CM REPORT

of Recent Decisions

2016 • Vol. 4

Trial War Lessons From The Foxhole

Indiana Supreme Court Broadens Application of Statutory Collateral Source Rule

Subrogation And Contribution Denied Against Municipal Entity

80th Anniversary Clausen Miller P.C.

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
of Recent Decisions

FEATURES

Report Staff

ARTICLES

SPECIAL ALERT: FOCUS ON INDIANA

APPELLATE

LIABILITY INSURANCE COVERAGE

TORTS

We are proud to present a "Guest Sidebar" in this issue, authored by our partner Paul Esposito, a senior member of Clausen Miller's Appellate Practice Group. Paul has been handling appeals for over 40 years. He has briefed and argued appeals in federal and state reviewing courts all over the country, including the U.S. Supreme Court.

Paul's appellate practice is not limited to the appellate courts. He strongly believes in a hands-on approach to appeals, one that has him working closely with defense counsel, both before and at trial. Paul has worked alongside some of the nation's best defense attorneys, against some of the nation's best plaintiff attorneys, in cases involving many millions of dollars in claimed damages. His goal is always the same: to help the firm's clients win at trial and on appeal.

In this "Guest Sidebar", Paul discusses the wisdom of utilizing appellate counsel at trial – a subject he has instructed on numerous times in his career.

Lessons From The Foxhole: Esposito Writes On Trial Wars

by Paul V. Esposito

It was William Tecumseh Sherman who uttered those forever famous words, "[w]ar is hell." Having left a path of destruction from Atlanta to Savannah, he certainly knew. But sooner or later, a trial lawyer would have said the same thing. For trial attorneys know that trial is war—and they are the warriors.

Their job may well be the toughest in the law. Consider the dynamics. Their opponent is usually prepared, hostile, and cagey – perhaps even unethical. The assigned judge, however well-intentioned, may lean towards an opponent.

Then there's the jury, a group of people about which little is known. They have their sympathies and biases, and must fight both. They are told the applicable law, but may not really understand it. They often pass out other people's money based on individual notions of how much is too much.

The trial attorney must constantly deal with shifting battle lines. Trial issues unexpectedly morph. An opponent's witnesses may throw a curveball; an attorney's own witnesses may stumble. Tricky issues of law suddenly surface, needing answers by the next morning—if not the next hour.

Understandably, their work is highly stressful. They must be ready to object to testimony within seconds. They must ask the right questions to opposing witnesses spring-loaded to inflict damage. They must keep a proper appearance before judge and jury. Their days start well before dawn and end well after nightfall. They eat and sleep poorly, often for weeks. What's amazing is how they endure and function so well.

Sometimes, trial attorneys need reinforcements, and increasingly, that's the role of an appellate attorney: to help them win. It's critical, and not just because winning is better than

Melinda S. Kollross
is a Clausen Miller shareholder and co-chair of the Appellate Practice Group. Specializing in post-trial and appellate litigation nationwide, Melinda is admitted to practice in both New York and Illinois, as well as the U.S. Supreme Court and U.S. Courts of Appeals for the Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. Melinda has litigated over 100 federal and state court appeals and has been named a Super Lawyer in appellate practice.
mkollross@clausen.com

Edward M. Kay
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.
ekay@clausen.com

Paul V. Esposito
is senior counsel at Clausen Miller P.C. and has been the primary handling attorney in appeals brought in the United States Supreme Court, the United States Courts of Appeals for the Third, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, and supreme and appellate courts in numerous states. Those appeals have covered a wide range of federal and state issues including constitutional, procedural, personal injury, transportation, employment, insurance coverage, and general commercial law.
pesposito@clausen.com

losing. On average, 70% of all appeals are won by the winner at trial. An appeal can be lost before it begins.

Years ago, appellate attorneys did not get involved until trials concluded. Their work was the ivory-tower stuff of writing briefs and arguing in reviewing courts. Too often, those efforts came too late. Wrong things were said or done at trial; right things weren't. It happens to even the best trial attorneys, who can't always deal with all things at all times.

But by working alongside trial counsel, appellate attorneys can be a big help. Because they don't prepare and examine witnesses, they can concentrate on a bigger picture. They are an extra set of eyes and ears at trial. From there, they can communicate to trial attorneys about what's working and what's not. It allows for real-time adjustments.

Appellate attorneys also help ensure that the issues are properly preserved. In the heat of battle, important details in trial proofs can be missed, and that can doom an appeal. With their background in court rules and case law, appellate attorneys can see where gaps in evidence must be filled to preserve a point. It can make all the difference.

Appellate counsel can take up some of the workload during trial. Almost always, trials need immediate research regarding a surprise issue. Performing research is right up the appellate counsel's alley. And counsel can help with time-consuming work like preparing trial motions and jury instructions. This allows trial attorneys to concentrate on other pressing matters.

The presence of appellate counsel can send a message from the client: we take this case very seriously, and we're preparing for the next level. It can make an opponent view the case more realistically, and reasonably.

Ultimately, it comes down to this—when trial and appellate attorneys join forces in the foxhole, the whole is better than the sum of the parts. And that provides the best chance to win both at trial and on appeal.

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 www.clausen.com/education/ for information regarding the state specific CE credit hours as well as course and instructor details.

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

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

Alternatives to Litigation: Negotiation and Mediation

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

An Insider's Guide To New York Practice

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

Attorney-Client Privilege and Work Product Doctrine

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

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

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

Coverage and Trial/Appellate Litigation— Strategies Affecting Coverage Determinations

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

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

Developments In Property Insurance Coverage Law

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

Illinois Super Lawyers 2017

Paul V. Esposito

James M. Hoey

Edward M. Kay

Kimbley A. Kearney

Melinda S. Kollross

Amy R. Paulus

Don R. Sampen

Illinois Rising Stars 2017

Daniel R. Bryer

Joseph J. Ferrini

Illinois Super Lawyers

Paul V. Esposito
Appellate

Paul is senior counsel for Clausen Miller P.C. and brings to our clients over 35 years of experience in appellate and trial courts throughout the nation. He has been the primary handling attorney in appeals brought in the United States Supreme Court, the United States Courts of Appeals for the Third, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, and supreme and appellate courts in numerous states. Those appeals have covered a wide range of federal and state issues including constitutional, procedural, personal injury, transportation, employment, insurance coverage, and general commercial law. Among his recent accomplishments, Paul was successful in obtaining the reversal of a multi-million dollar punitive damages award.

James M. Hoey
Insurance Coverage

Jim is a senior partner of Clausen Miller P.C. and is registered and certified to practice before the United States Patent and Trademark Office in patent cases as an attorney (since 1978). Jim has tried cases involving claims under all-risk policies, and named-peril policies involving damage to objects such as turbines, generators, motors and furnaces. He has also tried cases involving other property insurance issues, such as the amount of a business interruption loss, fraud and arson.

Edward M. Kay
Appellate

Ed is a Clausen Miller senior partner and co-chair of the Appellate Practice Group. He is rated AV® Preeminent™ by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed 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.

Kimbley A. Kearney
Appellate

Kim is a partner with Clausen Miller P.C. and is AV® Preeminent™ rated by Martindale-Hubbell. She has successfully litigated cases involving catastrophic personal injury, wrongful death, property loss, class actions, mass toxic tort, employment discrimination, insurance coverage and commercial disputes in trial and appellate courts throughout the United States. Kim is a Proctor in Admiralty and a former Member of the Board of Directors of the Maritime Law Association of the United States. She received her Juris Doctor, *cum laude*, and M.B.A. from Tulane University.

Melinda S. Kollross
Appellate

Melinda is a senior partner and Co-Chair of Clausen's Appellate Practice Group, specializing in post-trial and appellate litigation nationwide. She has litigated more than 100 appeals in state and federal reviewing courts, including participation in two appeals before the United States Supreme Court. Melinda has a winning record in appeals, she has argued before the Illinois Supreme Court, and has been named an Illinois Super Lawyer in Appellate practice seven times. Her work spans all areas of firm practice, including commercial, first-party property, liability insurance coverage and liability defense.

