CM REPORT

of Recent Decisions

2017 • Vol. 3

Seventh Circuit Condemns Class Action As "Utterly Worthless"

Dept. Of Justice Opposes The EEOC

Standard Fire Policy Terms Provide Relief For Innocent Insureds

Clausen Miller PC

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

CM REPORT of Recent Decisions
2017 • Vol. 3

FEATURES

3 *Sidebar*
6 *CM News*
20 *Case Notes*

ARTICLES

SPECIAL ALERT: FOCUS ON EMPLOYMENT LAW

7 Dept. Of Justice Opposes The EEOC In A Gay Discrimination Lawsuit
by Paul W. Daugherity

FIRST-PARTY PROPERTY

9 Standard Fire Policy Terms Provide Relief For Innocent Insureds
by Don R. Sampen

11 Where "Best Efforts" Are Not Enough: Court Sides With Landmark In Determining That Terms Of The Policy Are Abrogated By Protective Safeguard Endorsement
by Courtney E. Murphy and Jacob R. Zissu

13 Consequential Damages Dismissed As Too Speculative To Recover
by Courtney E. Murphy

LIABILITY INSURANCE COVERAGE

15 California Court of Appeals Rejects Policyholder's Attempt At "Elective Stacking" Of Coverage
by Alec M. Barinholtz

17 California Court of Appeal Narrowly Interprets Scope Of "Faulty Work" Exclusions
by Alec M. Barinholtz

Report Staff

Seventh Circuit Condemns Class Action Settlement That Merely Generates Fees For Plaintiffs Class Counsel As "Utterly Worthless"

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

In *In Re Subway Footlong Sandwich Marketing & Sales Practices Litigation*, 869 F.3d 551 (7th Cir. 2017), the United States Court of Appeals for the Seventh Circuit struck down a class action settlement because it did nothing more than generate attorney's fees for class counsel. Circuit Judge Diane Sykes writing for a three-judge panel found that a class action that seeks only worthless benefits for the class and yields only fees for class counsel is no better than a racket and should be dismissed out of hand.

Facts

This case had its genesis when an Australian teenager measured his Subway Footlong sandwich and discovered it was only 11 inches long. A photograph of this discovery was posted to the teen's Facebook page and it went viral. Within days of the post, "the American class-action bar rushed to court" to see if they could cash in on a footlong sandwich being only 11 inches in length.

Early discovery showed there was really nothing for the class action bar to cash in on. Most Subway Footlongs are indeed a "foot long" . . . and the few that didn't make the whole 12 inches were caused by the vagaries of the baking process. The dough used to make each roll weighs exactly the same, so an 11 incher would have the same amount of dough as a 12 incher. And discovery showed that the quantity of food was the same whether the roll after baking came out as 11 or 12 inches.

Instead of dropping the suit as meritless because there were no damages, class counsel focused on injunctive relief and a settlement was reached with Subway. Subway agreed to implement certain measures for a period of four years to insure that all Footlongs are a foot long. But the settlement acknowledged that even with these measures, a Footlong could come out as an 11 incher due to the baking process. The parties agreed to cap the attorney's fees of class counsel at $525,000 and the district court preliminarily approved the settlement.

An objector, Theodore Frank, argued that the settlement enriched only the lawyers and provided no benefits to the class. The district court rejected the argument and approved the settlement, and Frank appealed.

Analysis: The Seventh Circuit's Decision

On appeal, the Seventh Circuit reversed approval of the settlement holding that because the settlement yields only fees for class counsel and zero benefits for the class, it should not have been approved. The Seventh Circuit focused on what the class members got from Subway before and after the settlement, and found they got exactly the same

Melinda S. Kollross
is a Clausen Miller AV® rated (Preeminent) senior partner 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 150 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

thing . . . . the settlement did not improve or benefit the class members in any way whatsoever. Before the settlement, class members could be fairly certain that a Subway Footlong would be a foot long, and if it was only an 11 incher, that sandwich nonetheless weighed the same and had the amount of sandwich ingredients as a Footlong. The same was true after the settlement, and thus the Seventh Circuit found that the injunctive relief approved by the district judge was "utterly worthless."

Learning Point: Both plaintiffs and Subway joined forces to support the settlement . . . Class counsel wanted their attorney's fees and Subway just wanted to end the litigation. But the Seventh Circuit's decision makes clear that this Court will not tolerate these kinds of agreements between class representatives and the defendant just to end litigation that does nothing more than line the pockets of the class action bar. It is crucial for class action defendants to understand the Seventh Circuit's position when developing their strategies to combat and defeat class actions not only in the jurisdictions comprising the Seventh Circuit, but elsewhere if other courts adopt the Seventh Circuit's reasoning. Given the Seventh Circuit's stance on worthless class action settlements, class action defendants must now must find ways to aggressively fight the merits of class action litigation and cannot merely buy their peace by buying off plaintiffs' class counsel with attorney's fees . . . as Subway attempted to do in this case.

