CM EAST COAST REPORT

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New York Court Holds Intentionally Set Fire Is Considered Vandalism

Sole Proximate Cause Defense To Labor Law §240(1) Claim Reversed

Principle Of Subrogation Law Bars Foreign Insurer From $24M Recovery

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FEATURES

ARTICLES

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New Jersey Supreme Court Joins Majority Of Courts Holding That A GC's CGL Policy Will Provide Coverage For A Subcontractor's Defective Work

by **Robert A. Stern**

In *Cypress Point Condominium Association, Inc. v. Adria Towers, L.L.C., et al.* (A-13/14-15) (076348) (August 4, 2016), the New Jersey Supreme Court was faced with the question of "whether rain water damage caused by a subcontractor's faulty workmanship constitutes 'property damage' and an 'occurrence' under a property developer's commercial general liability (CGL) insurance policy." In short, the Court held as follows: "The consequential damages caused by the subcontractors' faulty workmanship constitute 'property damage,' and the event resulting in that damage – water from rain flowing into the interior of the property due to the subcontractors' faulty workmanship – is an 'occurrence' under the plain language of the CGL policies at issue here."

This litigation "arose from the construction of Cypress Point, a luxury condominium complex in Hoboken consisting of fifty-three residential units." During construction, Evanston Insurance Company issued four (4) CGL policies to the developer for the beginning of the construction project, and Crum & Forster issued three (3) CGL policies for the remainder of the construction project. All the CGL policies were modeled after the standard ISO form. The policies provided coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' . . . caused by an 'occurrence' that takes place in the 'coverage territory' . . . [and] . . . occurs during the policy period." "Property damage" was defined to include "[p] hysical injury to tangible property including all resulting loss of use of that property." "Occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

After substantial completion and transfer of control to the Association, "several condominium owners began experiencing problems, such as roof leaks and water infiltration at the interior window jambs and sills of the residential units. The Association also became aware of damage caused by water intrusion into the common areas and interior structures." The "Association brought an action against the developer and several subcontractors. It alleged faulty workmanship during construction, including but not limited to, defectively built or installed roofs, gutters, brick facades, exterior insulation and finishing system siding, windows,

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doors, and sealants." The Association also "claimed consequential damages, consisting of, among other things, damage to steel supports, exterior and interior sheathing and sheetrock, and insulation, to Cypress Point's common areas, interior structures, and residential units ("the consequential damages")."

The developer requested defense and indemnity from Evanston. Evanston refused, and the developer filed a Declaratory Judgment action. Additionally, the Association filed an Amended Complaint seeking a declaration as to whether its claims were covered by Evanston's CGL policy. Evanston filed an Amended Answer denying any obligation to defend or indemnify, and filed a Third-Party Complaint against Crum & Forster.

Evanston and Crum & Forster moved for summary judgment. They argued that they were not liable "because the subcontractors' faulty workmanship did not constitute an 'occurrence' that caused 'property damage' as defined by the policies." The trial court agreed and dismissed the litigation. On appeal, the appellate court reversed, holding that "unintended and unexpected consequential damages [to the common areas and residential units] caused by the subcontractors' defective work constitute 'property damage' and an 'occurrence' under the [CGL] polic[ies]." The matter was then appealed to the New Jersey Supreme Court.

The New Jersey Supreme Court issued a thirty-nine (39) page Opinion affirming the appellate court's decision and remanding the matter back to the trial court for proceedings consistent with the Opinion. In short, the Court first looked at the law regarding insurance policy interpretation. Then, the Court looked at 1973 and 1986 standard ISO CGL policy forms (the 1986 version was used the Evanston and Crum & Forster). The Court distinguished prior case law which relied upon the 1973 wording. The panel distinguished the Seminal New Jersey case *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233 (1979), "explaining that damage for breach of contractual warranty is limited and an expected cost of doing business, whereas liability for damage to a person or property is unpredictable and almost limitless. The CGL policy is designed to ensure against the latter risk."

The Court then examined case law from other jurisdictions interpreting the 1986 version of the CGL standard form. The Court stated that "these cases, while not controlling, represent a strong recent trend of interpreting the term 'occurrence' to encompass unanticipated damage to nondefective property resulting from poor workmanship."

The Court stated that it was going to follow a three step process to resolve the issue at hand. "First, we examine the facts of the Association's claims to ascertain whether the policies provide an initial grant of coverage. If so, the second step considers whether any of the policies' exclusions preclude coverage. Finally, in step three, we determine whether an exception to a pertinent exclusion applies to restore coverage."

