield of the cab, which property damage was not alleged to have been caused intentionally. If the complaint sought recovery for negligently caused property damage, the Court said, then Dahms would be entitled to coverage. It nevertheless found that the complaint did not seek recovery for the windshield—only injury to the cab driver—and therefore no coverage was owed.

Accordingly, the Court held that Country Mutual had a limited duty to defend, and thus partially affirmed and partially reversed the trial court's decision.

Learning Points:

(a) Where the allegations of an underlying complaint give rise to a duty to defend, that duty may terminate upon the criminal conviction of the insured for the conduct alleged.

(b) Evidence of a criminal conviction is admissible in a declaratory coverage action, even if outside the allegations of the underlying complaint, where the evidence is relevant to coverage. ♦

DAMAGES

PUNITIVE DAMAGES AVAILABLE FROM TORTFEASOR'S ESTATE

Whetstone v. Binner, 2016 Ohio LEXIS 714 (Ohio)

Following entry of default judgment, decedent died before damages were imposed. ***Held in a split decision:*** When liability is determined while a decedent is still alive, punitive damages are available from the estate. Absent postponement at decedent's request, damages would have been imposed during his life. Decedent's estate may explain at hearing that decedent is unavailable and that punitive damages will be imposed against an estate. Dissent argued that punitive damages are intended to punish a wrongdoer, not innocent beneficiaries.

FIRST-PARTY PROPERTY

REPEATED FLOODING SUFFERED BY NEIGHBOR NOT AN OCCURRENCE

Travelers Pers. Ins. Co. v. Edwards, 2016 IL App (1st) 141595 (Ill. App.)

A homeowner's neighbor suffered repeated home flooding over many years in part due to a driveway easement crossing the property. The neighbors sued in order to relocate the driveway easement. The homeowner tendered defense to its insurer, which sought a ruling that it had no duty to defend or indemnify. ***Held:*** The repeated flooding was a natural and ordinary consequence of the homeowners' refusal to allow the relocation of the driveway easement and therefore could be reasonably expected; accordingly, it was not the product of an accident. Since the flooding was not the product of an accident, it could not be deemed an occurrence and there was no coverage.

INSURANCE CLAIMS PRACTICES

EQUITABLE CONTRIBUTION OVERRIDES SELECTIVE TENDER RULE

Ins. Co. of the State of Pa. v. Great N. Ins. Co., 45 N.E.3d 1283 (Mass.)

Worker's compensation primary insurer sought equitable contribution from non-targeted insurer. ***Held:*** Selective tender not allowed. Equitable contribution provides fairness, furthers the risk-spreading purpose of insurance, and promotes stability and predictability in the insurance market. Selective-tender rule is inapplicable to workers' compensation because employee's tender of claim to employer constitutes notice to all insurers. Absent prejudice to insurer, an insured's failure to timely tender a claim to it, even if intentional, does not protect insurer from liability. Selective tender would frustrate public policy by benefitting some insurers at the expense of others. It would also burden the insolvency fund.

FAILURE TO READ POLICY DEFEATS NEGLIGENT PROCUREMENT CLAIM

Amankwah v. Liberty Mut. Ins. Co., 2016 Ohio App. LEXIS 1216 (Ohio App.)

Insurer did not provide collision coverage after insured rolled over policy to cover a new car. ***Held in a split decision:*** Insured's failure to review policy declarations and notice his reduced premiums was fatal to his negligent procurement claim. Insured knew that because of the substitution of cars, his premiums should have increased. Insurer was not required to highlight the policy change because insured initiated the change. ***Further held:*** There was no mutual mistake to support a reformation claim.

LIABILITY INSURANCE COVERAGE

SALE OF COUNTERFEIT GOODS DOES NOT TRIGGER ADVERTISING INJURY

United States Fid. & Guar. Co. v. Fendi Adele S.R.L., 2016 U.S. App. LEXIS 8973 (2d Cir.)

Ashley Reed sold counterfeit goods displaying luxury handbag-maker Fendi trademarks to merchandise resellers, including Burlington Coat Factory. Fendi sued Reed and Burlington for various trademark violations. Reed's insurer then sought a declaration that it owed no duty to indemnify Reed. ***Held:*** The sale of goods bearing counterfeit trademarked logos does not trigger advertising injury coverage when the goods are not used to solicit customers through printed ads or other media.

PROFESSIONAL LIABILITY INSURER NOT RESPONSIBLE FOR CLASS ACTION FEES

Edward T. Joyce & Assocs., P.C. v. Professionals Direct Ins. Co., 816 F.3d 928 (7th Cir.)