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

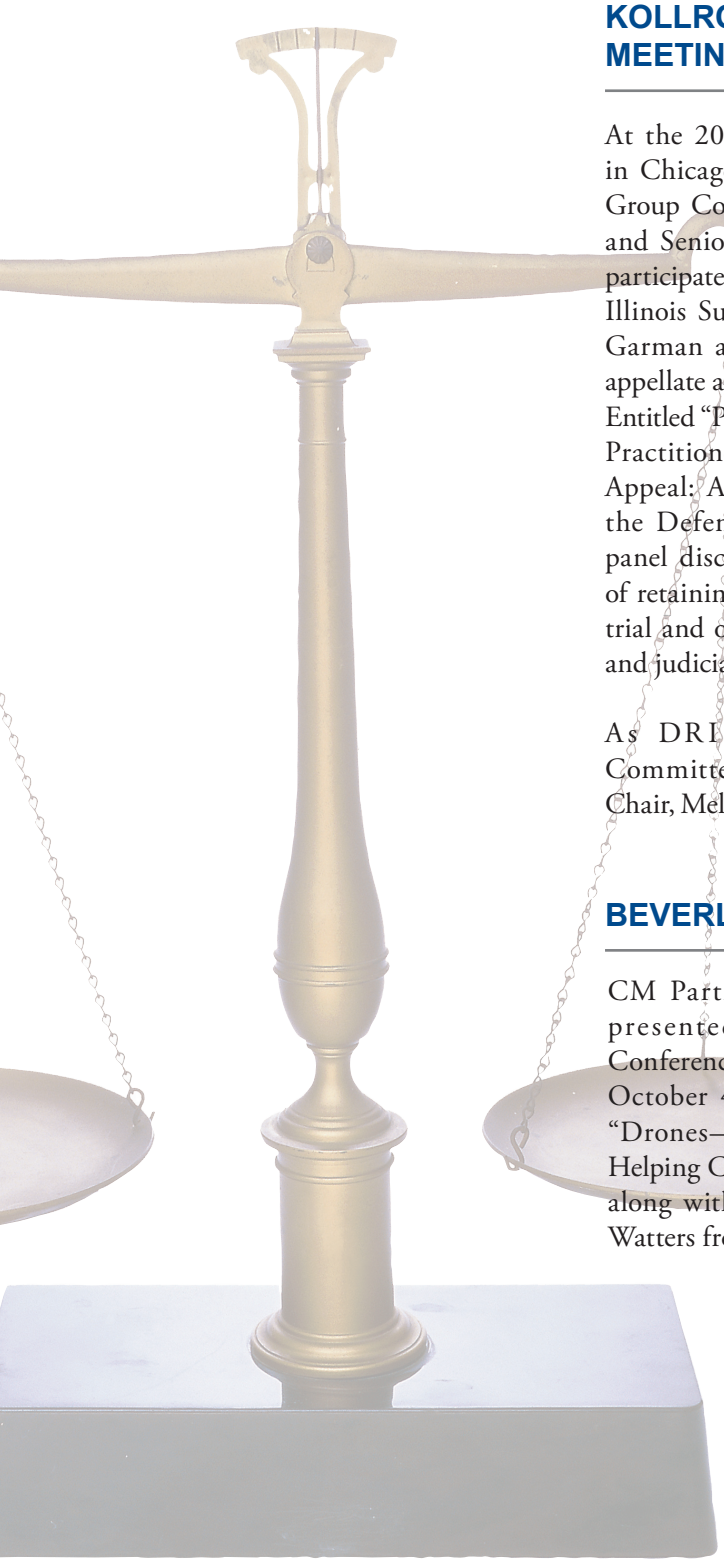
Subrogation: Initial Recognition, Roadblocks and Strategies

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



KOLLROSS AND ESPOSITO PRESENT AT DRI ANNUAL MEETING—APPELLATE ADVOCACY COMMITTEE CLE

At the 2017 DRI Annual Meeting in Chicago, CM Appellate Practice Group Co-Chair **Melinda Kollross** and Senior Counsel **Paul Esposito** participated in a panel discussion with Illinois Supreme Court Justice Rita Garman and the leading plaintiff's appellate attorney, Michael Rathsack. Entitled "Perspectives on the Appellate Practitioner's Role at Trial and on Appeal: A View from the Plaintiff, the Defense, and the Court," the panel discussion explored the value of retaining an appellate specialist at trial and on appeal from the litigant and judicial viewpoints.

As DRI Appellate Advocacy Committee 2017 Annual Meeting Chair, Melinda created and moderated the panel discussion. Each speaker provided excellent insights and humorous examples concerning the growing use of appellate counsel during pretrial proceedings, at trial and post-trial, as well as the benefits of retaining an appellate practitioner to prosecute or defend an appeal. Justice Garman confirmed that as a general rule, appellate practitioners write more focused, succinct and compelling briefs, and present oral argument best suited for an appellate tribunal, rather than a jury closing.

For more information about the effective use of appellate counsel before, during and after trial, please contact Melinda at **mkollross@clausen.com**.

BEVERLY PRESENTS AT 2017 FETTI CONFERENCE

CM Partner **Colleen A. Beverly** presented at the 2017 FETTI Conference in Chicago, Illinois on October 4-6, 2017. She presented "Drones—Effectively and Legally Helping Clean Up the Environment" along with her co-presenter Phillip Watters from Rimkus Consulting.

Colleen has practiced law at Clausen Miller for over 18 years, and routinely represents insurance carriers in third party liability coverage matters throughout the United States. For more information about her presentation, please contact Colleen at **cbeverly@clausen.com**.

Dept. Of Justice Opposes The EEOC In A Gay Discrimination Lawsuit

by ***Paul W. Daugherity***

In *Zarda et al. v. Altitude Express d/b/a Skydive Long Island et al.*, pending in the United States Court of Appeals for the Second Circuit, No. 15-3775, plaintiff filed suit against his former employer, alleging that he was fired due to a customer complaint that he disclosed his sexual orientation.

The district court dismissed the complaint pursuant to the Second Circuit's holding in *Simonton v. Runyan*, 232 F.3d 33 (2000), that Title VII does not proscribe sexual orientation discrimination.

The Second Circuit upheld the trial court's dismissal. Subsequently, it granted *en banc* review of the case in order to reconsider the panel's dismissal decision. Likely, this was due in part to the fact that sexual orientation discrimination claims under Title VII are being pursued in multiple circuits, with varying results. For example, in March 2017 in *Evans v. Ga Reg'l Hosp*, 850 F.3d 1248, the Eleventh Circuit held that discharge of an employee because of their sexual orientation is not prohibited under Title VII. Contrast that with *Hively v. Ivy Cmty. College of Ind.*, 853 F.3d 339, where in April 2017, the Seventh Circuit held that sexual orientation discrimination is prohibited under Title VII.

The Second Circuit invited the EEOC to submit an amicus brief concerning the sexual orientation discrimination under Title VII issue. Unsurprisingly, the EEOC encouraged the court to overrule *Simonton*, arguing that the distinction between gender non-conformity claims and sexual orientation discrimination claims is unworkable. The EEOC also argued that sexual orientation discrimination is inextricably linked to gender, involves gender-based discrimination due to whom a person associates with, and is linked to gender stereotypes and non-conformity, all of which is gender bias covered by Title VII.

The Department of Justice, despite the lack of an invitation, crashed the case and filed an amicus brief taking the opposite view of the EEOC—that Title VII does not cover discrimination on the basis of sexual orientation. The DOJ argued that sexual orientation cannot be tied to gender discrimination, as firing a person for being gay is not the same as firing the person because of their gender. The DOJ also argued that in spite of societal changes concerning discrimination due to sexual orientation, there has been no attempt to amend Title VII to include sexual orientation as a protected class, and this should be left to Congress.

