CM EAST COAST REPORT of Recent Decisions

2017• Vol. 4

Have Fun And Be Wary: Discussing Primary Assumption Of Risk

New York Court Of Appeals Expands Insurance Law Section 3420

Certainty Of Award Triggers Equitable Apportionment For Workers' Compensation Claimants

Clausen Miller P.C.

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

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FEATURES

ARTICLES

Have Fun And Be Wary: Three Recent Cases From The Second Department Discussing Primary Assumption Of Risk

by **George Caran**

A review of the Second Department decisions issued in the months preceding the close of 2017 revealed several interesting cases dealing with primary assumption of risk. The issues presented in those cases resulted in varying, but opinions by the Court. This article will discuss three cases that were reviewed by the Court.

The doctrine of primary assumption of risk states that a landowner is not liable for any injuries which occur if the plaintiff engages in a sport or recreational activity because the plaintiff consents to the common risks which are inherent in the activity and arise generally out of the nature of the sport or activity. If it is determined that the plaintiff freely assumed the risk, this assumption will negate any duty owed to him by the landowner. The doctrine, however, is applicable if the risk is open and obvious, and fully comprehended by the participant. The doctrine is intended to promote and encourage physical activities, and thus, it improves the health and wellbeing of the public.

In *Lee v. Brooklyn Boulders, LLC*, 2017 N.Y. App. Div. LEXIS 8723, 2017 NY Slip Op 08660 (2d Dep't December 13, 2017), the Court discussed the applicability of assumption of risk regarding rock climbing activities. Ms. Lee was enjoying a rock climbing session at an indoor facility. As she was descending a climbing wall she stepped onto the matted floor. At the moment that she stepped down, her foot landed in a gap between two of the mats and she sustained injuries. The gap was described as covered up by a piece of velcro.

Defendant moved for summary judgment which was denied and the appeal was filed. In affirming the lower court's decision, the Court stated that the risk of Plaintiff's foot getting stuck in the mat was not a commonly appreciated risk. The space between the mats, the Court stated, was not a perfectly obvious condition. The Court opined that there was a triable issue of fact whether the gap was a concealed risk and whether the accident was something that naturally flows from the activity of rock climbing.

In *E.B. v. Camp Achim*, 2017 N.Y. App. Div. LEXIS 9209, 2017 NY Slip Op 09115 (2d Dep't December 27, 2017), the Court tackled a case of children playing football at a children's camp. Plaintiff, who was fifteen years-old at the time, was injured when he ran into a metal bench that was affixed to the ground in a grass field used to play the game. Plaintiff admitted to being aware of the benches, using them as part of the game and even admitted that on one

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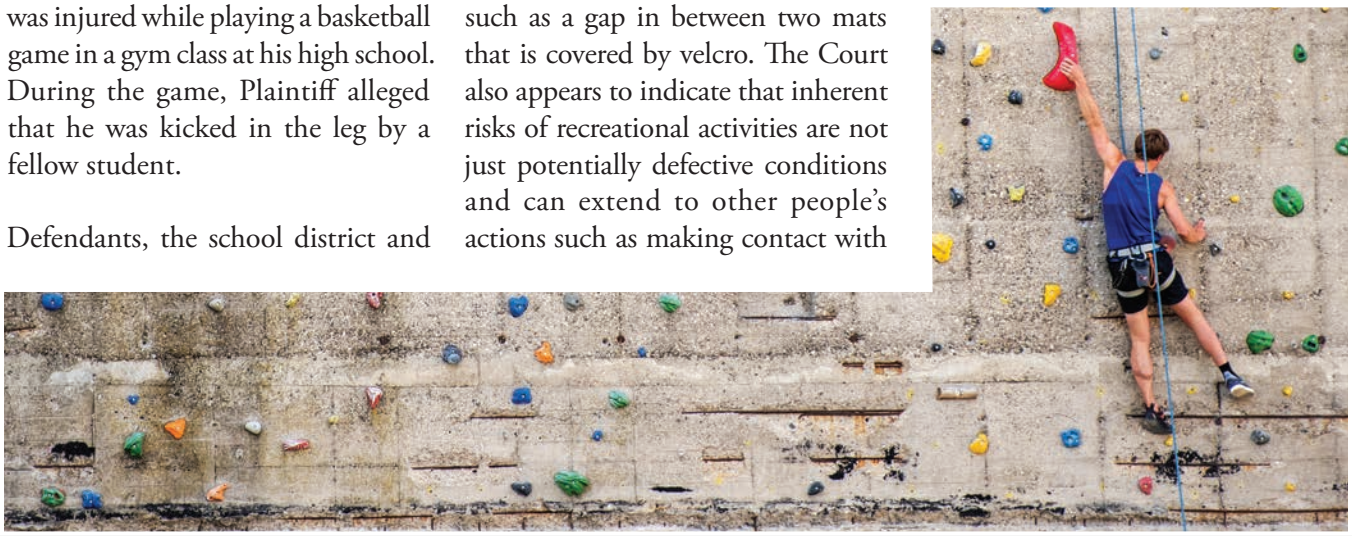
occasion he struck one of the benches while playing. Defendants moved for summary judgment on the doctrine of primary assumption of risk.

