CM REPORT

of Recent Decisions

2018 • Vol. 1

Restatement Of The Law Of Liability Insurance

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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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We are proud to present a "Guest Sidebar" in this issue, authored by one of our senior shareholders, ***Amy R. Paulus****, the Liability Coverage and Reinsurance Practice Group Leader 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.

Restatement Of The Law Of Liability Insurance Makes Its Mark Prior To Approval

by ***Amy R. Paulus***

As we reported last issue, Clausen Miller's Restatement of Liability Insurance Law Task Force assists insurers in understanding, monitoring, and responding to the *Restatement's* unprecedented "rewriting" of the common law on liability insurance on a broad array of issues. In a dramatic departure from the historic purpose of a Restatement, the *Restatement* of Liability Insurance Law is largely an advocacy piece, unabashedly promoted by its lead authors as a tool to change existing law to favor policyholders. The *Restatement* drafts have been met with sustained objections and criticism since inception as a Principles project, and the American Law Institute deferred a final vote on this *Restatement* until its next annual meeting in May 2018.

Numerous sections of the draft *Restatement* contain extremely controversial proposals that seek to fundamentally alter availability of insurance coverage and the ability of insurers to conduct business pursuant to existing contracts. For example, the current draft *Restatement* proposes replacement of the "plain meaning rule" for determining the meaning of a policy term with a "plain meaning presumption" that can be refuted by the policyholder with extrinsic evidence of a contractual intent. Further, even if a policy term is unambiguous on its face, that plain meaning can be overcome if a court determines that a reasonable person would clearly give the term a different meaning in light of extrinsic evidence. The draft *Restatement* proposes that a policyholder be allowed to rely on a broad array of extrinsic evidence to support its proposed interpretation of a claimed ambiguous policy provision. Conversely, the draft *Restatement* restricts the ability of insurers to present extrinsic sources of meaning to support the insurers' proposed

SIDEBAR

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interpretation to defeat a claim of ambiguity. Obviously, this proposal rewrites the black-letter "plain meaning" rule of contract interpretation.

The draft *Restatement* suggests an expansion of the insurer's duty to defend, and broadens the "four corners" analysis by also requiring insurers to consider not only the facts alleged but also facts that become known through the insurer's investigation. However, extrinsic facts will only defeat a duty to defend that otherwise exists when the issue concerns whether the claimant is an insured or whether a vehicle is covered under an auto policy. The *Restatement* also advocates for the imposition of severe penalties for an insurer's "unreasonable" failure to defend, and an expansion of consequences for a breach of a duty to settle a claim, including a waiver of policy limits.

The draft *Restatement* seeks to impose liability on insurers for selecting defense counsel that commit legal malpractice. Further, the draft *Restatement* proposes that insurers pay legal fees of policyholders in coverage disputes beyond the current standards contained in statutes or court rules—an obvious abrogation of the *American Rule*.

With respect to trigger and allocation, the draft *Restatement* proposes a default "injury in fact" trigger, but suggests a minimal burden of proof for the policyholder, which would allow a policyholder to trigger coverage under multiple policies based on evidence of exposure only. Then, the burden would shift to the insurer to show that no injury or damage actually occurred in its policy period. The draft *Restatement* adopts a time-on-the-risk allocation standard, but will likely add an exception to pro rata allocation for periods of time when insurance is allegedly "unavailable" for risks such as asbestos liability or when absolute pollution exclusions were added to CGL policies.

Other controversial provisions include commentary on when excess policies are implicated and whether excess insurers must "drop down" following the insolvency of a primary insurer. The draft *Restatement* also proposes restrictions on the "known loss" doctrine, limiting it solely to situations in which the policyholder is subjectively aware than an adverse judgment with regard to its liability is substantially certain.

Should the aspirational, pro-policyholder advocacy aspects of the *Restatement* take hold within the courts, the practical implications for insurers may be dramatic. For example, the punitive measures advocated for breach of the duty to defend or to settle a claim may result in insurers undertaking the defense of many uncovered claims, and filing an increased number of declaratory judgment actions to obtain a judicial imprimatur for the termination of its defense. Further, with increased claim costs, at least one scholarly commentator has posited that the *Restatement* will ultimately increase insurance premiums and reduce the availability of insurance, especially for the low income. *See* George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, Geo. Mason L. Rev. Vol. 24:635 (2017).

The Council of Advisors to the *Restatement* Reporters recently

approved Draft No. 4, except for §3 (the presumption in favor of the plain-meaning of standard form policy terms), §4 (ambiguous terms and extrinsic evidence), and §12 (liability of the insurer for the conduct of defense), and conforming changes to §§47 and 48 (insurance for known liabilities and remedies). The Reporters will present their proposed revisions to the Council in March 2018, and the final Draft is still scheduled to be presented for approval at the ALI Annual Meeting in May 2018.

While we await the final version and vote next month, at least two courts have seen fit to cite to the ***draft*** *Restatement* as authority supporting their opinions on the issues of reimbursement of defense costs for uncovered claims, and to support a jury instruction on the definition of "cooperation" within the meaning of a liability policy. Further, one court recently rejected the policyholder's attempt to use the draft *Restatement* to essentially overrule existing New York precedent regarding the consequences for breach of the duty to defend.

In *Selective Ins. Co. of Am. v. Smiley Body Shop, Inc.*, 260 F. Supp .3d 1023; 2017 U.S.Dist. LEXIS 81007 (May 26, 2017), the District Court for the Southern District of Indiana considered whether Selective was entitled to recoup the costs it paid to defend a policyholder up to the point that the policyholder obtain summary judgment in its favor in the underlying lawsuit. The court denied Selective's motion, noting that Selective did not point to any provisions in its policy that would support recoupment, and in the absence of Indiana law on the issue, referred to three reported decisions from other jurisdictions. In addition, the court cited to Section 21 of the Draft of the *Restatement*, which provides that "[u]less otherwise stated in the insurance policy or otherwise agreed to by the insured, and insurer may not seek recoupment of defense costs from the insured, even when it is subsequently determined that the insurer did not have a duty to defend or pay defense costs." *Restatement* of the Law of Liability Insurance §21 (discussion draft, to be considered by the members of the American Law Institute).

In July 2017, the District Court for the Southern District of Texas also cited at length to the draft *Restatement*, despite the fact that it is not final. In *Mid-Continent Cas. Co. v. Petroleum Solutions, Inc.*, 2017 U.S.Dist. LEXIS 107603; 2017 WL 2964933 (July 12, 2017), the court considered Mid-Continent's motion for a new trial based in part on its argument that the court erroneously charged the jury on the meaning of the cooperation clause in its CGL policy. Mid-Continent contended that the court's instruction that the policyholder "complied with the cooperation clause if PSI's conduct was reasonable and justified under all the circumstances that existed," improperly defined "cooperate," thereby casting doubt on whether the jury was properly guided in its deliberations. Mid-Continent argued that the court should have directed the jury to use the plain meaning of the wording of the cooperation clause. Mid-Continent proposed a jury instruction defining "cooperate" as "to be helpful by doing what someone asks or tells you to do."

The *Mid-Continent* court found that there was no basis in the policy language for Mid-Continent's proposed instruction, nor did the proposed instruction correctly state Texas law. The court found that the long-standing test articulated in Texas for "cooperation" described the insured's conduct as "reasonable and justified under the circumstances." The court also relied on Couch on Insurance for the principle that "[a]n insured cannot arbitrarily or unreasonably decline to assist in making a fair and legitimate defense or refuse to permit any defense to be made in his or her name."

Significantly, the *Mid-Continent* court then cited to Comment b. of the Restatement, tentative draft No.1, Section 29, dated March 21, 2016—note this is not even the most current draft of the Restatement. Comment b. in this 2016 draft provides:

> *b. Reasonable Assistance.*
>
> The duty to cooperate should take into account the position of the particular insured whose conduct is at issue, as well as the needs of the insurer. What is reasonable depends on, among other things, the knowledge and experience of the insured, the extent of the risks presented by the legal action, the complexity of the action, the ability of the insurer to obtain the information or other object of cooperation from sources other than the insured, the good-faith effort of the insured, and the extent to which cooperation is needed to reduce the insurer's exposure.

Additionally, the Reporter's Note b. states that "[c]ourts have consistently subjected the duty to cooperate to a reasonableness test." *Id.*

With this lengthy footnote citation, the *Mid-Continent* court bolstered

its decision to deny Mid-Continent's motion for a new trial. What is particularly surprising about this decision is that the court did not need to cite to the 2016 tentative draft of the *Restatement* because Texas case law directly on point fully supported the court's ultimate ruling. Thus, one must ask why the court went further than required to include a lengthy discussion of a non-final draft of the *Restatement*. One must also consider whether this signals the potential willingness of other courts to unnecessarily adopt or give credence to the *Restatement* in circumstances in which it is clearly unnecessary to do so.

Finally, we report that most recently another court was presented with the *Draft Restatement* by a policyholder but this time swung and missed. In *Catlin Specialty Ins. Co. v. J.J. White*, 2018 U.S. Dist. LEXIS 31189 (Feb. 27, 2018), the U.S. District Court for the Eastern District of Pennsylvania found that under applicable New York law, Catlin breached its duty to defend the policyholder under a pollution liability policy. The policyholders then argued that the insurer should be estopped from challenging whether indemnity coverage was owed for the underlying settlement as a consequence of its breach of the duty to defend. The policyholders cited to the *Draft Restatement*, §19 (Draft Mar. 28, 2017), which advocates that "an insurer that breaches the duty to defend without a reasonable basis for its conduct must provide coverage for the legal action for the which the defense was sought, notwithstanding any grounds for contesting coverage." The court notes that a comment to this draft section contends that "this rule encourages insurers to fulfill their duty to defend by providing a consequence for a wrongful breach of that duty," and that "[o]rdinary contract damages may not provide an adequate incentive for insurers to defend." *Id*.

However, the *Catlin* court relied instead on *K2 Inv. Grp. v. Am. Guar. & Liab. Ins. Co.*, 6 N.E.3d 1117, 1119-1121 (N.Y. 2014), which reaffirmed existing New York Court of Appeals precedent in the *Servidone* case that previously considered and rejected such arguments and "policy concerns." The *Servidone* and *K2* courts both concluded that the duty to indemnify is determined by the actual basis for the insured's liability, not the broader duty to defend standard based on the allegations in the pleadings. Thus, "to hold the insurer liable to indemnify on the mere 'possibility' of coverage perceived from the face of the complaint – the standard applicable to the duty to defend – the court [would] enlarge[] the bargained for coverage as a penalty for the breach of the duty to defend, and this it cannot do." *Servidone Construction Corp. v. Sec. Ins. Co. of Hartford*, 477 N.E.2d 441, 442-445 (N.Y. 1985).