Amy R. Paulus
Insurance Coverage

Amy is a partner and member of the Board of Directors of Clausen Miller who concentrates her practice in all areas of liability insurance coverage law, environmental and toxic tort coverage litigation, and reinsurance matters. Amy also regularly assists insurers in drafting new policy forms and coverages.

Don R. Sampen
Insurance Coverage

Don 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*, and is currently an Adjunct Professor at Loyola University College of Law teaching a course in Insurance Law. Don is also a prolific writer, authoring articles and book chapters in various areas of the law, including antitrust and whistleblower litigation. He also writes a column in the *Chicago Daily Law Bulletin* which appears twice monthly on insurance coverage matters. He has maintained an AV® Preeminent™ rating (highest possible peer review rating for legal ability and ethical standards) with Martindale-Hubbell for 25 years.

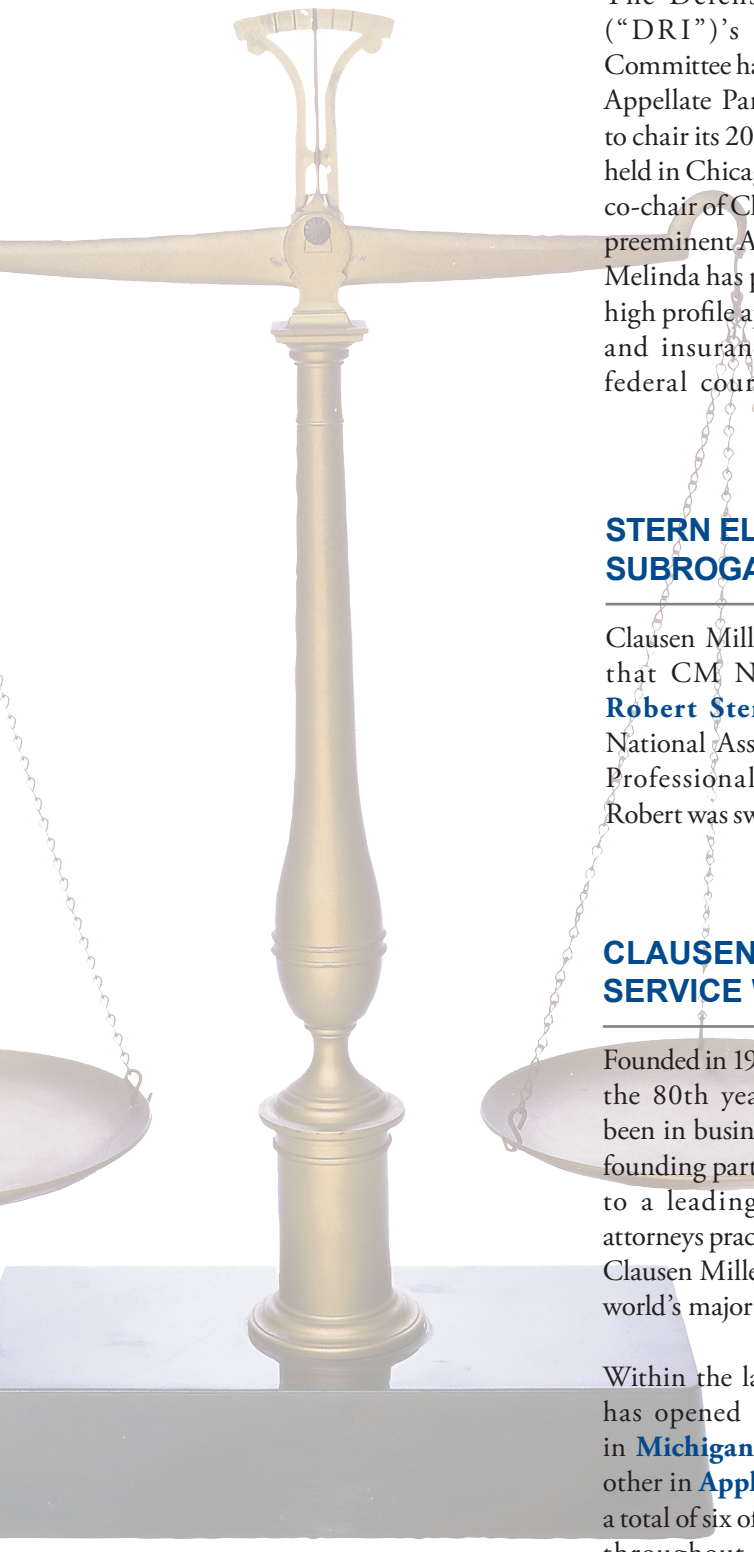
Illinois Rising Stars

Daniel R. Bryer
Employment and Labor

Dan is a partner in the Chicago office of Clausen Miller P.C. He concentrates his practice in the areas of employment law, professional liability, products liability, insurance coverage and business/commercial litigation. Dan has significant experience litigating these matters before state and federal trial courts, as well as administrative agencies such as the EEOC, Illinois Human Rights Commission, Illinois Educational Labor Relations Board and Illinois Board of Education. Dan obtained his law degree from The John Marshall Law School, where he graduated *magna cum laude*, and holds an LL.M. degree from Loyola University School of Law. Dan is licensed in Illinois, New Jersey and New York.

Joseph J. Ferrini
Appellate

Joe is a partner in the Chicago office of Clausen Miller P.C. and is a member of the Appellate Practice Group. Joe concentrates his practice in appellate work and has litigated appeals in federal and state courts, including Illinois, Indiana, New York and New Jersey. His work has covered many of the firm's practice areas, including Coverage, Property, Business/Commercial Litigation, Personal Injury Defense and Product and Professional Liability. Joe joined Clausen Miller following graduation from Loyola University Chicago School of Law, where he received his J.D., *magna cum laude*, finishing 3rd out of a class of over 200.



APPELLATE LEADER MELINDA KOLLROSS TO CHAIR DRI'S 2017 APPELLATE ADVOCACY COMMITTEE ANNUAL MEETING

The Defense Research Institute ("DRI")'s Appellate Practice Committee has selected Clausen Miller Appellate Partner **Melinda Kollross** to chair its 2017 Annual Meeting to be held in Chicago October 4-8, 2017. As co-chair of Clausen Miller's nationally preeminent Appellate Practice Group, Melinda has prosecuted and defended high profile appeals for savvy business and insurance clients in state and federal courts across the country. Melinda regularly shares her appellate expertise with the defense bar through practical published articles in DRI's For the Defense Magazine, such as "Oral Argument: What It Really Takes to "Please the Court'" (March 2015) and "Evaluating, Negotiating, and Effectuating Settlements on Appeal" (March 2016). She is also Editor-in Chief of Clausen Miller's quarterly law journal, the **CM Report of Recent Decisions**.

STERN ELECTED TO THE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS BOARD OF DIRECTORS

Clausen Miller is proud to announce that CM New York Shareholder **Robert Stern** was elected to the National Association of Subrogation Professionals Board of Directors. Robert was sworn into office at NASP's Annual Conference on October 24, 2016. Robert's appointment to NASP's Board is recognition by the Subrogation Industry of his success and leadership in the Subrogation Community.

CLAUSEN MILLER CELEBRATES 80 YEARS OF CLIENT SERVICE WITH MARKED GROWTH AND EXPANSION

Founded in 1936, the year 2016 marked the 80th year **Clausen Miller** has been in business. Growing from three founding partners and three associates to a leading Firm with over 100 attorneys practicing across the country, Clausen Miller represents many of the world's major insurance carriers.

Within the last year, Clausen Miller has opened two new offices—one in **Michigan City, Indiana** and the other in **Appleton, Wisconsin**. With a total of six offices strategically located throughout the country, Clausen Miller is able to offer its full array of legal services to clients across the United States.

Clausen Miller President **Dennis Fitzpatrick** said, "Clausen Miller is proud of its growth and our expanded ability to serve clients across the country and, through **Clausen Miller International**, around the globe."