In reversing the lower court's denial of the summary judgment motions, the Court stated that the construction of the playing surface falls under the doctrine of primary assumption of risk if the risks are known or obvious to the plaintiff. The Court concluded: "Since the infant plaintiff, who had been playing football on this field for more than an hour when the accident occurred was aware of that condition . . . he assumed the risk of injury. . . ."

In *Hanson v. Sewanhaka Cent. High Sch. Dist.*, 155 A.D.3d 702, 64 N.Y.S.3d 303 (2d Dep't 2017), the Court posted an opinion on another case involving a sports activity and children. In this instance, Plaintiff was injured while playing a basketball game in a gym class at his high school. During the game, Plaintiff alleged that he was kicked in the leg by a fellow student.

Defendants, the school district and the boy who kicked Plaintiff, moved for summary judgment and the motions were granted. In affirming the lower court's decision, the Court stated that Plaintiff was well aware of the risks that an activity such as a basketball game can pose, including contact or collisions with other participants. Interestingly, Plaintiff raised the argument that he was intentionally kicked by the defendant/student. However, the Court rejected the argument as not relevant to whether primary assumption of risk applies, and stated that there is no evidence Plaintiff asserted a cause of action for intentional tort.

Learning Point: In reviewing the three cases, the Second Department appears to make a point of distinguishing the cases where the condition was apparent, such as a steel bench that the plaintiff admitted to seeing, versus a condition that is a "concealed risk" such as a gap in between two mats that is covered by velcro. The Court also appears to indicate that inherent risks of recreational activities are not just potentially defective conditions and can extend to other people's actions such as making contact with the plaintiff and causing an injury. Interestingly, it would seem that when defending cases such as this, an intentional act does not negate the defense of primary assumption of risk and that even deliberate contacts may be considered as acts that naturally flow from the activity. Moreover, the plaintiff will not survive a motion for summary judgment on the assumption of risk doctrine without proving that the contact was intentional and unrelated to the activity itself. In conclusion, the defense must consider whether the condition that caused the accident was obvious and whether it was part of the playing field. If the allegation is that an act caused the injury, the act must naturally occur out of the activity which the plaintiff participated in and even if the action is intentional the doctrine will still apply. ♦



Florida High Court Holds That The Chapter 558 Statute Process Applicable To Construction Defect Claims Constitutes A "Suit"

by ***Dawn M. Brehony***

Chapter 558, Florida Statutes, known as the Construction Defect Statute, requires owners alleging a construction defect to send notice of claims to contractors, subcontractors, suppliers or design professionals identifying any alleged construction or design defect in reasonable detail prior to commencing a lawsuit for any such alleged defect. *See* §558.004, Fla. Stat. (2012). The intent of this statute is to allow for an alternative, confidential method to resolve construction disputes which would reduce the need to litigate, yet protect the rights of the property owner. *See* §558.001, Fla. Stat. (2012).