A law firm, after winning a large award for a class of securities-fraud plaintiffs, hired another firm to sue to collect the money owed. The law firm was ordered to reimburse some of the fees that it had been paid since it outsourced this work and sought those fees from its insurer. The insurer claimed that the reimbursed fees were a sanction and fell under an exclusion for fines, sanctions and penalties. ***Held:*** The reimbursement was not a sanction, but was an adjustment in the legal fees owed to the law firm and therefore fell under a policy exclusion for legal fees, costs or disbursements paid or owed to the law firm.

"PARTICIPATING IN" LANGUAGE IN SPORTING EVENTS EXCLUSION HELD AMBIGUOUS

West Bend Mut. Ins. v. Randolph Cnty. Fair, 2016 IL App (5th) 140499-U (Ill. App.)

Insurer argued that injuries caused to a volunteer at a "mud bog" racing event were excluded due to an exclusion stating "This insurance does not apply to 'bodily injury' to any person while practicing for or participating in any sports or athletic contest or exhibition that you sponsor." The volunteer was helping to remove vehicles that became stuck in the "mud bog" at the time of the accident. ***Held:*** "Participating in" is not sufficiently clear to avoid a finding of ambiguity and therefore is construed in favor of the insured.

MOLESTATION EXCLUSION BARS COVERAGE FOR VICARIOUS LIABILITY

World Harvest Church v. Grange Mut. Cas. Co., 2016 Ohio LEXIS 1306 (Ohio)

Insured sought coverage arising out of child abuse at its daycare center. ***Held:*** The molestation exclusion barred coverage for injury from actual or threatened abuse, regardless of whether liability was direct or vicarious. The failure to mention vicarious liability did not render the exclusion ambiguous. ***Further held:*** Insurer was not liable for attorneys' fees for pursuing uncovered claims. Neither was it liable for post-judgment interest despite provision for payment of interest on "any judgment." The policy must be read as a whole.

LOSS OF PROBIOTIC PILLS NOT COVERED

Wis. Pharmacal Co., LLC v. Neb. Cultures of Cal., Inc., 876 N.W.2d 72 (Wis.)

Insured recalled and destroyed supplement tablets containing wrong probiotic bacterial species. ***Held in a split decision:*** The losses were not covered by insured's general liability policies. The defect did not cause bodily injury or damage to property other than the pills themselves. The defective ingredient was part of an integrated system and so did not damage "other property" or cause "physical injury" to the other ingredients in the tablets. There was no "loss of use" of property; rather, insured lost the value of tablets. Although insured's supplier accidentally provided the defective ingredient, this did not constitute an "occurrence" under the policies. By itself, a breach of contract is not an occurrence. Dissent argued the economic loss doctrine plays no role in analyzing policy language.

LIABILITY INSURANCE COVERAGE/ ENVIRONMENTAL

LEAD IS A POLLUTANT UNDER GEORGIA LAW

Georgia Farm Bureau Mut. Ins. Co. v. Smith, 784 S.E.2d 422 (Ga.)

A toddler suffered brain damage from ingesting lead paint in a rental home. The mother sued the landlord, who tendered the mother's claim to his CGL insurer. The insurer filed a declaratory judgment action seeking a determination that the child's injuries were not covered under the policy and the insurer had no duty to defend based upon the absolute pollution exclusion. ***Held:*** The absolute pollution exclusion applied to bar coverage. Lead paint qualifies as a pollutant under Georgia law because the absolute pollution exclusion does not apply strictly to traditional industrial or environmental harm.

LIMITATIONS OF ACTIONS

ASBESTOS-RELATED STATUTE OF REPOSE UNCONSTITUTIONAL

Myers v. Crouse-Hinds Div. of Cooper Ind., Inc., 2016 Ind. LEXIS 156 (Ind.)

Mesothelioma victims diagnosed decades after initial exposure challenge asbestos-related statute of repose. ***Held in a split decision:*** Statute violates the Indiana Constitution's equal privileges and immunity clause. Statute creates impermissible classifications between persons injured by businesses that mined or sold asbestos and businesses that merely used it. ***Further held:*** General statute of repose does not bar cases "involving protracted exposure to an inherently foreign substance." Dissent argued that court upheld the statute of repose only a decade earlier.

FEDERAL TRANSPORTATION STATUTE OF LIMITATIONS PREEMPTS LONGER STATE STATUTE

Kennedy Tank & Mfg. Co. v. Emmert Indus. Corp., 2016 Ind. App. LEXIS 120 (Ind. App.).

Transportation carrier sued shipper for failure to pay expenses incurred in move of machinery. ***Held:*** Interstate Commerce Act's 18-month statute of limitations preempts state's 10-year statute governing written contracts. Though Congress deregulated carriers, it retained the 18-month limitation. Carrier must bring state law claims within the federal statute.

MEDICAL MALPRACTICE

HOSPITAL'S NOTICE TO PATIENT INSUFFICIENT TO AVOID VICARIOUS LIABILITY CLAIM

Ford v. Jawaid, 2016 Ind. App. LEXIS 95 (Ind. App.)

