CM REPORT

of Recent Decisions

2017 • Vol. 2

Fine Line Between Civility In Law And Client's Rights

FEHBA Plans Reap The Benefit Of Recent SCOTUS Ruling

Claim File Note Found Crucial To Defense Obligation

Clausen Miller PC

A summary of significant recent developments in the law focusing on substantive issues of litigation and featuring analysis and commentary on special points of interest.

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A Cautionary Tale: The Fine Line Between Practicing Civility In Law And Giving Up Your Client's Rights

by ***Melinda S. Kollross*** *and* ***Edward M. Kay***

Introduction

A recent decision by the Illinois Appellate Court, Second District, illustrates the fine line attorneys must walk between showing civility and extending courtesies to opposing counsel on the one hand and unwittingly giving up valuable client rights on the other. The decision in *Kantner v. LaDonna Jo Waugh*, 2017 IL App (2d) 160848, provides a blueprint on how to navigate this minefield.

Facts

Plaintiff filed a two-count medical malpractice suit against defendant with one count alleging lack of informed consent and the other count alleging negligence. The informed consent claim was involuntarily dismissed on defendant's motion. Plaintiff proceeded to trial on the negligence claim.

On the day trial was to begin, plaintiff's counsel came to court advising everyone that she had recently been the victim of domestic abuse and had a battered and bruised face. Plaintiff's counsel did not want to continue with the trial under that condition and asked for a continuance. Defendant objected to the continuance but agreed to allow a continuance to occur if plaintiff would pay the expert witness fees that might be charged for the witnesses being cancelled. Plaintiff's counsel balked at the payment of such fees and defendant then offered to not object to a motion to voluntarily dismiss the case, advising plaintiff they would not seek any reimbursement of costs "now or upon refiling." The trial court assured plaintiff's counsel that he would set the case for trial immediately upon refiling, since there was no more discovery to conduct. Defendant's counsel agreed to prepare the Order granting plaintiff's motion to voluntarily dismiss the negligence claim and that Order, as drafted by defendant, stated "On plaintiff's oral motion and by agreement of the parties the case is voluntarily dismissed pursuant to statute … with no costs assessed." The Order did not include the words "upon refiling."

Plaintiff's counsel thereafter refiled the negligence claim but defendant then moved to dismiss the negligence claim, arguing that plaintiff had violated the *res judicata* doctrine's rule against splitting claims enunciated in the Illinois Supreme Court's decision of *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008). Per *Hudson*, defendant argued that the involuntary dismissal of plaintiff's informed-consent claim, followed by the recent voluntary dismissal of the negligence claim, barred a subsequent refiling of the negligence claim. The trial court granted defendant's motion and dismissed the negligence claim.

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The Appellate Court's Decision: Defense Counsel's Conduct Implied That Defendant Would Not Object to a Refiling of the Claim Based on *Res Judicata*

The Appellate Court, Second District, reversed the dismissal of plaintiff's negligence claim and remanded the case back for a full trial on the claim. According to the Appellate Court, there are various exceptions to the *res judicata* doctrine's rule against claim splitting, one of them being that the parties have agreed in terms or "in effect" that the plaintiff may split claims. The Appellate Court found that in this case the parties agreed "in effect" that the plaintiff could split claims and thus separately try the negligence claim.

The Appellate Court found the following facts dispositive for its conclusion that defense counsel impliedly agreed to allow plaintiff to refile the negligence claim without objecting on *res judicata* grounds:

- Defendant suggested that plaintiff dismiss and refile;
- The Court told plaintiff that the suggested course of action would result in an expedited trial and would be advantageous over a continuance because no fees would be assessed; and
- defendant failed to correct anything the Court said, even offering to draw up the written Order.

According to the Appellate Court, in the context of a discussion about how plaintiff's counsel could bring her case to trial without incurring costs, "defendant suggested that plaintiff voluntarily dismiss and refile." Plaintiff's counsel sought and was given assurances that the claim could be refiled and proceed to trial. Under these circumstances, the Appellate Court found that defense counsel in effect agreed to allow the refiling to occur without any *res judicata* objections:

> Defendant in this case clearly did more than remain silent as to the issue of refiling. For the reasons stated above, in context, defendant's conduct implied they would not object to a refiling based on *res judicata*'s rule against claim splitting.

Learning Point: Oftentimes, the best strategy in litigation is to extend courtesies to opposing counsel in order to build a relationship that could prove useful to the proper resolution of the matter. Indeed, attorneys today are under a legal obligation to be civil to each other during the conduct of litigation. But counsel must walk a fine line between extending courtesies and giving up rights. As the Appellate Court noted in its opinion: "[u]nder our adversarial system, a defendant is not obligated to stop a plaintiff from making a fatal mistake." In this case, defense counsel should have said nothing other than to object to a continuance or, if a voluntary dismissal order was to be entered, reserve the defense rights to attack any refiled claim on *res judicata* grounds. And if defense counsel was not being purely altruistic, but thought they could "sandbag" plaintiff's counsel into making a fatal mistake by voluntarily dismissing the negligence claim, the Appellate Court's opinion shows that the Appellate Court would not tolerate that outcome.

