CM REPORT

of Recent Decisions

2017 • Vol. 4

SCOTUS Decision Proves Appellate Practice A Minefield

Horizontal Exhaustion Applies Before Excess Policies Are Triggered

Medical Malpractice Claim Not Barred By Statute Of Repose

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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United States Supreme Court Decision Proves That Appellate Practice Is A Minefield Best Navigated By Savvy Appellate Practitioners

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

Introduction

The recent unanimous decision by the United States Supreme Court in *Hamer v. Neighborhood Housing Services of Chicago*, __ U.S.__ (No. 16-58, Nov. 8 2017), illustrates once again the perilous nature of appellate practice, for in this decision the Supreme Court took to task experienced federal appellate jurists for failing "to grasp the distinction" "between jurisdictional appeal filing deadlines and mandatory claim-processing rules."

Facts

Petitioner Hamer sued respondents for employment discrimination. Respondents obtained summary judgment against Hamer on September 14, 2015, making Hamer's notice of appeal due by October 14, 2015. On October 8, 2015, before the 30-day notice of appeal deadline was about to expire, Hamer's counsel filed two motions—one to withdraw as counsel and another for a two-month extension of time to file the notice of appeal so that Hamer could find new counsel. The District Court granted both motions and extended Hamer's notice of appeal time from October 14, 2015 to December 14, 2015. The District Court's extension order, however, contravened Federal Rule of Appellate Procedure 4(a)(5)(C) which limited such extensions of time to file a notice of appeal to only 30 days in all cases. Respondents did not object to this 60-day extension of time.

Hamer appealed within the 60-day extension. On appeal, the United States Court of Appeals for the Seventh Circuit questioned its own jurisdiction raising the time limit found in FRAP Rule 4(a)(5)(C). The Seventh Circuit found that this time limit of an additional 30 days to file a notice of appeal was a jurisdictional time limit. In other words, Hamer was entitled to an extension of only an additional 30 days, not 60 days and thus Hamer's appeal filed outside this 30-day time limit deprived the court of subject matter jurisdiction to hear the appeal.

SCOTUS Reverses

On appeal, the Supreme Court found that the Seventh Circuit, like other Circuits, "tripped over" the holding in prior decisional law that the taking of an appeal within the prescribed time is mandatory and jurisdictional. According to the Court, time periods are jurisdictional "only if Congress sets the time," because "only Congress may determine a lower federal court's subject-matter jurisdiction." A time limit not set by Congress ranks as only a "mandatory claims processing rule".

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The Court held that this distinction was crucial since the failure to comply with a jurisdictional time period deprives a Court of Appeals with adjudicatory authority over an appeal. Mandatory claim-processing rules though "are less stern." According to the Court, while such rules must be enforced, they can be waived or forfeited, unlike a jurisdictional rule which is subject to no such waiver or forfeiture.

The Court found that FRAP Rule 4(a)(5)(C) limiting extensions of time to file a notice of appeal in all cases to just 30 days was only a claims-processing rule and not a jurisdictional time period. The Court based this conclusion on the application of 28 U.S.C. 2107 which limits an extension of time to file a notice of appeal to only those cases where the appellant lacked notice of the entry of judgment. According to the Court, "[f]or other cases, the statute does not say how long an extension may run." Accordingly FRAP Rule 4(a)(5)(C) prescribing a 30-day extension of time to all cases did not have a statutory basis, and could not be treated as a jurisdictional time period.

In remanding the case for further consideration, the Court noted that certain issues regarding the enforcement of FRAP Rule 4(a)(5)(C) were unaddressed and presumably would be addressed upon remand:

- whether respondents' failure to raise any objection in the District Court to the overlong time extension, by itself, effected a forfeiture;
- whether respondents could gain review of the District Court's time extension only by filing their own appeal notice, and
- whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)'s time constraint.

Practice Pointer: As this decision illustrates, preserving appellate rights from either the standpoint of an appellant or appellee requires not only a thorough understanding of the Federal Rules, but also the federal statutes conferring and prescribing jurisdiction and the cases interpreting those statutes and rules. Such appellate work should only be handled by trained and experienced appellate advocates and not by trial counsel or the occasional appellate lawyer. Further, as shown by the Court's remand order, appellate practitioners are usually best qualified to prevent a forfeiture of objections to violations of appellate rules . . . savvy appellate counsel here would have undoubtedly objected to the extension of time of 60 days as a violation of FRAP Rule 4(a)(5)(C), and if those objections were overruled, savvy appellate counsel would have filed a notice of appeal from the order to preserve the right to contest that order on appeal.

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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

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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

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Illinois Super Lawyers 2018

Paul V. Esposito

Edward M. Kay

Kimbley A. Kearney

Melinda S. Kollross

Amy R. Paulus

Don R. Sampen

Illinois Rising Star 2018

William C. Dickinson

Illinois Super Lawyers

Paul V. Esposito
Appellate

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

Edward M. Kay
Appellate

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Kimbley A. Kearney
Civil Litigation: Defense

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Melinda S. Kollross
Appellate

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Amy R. Paulus
Insurance Coverage

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. Demonstrating her commitment to, and deep understanding of, the insurance industry, Amy is a CPCU (Chartered Property Casualty Underwriter). She is also AV® Preeminent™ rated by Martindale-Hubbell. Her AV® rating is a reflection of her expertise, experience, integrity and overall professional excellence. Amy has earned designations as a Super Lawyer, Leading Lawyer, Top Women Attorneys, and was named a Top Civil Defense Lawyer in Illinois. In addition, Amy is a Fellow of the prestigious Litigation Counsel of America Trial Lawyer Society.

Don R. Sampen
Insurance Coverage

Don has over 30 years of trial and appellate experience in various areas, including insurance coverage and commercial litigation. Don is a *magna cum laude* graduate of Northwestern University College of Law, where he was Executive Editor of the *Northwestern Law Review*, and is currently an Adjunct Professor at Loyola University College of Law teaching a course in Insurance Law. Don is also a prolific writer, authoring articles and book chapters in various areas of the law, including antitrust and whistleblower litigation. He also writes a column in the *Chicago Daily Law Bulletin* which appears twice monthly on insurance coverage matters. He has maintained an AV® Preeminent™ rating (highest possible peer review rating for legal ability and ethical standards) with Martindale-Hubbell for 25 years.

Illinois Rising Stars

William C. Dickinson
Civil Litigation: Defense

Will is a partner in the Chicago office of Clausen Miller PC. He is an experienced litigator whose practice includes commercial litigation, medical malpractice, products liability, and construction law. Will has successfully defended clients in diverse areas of law, including claims for breach of contract, wrongful death and property damage, obtaining summary judgments and dismissals with prejudice on their behalf. In addition to his success in the courtroom, he has as achieved the positive resolution of cases through mediation, arbitration, and settlement negotiations.

CLAUSEN MILLER ANNOUNCES NEW OFFICE IN CONNECTICUT

Clausen Miller is proud to announce the opening of an office in Stamford, Connecticut. This new office location will enhance the Firm's ability to offer its full array of legal services throughout the tri-state area, including all state and federal courts. Clausen Miller recognizes the insurance industry's presence in Connecticut, and the needs of its clients in Connecticut, and responded by expanding its presence in the Northeast.

The office, located at 68 Southfield Avenue, is managed by Clausen Miller Partner **Matthew Van Dusen** and is supported by Shareholders **Carl Perri** and **Courtney Murphy**, Partner **Jacob Zissu** with Associates **Thomas Hennessey** and **Gregory Popadiuk** who also have a presence in the Stamford office.

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

Please contact Carl Perri with any questions about Clausen Miller's new office in Stamford, Connecticut: **cperri@clausen.com**

MINDY MEDLEY PUBLISHED IN AMERICAN BAR ASSOCIATION'S THE BRIEF

Mindy Medley, Clausen Miller Shareholder, was recently published in the Fall 2017 edition of The Brief, the publication of the ABA's Tort Trial and Insurance Practice Section. Mindy co-authored "The Examination Under Oath: What You Need to Know," which examines how to prepare for an EUO and discusses nationwide case law analyzing this important tool of insurers. Please contact Mindy at **mmedley@clausen.com** with any questions.

SENIOR PARTNER AMY PAULUS NAMED LEADING CIVIL DEFENSE LAWYER

Congratulations to Senior Partner **Amy Paulus** on being named a Top Civil Defense Lawyer in Illinois by *Chicago Lawyer Magazine*. Amy received this distinction for her work in Insurance Coverage and Reinsurance. This recognition was earned by being among those lawyers most often recommended by their peers. Amy heads up Clausen's Liability Insurance Coverage and Reinsurance Practice Groups.

