CM REPORT
of Recent Decisions

2018 • Vol. 2

Tampa, Florida Office Opening

What's Next Now That The Restatement Of Liability Insurance Was Approved?

New Duties Owed By Universities To Students And Pharmacists To Customers/Patients

Clausen Miller PC

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

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Clausen Miller PC is proud to announce the **July 1, 2018** opening of an additional office location in

Tampa, Florida

4830 West Kennedy Boulevard, Suite 600

The managing partner of CM's Florida office is **Anne Kevlin**, a licensed Florida attorney who specializes in first-party property as well as regulatory compliance matters. Anne most recently served as Director of Litigation for American Integrity Insurance in Tampa, Florida and is excited to return to active practice and manage our Florida office. At American Integrity, Anne was responsible for all legal, legislative and regulatory matters impacting the Florida property insurance company. As legal counsel for the claims, underwriting and operations functions at American Integrity, Anne reviewed claim decisions, performed contract reviews and negotiations, and addressed various corporate and insurance law needs. Anne monitored and responded to claims complaints and bad faith allegations and organized and conducted periodic training of claims staff. Her duties also included litigation and appeal strategy, policy wording, and management of outside panel law firms. She was responsible for a portfolio of ~1,600 lawsuits involving Florida property and liability claims. She provided legislative and regulatory monitoring and advocacy, review and drafting of proposed legislation and talking points for the Tallahassee liaison and advised their CEO and leadership team of developments and impact. Anne is a frequent industry speaker and is active in PLRB, CLM and DRI.

We are very excited about this new expansion project, the next chapter in CM's history of performing outstanding legal work for our clients in Florida state and appellate courts, as well as the federal district courts and 11th Circuit Court of Appeals.

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E-Filing: Avoiding Another Litigation Minefield

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

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E-filing documents into court systems was supposed to make everyone's job easier and provide more time to get a client's legal work completed. E-filing allows the attorney to timely file up to the last minute of the day when a document is due to be filed, so consequently there would be more time to complete the preparation of legal filings. But as two recent cases have shown, perhaps attorneys should still govern themselves by an "old fashioned mindset" even when employing the new fashion of e-filing.

Peraino v. County of Winnebago, 2018 Ill. App. (2d) 170368

In *Peraino*, plaintiff brought a personal injury action against Winnebago County, but the County obtained summary judgment on December 2, 2016. Plaintiff wanted to move for reconsideration and that post-trial motion was due to be filed on January 3, 2017 pursuant to the statutory 30-day jurisdictional time period.

At two minutes before midnight on January 3, 2017 plaintiff's paralegal began the process of attempting to electronically file the motion to reconsider. However, plaintiff's paralegal had certain problems during the e-filing process and the e-filing website would not upload the motion and the motion was not considered accepted or filed by the system until 12:03 a.m. on January 4, 2017. Plaintiff thereafter moved the trial court for leave to file the motion to reconsider *nunc pro tunc* till January 3, 2017 but the trial court denied that motion. The trial court found that since the late filing was due only to user problems and not any technical defects in the software or court electronic filing system, the motion could not be deemed to be filed when plaintiff's paralegal first attempted to upload it on January 3, 2017. Thus, certain State and local rules which would have deemed the motion filed when upload was first attempted were inapplicable because the fault was attributable to user error and not any fault in the court's electronic filing system.

On appeal, the appellate court took a somewhat different approach. The appellate court first found that the trial court lacked any subject matter jurisdiction to entertain plaintiff's motion to file its motion to reconsider *nunc pro tunc*. Since there was no timely post-trial motion on file by January 3, 2017, the trial court no longer had jurisdiction to entertain any type of motion. Accordingly, even if certain rules allowed a court to backdate a document upon motion as deemed filed at the time of an attempted uploading, those rules were inapplicable given the specific jurisdictional deadline of 30 days to file a post-trial motion. After 30 days, a trial court would no longer have jurisdiction to entertain a motion to backdate a document. Further, the appellate court found that even if those rules were applicable, they could not be applied where only user problems existed—"the inability of a registered user to submit a document electronically."

The appellate court accordingly vacated the trial court's order as entered without subject matter jurisdiction, and ordered that plaintiff's motion to file the motion to reconsider *nunc pro tunc* be dismissed.

Cairone v. McHenry County College, No. 17-CV-4257 (N.D. Ill. 4/3/18)

In *Cairone*, plaintiff sought to bring a civil rights action against defendant. The alleged violation giving rise to the civil rights action occurred on June 3, 2015 and thus a 2-year statute of limitations on her claim expired on June 3, 2017. Since June 3, 2017 was a Saturday, under the federal rules her period continued to run until June 5, 2017 and the complaint had to be timely filed by midnight on June 5, 2017.

Plaintiff's counsel began the e-filing process in the early evening hours of June 5, 2017, after the court's CM/ECF helpdesk had closed. Plaintiff's counsel had various problems with the court's CM/ECF System when he attempted to add plaintiff as a new party. Once plaintiff's counsel was able to add plaintiff as a new party, the CM/ECF System would not allow him to upload the complaint. Plaintiff's counsel made another effort to file the complaint at 11:58 p.m. on June 5, 2017 but was still unable to do so. Plaintiff's counsel again tried to file the complaint the following morning and the complaint was filed at 11:45 a.m. on June 6, 2017 without any problems. Plaintiff thereafter brought a motion for an extension of time to file the complaint because of excusable neglect and circumstances beyond plaintiff's control.

In seeking to obtain this extension of time, plaintiff made numerous arguments but these were all rejected by the district court:

— The federal rules do not authorize courts to enlarge statutory limitation periods for filing suit;

— Equitable tolling could not provide plaintiff any relief because of her lack of diligence in waiting until the last minute to file the complaint; and

— Illinois procedural rules that might provide that the complaint was deemed filed when plaintiff first tried to upload it onto the district court's electronic filing system were inapplicable in federal court.

The district court nonetheless granted plaintiff relief. Because of plaintiff's counsel's unrebutted representations that the failure to upload the complaint arose from a problem with the court's ECF filing system and not a problem with plaintiff's computer, the district court found that the clerk's office could not be considered accessible at the time when plaintiff tried to upload the complaint on June 5, 2017. Under the federal rules, if the clerk's office is inaccessible, the time for filing is extended to the first accessible day which in this case was June 6, 2017 when plaintiff was successful in uploading the complaint.