However, the recipient's participation in the Chapter 558 settlement process is not mandatory or adjudicative. *See* §558.004(5)-(6), Fla. Stat. (2012). Upon receipt of the required notice of claim, the recipient may choose to not respond, requiring the claimant to initiate a lawsuit to recover for such construction defects. *Id*. A question faced by liability insurers in Florida is whether the Chapter 558 process qualifies as a "suit," thereby potentially triggering their duty to defend Chapter 558 claims. The answer depends on the policy's definition of the term "suit."

On December 14, 2017, in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 42 Fla. Weekly S9606 (Dec. 14, 2017), the Florida Supreme Court issued a decision finding that the Chapter 558 pre-litigation process qualifies as a "suit" as defined in the policy because "alternative dispute resolution proceedings" are included within the scope of the policy's definition of "suit." However, the Court explained that the Chapter 558 framework was not a "civil proceeding" as it did not produce legally binding results, did not take place in a court of law, and was nothing more than a voluntary dispute resolution process.

Crum & Forster Specialty Insurance Company ("C&F") provided general liability insurance to Altman Contractors, Inc. ("Altman"), the general contractor for the construction of a high-rise residential condominium in Broward County, Florida, Sapphire Condominium ("Sapphire"). Altman was insured by C&F for the Sapphire project through seven consecutive one-year commercial general liability policies, all of which were materially the same (the "Policy"). The Policy provided in pertinent part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the

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> insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

Id. at 3. "Suit" is defined in the Policy as follows:

> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
>
> a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
>
> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

Id.

In compliance with Chapter 558, Sapphire served Altman with a series of notices of claim, which cumulatively claimed over 800 defects in the Sapphire project. In turn, Altman notified C&F of Sapphire's claims and demanded C&F to defend and indemnify Altman as to Sapphire's claims. C&F denied that the Chapter 558 notices invoked its duty to defend, taking the position that the notices did not constitute a "suit." *Id.* at 3-4.

As discussed above, while the Court concluded that the Chapter 558 process cannot be considered a "civil proceeding" under the terms of the Policy because the recipient's participation in the process is not mandatory or adjudicative, it found that the Chapter 558 process is included in the Policy's definition of "suit" as an "alternative dispute resolution proceeding" to which the insurer's consent is required to invoke the insurer's duty to defend the insured. *Id.* at 12-13. Significantly, however, the Court did not address the additional terms of the Policy, which required C&F's consent before an insured could participate in an alternative dispute resolution proceeding because it was outside of the certified question presented to the Court and an issue of fact disputed by the parties. *Id.*

Learning Point: The significance of *Altman Contractors* is far reaching and should have all liability carriers reviewing their policies' definition of the term "suit." Depending on the language of the policy, costs incurred during the Chapter 558 proceeding can potentially be recoverable under a liability policy with similar definitions of the term "suit." Additionally, with regard to policies requiring an insurer's consent to participate in an "alternative dispute resolution proceeding" in order to invoke an insurer's defense obligation, the implication of an insurer's refusal to consent is still unchartered waters and remains to be seen. As such, an insurer should carefully consider its response in deciding whether to consent to or reject participation in the process. ♦

New York Court Of Appeals Expands Insurance Law Section 3420 To Insureds That Have A Presence In New York And Create Risks In New York

by ***Melissa Cloonan***

The recent New York Court of Appeals decision *Carlson v. American International Group, Inc.*, 2017 N.Y. Slip. Op. 08163 (Nov. 20, 2017), may have sweeping impacts on out-of-state insurance carriers.

Claudia Carlson was killed when a truck crossed a double-yellow line divider and hit her car head-on. The truck was painted with DHL Worldwide Express, Inc.'s logo ("DHL"), owned by MVP Delivery and Logistics, Inc. ("MVP"), and driven by William Porter, an employee of MVP. At the time of the accident, DHL and MVP were parties to a cartage agreement, in which MVP used its fleet of trucks and employees to perform DHL's package delivery services in Western New York. Michael Carlson, husband of Claudia Carlson, filed an action under Insurance Law § 3420 (a)(2) to collect on insurance policies issued to DHL by National Union Fire Insurance Co. ("National Union") and American Alternative Insurance Co. ("AAIC"). These insurance policies listed coverage for "hired auto" to DHL, its employees, and "anyone else while using with your permission a covered 'auto' you own, hire, or borrow" and for vehicles "hired by DHL or on DHL's behalf and used with DHL's permission." *Carlson*, *supra*, 2017 N.Y. Slip. Op. 08163 at *2.