CLAUSEN MILLER LAUNCHES RESTATEMENT OF THE LAW OF LIABILITY INSURANCE TASK FORCE

Liability Coverage and Reinsurance Practice Group Leader **Amy Paulus** is spearheading CM's efforts to equip our clients with the most up-to-date and thorough arsenal of research and briefs to combat the misuse of the nascent ALI Restatement of Liability Insurance Law in coverage litigation and elsewhere. While the draft Restatement is not technically scheduled to be called for a vote until May 2018, Ms. Paulus notes that it has already been cited by several courts, and it even played a role in two recent decisions of courts in Texas and Indiana. Despite the efforts of various insurance industry groups and commentators, the reality is that the Restatement is now a tool being used by the policyholder's bar in coverage litigation, so time is of the essence for insurers.

CM's Restatement Task Force has created a database to monitor and track primary and secondary sources that pertain to the use of the Restatement, including court filings, rulings, publications, speeches, etc. Important developments will be logged and reported, especially if the Restatement is mentioned in pleadings or court orders. CM will identify the issues on which the Restatement is cited; the jurisdictions/courts; types of insurance policies or relevant policy language at issue; policyholder firms and tactics promoting its use; and counterarguments and authorities that show the true state of the law in all jurisdictions.

Additionally, several clients have requested that CM's Task Force provide consulting services and "parachute in" with assistance on briefing, oral arguments and amicus submissions. Ms. Paulus reports that CM is ready to provide the insights and firepower to our clients on this important initiative. CM Partners **Colleen Beverly**, **Ilene Korey** and **Mark Zimmerman** have joined Ms. Paulus in ensuring that seasoned coverage litigators are leading the Task Force endeavors.

If you would like additional information or would like to be included on the Restatement Task Force's circulation list, please contact Amy Paulus at **apaulus@clausen.com** or 312-606-7848.

GEORGE FLYNN AND MAURA MORGAN WIN SUMMARY JUDGMENT IN COOK COUNTY LEGAL MALPRACTICE CASE

Clausen Miller Partners **George Flynn** and **Maura Morgan** won summary judgment, thereby averting a 3-week trial for their client, just minutes after a co-defendant law firm reached a seven-figure settlement with a plaintiff Condominium Association.

Flynn and Morgan represented a large law firm (lawyers for the Association in an underlying lawsuit against a developer for alleged failures to cure construction defects in connection with the turnover of the condominium). The handling partner for the firm allowed the underlying case to be dismissed; resigned from the firm; and then continued the Association's representation at his new firm. Flynn moved for dismissal, arguing that the "viability doctrine" was a bar to a finding of proximate cause, since the successor firm and the Association had a right to seek reinstatement of the case, and thus "cure" any alleged malpractice. The motion was denied, and the denial affirmed by the Appellate Court.

On remand, the Association's president admitted to terminating the firm, and testified that he never expected the firm to take further action on behalf of the Association, as the firm no longer possessed any such authority. The Motion for Summary Judgment aimed at avoiding any "law of the case" issues, and instead focused on the plaintiff's inability to prove an ongoing duty owed by the terminated firm. The plaintiff has appealed the ruling of the Cook County Circuit Court. Please feel free to contact George Flynn (**gflynn@clausen.com**) or Maura Morgan (**mmorgan@clausen.com**) with any questions concerning the legal issues involved in the matter.

APPELLATE PRACTICE GROUP WINS IN ILLINOIS AND NEW JERSEY

In late December, the Illinois Appellate Court, Fourth District unanimously affirmed a defense judgment in a medical malpractice case based on arguments made in a brief filed by CM Appellate Practice Group co-chair **Melinda Kollross** and Appellate Senior Counsel **Paul Esposito**. The appellate briefing showed that the trial court properly exercised its discretion by excluding harmful evidence at trial and by rejecting plaintiffs' argument that the verdict should have been reversed based on the alleged lack of qualifications of a defense expert.

In early January, **Paul Esposito** and CM Partner **Matthew Leis** scored a big victory when the New Jersey Superior Court, Appellate Division, unanimously affirmed the dismissal of a legal malpractice claim against our client arising out of his defense of a domestic disturbance matter. Leis and Esposito demonstrated that the complaining person failed to provide an affidavit as required by New Jersey law attesting to the alleged merit of his claim.

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2017 DRI Annual Meeting: Appellate Advocacy Committee CLE Panel Presentation Highlights

by ***Melinda S. Kollross***

From left: Melinda S. Kollross, Paul V. Esposito, Hon. Rita B. Garman, Michael W. Rathsack

On October 4, 2017, the DRI Appellate Advocacy Committee presented "Perspectives on the Appellate Practitioner's Role at Trial and on Appeal: A View from the Plaintiff, the Defense, and the Court." I was honored to moderate the panel discussion, which featured **Mike Rathsack**, the most prominent Illinois plaintiffs' appellate attorney, defense attorney and Clausen Miller Senior Counsel **Paul Esposito**, one of the most frequently retained trial monitoring and appellate practitioners, and sitting **Illinois Supreme Court Justice Rita Garman**. The panelists analyzed the value of retaining an appellate specialist at trial and on appeal.

After uniformly recognizing the current trend towards increased use of appellate practitioners in both the trial and appellate courts, the panelists focused on specific ways in which clients can benefit from employing the services of an appellate practitioner at the trial court level and in prosecuting or defending an appeal.

Mike and Paul described how they are routinely called upon to assist trial counsel with pre-trial proceedings, including briefing motions to dismiss and for summary judgment. At trial, they not only function as the client's eyes and ears by providing daily trial reports objectively assessing "how the case is going", but also actively assist the trial team by preparing motions *in limine*, consulting on jury selection, researching/briefing evidentiary issues, drafting jury instructions and motions for directed verdict, and generally ensuring that error is preserved for appellate review by making sure that a complete record exists—including renewed objections and offers of proof as needed in a given jurisdiction. This team approach allows the trial attorney to focus on openings/closings, examination of witnesses, and overall trial strategy while the appellate practitioner researches, writes and documents error, thereby maximizing the chance of obtaining a successful result at trial while simultaneously creating the strongest record on appeal. Justice Garman noted that waiver is a common issue which the proactive use of appellate counsel at trial can help avoid.

The discussion then moved on to appeals. When asked "why retain an appellate practitioner to handle the appeal, especially if trial counsel won below?" Justice Garman confirmed that as a general rule, appellate practitioners write better appellate briefs and present better oral arguments. She explained that in her experience, appellate practitioners are more likely to present succinct, focused briefs with compelling legal argument while avoiding redundancy and other problems. Justice Garman also noted the tendency of many trial attorneys to make a jury-type closing argument before the appellate tribunal—rather than tailoring their argument to the appellate arena, where the judges are concerned with the legal issues presented, the applicable standard of review, and the precedential impact of the opinion they render. Mike and Paul likewise confirmed their preference for facing an appellate practitioner (sometimes each other) rather than trial counsel when prosecuting or defending an appeal.

Audience members were encouraged to ask questions throughout the panel discussion, increasing its instructional value for all participants.

Common Law Claim For Intentional Infliction Of Emotional Distress In Sexual Harassment Case Preempted By Illinois Human Rights Act

*by **Brian J. Riordan** and **Kathleen M. Klein***

The Seventh Circuit recently took on, and eventually barred, an emotional distress claim for sexual harassment in the workplace in *Richards v. U.S. Steel*, 88 F.3d 557 (7th Cir. 2017). The Plaintiff could not file a claim under the Illinois Human Rights Act (the Act), so instead filed a common law claim for intentional infliction of emotional distress. The Court threw out the emotional distress claim, because the Act preempted it.

Facts

After fourteen years at the defendant company, Plaintiff employee Richards participated in a four-month electrician training rotation program. It was at that point that the harassment allegedly started. The department supervisor told her she would never be able to meet his standards as an electrician. After that rotation, she transferred to another department, where Richards testified she was subject to inappropriate comments and behavior by the supervisor. She complained of a variety of conduct, testifying that the supervisor pulled her jacket open and made a vulgar comment; jerked her radio off her chest, where it was attached to her bra; commented on whether something she was standing on would hold her weight; dared Richards to call him an insulting name; and told lewd jokes in her presence. When she complained of the conduct and filed a discrimination complaint with the company, she was told she needed to adjust to the supervisor's rough management style, that she was too emotional, and that she should see a psychiatrist.

After most of Richards' claims against U.S. Steel were dismissed as filed too late, Richards was left with only her claim for intentional infliction of emotional distress under Illinois common law. The employer won summary judgment in the trial court, and Richards appealed.

Analysis

The Seventh Circuit affirmed, finding that Richards' distress claim is preempted by the Act.

The Act provides that claims brought under it preempt claims for the same conduct at common law. On appeal in *Richards*, the Court had to determine whether the facts alleged by Richards, specifically, were preempted—a case-by-case analysis.

The only way a plaintiff could bring an emotional distress claim for sexually harassing conduct is if the conduct was "extreme and outrageous." However, if an employee's acts were "extreme and outrageous" sexual harassment,

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or constituted assault, they could not be attributed to the employer under common law, because they did not "serve" the employer under agency principles. So, any part of the claim based on "extreme and outrageous" conduct had to be dismissed, since the case was brought only against U.S. Steel.