The Firm's **Michigan City, Indiana** office, established in 2015, is located at 200 Commerce Square and is managed by Indiana licensed partners,

Paige M. Neel and **Kimbley A. Kearney.** The opening of the Indiana office allows the Firm to continue to provide legal services to its clients with matters in Indiana, but now with the ease and convenience of a physical presence in the state.

The Firm's **Appleton, Wisconsin** office, established in 2016, is located at 4650 W. Spencer Street and is managed by Clausen Miller's Wisconsin licensed partner, **Patrick Breen**. Prior to joining Clausen Miller earlier this year, Pat spent over fifteen years in senior level positions in corporate legal departments. In those roles, he managed domestic and international litigation including product liability, employment, commercial and antitrust matters, advised on employment matters, and negotiated a wide variety of commercial agreements including purchase and supply, dealer distribution, and asset purchase agreements.

In addition to expanding its national footprint, Clausen Miller has experienced attorney growth with the addition of a partner in Chicago and a partner in New Jersey, as well as two associates.

Lisa A. Hausten joins the Firm's Chicago office as a partner. Lisa is an experienced appellate practitioner and business litigator. Focusing on complex commercial litigation, Lisa is a skilled strategist and negotiator, an accomplished trial attorney, and an ardent advocate in the appellate courts. She has tried cases in the state and federal courts as well as before administrative tribunals. She has handled all types of matters from injunctions to jury trials.

Hillary A. Fraenkel adds depth to the Firm's New Jersey office as a partner. With sixteen years of civil litigation experience, Hillary consistently delivers results and effective client service as counsel for insurers and their policyholders in employment defense, legal malpractice claims, condominium E&O and D&O claims, agent and broker E&O claims, construction injury claims, and professional liability claims.

Valeri J. Nowik has joined the Firm's Chicago office as an associate. Since graduating from law school, Valeri has served both as a Village Prosecutor and as an associate with a firm specializing in estate, tax, and healthcare matters.

In conjunction with the growth and expansion, a website rebranding effort has been underway to provide current and potential clients with a sophisticated, user-friendly website experience. With a new streamlined website design, the new **www.clausen.com** launched in August of 2016. Clausen Miller's new website is easily navigated and provides timely content – the website parallels Clausen Miller's dedication to providing clients with exceptional, efficient service.

Headquartered in **Chicago**, the Firm maintains U.S. offices in **New York, New Jersey, Indiana**, **Southern California** and **Wisconsin**. Clausen Miller LLP is located in London, England, in the heart of the global insurance market. Clausen Miller is also the founding member of Clausen Miller International, a cooperative of leading independent law firms with affiliates in Paris, Rome, Brussels, Dusseldorf and Berlin that practice in all aspects of insurance and reinsurance law.

JACOBSON AND BREHONY HELP INSURER WIN $100M HAIL DAMAGE COVERAGE SUIT

CM partner **Andy Jacobson** and senior associate **Dawn Brehony** successfully defended Commonwealth Insurance Co. from a Tennessee property owner's $100 million suit concerning the insurer's refusal to cover losses resulting from a severe 2007 hailstorm. The U.S. District for the Southern District of New York (Judge Kenneth M. Karas) recently granted Commonwealth's motion for summary judgment finding that the insured (TN Metro) waited too long to file suit after the latest possible cutoff date. *TN Metro Holdings I LLC, et al. v. Commonwealth Insurance Co.*, No. 7:11-cv-06063 (S.D.N.Y. Dec. 14, 2016).

In early 2007, TN Metro paid Green Realty Development Co. $66.5 million for a group of apartments and houses in Clarksville, Tennessee. Green Realty had purchased a Commonwealth insurance policy for the properties, but the parties dispute whether the policy was properly transferred to TN Metro. In April 2007 while the sale transaction was pending, a severe hailstorm swept through the area, causing approximately $3.2 million in damages to the properties. The plaintiffs allege that when they contacted Commonwealth seeking coverage for storm damage repairs, the insurer repeatedly found reasons to delay payment over a period of several years. Consequently, the TN Metro companies were allegedly unable to rent the properties and generate enough income to pay off the debt it incurred in buying them.

TN Metro sued Commonwealth in August 2011, seeking at least $100 million in damages. In March 2016, the insurer moved for summary judgment, claiming that the suit had been filed outside the applicable one-year statute of limitations, which began to run on the date of the loss-causing occurrence. The federal district court granted the motion. In its order, the Court stated that, because the terms "loss" and "series of losses" in the policy's limitations provision are ambiguous, the limitations period could have started running on one of two dates: either the date of the hailstorm or one year later, which was the latest date on which TN Metro could seek compensation for lost rent or rental value. But that ultimately did not matter, because the suit was untimely regardless of which date was used as a starting point. TN Metro sued Commonwealth more than three years after the hailstorm and more than two years after the cutoff for seeking coverage for lost rent or rental value, the Court said.

TN Metro had also contended that Commonwealth was barred from claiming the suit was untimely because an alleged agent of the insurer, Granite State Insurance Co., had made partial payments to TN Metro for losses tied to the storm. However, the Court held that Granite State's actions have no bearing on the coverage dispute because evidence shows that, during the relevant time period, Granite State was a wholly owned subsidiary of AIG, not Commonwealth. For more information on our first-party property insurance practice, please contact Andy (**ajacobson@clausen.com**) or Dawn (**dbrehony@clausen.com**).

KATHLEEN KLEIN WINS APPEAL FROM GARNISHMENT ACTION FOR HOSPITALITY CLIENT

Following confirmation of what was essentially a default judgment against the client in a wage garnishment matter, CM senior associate **Kathleen Klein** was retained and worked with the client to put together a detailed petition under 735 ILCS 5/2-1401, a statute allowing for relief from court judgments older than 30 days. Because of the time that had elapsed since its entry, the petition was subject to a higher standard of review. The plaintiff in the garnishment matter challenged both the facial sufficiency of the petition and its merits. After briefing and oral argument, the trial court denied plaintiff's motion, summarily granted the petition in the client's favor, and vacated the judgment. With this ruling, the client was relieved from the effects of the money judgment. Plaintiff appealed both the denial of his motion attacking the petition, and the summary grant of the petition to vacate the original judgment. The Illinois Appellate Court, First District affirmed. In a well-reasoned memorandum opinion, the Appellate Court agreed that the Petition Kathleen had prepared was adequate, that both CM's client and counsel met all the requirements for relief under 2-1401, and that the trial court was correct in granting summary judgment in the client's favor. Despite the plaintiff's persistence, chasing the judgment all the way to the Appellate Court, the client prevailed and has been relieved from any responsibility for the underlying default judgment. For more information, please contact Kathleen (**kklein@clausen.com**).

Clausen Miller PC is proud to announce the opening of an additional office location

Michigan City, Indiana

200 Commerce Square

Expanding Clausen Miller's full line of legal services through our new office in Indiana

Visit us at ***clausen.com***

Indiana Supreme Court Broadens Application of Statutory Collateral Source Rule By "Charting a Middle Course"

by ***Kimbley A. Kearney***

In *Stanley v. Walker*, 906 N.E.2d 852 (2009), the Indiana Supreme Court interpreted the state's collateral source statute to permit a defendant in a personal injury action to introduce evidence of discounted medical payments negotiated between the plaintiff's medical providers and his private health insurer to prove the reasonable value of medical services, as long as insurance is not referenced. The statute abrogates the common law rule which makes evidence of collateral source payments inadmissible. In *Patchett v. Lee*, 60 N.E.3d 1025 (Oct. 21, 2016), the Court shut down the frequent argument of plaintiffs' lawyers that *Stanley* applies only to amounts paid by private health insurance companies, not government programs such as Medicare and Medicaid.

Facts

In *Patchett*, the plaintiff was insured under the Healthy Indiana Plan (HIP), a government sponsored healthcare program under which HIP medical providers accepted $12,051.48 in full satisfaction of the plaintiff's accident related medical bills totaling $87,706.36 based on maximum allowable reimbursement rates.