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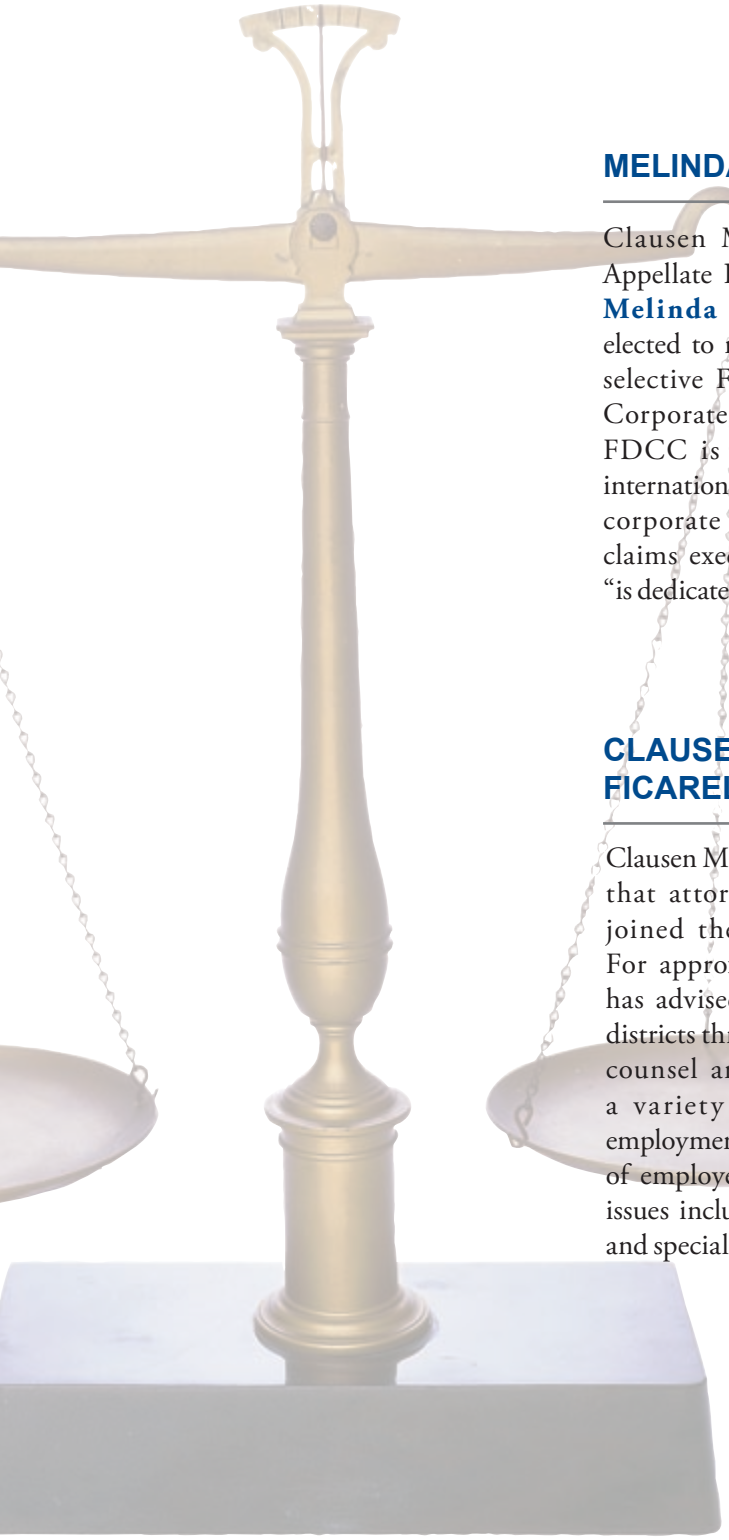

MELINDA KOLLROSS ELECTED TO FDCC MEMBERSHIP

Clausen Miller shareholder and Appellate Practice Group Co-Chair **Melinda Kollross** was recently elected to membership in the highly selective Federation of Defense & Corporate Counsel (FDCC). The FDCC is comprised of U.S. and international defense litigators, senior corporate counsel, and insurance claims executives. The organization "is dedicated to promoting knowledge, fellowship and professionalism for lawyers and other professionals striving to achieve a balanced justice system in the defense of civil lawsuits. For over 75 years, the hand-picked members of the FDCC have been national leaders in the courthouse and in-house – an elite group that drives the agenda and educates the defense legal community." Melinda is honored to join their ranks.

CLAUSEN MILLER WELCOMES ANTHONY ("TONY") FICARELLI TO OUR CHICAGO OFFICE

Clausen Miller is pleased to announce that attorney **Tony Ficarelli** has joined the Clausen Miller team. For approximately 25 years, Tony has advised and represented school districts throughout Illinois as general counsel and as special counsel in a variety of matters, including employment, discipline and dismissal of employees, and complex student issues including discipline, residency and special education. He also focuses on representing boards of education in collective bargaining agreements with teachers' unions and various other educational employee support bargaining units. In addition, Tony serves as general counsel to other units of local government, including park districts and not-for-profit organizations. For more information, please contact Tony at **aficarelli@clausen.com** or 312.606.7644.

PAULUS NAMED AS ONE OF THE LEADING WOMEN LAWYERS IN ILLINOIS FOR 2017

The Law Bulletin Publishing Company, through its subsidiary Leading Lawyers of Chicago, has named Clausen Miller's **Amy Paulus** as one of the Leading Women Lawyers in Illinois for 2017.

Amy is the Liability Coverage and Reinsurance Practice Group Leader, a senior shareholder and member of the Board of Directors of Clausen Miller. Amy has built a national reputation in all areas of liability insurance coverage law, professional liability, employment practices, transportation, claims handling issues and best practices, bad faith, excess insurance, intellectual property, cyber losses, and reinsurance matters and arbitrations.

The lawyers selected for the list have been recommended by their peers to be among the top lawyers in Illinois. Less than five percent of all lawyers licensed in Illinois have received the distinction of being a Leading Lawyer.

CLAUSEN MILLER NAMED ONE OF THE 400 LARGEST LAW FIRMS BY *LAW360*

Clausen Miller appears on the *Law360 Top 400 Law Firms* list for the third year in a row. Within the last two years, the firm 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.

Methodology of the survey was based on U.S. law firm headcount as of December 31, 2016.

SUMMARY JUDGMENT FOR DEFENSE IN DROWNING DEATH OF MINOR

Clausen Miller defense team members **Jack Hynes**, **Don Sampen**, **Jim Bigoness** and **Will Dickinson** combined forces to successfully defend CM's client in the drowning death of a 12 year-old girl in an apartment complex pool. CM represented the staffing company that employed the pool monitor. The incident was recorded on surveillance video. Plaintiff alleged negligence and negligent hiring claims. Cook County Circuit Court Judge Kathy Flanagan granted summary judgment for our client, finding that the pool was an open and obvious danger and that our client did not breach any duties owed in connection with the incident.