The parts of Richards' emotional distress claim that were based on conduct that was not "extreme and outrageous"—or, conduct that actually did serve the employer—likewise had to be dismissed. The Act created new duties, for example, not to engage in sexually harassing behavior, even where the behavior did not rise to "extreme and outrageous" conduct actionable at common law. The law defines "extreme and outrageous" as going beyond "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," and "beyond the parameters of the typical workplace dispute." Where the acts are these "mere insults" or "indignities," and the duty with respect to the conduct arises out of the statute, the claim for distress caused by that conduct is preempted.

Practice Pointers:

1. Dismissing Distress Claims Based on *Richards*

The key in *Richards* was that Plaintiff did not have an Act claim. U.S. Steel's appellate victory was merely because Richards waited too long to file some of her claims, and was barred from proceeding under the Act. In practice, this could be because the statute of limitations ran on an Act claim, or Plaintiff for whatever reason decided not to bring a claim under the Act. Where there is only a tort claim, the *Richards* case provides an avenue for defense counsel to obtain dismissal.

This is a fact-intensive inquiry, and is most likely to be successful after the facts have been developed in depositions, as in *Richards*, where the Plaintiff had already given her deposition testimony. The court will look at the specific conduct testified to at deposition. Does the conduct meet the court's high standard for "extreme and outrageous" conduct? If it is, such conduct by an employee cannot "serve the master," and so cannot be the basis of an emotional distress claim against the employer. If the conduct is not extreme and outrageous, counsel can argue it should be preempted, because the statute creating the duty also demands preemption.

2. A Warning About Illinois Human Rights Act Claims

Looking beyond the Court's holding, the decision is a warning to employers. The Court commented that, had Plaintiff been able to proceed under the Act, it may have required a different response from management, and the employer may have faced a less favorable result in court. The Court's repeated admonishments of the employer's conduct are a clear signal that this type of conduct isn't actionable against the employer as emotional distress, but with a timely filed complaint could certainly be a source of liability for employers under the Act. ♦

Manufacturing And Selling Are But One Occurrence

by ***Don R. Sampen***

Most commercial general liability policies are subject to both an occurrence limit and a higher aggregate limit. Hence, an important question sometimes arises whether a loss or series of losses involves just one occurrence, thereby triggering only the single occurrence limit, or whether it involves more than one occurrence, for which two or more occurrence limits could be available. The question is particularly important where the insured manufactures and sells a product resulting in multiple injuries. The Illinois Appellate Court, First District recently held that the continuous manufacture and sale of a product giving rise to thousands of lawsuits for asbestos-related diseases, constituted but one occurrence. *United Conveyor Corp. v. Allstate Insurance Co.*, 2017 IL App (1st) 162314 (Dec. 5, 2017).

Facts

The insured, United, designed, manufactured and sold ash-handling conveyor systems for coal plants according to its customers' specifications. From about the 1930s to early 1984 the company sold asbestos-containing gaskets that were used in the systems' assembly and for replacement parts. Asbestos was used because the systems operated under high temperatures that required sealants to withstand intense heat.

The Travelers Indemnity Co. and/or Travelers Casualty and Surety Co. (Travelers) issued United several primary-level comprehensive general liability and umbrella liability policies from 1952 through the mid 1970s. The policies had aggregate limits that were higher than the per-occurrence limits. The number of occurrences determined whether a policy's per-occurrence limits or higher aggregate limits applied.

Beginning in 1983, United was named as a defendant in thousands of lawsuits filed in multiple jurisdictions by individuals claiming to have sustained bodily injury allegedly from inhaling asbestos fibers from United's conveyor systems while installing or repairing the systems. Travelers defended United against the suits under a full reservation of rights, including the right to enforce the policies' applicable "limits of liability."

In January of 2009, United received a letter from Travelers stating that all the primary policies had been exhausted. United interpreted the letter to mean that the per-occurrence, not aggregate, limits had been exhausted. The record, however, contained no contemporaneous writings reflecting United's disagreement with Travelers' position or asserting United's position

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that the design and installation of each conveyor system should be treated as a separate occurrence.

In mid-2012, United nonetheless filed suit seeking a declaration that the asbestos claims constituted multiple occurrences, triggering the policies' aggregate limits and not just the per-occurrence limits. After several years of litigation, United moved for summary judgment on the multiple occurrences issue, and also asserted that Travelers was estopped from arguing for only a single occurrence because it allegedly failed to reserve on that issue. In response, Travelers filed its own cross motion.

In early 2016, the trial court found in favor of Travelers and against United. United then filed a motion for leave to amend its complaint seeking a determination that Travelers had waived, or was estopped to raise, the single occurrence position, and that motion was denied. Because cross-claims among the defendants remained pending, the trial court entered a finding under Illinois Supreme Court Rule 304(a) that there was no just reason to delay appeal. United brought this appeal.

Analysis

In an opinion by Justice Mary Anne Mason, the First District affirmed. Addressing the occurrence issue, the Court noted that, under *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407 (2006), Illinois has adopted the "cause" theory of liability to determine the number of occurrences. That means that the number of occurrences is decided by determining the cause of the damage rather than by looking at the consequences of the damage.

The Appellate Court observed that both *Nicor* and an earlier case effectively applying the cause test, *United States Gypsum Co. v. Admiral Insurance Co.*, 268 Ill. App. 3d 598, (1st Dist. 1994), focused on the number of deductibles, or self-insured retentions, an insured had to pay before triggering coverage. Nonetheless, the First District found that whether focusing on deductibles or occurrence limits, the same cause test should be used for determining the number of occurrences.

Here, said the Court, the single, unitary cause of the claims against United was the fact that it incorporated asbestos-containing components or products into each of its systems designed for high-heat operations. The cause of loss was not attributable to the installation and maintenance by United's customers of each conveyor system that contained asbestos products. Thus, unlike in *Nicor*, no separate human intervening event relating to each system was involved. Rather, all the claims related to a single occurrence. And the per-occurrence limit therefore applied.

As for United's further argument that it should have been allowed to amend its complaint to raise its estoppel argument, the Appellate Court found that United was aware of Travelers' occurrence position when it filed this case in 2009. It in fact raised the estoppel argument as part of its summary judgment motion, and Travelers responded that United was foreclosed from arguing waiver and estoppel because it had never pleaded such claims. Hence, granting the motion would have prejudiced Travelers by requiring it to defend against entirely different claims after summary judgment had been allowed.

The First District therefore affirmed the decision of the trial court in favor of Travelers.

Learning Point: Under the cause test for determining the number of occurrences, an insured's conduct in manufacturing and selling a product allegedly causing injury to multiple purchasers or users of the product constitutes but one occurrence. ♦

Horizontal Exhaustion Applies Where Excess Policies Require Exhaustion Of All Underlying Coverage Before Excess Polices Are Triggered

by Henry T.M. LeFevre-Snee

In *Montrose Chemical Corp. of Cal. v. Superior Court*, 14 Cal. App. 5th 1306 (Cal. App. 2017), the Court of Appeal of California held that, where excess policies required exhaustion of all underlying coverage before they could be triggered, horizontal exhaustion would apply to determine the manner in which coverage attached.

Facts

From 1947 - 1982, Montrose produced dichloro-diphenyltrichloroethane ("DDT") at a facility in Torrance, California. In 1990, environmental regulators brought suit, alleging that Montrose's operations caused environmental contamination. Montrose subsequently entered into partial consent decrees, through which it allegedly incurred hundreds of millions of dollars in damages. Montrose then sought coverage under more than 115 primary and excess CGL policies applicable to the Torrance facility, which it had purchased between 1960 and 1986.

Citing *State of California v. Continental Ins. Co.*, 55 Cal. 4th 186 (2012) ("Continental"), Montrose asserted that to reach any excess policy it need only exhaust underlying policies in the same policy period, rather than all underlying policies in every policy period. In *Continental*, the California Supreme Court held that, in the absence of anti-stacking provisions, standard policy language permits an insured to stack policy limits across every triggered policy period up to the full limits of each policy, thereby forming one giant "uber-policy" with limits equal to the sum of all triggered policies.

The insurers, on the other hand, argued that all underlying policy limits must be exhausted before any excess policy could be called upon. The trial court agreed with the insurers, and applied horizontal exhaustion to Montrose's entire coverage program.

Analysis

The Court of Appeal focused on provisions in policies issued by American Centennial Insurance Company ("American Centennial"), Continental Casualty Company ("Continental"), and Columbia Casualty Company ("Columbia"). The American Centennial policies contained the following "retained limit" clause:

> [T]he company's liability shall be only for the ultimate net loss in excess of the insured's retained limit defined as the greater of . . . the total of the applicable limits of the underlying policies listed in [the declarations] hereof, and the applicable limits of any other underlying insurance collectible by the insured.