Learning Point: *Peraino* and *Cairone* illustrate the observation made by the United States Court of Appeals for the Seventh Circuit that lawyers who "wait until the last minute to comply with a deadline ... are playing with fire." *Spears v. City of Indianapolis*, 74 F. 3d 153, 157 (7th Cir. 1996). Plaintiff's counsel in *Cairone* was lucky. His representation that the court's ECF System failed were unrebutted. And although the court noted that it would have been nice if plaintiff's counsel had "taken note of any error messages he received while trying to file the complaint", the court had no reason to doubt counsel's sworn representations. Plaintiff's counsel in *Peraino* was not as fortunate as the failure to upload the motion to reconsider resulted from user error and not any problem with the court's system. These decisions however point out that the "best practice" should be to e-file documents while an e-filing helpdesk is open so that any problem with e-filing can be addressed and corrected in order to allow the timely filing of all legal documents. Even though e-filing would conceivably allow one to file minutes before midnight, attorneys should use an old fashioned mindset –make every effort to e-file before the court or a court's help desk closes.

LAW BULLETIN NAMES 24 CLAUSEN MILLER ATTORNEYS *LEADING LAWYERS*

The Law Bulletin Publishing Company, through its subsidiary Leading Lawyers of Chicago, has named 24 Clausen Miller attorneys *Leading Lawyers* and two attorneys *Emerging Lawyers* for 2018.

2018 Leading Lawyers

- Ivar R. Azeris
- Diane M. Baron
- Rodd E. Elges
- Margaret Hupp Fahey
- Anthony Ficarelli
- Dennis D. Fitzpatrick
- George K. Flynn
- David M. Heilmann
- Harvey R. Herman
- Celeste A. Hill
- Richard G. Howser
- John M. Hynes
- Melinda S. Kollross
- Ilene M. Korey
- Amy R. Paulus
- William P. Pistorius
- Robert L. Reifenberg
- Brian J. Riordan
- P. Scott Ritchie
- Thomas H. Ryerson
- Martin C. Sener
- James R. Swinehart
- Sava Alexander Vojcanin
- Mark W. Zimmerman

2018 Emerging Lawyers

- Mindy M. Medley
- Paige M. Neel

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

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

CM partner **Jim Swinehart** recently 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 which is provided below. For more information, please contact Jim at **jswinehart@clausen.com** or 312-606-7469.

https://www.clausen.com/wp-content/uploads/2018/05/At-A-Loss-Concurrent-Causation-and-Ensuing-Loss.pdf

FELDMAN AND STEWART SUCCESSFUL AT THE ARMED SERVICES BOARD OF CONTRACT APPEALS

California partners **Ian Feldman** and **Meredith Stewart** secured a dismissal of the U.S. Army Corps of Engineers' (the "Corps") claim for over $560,000 in excess reprocurement costs against a subcontractor client arising out of the installation of 2,273 window treatments at the Department of Veteran Affairs Medical Center in Aurora, Colorado. The project has had a long history of delays, which in turn required direct congressional oversight.

The Corps terminated our client's subcontract and the contracting officer issued a decision assessing over $560,000 in excess reprocurement costs. On behalf of the client, we appealed the contracting officer's decision to the Armed Services Board of Contract Appeals in Falls Church, Virginia. During a hearing on June 12, 2018, both sides presented their case, which included three witnesses and thorough digital presentations. At the conclusion of the hearing, the Corps voluntarily agreed to withdraw its claim, in its entirety, with prejudice.

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An Insider's Guide To New York Practice

Appellate and Trial Protocols for Resolving Coverage, Casualty and Recovery Issues Facing the Insurance Claims Professional

Attorney-Client Privilege and Work Product Doctrine

Bad Faith Law and Strategy for the Claims Professional and Appellate Protocols for the Resolutions of Such Claims

Breaking Bad Faith, Failure To Settle Within Policy Limits, And Strategy For The Claims Professional

Builders Risk Insurance: Case Law, Exclusions, Triggers And Indemnification

Coverage and Trial/Appellate Litigation—Strategies Affecting Coverage Determinations

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Deep Pockets: Prosecuting & Defending Government Liabilities—US & Municipalities

Developments In Property Insurance Coverage Law

Jumping Over the Evidentiary Hurdles to Victory

Miscellaneous Issues of Interest Relating to Property Insurance

Negotiation: Methods For Determining Settlement Values And Strategies For Acquiring Movement

Recent Developments In Insurance Coverage Litigation

Recent Trends In Bad Faith And E-Discovery Issues And Protocols To Resolve Same For The Claims Professional

Subrogation: Initial Recognition, Roadblocks and Strategies

Targeted Tenders, Suits Against Employers, And Other Legal Issues Facing The Claims Professional

Tips And Strategies For Claims Professionals: The Affordable Care Act, Unilateral Settlement Agreements, And Ethics In Claims Handling

Tips And Strategies For The Claims Professional: What You Need To Know About Medicare Reporting, The Affordable Care Act, Targeted Tenders, And Unilateral Settlement Agreements

If you are interested in a course or topic not currently listed in our available courses, please contact the Clausen Miller Marketing Department at marketing@clausen.com

Appraisers May Determine Cause Of Damage

by ***James R. Swinehart***

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is a shareholder in the Chicago office Clausen Miller, PC. He has been a lawyer for over 34 years and has specialized in first-party property coverage and litigation throughout the U.S. Jim has practiced in many state and federal courts and has experience in mediation and arbitration. His practice involves substantial dealings with experts in various disciplines and writing opinion letters, motions, and briefs.
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In *Walnut Creek Townhome Association v. Depositors Insurance Co.*, No. 16-0121 (Iowa, June 1, 2018), the Iowa Supreme Court held that the factual cause of damage to insured property may be determined by appraisal.

Facts

This case involved alleged damage by hail to shingle roofs in a residential complex. There was also a question of whether the shingles were defective, and, notably, the policy had anti-concurrent causation language with regard to certain exclusions, including those for "deterioration," "latent defect," and "faulty workmanship." The insurer denied the claim for the roof but paid for hail damage to "soft metals." The insured demanded appraisal and also filed a lawsuit demanding appraisal. In the appraisal, an award was entered, setting the amount of loss from hail at $1,467,830. In a bench trial, the court determined the policy excluded the damage to the roofs and held the appraisal award was not binding or conclusive on the parties.

Analysis

The Iowa Supreme Court disagreed, finding that appraisers may "decide the factual cause of damage to insured property to determine the amount of loss," and that, while the court decides coverage questions, "the appraisers' determination of the factual cause and monetary amount of the insured loss is binding on the parties absent fraud or other grounds to overcome a presumption of validity." Therefore, the district court could not disregard the appraisers' factual determination that hail damaged the shingles. Further, the appraisal award was binding on the parties as to the amount of loss from hail, but that amount remained subject to the anti-concurrent causation provision and exclusions, the applicability of which the court would decide. A new trial was ordered in which the court must accept the appraisal award as to the hail damage but would adjudicate the coverage defenses to determine what amount, if any, the insurer owed under the policy.