Paul W. Daugherity
is a partner at Clausen Miller P.C. with experience in Employment, Insurance Coverage, and Personal Injury and Property Damage defense, in state and federal court, and administrative agencies. Paul's varied legal practice helps in his representation of clients by allowing him to understand and advise on the interplay of different legal areas and issues, providing the necessary knowledge base to be an effective problem solver and creative thinker..
pdaugherity@clausen.com

It is unusual to see government agencies opposing each other in Title VII cases. However, sexual orientation discrimination is a hot topic, and has become a political issue. Given this development, coupled with the split in the circuits, it is likely that this issue will make it to the Supreme Court sometime in the near future. We will continue to monitor developments in this area and advise when a decision is issued in *Zarda*. ♦

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 ***www.clausen.com***

Standard Fire Policy Terms Provide Relief For Innocent Insureds

by ***Don R. Sampen***

Many states, including Illinois, through their respective Departments of Insurance, have adopted a Standard Fire Policy for homeowners. The terms of the policy may be found at: **http://insurance.illinois.gov/prop_cas_is3_checklists/statutes/StandardFirePolicy.pdf**. When the policy issued to the homeowner differs from the Standard Policy to the detriment of the insured, a question arises concerning what terms control, the state Standard Policy or the homeowner's policy. The Seventh Circuit Court of Appeals, construing Illinois law, recently held that the terms of the Standard policy control. In so holding, the court found that the homeowner's policy exclusion applicable to intentional property damage caused by an insured, did not bar coverage under the policy for innocent insureds. *Streit v. Metropolitan Casualty Ins. Co.*, 863 F.3d 770 (7th Cir. 2017).

Facts

The Streits' son, who was 19 years old and lived with his parents, set fire to the family's home in 2014. The Streits submitted the claim to their homeowner's insurer, Metropolitan, which denied coverage. It did so on the basis of a policy exclusion applicable to "any intentional or criminal act committed . . . by you or at your direction."

The terms "you" and "your" were defined in the policy as including the spouse and relatives of the persons identified in the policy Declarations, and thus included the Streits and their son. Based on this definition, Metropolitan construed the exclusion as excluding coverage for all insureds because of the intentional act of the son.

Mr. and Mrs. Streit, however, took the position that they, as innocent insureds, should not be excluded from coverage. The parties stipulated in the district court that the two parents had nothing to do with their son's arson. The district court agreed with Mr. and Mrs. Streit and entered judgment in their favor covering the loss. Metropolitan took this appeal.

Analysis

In an opinion by Judge Diane S. Sykes, the Seventh Circuit affirmed. The Seventh Circuit initially turned to the Illinois Standard Fire Policy promulgated under the authority of the Illinois Director of Insurance. Under its terms, coverage is excluded for, among other things, the "neglect of the insured" to use reasonable means to preserve the property. The Standard Fire Policy

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

also lists as a condition that suspends coverage an increase in hazard "by any means within the control or knowledge of the insured."

The Seventh Circuit observed that, while the Illinois Supreme Court has yet to address the issue, Illinois appellate courts make clear that the terms of the Standard Fire Policy control in the event of a conflict between an insurer's policy and the Standard Fire Policy. *See, e.g., Lundquist v. Allstate Insurance Co.*, 314 Ill. App. 3d 240 (1st Dist. 2000).

The Court then focused on the term "the insured" as used in the Standard Fire Policy. The Court cited case law supporting the proposition that "the insured," as distinguished from "an insured," as used in a policy, typically refers to the insured seeking coverage. Thus, if one insured commits intentional wrongdoing, an innocent co-insured may still recover under the policy.

This reasoning, said the Court, applied here to allow Mr. and Mrs. Streit to recover under the policy, even though coverage would be denied to their son.

Metropolitan argued that such a construction violated public policy concerns by permitting one to take advantage of his or her own wrong. The Seventh Circuit disagreed, observing that Mr. and Mrs. Streit did not seek coverage for their own intentional actions but only for the actions of someone else, their son. Such coverage did not violate public policy.

Metropolitan also cited an Insurance Code provision that mandates recovery for innocent insureds "if the loss arose out of a pattern of criminal domestic violence." 215 ILCS 5/155.22b. Metropolitan suggested that the wording of the statute narrowed the circumstances under which an innocent insured maintained a right to coverage.

The Seventh Circuit disagreed again, stating that the statute only created a baseline rule that applied to all types of insurance. Whether a fire policy must provide coverage for innocent insureds in circumstances not described by the statute was answered by the Standard Fire Policy.

The Court therefore affirmed in favor of coverage.

Learning Point: Under Illinois law and the terms of the Standard Fire Policy, homeowners' policies covering fire damage must provide coverage for loss for innocent insureds, even if the loss is caused by the intentional act of a co-insured. ♦

Where "Best Efforts" Are Not Enough: Court Sides With Landmark In Determining That Terms Of The Policy Are Abrogated By Protective Safeguard Endorsement

by ***Courtney E. Murphy*** *and* ***Jacob Zissu***

455 Companies LLC v. Landmark American Ins. Co., No. 2:16-cv-10034, 2017 U.S. Dist. LEXIS 118325 (E.D. Mich. 2017)

Facts

455 Companies LLC alleged that Landmark breached their property insurance contract by denying their claim for water damage to the insured property. 455 owned a 114,000 square foot commercial building with five floors, a basement and two mechanical penthouses on the roof, all located at 455 West Fort Street in the downtown business district of Detroit, Michigan. The loss allegedly occurred in early January 2015, when a pipe broke in a women's room on the fifth floor of the building causing extensive water damage to all lower floors.

At issue was the application and scope of a Protective Safeguards Endorsement and a Protective Safeguards Endorsement—Form Change. The Protective Safeguards Endorsement contained a warrant that the heat be maintained at 55 degrees. The Protective Safeguards Endorsement—Form Change added an exclusion which stated that the Company will not pay for water loss or damage if, prior to the loss, the insured failed to maintain the protection safeguard listed in the Endorsement's schedule. The Policy's main form also contained a Water Exclusion which precludes recovery for water loss and damage caused by freezing unless "You do your best to maintain heat in the building or structure." Seeking to combine the terms of the Protective Safeguards Endorsements with the "best efforts" exception to the Water Exclusion found in the Policy's main form, 455 argued that it was entitled to judgment as a matter of law because evidence of utility payments together with their retention of a property management company demonstrated that 455 did its "best to maintain heat in the building or structure." Alternatively, 455 argued that because the Water Exclusion found in the Policy's main form was more specific with respect to water loss caused by freezing, the main form should apply in lieu of the Protective Safeguards Endorsements.