The American Centennial policies' "other insurance" clause provided:

> If other collectible insurance . . . is available to the insured covering a

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> loss also covered hereunder (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) the insurance hereunder shall be in excess of and not contribute with, such other insurance.

Continental's and Columbia's policies defined "loss" as:

> [T]he sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable, after making deductions for all recoveries, salvages and other insurances (whether recoverable or not) other than the underlying insurance and excess insurance purchased specifically to be in excess of this policy.

The Continental and Columbia "other insurance" clauses stated:

> If, with respect to a loss covered hereunder, the insured has other insurance, whether on a primary, excess or contingent basis, there shall be no insurance afforded hereunder as respects such loss; provided, that if the applicable limit of liability of this policy is greater than the applicable limit of liability provided by the other insurance, this policy shall afford excess insurance over and above such other insurance in an amount sufficient to give the insured, as respects the layer of coverage afforded by this policy, a total limit of liability equal to the applicable limit of liability afforded by this policy.

The other insurance clause did "not apply with respect to the underlying insurance or excess insurance purchased specifically to be in excess of this policy."

Affirming in part and reversing in part, the Court of Appeal noted that *Continental* did not decide whether an insured may access higher level excess insurance before exhausting lower level excess insurance written for different policy periods. Moreover, *Continental* did not announce any "general principle" that insureds may tap policies for indemnification however they choose. Rather, policies must be interpreted and applied according to their own terms.

The Court of Appeal noted that the American Centennial policies' "retained limit" clause stated that the insurers' liability was in excess of the "applicable limits of any other underlying insurance collectible by the insured." Moreover, the "other insurance" clause provided that the policies were excess to both scheduled and unscheduled policies. Similarly, Continental's and Columbia's policies defined "loss" to include deductions for "other insurances (whether recoverable or not) other than the underlying insurance." Further, the "other insurance" clause provided that the Continental and Columbia policies did not cover losses for which Montrose had other insurance. The Court of Appeal also distinguished the excess policies at issue, which attached upon exhaustion of underlying coverage, from primary policies, which attach upon the happening of a covered occurrence, and declined to hold that the excess policies' other insurance clauses only applied to contribution among insurers. Accordingly, horizontal exhaustion would apply to coverage underlying these excess policies, and to others whose language also required exhaustion of all underlying policies triggered by the loss, regardless of when those policies were in effect.

Finally, the Court of Appeal declined to apply horizontal exhaustion broadly across Montrose's entire coverage program. Rather, the manner of exhaustion of underlying coverage should be determined on a policy-by-policy basis, according to each policy's language.

Learning Points: Under California law, before coverage may attach, excess policy language referencing exhaustion of all underlying coverage triggered by a loss requires horizontal exhaustion of all underlying coverage, regardless of whether those underlying policies were in effect during the same policy period. However, horizontal exhaustion is not applicable *per se*; the sequence in which policies may be accessed must be decided on a policy-by-policy basis, taking into account the relevant provisions of each policy. ♦

Second Circuit Enforces Non-Cumulation Clauses In *Olin Corp. v. OneBeacon Am. Ins. Co.*

by **Henry T.M. LeFevre-Snee**

In *Olin Corp. v. OneBeacon Am. Ins. Co.*, 864 F.3d 130 (2d Cir 2017) ("*Olin IV*"), the U.S. Court of Appeals for the Second Circuit held, in an environmental insurance coverage action, that where policies contain "prior insurance clauses", an insurer may reduce the limits of liability of those policies by the amounts paid by another insurer for the same loss under any prior policy in the same excess layer, rejecting the policyholder position that the prior insurance clause only applied to prior policies issued by the same insurer.

Facts

OneBeacon issued to Olin Corporation ("Olin") three excess umbrella insurance policies for the period of 1970 through 1972 (the "OneBeacon Policies"). These policies attached at various points above a $300,000 primary policy issued by the Insurance Company of North America ("INA"). The London Market Insurers ("LMI") issued excess umbrella policies for periods prior to the effective periods of the OneBeacon policies.

Olin had previously entered into a global settlement with the London Market Insurers as to all Olin's environmental liability, including the sites for which Olin was pursuing OneBeacon.

Each of the OneBeacon Policies contained a "prior insurance" or "noncumulation" clause, which provided:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof, the limit of liability hereon . . . shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.

The prior insurance clause was accompanied by a "continuing coverage" clause, which provided:

> Subject to the foregoing paragraph and to all other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, [OneBeacon] will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.

OneBeacon argued in the district court that the prior insurance clause required that the per occurrence limits of the OneBeacon Policies be reduced by the per occurrence limits of any prior policies

in the same layer of coverage triggered by the same occurrence, irrespective of which insurer issued the earlier policies. The district court disagreed, holding that the prior insurance clause applied only to any other excess policy issued by the *same* insurer.

Analysis

OneBeacon appealed and the Second Circuit Court of Appeals reversed in part. Initially, and based on the intervening decision of the New York Court of Appeals in *In re Viking Pump, Inc.*, 52 N.E.3d 1144 (N.Y. 2016) the *Olin* Court held that all sums allocation applied to the environmental losses at issue, and that vertical exhaustion applied to the relevant policies, such that the insured could access each excess policy once the immediately underlying policies' limits were depleted, even if other lower-level policies during different policy periods remained unexhausted. Turning its attention to the prior insurance provision, the *Olin* Court held that the plain language of the prior insurance clause required that the occurrence limit of each OneBeacon Policy be reduced by amounts actually paid under any applicable prior excess insurance policy in the same layer of coverage for the same loss, regardless of whether that prior policy was issued by another insurer. Citing *Viking Pump*, the *Olin* Court reasoned that the intent of the prior insurance clause thereby prevented Olin from stacking, or cumulating, coverage by adding together the maximum limits of successive policies triggered by an occurrence. The Court explained that this result was supported by the plain language of the prior insurance clause, which applied to "any other excess policy", and did not limit its application to prior policies issued by the same insurer. The Court further stated that this result was supported by all sums allocation methodology applied to the damages at issue, and that the same principle which allows a policyholder to attribute the full amount of its loss to a single policy year also "limits [the Policyholders'] ability to tap multiple insurers for the same loss."

However, the Court rejected OneBeacon's argument that, under the prior insurance clause, the limits of the OneBeacon Policies should be reduced by the limits of any prior policies that were triggered by the same occurrence, regardless of whether those policies had been called upon for indemnification. Rather, the prior insurance clause only prevented Olin from stacking policies once it had actually been indemnified. The Court did agree with OneBeacon that "amounts due" under prior policies included settlements, rejecting Olin's argument that "amounts due" only included amounts paid pursuant to a judgment against the insurer, or the insurer's admission of liability. The Court remanded the matter for a determination of what amounts, if any, of LMI's global settlement with Olin pertained to the environmental sites at issue.

Learning Points: Under New York law, the all sums method applies to excess policies containing prior insurance and continuing coverage clauses, and the all sums method determines the exhaustion of policies underlying excess policies containing such clauses. The *Olin IV* Court held that, under the prior insurance clause, an insurer may reduce the limits of its liability by the amounts paid (including by way of settlement) for the same loss under any prior policy in the same excess layer, regardless of whether that insurer also issued those policies; *Olin IV* rejected the insurers' argument that the prior insurance clause allows the insurer to reduce the policy's limits by the limits of any prior policy also triggered by the same loss, regardless of whether any funds had been paid under that prior policy. ♦

Medical Malpractice Claim Brought Under The Wrongful Death Act Can Relate Back To Existing Claim And Is Not Barred By Statute Of Repose

by ***Melinda S. Kollross***

The Illinois Supreme Court holds that a medical malpractice claim brought under the Wrongful Death Act, 740 ILCS 180/0.01 *et seq.*, can relate back to an existing claim and is not barred by the statute of repose. *Lawler v. The University of Chicago Medical Center*, 2017 IL 120745.

Facts

On August 4, 2011, Prusak filed a medical malpractice claim against Defendants, alleging that Defendants failed to diagnose her macular pathology (an injury she allegedly discovered on August 7, 2009) leading Defendants to fail to recognize Prusak's lymphoma. Prusak died on November 24, 2013. As the executor of Prusak's estate, Prusak's daughter ("Lawler") substituted as Plaintiff. On April 11, 2014, Lawler filed an amended complaint adding a wrongful death claim. Defendants moved to dismiss the wrongful death claim as barred by the four-year statute of repose applicable to medical negligence cases, 735 ILCS 5/13-212(a). The circuit court granted the motion to dismiss, finding that the wrongful death claim was a new action and did not relate back to the original claims.

The Illinois Appellate Court reversed. It concluded that the wrongful death claim arose out of the same occurrence set forth in the original pleading, and that Defendants had notice of the underlying medical malpractice claims in a timely-filed complaint. Therefore, the Appellate Court held, Defendants would not be prejudiced by claims filed after the expiration of the statute of repose. The relation-back doctrine saved the wrongful death claim, which otherwise would be time-barred.