"Those post-construction consequential damages resulted in loss of use of the affected areas by Cypress Point residents and, we hold, qualify as '[p]hysical injury to tangible property including all resulting loss of use of that property.' Therefore, on the record before us, the consequential damages to Cypress Point were covered 'property damage' under the terms of the policies."

"Based on [guiding principles discussed in the Opinion], we find that the term "accident" in the policies at issue encompasses unintended and unexpected harm caused by negligent conduct. That construction of the term 'accident' as it relates to an 'occurrence' in a CGL policy aligns with both the commonly accepted definitions of 'accident' and the legal import given to the term by both this and other jurisdictions."

"In any event, under our interpretation of the term 'occurrence' in the policies, consequential harm caused by negligent work is an 'accident.' Therefore, because the result of the subcontractors' faulty workmanship here—consequential water damage to the completed and nondefective portions of Cypress Point—was an 'accident,' it is an 'occurrence' under the policies and is therefore covered so long as the other parameters set by the policies are met."

The Court noted that there were coverage exclusions related to "your work." Examining those exclusions in isolation, a court could determine that there is no coverage. But, the Court noted, the exclusion cannot be reviewed in isolation.

Importantly, the Court stated: "However, the 'your work' exclusion contains an important exception that 'narrow[s] the exclusion by expressly declaring that it does not apply 'if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."" "Accordingly, the third and final step of our inquiry compels the conclusion that, because the water damage to the completed portions of Cypress Point is alleged to have arisen out of faulty workmanship performed by subcontractors, it is a covered loss."

"Thus, the Association's claims of consequential damages caused by the subcontractors' faulty workmanship are covered not only by the insuring agreements' initial grant of coverage but also by the subcontractor exception to the 'your work' exclusion." ♦

Learning Point: When a subcontractor's defective workmanship causes damages, it is imperative to review in detail the exact wording of the general contractor's CGL policy to determine whether it, in fact, does not provide defense and indemnity obligations. If the policy follows the 1986 standard ISO form, and certain exclusions contain their own exclusions, full coverage will apply. ♦

New York Court Holds That An Intentionally Set Fire Is Considered Vandalism As Defined By The Policy Language

by ***Michael W. Jacobson***

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The Appellate Division of the Supreme Court of New York, Second Department, recently affirmed a ruling on appeal that a Vandalism policy exclusion defined as "willful malicious conduct resulting in damage or destruction of property" was unambiguous and precluded coverage for a fire that was intentionally set. *Capek v. Allstate Indem. Co.*, 138 A.D.3d 666 (2d Dep't 2016).

Plaintiff owned certain real property located in East Setauket, which included a house. On December 18, 2010, a fire caused damage to the premises. A police investigation determined that the cause of the fire was incendiary or intentionally set. *Id.* at 666.

The policy at issue provided, in relevant part, that: "[w]e do not cover loss to the property … consisting of, or caused by … [v]andalism. However, we do cover sudden and accidental direct physical loss caused by fire resulting from vandalism unless your dwelling has been vacant or unoccupied for more than 90 consecutive days immediately prior to the vandalism." *Id.* at 667.

Importantly, the policy defined "Vandalism" as "willful or malicious conduct resulting in damage or destruction of property."

Following a denial of coverage based on the Vandalism exclusion, Plaintiff commenced this action against Defendant to recover damages for breach of contract and argued that the policy was ambiguous. Defendant moved for summary judgment dismissing the Complaint, contending, *inter alia*, that the vandalism exclusion was unambiguous and that it precluded coverage for the damage caused to the premises by the intentionally set fire. In opposition, Plaintiff contended, *inter alia*, that the term vandalism under the subject policy was ambiguous. The motion court granted Defendant's motion.

In affirming the lower court's decision, the Appellate Division found, "The subject policy expressly provided that it did not cover vandalism, which was defined as willful or malicious conduct resulting in damage or destruction of property." The subject policy, however, did, in fact, cover "sudden and accidental direct physical loss caused by fire resulting from vandalism."

The Appellate Division held that the evidence submitted by Defendant in support of its motion established, *prima facie*, that the fire at issue was intentional and, thus, would constitute "willful or malicious conduct resulting in damage or destruction of property" and would not, therefore, be covered. *Id.* at 667. Further, the Court rejected Plaintiff's ambiguity argument and reliance on *MDW Enters. v. CNA Ins. Co.* (4 AD3d 338, 772 N.Y.S.2d 79) as misguided because, in contrast to the subject policy, the policy addressed therein did not define the term "vandalism."