Analysis

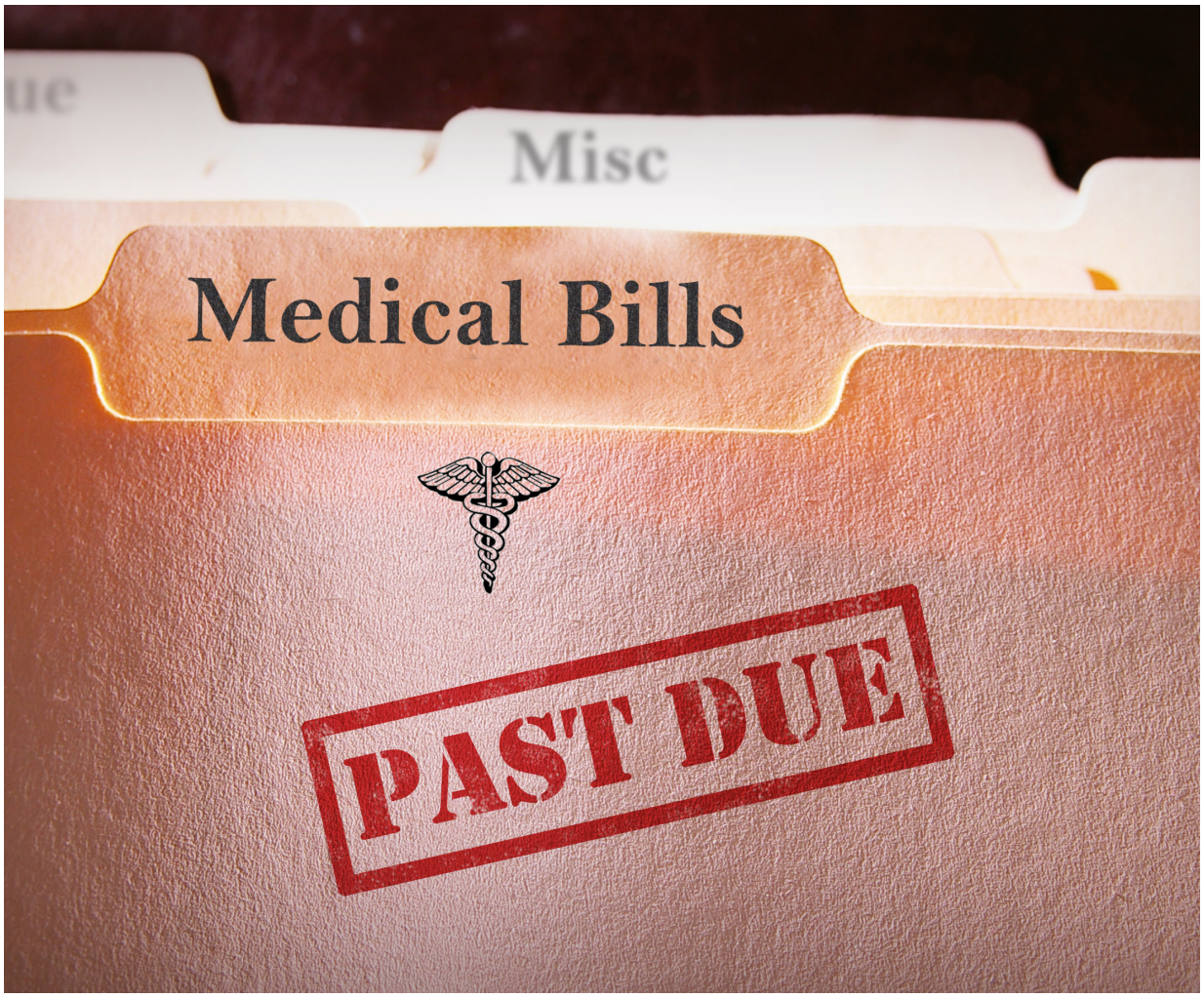
The Indiana Supreme Court rejected the reasoning of the lower courts that HIP's maximum allowable rates did not reflect the reasonable value of medical services provided because they were not negotiated at "arm's length between a medical provider and an insurance company," but rather "political and budget concerns" underlying the government program. The Court concluded that, in determining relevance of collateral source evidence, "[t]he salient fact is not whether (or to what extent) the reimbursement rates were negotiated. What counts is that the participating provider has agreed to accept the lower rates as payment in full." It noted that the participation of medical providers in the government program was entirely voluntary and their agreement to accept the reduced rates required by the program is "relevant, probative evidence of the reasonable value of medical services," which is the measure for recovery of medical expenses under Indiana tort law.

The Court noted that, since it decided *Stanley* in 2009, six states (West Virginia, Maryland, Colorado,

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.
kkearney@clausen.com

Massachusetts, Minnesota and Oregon) have precluded the admission of discounted reimbursements in determining the reasonable value of medical services. Two states (Delaware and Texas), limit recovery to the discounted amount actually paid for medical services. Two states (California and Kansas), follow Indiana's "middle ground" course which *Patchett* found to be the "fairest approach." The "middle ground" approach adopted in *Stanley* and reaffirmed in *Patchett* permits the fact finder to consider both the amount originally billed and the reduced amount actually paid and accepted, "along with any other relevant measures of the reasonable value of medical care," in determining the amount of damages that will make a plaintiff whole.

Learning Point: *Patchett* suggests that *any* relevant evidence of the reasonable value of medical care is admissible on the issue of fair value of medical treatment, as long as the evidence is not substantially outweighed by the danger of unfair prejudice, confusion or needlessly presenting cumulative evidence. *Patchett* also instructs that the admissibility of evidence is usually left to the sound discretion of the trial court but, when admissibility depends on the proper interpretation of a statute, a trial court's decision will be reviewed *de novo* on appeal. Thus, appellate challenge to the introduction of evidence under a statute may be governed by the most favorable standard of review. Litigants should keep that in mind when erroneous admission of evidence significantly impacts the potential or actual judgment value of the case. ♦



So Now We Know: A Long Awaited Decision Comes Concerning Owners And General Contractors Liability For Jobsite Accidents

by ***Paul V. Esposito***

Way back in 1965, the Illinois Supreme Court announced that Restatement §414 is part of the Illinois common law. It has taken 51 years for the Court to explain what that means. *Carney v. Union Pac. R.R.*, 2016 IL 118984, marks the Court's first attempt to clarify the liability of owners and general contractors for jobsite accidents. As a bonus, it explains who is not protected by a Restatement §411 claim for negligence in the selection of a contractor.

Restatement §414

Like most states, Illinois follows the general rule that one who hires an independent contractor is not liable for injuries caused by its conduct. The rule flows from the hiring entity's lack of control over the means and methods—the operative details—of an independent contractor's work.

But what if the hiring entity was negligent? Restatement §414 provides an exception. It imposes liability where the hiring entity retains control over any part of the work yet does not act with reasonable care. During the Supreme Court's half-century silence, appellate court decisions have created confusion about §414. That is why *Carney* is so important.

Facts

In *Carney*, scrap contractor Happ's, Inc. bought three abandoned Union Pacific ("UP") railroad bridges and agreed to remove them. Happ's hired subcontractor Carney Group to assist in the removal. In the process, the son of Carney's owner was seriously injured. He sued UP. The trial court granted UP's motion for summary judgment; the appellate court reversed.

Analysis

The Supreme Court reinstated summary judgment. Contrary to appellate court decisions, it held that §414's reach is limited to cases involving the direct negligence of a hiring entity. A vicarious liability claim must be governed by agency law, not §414. That's a big change in Illinois law.

Just as importantly, the Court explained what is needed to establish retained control. The "best indicator" of whether retained control exists is the written agreement between a defendant and contractor. Absent proof through the agreement, retained control may be proven by evidence that a defendant acted inconsistently with it.