Analysis

The Illinois Supreme Court granted leave to appeal and affirmed in a unanimous opinion authored by Justice Freeman. The Court examined the Wrongful Death Act, the medical malpractice statute of repose, and the relation back statute in its Opinion.

Wrongful Death Act

A wrongful death action allows the decedent's next of kin to recover damages for their own loss based on the wrongful actions of another. The cause of action accrues when the death occurs. In a wrongful death action "the cause of action is the wrongful act, neglect or default causing death, and not merely the death itself." A wrongful death action must be commenced within two years after the death. 740 ILCS 180/2 (West 2010).

Medical Malpractice Statute of Repose

The medical malpractice statute of repose (735 ILCS 5/13-212(a)) provides that actions based on medical malpractice are subject to a four-year statute of repose triggered by the

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occurrence of the act or omission that caused the injury:

> Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician . . . whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death." 735 ILCS 5/13-212(a) (West 2010).

The only exception expressly noted by the statutory language is fraudulent concealment, which is not at issue here. The repose period was enacted by the legislature to curtail the "long tail" of exposure to medical malpractice claims as a result of the 2-year discovery rule by placing an outer time limit within which a malpractice action must be commenced.

Relation Back Statute

The relation back statute permits an amended pleading to relate back to the date of the original pleading such that "[t]he cause of action . . . set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted" where two conditions are met: (1) the original pleading was timely, and (2) the amendment grew out of the same transaction or occurrence set up in the original pleading. 735 ILCS 5/2-616(b) (West 2010).

The Court then considered, as a matter of first impression, Defendants' contention that the relation back statute does not apply where decedent's death occurred more than four years after the alleged medical negligence. Defendants maintained that Plaintiff's wrongful death cause of action was "extinguished" by the statute of repose in August 2013— before it accrued in November 2013—and the relation back statute cannot "preserve" it.

If Plaintiff had filed an original complaint alleging a wrongful death cause of action in November 2013, it would have been barred by the statute of repose. 735 ILCS 5/13-212(a) (West 2010). However, the relation back statute provides that amendments to a complaint "shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed." 735 ILCS 5/2-616(b) (West 2010). The parties do not dispute that Plaintiff's original complaint was timely filed and the amendment clearly grew out of the same transaction or occurrence as alleged in the original complaint. Thus, the Court found that Plaintiff satisfied the two requirements in the relation back statute, and it applies to her wrongful death claim. Pursuant to the statute, the claim is not time-barred even though it accrued after the statute of repose period expired and it can be added by amendment to Plaintiff's pending complaint in accordance with the relation back statute. The Court found support for its holding in two out-of-state decisions: *Sisson v. Lhowe*, 954 N.E.2d 1115 (Mass. 2011), and *Wesley Chapel Foot & Ankle Center, LLC v. Johnson*, 650 S.E.2d 387 (Ga. Ct. App. 2007).

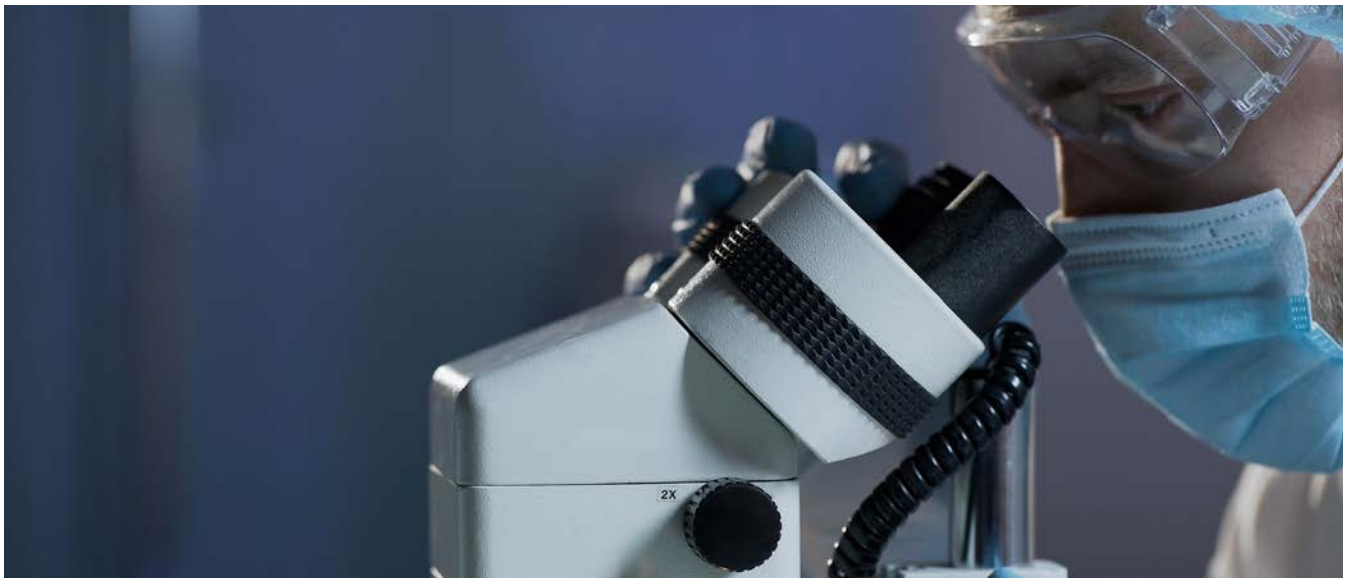
The Court rejected Defendants' contention that the statute of repose "extinguishes" a wrongful death claim such that the relation back statute cannot apply, and that the appellate court's ruling here enabled the plaintiff to "preserve" its wrongful death claim until the claim accrued, in contravention of the Court's holding in *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271. The Court explained that the legal fiction that the relation back statute considers the claim brought as of the date of the original complaint does not run afoul of the Court's holding in *Evanston Insurance Co.*—which did not involve an amendment to a pending complaint—because the legislature chose to preclude claims from being time-barred in very limited situations such as here, where, if an amendment related back to the timely filed original complaint, it would not be "barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted." 735 ILCS 5/2-616(b) (West 2010). This legal fiction of the amendment relating back to the date of filing allows the statute to function as the legislature intended; it does not mean that an amendment can add a claim that has not yet accrued.

The Court further rejected Defendants' argument that the appellate court's decision was in error because it blurred the distinctions between statutes of limitations and statutes of repose. According to the Court, the appellate court referred to "notice" and "prejudice" based on the legislative history of the relation back statute, which shows that the rationale behind the same occurrence or transaction rule was based "on the belief that if the defendant has been made aware of the occurrence or transaction which is the basis for the claim, he can prepare to meet the plaintiff's claim, whatever theory it may be based on."

The Court also rejected Defendants' contention that even if the relation back statute applies to Plaintiff's wrongful death claim, the resulting "conflict" between the statute of repose and the relation back statute must be resolved in favor of the statute of repose. They maintain that the statute of repose should control since it is the more specific statutory provision and the relation back statute is a procedural provision. Moreover, Defendants argued that the only exception to the statute of repose that the legislature expressly provided for was fraudulent concealment, which does not apply here.

The Court found that the statutes do not conflict with one another. The statute of repose bars a cause of action if it is initially brought more than four years after the alleged medical negligence. The relation back statute governs amendments to complaints and functions without being subject to time limitations. Thus, when applying the relation back statute, the statute of repose will not bar an amendment as long as there is a pending timely filed original complaint and the same transaction or occurrence test is satisfied. The relation back statute is the more specific statutory provision to these circumstances. In the Court's view, its interpretation does not create an exception, nor is it contrary to the legislative intent of the statute of repose. As noted, the statute of repose was enacted to curtail the "long tail" of liability created by the increased use of the discovery rule beginning in the 1960s. It aims to prevent the assertion of stale claims and to protect defendants from uncertain and protracted liability. However, when there is a pending complaint based on medical malpractice and a wrongful death claim is added to that complaint, these concerns are not implicated. A defendant would already be aware of a claim for medical malpractice, and the wrongful death claim would not be stale if it is based on the same transaction or occurrence as the original complaint.

Learning Point: Under *Lawler,* a medical malpractice claim brought under the Wrongful Death Act can relate back to an existing claim and is not barred by the 4-year statute of repose where: (1) the original pleading was timely filed, and (2) the amendment grew out of the same transaction or occurrence set forth in the original pleading. ♦



Hospital Not Vicariously Liable For Acts Of Employees Of Unrelated, Independent Clinic Under Apparent Agency Theory

by ***Melinda S. Kollross***

In a split decision, the Illinois Supreme Court holds that a hospital could not be held vicariously liable under the doctrine of apparent agency for the acts of the employees of an unrelated, independent clinic that was not a party to the litigation. *Yarbrough v. Northwestern Memorial Hospital*, 2017 IL 121367.