Learning Point: Vandalism exclusion covering "willful or malicious conduct" will serve to preclude coverage for an intentionally set fire. Moreover, New York law requires that an insurance contract must be interpreted under its plain language when the policy is unambiguous. ♦

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Email From Your Doctor Constitutes Medical Treatment

by ***Mara Goltsman***

In today's modern age, we no longer have to call our doctor's "service" and wait for a call back, as most of our doctors will provide us with an email address at which we can contact them with various questions. But, does email communication with our doctor constitute actual treatment? In a recent decision in *Caesar v. Brookman*, 2016 N.Y. Slip. Op. 26102 (Sup. Ct., N.Y. Co., March 30, 2016), Judge Schlesinger held that it does.

In *Caesar*, Plaintiff went to Defendant's office initially on September 28, 2012, with a complaint of a possible foreign body in his right heel. Defendant podiatrist examined his heel and noted a small opening from which he removed a shard of glass. He cleaned the area, dressed the wound and provided Plaintiff with instructions to apply an antibiotic cream and change the dressing daily. Two (2) days later, Plaintiff emailed Defendant with a list of complaints and sent him a photograph of the foot. Defendant replied to the email later that day. Thereafter, Plaintiff was hospitalized on October 2, 2012, and treated surgically for a MRSA infection in his right heel.

The statute of limitations is one of the most important aspects of the practice of law. If the statute expired before an action was commenced, an action will be time barred and a plaintiff will be unable to obtain his or her day in court.

Section 214-a of the New York Civil Practice Law and Rules provides that the statute of limitations for medical, dental or podiatric malpractice actions is two years and 6 months from the act, omission or failure complained of or of the last treatment where continuous treatment was rendered for the same illness, injury or condition which gave rise to the act, omission or failure at issue.

In *Caesar*, Plaintiff commenced this action on March 30, 2015, two years and 6 months from September 30, 2012, the date of the email exchange. Defendant filed a motion to dismiss Plaintiff's complaint as time barred, arguing that Plaintiff's treatment with Defendant ended on September 28, 2012, the sole date of treatment, and that the statute of limitations expired on March 28, 2015, *before* the action was commenced. Plaintiff argued that the email exchange constituted continuous treatment with respect to the same condition for which Plaintiff first saw Defendant podiatrist on September 28, 2012, and, as such, the last date of treatment was September 30, 2012, and the action was therefore timely commenced on March 30, 2015, the last day that Plaintiff could bring the action.

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Judge Schlesinger's decision noted the fact that when Plaintiff sent the email, he was seeking treatment from Defendant for the same condition for which he saw Defendant initially at his office, and that Defendant provided medical advice to Plaintiff which Judge Schlesinger interpreted as medical treatment. In reaching the decision, the Court considered the substance of the communication between Defendant podiatrist and his patient, rather than how the communication occurred. Judge Schlesinger held that Defendant provided medical advice to Plaintiff in response to his e-mail which, in turn, evidenced the fact that the "continuous treatment" doctrine applied in this matter, that Defendant podiatrist rendered treatment to Plaintiff via email, and that Plaintiff continued to rely on Defendant podiatrist as his treating provider.

Judge Schlesinger appeared to consider Judge Joan A. Madden's earlier decision in *Sturman v. Davis*, 2012 NY Slip Op 33531 (Sup. Ct., N.Y. Co., June 19, 2012), in formulating her decision in *Caesar*. The *Sturman* matter involved a legal malpractice cause of action commenced by a plaintiff against a defendant law firm. The defendant sought a dismissal of the plaintiff's Complaint as time barred and the Court granted the defendant's motion. The plaintiff sought reargument of the motion which the Court granted and then upheld its previous decision.

In *Sturman*, the plaintiff sent an e-mail to the defendant law firm on June 25, 2007, stating, in relevant part, "I am now asking for you to please return my money I am willing to forget the potential damage you have done to my case but I can no longer wait for you to do something for three years…." The defendant sent an email in response on June 26, 2007, stating, in relevant part, "I accept your termination of my firm in the best light possible…."