The agreement disclaimed an employment relationship between UP and Happ's, the latter being only an "independent contractor." Happ's was required to provide all labor, tools, equipment, materials, supplies, and supervision. Under the agreement, UP could require a workmanlike job, stop the work or

Paul V. Esposito
is senior counsel at Clausen Miller P.C. and has been the primary handling attorney in appeals brought in the United States Supreme Court, the United States Courts of Appeals for the Third, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, and supreme and appellate courts in numerous states. Those appeals have covered a wide range of federal and state issues including constitutional, procedural, personal injury, transportation, employment, insurance coverage, and general commercial law.
pesposito@clausen.com

make changes, or terminate Happ's for unsatisfactory work. But those were mere "general rights" not evidencing retained control under §414.

UP's rights touching on job safety did not establish retained control. UP could require the removal of unsafe workers or equipment and require specific protective gear. "A general right to enforce safety, however, does not amount to retained control under section 414." And the contract placed control over job safety with Happ's.

The Court found no evidence that UP sought to retain control over the work. It also ruled that UP's post-accident suggestions on how to avoid a recurrence did not establish a duty under §414 as a matter of law. "To hold otherwise would penalize a defendant's safety efforts by creating, in effect, strict liability for personal injury to any job site employee."

In the end, the Court found no evidence that "defendant retained at least some control ***over the manner in which Happ's performed the bridge removal work.***" (emphasis supplied). This is the most significant statement of all. Many appellate decisions have mistakenly focused on retained control over safety. Instead, retained control must exist over operative details.

Having kept quiet for so long, the Court spoke in a big way.

Restatement §411

Plaintiff also claimed that UP was negligent in selecting Happ's to dismantle the bridges. The claim implicated Restatement §411, which the Court had adopted decades earlier. Section 411 subjects a hiring entity to liability to injured third persons where it failed to exercise reasonable care in selecting a contractor.

The Court found a genuine issue of fact as to whether UP exercised sufficient care in retaining Happ's. But the dispositive issue was whether plaintiff – an employee of the subcontractor – was a protected "third person" under §411. The Court concluded that he was not.

The Court found no evidence in the text of or illustrations to §411 indicating that it was intended to cover jobsite employees. An Illinois appellate court decision and decisions nationwide reinforced the Court's conclusion.

The Court found good reason for the rule. Unlike the public, a jobsite worker is in a better position to protect himself. Unlike the public, he receives worker's compensation benefits from his employer. And as discussed, nothing in §411 would appear to support the inclusion of jobsite employees.

Interestingly, the Court did not adopt two of the rationale from other decisions. First, because a contractor usually factors the cost of worker's compensation into its bid, holding the hiring entity liable effectively makes it pay twice. Second, it would be inequitable for the hiring entity to pay full damages when the employer only pays worker's compensation. The Court probably foresaw unwanted implications with other cases from these rationales.

That said, the Court still barred open-ended liability under §411.

Learning Points:

- Restatement §414's reach is limited to cases involving the direct negligence of a hiring entity.
- The best indicator of whether retained control exists is the written agreement between a defendant and contractor. Absent proof through the agreement, retained control may be proven by evidence that a defendant acted inconsistently with it.
- A general right to enforce safety does not amount to retained control under §414. Instead, retained control must exist over operative details.
- Jobsite employees are not protected "third persons" under § 411 of the Restatement. ♦

Subrogation And Contribution Denied Against Municipal Entity

by Don R. Sampen

An insurer's rights of contribution and subrogation against other insurers are typically preserved by contract, common law and/or a reservation of rights letter. When the other "insurer" is a self-insured public entity, however, additional considerations may apply. In a recent case, the First District Illinois Appellate Court held that a commercial auto insurer was not entitled to obtain reimbursement from a self-insured municipal entity, under either a subrogation or contribution theory, due to the terms of a lease between the entity and the insured. *Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service*, 2016 IL App (1st) 151659 (Nov. 17).

Facts

The municipal entity, Pace, contracted with Countryside Association for People with Disabilities to furnish vehicles for the transportation of disabled individuals. Under the leasing agreement, Countryside was to furnish its own drivers.

Pace, however, agreed to provide "commercial auto liability coverage" for any claims involving the vehicles. The leasing agreement also provided that Pace's self-insured retention and any excess insurance it purchased would be primary to any coverage separately acquired by Countryside. Excluded from coverage under the lease agreement was coverage for "willful and wanton, reckless, or intentional conduct" by Countryside employees. Countryside acquired separate coverage through Philadelphia Indemnity Insurance Company. Its policy provided, among other things, that for covered autos not owned by Countryside—which included the Pace vehicles—the Philadelphia coverage would be excess over any other collectible insurance.

In 2013, a driver for Countryside mistakenly left a disabled passenger in one of the Pace vehicles for more than five hours when the temperature outside reached 90 degrees. The passenger survived but with serious injuries. The driver eventually pleaded guilty to a Class 4 felony for reckless conduct.

The passenger's family threatened litigation, and Philadelphia settled on behalf of Countryside for $1.5 million. Pace declined to participate in the settlement, citing the willful/reckless exclusion for coverage as provided for in the lease agreement. Philadelphia then sued Pace based on equitable subrogation, equitable contribution, unjust enrichment, and an assignment from Countryside of all rights against Pace.

During the litigation, Pace disclosed that it was self-insured for up to $3 million, and that 70% of its risk program funding came through sales tax funding. Pace moved to dismiss pursuant to 735 ILCS 2-619, which motion the trial court allowed. The court held, among other things, that it would be against public policy to

Don R. Sampen
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.
dsampen@clausen.com

require Pace to pay from public funds. Philadelphia took this appeal.

ANALYSIS

Subrogation

In an opinion by Justice Margaret Stanton McBride, the First District affirmed. The Court began its analysis by distinguishing equitable subrogation from equitable contribution. The former places the entire burden for a loss on the party ultimately liable or responsible for the loss and by whom the liability should have been discharged. The latter, as among coinsurers, permits one insurer who has paid the entire loss or greater than its share to be reimbursed from other insurers who are also liable for the same loss.

Philadelphia's initial argument on appeal was that the trial court erred in finding that public policy allowed Pace to avoid its contractual obligations. While the Appellate Court expressed support for the trial court's decision, it said that the equitable subgrogation argument was more appropriately decided on the basis of the lease exclusion for reckless conduct.

On that point, Philadelphia argued that a draft complaint tendered it by the injured rider's attorney contained allegations of negligence, and not just recklessness. The First District rejected that argument in part based on the fact that Philadelphia had settled the claim before the complaint was ever filed. So the duty to defend, to which the complaint's allegations would have been relevant, never became an issue.

In addition, making note of the driver's criminal conviction, the Appellate Court said that the facts as presented to it could lead only to the conclusion that the driver behaved in a reckless fashion. Since equitable subrogation is used to place the entire burden for a loss on the party responsible, Philadelphia could not rely on various allegations of negligence to contend that Pace was the sole responsible party.

Contribution

The Court then turned to the claim based on equitable contribution. That claim includes among its required elements proof of coverage for identical parties, insurable interests and risks. The Appellate Court said that the claim asserted by Philadelphia failed because the leasing agreement, even if it were considered a policy of insurance, did not cover recklessness. The Philadelphia policy, by contrast, contained no equivalent exclusion. So the leasing agreement and Philadelphia policy did not cover the same risks.

Finally, the Court rejected the cause of action for unjust enrichment on the ground that Pace had not unjustly retained a benefit. And it rejected the cause of action based on the assignment from Countryside because Philadelphia could only have been assigned rights possessed by Countryside, and Countryside's contract with Pace provided no basis for recovery.

The Court therefore affirmed the dismissal in favor of Pace.

Learning Points:

(a) An insurer's claim for equitable subrogation based on the defendant's contract obligations to the insured fails where, by the terms of the contract, the defendant is not liable for the claim asserted.

(b) An insurer's claim for equitable contribution based on the defendant's contract obligation to the insured to provide insurance coverage fails where the coverage contemplated under the contract involves a risk different from the coverage provided by the claimant insurer. ♦

Illinois Retains "Impact Rule" For Direct Victims Claiming Negligent Infliction Of Emotional Distress

by ***Melinda S. Kollross***

The Illinois Supreme Court has recently confirmed that, despite some indications to the contrary in prior cases, the "impact rule" still applies to claims for negligent infliction of emotional distress in "direct victim" situations. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041 (Dec. 15, 2106).