SUBROGATED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT GRANTED AND FULL DAMAGES AWARDED

On May 15, 2017 CM partner **Greg Aimonette** and **Ken Wysocki** accomplished what some have said is impossible. They obtained summary judgment in their client's favor on a plaintiff's subrogation complaint.

Summary judgment was granted for plaintiff, a subrogated insurance client in a matter involving a fire and equipment loss to the insured, a heavy duty equipment leasing company. After the completion of fact discovery and defeating defendant's Motion to Dismiss, Greg and Ken filed a Motion for Summary Judgment on the Breach of Contract count, a contract that contained some waiver of subrogation language, and voluntarily dismissed the Negligence count. Defendants filed a competing Motion for Summary Judgment. Cook County Circuit Court Judge Raymond Mitchell granted summary judgment in favor of our client and awarded the full damages sought based on our insured's affidavit. The responding defendant had only stated in their summary judgment brief that they would challenge the damages at the time of trial. Thus, the insured's affidavit stood unrefuted on the amount of damages sustained, supporting a 100% damages award in excess of $300,000. The summary judgment motion was granted mere moments before the parties were scheduled to participate in a settlement conference before another judge.

The case, *Travelers Property Casualty Company Of America v. ArcelorMittal USA Inc.*, Case No. 2015 L 006441, was before Judge Raymond W. Mitchell on Commercial Calendar "S", and the written opinion is available by request. Please contact Greg at **waimonette@clausen.com** for more information.

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U.S. Supreme Court Holds That Abuse Of Discretion Standard Is Applicable To Review Of Decisions Regarding EEOC Subpoenas

by ***Daniel R. Bryer***

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In *McLane Co. v. EEOC*, 197 L.Ed.2d 500 (U.S. 2017), the Supreme Court addressed the appropriate standard of review for challenged EEOC subpoenas. The Court held that the Ninth Circuit improperly reviewed such a challenge *de novo* when there is a longstanding practice of reviewing administrative subpoenas for abuse of discretion. A district court's decision on quashing or enforcing an EEOC subpoena should be reviewed for abuse of discretion.

Facts

A McLane employee, Damiana Ochoa, worked for eight years as a "cigarette selector," a physically demanding job, before taking three months maternity leave in 2007. McLane requires new employees and those returning from medical leave to pass a physical evaluation before carrying out a physically demanding job. Ochoa failed the evaluation three times and was fired by McLane.

In response, Ochoa brought a discrimination claim against McLane with the EEOC alleging that she had been fired on the basis of her gender. The EEOC began investigating the claim, and McLane provided it with basic information regarding the evaluation. McLane also provided a list containing certain information of employees who had taken the physical evaluation. This list included the gender, role at the company, evaluation score and the reason for being asked to take the evaluation. McLane, however, refused to provide "pedigree information" including the names, social security numbers, last known addresses and telephone numbers of the employees. The EEOC then received information that McLane had used the physical evaluation nationwide. In response, the EEOC expanded its investigation to cover nationwide practices and to investigate possible age discrimination. The EEOC issued subpoenas for pedigree information in its new investigation. McLane again refused to provide this information.

The EEOC then filed actions in Federal District Court seeking to enforce the subpoenas. The District Judge, after a hearing, declined to enforce the subpoenas to the extent that they sought pedigree information. The District Court viewed the pedigree information to be not relevant to the charges. The EEOC then appealed the decision to the Ninth Circuit. The Ninth Circuit reviewed the District Court's decision *de novo* and found that the District Court had erred in ruling the pedigree information to be irrelevant. The Supreme Court then granted *certiorari* to determine the applicable standard of review for a decision relating to the enforceability of an EEOC subpoena.

Analysis

The Court stated that in deciding the appropriate level of review two factors are traditionally considered. First, does the "history of appellate practice" reveal an answer? Second, is one judicial actor better positioned

than another to come to a decision on the issue? Both factors indicate that abuse of discretion is the appropriate standard in this case.

First, the Court noted the longstanding practice to review a decision to enforce or quash an administrative subpoena for abuse of discretion. This was the practice prior to the passing of Title VII. The Court explained that the National Labor Relations Act (NLRA) confers the authority to issue subpoenas on the National Labor Relations Board (NLRB) in the same way that Title VII confers that authority on the EEOC. Prior to the incorporation of the NLRA's subpoena enforcement provisions into Title VII, every Circuit tasked with reviewing a subpoena from the NLRB found abuse of discretion to be the applicable standard. The abuse of discretion standard was widely applied when Title VII was amended to authorize EEOC subpoenas.

Second, the Court found that the District Court is well suited to decide if evidence sought is relevant and if a subpoena should be enforced. District Courts are better suited to make fact intensive, close call decisions than a Court of Appeals. This is exemplified by the District Court deciding on the relevance of evidence at trial and the reasonableness of pretrial criminal subpoenas.

Learning Point: The abuse of discretion standard will make it much more difficult for an employer to challenge an EEOC subpoena on appeal. As a result, more emphasis will be placed on the presentation of evidence at the trial level. Additionally, employers will need to better tailor objections to a subpoena in order to demonstrate that the subpoena has been issued for an improper purpose or seeks information that is burdensome or irrelevant to the proceedings. ♦

FEHBA Plans Reap The Benefit Of Recent SCOTUS Ruling— FEHBA Preempts State Anti-Subrogation Laws

*by **Kristin B. Esposito** and **Scott R. Shinkan***

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The United States Supreme Court holds that the express preemption provision of the Federal Employees Health Benefits Act supersedes state law, allowing insurers to recover from a personal injury settlement benefits paid in an FEHBA plan regardless of state anti-subrogation laws. *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. ___ (2017). https://www.supremecourt.gov/opinions/16pdf/16-149_6jfm.pdf

Facts

In 2006, Jodie Nevils, a federal employee, was injured in a car accident. She was insured under the Federal Employees Health Benefits Act ("FEHBA"), which affords private carriers the opportunity to contract for federal employees' health insurance. Coventry Health Care of Missouri carried Nevils' FEHBA health plan and provided payments for a portion of the medical bills incurred as a result of the accident. Nevils sued the alleged negligent driver and later settled. Coventry asserted a lien against the settlement proceeds, which Nevils satisfied before filing a class action suit against Coventry for conversion and unjust enrichment pursuant to Missouri's anti-subrogation law.