Judge Madden held that in order for the continuous representation doctrine to apply, there must be clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney. *Id.* She noted that there was no further evidence after the defendant's e-mail to the plaintiff affirming that the relationship had ended, and that there was any mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim such that the statute of limitations was no longer tolled by the continuous representation doctrine. The Court held that the attorney-client relationship was terminated on June 25, 2007, when the plaintiff sent the email which clearly communicated to her attorney that she was no longer willing to have the law firm represent her.

Similarly, Judge Schlesinger held that Plaintiff's email in *Caesar* clearly indicated his belief that Defendant was his treating podiatrist for his right foot injury and Defendant's email in response provided further evidence of the physician-patient relationship, particularly as Defendant podiatrist provide medical advice to Plaintiff in recommending that he take antibiotics. Judge Schlesinger found, therefore, that Plaintiff continued to rely upon Defendant's medical advice and that the "continuous treatment" doctrine applied. The September 30, 2012, email exchange was, therefore, the last date of treatment.

Learning Point: In New York, medical advice provided via email is afforded as much weight as medical advice provided in person or via letter, and will be considered continuous treatment so as to toll the statute of limitations. ♦

New York Court Reverses Lower Court's Application Of The Sole Proximate Cause Defense To Labor Law §240(1) Claim

by ***Nicholas J. Marino***

In *Grant v. Solomon R. Guggenheim Museum* (2016 NY Slip Op 04003 Decided on May 24, 2016), the First Department ruled on the application of the sole proximate cause defense to New York Labor Law §240(1). The lower court decision authored by Justice Cynthia Kern of Supreme Court, New York County granted motions to dismiss Plaintiff's Complaint against Defendants Solomon R. Guggenheim Museum ("Guggenheim") and F.J. Sciame Construction Co., Inc. ("Sciame"), and denied Plaintiff's own motion for summary judgment seeking the same relief. Plaintiff, a construction worker, was injured while preparing a crate of glass to be offloaded from the rear of a flatbed truck. Plaintiff was using a device known as a Johnson bar to maneuver the crate into position for slings to be attached, so it could be hoisted by a crane. As he was moving the crate it toppled over and struck him. The lower court held that both Guggenheim and Sciame (respectively, the owner and general contractor), had not violated the statute, and that Plaintiff's use of the Johnson bar (which Justice Kern determined was not the proper tool for this task) was the sole proximate cause of the accident.

The First Department reversed Justice Kern's decision, denying both Guggenheim and Sciame's motions, and granting Plaintiff summary judgment on his §240(1) claim. The Court took note of the crate's size (six feet tall) and weight (approximately 1,500 pounds). The Decision emphasized that the crate posed an elevation-related hazard because it was an object that required securing for the purposes of the work in which Plaintiff was engaged, citing to *Outar v. City of New York.* 5 N.Y.3d 731 (2005). Even more notably, the Court held that there was unrebutted evidence that several safety devices, including wooden bracing blocks "would have stabilized the crate" while it was being maneuvered into position. The Court also cited to Plaintiff's testimony that in the past he had used a Johnson bar to accomplish this same task, but with the assistance of a co-worker to stabilize the crate– in this instance, however, no one assisted him.

The Court underscored that where §240(1) has been violated, there can be no finding that a plaintiff was the sole proximate cause of an accident, citing to *DeRose v. Bloomingdale's Inc.*, 120 A.D.3d 41 (1st Dep't, 2014). Plaintiff's submission that

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wooden bracing blocks could have been used to stabilize the crate was sufficient, standing alone, to establish a violation of the statute. With that violation established, the Court commented that even if Plaintiff's use of the Johnson bar had been improper (in dicta, the Court inferred that this too was a dubious conclusion) it would not change the conclusion that Defendants violated the statute and were subject to strict liability.

Learning Point: This decision is a stark reminder of the broad and striking power of Labor Law §240(1)'s application to elevation-related construction activities, and the relative weakness of the sole proximate cause defense. While the statute applies to materials that are inadequately "hoisted or secured," here the Court found a violation where the object was being positioned *in preparation* for hoisting. The holding also emphasizes the need to rebut expert submissions when briefing motions for summary judgment. The First Department noted that Plaintiff's submission concerning the adequacy of wooden bracing blocks to prevent the accident was unrebutted. Had Defendants submitted an Affidavit from an expert calling into question this conclusion, it is possible that the Court would have stopped short of granting Plaintiff summary judgment. ♦

Pre-Judgment Interest Is At Court's Discretion

by ***Robert A. Stern***

In *Utica Mut. Ins. Co. v. Clearwater Ins. Co.*, 2016 U.S. Dist. LEXIS 91413, *2-5 (N.D.N.Y July 14, 2016), the Court was faced with the difficult issue of determining the date to commence calculating pre-judgment interest. In the underlying dispute, there were nearly forty breaches of contract, different lengths of billing periods and other issues all affecting the potential commencement date of pre-judgment interest.