Analysis

Siding with Landmark, the federal district court found that the Protective Safeguards Endorsements added a condition and an exclusion to the Policy. The court specifically found that coverage is conditioned on maintaining heat at 55 degrees and that losses caused by water damage are excluded to the extent that 455 failed to maintain the heat at 55 degrees prior to the loss. Addressing the "best efforts" argument, the court held that if, as Landmark contends, the pipes

Courtney E. Murphy
is a shareholder in the New York office of Clausen Miller P.C. Her practice areas include first-party property insurance, insurance coverage litigation, casualty liability, products liability and professional liability matters.
cmurphy@clausen.com

Jacob R. Zissu
is a partner in the New York office of Clausen Miller P.C. He concentrates his practice in the areas of civil litigation involving first-party property insurance, casualty liability, construction litigation, products liability, personal injury, and insurance coverage matters.
jzissu@clausen.com

froze and burst because 455 failed to keep the building above 55 degrees, the exclusion applies and the condition is unsatisfied regardless of whether 455 used "best efforts" to maintain heat. The court went on to state that:

> Plaintiff's contention that "to the extent there is any conflict or ambiguity between policy provisions, such ambiguity must be resolved in 455's favor" . . . ignores the longstanding principle that "conflicts between the terms of an endorsement and the form provisions of an insurance contract are resolved in favor of the terms of the endorsement." . . . Thus, Plaintiff's argument that the loss form's "best efforts" provision should be applied for water damage resulting from freezing because it is "more specific" than the protective safeguards endorsements is misguided.
>
> The "best efforts" provision, to the extent it conflicts with the amendatory endorsements, is abrogated by the endorsements irrespective of whether it is more specific." . . . Further, the policy is unambiguous. To be sure, combining the form policy with multiple endorsements that do not explicitly modify or replace the "best efforts" provision is not ideal. But the mere fact that the contract language is difficult to assemble because it is spread across multiple forms does not render it ambiguous—"an insurance contract is not ambiguous if it fairly admits of only one interpretation."

Here, the court agreed with Landmark that the Policy, taken together, admits to only one interpretation which is that the Protective Safeguards Endorsements added a warrant to maintain heat at 55 degrees and imposed an exclusion if the protective safeguard was not maintained, notwithstanding claimed "best efforts" at compliance.

Learning Point: Conflicts between the terms of an endorsement and the form provisions of an insurance contract are resolved in favor of the terms of the endorsement. Where an amendatory endorsement is not limited to a particular form provision, it must be deemed to supersede all other provisions with which it conflicts. ♦

Consequential Damages Dismissed As Too Speculative To Recover

by **Courtney E. Murphy**

455 Companies LLC v. Landmark American Insurance Co., No. 2:16-cv-10034, 2017 U.S. Dist. LEXIS 125859 (E.D. Mich. 2017)

Facts

Plaintiff 455 Companies LLC alleged that Landmark breached their property insurance contract by denying their claim for water damage to the insured property. Plaintiff claimed that as a result of the loss and damage, it lost approximately $4,250,000 in sale/rental opportunities/revenue—damages which were claimed to have been foreseeable and contemplated by the parties at the time the Policy was bound. Landmark moved for partial summary judgment on Plaintiff's claims for lost sales/rental proceeds and certain defense costs incurred in connection with a lawsuit filed by a remediation company, which 455 opposed.

Analysis

The District Court initially observed that under Michigan law, damages recoverable in an action for breach of a commercial contract are those that "arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made." *Lawrence v. Will Darrah & Assocs. Inc.*, 445 Mich. 1, 13 (Mich. 1994) (quoting *Kewin v. Mass. Mutual Life Ins. Co.*, 409 Mich. 401, 419 (Mich. 1980)).

Lost sale/rental opportunities

Landmark argued that as to its claim of lost sale/rental opportunities, 455 could point to no existing negotiations with prospective tenants, no efforts made relative to promoting or marketing the building to prospective tenants, and no interested companies which lost interest as a result of the water damage. Landmark also argued that Plaintiff's opposition to summary judgment was "bereft of evidence that Plaintiff informed Defendant, *at the time the Policy was bound*, that it intended to sell the property." Siding with Landmark, the District Court granted summary judgment, dismissing 455's claim for alleged lost sales relative to the building.

Lost rental revenues

Landmark next contended that 455 is not entitled to recover for lost proceeds from renting out the building because renting the building was not fairly contemplated by the parties at the time of the contract, because any damage award would be speculative and because Plaintiff failed to mitigate the damage to the building. "A party asserting a claim has the burden of

proving its damages with reasonable certainty." *Hofmann v. Auto Club Ins., Ass'n*, 211 Mich. App. 55, 108 (Mich. App. 1995). Under Michigan law:

> For a plaintiff to be entitled to damages for lost profits, the losses must be subject to a reasonable degree of certainty and cannot be based solely on mere conjecture or speculation; however, mathematical certainty is not required, and even where lost profits are difficult to calculate and are speculative to some degree, they are allowed as a loss item. The type of uncertainty which will bar recovery of damages is uncertainty as to the fact of the damage and not as to its amount . . . [since] where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery.

Bonelli v. Volkswagen of American, Inc., 166 Mich. App. 483, 511 (Mich. App. 1988) (citing *Lorenz Supply Co. v. Am. Standard, Inc.*, 100 Mich. App. 600, 612 (1980), *aff'd*, 419 Mich. 610 (1984) and quoting *Wolverine Upholstery Co. v. Ammerman*, Mich. App. 235, 244 (1965) (quoting 15 Am. Jur., Damages, Section 23, pp. 414-16)).

While the building displayed an interior "available" sign indicating that it was available for lease, Plaintiff pointed to nothing further in the record to show the existence of any negotiations with prospective tenants, efforts made to promote or market the building to prospective tenants, or that any interested companies lost interest as a result of the flooding. Given the lack of evidence showing such efforts, 455 attempted to rely on Landmark's real estate expert to show that the building would net $645,458 in annual operating income in its pre-loss condition. Notwithstanding the expert opinion, the Court was quick to note that Landmark's expert's opinion assumed that 455 successfully secured a renter—itself dependent on efforts to market the property to potential tenants. As Plaintiff could point to no such evidence, the District Court agreed with Landmark and found that any claim for lost rental proceeds was too speculative to support an award of damages.