CM's Restatement Task Force will continue to report on all significant developments, while maintaining its proprietary database to track the issues, jurisdictions/courts, rulings, briefs and other aspects of how the *Restatement* is used to alter the current state of insurance law. Our Task Force is positioned to provide consulting services, *amicus* briefing, and generally to assist insurers in setting the record straight. Should you have any questions or wish to discuss any issues relating to the *Restatement* or our Task Force, please contact Task Force Chair **Amy Paulus** at **apaulus@clausen.com**, or the Senior Members of the Task Force: **Colleen Beverly** at **cbeverly@clausen.com**, **Ilene Korey** at **ikorey@clausen.com**, or **Mark Zimmerman** at **mzimmerman@clausen.com**.

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EXPERIENCED COVERAGE ATTORNEY JOINS CM'S IRVINE, CA OFFICE

Attorney **Kris K. Spiro** has joined Clausen Miller's Irvine office and is a member of the firm's Insurance Law practice group. Kris has rendered numerous coverage opinions involving standard and manuscript primary, excess and umbrella policies including general liability, personal and advertising injury, construction defect and professional liability policies. In addition to her experience as a coverage attorney, Kris has worked in the claims management field for a large insurance company, where she was responsible for handling hundreds of claims from tender through resolution, as well as for providing input in policy drafting and bordereau maintenance. With her experience in claims management, Kris understands the need to promptly and effectively communicate with her insurance clients in order to assist them in achieving their goals and satisfying their insureds. Contact Kris at **kspiro@clausen.com** for more information.

MELINDA KOLLROSS PRESENTS AT DRI APPELLATE ADVOCACY/TRIAL TACTICS SEMINAR IN VEGAS

CM Appellate Practice Group Co-Chair **Melinda Kollross** moderated a panel discussion "Positioning a Case for Appeal" at the DRI Appellate Advocacy/Trial Tactics Seminar held recently at Planet Hollywood Resort in Las Vegas. The distinguished panel included former Oregon Supreme Court and Oregon Appellate Court Justice W. Michael ("Mick") Gillette, now at Schwabe Williamson & Wyatt, Teresa M. Young of Brown & James, PC and Jennifer Willis Arledge of Wilson Elser. The panel discussed how to best position a case for a positive resolution on appeal, from the pre-litigation stages through the actual appeal, including tips and strategies for framing issues, preserving claims of error, and developing the strongest appeal arguments whether as appellant or appellee/respondent—including when and how to get appellate counsel involved. For more information, please contact Melinda at **mkollross@clausen.com** or 312.606.7608.

JIM SWINEHART PRESENTS AT DRI INSURANCE COVERAGE AND CLAIMS INSTITUTE IN CHICAGO

On March 23, 2018, **Jim Swinehart** gave a presentation at the DRI Insurance Coverage and Claims Institute Conference held in Chicago. His presentation was entitled "At a Loss: Concurrent Cause of Loss/Ensuing Loss Provisions" and focused on loss scenarios involving one or more cause that is covered and one or more that is excluded. Such loss scenarios can be perplexing and complicated. The aim of the presentation was to provide pointers in analyzing concurrent causation and ensuing loss scenarios. Jim also prepared a paper in conjunction with the presentation. For more information, please contact Jim at **jswinehart@clausen.com** or 312-606-7469.

DON SAMPEN ARTICLE PUBLISHED IN ILLINOIS BAR JOURNAL

An article on the appellate process was recently published by **Don R. Sampen** in the March 2018 edition of the *Illinois Bar Journal*. The article is entitled "A Guide to Illinois Interlocutory Appeals." It addresses the requirements for interlocutory appeals under Illinois Supreme Court Rules 306, 307 and 308.

https://www.clausen.com/wp-content/uploads/2018/03/A-Guide-to-Illinois-Interlocutory-Appeals.pdf

SHEILA TOTORP SCHEDULED TO PRESENT AT THE 2018 WEST COAST CASUALTY'S CONSTRUCTION DEFECT SEMINAR

CM partner **Sheila M. Totorp** will be presenting at the 2018 West Coast Casualty's Construction Defect Seminar in Anaheim, California on May 16-18, 2018. She will be presenting "Subcontractor Wars: The Last AI" with co-presenters from the insurance industry. Sheila has practiced law at Clausen Miller for seven years, and routinely represents subcontractors in construction defect litigation throughout California.

MELINDA KOLLROSS PUBLISHED IN THE FEBRUARY 2018 EDITION OF DRI'S *FOR THE DEFENSE* MAGAZINE

Read Clausen Miller Appellate Practice Group Co-Chair **Melinda Kollross's** latest feature article "Winning Your Appeal with Your 'Statement of Facts'" published in the February 2018 edition of DRI's For the Defense Magazine. The article weaves together both practical procedural suggestions and creative options for crafting your factual recitation to best suit—and position you to win—your next appeal.

https://www.clausen.com/wp-content/uploads/2018/02/FTD-1802-Kollross.pdf

ESPOSITO GETS APPEAL DISMISSED FOR LACK OF JURISDICTION

Clausen Miller Appellate Practice Group senior counsel **Paul Esposito** recently notched a defense victory on appeal when the Appellate Court in Chicago dismissed a plaintiff's appeal for lack of appellate jurisdiction. Plaintiff was the administrator of a decedent's estate. Her decedent was killed in a rear-end accident on a Chicago expressway. A jury returned a verdict for defendants because plaintiff failed to prove that decedent consciously experienced pain and suffering prior to death. When plaintiff herself died following the judgment, her attorney filed a notice of appeal before obtaining a substitute plaintiff.

The Appellate Court agreed with Esposito that once plaintiff died, her attorney lacked the authority to take any action on her behalf. He needed to obtain the appointment of a successor administrator. Having failed to timely do so, the attorney's notice of appeal was a nullity that could not confer appellate jurisdiction on the Court. Another reminder that the minefield of appellate practice is best navigated by experienced appellate practitioners. For more information contact Paul at **pesposito@clausen.com**.

LORY, LEIS AND FERRINI OBTAIN MALPRACTICE DISMISSAL AT PLEADING STAGE

In *Ladera Partners v. Goldberg, Scudieri and Lindenberg*, the plaintiff brought legal malpractice, negligence and breach of fiduciary duty claims in New York state court against its former attorneys based, in part, on a purported failure to provide it with notice of a foreclosure sale with respect to one of its properties. In a decision issued on January 9, 2018, the First Department affirmed the dismissal of the complaint in its entirety, agreeing that the plaintiff's claims were defeated by matters addressed in prior litigation and that some of the claims were duplicative of others. **Tyler Lory** and **Matthew Leis** obtained the favorable result in the trial court. **Joseph Ferrini** of the **Clausen Miller Appellate Group** handled the appeal.

California Supreme Court Confirms SB800 As The Exclusive Remedy For Construction Defect Claims

by ***Sheila M. Totorp***

Introduction

The unanimous decision by the California Supreme Court in the highly anticipated *McMillin Albany, LLC v. Superior Court*, No.5229762 (1/18/2018), case resolved a previous split in California law as to the boundaries of California's Right to Repair Act, Civil Code §§ 895, *et seq.* ("SB800"). In its decision, the Court settled two issues: (1) whether SB800 precludes a homeowner from pleading common law causes of action for defective conditions that resulted in physical damage to a home; and (2) whether a homeowner's failure to comply with SB800's pre-litigation procedures mandates a stay of proceedings where the homeowner commences litigation by asserting common law causes of action for construction defects.

The California Supreme Court answered "yes" to both, giving builders and developers a decisive win. The Court held that SB800 cuts off a homeowner's right to creatively plead around the statute by asserting common law causes of action against a builder or developer relating to alleged construction defects, and requires that homeowners participate in the SB800 pre-litigation procedures.

Facts

The homeowner Plaintiffs purchased 37 new single-family homes built by developer and general contractor McMillin Albany LLC ("McMillin") after January 2003. In 2013, the homeowners sued McMillin, alleging the homes were defective in nearly every aspect of their construction. The operative first amended complaint filed by the homeowners included common law claims for negligence, strict product liability, breach of contract, breach of warranty, and a statutory claim for violation of the construction standards set forth in SB800. The complaint alleged the defects caused property damage to the homes and economic loss due to the cost of repair and the reduction in property values.

McMillin sought a stipulation from the homeowners to stay the litigation so the parties could proceed through the informal pre-litigation process contemplated by SB800. The homeowners elected not to stipulate to a stay and instead dismissed their SB800 statutory claim. McMillin then moved for a court-ordered stay, which the trial court denied. In doing so, the trial court concluded it was bound to follow *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC,* 219 Cal.App.4th 98 (2013), which held that SB800 was adopted to provide a remedy for construction defects causing only economic loss and did not alter pre-existing common law remedies in cases resulting in actual property damage or personal injuries.

However, the trial court certified the issue as one worthy of immediate review. McMillin sought writ relief. The Court

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of Appeal granted the petition and issued the writ, disagreeing with *Liberty Mutual*. In doing so, the Court of Appeal held the Act's pre-litigation resolution process applied even though the homeowners dismissed their SB800 statutory claim. The Court of Appeal concluded that McMillin was entitled to a stay pending completion of the pre-litigation process.

Analysis

The Supreme Court of California granted review and affirmed the judgment of the Court of Appeal in a unanimous opinion authored by Justice Liu. The issue before the Court was whether a common law action alleging construction defects resulting in both economic loss and property damage is subject to SB800's pre-litigation notice and cure procedures. The Court's analysis relied heavily on statutory history and construction.

In *Aas v. Superior Court*, 24 Cal.4th 627, 632 (2000), the California Supreme Court held that the economic loss rule bars homeowners from recovering damages where there is no showing of actual property damage. In doing so, the Court emphasized that the Legislature was free to alter the limits on recovery and to add any homeowner protections it deemed appropriate. Two years later, the California Legislature responded by enacting comprehensive construction defect litigation reform, which was codified at Civil Code §§ 895-945.5 (commonly known as the Right to Repair Act or SB800). In addition to setting forth standards for construction of a dwelling and providing homeowners with a right to sue for deficiencies even in the absence of property damage or personal injury, SB800 also established a pre-litigation dispute resolution process, whereby builders must be given notice of alleged construction defects and an opportunity to cure the defects prior to a homeowner filing a lawsuit.