Learning Point: Under Iowa law, factual determinations made by an appraiser, such as cause of loss, are binding on the parties and the court in coverage actions absent fraud or other grounds to overcome a presumption of validity. ♦

Insured Has Burden Of Showing What Claimed Damage Occurred During The Policy Period

by **James R. Swinehart**

Applying Texas law, the Fifth Circuit holds that where property damage is caused by multiple events, some of which occurred during and some outside of the policy period, the insured bears the burden of proving what portion, if any, of the claimed damages occurred during the policy. *Certain Underwriters at Lloyd's of London v. Lowen Valley View, L.L.C.*, 2018 U.S. App. LEXIS 15337 (5th Cir. June 6, 2018).

Facts

Lowen involved damage to the roof of a hotel, from multiple hail events, with only one event occurring during the policy period. In late 2014, the shingle roof of the hotel was inspected by a roofing contractor, who found evidence of significant hail damage. On December 29, 2014, written notice of loss was given to Lloyd's, the insurer. The notice indicated the date of loss as June 13, 2012, which was within the Lloyd's policy period. That date of loss was based on a weather history report obtained by the contractor. Haag Engineering inspected the roofs for Lloyd's and issued several reports, including one that stated the damage "most likely occurred on June 13, 2012," but, in later reports, Haag indicated that, based on meteorological data, hail likely did not fall at the location only one time; rather, it fell on other dates before June 2012.

Analysis

The trial court granted Lloyd's motion for summary judgment and the Fifth Circuit affirmed. In so doing, the Fifth Circuit declared that, under Texas law, an insured bears the burden of establishing a claim is covered by a policy. Additionally, the Fifth Circuit noted that the evidence revealed that several storms struck the vicinity of the hotel over several years, with only one storm occurring within the coverage period. Given this undisputed evidence, the insured had the burden of showing what portion, if any, of the claimed damage occurred during the policy period, *i.e.*, the jury had to have a reasonable basis for allocating damage to the coverage period. Since the insured failed to meet this burden, Lloyd's was entitled to summary judgment.

Learning Point: Under Texas law, where some damage-producing event(s) such as hail occurred during the policy period and some occurred outside of the policy period, the insured bears the burden of proving what portion, if any, of claimed damages occurred during the policy period. Absent such proof, the insured cannot recover. ♦

What's Next Now That The Restatement Of Liability Insurance Was Approved?

by **Colleen A. Beverly**

Colleen A. Beverly
is a shareholder at Clausen Miller P.C. who represents insurance companies throughout the U.S. in a multitude of complex insurance coverage matters, including environmental, asbestos, silica, manganese, mold, semiconductor clean room and advertising injury claims. Colleen has also filed many declaratory judgment actions to determine coverage issues with respect to assault and battery and liquor liability exclusions, obtaining favorable rulings in every action.
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Introduction

Lawyers must stand up for the integrity of the law. Both the insurance industry and policyholders must fight any court's inclination to rely upon the final Restatement of the Law of Liability Insurance (the Restatement) to the extent it contravenes the common law, is out of sync with majority rules, or "creates" rather than "restates" liability insurance law. A "restatement" traditionally has been a summary of existing common law. However, the Restatement of Liability Insurance is an advocacy piece, not a summary of the common law.

After much controversy and criticism, the long-criticized Restatement was approved during the ALI Annual Meeting held on May 22, 2018. As previously reported by our Restatement Task Force, insurer and policyholder advocacy groups have vehemently argued over many provisions of the Restatement since this project began back in 2010. This controversy led to many different drafts of the Restatement, with the Council of Advisors to the Restatement Reporters approving Proposed Final Draft No. 2 on April 13, 2018. The ALI Members voted to approve this version during the Annual Meeting.

As lawyers, we have an obligation to ensure that the law is properly applied and that courts follow the law, not the ALI's aspirations as to what the law ought to be. The ALI's approval of the Restatement calls into question its credibility and reveals the potential bias of its members. Before the Restatement was finalized, Professor George Priest highlighted the pro-policyholder beliefs of the two key reporters of the Restatement, Tom Baker and Kyle Logue. 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 (2017). Although most criticism has come from the insurance industry, policyholders' counsel have also criticized the Restatement. See, Cox & Konkel, *ALI Restatement Misstates Law on Long-Tail Harm Claims*, Law360 (March 29, 2018), **www.law360.com/articles/1027687/ali-restatement-misstates-law-on-long-tail-harm-claims**. Lawyers on both sides of the "v" must ensure that the law is applied as written.

The Clausen Miller Restatement Task Force continues to track data in our proprietary database regarding the bias that is inherently written into the Restatement and how the Restatement is and will continue to alter the current state of insurance law. Our Task Force is ready and able to use this data to fight against reliance on the Restatement in courts throughout the country.

Analysis

The final Restatement is similar to previous versions. The most significant

revisions in the Final Restatement are to §§ 3 and 4 of Chapter 1, §§ 12 and 19 of Chapter 2 and the old §§ 48 and 49 (now §§ 47 and 48) of Chapter 4. Below is a brief description of these sections in comparison to prior versions.

Plain Meaning

One of the most controversial aspects of Restatement drafts was the proposal to replace "the plain meaning rule" for determining the meaning of a policy term with a "plain meaning presumption" that could be refuted by extrinsic evidence of contractual intent. In the end, the ALI reverted back to the "plain meaning rule" based on the fact that the vast majority of courts adopt the "plain meaning rule." ALI Reporter Tom Baker stated that the ALI was ultimately persuaded by the judges to adopt the "plain meaning rule" instead of the "plain meaning presumption" rule that it initially proposed. The judges felt that the "plain meaning presumption" was too complicated.

One of the nuances of "plain meaning" addressed in the Restatement is what happens when there is a meaning of a word in a trade. The Restatement follows the approach that the "plain meaning" is the "plain meaning" as it would be understood by someone who is knowledgeable in that trade. See §3 Comment c.

With respect to whether a term is ambiguous, the Restatement is careful in deciphering "sources of meaning" from "extrinsic evidence." In Comment c to §3, the Restatement reporters note that the term "extrinsic evidence" does not include all sources of meaning that are extrinsic to the policy. Specifically, the Restatement states that facts of the claim at issue and custom, practice and usage are extrinsic to the policy but are often considered by courts when determining the "plain meaning" of a term. In Comment d, the Restatement identifies the "sources of meaning" that can be used in determining whether a term is ambiguous are the same forms a court can use in determining the "plain meaning" but a court cannot use sources beyond that such as precontractual negotiations or courses of dealing.