The FEHBA provides health care to federal employees, allowing the Office of Personnel Management ("OPM") to contract with private insurance carriers for different plans. The contracts that OPM negotiated provided for reimbursement and subrogation. OPM also issued regulations within FEHBA pertaining to reimbursement rights and subrogation, specifically deferring to the provision of benefits under the plan's coverage. The FEHBA also contains an explicit clause pre-empting state law, 5 U.S.C. §8902 (m)(1). However, Missouri and several other states bar enforcement of reimbursement provisions and contractual subrogation.

The Missouri Supreme Court ruled against Coventry and held that Missouri's anti-subrogation law is not preempted by FEHBA because an insurer's claim to a personal injury settlement does not "relate to" the "nature, provision, or extent of coverage or benefits." The Court further held that FEHBA violates the Supremacy Clause. Coventry appealed to the Supreme Court of the United States.

Analysis

In an 8-0 opinion authored by Justice Ginsburg, the U.S. Supreme Court unanimously reversed and remanded. Justice Thomas filed a concurring opinion. Justice Gorsuch took no part in the consideration or decision of the case. The Supreme Court held that FEHBA's contractual subrogation and reimbursement prescriptions do "relate to … payments with respect to benefits,"

therefore overriding state laws that bar subrogation and reimbursement. The Court also held that FEHBA did not violate the Supremacy Clause.

The Supreme Court first analyzed whether the subrogation and reimbursement requirements included within the Coventry contract "*relate* to the nature, provision, or extent of coverage or benefits … including payments with respect to benefits." The Court held that FEHBA §8902(m)(1) unequivocally covers the contractual terms by plain language, which is consistent with the text and purpose of the statute. This is because the term "relate to" has repeatedly been recognized in preemption clauses to reference payments and benefits, and when a carrier attempts to recoup the benefits it has previously paid out, it seeks a return from a third party in the form of monetary payment in exchange for the benefit that the carrier previously provided.

The Court also rejected the assertion that FEHBA violates the Supremacy Clause. The Court acknowledged that language in the OPM contracts appears to "supersede and preempt" state or local law. However, because the federal FEHBA statutes itself, not the OPM contracts, override state law, there is no violation of the Supremacy Clause.

Learning Points:

- FEHBA allows insurance carriers to recover benefits provided to federal employees regardless of state laws.
- Any state anti-subrogation law is preempted by FEHBA, and you may claim reimbursement from personal injury settlement proceeds pursuant to the FEHBA Plan's contract.
- Caution is recommended, however, because Justice Thomas' concurring opinion leaves open the possibility for another challenge to FEHBA's preemption of state law on the grounds that it may unlawfully delegate legislative power to the executive branch.

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Wisconsin Court Of Appeals Holds That The "Four-Corners Rule" Does Not Apply When An Insurer Provides A Defense To Its Insured

by ***Patrick L. Breen***

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In *Stimac Family Trust v. Wisconsin Power and Light Company*, No. 2016AP748 (Wis. App.) (recommended for publication), the Wisconsin Court of Appeals discussed whether extrinsic evidence must be considered in making a coverage determination when an insurer provides a defense under a reservation of rights. Specifically, the court analyzed the applicability of the "four-corners rule", pursuant to which the court's analysis is limited to the four corners of the complaint.

Facts

Wisconsin Power and Light Company ("WPL") was performing trenching/excavating work near a residence owned by the Stimac Family Trust ("Stimac") when it severed an underground sewer line, causing sewage and waste material to flood the Stimac residence. West Bend Mutual Insurance Company ("West Bend") insured Acquire Contracting and Restoration, Inc. ("Acquire"). WPL hired Acquire to repair the Stimac residence. Soon after the repairs were made, Stimac observed mold growth in areas of the home and a pervasive odor of sewage. Stimack alerted WPL and Acquire, both of whom denied any further obligation or responsibility to repair the property.

Stimac sued Acquire, alleging that Acquire was negligent in its repair efforts and, as a result, the home was uninhabitable due to mold and odor issues. West Bend alleged that its policy did not cover the claim, but provided counsel for Acquire pursuant to a reservation of rights. West Bend filed a motion to bifurcate the coverage and liability issues and stay proceedings pending a resolution of the coverage issue. West Bend asserted that it had "no duty to defend or indemnify Acquire," but explained that "in an excess of caution, West Bend has provided a defense to Acquire under a reservation of rights." The trial court granted West Bend's motion to bifurcate.

West Bend then sought summary judgment on its theory that the policy exclusions precluded coverage. West Bend submitted no extrinsic evidence apart from an affidavit of counsel attaching a copy of the pertinent policy. West Bend argued that the coverage analysis must be confined to the four corners of the complaint and the policy.

The trial court granted West Bend's motion, finding the exclusions applicable and agreeing with West Bend that the coverage analysis must

be confined to the four corners of the complaint and the policy. The court entered an order dismissing West Bend from the case, and an appeal followed. On appeal, Stimac and Acquire argued that the court should have gone beyond the four-corners analysis and considered extrinsic evidence in determining whether coverage was provided by the policy in question.