The California Supreme Court observed that the analysis turned on the extent to which the Legislature intended SB800 to alter the common law – whether SB800 was designed only to abrogate *Aas* by supplementing common law remedies with a statutory claim for economic loss or whether it was to go further and supplant the common law with new rules governing the method of recovery in actions alleging property damage.

The Court focused on the actual text of SB800 and the legislative history in making its ruling. Specifically, the Court noted that Civil Code § 896 expressly states that it applies to "any action" seeking damages for a construction defect, not just any action under the title. The Court also noted that the express language of SB800 states that the cause of action brought by a claimant shall be limited to violation of the standards set forth in SB800 except as explicitly set forth in SB800. The Court then points out that negligence and strict liability claims for property damage, unlike personal injury claims, are not among those specifically excepted from SB800. The Court found further support for SB800's comprehensive nature in the Legislative history, which consistently described the Act as "groundbreaking reform" and a "major change" in construction defect litigation, designed to "significantly reduce the cost of construction defect litigation and make housing more affordable." Finally, the Court noted that if it were to read SB800 to permit homeowners to continue to sue as before at common law, without abiding by the procedural requirements of SB800, it would thwart the mandatory pre-litigation process and right to repair.

The California Supreme Court concluded that the Legislature intended SB800 to: (1) displace and supplant common law as to construction defects that cause property damage; (2) supersede the holding in *Aas* by providing a statutory basis for recovery for construction defects in the absence of property damage; and (3) preserve the status quo for common law claims for personal injuries arising from construction defects. Therefore, SB800, and its appurtenant provisions, constitutes the exclusive remedy for economic losses and property damage arising from construction defects affecting residential construction projects and homeowners are required to initiate and complete the pre-litigation procedures provided in SB800 prior to commencing litigation.

Learning Points: The California Supreme Court held that SB800 is the exclusive remedy not just for economic loss, but also for property damage arising from construction defects. This decision limits the causes of action homeowners can bring against builders and developers. No longer can homeowners bring common law causes of action for negligence or strict liability against a builder alleging construction defects on new houses sold after 2003. All claims seeking recovery for construction defect damages are subject to SB800's pre-litigation procedures regardless of how they are plead in the complaint and homeowners must comply with the pre-litigation procedures before filing suit.

The *McMillin Albany* decision will have a significant impact on construction litigation by providing trial courts with the authority to ensure compliance with SB800, including strict compliance with the limitations periods set forth therein. Builders and developers will also be able to use SB800 to assert that homeowners' claims are not actionable if the allegedly defective condition was unilaterally repaired or changed by a homeowner or where the homeowner failed to fully comply with SB800's pre-litigation procedures. This is significant in that builders and developers can apply it as a defense to subrogation cases involving claims by homeowners' insurance carriers that have repaired property damage claims submitted by the homeowner without complying with the pre-litigation procedures of SB800.

In sum, the *McMillin Albany* decision is a win for builders and developers and will significantly impact the handling of construction defect claims and litigation for years to come. ♦

2nd Circuit Joins The List Of Federal Courts Holding That Sexual Orientation Discrimination Is A Violation Of Title VII

by ***Paul W. Daugherty***

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On February 26, 2018, the Second Circuit Court of Appeals issued an *en banc* decision in *Zarda v. Altitude Express, Inc*. No. 15-3775, holding that sexual orientation discrimination violates Title VII of the Civil Rights Act.

Facts

Zarda was a skydiving instructor who brought a discrimination claim under Title VII alleging he was fired from his job at Altitude Express, Inc., because he failed to conform to male sex stereotypes by referring to his sexual orientation. While it is well settled that gender stereotyping violates Title VII's prohibition on discrimination "because of . . . sex", the Second Circuit previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes non-conformity with a gender stereotype, are not cognizable under Title VII.

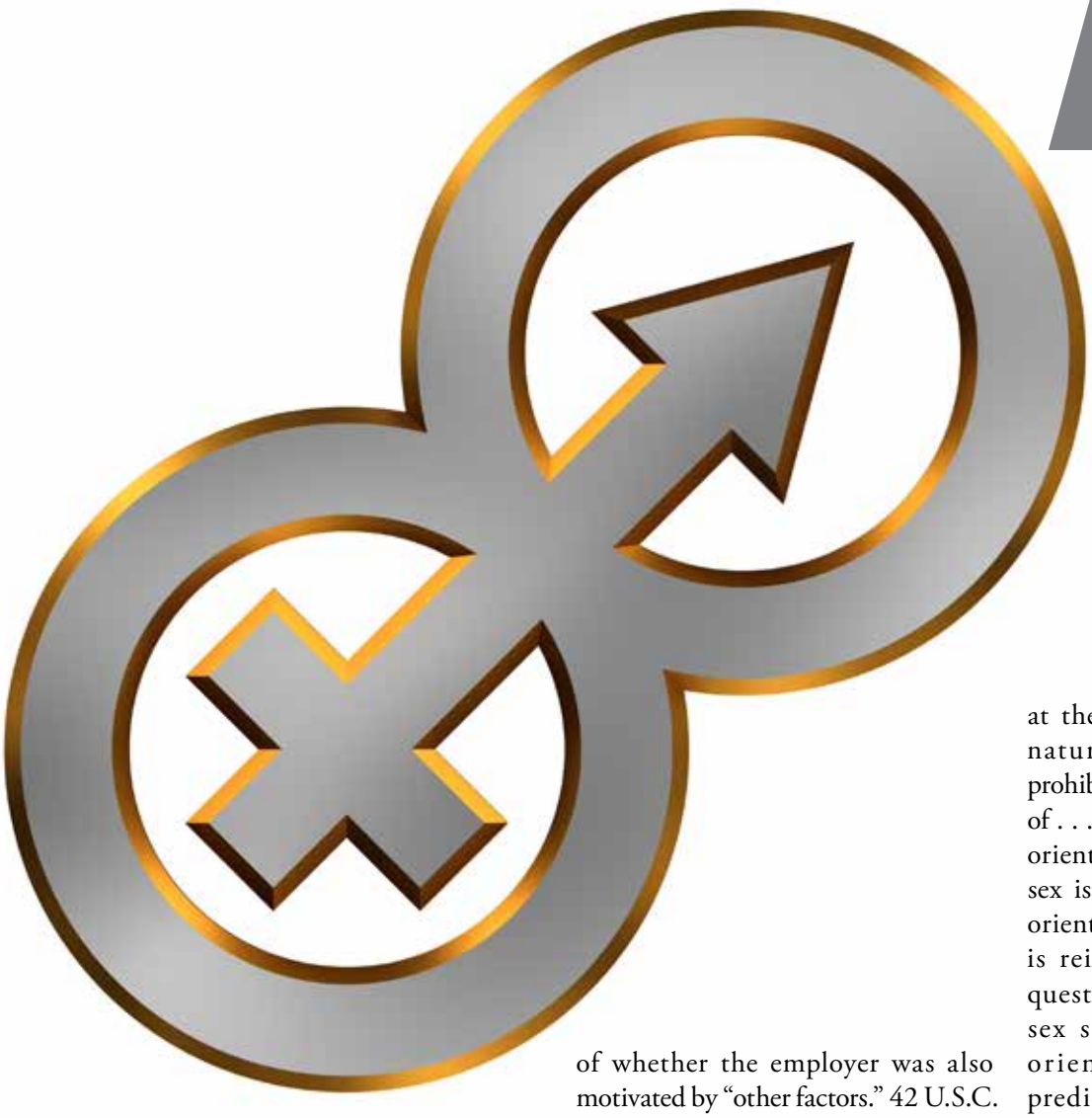
The U.S. District Court for the Eastern District of New York granted summary judgment to defendants because Zarda had failed to show that he had been discriminated against on the basis of his sex. On July 15, 2015, the EEOC decided *Baldwin v. Fox*, Decision No. 0120133080, 2015 WL 4397641, holding that sex discrimination **includes** sexual orientation discrimination. Consequently, Zarda asked the District Court to reinstate his Title VII claim. The District Court declined to do so citing the Second Circuit Opinion in *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). Zarda filed his appeal, and a panel of the Second Circuit affirmed the District Court's summary judgment ruling.

Analysis

The Second Circuit convened a rehearing *en banc* to consider whether Title VII prohibits discrimination on the basis of sexual orientation such that Second Circuit decisions/precedents to the contrary should be overruled.

En banc, the Court held that sexual orientation discrimination constitutes a form of discrimination "because of…sex" in violation of Title VII and therefore overturned its prior rulings on this issue in *Simonton* and *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-23 (2d Cir. 2005).

The Court noted that in 2015 the EEOC held that "Sexual orientation is inherently a 'sex based consideration'; accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." The Court noted that since the EEOC's decision in *Baldwin v. Fox* (July 15, 2015), that two circuits have revisited the question. The Eleventh Circuit (in March 2017) and the Seventh Circuit (in April 2017) conducted *en banc* hearings and held that discrimination on the basis of sexual orientation **is** a form of sex discrimination. The Court also stated that, "in deciding



whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase 'because of . . . sex,'. However, in interpreting this language, we do not write on a blank slate. Instead, we must construe the text in light of the entirety of the statute as well as relevant precedent. As defined by Title VII, an employer has engaged in 'impermissible consideration of . . . sex . . . in employment practices' when 'sex . . . was a motivating factor for any employment practice,' irrespective of whether the employer was also motivated by "other factors." 42 U.S.C. §2000E-2(m). Accordingly, the critical inquiry for a court assessing whether an employment practice is 'because of . . . sex' is whether sex was 'a motivating factor.'" The Second Circuit noted that in *Griggs v. Duke Power Co.*, the Supreme Court held that Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex, such as life expectancy, *Manheart*, 435 U.S. at 711 and non-conformity with gender norms, *PriceWaterhouse*, 490 U.S. at 250-51.

The Second Circuit concluded that sexual orientation discrimination is motivated at least in part, by sex and is thus a subset of sex discrimination. Therefore, looking at the text of Title VII the "most natural reading of the statute's prohibition on discrimination 'because of . . . sex' is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. The statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible bases for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination—which is motivated by an employer's opposition to romantic associations between particular sexes—is discrimination based on the employee's own sex."