Facts

Plaintiff obtained prenatal medical care at Erie Family Health Clinic, a federally-funded, non-profit clinic. She was told she would receive some prenatal care at Northwestern Memorial Hospital ("NMH") and would deliver her baby there. Erie-employed physicians seeking privileges to practice at NMH are required to apply for them, as would any physician.

After some initial complications, Plaintiff obtained an emergency ultrasound at another hospital, which revealed that she had uterine and cervical issues. A follow-up ultrasound was performed at Erie, which revealed only the cervical issue. A 20-week ultrasound was performed at NMH. Plaintiff then gave birth at 26 weeks. Among others, she sued NMH, alleging that Erie was its apparent agent, and Erie rendered negligent prenatal care for failing to detect and treat her uterine and cervical conditions, which caused her preterm delivery. She asserted several allegations of close ties between Erie and NMH to support the apparent agency claim. She did not sue Erie.

NMH moved for partial summary judgment, arguing that it had no control over Erie or its employees, did not provide any financial or operational support to Erie, and did not otherwise hold Erie out as its agent. The circuit court *sua sponte* certified a question under Supreme Court Rule 308 regarding whether NMH could be held vicariously liable under an apparent agency theory "for the acts of the employees of an unrelated, independent clinic that is not a party to the present litigation."

The First District Appellate Court answered "yes." It initially noted that a hospital can be vicariously liable for the acts of independent contractor physicians, even where the conduct occurred at an affiliated clinic outside of the four walls of the hospital. It concluded that the key inquiry is whether the hospital and/or clinic held themselves out as having such close ties that a reasonable person could conclude that an agency relationship existed, and whether the plaintiff relied on the hospital for treatment, rather than any particular physician. It further held that there was no requirement that the apparent agent also be named as a defendant.

NMH filed a petition for leave to appeal arguing that the First District greatly expanded the scope of the apparent agency doctrine, in contravention of prior Illinois Supreme Court precedent, creating liability for a hospital for all acts of any physician with hospital privileges.

Analysis

The Illinois Supreme Court granted review and reversed the Appellate Court in a 4-3 opinion authored by Justice Theis (Chief Justice Karmeier and Justices Thomas and Garman, concurring). The certified question before the Court asked:

> Can a hospital be held vicariously liable under the doctrine of apparent agency set forth in *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill.2d 511, 622 N.F.2d 788, 190 Ill. Dec. 758 ([1993]), and its progeny for the acts of the employees of an unrelated, independent clinic that is not a party to the present litigation?

In *Gilbert*, the Illinois Supreme Court held that a hospital may be found vicariously liable under the doctrine of apparent authority for the negligent acts of a physician providing care at a hospital, regardless of whether the physician is an independent contractor, unless the patient knows or should have known that the physician is an independent contractor. *Gilbert* sets forth the following three elements for a hospital to be liable under the doctrine of apparent authority: (1) plaintiff must show that the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.

The Court revisited the issue of apparent authority in the medical malpractice context in *Petrovich v. Share Health Plan of Illinois*, 188 Ill. 2d 17 (1999), wherein plaintiff alleged that an HMO was vicariously liable for the conduct of the participating physicians who treated her. Following its rationale in *Gilbert*, the Court held that to establish apparent authority against an HMO for physician malpractice, the patient must prove (1) that the HMO held itself out as the provider of health care, without informing the patient that the care is given by independent contractors, and (2) that the patient justifiably relied upon the conduct of the HMO by looking to the HMO to provide health care services rather than looking to a specific physician.

The Court's most recent statements on apparent authority in the area of medical malpractice come in *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147 (2006). In *York*, the plaintiffs filed a medical malpractice action against the attending anesthesiologist who was employed by University Anesthesiologists, S.C., and added Rush as a defendant on the theory that the anesthesiologist was Rush's apparent agent. The Court found that the *York* plaintiff presented sufficient evidence of apparent authority to support the jury's verdict finding Rush vicariously liable for the malpractice of the anesthesiologist, and affirmed the trial court's denial of Rush's motion for judgment notwithstanding the verdict. The *York* Court discussed in detail what it termed the "realities of modern hospital care" and concluded that "the fervent competition between hospitals to attract patients, combined with the reasonable expectations of the public that the care providers they encounter in a hospital are also hospital employees, raised serious public policy issues with respect to a hospital's liability for the negligent actions of an independent-contractor physician."

Turning to the present case, the Court found the question before it does not implicate the policy considerations that informed its decision in *Gilbert* and later holdings in *Petrovich* and *York*. Those cases sought to protect a patient who is unaware that the individual providing him or her medical treatment is not an employee or agent of the hospital or HMO from whom treatment is sought. Under such circumstances, the Court found a patient should have the right to look to the hospital or HMO in seeking compensation for any negligent care.

Here, by contrast, plaintiff "sought treatment at Erie but looks to impose liability on NMH." Erie is neither owned nor operated by NMH. While Erie receives some charitable financial and technical assistance from NMH, Erie is an FQHC that relies heavily on federal grants and Medicaid reimbursement to provide underserved communities with primary and preventative care regardless of an individual's ability to pay. Erie's employees are considered federal employees, and suits against

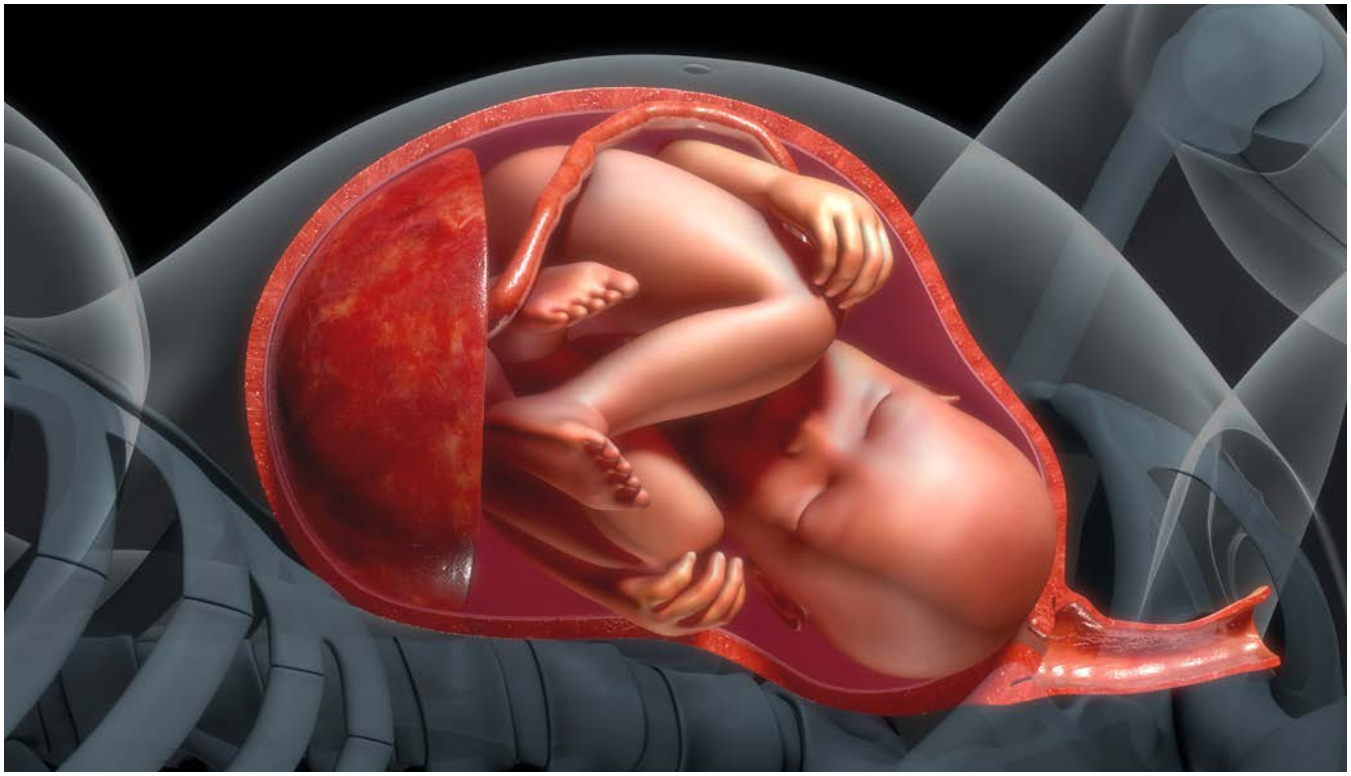
Erie or its employees can only be maintained under the Federal Tort Claims Act. Erie does not utilize the Northwestern name. There is no Northwestern-related branding or the use of Northwestern's trademark purple color by Erie.

The Court distinguished these facts from the *Malanowski* case cited by Plaintiff, wherein Loyola owned and operated the subject outpatient center which allegedly bore the "Loyola" name, the outpatient center held itself out as a direct provider of health care services, the outpatient center introduced the decedent to her physician, and the payment for services provided by the physician was made directly to the outpatient center. *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720 (1997).