The Court noted that in New York, awarding pre-judgment interest is at the court's discretion, and there are two methods to choose from. First, interest can be calculated "upon each item from the date it was incurred." Second, interest can be calculated "upon all of the damages from a single reasonable intermediate date." *Id.* (citing N.Y. C.P.L.R. 5001(b); *Pac. Westeel, Inc.*, 2003 U.S. Dist. LEXIS 18436, 2003 WL 22359512, at *3.

The Court concluded that after "considering the complexities presented under the first calculation, the court opts to use the second calculation and select a single reasonable intermediate date. Accordingly, prejudgment interest shall run from the midpoint between ninety days after the oldest unpaid billing of November 2, 2012 and ninety days after the most recent unpaid billing of March 22, 2016 through July 14, 2016, the date of this order." *Id.* The Court noted that this method is "consistent with other cases in which courts are tasked to determine a single reasonable intermediate date, *see Oy Saimaa Lines Logistics Ltd. v. Mozaica-New York, Inc.*, 193 F.R.D. 87, 91 (E.D.N.Y. 2000) (collecting cases), without overly burdening the court to engage in a complicated formula after providing the parties with the opportunity settle this issue amongst themselves."

Learning Point: Plaintiffs in a breach of contract matter should always seek pre-judgment interest. Naturally, they should seek the earliest possible date for commencement of the calculation. Defendants should be mindful of the potential to have a court pick a commencement date after the actual breach at issue. ♦

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New York Court Holds That General Cleaning Routines Without Specific Evidence Of Activities On Date Of Accident Are Insufficient To Disprove Constructive Notice Of Water Hazard

by **Allison L. Pisciotta**

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In *Sada v. August Wilson Theater*, 2016 N.Y. Slip. Op. 05024 (1st Dep't June 23, 2016), the Appellate Division, First Department, affirmed that "evidence submitted by defendant was insufficient to establish *prima facie* that it lacked constructive notice of the alleged water hazard. Although defendant described its general cleaning routines at the theater, it failed to offer specific evidence as to its activities on the day of the accident […]." See *Pineda v. 1741 Hone Realty Corp.*, 135 A.D.3d 567, 567 (1st Dep't 2016).

Defendant is a Broadway theater that was sued by Plaintiff who was allegedly injured when he slipped on a wet staircase as he was returning to a show at the theater after having gone outside during intermission. Defendant moved for summary judgment dismissing Plaintiff's Complaint on the ground that Plaintiff cannot establish it created the condition, had notice of the condition or sufficient time to correct the condition. The lower court denied summary judgment.

On appeal, the First Department highlighted that Defendant submitted evidence of its general cleaning routines at the theater, but did not introduce evidence as to its activities on the day of the accident, such as when the staircase was last inspected or maintained before Plaintiff fell. The First Department found that evidence related to Defendant's general cleaning routines, without any specific evidence as to Defendant's actions on the day of the accident, is insufficient to establish *prima facie* that Defendant lacked constructive notice of the water hazard.

Moreover, the First Department found that Plaintiff raised an issue of fact as to notice of the alleged condition and whether Defendant had enough time to remedy the condition, as Plaintiff testified that he told an usher that the area was wet before his accident. Fifteen minutes later, Plaintiff slipped in the same area he had complained of when he went outside during intermission.

The First Department affirmed the lower court's decision denying Defendant's motion for summary judgment dismissing Plaintiff's Complaint.

Learning Point: A defendant moving for summary judgment in a premises liability case cannot establish *prima facie* that it lacked constructive notice of a water hazard by merely describing its general cleaning routines and failing to offer specific evidence as to defendant's activities on the day of the accident. Moreover, a plaintiff raises a triable issue of fact when he testifies that shortly before the accident, he reported the hazardous condition. ♦

U.S. District Court Applies Long-Standing Principle Of Subrogation Law To Bar Foreign Insurer From Recovering $24 Million

by ***Nathalie C. Hackett***

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On June 20, 2016, the U.S. District Court for the Southern District of New York upheld an International Chamber of Commerce ("ICC") tribunal's decision to dismiss a Brazilian insurer's recovery claim, and stonewalled the insurer's subrogation action for $24 million in damages.