Learning Point: This case illustrates a growing split amongst the Circuits as to what qualifies as "sex" discrimination, and whether or not it includes sexual orientation discrimination. While the Supreme Court has declined to review this issue, it appears that such a review is inevitable due to the continued split amongst the Circuits. ♦

No Coverage For Counterfeit Wine Under "Valuable Possessions" Policy

by ***Melinda S. Kollross***

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"O thou invisible spirit of wine, if thou hast no name to be known by, let us call thee devil!" (Shakespeare, *Othello*, act II, scene 3.)

With some amusing nods to Shakespeare, a California Appellate Court holds that an unsuspecting wine collector who purchased millions of dollars' worth of counterfeit wine from a "villainous wine dealer" sustained a financial loss, but no loss to property that was covered by his "Valuable Possessions" property insurance policy. "In other words, the wine collector is stuck with the devil wine without recompense. A Shakespearean tragedy, to be sure." *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33 (Cal. App. 4 Dist. 2018).

Facts

David Doyle collects rare, vintage wine. His "world-class" wine collection is housed in a wine storage facility in Laguna Beach. Starting in 2007, Doyle insured his wine collection against loss or damage by purchasing a "Valuable Possessions" policy from Fireman's Fund with a blanket policy limit of $19 million. Doyle purchased eight annual renewal policies.

During the eight years the policies were in effect, Doyle purchased close to $18 million of purportedly rare, vintage wine from Rudy Kurniawan. But a law enforcement investigation revealed that for many years Kurniawan had apparently been filling empty wine bottles with his own wine blend and affixing counterfeit labels to the bottles. In 2013, Kurniawan was convicted of fraud and was sent to prison for 10 years.

In 2014, Doyle filed a claim seeking reimbursement from Fireman's Fund "for the losses he sustained" due to Kurniawan's fraud. After conducting an investigation, Fireman's Fund denied all coverage stating there was no covered "loss" under the policy. In 2015, Doyle filed a first amended complaint alleging breach of contract, among other causes of action. Fireman's Fund filed a demurrer, which the trial court sustained without leave to amend. Doyle appealed.

Analysis

The Fireman's Fund insurance policy at issue is a preprinted "Scheduled Valuable Possessions Policy," which covers various items of valuable personal property such as jewelry, furs, and fine art. The policy also covers: " 'Collectibles', meaning wine, sports cards, dolls, model trains, and other private collections of rare, unique or novel items of personal interest including memorabilia." The "PERILS INSURED AGAINST" provision states: "We insure for direct and accidental loss or damage to covered property caused by an 'occurrence.' " The policy defines an "occurrence" as "a loss to covered property which occurs during the policy period and is caused by one or more perils we insure against." The policy does not define the term "loss."

The "EXCLUSIONS—LOSS NOT INSURED," portion of the policy lists various exclusions such as, "Wear and tear, gradual deterioration, latent

defect or inherent vice[.]" The policy also provides that: "If wine is covered ., the following exclusions also apply: [¶] a. Failure to use reasonable care to maintain all heating, cooling or humidity control equipment in proper operating condition.; [¶] b. Improper handling or storage; [¶] c. Consumption; or [¶] d. Normal shortage, leakage, spillage, evaporation, dissipation, spoilage or deterioration, all usual and customary to wine."

On appeal, Doyle argued that the policy provides "broad protection against all insurable risks, which include crime-related losses to [his] investment whether anything physical happened to the wine or not." Conversely, Firearm's Fund argued that no "loss or damage to covered property" occurred; that is, "the wine is in the exact same condition now that it was in when [Doyle] first insured it." Based on the nature of property insurance and the plain language of the policy, the Appellate Court agreed with Fireman's Fund; Doyle indeed suffered a financial loss, but there was no loss to his covered property.

The Court explained that the threshold requirement for recovery under a contract of property insurance is that the insured property has sustained physical loss or damage. The requirement that the loss be "physical," given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer where the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

Here, Doyle has not plead a breach of contract claim that can be proven at trial because nothing happened to the covered property (i.e., the wine that Doyle purchased and insured). That is, the plain language of the "PERILS INSURED AGAINST" provision makes it clear that Fireman's Fund was insuring against "direct and accidental loss . to covered property"—with the preposition "to" linked to "covered property." Fireman's Fund was accordingly insuring against any losses to the wine; Fireman's Fund was not insuring against any losses to Doyle's finances or to his unrealized expectations as to the value of the wine he had purchased. The wine remained counterfeit (and essentially worthless) from the time of purchase throughout the entire coverage period of the policy. Thus, Doyle cannot reasonably expect reimbursement from Fireman's Fund for the millions of dollars he spent buying wine which was essentially valueless at the time of purchase.

"Indeed, when it comes to property insurance, diminution in value is not a covered peril, it is a measure of a loss." Given the fundamental nature of property insurance, the policy Doyle purchased only insured him against potential harms to the wine itself, such as fire, theft, or abnormal spoilage; Doyle did not insure himself against any potential financial losses. Doyle did not buy a provenance insurance policy; Doyle bought a property insurance policy.

The Appellate Court expressly rejected Doyle's argument that because the subject policy does not list fraud as an exclusion, fraud is covered under the policy. The problem with Doyle's argument is that: "The burden is on the insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." Here, Doyle has failed to establish that any type of financial loss, including fraud, comes within the scope of the property insurance policy he purchased. That the policy does not specifically list fraud as an exclusion is irrelevant. The Court further noted that its decision is based on the clear and explicit language in the covered perils provision. The Court did not find the contract terms to be ambiguous and thus did not consider Doyle's expectations at the time of contracting based on extrinsic parol evidence.

The Court concluded by offering Doyle a "small piece of wisdom from the Bard of Avon": "The robbed that smiles steals something from the thief." (Shakespeare, *Othello*, act I, scene 3.)

Learning Point: Under standard property insurance policy language affording coverage for "direct and accidental loss or damage to covered property caused by an 'occurrence'" no coverage is provided for mere diminution in value of covered property unaccompanied by any physical loss or damage to the covered property. ♦

10th Circuit Holds Damage To Insured's Work Caused By Subcontractor's Faulty Workmanship A Covered "Occurrence" Under New York Law

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

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In *Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.*, No. 16-3359, 2018 U.S. App. LEXIS 3342, 2018 WL 843284 (10th Cir. 2018), the U.S. Court of Appeals for the Tenth Circuit, applying New York law in a construction defect coverage case, held that where a policy contains a "Subcontractor Exception" to a "Your Work" exclusion, property damage to an insured's work product caused by a subcontractor's faulty workmanship constituted a covered "occurrence", and coverage was not precluded under the "Your Work" exclusion.

Facts

Black & Veatch Corporation ("Black & Veatch") contracted with American Electric Power Service Corporation ("American Electric") for Black & Veatch to engineer, procure, and construct several jet bubbling reactors, which were designed to eliminate contaminants from exhaust emitted by coal-fired power plants. Black & Veatch subcontracted certain engineering and construction aspects to Midwest Towers, Inc. ("Midwest Towers"). Deficiencies in the components provided by Midwest Towers and constructed by Midwest Tower's subcontractors caused internal components of seven of the jet bubbling reactors to deform, crack, and sometimes collapse.

Pursuant to American Electric and Black & Veatch's subsequent settlement agreements, Black & Veatch was obligated to pay more than $225 million to repair and replace the internal components of the jet bubbling reactors. Prior to the loss at issue, Aspen Insurance (UK) Ltd. and Lloyd's Syndicate 2003 (collectively, "Aspen") had entered into an insuring contract with Black & Veatch (the "Aspen Policy"). Aspen denied coverage, asserting in subsequent litigation that Black & Veatch's expenses arose from property damages that were not covered "occurrences" under the Aspen Policy, because the only damages involved were to Black & Veatch's own work product.

The Decision Below

After Aspen denied coverage, Black & Veatch sued for breach of contract and declaratory judgment. Applying New York law, the U.S. District Court for the District of Kansas agreed with Aspen that the damage to the jet bubbling reactors was not an "occurrence" under the Aspen Policy because the damages occurred to Black & Veatch's own work product—the jet bubbling reactors—and therefore were not covered under the Aspen Policy.

Analysis

On appeal, the U.S. Court of Appeals for the Tenth Circuit concluded that the New York Court of Appeals would hold that the damage to the jet bubbling reactors was an "occurrence"

under the Aspen Policy, because the damage was accidental, and that a contrary reading would render the Subcontractor Exception and Endorsement 4 surplusage, in violation of New York law.

The insuring agreement of the Aspen Policy provided as follows:

> We [the Insurer] will pay on behalf of the "Insured" those sums in excess of the [liability limit provided by other insurance policies] which the "Insured" by reason of liability imposed by law, or assumed by the "Insured" under contract prior to the "Occurrence", shall become legally obligated to pay as damages for: (a) "Bodily Injury" or "Property Damage" . . . caused by an "Occurrence"[.]

The Aspen Policy defined "occurrence" as "*an accident* . . . that results in 'Bodily Injury' or 'Property Damage' that is not expected or not intended by the 'Insured.'" (emphasis added). Although the Aspen Policy did not define "accident", the New York Court of Appeals held in *Cont'l Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640 (N.Y. 1993), that damages are accidental so long as they are "unexpected and unintentional." Consequently, coverage may be barred under New York law "only when the insured intended the damages", regardless of the fact that an insured might have foreseen the possibility that its subcontractor would build a defective product. Because Black & Veatch did not "expect or intend" that its subcontractor, Midwest Towers, would cause the damages at issue, and there was no evidence that Black & Veatch increased the likelihood of such damages through reckless cost-saving or other measures, the damages at issue constituted an "accident," and therefore an "occurrence," under the Aspen Policy.

The Aspen Policy also contained the following "Your Work" exclusion:

> This policy does not apply to . . . "Property Damage" to "Your Work" arising out of it or any part of it and included in the "Products/ Completed Operations Hazard."

"Your Work" was defined as "work operations performed by you or on your behalf" by a subcontractor.

The "Your Work" exclusion was subject to an exception, which provided that "[the 'Your Work' exclusion] does not apply if the damaged work or the work out of which the damage arises was performed on [Black & Veatch's] behalf by a subcontractor" (the "Subcontractor Exception").

A second exclusion, known as "Endorsement 4", excluded coverage for property damage to the "particular part of real property" that Black & Veatch or its subcontractors were working on when the damage occurred.