The questions presented to the Court of Appeals were whether Carlson had sufficiently pled that MVP is an "insured" under DHL's policies and whether the policies fall within the purview of Insurance Law § 3420 as policies "issued or delivered" in NY. The Court held that the issue of whether MVP is an "insured" is a question of fact to be decided by the trier of fact. The Court also held that § 3420 encompasses situations where both insureds and risks are located in this State.

On appeal, AAIC argued that § 3420 did not permit Carlson to file a claim against its Policy. AAIC's Policy was initially issued by DHL's predecessor, Airborne, Inc., which is headquartered in Washington, and later assumed by DHL, which is headquartered in Florida, and was issued in New Jersey. Thus, AAIC stated that its Policy was not "issued or delivered" in NY.

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NY Insurance Law § 3420(a) states:

> No policy or contract insuring against liability for injury to person . . . or against liability for injury to, or destruction of, property shall be **issued or delivered in this state**, unless it contains in substance the following provisions or provisions that are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors[.] (bolded for emphasis).

The Court reasoned that the meaning of "issued or delivered" is informed by its decision in *Preserver Ins. Co. v. Ryba*, 10 N.Y.3d 635 (2008). In *Preserver*, the Court held that § 3420(d) applied to policies "issued for delivery" in New York and that "a policy is 'issued for delivery' in New York if it covers both insureds and risks located in this state." *Preserver*, *supra*, 10 N.Y.3d at 642. Therefore, in the case at bar, the Court held that § 3420 applies to policies that cover insureds and risks located in the State, not where the policy document itself was actually handed over or mailed. The Court reviewed the legislative history of § 3420 as well as the 2008 change in the language in § 3420(d) from "issued for delivery" to "issued or delivery," to determine that the application of this Section must be broadened and liberally construed. The Court stated that in applying *Preserver*:

> [I]t is clear that DHL is "located in" New York because it has a substantial business presence and creates risks in New York. It is even clearer that DHL purchased liability insurance covering vehicle-related risks arising from vehicles delivering its packages in New York, because its insurance agreements say so.

Carlson, *supra*, 2017 N.Y. Slip. Op. 08163 at *9.

In a sharp Dissent, Justice Garcia wrote that the Majority's "misinterpretation" of § 3420 "enacts sweeping changes across the Insurance Law, generating substantial implications, both known and unknown." *Carlson*, *supra*, 2017 N.Y. Slip. Op. 08163 at *18. The Dissent cannot fathom the idea that the New York legislature intended to require every automobile insurer throughout the country to comply with New York insurance statutes on the chance that a vehicle may be driven into New York or to dictate the relationship between out-of-state insureds and out-of-state insurers. The Dissent further questioned whether this interpretation of § 3420 will now apply to out-of-state residents driving into New York, owning property there, or vacationing there.

Learning Point: The scope and impact of this broadened interpretation of § 3420 is currently unknown. It is unclear how far future courts will reach in applying § 3420 and whether out-of-state insurers will be greatly impacted as the Dissent predicted. However, out of pre-caution, national and out-of-state insurance carriers should keep in mind the potential New York presence their insureds may have, and whether these policies meet the requirements of New York Insurance Law to avoid coverage issues and potential litigation in New York. ♦

Third Circuit Rules That Even Short Work Breaks Are Compensable Under FLSA

by ***Brian I. Confino***

In *Secretary United States Department of Labor v. American Future Systems, Inc. d/b/a Progressive Business Publications*, No. 16-2685 (October 13, 2017), the Third Circuit ruled that the FLSA requires employers to compensate non-exempt employees for all rest breaks of 20 minutes or less.