Energy giant, Alstom Brasil Energia e Transporte LTDA and Alstom Power Inc. ("Alstom Power"), which supports close to 25% of the world's power production capacity through its technology and services, petitioned the Court to enforce an arbitration award that insulated it from liability for a 2007 fire at Alumina do Norte do Brasil S.A. ("Alunorte"), a Brazilian aluminum refinery insured by Mitsui Sumitomo Seguros SA. ("Mitsui"). *Alstom Brasil Energia E Transporte Ltda. v. Mitsui Sumitomo Seguros S.A.*, 2016 U.S. Dist. LEXIS 80151 (S.D.N.Y. June 20, 2016).

Alstom supplied two steam generation units to be installed in Alunorte's aluminum refinery facility in Barcarena, Brazil, pursuant to a supply contract. *Id.* at *2. The contract between Alunorte and Alstom included an arbitration provision, which stated that disputes between Alstom and Alunorte would be resolved by the ICC in the State of New York. *Id.* at *5-6.

Ruptures in the specialized aluminum tubing in the steam generation units supplied by Alstom led to a fire at the facility in September, 2007, resulting in $24 million in property damage and lost profits to Alunorte, and Mitsui, by way of subrogation. Following the fire, Alunorte and Alstom entered into an additional compromise agreement, which mutually released the parties from all actual or potential claims as to each other (the "Release"). *Id.* at *3.

Mitsui, as subrogee of Alunorte, sued Alstom in the Brazilian courts for recovery of its $24 million in damages. *Id.* at *3. Alstom served Mitsui with a Demand for Arbitration before the ICC, thus invoking the arbitration clause of the Alstom-Alunorte supply contract, and moved to dismiss Mitsui's lawsuit in the Brazilian courts. *Id.* Alstom argued that Mitsui, as the insurer of Alunorte "stepped into the shoes" of its insured, and was thus bound by the arbitration provision, and bound by the release given by Alunorte to Alstom; and that Mitsui could not sue Alstom in the courts of Brazil. *Id.* *4. Mitsui entered a special appearance contesting the jurisdiction of the arbitration tribunal. *Id.*

In July, 2015 a panel of arbitrators at the ICC accepted jurisdiction over the dispute and ruled Mitsui was, in fact, bound by the arbitration provision in the supply contract. The panel also dismissed Mitsui's claim against Alstom, and Alstom's counterclaims, and ruled that each party would bear its own legal costs. *Id.* at *23. Alstom petitioned a New York state court to confirm the arbitration award, pursuant to 9 U.S.C. § 207, which permits any party to the arbitration to apply to any court having jurisdiction for an order confirming an arbitral award within three years after the award is granted. *Id.* Mitsui moved the dispute to federal court, only to argue that the court lacked personal jurisdiction to enforce the arbitration award. *Id.* at *11.

Mitsui contended that the ICC had no authority to force it to arbitrate its claims, and that even if the New York federal court decides it has jurisdiction, the ICC lacks authority to rule on the dispute, as Mitsui was not a party to the contract containing the arbitration provision. *Id.* at *10. Mitsui also pushed for dismissal on the grounds of *forum non conveniens*. *Id.* at *19. Alstom argued that Mitsui, as insurer of Alunorte, "stepped into the shoes" of its insured, and therefore was required to arbitrate disputes under the rules of the ICC. *Id.* at *18.

The U.S. District Court for the Southern District of New York upheld the long-standing proposition of subrogation law, that the insurer "steps into the shoes of its insured," and thus inherits the rights and/or limitations of its policyholder when pursuing subrogation claims. *Id.* The Court noted that under both Brazilian and federal law, Mitsui as a subrogee of Alunorte, inherited the provisions of Alunorte's supply contract with Alstom, and therefore was bound to arbitrate its subrogation action. *Id.* at 16-17. U. S. District Judge Alvin K. Hellerstein noted, "Mitsui knew when it extended insurance that it would be assuming subrogation rights, and taking over the rights of its insureds, should it have to indemnify its insureds…. These rights are defined by contracts made by the insureds, and Mitsui, as insurer, can have no better, or different, rights than those belonging to its insured." *Id.* at *14-15.