The Tenth Circuit concluded that it would be redundant to exclude coverage for property damage to Black & Veatch's own work (as stated in the "Your Work" exclusion) if the definition of "occurrence" precluded coverage for such damages in the first instance. Similarly, the Court reasoned that there would be no reason to provide an exception to the "Your Work" exclusion when "the damaged work . . . was performed . . . by a subcontractor" if the basic insuring agreement did not encompass those damages in the first place. Finally, there would be no reason for "Endorsement 4" to exclude coverage only for damage to a "particular part" of the jet-bubbling reactors if there was no coverage for damage to the insured's work in the first instance.

Aspen asserted that, under New York's First Department's decision in *George A. Fuller Co. v. United States Fidelity and Guaranty Co.*, 200 A.D.2d 255 (1st Dept. 1994) ("*Fuller*"), CGL insurance policies are "not intended to insure against faulty workmanship or construction", and therefore the Aspen Policy did not cover the damages at issue. The Tenth Circuit distinguished *Fuller*, noting that the policy before the *Fuller* court excluded damages to "that particular part of any property that must be restored, repaired or replaced" due to work that was performed incorrectly either by "you [the insured] or on your behalf [by a subcontractor]." In this case, the Aspen Policy expressly provided coverage for damages to an insured's work arising from a subcontractor's faulty workmanship.

Finally, because the damages at issue arose out of the work of Black & Veatch's subcontractor, Midwest Towers, the Court found that the "Your Work" exclusion was inapplicable. In particular, the "Subcontractor Exception" in the Aspen Policy provided that the "Your Work" exclusion "does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."

Learning Points: The *Black & Veatch* court held that, under New York law, property damage that is not "expected

or intended" by the insured was an "accident", and therefore also constituted an "occurrence" under the CGL policy at issue. Further, while the "Your Work" exclusion precluded coverage for damages arising from Black & Veatch's or its subcontractor's work, the "Subcontractor Exception" brought the claim back within the scope of coverage, because the damages at issue were caused by the work of a subcontractor.

The *Black & Veatch* decision is consistent with the current trend of decisions by many state courts holding that construction defects may constitute an occurrence under a CGL policy. *See Cherrington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E.2d 508, 518 n.19 (W. Va. 2013) (summarizing cases from Arizona, California, Connecticut, Florida, Georgia, Indiana, Kansas, Minnesota, Mississippi, Missouri, Montana, North Dakota, South Dakota, Tennessee, Texas, and Wisconsin); s*ee also Cypress Point Condo. Ass'n v. Adria Towers, L.L.C.*, 143 A.3d 273 (N.J. 2016) (holding that consequential damage resulting from defective workmanship performed by subcontractors constituted both an "occurrence" and "property damage" under the terms of the policies.). ♦

Circuit Court Of Cook County Again Rules That Policyholder Failed To Prove Primary Exhaustion In Asbestos Coverage Case

by ***Colleen A. Beverly***

The Circuit Court of Cook County recently ruled that John Crane, Inc. did not demonstrate that its primary policies were exhausted and thus, any ruling regarding exhaustion of the umbrella and excess policies would be premature. *John Crane Inc. v. Admiral Insurance Company, et al.*, Case No. 04-CH-08266 (Dec. 28, 2017). This is the second time during the course of this protracted litigation that the Circuit Court found that the policyholder did not prove primary exhaustion.

Facts/Procedural Background

The insured, John Crane Inc., manufactured gaskets containing asbestos. Since 1979, John Crane has been named as a defendant in over 250,000 asbestos-related bodily injury claims throughout the United States. From January 1, 1944 through August 1, 2001, John Crane purchased primary insurance coverage from Kemper Insurance Company. These policies contained a duty to defend and provided that defense costs would be paid in addition to policy limits. John Crane also purchased umbrella and excess policies above the Kemper primary policies. This case only involves John Crane's umbrella and excess carriers who issued policies from 1961 to 1985.

John Crane filed suit in 2004. In 2008, the Circuit Court conducted a trial on the issue of whether John Crane's primary coverage was exhausted. The Circuit Court found that John Crane did not prove primary exhaustion under a *pro rata* allocation. John Crane appealed this decision.

In a June 4, 2013 opinion, the Illinois First District Appellate Court reversed the Circuit Court's *pro rata* ruling and holding that John Crane failed to prove primary exhaustion. The Appellate Court found that all sums allocation applied to asbestos injuries where the policies at issue contain all sums language and to determine horizontal exhaustion of the primary policies an insured must only prove exahaustion of limits in a period of bodily injury, sickness or disease. The Appellate Court remanded for a determination of exhaustion based upon its opinion and directed the Circuit Court to consider any judgments and settlements John Crane and its primary carrier Kemper paid since the first exhaustion trial which took place in 2008.

In February and March 2017, the parties conducted another exhaustion trial in which John Crane attempted to prove primary exhaustion of its policies under an all sums allocation.

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Prior to the trial the court issued various legal opinions including but not limited to a ruling that Crane must horizontally exhaust its primary policies prior to allocating claims to umbrella and excess policies, certain insurers' policies only apply excess of the Kemper umbrella policies due to other insurance clauses, enforcing prior insurance and non-cumulation clauses in certain excess insurer policies and prohibiting the use of vertical exhaustion.

Prior to trial, John Crane amended its expert report several times to comply with the court's various legal rulings. During the twenty-three day trial, John Crane relied primarily on the opinion of its expert Ross Mishkin of The Claro Group to show primary exhaustion. Mr. Mishkin conducted a claims analysis, determined trigger dates, conducted payment verification and conducted insurance allocation for the 141 underlying asbestos claims against John Crane that were at issue.

Analysis

The insurers objected to Mr. Mishkin's use of the underlying claim files to establish trigger dates on the basis that these files were hearsay. The court rejected this argument, finding that *U.S. Gypsum Co. v. Admiral Ins. Co.*, 268 Ill. App. 3d 598 (1st Dist. 1994), allowed John Crane to utilize the underlying claim documents to establish trigger dates. The court also found that under Rule 703 of the Illinois Rules of Evidence it was permissible for Mr. Mishkin to rely on the underlying claim files to make trigger date determinations.

Despite the court's ruling in favor of John Crane on its expert's use of the underlying claim files, the court still found that John Crane failed to prove primary exhaustion. Specifically, the court found that John Crane's expert did not consistently follow the rules he created for allocation. Further, the court found Mr. Mishkin's methodology to be problematic because neither he nor anyone at The Claro Group reviewed all of the underlying claim files. The court noted that John Crane's expert's failure to review approximately two-thirds of the documents in the case greatly harmed the reliability and credibility of his allocation. The court also rejected Mr. Mishkin's method of "banking" claims in which Mr. Mishkin chose to reserve or bank either a portion of or a full claim payment until either all of the primary policies were exhausted or certain umbrella policies were exhausted. The court found that this practice violated Mr. Mishkin's protocol of allocating claims in payment order. The court stated that banking claims does not comply with the standards in the insurance allocation field and is a method that allowed Mr. Mishkin to improperly circumvent the horizontal exhaustion doctrine.

The court further rejected Mr. Mishkin's allocation of specific claims even under the assumption that his methodology was not flawed. For these specific claims, the court found that Mr. Mishkin's trigger conclusions were unsupported by the record and thus, those claims were not properly allocated.

John Crane filed its notice of appeal on January 29, 2018.

Learning Point: Clausen Miller has been actively involved in this litigation and will report on further developments in future editions of the CM Report. For more information, contact Colleen at **cbeverly@clausen.com**. ♦

Illinois Fault Allocation Tale Of Two Statutes: A Balancing Test Gone Wrong

by ***Paul V. Esposito***

Once upon a time, Illinois had two statutes designed to equitably apportion fault and so protect minimally responsible defendants from mega-dollar judgments. Though the statutes still stand, they don't provide defendants in personal injury cases near the protection they were intended to give.

The first statute, §2-1117 of the Code of Civil Procedure, states that a defendant with less than 25% of "total fault" has only several liability. It was designed to protect defendants with little fault—but sometimes lots of money—from being forced to pay the entire amount of a judgment.

The second statute, the Contribution Act, encourages the equitable allocation of damages among tortfeasors. A defendant paying more than its *pro rata* share of a judgment may recover the excess from co-defendants. The statute encourages "good faith" settlements by authorizing the dismissal of contribution claims brought against a settling defendant.

So what happens to a defendant's rights under §2-1117 when a plaintiff accepts a pre-trial, low-dollar offer from a financially broke, very negligent defendant? Based on a sharply-divided Supreme Court decision, those rights are at great risk. *Antonicelli v. Rodriguez*, 2018 IL 121943.

Facts

Angela Antonicelli was driving on a tollway when Daniel Rodriguez, high on cocaine, made an illegal U-turn and hit her car. Karl Browder, a trucker behind Antonicelli, could not avoid it. She was severely injured. Antonicelli sued Rodriguez, Browder, and Browder's employer. The Browder defendants filed a contribution claim against Rodriguez. Antonicelli agreed to settle with the otherwise penniless Rodriguez for $20,000, the limits of his insurance. The trial court found that the settlement was in good faith under the Contribution Act and so dismissed the action against Rodriguez. The court rejected Browder's argument that it should have considered Browder's rights under §2-1117.

Analysis

The majority opinion

In a split decision, the Supreme Court affirmed. The majority recognized that the Contribution Act promotes the dual policies of encouraging settlements and equitably allocating damages among defendants. Whether a settlement is in "good faith" depends on whether it was reached without fraud or collusion and is consistent with the Act's twin policies. A trial court's job is to balance those policies based on the facts of each case.

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A trial court has discretion in determining "good faith," and the majority found no abuse of it. There had been no fraud or collusion in reaching the settlement, Rodriguez had paid his policy limit, and keeping him in the case would have increased defense costs. The majority ruled that a court need not consider the relative liabilities of the parties pursuant to §2-1117 in deciding whether a settlement equitably allocates damages. Doing so would be "impractical" and would defeat the Contribution Act's purpose "of encouraging settlement in the absence of bad faith, fraud, or collusion." For the majority, equitable apportionment would be achieved because Browder would get a $20,000 settlement credit against any judgment.