Facts

Plaintiff Schweihs sued Chase, outside companies, and two individual vendors who perform inspection and preservation services on foreclosed properties. Schweihs defaulted on the mortgage for her Northbrook home in 2007. Chase obtained a judgment of foreclosure in May of 2010. Schweihs retained the right to possession until the redemption period expired in August 2010. In June 2010 – prior to expiration of the redemption period- the individual defendants (Gonsalez and Centeno) went to plaintiff's home after they were engaged to change the locks and turn off the utilities. They were instructed not to do any work if they found the home occupied. After initially knocking on the door and then spending more than 45 minutes trying to determine if anyone was home, and hearing from neighbors that the house was usually vacant, Gonsalez again knocked on the front door. Receiving no answer, Gonsalez and Centeno contacted management and were told to proceed, which they did, by removing the lock to the back door. Inside the house, they encountered Schweihs, who was 58 years old at the time and lived alone. Schweihs testified she had heard the initial knocking but decided not to answer the door. She ordered the men to leave and stated she was calling her lawyer. Plaintiff further testified that one of the two workmen spoke to her "in a forceful way" about securing and winterizing the house and needing to speak with her outside the home. Gonsalez and Centeno then went outside, around to the front of the house, and knocked again. Schweihs did not answer, and the men waited for the police, who did not speak to the plaintiff, but to Gonsalez, Centeno and a neighbor. The police made no arrests.

Plaintiff testified that after the incident she was afraid while in her home and fearful that she may be attacked. On the same day of the incident, plaintiff went to the hospital because she "didn't feel right." Subsequently, she sought treatment, therapy, and medication from multiple doctors for issues with sleeping, post-traumatic stress, anxiety, and depression. Plaintiff stated that she felt anxiety when approaching her home and that at times she stayed in hotels because of her fear of subsequent break-ins. She was inhibited from packing and preparing her home for sale because of this fear. Additionally, she alleged that she sought temporary leave from her employment due to the incident but that her request was denied and she was instead terminated.

Melinda S. Kollross
is a Clausen Miller shareholder and co-chair of the Appellate Practice Group. Specializing in post-trial and appellate litigation nationwide, Melinda is admitted to practice in both New York and Illinois, as well as the U.S. Supreme Court and U.S. Courts of Appeals for the Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. Melinda has litigated over 100 federal and state court appeals and has been named a Super Lawyer in appellate practice.
mkollross@clausen.com

In October 2010, plaintiff filed a five-count complaint against defendants alleging trespass, negligent trespass, private nuisance, intentional infliction of emotional distress, and negligence. Extensive discovery and motion practice ensued. Defendants filed motions for summary judgment as to each of plaintiff's counts. On February 6, 2014, the court granted defendants' motions for summary judgment with respect to plaintiff's claims for private nuisance and intentional infliction of emotional distress. It denied defendants' motions with respect to the claims for trespass and negligent trespass, and those claims are still pending in the circuit court. The court also granted plaintiff's motion for leave to amend. It then dismissed the negligent infliction of emotional distress claim, as amended, pursuant to Section 2-615 of the Code of Civil Procedure.

A divided Appellate Court affirmed, first addressing the negligent infliction of emotional distress claim. The Court noted the two types of victims in emotional distress cases: bystanders and direct victims. It determined that plaintiff was a direct victim and must allege "some physical impact" from defendants' conduct. The Court found that because she did not plead any physical contact, she could not establish a claim for negligent infliction of emotional distress and that count was properly dismissed. It further noted that its conclusion was consistent with the Illinois Supreme Court's holdings in *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 555 (1983); *Corgan v. Muehling*, 143 Ill. 2d 296, 304 (1991); and *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 346-47 (1995). The Court did acknowledge however, that certain language in *Pasquale* mischaracterized the holding in *Corgan*, which has led to some confusion in the courts. It concluded that the language in *Pasquale* was *obiter dictum* and not binding. The Appellate Court next addressed plaintiff's intentional infliction of emotional distress claim, finding that summary judgment was proper as a matter of law because plaintiff could not establish that defendants' conduct was "extreme and outrageous." Justice Harris dissented regarding the negligent infliction of emotional distress claim, stating that the majority was wrong in continuing to require physical impact in claims for negligent infliction of emotional distress for direct victims.

The Illinois Supreme Court granted plaintiff's petition for leave to appeal.

Analysis

The Illinois Supreme Court focused on clarifying the law concerning the impact rule in actions for negligent infliction of emotional distress. After thoroughly analyzing *Rickey*, *Corgan* and *Pasquale*, the Court concluded that this precedent had not eliminated the impact rule for plaintiffs claiming to be the direct victim of negligent infliction of emotional distress. While acknowledging that *Pasquale* and *Corgan* contained language indicating that the impact rule had been abrogated, the Supreme Court agreed with the appellate court that those statements were non-precedential *obiter dictum*. As Schweihs' complaint lacked any allegation of a physical impact during her encounter with Gonsalez and Centeno, the Supreme Court affirmed dismissal of her negligent infliction of emotional distress claim.

The Supreme Court also affirmed the entry of summary judgment for the defendants on plaintiff's intentional infliction of emotional distress claim. After reviewing the facts of record concerning plaintiff's encounter with the individual defendants, the Court found that plaintiff had not been subjected to extreme and outrageous mistreatment. The Court concluded that the defendants' efforts to preserve the property, pursuant to the bank's contractual right, did not constitute atrocious conduct "utterly intolerable in a civilized community."

In a special concurrence, Justice Rita Garman noted that the basis for the Court's holding in *Corgan* was rejected, at least in part, by its decision in *Clark v. Children's Memorial Hospital*, 2011 IL 108656, and to make a clear distinction between a claim of negligent infliction of emotional distress ("NIED") and a claim of liability for negligence or other personal tort in which the act or omission of the defendant caused emotional distress for which damages may be recovered. Justice Garman wrote: "[i]n the present case, while the plaintiff cannot state a claim for NIED in the absence of a contemporaneous physical impact or injury directly resulting from the defendants' entry into her home, her other claims are still pending in the circuit court. Whether any of these claims succeeds, whether damages for emotional distress are available for the particular claim, and whether she proves her entitlement to such damages remain to be seen."

Learning Point: The "impact rule" is alive and well in Illinois. A plaintiff asserting a claim for negligent infliction of emotional distress as a "direct victim" must plead and prove contemporaneous physical impact or injury directly resulting from the defendant's conduct in order to maintain and prevail on such a claim. ♦

AUTO LIABILITY INSURANCE COVERAGE

CERTIFICATE OF TITLE ESTABLISHES VEHICLE "OWNERSHIP" FOR PURPOSES OF AUTOMOTIVE POLICY

Grange Mut. Cas. Co. v. Acuity, 2016 IL App (1st) 153097-U

Insurer filed suit seeking a declaration regarding coverage relative to an underlying motor vehicle accident. The disputed policy excluded coverage for bodily injury or property damage resulting from the use of an "owned" vehicle and offered coverage for a "non-owned" vehicle. The insurer asserted that the vehicle at issue was co-owned by the driver and his company, thereby rendering it an "owned" vehicle relative to the driver for purposes of the policy. As evidence, the insurer offered the title of the car, which listed the driver in his individual capacity. ***Held:*** A certificate of title to an automobile is evidence of legal title. A prima facie presumption of ownership arises from a certificate of title, and this presumption may be rebutted by competent evidence of actual ownership. Here, no competent evidence of actual ownership was presented and thus coverage was excluded under the policy.

NOTICE OF LOSS PROVISION SATISFIED DESPITE LACK OF WRITTEN NOTICE

Direct Auto Ins. Co. v. Zaidan, 2016 IL App (1st) 160538-U

Insurer filed suit seeking a declaration that its insured violated the Notice of Loss provision of his policy by first reporting an accident over the phone and not providing any additional information in writing for a period of three months. The policy required that notice be provided in writing within 30 days of any accident or loss. ***Held:*** The purpose of the notice requirement was fulfilled because the insured's telephone call provided actual and reasonable notice of the occurrence and sufficient information to enable the insurer to investigate the claim.