After treatment by independent-contractor doctor in hospital, patient's problems continued. ***Held:*** Issue remained as to whether hospital meaningfully notified patient of independent contractor relationship. Notice must be given and acknowledged at the time of patient's admission. In emergencies, a written notice may be insufficient if patient is unable to make informed choice. Hospital's notice merely stated that doctors "may" be independent contractors— insufficient notice as to patient.

ATTORNEY AVOIDS SUMMARY JUDGMENT ON CONTINUOUS REPRESENTATION ISSUE

Red Zone LLC v. Cadwalader, Wickersham & Taft LLP, 2016 N.Y. LEXIS 1143 (N.Y.)

Plaintiff brought a legal malpractice claim against its former attorney and initially obtained summary judgment as to the defendant's statute of limitations defense by arguing that any limitations period was tolled by the attorney's continued representation of the LLC. ***Held:*** Fact questions existed where the defendant presented evidence of: the significant gap in time between the alleged malpractice and the later communications between the parties; the changed nature of defendant's alleged legal representation of plaintiff; absence of clear delineation of the period of representation; and affidavits disclaiming any mutual understanding of legal representation after 2005.

MERGERS

COURT ADOPTS DELAWARE REVIEW STANDARD FOR GOING-PRIVATE MERGERS

Matter of Kenneth Cole Prods., Inc, 2016 N.Y. LEXIS 1059 (N.Y. 2016)

A majority shareholder of Kenneth Cole Productions, Inc. proposed a going-private merger to the board of directors. The shareholders commenced class action lawsuits alleging the board of directors and Cole breached a fiduciary duty. ***Held:*** In reviewing challenges to going-private mergers, New York courts should apply the business judgment rule as long as certain shareholder-protective conditions are present; if those measures are not present, the entire fairness standard should be applied. The lack of alleged fraud or bad faith satisfied the business judgment rule, upholding the complaint's dismissal.

NEGLIGENCE

QUESTION OF FACT EXISTS REGARDING KARATE ACCIDENT

Megenity v. Dunn, 2016 Ind. App. LEXIS 169 (Ind. App.)

Instructor was injured during practice session by student's inappropriate kick. ***Held in a split decision:*** Question existed whether the kick was a commonly understood part of the practice activity. Dissent argued that the proper focus should be on entire sport of karate rather than a single practice drill.

GENERAL CONTRACTOR NOT LIABLE FOR INJURY TO EMPLOYEE OF SUB-SUB

Ryan v. TCI Arch'ts/Eng'rs/Cont'rs, Inc., 2016 Ind. App. LEXIS 165 (Ind. App.)

Employee of sub-subcontractor fell during course of construction job. ***Held in a split decision:*** Owner/general contractor contract did not evince contractor's intent to assume duty of care to sub-sub's employee. The general contractor was not required to take precautions, only to supervise work. Under contracts, the subs had responsibility to implement and monitor safety. Dissent argued that contract language was sufficient to impose duty of care.

STORM IN PROGRESS DOCTRINE PROTECTS LANDOWNER

Sherman v. New York State Thruway Auth., 2016 N.Y. LEXIS 1061 (N.Y.)

A trooper slipped and fell in stormy conditions on an icy sidewalk outside of the barracks and sued the property owner. The property owner sought summary judgment, arguing that the storm was still in progress per weather reports and per plaintiff's own concessions, and that no duty to maintain is owed until a storm has ended. ***Held:*** The defendant submitted uncontroverted evidence that a storm was still in progress. Although the weather had warmed up from an "intermittent wintry mix" of snow, sleet and rain to merely rain at near freezing temperatures, this was sufficient to satisfy the doctrine.

MOWING ACCIDENT NOT COVERED BY RECREATIONAL USE STATUTE

Combs v. Ohio Dept. of Nat. Res., 2016 Ohio LEXIS 953 (Ohio)

Visitor to state park was injured by a rock thrown from mower. ***Held in a split decision:*** Recreational use statute does not protect against liability for injuries caused by negligent operations on land. It only bars liability for injuries arising from conditions of the land. As to the operations, a duty to exercise reasonable care exists. Dissent contends that because injury was caused by thrown rock, it resulted from a condition on the premises.

EDGE-DROP NOT PART OF ROAD FOR PURPOSES OF IMMUNITY

Baker v. Wayne County, 2016 Ohio LEXIS 952 (Ohio)

Decedent died when her car drove off edge of highway under repair and onto shoulder. ***Held in a split decision:*** County immune from liability. Although immunity statute is inapplicable to negligent failure to repair public roads, berms and shoulders are not considered part of the road. Having traveled off the edge, decedent left the public road. Dissent argued that the edge is part of the road.