Analysis

In reviewing the order of dismissal, the appellate court began by stating that "[w]hether an insurer has a duty to defend an insured is a question of law often determined by comparing the allegations contained in the complaint to the terms of the insurance policy without resorting to extrinsic evidence, a procedure known as the four-corners rule." The court also noted, however, that "[o]ur Supreme Court has outlined a specific procedural context where the four corners rule is not applicable." Citing *Estate of Sustache v. American Family Mutual Insurance Company*, 311 Wis. 2d 548, 751 N.W.2d 845, the court stated that "where an insurer elects to provide a defense to the insured under a reservation of rights, pending determination on coverage, the four corners rule is no longer controlling."

The court went on to quote from another Supreme Court case, *Olson v. Farrar*, 338 Wis. 2d 215, 809 N.W. 2d 1 (2012). In *Olson*, the court held that the four-corners rule is not implicated where "the insurer has elected to provide a defense pending a final determination on coverage." From that point forward, the court held, "both the insurer and the insured have a right to seek a coverage determination and may introduce extrinsic evidence" where appropriate to the resolution of the coverage question.

The appellate court reversed the trial court's order of dismissal. In doing so, it found that the trial court had applied the four-corners rule in deciding West Bend's motion for summary judgment. The court disagreed with this approach. The court observed that West Bend had provided a defense to Acquire under a reservation of rights, sought and was granted bifurcation of the coverage and liability issues, and moved for summary judgment on the coverage issue. Thus, the case went "beyond the initial duty to defend stage of the proceedings and proceeded to a determination of coverage." From that point forward, the court held, "any extrinsic evidence offered by either party must be considered by the court on the question of coverage." Ultimately, the court held that the trial court had "erred in making its determination based on the four corners of the complaint", and remanded the case for the court to consider any extrinsic evidence already submitted and whether further discovery was necessary.

In its opinion, the court summarized the procedure utilized when an insurer disputes coverage as follows:

> If an insurer alleges that it has no duty to defend its insured and does not provide its insured with a defense, then the four-corners rule applies and the only documents utilized by the court are the insurance policy and the complaint. No extrinsic evidence may be considered. In contrast, if an insurer alleges that its policy does not provide coverage but provides a defense to its insured and bifurcates the matter while coverage is contested, then the court considers the complaint, the policy, and any extrinsic evidence to determine whether coverage exists.

Learning Point: The four-corners rule applies only to the analysis of an insurer's duty to defend. If an insurer disputes coverage and does not provide its insured with a defense, the four-corners rule applies and the court's analysis is limited to the complaint and the policy. Once the insurer agrees to defend, however, and seeks a determination of coverage, the focus has moved beyond the duty to defend and on to a coverage determination. Accordingly, the four-corners rule is no longer controlling. From that point forward, any extrinsic evidence offered by either party will be considered. ♦

Claim File Note Found Crucial To Defense Obligation

by ***Don R. Sampen***

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An insurer's duty to defend typically is said to turn, first and foremost, on the allegations of the underlying complaint. On occasion, however, courts look outside the four corners of the complaint to extrinsic evidence to determine if a defense obligation exists. In a recent case, the Illinois First District Appellate Court held that an insurer had a duty to defend an additional insured based in significant part on information reflected in the insurer's own claim file. *Pekin Insurance Co. v. AAA-1 Masonry & Tuckpointing, Inc.*, 2017 IL App (1st) 160200.

Facts

AAA, a construction contractor, entered into a subcontract with Alpha 1 Construction, Inc., for construction services. Under the subcontract, Alpha agreed to name AAA as an additional insured on Alpha's CGL policy. The subcontract further provided that Alpha was an independent contractor, that Alpha was to maintain full control over its workers, and that the work was to be performed solely by Alpha.

Pekin issued a liability policy to Alpha with a blanket additional insured endorsement. The endorsement extended coverage to additional insureds only for vicarious liability based on the named insured's (*i.e.*, Alpha's) ongoing operations, and it excluded liability in any way attributable to the claimed negligence of the additional insured.

An employee of Alpha, Emil Piekutowski, was injured on the job and brought suit against AAA, among others. The complaint alleged that the defendants were responsible for coordinating work, had authority to stop the work, and were negligent in various ways, resulting in his injury. Alpha was not named a party.

One of the other defendants in the underlying case, however, Chicago Scaffolding, Inc. (CSI), brought a third party action against Alpha. The third party complaint alleged that Piekutowski was injured while using scaffolding equipment provided by AAA and that Alpha was negligent in supervising Piekutowski.

AAA's general liability insurer, Scottsdale Insurance Company, tendered AAA's defense in the underlying suit to Pekin. Pekin denied coverage on the ground that it did not believe its duty to defend AAA was triggered because AAA was not alleged to have been responsible for damages stemming from Alpha's acts or omissions, but rather was sued for its own negligence.

Pekin then brought this declaratory action seeking a determination of its obligations. AAA counterclaimed seeking a declaration that Pekin had a duty to defend it in the underlying suit. Scottsdale intervened, agreeing with AAA and seeking reimbursement of defense costs in connection with its defense of AAA.

Upon cross motions for summary judgment, Scottsdale submitted various documentation. It included CSI's third party complaint alleging Alpha's negligence in connection with the use of AAA's scaffolding equipment, and a note from Pekin's claim file commenting on the circumstances of Piekutowski's injury. The note indicated that the injury took place during a hoisting operation involving the use of the scaffolding.

The trial court granted Scottsdale's motion for summary judgment and denied Pekin's. Pekin took this appeal.

Analysis

In an opinion by Justice Shelvin Louise Marie Hall, the First District affirmed. The Appellate Court observed that in a declaratory judgment action, an insurer's contractual duty to defend is ordinarily determined on the basis of the allegations in the underlying complaint. The First District further stated, however, that a court is not limited to consideration of those allegations. Thus, it is proper for the court to consider the insurer's knowledge of true but unpleaded facts that, when taken together with the allegations in the complaint, indicate that the claim is within or potentially within the policy coverage. The only time such evidence should not be permitted is when it tends to determine an issue crucial to the resolution of the underlying lawsuit.