Defense costs

After the loss occurred, 455 directly retained Signal Restoration to provide water remediation services. The agreement signed between 455 and Signal stated, in sum and substance that:

> In the event that there are insufficient Insurance Proceeds for all or part of the work performed, the owner or responsible party agrees to pay Signal Restoration Services the cost of the services and materials, including overhead and profit in an amount not to exceed 20%. The property owner shall be responsible for payment of all sums due that are not covered by the Insurance Proceeds.

After completing the work, Signal issued its bill for services rendered which 455 refused to pay. Signal then sued 455 for payment of its invoices and 455 sought recovery from Landmark for costs incurred to defend the Signal lawsuit—a lawsuit filed for its own non-payment. In addressing 455's claim to recover defense costs as consequential damages, the Court stated: "Here, Plaintiff made contractual arrangements to which Defendant was not a party and in which Plaintiff committed to covering all costs not paid by Defendant, apparently failed to keep a handle on the costs from that arrangement, and then was unable to pay those costs once Defendant denied the claim." In granting Landmark summary judgment on this count, the Court found these circumstances too removed to qualify as the "natural result" of Landmark's conduct under the circumstances here and stated that nothing in the record suggests that damages such as these were contemplated by the parties at the time of the contract.

Learning Point: An insured's over-reaching on claimed consequential damages may be defeated by developing a solid factual record and presenting a thorough legal analysis on damages to the court in summary judgment briefing.

Editor's Note: *This case was successfully briefed by Clausen Miller partner* ***Courtney Murphy****, whose practice focuses on first-party property matters, and* ***Joseph Ferrini*** *and* ***Don Sampen*** *of the firm's Appellate Practice Group. The victory was a true collaborative effort yielding a significant win for Landmark.* ♦

California Court of Appeals Rejects Policyholder's Attempt At "Elective Stacking" Of Coverage

by ***Alec M. Barinholtz***

In a coverage dispute that has been roiling for more than 25 years and yielded two California Supreme Court decisions so far, the Court of Appeal, Second Appellate District (Los Angeles), recently rejected a policyholder's attempt to "electively stack" coverage to allow it to access excess policies in a given year so long as lower-level policies in the same policy year have been exhausted. *Montrose Chemical Corp. of California v. Superior Court*, 14 Cal. App. 5th 1306 (2017)(*Montrose III*).

Facts

From 1947 to 1982, Montrose manufactured DDT at a facility in Torrance, California. In 1992, the United States and the State of California sued Montrose under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9607 *et seq.*) (CERCLA), alleging that Montrose's operations caused environmental contamination of the land, water and wildlife in the area.

Montrose purchased "layers" of general liability coverage from multiple insurers between 1960 and 1986, and filed suit against its primary and excess insurers seeking coverage for its environmental liabilities. While Montrose's coverage litigation was pending, the California Supreme Court issued its decision in *State of California v. Continental Ins. Co.*, 55 Cal.4th 186 (2012)(*Continental*). *Continental* held that where an ongoing environmental injury triggers multiple policies across many policy years, the insured may "stack" the policies "'to form one giant "uber-policy" with a coverage limit equal to the sum of all purchased insurance policies.'"

Although *Continental* addressed whether an insured could access policies spanning multiple policy periods to maximize coverage for long-tail environmental exposures, the Court did not address the order or sequence in which coverage could be accessed. Based on *Continental*, Montrose argued that to reach excess coverage in any given year, it need only demonstrate that all underlying policies *in the same policy year* were exhausted (vertical exhaustion). Montrose's excess insurers argued that before Montrose could access any excess policies, Montrose must demonstrate the exhaustion of every triggered underlying policy across *all* triggered policy periods (horizontal exhaustion). The trial court sided with Montrose's insurers, requiring horizontal exhaustion.

Alec M. Barinholtz
is a partner at Clausen Miller P.C.'s Irvine, CA office who has represented insurance companies at both the trial and appellate levels in coverage and bad faith litigation involving all types of insurance policies, including commercial general liability, products liability, pollution and remediation liability and fixed price remediation, directors and officers liability, employment practices liability, entertainment risk, errors and omissions, and professional liability.
abarinholtz@clausen.com

Analysis

The Court of Appeal likewise rejected Montrose's vertical exhaustion argument. Instead, the Court relied upon the particular language of many of the excess policies, which specified that "the policies attach not upon exhaustion of lower layer policies within the same policy period, but rather upon exhaustion of *all* available insurance."

For example, some policies attached on the exhaustion of a "retained limit," defined to include not only scheduled underlying insurance, but the applicable limits of all other underlying insurance collectible by the insured. Further, the "other insurance" language in some of the excess policies made clear that if other collectible insurance was available to the insured coverage applied only in excess of such other insurance. The Court emphasized that the policies at issue were all excess policies, not primary policies, and that the "other insurance" language was part of the definition of "the insurance that must be exhausted before the excess insurance attaches."

While rejecting the policyholder's vertical exhaustion argument, the Court also declined to apply a "universal" rule that would require all underlying insurance in all policy periods to exhaust before any excess policy attaches. Rather, whether a particular excess policy attaches upon the exhaustion of scheduled underlying insurance *only* or upon the exhaustion of all underlying insurance depends on the specific language of the policy. Because not all of the 115 excess policies in dispute were before the Court, the matter was remanded for further proceedings.

Learning Point: As *Montrose III* re-emphasizes, the starting point for any coverage analysis is the policy language. Policies are supposed to be interpreted according to their terms, in a manner that gives effect to all of their provisions. The policyholder's "elective stacking" argument not only ignored, but was contrary to provisions of the excess policies that governed their attachment points. While the Court's rejection of elective stacking in favor of horizontal exhaustion arguably complicates the task of allocating liability among 100 policies spanning 25 years, the Court rightly observed: "[W]e cannot, in the service of expediency, impose obligations that are inconsistent with the terms of the contracts Montrose itself negotiated."♦

California Court of Appeal Narrowly Interprets Scope Of "Faulty Work" Exclusions

by ***Alec M. Barinholtz***

In what it described as a case of first impression, the California Court of Appeal, Fourth Appellate District (Riverside County), recently interpreted the scope of two "faulty workmanship" exclusions, j(5) and j(6), to apply only to work that the insured was *actively* performing at the time of damage, and then, only to the specific component of the insured's work that was incorrectly performed. *Global Modular, Inc. v. Kadena Pacific, Inc.*, 2017 Cal. App. LEXIS 778 (Cal. App. 2017).