Liability Of Insurer For Conduct Of Defense

The original version of this section imposed vicarious liability on an insurer if defense counsel was an employee of the insurer and direct liability if the insurer retained defense counsel with inadequate professional liability insurance. This section was extensively revised to align with the Restatement Third, The Law Governing Lawyers.

Despite the revisions, the final version of §12 is still troubling. It imposes liability on the insurer for the conduct of the defense and for negligent selection of defense counsel. As the Restatement comments admit, whether an insurer is negligent in the selection of defense counsel is a fact-specific question.

According to Comment b, this question "turns on the insurer's efforts to assure that the lawyer had adequate skill and experience in relation to the claim in question, as well as adequate professional liability insurance." As critics have pointed out, what is the standard for "adequate" insurance and how are insurers to objectively determine if outside counsel have such "adequate" insurance? This requirement in the Restatement will result in much confusion and controversy in future cases. This section goes well beyond the reach of a Restatement and instead attempts to usurp the legislative process regarding negligent selection of defense counsel.

Consequences Of Breach Of The Duty To Defend

The ALI removed problematic subsection 2 of the draft §19 which provided that an insurer that breaches a duty to defend must provide coverage for the action for which the defense was sought regardless of any coverage defenses it may have. This is not the majority law of this country and the Restatement again went too far in putting such a provision in the draft. The final Restatement §19 simply states that an insurer that breaches its duty to defend forfeits the rights to assert any control over the defense.

Remedies

The final Restatement eliminates the highly controversial subsection (4) in previous drafts which abrogated the American Rule and allowed fee shifting to an insurer when it did not prevail in a declaratory judgment action it brought to determine its obligations under a policy. As critics pointed out, this provision was illogical in that it sought to punish insurers for doing what courts recommended they do to determine the scope of their obligations – file declaratory judgment actions. With the risk of having to pay the insureds' legal costs if it failed in its declaratory judgment action, such a rule would incentivize insurers to not defend and not file a declaratory judgment action. The ALI must have understood this concern by eliminating this provision from the final Restatement. The final Restatement §47 mirrors the common law remedies available to prevailing policyholders. It also specifically states that fees are awarded to a prevailing party "when provided by state law or the policy". See §47(3).

Damages For Breach Of A Liability Insurance Policy

Similar to §47, the final Restatement eliminated subsection (3) in previous drafts which diverged from the American Rule with respect to fee shifting. State legislators have carefully considered and decided this issue as critics have repeatedly pointed out to the Restatement Reporters. It appears that such criticism convinced the ALI to take out this section.

Learning Points: The revisions to these sections do not eliminate the problems of the Restatement. Although the revisions may put certain sections more in line with the common law, as a whole, the Restatement overreaches and creates new standards of liability that are contrary to both statutory and common law. These new standards lack clarity and invite litigation. It is up to the lawyers to demonstrate to the courts in this inevitable litigation to come, the problems with the Restatement's vague terminology, the dangers of imposing new standards of liability that have no basis in the law, and the ethical issues that arise from reliance on a Restatement that runs counter to the majority rule. Judges should not rely on an advocacy piece that disguises itself as a "restatement".

CM's Restatement Task Force will continue to report on all significant developments, while maintaining our proprietary database to track the issues, jurisdictions/courts, rulings and other aspects of how the Restatement is used to alter the current state of insurance law. As previously reported, courts cited to the Restatement even before it was finalized. We expect to see even more courts citing to it now that it has been approved. Our Task Force is positioned to provide consulting services, *amicus* briefing, and generally to assist insurers in dealing with the Restatement. Should you have any questions or wish to discuss any issues relating to the Restatement or our Task Force, please contact the Task Force Members: Amy Paulus at **apaulus@clausen.com**; Colleen Beverly at **cbeverly@clausen.com**; Ilene Korey at **ikorey@clausen.com**; or Mark Zimmerman at **mzimmerman@clausen.com**. ♦

New York High Court Rejects "Unavailability Rule" In *KeySpan*

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

In *KeySpan Gas E. Corp. v. Munich Reins. Am., Inc.*, 31 N.Y.3d 51 (2018) ("*KeySpan*"), the New York Court of Appeals held that the "unavailability rule", whereby long-tail damages are not allocated to periods when relevant insurance was "commercially unavailable," is inconsistent with policy language limiting coverage to damage taking place "during the policy period." The Court of Appeals reasoned that to allocate risk to the insurer for years outside the policy period ignores that the policies do *not* provide indemnification for liability incurred as a result of an accident or occurrence taking place outside that period.

Background

In so holding, the Court of Appeals called into question the basis for its prior holding in *In Re Viking Pump, Inc.*, 27 N.Y.3d 244 (2016) ("*Viking Pump*"), which held that a provision that prevented stacking of limits for an occurrence triggering multiple policy periods, *i.e.*, a "non-cumulation" clause, required that insureds be permitted to assign their total liability to any policy in effect during the periods that the damage occurred, up to the policy limits, regardless of language limiting the scope of coverage to damages because of injury taking place "during the policy period". Prior to this 2016 decision, New York had been a solidly *pro rata* allocation jurisdiction.

In Re Viking Pump

In *Viking Pump*, the Court of Appeals held that the excess insurers of Viking Pump and Warren Pumps may be held liable on an "all sums" basis for asbestos claims against the manufacturers, and that vertical exhaustion, rather than horizontal, applies due to the non-cumulation and prior insurance provisions contained in or incorporated into the excess policies. The excess policies provided that the insurer:

> will pay on behalf of the insured all sums in excess of the retained limit which the insured shall become legally obligated to pay . . . as damages . . . because of:
>
> (a) personal injury . . . with respect to which this policy applies and caused by an occurrence.

"Occurrence" was defined, in part, as "injurious exposure to conditions, which results in personal injury" which, in turn, was defined as "personal injury or bodily injury which occurs during the policy period." The policies also provided that, "[f]or the purpose of determining the limits of the [insurer's] liability: (1) all personal injury . . . arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as the result of one and the same occurrence."

The excess policies followed form to a "non-cumulation" of liability provision, which provided that:

> [i]f the same occurrence gives rise to personal injury, property damage or advertising injury

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> or damage which occurs partly before and partly within any annual period of this policy, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by [the insurer] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof.

The policyholders, manufacturers of asbestos-containing products, argued that their losses should be allocated through a "joint and several" or "all sums" method, which would allow the insureds to assign their total liability to any policy in effect during the periods that damage occurred, up to the policy limits. Under this method, the targeted insurers could then seek contribution from the issuers of other triggered policies that had not paid their share.

The insurers argued for *pro rata* allocation, under which each insurance policy is allocated a "pro rata" share of the total loss, representing the portion of the loss that occurred during the policy period.