The splits

The opinion drew two special concurrences and a dissent, all three centering on a decision not mentioned by the majority. In *Ready v. United Goedecke Services, Inc.*, 232 Ill. 2d 369 (2008), (a case Clausen Miller handled on appeal), the Court ruled that under §2-1117, a jury should not consider the fault of settling tortfeasors in determining "total fault." For example, if Rodriguez was actually 99% at fault, a jury could not allocate that fault to him. Browder's 1% fault would translate into 100% fault for purposes of joint and several liability. Given the ten years of legislative silence after *Ready*, one concurring justice asked the legislature to clarify its original intent. Another concurring justice did not seek clarification. She had dissented in *Ready* and remained convinced that *Ready* misinterpreted §2-1117.

Going further, the dissenting justice described the problems that *Ready* created. Because *Ready* barred consideration of a settling party's fault, Browder was forced to challenge "good faith" in hopes of keeping Rodriguez in the case. Rodriguez may have been largely, if not totally, at fault for injuring Antonicelli. His $20,000 payment was a drop in a bucket compared to Antonicelli's potential damages. Yet because of *Ready*, Rodriguez's name would not appear on the jury verdict form for purposes of setting his percentage of fault. So in deciding the issue of "good faith," the trial court should have fully considered the Contribution Act's purpose of equitably apportioning damages. It did not. It approved a pre-trial $20,000 settlement because without fraud or collusion, Rodriquez surrendered his policy limits and his settlement saved defense costs. There was no real balancing of the dual purposes of the Act.

Learning Point: Antonicelli compounds the problems *Ready* created ten years ago as to the equitable allocation of fault and damages under §2-1117. Defendants will have a tough time proving the inequities of a settlement when a very negligent co-defendant settles for short money. A clarification of §2-1117 could help, but in the current legislative atmosphere it is unlikely. And though the dissent makes a great case for reconsidering *Ready*, that's also unlikely right now.

Learning Point: But the dissent's citation to *Yoder v. Ferguson*, 381 Ill. App. 3d 353 (2008), (another case Clausen Miller handled on appeal), raises the possibility of an equal-protection challenge to *Ready*'s exclusion of settling defendants from verdict forms. *Ready* creates unequal classifications of defendants. Those standing trial altogether have their fault allocated differently than when one or more, but less than all of them, have settled. There should be no difference in the allocation process. After all, "total fault" was established at the time of the accident. It does not change when a defendant settles. Under *Ready's* interpretation of §2-1117, a remaining defendant's percentage of fault can increase with each new settlement. The Supreme Court has never passed on the constitutional issue. Practitioners should raise it when a motion for a "good faith" finding is presented and when a case involving a settled defendant goes to trial.

At this point, it may be only way to correct a balancing test gone wrong. ♦

New York High Court Holds "Private" Facebook And Other Social Media Postings May Be Discoverable

by ***Mara Goltsman***

The Court of Appeals of New York holds that even materials marked "private" by Facebook users are subject to discovery if they contain material relevant to the issues in controversy in the litigation. *Forman v. Henkin*, 2018 N.Y. Slip. Op. 01015 (Feb. 13, 2018). In *Forman*, New York's highest court overruled an Appellate Division order which utilized a heightened threshold for production of the plaintiff's social media records that depended on what plaintiff chose to share on the "public" portion of her Facebook account.

Most people are savvy enough to make their social media accounts private, thereby restricting access to any information that can be discovered about them. Prior case law required defense counsel to demonstrate a reason to request access to plaintiffs' social media accounts, which was virtually impossible to do for an account marked as "private." Such designations no longer control access in New York.

Facts

Plaintiff in *Forman* allegedly sustained injuries as a result of her fall from a horse owned by defendant. Specifically, she alleged that she suffered spinal and traumatic brain injuries and now suffers cognitive deficits, memory loss, difficulty with both written and oral communication and social isolation. At her deposition, plaintiff testified that she deactivated her Facebook account six months after the accident and could not remember whether she posted any photographs depicting her life after the accident. She testified that she can no longer participate in activities such as cooking, traveling, going to the movies and boating as a result of the fall. She also testified that she has difficulty using a computer and has difficulty writing coherent emails.

Defendant demanded that plaintiff provide an unlimited authorization allowing access to her entire Facebook account, which plaintiff refused to do. Defendant filed a motion to compel production of this authorization which plaintiff opposed, arguing that defendant failed to establish a basis for allowing access to plaintiff's "private" account as her public Facebook account contained one photograph that did not contradict plaintiff's allegations. The trial court granted defendant's motion to the limited extent as follows: (1) plaintiff was to produce all privately posted photographs before the accident that she intends to produce at the time of trial; (2) plaintiff was to produce all privately posted photographs after the accident that do not depict nudity or romantic encounters; and (3) plaintiff was to provide an authorization for her Facebook account showing each time that plaintiff posted a private message after the accident as well as the number of characters or words in these postings. Plaintiff appealed to the Appellate Division, which eliminated the defendant's ability to obtain post-

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accident messages and limited disclosure to photographs that plaintiff intended to introduce at the time of trial, and otherwise affirmed. Defendant then appealed to the Court of Appeals.

Analysis

CPLR 3101(a) states that there shall be full disclosure of all matter material and necessary to the prosecution or defense of a (civil) action, regardless of the burden of proof. The Court of Appeals focused on the terms "material and necessary" in issuing its decision that the party seeking discovery must satisfy a threshold requirement that the discovery sought is relevant and stated that the CPLR requires liberal discovery which in turn will encourage fair and effective resolution of disputes on their merits. The Court of Appeals held that based on this threshold inquiry, defense counsel's demand for access to photographs that plaintiff posted to Facebook after her accident was reasonably calculated to provide relevant evidence, notably as to plaintiff's allegations concerning the activities that she can no longer engage in as a result of the fall at issue.

The Court of Appeals helpfully made the analogy to the privacy of medical records and the fact that courts allow the waiver of the patient-physician privilege when a plaintiff affirmatively places a medical or physical condition into issue by commencing a lawsuit. The Court held that similarly, private social media postings can be subject to discovery if they are relevant, thereby dispensing with the notion that private social media postings are non-discoverable by virtue of their privacy, an argument that effectively allows a plaintiff to hide evidence of what they are in fact able to do despite their allegations to the contrary.

Forman is extremely helpful, as prior precedent required defense counsel to demonstrate that social media postings on a plaintiff's public page contradicted plaintiff's allegations in the lawsuit—thereby allowing plaintiffs to prevent disclosure by limiting what is visible on their public postings. The Court of Appeals rejected the notion that plaintiff's so-called privacy settings govern the scope of disclosure of social media materials.

However, the Court of Appeals agreed with other courts that ruled against allowing discovery of a plaintiff's entire social media account simply because they commenced a lawsuit. The Court held further that when faced with a dispute such as the one involved in *Forman*, courts should (1) consider the allegations made and the nature of the events involved in litigation in order to determine whether relevant material is likely to be found on plaintiff's social media page; and (2) weigh the potential utility of the information sought with any privacy or other concerns raised by the plaintiff. The Court of Appeals held that the court should issue an order specifically tailored to the facts at issue with a directive as to what must be disclosed and what is protected as non-relevant to the facts in controversy. Finally, the Court of Appeals held that courts should also consider how far back to require disclosure of social media postings and that courts may consider whether the disclosure of sensitive or embarrassing postings that are only of marginal relevance may be withheld.

Learning Point: Social media postings on plaintiffs' "private" pages are discoverable if they are relevant as the threshold inquiry as to whether or not these postings must be produced is whether the materials are reasonably calculated to contain relevant information, not whether the postings are private. *Forman* is an important win for the defense bar that will hopefully inform other jurisdictions around the country. ♦

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ARBITRATION

HEIRS NOT BOUND TO ARBITRATE WHERE CRUX OF ALLEGATIONS FALL OUTSIDE OF PROFESSIONAL NEGLIGENCE

Avila v. Southern Calif. Specialty Care, Inc., 20 Cal. App. 5th 835 (2018)

Son brought wrongful death, negligence and elder abuse claims on behalf of decedent against long-term care hospital. Son had signed arbitration agreement on decedent's behalf. Hospital sought arbitration. Trial court denied request, reasoning arbitration agreement did not apply to wrongful death claim and refused to compel arbitration of remaining claims due to risk of inconsistent judgments.

Held: Affirmed. Because complaint had allegations of both medical malpractice and elder abuse, the arbitration agreement did not bind the decedent's heir's claims for wrongful death under section 1295 of California's Medical Injury Compensation Reform Act (MICRA). Where the allegations are primarily brought under the Elder Abuse and Dependent Adult Civil Protection Act (CA Welfare & Institutions Code §15600 et seq), section 1295 of MICRA does not apply. The Court further held that in light of the risk of inconsistent rulings, the trial court did not abuse its discretion in refusing to force arbitration of the other claims.

PLAINTIFF COLLATERALLY ESTOPPED BY PRIOR ARBITRATION AWARD

Robert Doyle v. Univ. Underwriters Ins. Co., 2017 Conn. App. LEXIS 514

An arbitrator awarded plaintiff $105,924.00 in arbitration against a driver that injured him. The driver's insurer paid the plaintiff its $100,000.00 policy limit. Plaintiff then sued his insurer, seeking all his purported future medical expenses as underinsured motorist benefits. The trial court granted defendant summary judgment on collateral estoppel grounds and rendered judgment for plaintiff for $5,924.00. Plaintiff appealed. ***Held:*** Affirmed. The damages owed plaintiff had been fully and fairly litigated and decided in the arbitration.

CIVIL PROCEDURE

PLAINTIFFS WITH DISPARATE CLAIMS MAY MAKE JOINT STATUTORY OFFER

Gonzalez v. Lew, 20 Cal. App. 5th 155 (2018)

Decedents died in house fire and heirs brought wrongful death action against homeowner. Heirs served joint statutory offer to compromise for $1.5 million to settle both wrongful death claims. Defendant served its own statutory offer for $1 million. Case went to trial and jury awarded plaintiffs $2.6 million. Plaintiffs claimed their costs, including post-statutory offer expert costs. ***Held:*** The plaintiffs' statutory offer, though made jointly, was valid and plaintiffs were entitled to their costs, including post-statutory offer expert costs. Although the plaintiffs had separate claims, statutory offers are meant to encourage settlements and global single offer should not be discouraged.