Facts

Kadena Pacific, Inc., a general contractor, subcontracted with Global Modular, Inc. to build and deliver modular units to a construction project. Global's work included assembly of the units and finishing them (*e.g*, installing framing, insulation, drywall and ducting). Global's scope of work excluded installation of the roof, which was to be performed by a different subcontractor after all of the units were assembled.

Global's units were supposed to be delivered and assembled during the summer but, instead, were delivered during the rainy season in October and November. Despite Global's efforts to protect the units during assembly, water infiltrated the units damaging the framing, insulation, drywall and ducting. The repairs, in turn, caused project delays.

When Kadena refused to pay, Global brought suit and Kadena counterclaimed for breach of contract. The parties eventually settled, except with respect to damage claims that were otherwise covered by Global's general liability insurance issued by North American Capacity ("NAC"). The damage claims were tried to a jury, which awarded Kadena in excess of $1 million for repair/replacement costs to the units and for associated project delays.

NAC brought a separate suit against Kadena seeking a declaration that the judgment was not covered under the general liability policy issued to Global. On cross-motions for summary judgment, NAC argued that exclusions j(5) and j(6) excluded coverage for the repair/replacement damages, which occurred during Global's ongoing operations. The trial court rejected NAC's arguments, concluding that the repair/replacement damages were covered.

Analysis

The California Court of Appeal affirmed the trial court's rulings regarding coverage for the repair/replacement costs.

Exclusion j(5) precludes coverage for property damage to "[t]hat particular part of real property on which you or any contractors or subcontractors

working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations."

Parsing the exclusion and focusing on the meaning of the phrase "are performing operations," the Court of Appeal reasoned that exclusion j(5)'s use of the active, present tense limited the exclusion to damage caused during physical construction activities. Based on this interpretation, the Court concluded that exclusion j(5) did not apply to the water intrusion damage, which occurred during heavy rainstorms when Global was not physically working on the modular units.

The Court turned next to Exclusion j(6), which precludes coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The focus of the Court's analysis of exclusion j(6) was on the meaning of the phrases "that particular part" and "incorrectly performed."

The Court rejected a reading of the exclusion that would broadly apply to damage to any portion of an insured's work that occurs while construction is ongoing. Relying on a dictionary definition of the word "particular," the Court reasoned that the phrase "that particular part" is a narrowing element that limits the exclusion to a distinct part of a construction project. The additional requirement that the incorrect work must have been performed "on" that particular part further narrows the exclusion. Taken together, this narrowing language confines the exclusion to the specific part of the insured's work on which the insured performed faulty workmanship.

Applying the foregoing analysis, the Court concluded that the "particular part" of the work that might have been incorrectly performed was Global's placement of the plastic tarps that failed to keep water out of the units. Even though Global's work also included the installation of the insulation, framing, drywall and ducting that was damaged as a result of water infiltration, because there were no allegations that Global's installation of those materials was also defective, the Court held that exclusion j(6) did not preclude coverage for repair/replacement costs for damage to these items.

Learning Point: California decisions have long recognized that liability insurers are not guarantors of a contractor's faulty work, and have broadly held that exclusions j(5) and j(6) are intended to preclude coverage for damage to a contractor's own work while that work is in progress. *See, e.g., Clarendon American Ins. Co. v. General Security Indem. Co. of Arizona*, 193 Cal. App.4th 1311, 1325-1326 (2011) ("The insurer is not obligated to indemnify a policyholder for property damage that occurs while the insured is performing operations on that property.")

Further, even if the faulty workmanship at issue in *Global Modular* was properly limited to the placement of tarps intended to prevent water intrusion, the direct result of such faulty workmanship was damage to the insured's own work (*e.g.*, insulation and drywall) and not the work of other subcontractors. "[L]iability coverage comes into play when the insured's defective materials or work cause injury to property *other than the insured's own work* or products." *Maryland Casualty Co. v. Reeder*, 221 Cal.App.3d 961, 967 (1990) (emphasis added). By allowing liability to be shifted to a commercial general liability insurer for damage to the insured's own work product, the *Global Modular* decision blurs the distinction between liability coverage and builders risk coverage, the latter of which is intended to cover damage to property under construction.

The *Global Modular* decision is not yet final. Accordingly, it is subject to discretionary review by the California Supreme Court at the request of any party. In addition, the decision is subject to being "depublished" upon a request made by any person to the California Supreme Court, regardless of party status, and regardless of whether review is granted. We will be monitoring the decision for further developments. ♦

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***

CIVIL PROCEDURE

INSURER-SUBROGEES MUST FILE ACTIONS IN THEIR OWN NAMES WHEN THEY ARE THE REAL PARTY IN INTEREST

Developers Sur. & Indem. Co. by & through Insco Ins. Servs., Inc. v. Lipinski, 2017 WL 2856338 (Ill. App.)

Insurer sued attorney for legal malpractice. After years of litigation, the insurer admitted that insurance had compensated it for all losses from the alleged malpractice and that it owed its insurers all damages it recovered. The insurer argued that under the collateral source rule, the attorney should not benefit from its insurance, and damages should not be affected. The trial court held that the collateral source rule did not apply in legal malpractice actions and dismissed the complaint because the insurer could not prove any damages suffered. ***Held:*** Affirmed. Section 2–403(c) of the Code of Civil Procedure requires that an insurer-subrogee file an action in its own name when it is the real party in interest and this was not done here, warranting dismissal.

CONTRACTS

STATUTE OF FRAUDS APPLICABLE WHERE RESULT WOULD BE UNFAIR BUT NOT UNCONSCIONABLE

Matter of Hennel, 29 N.Y.3d 487 (N.Y. 2017)

Petitioners sought to enforce an oral promise that would otherwise be void under the statute of frauds, relying on theories of promissory estoppel and unconscionability. They claimed they had assumed all management and maintenance duties for an apartment building in reliance on their grandfather's oral promise that on his death his estate would pay off the mortgage. ***Held:*** Where the elements of promissory estoppel are satisfied and enforcement of the statute of frauds would inflict such an unjust and egregious result upon the party who detrimentally relied on the oral promise that the resulting injury would be unconscionable, the opposing party may be estopped from relying on the statute of frauds. ***Further held:*** Here, application of the statute of frauds would not inflict an unconscionable injury because, while the result may be unfair, it is not unconscionable.