In a prior decision, *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687 (N.Y. 2002) ("*Con Ed*"), the Court of Appeals held that where policies provided indemnification for liability incurred as a result of an accident or occurrence "during the policy period", and not outside that period, *pro rata* allocation, rather than joint and several liability, was more consistent with the language of the policies.

Like the policies at issue in *Con Ed*, the *Viking Pump* policies also limited coverage to damages because of injury "which occurs during the policy period." However, *Viking Pump* held that, regardless of the limited scope of coverage language, all sums was the appropriate method for determining insurer liability, reasoning that to apply *pro rata* allocation would be inconsistent with the language of the non-cumulation clause. The Court of Appeals reasoned that non-cumulation clauses "plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may "also [be] covered in whole or in part under any other excess [p]olicy issued to the [insured] prior to the inception date" of the instant policy."

Facts

KeySpan Gas East Corporation's ("KeySpan") predecessor, Long Island Lighting Company ("Long Island Lighting"), operated gas plants over a period of several decades. Long-term, gradual environmental damage took place, and KeySpan undertook remediation of the sites.

Century Indemnity Company ("Century") issued excess liability insurance policies to Long Island Lighting. The environmental contamination had occurred gradually and continuously before, during, and after the Century policy periods.

KeySpan sought a declaration of coverage in New York state court under a number of insurance policies, including the policies issued by Century. Applying *pro rata* allocation, the Supreme Court held that liability should be allocated to KeySpan for the years in which it elected to self-insure and in which the legislature mandated a pollution exclusion in liability policies. However, the trial court further held that Century was responsible for damages arising from pollution taking place during years in which coverage was otherwise unavailable in the marketplace. The Appellate Division then reversed the Supreme Court's order, holding that "Century [also] does not have to indemnify KeySpan for losses that are attributable to time periods when liability insurance was otherwise unavailable in the marketplace."

Analysis

KeySpan did not dispute that it bore the risk for those years in which property damage insurance was available to, but not purchased by, Long Island Lighting, as it was voluntarily self-insured. KeySpan argued, however, that it should be responsible only for those years in which insurance was available in the marketplace.

In response, Century argued that the "unavailability rule" was inconsistent with the policy language mandating *pro rata* allocation. Century further contended that the imposition of liability on an insurer for damages resulting from occurrences outside the policy period would contravene the very premise underlying *pro rata* allocation.

The Court of Appeals agreed with Century, holding that each of the policies contained language limiting the insurer's liability to losses and occurrences happening "during the policy period." *Pro rata* allocation, rather than all sums, was more consistent with such policy language because "the policies provide indemnification for liability incurred as a result of an

accident or occurrence during the policy period, not outside that period."

The Court of Appeals further held that the unavailability rule was inconsistent with the policies' "during the policy period" coverage limitation. To allocate risk to the insurer for years outside the policy period would ignore that the policies only provided indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside that period.

Viking Pump In The Wake Of *Keyspan*

In holding that a non-cumulation clause mandates application of joint and several liability, *Viking Pump* failed to distinguish between the definition of "occurrence" for purposes of the scope of coverage, and the definition of "occurrence" for purposes of determining the limits of the insurer's liability. For purposes of determining the scope of coverage, the policy defined "occurrence" as "injurious exposure to conditions, which results in personal injury" which, in turn, was defined as "personal injury or bodily injury which occurs *during the policy period*." (emphasis added). Under this definition of "occurrence", without injury "*during the policy period*" there was no "occurrence" that fell within the scope of coverage.

The policy's "occurrence" definition further provided that "*[f]or the purpose of determining the limits of the [insurer's] liability*: (1) all personal injury . . . arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as the result of one and the *same occurrence*." (emphasis added). Nothing in this limits of liability "occurrence" definition expanded the scope of coverage, which remained limited to "all sums in excess of the retained limit which the insured shall become legally obligated to pay . . . as damages . . . because of: (a) personal injury . . . caused by [injurious exposure to conditions, which results in (personal injury or bodily injury which occurs *during the policy period*)]." (emphasis added).

The "same occurrence" contemplated by the non-cumulation clause is the same "occurrence" referenced in the limits of liability "occurrence" definition. In other words, the non-cumulation clause potentially applies to reduce the policy's limits of liability when "continuous or repeated exposure to substantially the same general conditions" causes injury "which occurs partly before and partly within any annual period of this policy[.]"

Accordingly, rather than expanding the scope of coverage, a non-cumulation clause serves "to prevent stacking, the situation in which 'an insured who has suffered a long term or continuous loss which has triggered coverage across more than one policy period . . . wishes to add together the maximum limits of all consecutive policies that have been in place during the period of the loss." The Court of Appeals has repeatedly endorsed this construction of non-cumulation clauses, as the *Viking Pump Court* conceded. *See Nesmith v. Allstate Ins. Co.*, 25 N.E.3d 924 (N.Y. 2014); *Hiraldo v. Allstate Ins. Co.*, 840 N.E.2d 563 (N.Y. 2005).

KeySpan's reasoning calls into question several other premises for the all-sums decision in *Viking Pump*. For instance, *KeySpan* reaffirmed *Con Ed's* holding that the limitation of coverage to damages taking place "during the policy period" means what it says: "the policies provide indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside that period." *Viking Pump* reads this limiting language right out of the policy, in the name of a non-cumulation clause, which pertains only to limits of liability, rather than scope of coverage.

Also, *KeySpan* further erodes any justification for violating the "during the policy period" limitation by misapplication of the non-cumulation clause. By holding that the unavailability rule improperly allocates risk to the insurer for years outside the policy period, *KeySpan* weakens reliance on the non-cumulation clause, which does not apply to the scope of coverage, for application of joint and several liability.

Learning Points: New York law rejects the "unavailability rule" and allows for allocation of damages to the policyholder for periods when relevant insurance was "commercially unavailable." The Court of Appeals has declared that application of this rule is inconsistent with policy language limiting coverage to damage taking place "during the policy period." To allocate risk to the insurer for years outside the policy period ignores that such policies do *not* provide indemnification for liability incurred as a result of an accident or occurrence taking place outside that period. How *KeySpan* will be reconciled with *Viking Pump* remains somewhat of an open question, but the better approach is to apply *KeySpan* where the policies contain non-cumulation provisions and require the policyholder to be responsible for damages during periods where insurance was commercially unavailable ♦

Excess Insurer Has No Duty To Defend Where Excess Policy's Scope Of Coverage For Subject Claim Is Same As Underlying Policy

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

In *Johnson Controls, Inc. v. Cent. Nat'l Ins. Co.*, 2018 Wisc. App. LEXIS 422, 48 ELR 20068, 2018 WL 1957131 (Wis. App. 2018), the Wisconsin Court of Appeals reversed a $68 million judgment in favor of insured Johnson Controls, Inc. ("Johnson Controls") in an environmental insurance coverage litigation matter. The Court held that two excess insurers had no obligation to defend Johnson Control against the underlying environmental claims, because the duty to defend only arose where the occurrence was covered under the excess policies but not the underlying insurance.