American Future Systems, d/b/a Progressive Business Publications ("Progressive"), is a business publication and distribution company located in suburban Philadelphia. Progressive pays its sales representatives on an hourly basis and distributes bonuses on a sales-per-hour basis. Sales representatives are compensated only for "working time," when they are logged onto their computers at their workstations. They are required to log off when they leave their workstation for any reason.

Previously, Progressive had a policy that gave its representatives two 15-minute paid breaks per day. In 2009, it eliminated the paid breaks, instead allowing employees to log off their computers at any time, calling it "flexible time." However, if the employees were logged off for more than 90 seconds, they were not paid for the break. The unpaid breaks included time to use the bathroom, get coffee or to take a moment in between sales calls to prepare for the next call.

In its motion for summary judgment, Progressive argued that since the FLSA does not require an employer to provide breaks and the flexible time does not constitute hours worked under the FLSA, the Company is not required to pay for the breaks at issue. The Company asserted that *29 C.F.R. § 785.16* applied, which states that breaks taken solely for the employee's personal benefit need not be counted as compensable working time. Progressive maintained that, because its system does not place any obligation on representatives to return to their workstations to continue working after breaks, representatives are completely relieved of all work-related duties during break time, and are therefore "off duty" pursuant to Section 785.16.

The Third Circuit disagreed, ruling that *29 C.F.R. § 785.18* applied instead, which states that short breaks ranging from five minutes to 20 minutes must be counted as compensable working time. The Court found that the more specific language

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in 785.18 trumped the general guidance in 785.16. It explained that the FLSA is a "humanitarian and remedial legislation" and "has been liberally interpreted." Employers are not required to have a break policy, but if they do, the FLSA requires that employees be properly compensated. The Court stressed that an employer cannot simply avoid this obligation by mischaracterizing breaks as flexible time off.

Learning Point: The Third Circuit's precedential ruling brings the Circuit's conception of the interplay between the CFR and FLSA, and the obligations that result, in line with the liberal interpretation of the DOL. As a result, employers, especially in Pennsylvania, New Jersey, and Delaware, who permit employees to take breaks lasting under 20 minutes, should be aware that such breaks most likely need to be paid. This may include, for example, splitting an unpaid 30-minute lunch break into two 15-minute breaks because the business requires the break be interrupted. Employers should have policies directing employees and managers on paid and unpaid break time, and that unpaid breaks of over 20 minutes must be taken in their entirety. ♦

Certainty Of Award At The Time A Third-Party Suit Is Resolved Triggers Equitable Apportionment For Workers' Compensation Claimants

by ***Ian T. Williamson***

In *Matter of Terranova v. Lehr Construction Co.*, 2017 NY Slip Op 08799 (Court of Appeals, December 19, 2017), New York's Highest Court held that a claimant's litigation costs may be equitably apportioned if the award is quantified at the time a third-party lawsuit is resolved.

In *Terranova*, the claimant injured his knee on a raised floor tile while working as a foreman for Lehr Construction Company ("Lehr"). He sought workers' compensation benefits from Lehr's carrier, New Hampshire Insurance Company ("NHIC"), as well as damages from the third-party contractor responsible for the defective tile. He settled with the third-party contractor and received workers' compensation payments while simultaneously litigating the extent of his schedule loss of use. It was ultimately determined by the New York State Workers' Compensation Board ("WCB") that the claimant suffered a ten percent schedule loss of use that yielded him 28.8 weeks of benefits, amounting to an additional $9,960.00 to the $21,495.99 he had already received.

In the lower court decision, the Third Department affirmed a decision of the WCB which found that the claimant was not entitled to continued payments for litigation costs because the schedule loss of use award had an ascertainable present value. In reviewing the lower court decision, the Court of Appeals acknowledged that Section 29 of the Workers' Compensation Law gives the claimant the first right to bring a third-party action and that when a claimant recovers in the third-party action, the carrier is granted a lien on the amount of recovery proceeds equal to the past amount of compensation it has paid. The 1975 amendment to Section 29 of the Workers' Compensation Law makes clear that this lien does not bar a claimant's equitable apportionment for attorney's fees. *See* Workers' Compensation Law, Section 29, subd 1.