INSURANCE LITIGATION

INSURER UNABLE TO STOP HOME RAZING

Auto-Owners Ins. Co. v. City of Appleton, 2017 Wisc. App. LEXIS 633 (Wis. App.)

Home insurer sued city to prevent enforcement of raze order following extensive fire damage to home. ***Held:*** Fire-damaged homes are subject to the raze statute if dangerous or unreasonably expensive to repair. Statute is not limited to homes and buildings that deteriorate over time. An insured's request for a raze order is not unreasonable merely because repair is possible. Repairs are presumptively unreasonable if cost would exceed 50% of home's value. A city inspector need not see the building to apply the formula needed for assessment.

JUROR BIAS

JUROR SHOULD HAVE BEEN REMOVED UNDER STATUTE

People v. Spencer, 29 N.Y.3d 302 (N.Y. 2017)

During trial deliberations, a juror came forth and informed the judge that she needed to be excused. The trial judge conducted an extensive inquiry of the juror in the presence of the attorneys and defendant during which the juror repeatedly stated that she was unable to discharge her duty. The trial court nevertheless made the juror stay on and render a verdict over defense objection. The appellate court found no error in this action. ***Held:*** Reversed. The Court of Appeals held that the trial court erred in failing to discharge a juror as "grossly unqualified to serve" pursuant to CPL 270.35(1) because she had repeatedly and unambiguously stated that she was unable to render an impartial verdict based solely on the evidence and the law.

LEGAL MALPRACTICE

ASSOCIATE NOT LIABLE FOR FIRM OWNER'S THEFT

DiBenedetto v. Devereux, 2017 Ind. App. LEXIS 274 (Ind. App.)

Client sued associate after firm's partner stole trust fund money received in settlement of injury claim. ***Held:*** Associate did not owe a duty to protect client. The associate had spoken to the client only in general terms as to the money and the firm's need to hold it until liens were resolved. There was no evidence of wrongdoing by the associate.

LIABILITY INSURANCE COVERAGE

FAILURE TO APPLY ADEQUATE SEALANT TO BUILDING EXTERIOR QUALIFIES AS AN "OCCURRENCE"

Westfield Ins. Co. v. Nat'l Decorating Serv., Inc., 863 F.3d 690 (7th Cir. 2017)

Condominium association sued a general contractor and subcontractors for water damage allegedly caused by a painting subcontractor's failure to apply adequate sealant to the building exterior. Insurer sought a declaration that it owed no duty to defend defendants, arguing the association lacked standing to allege damage to individual unit owners' property and second, that the failure to apply an adequate amount of paint was not an "accident" and therefore there had been no "occurrence" under the policy. The trial court rejected these arguments. ***Held:*** Affirmed. "Occurrence" by definition includes "continuous or repeated exposure to substantially the same harmful conditions," which encompasses the allegations as to the painting subcontractor. Additionally, because the painting subcontractor allegedly damaged parts of the building outside the scope of the work for which it was engaged, there was potentially covered property damage sufficient to invoke the duty to defend.

LETTER CHARGING INSURANCE AGENT WITH BREACH OF DUTIES QUALIFIED AS CLAIM WITHIN POLICY

James River Ins. Co. v. TimCal, Inc., 2017 WL 2852812 (Ill. App. 2017)

An insurance agent affiliated with an insurer received a letter from another insurer charging it with breach of its duties as an insurance agent and informing it that that insurer would seek damages. The agent did not inform its professional liability insurer about the claim until much later. The PL insurer filed suit seeking a declaration that it had no duty to defend or indemnify the agent because it had failed to provide timely notice of the claim. The circuit court granted the PL insurer's motion for summary judgment. ***Held:*** Affirmed. The letter sent to the agent unambiguously qualified as a claim within the meaning of the PL insurance policy. Because the agent did not notify the insurer of the claim until after the applicable policy periods, neither of two policies provided coverage for the claim.

DRIVER EXCLUSION ENDORSEMENT VIOLATES ILLINOIS LAW AND PUBLIC POLICY

Thounsavath v. State Farm Mut. Auto. Ins. Co., 2017 WL 2953035 (Ill. App. 2017)

Plaintiff sought a declaration that, as applied to her, the driver exclusion endorsement in her automobile liability policies violated section 143a-2 of the Illinois Insurance Code and the public policy of Illinois. The trial court granted plaintiff's motion for summary judgment, ruling that the named driver exclusion violated Illinois' mandatory insurance requirements and public policy where the exclusion barred coverage for the named insured. The insurer appealed. ***Held:*** Affirmed. A named driver exclusion in an insured's policy that bars liability, uninsured, or underinsured coverage for the named insured violates Illinois' mandatory insurance requirements and Illinois public policy. The named driver exclusion endorsement is unenforceable against plaintiff.

INSURER'S DUTY TO DEFEND DOES NOT INCLUDE PROSECUTION OF INSURED'S COUNTERCLAIM

Mt. Vernon Fire Ins. Co. v. Visionaid Inc., 76 N.E.3d 204 (Mass.)

Insurer defended insured against former employee's wrongful termination claim but refused to prosecute insured's counterclaim for misappropriation of funds. ***Held in a split decision:*** Contractual duty-to-defend language required insurer's efforts to defeat a claim, not to bring a separate claim. The common law "in for one, in for all" rule likewise only obligates an insurer to defend against claims. Expanding the rule would result in increased litigation, including suits between insurers and insureds. ***Also held:*** Insurer's obligation to pay "defense costs" is only co-extensive with the duty to defend. To the dissent, the duty includes prosecuting compulsory counterclaims if a reasonable attorney would.

POLICY PROVIDES NO COVERAGE WHERE NAMED INSURED IS NOT NEGLIGENT

Burlington Ins. Co. v. NYC Transit Auth., 29 N.Y.3d 313 (N.Y. 2017)

Insurer issued a policy to an insured restricting liability to bodily injury

caused, in whole or in part by acts or omissions of the insured. An additional insured under the policy sought coverage for injury caused solely by its own negligence. The additional insured argued that policy language making it "an additional insured only with respect to liability for 'bodily injury' caused, in whole or in part, by [the named insured's] acts or omissions," meant that as long as the named insured could be seen as a "but for" cause of the injuries, coverage existed. The appellate court agreed with this position, reversing the trial court. ***Held:*** The Court of Appeals determined that the policy provides no coverage where the named insured is not negligent. Proximate cause and not merely "but for" causation, is required.