Facts

Johnson Controls' dispute with its insurers dates back to the late-1980s, after Johnson Controls was identified as a potentially responsible party ("PRP") in connection with environmental contamination at numerous locations. Central National Insurance Company of Omaha and Westchester Fire Insurance Company (collectively, "Central National") issued five umbrella excess policies to Johnson Controls, each of which sat above at least one umbrella policy written by another insurer, which in turn was above a primary policy issued by Employers Insurance of Wausau ("Wausau").

In 1989, Johnson Controls sued its insurers, seeking defense and indemnification for more than $150,000,000 in response costs at the sites.

In 2003, the Wisconsin Supreme Court ruled in favor of Johnson Controls on the issue of what constitutes a "suit" under insurance policies, holding that a PRP letter was a "suit" that marks the beginning of adversarial administrative legal proceedings that seek to impose liability upon an insured, triggering an insurer's duty to defend. Subsequently, the Wisconsin Supreme Court ruled that excess insurer London had a duty to defend the environmental claims under its policies. *See Johnson Controls, Inc. v. London Mkt.*, 784 N.W.2d 579 (Wis. 2010) ("*Johnson Controls IV*") The Court rejected London's argument that exhaustion of underlying coverage was a precondition to coverage, holding that under the terms of the other insurance clause in the London policies, London's duty to defend was triggered when the underlying insurer denied coverage under its policies.

Johnson Controls claimed that, under *Johnson Controls IV*, Central National breached its duty to defend it against the environmental claims. Central National asserted, based on the following policy provision, that *Johnson Controls IV* did not apply and that it had no duty to defend Johnson Controls:

> As respects occurrences covered under this policy, but not covered

> under the underlying insurances as set out in the attached schedule or under any other collectible insurance, the Company shall: (a) defend in his name and behalf any suit against the insured alleging liability insured under the provisions of this policy and seeking damages on account thereof, even if such suit is groundless, false or fraudulent[.]

The trial court ruled in favor of Johnson Controls and entered judgment against Central National in the amount of $68 million, plus 4.25% in post-judgment interest. The trial court reasoned as follows:

> [T]he principle remains that a duty to defend exists when coverage is arguable. . . . [I]t was unclear whether the claims were covered by the underlying policies. All of the insurers initially asserted that their policies did not cover the claim. Based on this fact, because it was "fairly debatable" whether any of the claims were "covered" or "not covered" by the underlying policies, [Central National] breached their duties to defend by failing to defend when it was fairly debatable whether the claim was covered.

Central National appealed.

Analysis

The Wisconsin Court of Appeals reversed the circuit court, emphasizing that, under *Johnson Controls IV*, the duty to defend analysis is driven by policy language, not generalized concepts about the role of excess insurance and the duties of excess insurers. Contrary to *Johnson Controls IV*, the trial court had relied on general insurance concepts, leading it to the mistaken conclusion that "because coverage under the facts of the claim was fairly debatable, the court could find that there was a duty to defend[.]" The Court of Appeals rejected this reasoning, noting that, if coverage were "fairly debatable," then the primary insurer would, in fact, have the duty to defend.

Importantly, Johnson Controls conceded on appeal that Central National "agreed to provide a defense only for 'occurrences covered under [Central National's] policy, but not covered under the underlying insurances.'" There was also no dispute that the scope of coverage was the same in the Wausau primary policies as in Central National policies.

The Court of Appeals refused to ignore the specific policy language at hand. The claims against Johnson Controls were never going to trigger Central National's duty to defend, because it was undisputed that the Central National policies and the underlying policies provided the same scope of coverage for the occurrence at issue. Therefore, it was impossible for an occurrence to be "covered" under the Central National policies but "not covered" under the Wausau policies. Because the Central National policies' coverage was identical to the underlying policies' coverage, either the occurrences were covered by all policies, in which case Central National had no duty to defend, or there was no coverage under any of the policies.

Accordingly, the Court of Appeals concluded that Central National owed no duty to defend Johnson Controls.

Learning Points: In order to determine whether an insurer is obligated to provide a defense, Wisconsin courts look to the language of the policy at hand, rather than general insurance concepts. Accordingly, where (1) an excess policy provides a defense only for claims covered under that excess policy, but which are not covered by underlying policies, and (2) the scope of coverage for the claims at issue is the same under that excess policy as the underlying policies, there is no duty to defend under that excess policy. The Court of Appeals' decision also derailed a sentiment prevalent in the wake of *Johnson Controls IV* that, absent an express conclusion to the contrary, an excess insurer could have a duty to defend if the primary insurer refused to do so. ♦

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If At First You Don't Succeed: Wisconsin Supreme Court Approves Caps In Med Mal Cases

by ***Paul V. Esposito*** *and* ***Melinda S. Kollross***

Life is about many things, and one of the most important is perseverance. Walt Disney went bankrupt several times before he built Disneyland. He passed on a cartoonist named Charles Schultz, who eventually did alright drawing a group of kids and a dog named Snoopy. Thomas Edison found 1,000 ways not to invent a lightbulb. Michael Jordan lost almost 300 games, missed 9,000 shots, and failed to make 26 game-winning baskets. We count them among the greatest of their fields. They all kept shooting.

So did the Wisconsin legislature. In 1975, it established a system of guaranteed payments and controlled liabilities in cases involving medical malpractice. Health care providers were required to maintain $1 million/$3 million in liability insurance and pay annual assessments to a compensation fund. The fund guaranteed payment of all settlements and judgments for damages—economic or noneconomic—exceeding the coverage amount. In 1986, the legislature capped noneconomic damages at $1 million. In 1995, it reduced the noneconomic cap to $350,000. In 2005, the Wisconsin Supreme Court held that although statutory caps can be constitutional, the $350,000 cap violated the equal protection guarantees of the state constitution. *Ferdon ex. rel Petrucelli v. Wis Patients Comp. Fund*, 2005 WI 125 (a case we've previously reported). The legislature then upped the noneconomic cap to $750,000. That's where things stood when a very serious injury dispute reached the courts.