MOTION FOR SUMMARY JUDGMENT CLOTHED AS MOTION IN LIMINE IMPROPER

Casalini v. Alexander Wolf & Son, 2018 N.Y. Slip Op. 00246 (N.Y. App. Div. 1st Dep't)

Plaintiff was injured when he slipped on debris at a construction site and sued under Labor Law § 241(6) and in negligence. Prior to a bench trial, defendants purported to make a motion in limine and the court dismissed the action with prejudice, finding that defendant did not have sufficient notice of, and did not cause or create, the debris condition that caused plaintiff's accident. ***Held:*** Reversed. The motion in limine was actually an untimely motion for summary judgment, brought more than 120 days from the filing of the note of issue, and, therefore, should not have been granted. Further, an issue of material fact cannot form the basis for granting a motion *in limine*.

CONTRACTS

LACK OF EVIDENCE FATAL TO BREACH OF CONTRACT CLAIM

John K. Finney v. Cameron's Auto Towning Repair, 179 Conn. App. 301 (2018)

Plaintiff sought damages from a towing company for allegedly failing to repair his vehicle, which had been towed to its vehicle storage facility after an accident. Plaintiff alleged a failure to give a timely estimate and that he had been falsely informed that the vehicle was being repaired. ***Held:*** The trial court properly granted judgment to defendant. The owner averred that he had never agreed to repair Plaintiff's vehicle and that Plaintiff was free to

pick up his vehicle at any time after paying towing-related fees. Plaintiff failed to counter this evidence.

EMPLOYMENT DISCRIMINATION

EVIDENCE OBESITY HAS PHYSIOLOGICAL CAUSE ALLOWS ACTION UNDER FEHA

Cornell v. Berkeley Tennis Club, 18 Cal. App. 5th 908 (2017)

Plaintiff, a severely obese woman, was fired from defendant tennis club after working there for over 15 years. The club sought summary judgment on her claims under California's Fair Employment and Housing Act ("FEHA"). Plaintiff unsuccessfully opposed with a physician declaration that her obesity was more likely than not caused by a genetic condition affecting metabolism. Plaintiff appealed. ***Held:*** Reversed. The evidence showed the employee may establish a physiological cause for obesity.

EVIDENCE

EXPERT OPINION INADMISSIBLE SINCE NOT TIED TO SPECIFIC FACTS OF CASE

Sanchez v. Kern Emerg. Med. Transp. Corp, 8 Cal. App. 5th 146 (2017)

Plaintiff alleged defendant negligently delayed transporting him to the hospital after suffering high school football game injury. His expert opined that delays in treatment are bad but did not discuss or refute defense expert opinions that delays in the specific circumstances were either inevitable or so minor that they could not have caused the specific injury. ***Held:*** The trial court properly excluded the expert's opinions because they were not supported by the evidence and were so overly generic that they were speculative.

GOVERNMENTAL IMMUNITY

INSPECTION AND REPAIR OF A PLAYSCAPE WAS A DISCRETIONARY ACT; GOVERNMENTAL IMMUNITY APPLIED

McCarroll, et. al. v. Town of East Haven, 2018 Conn. App. LEXIS 112 (2018)

Minor fell from ladder of wooden playscape at school playground. Parents sued defendant town alleging playscape and ladder were in decrepit condition and school personnel were aware. The trial court granted defendant summary judgment based on governmental immunity. ***Held:*** Affirmed. Although town owed plaintiffs a duty of care, the inspection and repair of the playscape was a discretionary act and, thus, governmental immunity applied. The identifiable person-imminent harm exception to discretionary act immunity did not apply.

CITY IMMUNE AS TO APPROVING, ISSUING PARADE PERMITS

Barton v. Columbus Robotics, Inc., 2018 WL 1056671 (Ind. App.)

Plaintiff was injured while attending an annual parade in Columbus and sued the City of Columbus which had approved and issued parade permit. ***Held:*** The City has statutory governmental immunity. Immunity ensures that public employees can exercise the independent judgment necessary to carry out their duties without threat of harassment by litigation over decisions made within the scope of their employment.

INSURANCE CLAIMS PRACTICES

DELAYED-DAMAGE RULE INAPPLICABLE TO SUIT AGAINST INSURANCE AGENCY

LGR Realty, Inc. v. Frank and London Ins. Agency, 2018 Ohio Lexis 297 (Ohio)

After insurer denied coverage based on exclusion of specific property, insured's suit against agency procuring policy was dismissed as time-barred. ***Held in split decision:*** Delayed-damage rule did not save insured's claim. Generally, a limitations period starts when an injurious act is committed, even though injury occurs later. Under the delayed-damage rule, a cause of action does not accrue until damage occurs. The rule was inapplicable here because the exclusion was in the policy from the start; harm occurred at that time. Concurrence argued rule should be abolished for coverage matters. Dissent argued accrual requires discernible injury.

INSURANCE LITIGATION

INSURER LIABLE FOR BREACH OF DUTY TO DEFEND

Steadfast Ins. Co. v. Greenwich Ins. Co., 2018 Wisc. App. LEXIS 51

After settling sewer-backup claims of a mutual insured, one insurer sued another to recoup defense costs. ***Held:*** Defendant provided primary rather than excess coverage and so was liable for costs. Its policy did not qualify as "other insurance," triggered only when policies cover the same risk and interest of an insured during the same period. Different periods and insureds were involved. ***Further held:*** Claim was not time-barred by a one-year statute because the plaintiff sought equitable subrogation due to defendant's breach. Defendant could not allocate defense costs among insurers because plaintiff stood in the insured's shoes and could sue for breach.

LEGAL MALPRACTICE

ATTORNEYS NOT LIABLE FOR BREACH OF FIDUCIARY DUTY OR MALPRACTICE IN REPRESENTING FORMER CORPORATE PRESIDENT

CRIT Corp. v. Wilkinson, 2018 Ind. App. LEXIS 16

While representing corporation, attorneys also represented its ex-president in seeking to acquire competing business. ***Held:*** Rules of professional conduct may not be used as a basis of civil suit for breach of fiduciary duty. Corporation's legal malpractice claim lacked an allegation of actual damage arising out of the attorneys' conduct. The request to disgorge attorneys' fees paid by corporation was insufficient. Attorneys were not guilty of fraud by failing to disclose ex-president's intent because they learned about it while representing him, not the corporation.

LIABILITY INSURANCE COVERAGE

NO INDEPENDENT COUNSEL ABSENT EVIDENCE INSURER CONTROLS BOTH SIDES OF LITIGATION

Centex Homes v. St. Paul Fire & Marine Ins. Co., 19 Cal. App. 5th 789 (2018)

Insurer defended both a subcontractor and a contractor sued in a construction defect action. The contractor filed a cross-complaint against its subcontractors and the insurer, seeking a declaration that it was entitled to independent counsel because the insurer's reservation of rights created significant conflicts of interest. The insurer obtained summary judgment. ***Held:*** Absent a reasonable likelihood of an actual conflict of interest, independent counsel was not required because the insured failed to show a triable issue of fact to demonstrate the insurer controlled both sides of the litigation.

NO DUTY TO DEFEND OR INDEMNIFY WHERE ALLEGATIONS AMOUNT TO DELIBERATE CONDUCT, RATHER THAN AN "ACCIDENT"

Traveler's Property Cas. Co. of Am. v. Actavis, Inc., 16 Cal. App. 5th 1026 (2017)

Insured drug manufacturer sought defense and indemnity for underlying lawsuits brought by municipalities alleging that it engaged in deceptive marketing to expand sales of opioids, causing increased addiction. The policies at issue defined a covered event or occurrence as an "accident." The policies had exclusions for bodily injury or property damage caused by "your products or completed work." ***Held:*** The carriers owed no duty to defend or indemnify because there was no "accident" alleged. Rather, the claims were premised on a conscious marketing campaign, which was found to be deliberate conduct. Claims of intentional or even negligent misrepresentation are not accidents.

NO ADDITIONAL INSURED COVERAGE FOR CONSTRUCTION MANAGER

Gilbane Bldg. Co. et al. v. St. Paul Fire & Marine Ins. Co., 2018 N.Y. Slip. Op. 02117 (N.Y.)

Construction manager sued insurer seeking coverage as additional insured. Policy provided additional insured was "any person or organization with whom you have agreed to add as an additional insured by written contract." Lower Court held construction manager was an additional insured but appellate court reversed. ***Held:*** Appellate decision affirmed. The terms of the policy unambiguously required a written contract between the named insured and an additional insured, if coverage is to be extended to an additional insured. Policy had to be read according to its clear terms.

MEDICAL MALPRACTICE

PHYSICIAN WAS ADEQUATELY NOTIFIED OF INTENT TO SUE

Selvidge v. Tang, 2018 Cal. App. LEXIS 182

Physician sought dismissal of lawsuit against him as untimely as he never received notice of intent. ***Held:*** The Medical Injury Compensation Reform Act ("MICRA") requires a physician be given at least 90 days' notice of the intention to commence an action. Plaintiffs did not need to demonstrate that the physician had actual notice and only had to demonstrate that they took adequate steps to achieve actual notice. The Court held that they did this by serving notice of intent at the address the physician provided to the state medical board.

MICRA INAPPLICABLE TO INTENTIONAL CONCEALMENT CLAIM VERSUS DOCTOR

Bigler-Engler v. Breg, Inc., 7 Cal. App. 5th 276 (2017)

Plaintiff sued a doctor and his medical group for medical negligence, breach of fiduciary duty and intentional failure by her doctor to disclose financial interest in a prescribed medical device. ***Held:*** MICRA applied to all of the claims against the doctor and medical group except the claim for intentional concealment against the plaintiff's doctor. The MICRA limit was applied after the Proposition 51 fault allocations. The Court noted that Proposition 51 determines a defendant's liability for noneconomic damages and MICRA sets a cap on the recovery.

NEGLIGENCE

COLLEGE OWES DUTY TO ITS STUDENTS ENGAGED IN CURRICULAR ACTIVITIES

The Regents of the Univ. of Calif. v. Sup. Ct. (Rosen), 2018 Cal LEXIS 1971 (Cal. 2018)

A UCLA student began having auditory hallucinations and the university sought to provide mental health care to the student. One morning, the student stabbed plaintiff, another student, during chemistry lab. Plaintiff sued the university and several employees claiming they were negligent in failing to protect her from another student's foreseeable violent conduct. ***Held:*** The California Supreme Court held that, considering the unique features of the collegiate environment, universities have a special relationship with their students and a duty to protect them from foreseeable violence during curricular activities.