It is established that litigation costs should be apportioned at the time of a third-party settlement, when the value of future compensation payments that a carrier has been relieved of paying is not so speculative that it would be improper to estimate and to assess litigation costs against this benefit to the carrier. *See Matter of Kelly v. State Ins. Fund*, 60 N.Y.2d 131, 135-139 (1983). In situations where the value of benefits associated with a disability cannot be quantified or reasonably predicted, it is not appropriate for a court to apportion attorney's fees based upon that fluctuating value at the time of the third-party settlement. *See Burns v.*

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Varriale, 9 N.Y.3d 207 (2007). In *Burns*, the fluctuating variable was the claimant's income; however, the Court noted that this was not sufficient to absolve a carrier from periodically paying its equitable share of claimant's attorney's fees as the benefits accrue, as in a schedule loss of use circumstance.

Here, the precedents of *Kelly* and *Burns* do not mandate an "all or nothing" application with regard to carriers' payments of litigation costs in schedule loss of use claims where awards shall be either assigned at the time of a third-party settlement or subsequently waived. Rather, a court must determine whether the award can be quantified at the time of the third-party settlement; if schedule use of loss benefits can be determined based upon factors such as the time frame allocated in terms of payout, then such costs can and should be equitably apportioned.

Learning Point: *Terranova* illustrates the importance of acknowledging shades of gray when it comes to equitable apportionment of litigation costs in workers' compensation awards. The onus of paying a claimant's litigation costs rests on the shoulders of the workers' compensation carrier wherever such value can be feasibly ascertained, even in cases where a schedule loss of use award is concerned. ♦

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SUBROGATION GROUP'S SUCCESS CONTINUES

100% Pre-Suit Recovery Beats Out Other's Recovery

CM Partner **Robert A. Stern** (New York/New Jersey) was retained by an Insured and its insurance market to represent their recovery interests arising out of a sprinkler head discharge. One of the market members decided not to retain CM but instead to seek recovery from the adversary on its own. Robert stated to the non-cooperating market member that it had a better chance of a recovery using CM then going at it alone; but, the market member disagreed.

Robert then approached the liability carrier and argued that the sprinkler head was damaged by its insured, the overnight cleaning crew. The liability carrier argued that there were no witnesses, video or any other admissible proof to the cleaning crew damaging the sprinkler head. Notwithstanding, Robert continued to seek a full recovery for CM's clients. After the non-participating market member settled its portion of the claim with the liability carrier for less than the full loss amount of its share of the loss, the liability carrier pushed harder in wanting a discount to settle from CM's clients. Robert refused to move off a full recovery, and in the end, the liability carrier settled with CM's clients for 100% of their RCV damages.