Facts

In May 2011, Ascaris Mayo went to a hospital emergency room complaining of abdominal pain and a high fever. She was advised to consult her gynecologist because of her history of fibroids. The next day she went to another emergency room, where she was diagnosed with sepsis caused by an untreated infection. Many of her organs failed, and all four limbs were amputated due to dry gangrene. She brought suit and was awarded almost $9 million in economic damages and $15 million in noneconomic damages. The fund moved to reduce the noneconomic award consistent with the cap. The trial court ruled that as applied, the cap violated state equal protection and due process guarantees. The court of appeals ruled that the cap was unconstitutional on its face. A divided Supreme Court overruled *Ferdon* and concluded that the cap was constitutional on its face and as applied. *Mayo v. Wis. Injured Pat. and Fam. Comp. Fund*, 2018 WI 78, 2018 Wisc. LEXIS 306.

Analysis

In large part, the case turned on the proper standard to be applied to constitutional law challenges. Generally, a statute can be challenged as unconstitutional "on its face" or "as applied" to the particular case. Under

the first, a challenger must show that the law is unenforceable under all circumstances. Under the second, the law must be unenforceable as to the particular challenger because of an actual violation of his or her rights. Moreover, there are two different levels of scrutiny. If a fundamental right if involved—like the right to vote or to be free of discrimination—a court will strictly scrutinize a statute to determine if it serves a compelling state interest. If no fundamental right is involved, the court merely determines whether there was a rational basis for the statute.

The 2005 ruling in *Ferdon* created a third level of scrutiny: "rational basis with teeth." The problem was that the court gave no guidance on how to apply the test. Consequently, it allowed judges to apply their own policy choices as to whether caps should be imposed, and if so, to what degree. That allowed the *Ferdon* majority to ignore the guaranteed-payment feature of the law in deciding that the $350,000 cap was unconstitutional. So the *Mayo* Court scrapped the test and overruled *Ferdon*.

Mayo argued that the cap created two differently treated classes: one fully compensated despite the noneconomic cap amount and one not so. With *Ferdon* gone and no fundamental right to noneconomic damages involved, the court examined Mayo's allegations under the rational relationship test. Under the test, the existence of some inequality was permissible if there is any reasonable basis to justify the classifications. The standard is met if the classifications are: (1) substantially distinct, (2) germane to the purpose of the law, (3) open to additional members, (4) equally subject to the applicable law, and (5) different enough to suggest legislation for the public good. The majority found that the amended law met all of the criteria.

It also found that the legislative goals of the statute supported the damage caps. The goals were to lower health care costs and insurance rates, encourage doctors to practice in Wisconsin, reduce the expensive practice of "defensive" medicine, make economic damages more predictable in order to control premium adjustments, and to protect the fund. Under the rational-basis review standard, whether those goals were actually met did not matter. The Court found no reason to hold the statue as unconstitutional on its face.

As for Mayo's "as applied" challenge, the Court found that it failed the test. Mayo was not treated differently from others in her class. Moreover, the cap as applied was neither arbitrary nor unrelated to a legitimate government interest. Whether the fund had sufficient assets to pay the judgment was irrelevant. The legislature had made a policy decision. Given that the legislature had a constitutional right to abolish malpractice claims altogether, its choice to set a cap was permissible.

The two dissenters—part of the *Ferdon* majority—did not mention the rejection of the "rational basis with teeth" test. But the dissent argued that none of the legislative goals have worked out in fact. The fund has remained solvent, doctors have not fled, they will not be personally liable for judgments, and there is no proven correlation between awards and insurance hikes. But that point is weak, for circumstances can change. The legislature had the right to make policy choices that paid dividends in the future if not in the present. Finally, the dissenters believed that *Ferdon* should remain the law because it was the right law. But in fact, *Ferdon* wasn't. The Court had overstepped its role by inserting individual justices' public policy views into the process.

Learning Point: *Mayo* points to the need to be watchful. Since *Ferdon*, the Wisconsin Supreme Court has undergone a change in personnel that has shifted judicial philosophy more center. This has allowed a return to the proper application of a longstanding constitutional test.

But even more, a threshold question exists as to whether the imposition of a cap can ever be subject to an equal protection/due process challenge. The problem is that the class of people affected by the cap could just as easily not be affected by a cap. The reason is simple: noneconomic damages are inherently subjective, and no one has a right to them in any particular amount. The jury awarded Mayo noneconomic damages of $15 million. It could have awarded her $750,000. There is no minimum required award of noneconomic damages. A jury has discretion in awarding damages, and in a personal injury case, the courts are reluctant to interfere. So it is difficult to argue that a cap on noneconomic damages creates a class of disadvantaged persons.

The Wisconsin result is a good one, and there will probably be more opportunities in other states to sustain caps on economic damages. Keep shooting. ♦

New Duties Owed By Universities To Students And Pharmacists To Customers/Patients

by Paul V. Esposito

Not Just Bottle-Fillers: Pharmacists' New Duty To Protect Patient's Health Care Coverage

Progress does not come cheap, a fact no more evident than in the field of pharmacology. The progress, of course, is undeniable. Once blends of herbs, roots, oils, and powders—with a prayer thrown in for luck—today's complex, scientifically-based compounds can cure conditions unknown in past centuries. But they don't come without years of research and testing supported by huge financial investments for which investors hope to be handsomely rewarded.

These days, medicines can be very expensive, sometimes even cost-prohibitive, for consumers. Health insurance has becomes essential for consumers to obtain them. Faced with high payouts, insurers look for ways to keep costs down. One is through lower-cost generic drugs. Some insurers will not pay for prescribed drugs if cheaper generic drugs are available.

Enter the pharmacist. No longer just a person putting pills in a bottle, a pharmacist must be ready to interact with a physician, the physician's patient, and the patient's insurer as to a prescription. It puts new business demands on the pharmacist. And now, new legal demands. In *Correa v. Schoeck*, 279 Mass. 686, 2018 Mass. LEXIS 353, a divided Massachusetts Supreme Judicial Court has recognized them.

Facts

In May 2009 Yarushka Rivera, age 18, suffered an epileptic seizure. Her doctor prescribed Topamax to control them. Yarushka filled the prescription at a Walgreens store. MassHealth (a Medicaid program) covered the cost. When she and her family tried to refill the prescription, they were told that once Yarushka turned 19, MassHealth would require her physician to complete a "prior authorization" form for her to obtain coverage. The form was designed to ensure that cost-effective generic drugs were used if available. According to the family, a pharmacist said that Walgreens would contact the doctor. Though not required, Walgreens routinely faxed notices to physicians about the need for the form. Occasionally a pharmacist would place a follow-up call. If an insurer denied coverage for lack of a signed form, a pharmacist would follow up with the physician by phone and/or fax.

Unfortunately, the players were not on the same page. According to plaintiffs, they repeatedly called the pharmacy and doctor about the needed authorization. Walgreens supposedly assured them that they would handle the paperwork. Walgreens denied the conversations and assurances. The doctor's personnel claims that they never heard from the family or Walgreens about the need for the form.