In this case, the Appellate Court said that Pekin's claim file note constituted the kind of facts that should be considered. Pekin contended otherwise, arguing that the note did not state or suggest that Alpha was negligent. The Court rejected the argument, saying that the issue is not whether it suggests that Alpha was negligent, but whether the note, when taken together with the underlying allegations, indicate that the claim is potentially within policy coverage.

In particular, the Appellate Court found that when Piekutowki's allegations against the named defendants were read in conjunction with the claim note and the terms of the subcontract, they created the possibility that AAA could be found liable for Piekutowski's injuries based on Alpha's careless or negligent operation of the scaffolding.

The First District concluded that Pekin's duty to defend AAA under the additional insured endorsement was triggered. It further held that the unpleaded facts found in the claim note did not determine any issue crucial to the underlying lawsuit. The Court therefore affirmed the summary judgment in favor of Scottsdale holding that Pekin had a duty to defend.

Learning Point: An insurer's knowledge of true but unpleaded facts, including notes in the insurer's own claim file, may be taken into account when deciding the insurer's duty to defend an additional insured. ♦

DAMAGES

INDIANA SUPREME COURT SETS RULE GOVERNING PROOF OF DECREASED EARNING CAPACITY OF UNAUTHORIZED IMMIGRANT

Escamilla v. Shiel Sexton Co., 2017 Ind. LEXIS 341 (Ind.)

Unauthorized immigrant was injured at work site. ***Held:*** An unauthorized immigrant may sue for decreased future earning capacity. Courts are open to all persons, regardless of immigration status. An immigrant's status is admissible only if immigrant will likely be deported. The standard is strict to avoid high risks of jury confusion and unfair prejudice.

INSURANCE CLAIMS PRACTICES

INSURER ENTITLED TO DEMAND FULL RELEASE FOR INSUREDS

Caira v. Zurich Am. Ins. Co., 2017 Mass. App. LEXIS 46 (Mass. App.)

Despite existence of excess insurance, primary insurer conditioned payout on a release of all claims against insured. ***Held:*** Settlement statute does not require an insurer to surrender its policy without a full release of its insured. Although insurer must act fairly and promptly when liability is reasonably clear, it also must protect insured from continued exposure. Payment without a release is not a settlement.

INSURER'S SETTLEMENT OFFERS FAIR AND REASONABLE

Silva v. Norfolk & Dedham Mut. Fire Ins. Co., 2017 Mass. App. LEXIS 48 (Mass. App.)

Third-party claimant sued insurer for unreasonably low settlement offers during trial and appeal. ***Held:*** The offers were reasonable. By statute, an insurer must effectuate a prompt fair settlement once liability becomes reasonably clear. But liability includes damages, and the insurer's investigation raised questions as to the cause and extent of damages. Also, the insurer's post-trial offer to pay policy limits without interest did not warrant higher damages. An offer of interest is only needed to toll the accrual of further interest, not to avoid penalty.

INSURER LIABLE FOR INTEREST ON DELAYED PAYMENT

Casper v. Am. Int'l S. Ins. Co., 2017 Wisc. App. LEXIS 342 (Wis. App.)

Claimants demanded interest following a policy-limits settlement of catastrophic claims. ***Held:*** The delay in payment warranted interest. Under statute, a claim is overdue if not paid within 30 days after all conditions are met. The statute serves to compensate claimants for the lost value of money. A claimant must show that liability is unquestioned, damages are certain, and that the insurer received notice of both. To avoid interest, the insurer must reasonably prove that liability is fairly debatable. If damages are high compared to policy limits, the potential for contributory negligence by itself is not reasonable proof. Here, the insurer knew that damages would exceed the policy limit even with contributory negligence and its duties to multiple insureds did not excuse its delay.

LEGAL MALPRACTICE

DEFENDANT DID NOT DISPROVE PROXIMATE CAUSATION AS A MATTER OF LAW

Ragunandan v. Donado, 150 N.Y.S.3d 889 (N.Y. App. Div. 2d Dep't)

Plaintiff filed legal malpractice action against an attorney who represented her at a real estate closing. The attorney-defendant, in good faith, distributed funds according to a valid contract that he played no role in drafting. The attorney's motion for summary judgment contended that "any deficiency in his skill and knowledge was not a proximate cause of the plaintiff's damages," and that another party was the actual proximate cause of the damages. The Supreme Court granted the motion. ***Held:*** Reversed. Defendant failed to establish, *prima facie*, the absence of proximate cause. The court opined, "[t]he fact that another person may have taken advantage of the defendant's allegedly deficient performance to cause damages to the plaintiff did not, under the circumstances of this case, establish, *prima facie*, that the defendant's alleged deficiencies were not also a proximate cause of her damages."

LIABILITY INSURANCE COVERAGE

POLLUTION EXCLUSION BARS COVERAGE FOR CONTAMINATED SEDIMENT EXPOSURE

Cincinnati Ins. Co. v. Roy's Plumbing, Inc., No. 16-2511-cv, 2017 U.S. App. LEXIS 9729 (2d Cir.)

Three families residing near a containment area in Niagara Falls claimed that a contractor performed negligent work that exposed a substantial amount of contaminated sediment, which then migrated to their homes causing physical injuries and property damage. The contractor sought coverage under its policy, which the insurer denied pursuant to a pollution exclusion. The district court granted summary judgment to the insurer, finding that coverage was barred because the underlying suit alleged only injuries arising out of traditional environmental pollution. ***Held:*** Affirmed. The insurer showed that the underlying allegations fell within the policy's pollution exclusion and therefore had no duty to defend or indemnify the insured.