CHAMPERTY

COMPANY FOUND CHAMPERTOUS UNDER STATUTE

Justinian Capital SPC v WestLB AG, 2016 N.Y. LEXIS 3419 (Ct. App.)

A Cayman Islands company sued an investment company alleging fraud in the management of two investment vehicles, causing a steep decline in the value of notes purchased by a nonparty. The Cayman company acquired the notes from DPAG days before it commenced the action. A champerty statute prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit. ***Held:*** Because notes were acquired by appellant from a nonparty for the sole purpose of bringing litigation, the acquisition was champertous.

DAMAGES

DISCOUNTED REIMBURSEMENTS FROM GOVERNMENT PAYERS ADMISSIBLE TO PROVE REASONABLE VALUE OF MEDICAL CARE

Patchett v. Lee, 60 N.E.3d 1025 (Ind.)

To counter plaintiff's request for full compensation for medical expenses, defendant offered evidence that plaintiff's medical provider accepted an 86% discounted payment by government-sponsored healthcare program. ***Held:*** Discounts provided under government-sponsored plans are no different from discounts provided under private insurer plans. Indiana takes the middle-ground position of allowing evidence of bills for both full charges and discounted charges. Introducing both bills will rarely confuse a jury. Evidence of a discounted amount should not refer to an insurer. *Editor's Note: See full case analysis at page 13.*

FIRST-PARTY PROPERTY INSURANCE

EMAIL SCAM HELD INCIDENTAL USE OF COMPUTER

Apache Corp. v. Great American Ins. Co., No. 15-20499, 2016 U.S. App. Lexis 18748 (5th Cir.)

Policyholder was fraudulently induced to wire $7 million as payment of vendor invoices to a fraudulent bank account under a belief that the account was maintained by its vendor. The inducement was triggered by a phone

call and confirmed by a fraudulent e-mail that was purportedly sent on the vendor's letterhead. The fake letter also included a false telephone number, which the Policyholder's personnel used to confirm the request. Shortly after the money transfers, the Policyholder was notified that the true vendor had not received its payments. Policyholder sought to recover lost monies from its insurer under the policy's Computer Fraud coverage. ***Held:*** The Fifth Circuit held that the email, while part of the overall scheme, was merely incidental to the occurrence of the authorized transfer of money. Therefore, the court concluded that interpreting the computer-fraud provision as reaching any fraudulent scheme in which an email was part of the process, would convert the computer-fraud provision to one for general fraud. The fraudulent transfer was not the direct result of computer use, but rather other events.

LIABILITY INSURANCE COVERAGE

PRO RATA ALLOCATION APPROPRIATE IN ASBESTOS ROW UNDER MICHIGAN LAW

Continental Cas. Co. v. Indian Head Industries, Inc., No. 15-227, 2016 U.S. App. LEXIS 22431 (6th Cir.)

A corporation sought coverage from its insurer for asbestos injuries claims filed against it after it acquired an automotive gasket company, which manufactured asbestos-containing products. The insurer filed suit seeking a declaratory judgment as to its responsibilities under the policies, specifically claiming that defense costs must be apportioned for suits based on injuries during the insurance period. The district court ruled for the insurer, holding that the pro rata time-on-the-risk method of allocation applied. ***Held:*** The Sixth Circuit affirmed the lower court's decision in favor of pro rata allocation, noting that the policy language contains temporally limiting language to during the policy period and that courts typically apply pro rata allocation under Michigan law.

EEOC CHARGE AND SUBSEQUENT LAWSUIT ARE CONSIDERED SEPARATE "CLAIMS" UNDER CLAIMS MADE POLICY

John Marshall Law Sch. v. Nat'l Union Fire Ins. Co., 2016 U.S. Dist. LEXIS 178365 (N.D. Ill.)

Law school filed breach of contract action against its insurer alleging that the insurer wrongfully denied coverage for an underlying employment discrimination lawsuit brought by a law school professor. The policy at issue was a "claims made" policy, meaning that it covered losses "arising from a Claim first made against [the] Insured during the policy period." The insurer argued that the "claim" was made against the insured at the time he filed an EEOC charge, which was outside of the policy period. The law school countered by arguing that the EEOC charge and federal lawsuit were separate claims and that coverage existed for the lawsuit because it was filed within the policy period. ***Held:*** There is no provision within the policy defining when a claim is first made and there is also no provision dictating that multiple claims arising under the same facts are considered a single claim. Furthermore, there are other policy provisions that specifically contemplate that more than one "claim" can arise from a set of facts. Therefore, the EEOC charge and subsequent discrimination lawsuit must be considered separate "claims" under the policy. As such, the lawsuit was filed within the policy period.

RECKLESS CONDUCT EXCLUSION PRECLUDES RECOVERY

Philadelphia Indem. Ins. Co. v. Pace Suburban Bus Serv., 2016 IL App (1st) 151659

Insurer of facility for individuals with disabilities filed suit seeking reimbursement from a bus company relative to a $1.5 settlement paid to a disabled passenger who had been left in a 90 degree van, causing her to suffer seizures. The bus company and the facility had entered into a leasing agreement, which provided that the bus company was to procure insurance covering the facility for any claims of bodily injury. The agreement, however, excluded coverage for injuries resulting from "willful and wanton, reckless or intentional conduct." ***Held:*** The driver of the bus plead guilty to felony reckless conduct. Furthermore, even if the driver had not plead guilty, there is no question of material fact that he acted recklessly by leaving the disabled passenger in the van for five hours on a 90 degree day and by failing to check on her well-being or seek medical care upon later discovering her in the van. The exclusion for reckless conduct is therefore dispositive and precludes recovery. *Editor's Note: See full case analysis at page 17.*

NEGLIGENCE

PREMISES OWNERS SUBJECT TO LIABILITY FOLLOWING ELECTRICIAN'S EXPOSURE TO ASBESTOS

Myers v. Bremen Casting, Inc., 61 N.E.3d 1205 (Ind. App.)

Electrician contracted mesothelioma while working for independent contractor retained by premises owners. ***Held:*** A principal may be liable for a contractor's negligence if the work is intrinsically dangerous or will likely cause injury absent due precaution. Working with asbestos is not intrinsically dangerous as a matter of law. The need for precaution must be foreseen at the time of contracting and involve a risk unique to the work. An issue of fact exists as to whether electrician was routinely exposed to asbestos on other jobs. ***Also held:*** A landowner must maintain property in a reasonably safe condition for contractors. If worker is injured by a condition he was called to address, an owner must have superior knowledge of the condition to be liable. An issue exists as to whether electrician was hired to address the condition.

INDIANA FOLLOWS MINORITY RULE ON DIRECT NEGLIGENCE ACTIONS AGAINST EMPLOYER ADMITTING AGENCY

Sedam v. 2JR Pizza Enter., LLC, 61 N.E.3d 1191 (Ind. App.)

Decedent was killed in a car accident involving a pizza delivery driver. ***Held:*** Despite employer's admission of its driver's agency, employer is still subject to suit for negligent hiring, training, supervision, and retention. Indiana adopts the minority rule because negligent entrustment, hiring, supervision, and retention torts are distinct from respondeat superior actions. Allowing direct negligence actions provides for a fairer allocation of fault and damages under the comparative fault system.

LANDOWNER OWES DUTY TO PROTECT INVITEE FROM FURTHER INJURY

Rogers v. Martin, 48 N.E.3d 318 (Ind.)

Decedent's estate sued co-host of party after a fight between other host and decedent resulted in death. ***Held:*** Despite defendant/co-host's knowledge that partygoers were drinking, she was not required to foresee the fight. But issue of fact existed as to whether she should have helped decedent after he was found breathing but motionless. A landowner must protect an invitee from exacerbation of an injury occurring on premises. Defendant could reasonably foresee that guest might suffer additional injuries if left unattended. ***Further held:*** Defendant is not liable under the Dram Shop Act for furnishing alcohol to co-host. Both co-hosts supplied the beer, so one did not furnish alcohol to the other.