SCHOOL CORPORATION IMMUNE FROM LIABILITY FOR SCHOOL BUS ACCIDENT

Jacks v. Tipton Cmty. Sch. Corp., 2018 Ind. App. LEXIS 62

Student was injured when school bus hit dip in road. ***Held:*** School was immune from liability for driver's conduct. Under state statute, driver was independent contractor, triggering immunity. The common law test as to driver's employment status was irrelevant. Liability could not be imposed under a non-delegable duty theory. There was no evidence of school's negligence. Driver was properly licensed and trained, and did not have a poor driving record.

RESTAURANT OWES DUTY TO PREVENT SHOOTING

Hamilton v. Steak 'n Shake Ops., Inc., 2018 Ind. App. LEXIS 87

After 30 minutes of taunting by assailants, woman was shot in the face during a restaurant fight. ***Held:*** Restaurant owed duty to take steps to protect woman from attack. The foreseeability component of duty looks at the broad type of plaintiff and harm, without regard to the actual facts of the occurrence. The broad type of plaintiff was a person subjected to threats and taunts for 30 minutes; the broad type of harm was injury flowing from a resulting fight. The incident was not sudden; restaurant personnel were aware of the ongoing taunts and threats. They did not need to foresee the precise harm that followed.

PLAINTIFFS DO NOT NEED TO DISPROVE OWN FAULT

Rodriguez v. City of New York, 2018 N.Y. LEXIS 793 (N.Y.)

Worker was injured while "outfitting" sanitation trucks with tire chains and plows to enable them to clear the streets of snow and ice. Worker moved for summary judgment as to defendant's liability, which trial and appellate court denied because plaintiff failed to make a prima facie showing that he was free of comparative negligence. ***Held:*** Acknowledging the issue to be one that has "perplexed courts for some time," the Court of Appeals held that a plaintiff does not need to establish the absence of their own comparative negligence in order to obtain partial summary judgment with respect to a defendant's liability.

POWER COMPANY'S ACTS NOT SHOWN IMMUNE

Connolly v. Long Island Power Auth., 2018 N.Y. Slip Op. 01148 (N.Y.)

Citizens sued a legislatively-created and publicly owned power company alleging negligent failure to shut down power as Hurricane Sandy approached the area. The company moved to dismiss, asserting its actions were governmental and discretionary and that it was entitled to immunity. ***Held:*** The provision of electrical power is a private entity service, therefore, company failed to show it was acting in a governmental, rather than a proprietary, capacity as a matter of law.

EXPERT EVIDENCE NEEDED TO MAKE CAUSAL LINK BETWEEN FALL AND INJURY

Heard v. Dayton View Commons Homes, 2018 Ohio App. LEXIS 619

Tenant slipped and fell because of water seepage under his exterior door. ***Held:*** Tenant failed to link his neck injuries and surgery to the fall. Tenant had history of pre-existing neck problems and a prognosis of future surgery. Tenant needed expert medical evidentiary material to link the fall to all or some of his neck pain.

TEMPORARY EMPLOYER SUBJECT TO TORT LIABILITY FOR EMPLOYEE'S INJURY

Ehr v. West Bend Mut. Ins. Co., 2018 Wisc. App. LEXIS 16

Following fatal car accident, estate of deceased temporary employee filed a tort claim against temporary employer. ***Held:*** Absent a filed worker's compensation claim, the exclusive-remedy provision of the compensation statute does not prohibit a suit in tort. Allowing a tort suit is not inconsistent with the purposes of the statute, nor will it permit a double recovery.

TREE TRIMMER DOES NOT GET RECREATIONAL IMMUNITY

Westmas v. Creekside Tree Serv., Inc., 2018 Wisc. LEXIS 16 (Wis.)

While walking on public path through recreational property, decedent was killed by falling branch. ***Held in a split decision:*** Tree trimmer was not covered by the recreational immunity statute. Trimmer was not property owner's agent for immunity purposes because owner did not attempt to control trimmer's work and lacked the right to control work details. Trimmer was not a statutory "owner" because it did not occupy property with the necessary degree of permanence.

NY CIVIL RIGHTS LAW

AVATAR MAY BE A PORTRAIT UNDER CIVIL RIGHTS LAW

Lohan v. Take-Two Interactive Software, Inc., 2018 N.Y. Slip. Op. 02208 (N.Y.)

Actress Lindsay Lohan sued Grand Theft Auto game maker claiming her likeness was used without her permission to create an avatar character in the game. Lower Court denied a motion to dismiss but appellate court reversed. ***Held:*** Appellate decision affirmed. An avatar, that is, a graphical representation of a person in a video game or like media, may constitute a portrait within the meaning of Civil Rights Law §§ 50 and 51. ***Further held:*** Here the character simply was not recognizable as plaintiff and no mention of her was made, meriting dismissal.

PREMISES LIABILITY

HIRER MAY BE LIABLE IF IT FAILS TO SHOW INDEPENDENT CONTRACTOR COULD HAVE ADOPTED SAFETY PRECAUTIONS TO REMEDY KNOWN HAZARD

Gonzalez v. Mathis, 20 Cal. App. 5th 257 (2018)

Defendant homeowner hired plaintiff contractor to wash windows. Contractor claimed loose rocks and sand on roof were a dangerous condition and caused him to lose footing and fall. Homeowner successfully argued that an independent contractor is prohibited from suing his hirer for workplace injuries and that he did not retain control over the manner of the work and did not fail to warn of a concealed hazard. ***Held:*** Reversed. Video evidence showing plaintiff could have maneuvered safely around the roof despite open and obvious hazardous condition was not conclusive that plaintiff could have reasonably used the roof area on the date of the accident. Moreover, defendant did not show the video evidence accurately depicted the roof's condition at time of accident.

PRODUCT LIABILITY

POULTRY PROCESSING FARM NOT LIABLE FOR PUNITIVE DAMAGES

Craten v. Foster Poultry Farms Inc., 2018 U.S. Dist. LEXIS 23384 (D.C. Az.)

Plaintiff contracted salmonellosis and experienced illness allegedly caused by raw chicken processed by the defendant.

Defendant sought dismissal of the punitive damages claim. ***Held:*** Punitive damages are awarded in Arizona only where proven by clear and convincing evidence that the defendant engaged in reprehensible conduct and acted with an evil mind. A manufacturer's conduct does not rise to this level of egregiousness when the government agency responsible for regulating the safety of the product in question approved it for public sale.

TORTS

MALICIOUS PROSECUTION REQUIRES FAVORABLE TERMINATION OF ENTIRE ACTION

Lane v. Bell, 20 Cal. App. 5th 61 (2018)

Plaintiffs in an underlying action sued a joint property owner defendant arising out of a property dispute. The defendant cross-complained seeking a declaration of the extent of her interest in the property and an order for partition. Plaintiffs prevailed on most of the claims in the cross-complaint, but a judgment was entered valuing defendant's interest in the property and granting her claim for partition. Plaintiffs brought malicious prosecution claim. ***Held:*** Plaintiffs could not satisfy the essential element of favorable termination of the prior action because that judgment granted some of the relief sought by the defendant and thus was partially in defendant's favor.

SCHOOL AND TEACHER NOT LIABLE FOR TOUCHING STUDENT

Fort Wayne Cmty. Schs. v. Haney, 2018 Ind. App. LEXIS 43

After teacher touched student's posterior to induce her to sit back down, mother sued school and teacher for battery and violation of student's Fourth Amendment rights. ***Held:*** School and teacher had qualified immunity. A teacher may take action reasonably necessary to carry out an educational function or prevent interference. Student was dropping items on floor while other students were taking a test. As a matter of law, teacher acted reasonably and in good faith. Under state law, the teacher stood in relation to a parent.

DRUG TREATMENT FACILITY PATIENT CANNOT SUE FACILITY FOR HIS DRUG USE

Klean W. Hollywood, LLC v. Superior Court, 2018 Cal. App. LEXIS 190

Resident sued a treatment facility for injuries sustained after he smuggled heroin into the facility and injected it late at night. ***Held:*** While the Drug Dealer Liability Act allows drug users to bring an action against a third party for their drug use, the facility was not liable since it took reasonable measures to prevent plaintiff from using drugs while at the facility. Also, resident's claim that the facility can be liable for failing to stop him from obtaining and using drugs has no support in the common law or public policy.

TRIAL PRACTICE

COURT MUST DISQUALIFY ITSELF AFTER SUGGESTING STIPULATED JUDGMENT AMOUNT TO BOTH PARTIES, THEN AWARDING THAT VERY AMOUNT

Carvalhos Masonry, LLC v. S and L Variety Contrs., LLC, 2018 Conn. App. LEXIS 93

Defendant appealed a judgment after a bench trial concerning a construction contract dispute. Defendant claimed the trial court should have disqualified itself from deciding liability and damages after it sent a correspondence to both parties, after the trial but before it rendered its decision, suggesting that they stipulate to a judgment for a specific dollar amount—the exact amount the court then awarded. ***Held:*** Reversed and remanded for a new trial. The trial court should recuse itself in such a situation to avoid appearance of bias.

WORKERS' COMPENSATION

11 WEEK CUSTOM WAS PROPER BASIS FOR DETERMINING BENEFITS

Melendez, Jr. v. Fresh Start Gen. Remodeling and Contr., LLC, 2018 Conn. App. LEXIS 97

Claimant was injured in a vehicle being driven to the defendant's home where, for approximately 11 weeks, he had performed handy work for defendant. Defendant argued the claimant was

not his employee and not entitled to workers' compensation because he was not regularly employed for over 26 hours per week. Defendant argued the Commission should have examined the hours worked by the claimant over a 52-week period. ***Held:*** Affirmed. The 11-week period of employment was the proper measure and revealed a consistent schedule. A 52-week period was not a reasonable period of time to determine regular employment.

DIVISION OF ATTORNEYS' FEES PROPER SUBJECT FOR COMMISSION

Edward Frantzen v. Davenport Electric, et. al., 2018 Conn. App. LEXIS 81

Attorney who had represented claimant in worker's compensation proceedings appealed a decision determining the Commission could adjudicate a fee dispute between the attorney and a law firm that previously had represented the claimant. The Commission had ordered a 50/50 split of attorney's fees. ***Held:*** Connecticut General Statutes §31-327[b] provided that all attorneys' fees, including the division of fees between successive counsel, are subject to the Commissioner's approval. Therefore, the Commission had authority to adjudicate the fee dispute.

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