INSURER HAD DUTY TO DEFEND UNDER E&O POLICY WHERE CLAIMS COULD HAVE ARISEN FROM MERE NEGLIGENT CONDUCT OR INNOCENT MISTAKE

Title Indus. Assur. Co., R.R.G. v. First Am. Title Ins. Co., 853 F.3d 876 (7th Cir.)

Insured sought coverage for a suit alleging that it had misused escrow funds when facilitating real estate "flip" transactions. Coverage was denied based on policy exclusions precluding coverage where allegations against the insured pertained to fraud or a failure to pay escrow funds. Many years later, after no additional communications, the insurer appointed counsel to defend its insured and filed a declaratory action claiming non-coverage. An underlying claimant filed a counterclaim seeking a declaration that the insurer breached its duty to defend its insured (which had by now defaulted). The district court granted judgment in favor of the claimants, estopping the insurer from asserting coverage defenses. ***Held:*** Affirmed. Insurer had duty to defend, since some allegations had no obvious relationship to the fraud claim, and could have arisen from mere negligent conduct. Additionally, the alleged commingling of money belonging in the escrow fund could have occurred through innocent mistake. The insurer was estopped from asserting any policy exclusions due to its breach of duty.

INSURED'S FAILURE TO APPEAR AT MANDATORY ARBITRATION HEARING RESULTING IN DEBARRING ORDER DOES NOT ESTABLISH SUBSTANTIAL PREJUDICE

Direct Auto Ins. Co. v. Reed, 2017 IL App (1st) 162263

Insurer sought declaration it had no duty to provide coverage in connection with a motor vehicle accident because its insured, the driver of one of the vehicles, breached the policy's cooperation clause in failing to appear at a mandatory arbitration hearing in the underlying litigation, resulting in an order debarring her from rejecting an unfavorable arbitration award. The circuit court found that although the insurer had *prima facie* shown that the insured willfully refused to cooperate, the insurer had failed to show that it suffered substantial prejudice as a result of her breach. ***Held:*** Affirmed. A debarring order, on its own, does not as a matter of law establish the substantial prejudice that an insurer must demonstrate to obtain a declaration of no coverage based on an insured's breach of a policy's cooperation clause.

DAMAGE TO SCALLOPS WAS "ACCIDENT" UNDER POLICY

Hanover Ins. Group, Inc. v. Raw Seafoods, Inc., 2017 Mass. App. LEXIS 49 (Mass. App.)

Processor damaged scallops but could not explain how or why. ***Held:*** The damage was a covered occurrence under the processor's CGL policy. The policy defines "occurrence" as an accident: an unexpected happening neither intended nor designed. The processor had never experienced a similar problem. Damaging scallops was not an ordinary part of the process. There was no evidence of intent to damage the scallops; processor had been found liable for negligence only. Proving exact cause of damage was unnecessary.

BUSINESS-PURSUITS EXCEPTION APPLIES TO ACTS OUTSIDE SCOPE OF EMPLOYMENT

Nguyen v. Arbella Ins. Group, 2017 Mass. App. LEXIS 64 (Mass. App.)

City employee sought defense under his homeowner's policy against former co-employee's tort and civil rights claims. ***Held:*** The business-pursuits policy exclusion applies even if the insured's actions do not serve his personal or his

employer's business interests. If a claim arises out of or in connection with an insured's business, the exclusion applies. To qualify as a "business," the insured must be regularly engaged in it as a means of livelihood, and do so for monetary gain. The insured was a city employee working steadily and for pay. It was irrelevant that his conduct was arguably outside the scope of employment.

COURT OF APPEALS HOLDS NO COVERAGE FOR NEGLIGENT ADDITIONAL INSURED

Burlington Ins. Co. v. NYC Transit Auth., No. 57, 2017 WL 2427300 (N.Y.)

Insurer issued policy listing New York City Transit Authority and MTA New York City Transit as additional insureds. Insurer denied coverage to NYCTA and MTA on the grounds that they were not additional insureds within the meaning of the policy because NYCTA was solely responsible for the accident and injury. Therefore, the question on appeal was whether the additional insured language of the policy provided coverage where the named insured was not negligent. The policy in question provided that NYCTA, MTA, and the City are additional insureds: "... only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf." ***Held:*** Where an insurance policy is restricted to liability for any bodily injury "caused, in whole or in part" by the "acts or omissions" of the named insured, the coverage only applies to injury proximately caused by the named insured. An additional insured is not covered for an injury caused solely by its own negligence.

HAZARDOUS MATERIALS EXCLUSION DID NOT BAR COVERAGE

Hillcrest Coatings, Inc. v. Colony Ins. Co., No. 16-01898, 2017 WL 2491075 (N.Y. App. Div. 4th Dep't)

Company was sued for allegedly creating a "malodorous condition" in the surrounding neighborhood due to its negligent operation of a glass recycling plant. The company sought a declaration that its insurer had a duty to defend the plant operator in the underlying case. The insurer argued that coverage was precluded by a hazardous materials exclusion. The lower court found for the insured. ***Held:*** There was a reasonable possibility of coverage. Therefore, the insurer did not meet its burden of establishing as a matter of law that the hazardous materials exclusion precluded coverage.

LIMITATIONS OF ACTIONS

DISCOVERY RULE TOLLS LIMITATIONS PERIOD FOR ALLEGATIONS OF TORTIOUS CONDUCT AGAINST INSURER'S AGENT

Am. Family Mut. Ins. Co. v. Krop, 2017 IL App (1st) 161071

Insurer sought declaratory judgment that defendants were not entitled to coverage or protection under a 2012 homeowners policy. In response, defendants alleged that the insurer and its agent had negligently failed to procure the level of insurance coverage requested. Insurer and agent moved to dismiss asserting that the defendants' claims were barred since beyond the two-year statute of limitations for actions against insurers. The trial court granted the motion. ***Held:*** Reversed. When an insured alleges tortious conduct by an insurer's agent, although the cause of action accrues at the time of the breach, the statute of limitations is subject to tolling by application of the discovery rule. Therefore, the counterclaim was not time-barred as the cause of action accrued upon denial of coverage, which was when the injury was discovered.