The Court recognized that physicians employed by Erie routinely have privileges to practice at NMH. However, they must apply for such privileges as would any doctor. The Court explained: "*Gilbert* was informed by our concern with the reasonable expectations of the public that the care providers that they encounter in a hospital are also hospital employees . . . *Gilbert* does not suggest that merely granting a physician employed by another entity hospital staff privileges alone could create an apparent agency relationship." The Court accordingly refused to read *Gilbert* and its progeny "so broadly as to impose vicarious liability under the doctrine of apparent authority on a hospital for the care given by employees of an unrelated, independently owned and operated clinic like Erie."

Justice Burke authored a lengthy dissent, in which she was joined by Justices Freeman and Kilbride. Justice Burke stated "[t]he appellate court did a thorough analysis of the *Gilbert* elements and explained why there remain questions of fact sufficient to preclude the entry of summary judgment. I find this analysis persuasive and would adopt it herein."

Learning Point: A hospital cannot be held vicariously liable under the doctrine of apparent agency for treatment rendered at and by employees of an unrelated, independently owned and operated clinic which did not use the hospital's name or branding; the mere fact that some physician employees of the clinic also had staff privileges at the hospital is insufficient to establish liability under *Gilbert* and its progeny. ♦



California Supreme Court Holds Landowner Not Liable For Obvious Danger It Does Not And Cannot Control

by ***Meredith D. Stewart***

A landowner's liability to its invitees hinges on whether or not a duty is imposed by law. But, mere ownership of property does not automatically equate to liability. Rather, *in Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, the California Supreme Court recently declined to find a landowner owed a duty to protect invitees from obvious dangers presented by crossing a public street. In reaching its decision, California's highest court reversed the decision of the Court of Appeal and found that a church, which did nothing more than site and maintain a parking lot requiring its invitees to cross a public street, owed no duty to protect its invitees from the obvious dangers presented by the public street. The *Vasilenko* decision is critical for premises liability matters in that it defines and constricts the extent of a duty that is owed by a landowner to its invitees in similar circumstances.

Facts

Plaintiff Aleksandr Vasilenko ("plaintiff") was struck by a car while crossing a public street from defendant Grace Family Church's ("church") overflow parking area to the main premises of the church. Plaintiff was injured and he and his wife sued the church for negligence and loss of consortium, contending that the church owed him a duty of care to assist him in crossing the public street. The church filed a motion for summary judgment on the ground that it did not owe a duty to the plaintiff because the church did not own, possess or control the public street at issue. Summary judgment was granted in favor of the church and the plaintiff appealed. The California Court of Appeal reversed the decision, but the California Supreme Court recently disagreed and found that no duty was owed by the church to prevent the plaintiff's injuries.

Analysis

Generally, each person has a duty to exercise, in his or her activities, reasonable care for the safety of others. Historically, courts have utilized the concept of duty to limit the infinite liability that might flow from every negligent act. A duty is to be created only where "clearly supported by public policy." In California, whether or not to impose a duty is measured by evaluation of several foreseeability and public policy factors outlined in *Rowland v. Christian*, (1968) 69 Cal.2d 108. Those factors are: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved." This is traditionally a question of law for the Court because a finding that there is no duty represents a decision by the Court that there is an exception to the general rule that each person has a duty to act with reasonable care for the safety of others.

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In *Vasilenko*, the Court examined whether an exception to the general rule that a landowner owes a duty to its invitees exists where the landowner sites and maintains a parking lot, which causes its invitees to cross a public street. The decision was in light of the known and obvious dangers presented by crossing a public street and the fact that the church increased the likelihood that its invitees would encounter danger because they had to encounter the danger of crossing the public street. Can subjecting an invitee to such increased exposure to danger

be exempted from the general duty of care owed to invitees? The California Supreme Court now says "yes."

In looking at the *Rowland* factors, the *Vasilenko* Court found that the first two factors support imposition of a duty—*i.e.*, it was foreseeable that the plaintiff could be struck by a car when crossing the street and it is certain that plaintiff suffered injury. However, the *Vasilenko* Court found the third *Rowland* factor—closeness of the connection between the defendant's conduct and the injury suffered—did not weigh in favor of finding a duty. The reason was simple—without facts and evidence to demonstrate "the landowner impaired the driver's ability to see and react to crossing pedestrians, the driver's conduct is independent of the landowner's." In addition, the invitees decision as to when, where and how to cross the street was independent of the landowner absent facts and evidence that the landowner somehow impaired the invitee's ability to see and react to passing motorists. The Court looked further at the public policy factors to reach its ultimate decision that no duty was owed by the church to the plaintiff.

Specifically, the church had limited ability to control the public street or the movement of traffic. Moreover, the danger of crossing the street is obvious and there is no duty to warn of obvious dangers. With respect to the parking lot chosen by the church, because there are numerous factors that may weigh in favor of and against the location of the lot, it is not obvious how to determine whether a safer lot was available. This would place a difficult burden on the landowner to "reliably predict which parking lot might be considered a safer available alternative." The Court went on to find that drivers and invitees can exercise greater care to prevent future harm than landowners, and the burden on landowners in monitoring the dangers of the public street were too high. These latter factors weighed against finding a duty. As for the moral blame factor, the Court found landowners have limited ability to reduce the danger and generally exercise no greater control over the danger than the invitees who cross the street. As for availability of insurance, in light of the insurance available to drivers, to invitees (uninsured or underinsured motorist coverage) and to landowners, that factor did not weigh for or against imposition of a duty.

The Court evaluated the *Rowland* factors with varied results. However, the Court found the "policy of preventing future harm looms particularly large." The Court reasoned that the comparative ability of a landowner to take steps to reduce the risk to its invitees as compared with the ability of both invitees and drivers to prevent injury tipped the scale against finding a duty on behalf of the landowner. Furthermore, imposing a duty on the landowner, or the church in this case, would discourage the landowner from designating parking, which itself carried many benefits to the invitees. The Court also did not ignore a key factual distinction in *Vasilenko* as compared with other authorities addressing similar issues—there were no facts suggesting the church created a danger beyond that presented by the public street itself. While the plaintiff argued on appeal that the church voluntarily assumed a duty to assist him, the Court found that issue was not presented in the trial court, but may be considered by the Court of Appeal on remand if the plaintiff elected to pursue the theory. It appears this latter issue leaves the determination of the existence of a duty slightly open if there are facts alleging, and evidence supporting, the argument that the church assumed a duty by maintaining a parking lot across the street which required its invitees to cross a public street.

Learning Points: In the well-reasoned *Vasilenko* opinion, the California Supreme Court carefully evaluated the foreseeability and public policy considerations that must be taken into account in deciding whether to impose a duty on a landowner to protect its invitees from injury presented by the obvious danger of crossing a public street to access its premises. Beyond just street crossing situations, this decision is particularly significant where an invitee plaintiff seeks to recover damages for alleged negligence of a landowner when the injury producing event was not only obvious, but caused by the actions of the invitee himself or a third party. For defendant landowners, the *Vasilenko* decision weighs in favor of pursuing summary judgment on the issue of duty where obvious dangers are present and outside the control of the landowner. As a matter of public policy, because landowners are not insurers of public safety, an exception to the general rule of duty is not only logical, it is now backed by California precedent. ♦

CONSTRUCTION

DOH ADEQUATELY ASSESSED PROJECT'S ENVIRONMENTAL IMPACT

Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Mnhttn., 2017 N.Y. LEXIS 3699 (N.Y.)

Parents of students at a school next door to a construction site challenged the Department of Health's environmental quality assessment, which allowed construction to proceed. The parents asserted the DOH adopted a flawed methodology to measure the prevalence of lead at the construction site, failed to fully assess the impact of airborne lead dust, and never looked specifically at the danger posed to children, the elderly, or the infirm. ***Held:*** DOH complied with its responsibilities by taking the requisite "hard look" at the relevant areas of environmental concerns and making a reasoned elaboration of the basis for its determinations.

EXCESS INSURANCE

EXCESS LINE ASSOCIATION HAS NO RIGHT TO SUE

Excess Line Assn. of N.Y. v. Waldorf & Assoc., 30 N.Y.3d 119 (N.Y.)

The Excess Line Association of New York (ELANY) facilitates compliance with the many filing and record keeping requirements for excess line brokers. ELANY sued a brokerage firm seeking recoupment of stamping fees the firm had failed to pay. ***Held:*** The legislatively created ELANY was not authorized to recover unpaid stamping fees through a plenary action. The plan of operation for ELANY limited its remedy to reporting fee violations to DFS.

LIABILITY INSURANCE COVERAGE

QUESTION WHETHER TRUCK WAS "HIRED AUTO" ALLOWS CLAIMS TO SURVIVE

Carlson v. Am. Intl. Group, Inc., 2017 N.Y. LEXIS 3280 (N.Y.)