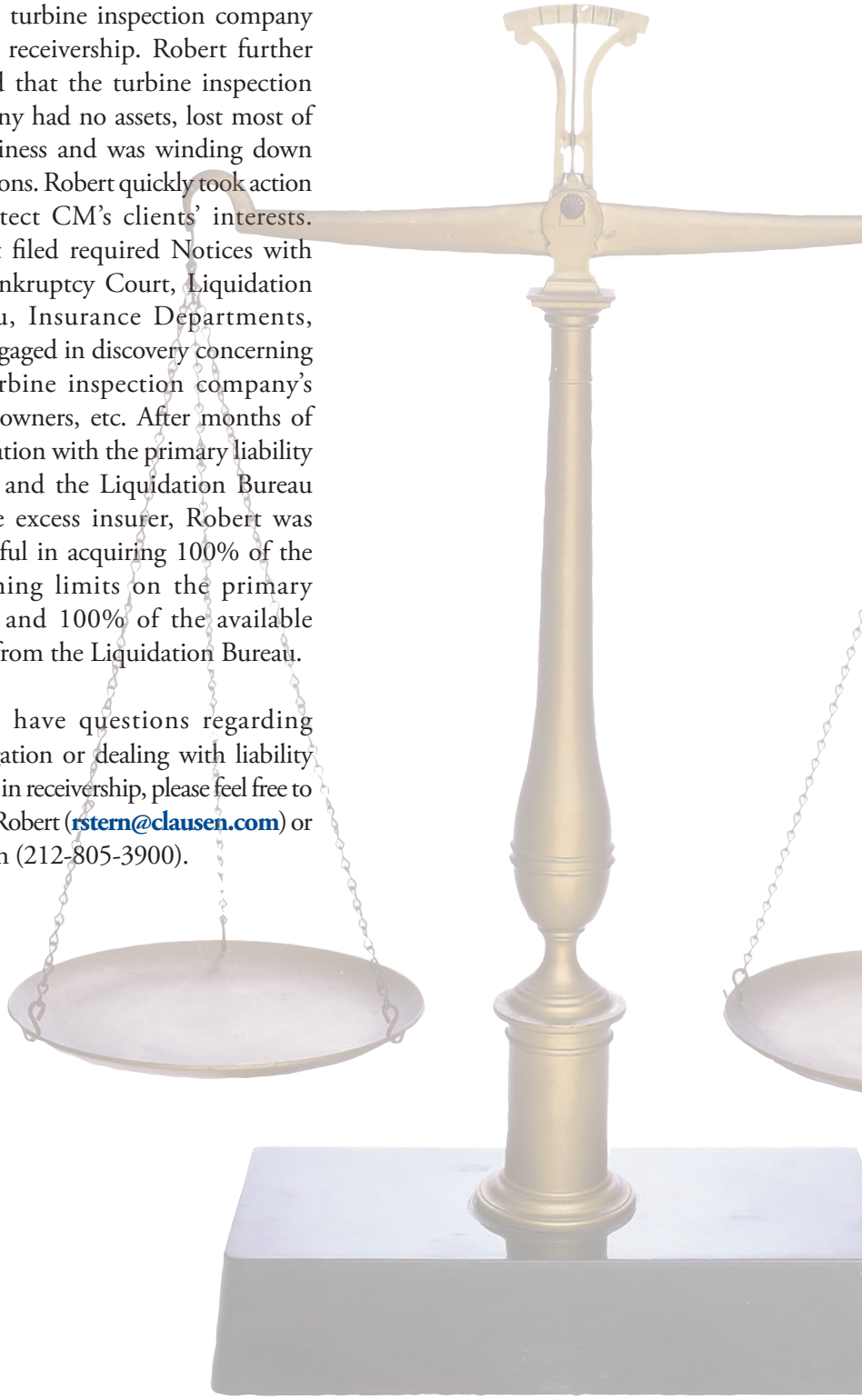
If you have questions regarding Subrogation or negotiating, please feel free to e-mail Robert (**rstern@clausen.com**) or call him (212-805-3900).

Seven Figure Recovery Following Catastrophic Failure Of A Steam Turbine

A steam turbine used to provide cold air and water to certain New York City buildings exploded. As a result, the Insured suffered property and business income loss. CM's clients indemnified the Insured. CM's clients actually hired a different set of attorneys to handle the subrogation investigation and litigation. Litigation was filed against a turbine inspection company. The Defendant contested liability, asserted contract defenses and challenged the damages. After an appeal, the litigation being sent back to the trial court and no settlement offers on the table, the clients transferred the file to CM Partner **Robert A. Stern** (New York/ New Jersey).

Robert learned that the liability carrier for the turbine inspection company had a declining limits policy. Robert also learned that the excess carrier for the turbine inspection company was in receivership. Robert further learned that the turbine inspection company had no assets, lost most of its business and was winding down operations. Robert quickly took action to protect CM's clients' interests. Robert filed required Notices with the Bankruptcy Court, Liquidation Bureau, Insurance Departments, and engaged in discovery concerning the turbine inspection company's assets, owners, etc. After months of negotiation with the primary liability carrier and the Liquidation Bureau for the excess insurer, Robert was successful in acquiring 100% of the remaining limits on the primary policy and 100% of the available funds from the Liquidation Bureau.

If you have questions regarding Subrogation or dealing with liability carriers in receivership, please feel free to e-mail Robert (**rstern@clausen.com**) or call him (212-805-3900).



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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 an 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

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.

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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