"FOREIGN OBJECT" EXCEPTION INAPPLICABLE TO CAPSULE CAMERA

Leace v. Kohlroser, 2017 N.Y. App. Div. LEXIS 4351 (N.Y. App. Div. 2d Dep't)

Plaintiff sued doctors, alleging malpractice, when a capsule camera was found in plaintiff's intestines three years after it was swallowed. The trial court granted summary judgment to the doctors, ruling the statute of limitations period had run. ***Held:*** Affirmed. The capsule camera was intentionally swallowed and used diagnostically to visualize the condition of the plaintiff. It was not used or even introduced into the plaintiff's body in the course of a surgical procedure. Thus, the "foreign object" exception to the statute of limitations period does not apply. ***Further Held:*** In determining whether an object that remains in a patient is a "foreign object," courts should consider "the nature of the materials implanted in a patient, as well as their intended function."

MEDICAL MALPRACTICE

DISMISSAL AFFIRMED WHERE EXPERT FAILED TO DEFINE STANDARD OF CARE

Webb v. Albany Med. Ctr., 2017 N.Y. App. Div. LEXIS 5086 (N.Y. App. Div. 3d Dep't)

Plaintiff sued a medical center, alleging a deviation from the standard of care when the plaintiff was injured while helping transfer a patient from a wheelchair to a bed. The plaintiff, who was visiting the patient, argued that the center was negligent because she was not capable of following directions or rendering support in the transfer. The trial court granted the defendant's motion for summary judgment. ***Held:*** Affirmed. The center did not deviate from the accepted standard of care when utilizing a slide board to transfer the patient. Defendant demonstrated that the patient had successfully completed slide board transfers with minimal or moderate assistance on prior occasions. ***Further Held:*** The affidavit of plaintiff's expert "failed to identify or define the applicable standard of care appropriate in this case, merely asserting, in a conclusory manner, that [the patient] required a higher level of assistance than was provided to her."

NEGLIGENCE

GENERAL CONTRACTOR SUBJECT TO LIABILITY FOR INJURY TO SUBCONTRACTOR'S EMPLOYEE

Ryan v. TCI Architects/Engineers/Contractors, Inc., 2017 Ind. LEXIS 317 (Ind.)

Subcontractor's employee fell off a ladder while removing ducts. ***Held:*** The general contract revealed the general contractor (GC)'s intent to assume a duty of care. The contract directed the GC to assume responsibility for implementing and monitoring safety precautions and programs. It required the GC to designate a safety representative to be involved in routine daily inspections and weekly safety meetings. The GC had complete and exclusive control over the means, methods, sequences, and techniques of construction and agreed to provide everything needed to complete the work.

GUN SELLER IMMUNE FROM SUIT

KS&E Sports v. Runnels, 2017 Ind. LEXIS 308 (Ind.)

Injured police officer sued gun seller after criminal obtained gun from strawman. ***Held:*** Statute immunized firearm sellers from damages suits resulting from third party's unlawful misuse of firearm or ammunition. Statute is not preempted by federal law and does not violate open courts, equal protection, and due process constitutional provisions. However, statute does not immunize against claims for equitable relief and the officer's public nuisance claim survived for that reason. The attempt to pierce the corporate veil failed because the officer sought monetary relief.

PRODUCTS LIABILITY

SCARANGELLA EXCEPTION INAPPLICABLE TO PRODUCTS SOLD TO RENTAL MARKET

Fasolas v. Bobcat of N.Y., Inc., 53 N.Y.S.3d 61 (N.Y. App. Div. 2d Dep't)

Decedent's estate sued a manufacturer and a rental center for wrongful death, alleging that the skid-steer loader the decedent rented was defective because it did not include a window kit to protect the cab as a standard feature. During use, a nine-foot tree entered the cab and crushed the decedent. In defense, the manufacturer cited a Court of Appeals decision, *Scarangella v. Thomas Built Buses*, 717 N.E.2d 679 (N.Y. 1999), for the proposition that sophisticated buyers are in the best position to assess how risky a product is without an optional safety device. ***Held:*** *Scarangella's* manufacturer liability exception does not apply to products sold to the rental market because the rental clientele is less likely to have experience and knowledge concerning such equipment and is not "in a position to engage in rational and reasonable balancing of the risk against the reward of not purchasing the optional safety device" and can not be "assumed to be adequately motivated to do so."

TORTS

EMPLOYER NOT LIABLE FOR INTENTIONAL TORT IN ENVIRONMENTAL MISHAP

Henzerling v. Envtl. Ent., Inc., 2017 Ohio App. LEXIS 1688 (Ohio App.)

Estate of employee sued employer for intentional tort arising out of a fire during a decontamination procedure. ***Held:*** Estate failed to prove employer's deliberate intent to cause injury, as needed to bypass workers' compensation system. A rebuttable presumption of deliberate intent requires evidence of an intentional removal of an equipment safety guard. The submersion tank used in the decontamination process was not an equipment safety guard, and nothing on it was removed. The estate could not prove the employer's knowledge that the contaminated product contained organic material likely to burn or explode.

UM/UIM

120-DAY NOTICE PROVISION AGAINST PUBLIC POLICY FOR CIRCUMVENTING UIM STATUTE

Smith v. Am. Heartland Ins. Co., 2017 IL App. (1st) 16144

Plaintiff sustained injuries from a hit-and-run while a passenger in a vehicle owned by the insured. The underinsured motorist policy required notice within 120 days for hit-and-run incidents and the plaintiff's attorney, using information provided by the insured, notified one, but not both, potentially applicable carriers. The carrier that was not notified eventually denied coverage based upon lack of timely notice. ***Held:*** The 120-day notice provision that the insurer sought to enforce against the plaintiff is a dilution or diminution of the uninsured motorist statute and is, therefore, against public policy as applied to the plaintiff.

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