BALLOON OWNER NOT IMMUNE IN RECREATIONAL ACCIDENT

Roberts v. T. H.E. Ins. Co., 2016 Wisc. LEXIS 121 (Wis.)

Waiting to board hot air balloon at charity event, plaintiff was injured when balloon broke from its tether. ***Held in a split decision:*** Balloon owner was not covered by recreational immunity statute. Balloon owner was not an occupier of land because it did not own land, produce the event, or make property available for recreational use. Because balloon was transient, it failed to qualify as "property." Exculpatory agreement was void as against public policy. Waiver must be limited, provide adequate notice of nature and significance, and allow signatory an opportunity to negotiate.

PRIVILEGE

PRIVILEGE DOES NOT PROTECT MERGER COMMUNICATIONS

Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 2016 N.Y. LEXIS 1649 (N.Y.)

Attorney-client communications were shared when two entities were in the process of merging and those communications were sought by a plaintiff in discovery in a subsequent dispute. ***Held:*** The defendants' communications must relate to litigation, either pending or anticipated, in order for the common interest doctrine to apply. Here there was no evidence that communication-sharing outside of the litigation context was necessary for facilitating better legal representation, ensuring compliance with the law, or avoiding litigation.

TORTS

UNDOCUMENTED WORKER MAY RECOVER FOR LOST EARNING CAPACITY

Escamilla v. Shiel Sexton Co., 2016 Ind. App. LEXIS 94 (Ind. App.)

Undocumented worker claimed that injury impaired his earning ability as a brick mason. ***Held in a split decision:*** Worker's immigration status is relevant but not conclusive as to his ability to recover for loss. An expert must consider worker's status when computing earnings loss. If worker was likely to return to his home country, the rate of pay there might be more appropriate. Lack of documentation is relevant only if worker measures a loss at U.S. rates but is in danger of deportation. Dissent argues that immigration evidence is speculative and unfairly prejudicial.

HEALTHCARE AIDE'S CLAIMS FOLLOWING ACQUITTAL NOT ACTIONABLE

Ali v. Alliance Home Health Care, LLC, 2016 Ind. App. LEXIS 87 (Ind. App.)

Following acquittal on theft charges, aide sued former employer for defamation, malicious prosecution, false imprisonment, intentional infliction of emotional distress, and vicarious liability. ***Held:*** Defamation claim failed because communications with law enforcement and insurer enjoyed qualified privilege. Communications with government were protected by statute. Comments furthering investigation were not defamatory as a matter of law. Malicious prosecution claim failed because employer did not initiate action and probable cause existed. False imprisonment and infliction of emotional distress claims failed for lack of malicious/fraudulent motive and outrageous conduct, respectively. Vicarious liability claim failed because investigator was independent contractor.

UM/UIM

UM BENEFITS REQUIRE DIRECT PHYSICAL CONTACT BETWEEN VEHICLES

McJimpson v. Auto Club Grp. Ins. Co., 2016 Mich. App. LEXIS 958 (Mich. App.)

While driving on the interstate, a piece of sheet metal came loose from an unidentified semi-truck and struck the windshield of a vehicle, causing damage and injuries. The driver sought UM benefits from her insurer, who rejected the claim. The driver filed a complaint alleging that the insurer wrongly denied UM benefits. ***Held:*** The policy provides UM benefits when a hit and run vehicle makes direct physical contact with an insured's vehicle, which did not occur here. The direct physical contact requirement is not met when something falls from another vehicle.

HEALTH INSURER CANNOT OBTAIN REIMBURSEMENT FROM NO-FAULT INSURER

Aetna Health Plans v. Hanover Ins. Co., 2016 N.Y. LEXIS 1689 (N.Y.)

A health insurer sued a no-fault auto insurer for reimbursement of medical bills. ***Held:*** The health insurer does not fall under the term "health care provider" under 11 NYCRR 65-3.11 (a) and thus has no rights to receive direct no-fault benefits. Also, an assignment by the insured of her no-faults rights had already been made, leaving her with no right to assign to her health insurer.

WORKERS' COMPENSATION

ENDORSEMENT EXCLUDING COVERAGE IN STATES REQUIRING SEPARATE WORKERS' COMPENSATION DOES NOT EXCLUDE COVERAGE

Cont'l Western Ins. Co. v. Knox County EMS, Inc., 2016 IL App (1st) 143083 (Ill. App.)

Insured appealed finding that its insurer had no duty to defend or pay benefits on an Illinois workers' compensation claim due to an endorsement excluding coverage in states that required separate workers' compensation coverage. ***Held:*** The statute requires an employer to carry insurance sufficient to cover its complete legal obligation to pay the workers' compensation benefits to which its employee is entitled in Illinois. Illinois law requires coverage for workers' compensation claims, not separate coverage only for workers' compensation benefits due under Illinois law. Therefore, the exclusion did not apply.

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