Woman was killed when a truck painted with a packaging company's logo, owned (and driven) by another company, crossed the double-yellow divider and hit her car head-on. The companies had a cartage agreement whereby the one transported the packages of the other. Plaintiff sued the former's insurer. The lower court dismissed the claims outright, ruling the vehicle was not a hired auto and that the former company could not grant the latter permission to use the vehicle, despite expert affidavit that under industry custom they were hired autos used with permission. ***Held:*** Reversed. Where policies did not define "hired auto", the fact issue of the degree of control exercised by the packaging company over the other company's trucks was pivotal to a determination of whether the trucks constituted hired autos precluding dismissal. Notably, the mere fact that the cartage agreement labeled the truck owner an "independent contractor" was not dispositive, but one factor to be weighed with others.

INSURER NOT LIABLE FOR INSURED'S DEFENSE COSTS

OneBeacon Am. Ins. Co. v. Celanese Corp., 84 N.E.3d 867 (Mass. App.)

Insured terminated its costs-sharing agreements and demanded that insurer defend asbestos/product liability claims under its GL policies. ***Held:*** Insurer was not liable for attorney's fees incurred after insured rejected insurer's offer of defense. By defending without reservation of rights, insurer was entitled to control the defense, including choice of counsel. Although an exception exists for conflicts of interest, insurer neither offered a conditional defense nor subordinated insured's interest. A disagreement as to tactical strategy or potential liability does not create a conflict.

INSURER LIABLE FOR COVERAGE OF TEMPORARY SUBSTITUTE VEHICLE

Conaway v. Cincinnati Ins. Co., 2017 Ohio App. LEXIS 5229 (Ohio App.)

Following a breakdown of a truck covered under a business auto policy, employees were injured/killed when commuting to work in a co-employee's van. ***Held in a split decision:*** The van was a "temporary substitute vehicle." The policy covered a temporary substitute when a named vehicle was out of service. It did not need to be unavailable for a set time. An agreement to use another was unnecessary. The policy provided coverage where persons were "occupying" a temporary substitute. The dissent argued that basing coverage on a mere intent to use a substitute was overextensive. Absent van's owner's agreement that the vehicle was a temporary substitute, the injured persons were mere passengers.

MEDICAL MALPRACTICE

LIMITATIONS PERIOD RUNS FROM DATE OF BIRTH IN NEGLIGENT BIRTH CASES

B.F. v. Reproductive Med. Assoc. of N.Y., LLP, 2017 N.Y. LEXIS 3724 (N.Y.)

Couples sought in vitro fertilization treatment from defendant doctor. Doctor supplied an egg donor who tested positive for chromosomal abnormality that can result in deficits in child. Couples sued and doctor claimed lawsuits were out of time. ***Held:*** In actions permitting parents to recover the extraordinary expenses incurred to care for a disabled infant who, but for a physician's negligence, would not have been born, the statute of limitations runs from alleged date of birth rather than date of malpractice.

NEGLIGENCE

NEGLIGENT HIRING CLAIM DISALLOWED WHERE AGENCY ADMITTED

Sedam v. 2 JR Pizza Enters., LLC, 84 N.E.3d 1174 (Ind.)

Decedent was killed when struck by a pizza shop employee driving within the scope and course of employment. ***Held:*** Absent special circumstances, claims of negligent hiring, training, and/or supervision are precluded when employer admits agency and is subject to vicarious liability. A contrary rule would confuse the jury, waste judicial resources, expose the employer to double recovery, and result in an excess allocation of fault. Special circumstances arise when an employee commits an intentional tort or is incapable of negligence, and when an employer is a charitable institution. Both theories may be pursued in punitive damages cases.

TAVERN OWNER NOT LIABLE FOR PARKING LOT INCIDENT

Powell v. Stuber, 2017 Ind. App. LEXIS 830 (Ind. App.)

Patron was injured in a tavern parking lot while trying to pursue his assailant. ***Held:*** The tavern owner did not owe a duty of care. The imposition of a duty requires an analysis of the type of plaintiff and type of harm involved. Although a patron can be subject to attack, owners do not routinely contemplate that it would continue by a victim's pursuit of his assailant. The likelihood of harm was not enough to warrant precautions.

HOMEOWNER NOT LIABLE FOR WORKER'S FALL THROUGH ATTIC

Roseberry v. Diepenbrock, 2017 Ohio App. LEXIS 5225 (Ohio App.)

Exterminator fell through attic floor while searching for bats. ***Held:*** A homeowner has no liability to an independent contractor undertaking potentially dangerous work. Worker had been trained as to attic dangers. Homeowner was not aware of problem with a plank. Worker did not rely on an assurance that planks were stable. Homeowner did not participate in work other than in a general supervisory role. He lent worker a flashlight and told him to stay on the planks.

RIDER ASSUMED THE RISK OF FALL FROM PARADE FLOAT

Wagner v. Kretz, 2017 Ohio App. LEXIS 4933 (Ohio App.)

Parade float rider fell off when his unsecured chair collapsed. ***Held:*** The primary assumption of risk doctrine barred recovery. The risk of falling off an unsecured chair while riding on a moving parade float is a danger ordinary to the activity. It is common knowledge that danger exists, and plaintiff was aware. The injury occurred in the course of the activity.

PROPERTY MANAGER NOT LIABLE FOR TRIP ON UNEVEN PORCH AT NIGHT

Callentine v. Mill Invest., 2017 Ohio App. LEXIS 5057 (Ohio App.)

Tenant's guest was injured while stepping from porch to sidewalk at night. ***Held:*** Under the two-inch rule, the imperfection as to sidewalk segments was too trivial to support recovery. A variation under two inches is slight as a matter of law. Attendant circumstances provide an exception, but the test is objective and does not consider the actions of the parties unless conditions created by a property owner distracted a victim. The guest saw the area when entering the house. The defect was open and obvious. And under the step-in-the-dark rule, the guest was contributorily negligent by not checking the area before walking.

PRODUCT LIABILITY

MANUFACTURER OF NON-DEFECTIVE COMPONENT UNDER NO DUTY TO WARN END USER ABOUT THE DANGERS OF A COMPLETED ASSEMBLY

Pantzis v. Mack Trucks, Inc., 2017 Mass. App. LEXIS 151 (Mass. App.)

Decedent was strangled when his clothing caught on a moving assembly under his truck. ***Held:*** Manufacturer of a non-defective component has no duty to warn of dangers created by a completed assembly. Whether a component could be foreseeably used or misused did not create a jury question. There was no assumption of a duty to warn end users merely because the component manufacturer provided general warnings. When a component may have different uses, a seller generally need not provide safety features peculiar to a specific adaptation.

PUBLIC BENEFIT CORPORATIONS

BPCA UNABLE TO CHALLENGE CONSTITUTIONALITY OF REVIVAL STATUTE

Matter of WTC Lower Mnhttn. Disaster Site Litig., 2017 N.Y. LEXIS 3286 (N.Y.)

The New York legislature enacted a revival statute allowing workers who had been harmed cleaning up the World Trade Center disaster site to bring claims for exposure to toxins against the Battery Park City Authority, a public benefit corporation. The workers then brought claims and BPCA challenged the constitutionality of the revival statute. The Second Circuit submitted a certified question to the New York Court of Appeals, seeking clarification as to whether the BCPA was able to do so. ***Held:*** Like other state entities, public benefit corporations lack capacity to challenge the constitutionality of a state statute
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REINSURANCE

LIABILITY LIMITATION CLAUSE DOES NOT NECESSARILY CAP ALL OBLIGATIONS

Global Reins. Corp. of Am. v. Century Indem. Co., 2017 N.Y. LEXIS 3723 (N.Y.)

The Second Circuit submitted a certified question to the New York Court of Appeals, seeking clarification as to whether its prior ruling in *Excess Insurance Co. Ltd. v. Factory Mutual Insurance Co.*, 3 N.Y.3d 577 (2004), imposed either a rule of construction, or a strong presumption, that a per occurrence liability cap in a reinsurance contract limited the total reinsurance available under the contract to the amount of the cap regardless of whether the underlying policy was understood to cover expenses such as, for instance, defense costs. ***Held:*** *Excess* did not create such a presumption or construction. ***Further held:*** New York law does not impose either a rule, or a presumption, that a limitation on liability clause necessarily caps all obligations owed by a reinsurer, such as defense costs, without regard for the specific language employed therein.

TORTS

UNLAWFUL DISCRIMINATION STATUTE PUNITIVE STANDARD SAME AS COMMON LAW STANDARD

Chauca v. Abraham, 2017 N.Y. LEXIS 3278 (N.Y.)

The Second Circuit submitted a certified question to the New York Court of Appeals, seeking clarification as to the standard for punitive damages for actions claiming unlawful discriminatory practices under Administrative Code of the City of NY § 8-502(a). ***Held:*** Standard for determining punitive damages under § 8-502(a) is the common law standard—willful or wanton negligence, or recklessness, or a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.

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