SHOOTING INSIDE NEIGHBORHOOD BAR NOT FORESEEABLE

Goodwin v. Yeakle's Sports Bar and Grill, Inc., 62 N.E.3d 384 (Ind.)

Patron of neighborhood bar shot three others, two accidentally. ***Held:*** As a matter of law, there is no duty to foresee a shooting in a neighborhood bar. In analyzing duty, a court must only focus on the broad type of plaintiff and the broad type of harm, regardless of the facts involved. The concept of foreseeability for purposes of duty is much more general than it is for purposes of proximate causation. Imposing a duty on proprietors to foresee shootings would unfairly make them insurers of their patrons' safety.

GOLF CART ACCIDENT WITHIN NORMAL RANGE OF PARTICIPANT BEHAVIOR

Wooten v. Caesars Riverboat Casino, LLC, 2016 Ind. App. LEXIS 409 (Ind. App.)

Golfer was injured during a low-speed collision between two carts. ***Held:*** If the conduct of a participant in a sporting activity is within the range of ordinary behavior for participants, it is reasonable and not a breach of duty. Reckless or intentional conduct may be a breach of duty. The use of motorized carts has become an ordinary part of golf. There was no evidence of recklessness or intentional misconduct supporting liability.

EXTRA-HAND LABORER DEEMED AN EMPLOYEE COVERED BY WORKERS' COMPENSATION ACT

Vinup v. Joe's Constr., LLC, 2016 Ind. App. LEXIS 428 (Ind. App.)

Laborer hired for extra work on a construction job sued hiring company for negligence. ***Held:*** Laborer was an employee whose exclusive remedy was under the Workers' Compensation Act. Company had a right to control the method and details of the laborer's work.

It set workers' schedules, determined and assigned work tasks, provided tools and equipment, and could remove anyone from employment. The laborer's work was typically done on construction jobs. He was not performing skilled labor. He was working regular hours over a sufficient period of time, and although not paid at consistent intervals he received an hourly wage. The parties believed that they had created an employment relationship. ***Also held:*** Laborer was not covered under the company's CGL policy. The policy excluded coverage for accidents to employees, and laborer was not a "temporary worker" unaffected by the exclusion.

HOCKEY ASSOCIATION NOT LIABLE FOR HOCKEY PATRON FIGHT INJURIES

Pink v Rome Youth Hockey Assn., Inc., 28 N.Y.3d 994 (Ct. App.)

A fight broke out at a hockey game and an injured patron sued the hockey association alleging it breached a duty to protect the patron from a criminal assault. During the game there had been several on-ice fights, a coach ejection, and yelling and name-calling from fans. ***Held:*** While it owed a duty to protect spectators from foreseeable criminal conduct, the criminal assault plaintiff suffered from a fellow spectator was not a reasonably foreseeable result of any failure to take preventive measures. Also, the fans' behavior, however inappropriate, certainly did not create the risk that failure to eject any specific spectator would result in a criminal assault.

TREE TRIMMER NOT ENTITLED TO RECREATIONAL IMMUNITY

Westmas v. Selective Ins. Co. of S.C., 2016 Wisc. App. LEXIS 724 (Wis. App.)

Walker on a public path through private property was killed during tree trimming operation. ***Held:*** Trimmer was not an agent of the land owner for purposes of the recreational immunity statute. Although an agent may include an independent contractor, owner must retain the right to control work operations, and the contractor must have reasonably followed the owner's specifications. The owner left the details of the operation to the trimmer. ***Further held:*** The trimmer did not occupy the land for purposes of the statute. There must be a sufficient degree of permanent occupation rather than a mere temporary presence on the land.

NEW YORK MUNICIPAL LAW § 205

OFFICERS ABLE TO PURSUE § 205-E CLAIM IN SPITE OF § 207 BENEFITS

Matter of Diegelman v. City of Buffalo, 2016 N.Y. LEXIS 3532 (Ct. App.)

Police officers sued employer under General Municipal Law § 205-e. Employer argued that the officers' benefits under Municipal Law § 207 were akin to the Workers' Compensation Law and hence the exclusive remedy for the officers. ***Held:*** Where the municipal employer has elected not to provide coverage pursuant to the Workers' Compensation Law, a police officer who suffers a line-of-duty injury caused by the employer's statutory or regulatory violations may pursue a General Municipal Law § 205-e claim and § 207 does not impact this right.

PERSONAL JURISDICTION

BANK HAD SUFFICIENT CONTACTS TO ESTABLISH PERSONAL JURISDICTION

Rushaid v Pictet & Cie, 2016 N.Y. LEXIS 3569 (Ct. App.)

Plaintiffs sued defendant in New York state court for concealing ill-gotten money from a scheme orchestrated by three of plaintiffs' employees. Plaintiffs asserted that defendants aided and abetted the employees' breach of fiduciary duty. The defendant used New York correspondent bank accounts to launder their customers' illegally obtained funds. The trial court dismissed for lack of personal jurisdiction ***Held:*** Reversed. Foreign bank's intentional and repeated use of New York correspondent bank accounts to launder the illegally obtained funds constituted purposeful transaction of business substantially related to the foreign company's claims, CPLR 302(a)(1).

PRODUCTS LIABILITY

BIRTH CONTROL MANUFACTURER NOT LIABLE IN TEEN'S DEATH

Niedner v. Ortho-McNeill Pharm., Inc., 90 Mass. App. Ct. 306 (Mass. App.)

Seventeen year-old college student died suddenly of a pulmonary embolism while using a birth control patch. ***Held:*** Literature accompanying product adequately told consumers that the patch doubled the risk of blood clots over birth control pills. Manufacturer recommended that potential users consult a health care professional. There was no safer alternative design; a pill is a different product. As manufactured, the patch did not deviate from its design. ***Also held:*** There was no evidence of conscious pain and suffering arising out of teen's sudden death.

TORTS

OHIO REFUSES TO RECOGNIZE TORT OF NEGLIGENT MISIDENTIFICATION

Foley v. Univ. of Dayton, 2016 Ohio LEXIS 2703 (Ohio)

After being wrongly arrested and charged with burglary, victims sued townhouse dwellers for negligent misidentification. ***Held in a split decision:*** The claim does not exist in Ohio. Public policy favors the exposure of crime, and creating a new tort would have a chilling effect on that policy. The law provides actions for malicious prosecution, defamation, wrongful or false arrest or imprisonment, and false-light invasion of privacy. Rejection of a misidentification tort creates an appropriate balance between public policy and the right to civil relief. The dissent argues that rejecting the tort imposes an undue risk on the public.

HOSPITAL NOT LIABLE FOR EMPLOYEE'S DISCLOSURE OF PATIENT INFORMATION

Turley v. Univ. of Cincin. Med. Ctr., LLC, 2016 Ohio App. LEXIS 4321 (Ohio App.)

Hospital employee disclosed patient information to an unauthorized recipient. ***Held:*** Employee was not acting within the scope of employment as needed to impose liability on hospital. Employee was not hired to access records; she intentionally accessed them for reasons unrelated to patient treatment.

Clausen Miller PC

is proud to announce the opening of an additional office location

Appleton, Wisconsin

4650 West Spencer Street

Expanding Clausen Miller's full line of legal services through our new office in Wisconsin

Visit us at ***clausen.com***

Get Ready...

The CM Report is going fully digital in 2017!

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

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

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

CM REPORT of Recent Decisions

Clausen Miller P.C.

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

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

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

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

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

4650 West Spencer Street
Appleton, WI 54914
Telephone: (920) 560-4658

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

Clausen Miller International:

Grenier Avocats
43 rue de Cambon
75001 Paris, France
Telephone: 33.1.86.95.15.90

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

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

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

Clausen Miller Speakers Bureau

Clausen Miller Offers On-Site Presentations Addressing Your Business Needs

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

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

marketing@clausen.com
clausen.com

CMI CLAUSEN MILLER INTERNATIONAL