MEDICAL MALPRACTICE

MEDICAL MALPRACTICE NONECONOMIC DAMAGE CAPS UNCONSTITUTIONAL

Mayo v. Wis. Injured Patients & Fam's Comp. Fund, 2017 Wisc. App. LEXIS 494 (Wis. App.)

Plaintiff lost her extremities due to an untreated septic infection. ***Held:*** The $750,000 cap on noneconomic damages in a medical malpractice case is unconstitutional on its face. It violates the equal protection clause by reducing noneconomic awards for more severely injured victims while allowing full recovery for those less so. The cap does not meet the legislative goals of insuring access to medical care, preventing physician attrition, limiting incentives to practice defensive medicine, and protecting the integrity of the compensation fund. The court declines to hold that noneconomic caps would always be unconstitutional.

NEGLIGENCE

NO DUTY TO WARN ABOUT AMOEBA

Daviess-Martin Cnty. Joint Parks & Recreat. Dept. v. Estate of Abel, 77 N.E.3d 1280 (Ind. App.)

Estate of swimmer exposed to deadly amoeba in a freshwater lake sued county, its health department, and joint-county parks board for negligence. ***Held:*** No duty existed to warn swimmer of the amoeba. The county was unaware of its presence in the lake and was not required to test for it. There were no prior infections and no routine or rapid tests existed to detect the amoeba's presence. The CDC did not recommend testing untreated lakes. Also, the incidence of infection was very rare and a lake owner or operator could not reasonably foresee that swimmers would contract infection. The concurrence argued that a duty existed but found no breach.

EVENT PROMOTER NOT LIABLE FOR ASSAULT IN PARKING LOT

Jones v. Wilson, 2017 Ind. App. LEXIS 346 (Ind. App.)

Woman attending wrestling event was assaulted in parking lot while returning to her car. ***Held:*** An assault is an activity on land requiring proof of general foreseeability in order to impose a duty on the promoter. The focus is on the broad type of plaintiff involved in the harm without regard to the facts of the occurrence. Here, harm to a woman in the lot was unexpected and unforeseeable; there had been no similar attacks at the site in over 20 years.

RESTAURANT AND CONTRACTOR NOT LIABLE FOR PATRON'S FALL OFF HANDICAP RAMP

Vaughn v. Firehouse Grill, LLC, 2017 Ohio App. LEXIS 3075 (Ohio App.)

After previously walking on a handicap ramp three times, a patron fell off it moving to accommodate another patron. ***Held in a split decision:*** Edge of ramp was open and obvious despite color similarity between ramp and adjacent parking line. An objective standard applies to an open and obvious determination. The color uniformity did not prevent the condition from being open and obvious. The customer had an unobstructed view and was not distracted. Building code violations did not prevent the defense. ***Also held:*** The contractor was not liable for the subcontractor's painting work; it did not control the means and methods of painting. Dissent argued that the shape of the ramp created genuine issues of fact.

EMPLOYER OF UNDERAGE DRINKER NOT LIABLE FOR STATUTORY OR COMMON LAW NEGLIGENCE

Baker v. Wilson Auto Collision Inc., 2017 Wisc. App. LEXIS 535 (Wis. App.)

Plaintiff sued employer of underage drinker for injuries sustained in car accident. ***Held:*** Employer did not violate the statutory prohibition against providing alcohol to underage persons. No evidence existed that employer obtained, acquired, possessed or owned alcohol with the intent of supplying it to the employee. Evidence of past workplace consumption was irrelevant. Failure to take precautions

to prevent access did not equate with intentionally allowing it. ***Further held:*** Plaintiff did not have a claim of common law negligence. There was no evidence of employer's knowledge of the alcohol. No one gave employee permission to use it, and the employer was not present when he did.

NEGLIGENCE/ DRAM SHOP

LIQUOR PERMIT HOLDER NOT LIABLE FOR AUTO ACCIDENT DEATH

Perkins v. 122 E. 6th Street, LLC, 2017 Ohio App. LEXIS 2661 (Ohio App.)

Estate of deceased driver sued liquor permit holder under dram shop statute for overserving the other driver. ***Held:*** Estate failed to prove that holder served a "noticeably intoxicated person." Owners and employees of the liquor establishment either did not see the driver or notice intoxication. Statement by driver's girlfriend that he had texted about his intoxication could not impute to liquor servers actual knowledge of intoxication. Statement of co-owner's wife that driver said he was stoned was insufficient to establish noticeable intoxication. Wife stated that driver was not stumbling, slurring his words, or demonstrating signs of intoxication.

PERSONAL JURISDICTION

FOREIGN COMPANY'S CONTACTS WITH NEW YORK SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION

D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292 (N.Y. 2017)

One Spanish company sued another Spanish company in New York alleging a breach of contract related to efforts to find a U.S. distributor for Spanish wine. The defendant moved to dismiss the action based on lack of personal jurisdiction. The trial court denied this motion; however, the appellate court reversed finding that the contract at issue was performed "wholly in Spain." ***Held:*** Personal jurisdiction exists. The long arm statute allows jurisdiction over those who transact business in the state provided there is a relatedness between the transaction and the legal claim at issue. Here, both sides engaged in activities in New York in furtherance of their agreement and sufficient minimum contacts with New York existed given the visits to the state on multiple occasions to promote the wine and seek a distributor, and given the sale of wine thereafter to a New York-based distributor.

TORTS

NASTY NEIGHBORS BATTLE TO A DRAW IN LAND DISPUTE

Hayes v. Carrigan, 2017 Ohio App. LEXIS 2967 (Ohio App.)

In a case fit for People's Court, neighbors sued each other for trespass and nuisance. ***Held:*** Neither may recover. Planting bamboo near property line, where it spread into neighbor's property, is insufficient to prove intentional trespass. Allowing barking dogs, early-morning mowing, and playing of "Margaritaville" on repeat did not cause substantial nuisance damages. Laying weed killer on own property is not reckless, even if it could run off onto neighbor's property.

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

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

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

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

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