Learning Point: In a subrogation action, the insurer steps into the shoes of its insured, which enables the insurer to recover damages paid in consequence of a third-party's wrongful conduct. The principal of "stepping in the shoes" of the insured sometimes impedes the insurer's recovery action, based on the insured's agreements with the tortfeasor regarding choice of venue, choice of law and limitation of liability. Insurers must keep in mind that courts strictly construe this subrogation principle, which in some instances effectively bars the insurer's recovery action. ♦

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.

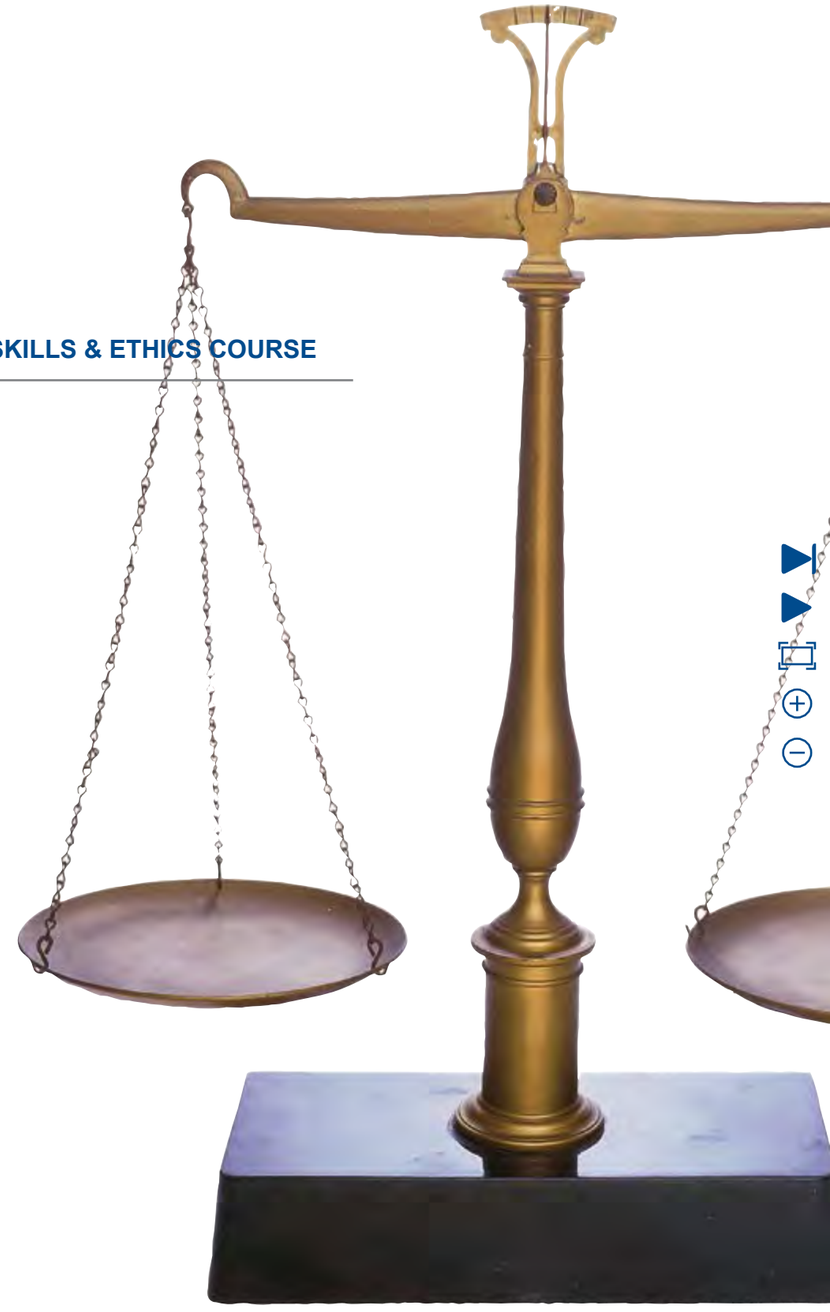
Wild Ginger and NYPRC obtained a property survey and moved for summary judgment prior to depositions based upon the survey and discovery materials. Plaintiff never opposed the motion. The neighboring co-defendants opposed the motion upon speculation and arguments, but failed to produce a competing property survey that revealed otherwise.

In the Decision and Order, dated March 21, 2016, 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).

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**).



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.

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.

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.

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.

MEDICAL MALPRACTICE

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

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.

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.

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.

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