Meanwhile Yarushka, then age 19, had a second seizure in August. MassHealth refused to cover the prescription because no one had submitted the form. The family could not afford the $400 needed for the medicine. There were more disputes over contacts, or the lack of them, to the doctor to get the form.

Near the end of October 2009 Yarushka had a third seizure, this one fatal. She had been off Topamax since August. Her estate's administrator sued Walgreens and the doctor for wrongful death. The trial court ruled that Walgreens had no legal duty to Yarushka.

Analysis

The Supreme Judicial Court disagreed. It ruled that each time Yarushka tried to fill the prescription, Walgreens owed her a "limited duty to take reasonable steps" to advise her and her physician about the need for the form. Pharmacists' roles have expanded over the years, and pharmacists were well suited to provide important information to doctors. State regulations require them to identify and prevent risks, consult with physicians, and offer to counsel patients. Given what pharmacists must do, those seeking their services are more their patients than their customers.

Pharmacists are also required to react when they know about specific risks to a patient. The learned-intermediary doctrine does not relieve a pharmacist who knows of those risks from acting. Rather than interfering with a doctor-patient relationship, imposing a duty on pharmacists supports it by helping to ensure that a patient receives prescribed medication. Industry practices also support the duty to notify both patient and physician of the need for prior authorization. Having the notice come from a pharmacist rather than a patient is more effective because of a pharmacists' knowledge and objectivity. Walgreens' pharmacists were trained to notify both doctor and patient. Absent notice, it is reasonably foreseeable to pharmacists that a patient unable to afford medicine will suffer harm.

The Court limited the new duty. It only applies to insurance-related problems. A pharmacist need only advise doctor and patient that for a patient to receive insurance coverage, the doctor must complete a form. The Court rejected plaintiff's argument that a pharmacist must follow up with doctors who do not provide the form. Nor does a pharmacist need to impose enforcement mechanisms on doctors failing to act. As long as a pharmacist provides the notices and records it, the duty is discharged.

The ruling was not unanimous. The dissenting justice argued that a pharmacist should only be required to notify a patient, not a doctor, each time a patient presents a prescription. Imposing a weak duty on pharmacists while simultaneously lessening the responsibility of insurers, doctors, and patients will compromise patient safety. Patients may develop a false sense of security that prescriptions will be filled when, in fact, pharmacists have no control over the result. Moreover, the extent of the new duty is uncertain. Will voicemail be enough? How many messages must be left? Must a pharmacist confirm receipt? What, if anything, must a pharmacist tell a health insurer about patient information and needs? Will small businesses be able to comply with document retention issues? Will physicians and insurers be allowed to delegate responsibilities to pharmacists? These and other questions troubled the dissent.

Learning Points: Generally a court's first foray into an issue does not resolve matters entirely, and that's the case here. Over time, the reviewing court will likely answer many of the dissenter's questions.

The biggest question may be one that the justices failed to ask: will the duty to provide notice eventually extend to health insurers? In the law, duties tend to expand, not contract. As a government program, MassHealth might enjoy immunities, but that's not usually true for private health plans. They owe duties to their beneficiaries. Where they know about a patient's serious condition and/or inability to afford medicine, the law might someday impose a duty to take active steps to help with obtaining needed authorizations.

One more thing: the case offers an important lesson about record keeping. Walgreens repeatedly claimed that it provided notice; Walgreen's problem was that it did not keep a written record of doing so. Especially where health issues are concerned, documenting efforts to protect patient health is vital.

Schools' Duty To Prevent Suicides: A New Special Relationship

It was a classic movie scene. Karl Malden, playing a fire-and-brimstone preacher in Disney's *Pollyanna*, has his flock squirming as his builds to his climactic line: "***Death comes unexpectedly!***" It was great stuff, humorous for how Malden played the congregation. But of course, we know

it's true. And when death does come, it can be so very tragic.

On college campuses, suicide is the second leading cause of death. The reasons can be many, sometimes never to be known. What's known is that for some students, the will to live even for another moment deserts them. For those left behind, the loss of life, the shock and pain, are always difficult to bear.

Generally, there is no legal duty to prevent suicide. The law does not impose a duty to rescue another from harm that a would-be rescuer did not create. But an affirmative duty of care may arise when a "special relationship" exists between a potential rescuer and a person at risk of harm. Typically, there are only a few special relationships: innkeeper-guest, carrier-passenger, master-servant, custodian-ward, and possessor of land-invitee. The Massachusetts Supreme Judicial Court has recently added another: university-student. *Nguyen v. Mass. Inst. of Tech.*, 2018 Mass. LEXIS 249.

Facts

Han Nguyen, a 25-year old grad student living off campus, enrolled in a marketing doctoral program. He wanted to be a professor. He sought the school's help with test-taking problems. Referred by student disability services to MIT's mental health service, Nguyen at first denied suicidal ideation. Later, he admitted to a long history of severe depression and two suicide attempts while an undergrad. But he did not identify a plan to commit suicide, nor did he appear imminently suicidal to school personnel or to an off-campus psychiatrist he was seeing.

While in the program, Nguyen received academic help from two professors, neither of whom were aware of his history of depression and suicide attempts. They heard he was having problems with sleep deprivation. They relaxed his exam schedule. Ultimately Nguyen passed his course work, but his work was not good. Given a teaching assistant role, he did not respond appropriately in emails to his supervisor. After a professor "read him the riot act" for an inappropriate email, Nguyen went to the roof of a school building and jumped to his death.

Nguyen's father brought a wrongful death action against MIT and three academics. The trial court ruled that none owed Nguyen a duty of care. The Supreme Court agreed, but not before explaining when an institution of higher learning owes an affirmative duty to prevent suicide.

Analysis

Special relationships in law are grounded in the concept of control. In a relationship like carrier-passenger or innkeeper-guest, the former exerts a measure of control that restricts the latter's opportunities to protect him or herself. In a relationship like master-servant, a master can control a servant's activities so to protect others from harm. So the law imposes an affirmative duty to protect and rescue from harm.

In a university-student relationship, schools have multi-faceted roles in their students' lives, from educator to advisor to coach to landlord to social director. At the same time, they do not monitor every aspect of students' lives and must remain respectful of their autonomy and privacy.

Given the relationship, the primary factor in determining the extent of a duty to protect and rescue is foreseeability. Can a school reasonably foresee that it would be expected to take protective action, and can it anticipate harm if it fails to do so? Another factor is whether a student would reasonably rely on a school's help and so not seek help from others. Other factors include the certainty of harm, the burdens on a school, the mutual dependence of school and student, financial benefits to a school, the moral blame for inaction, and social policy considerations of holding a school liable.

Based on these factors, the *Nguyen* Court found a special relationship, with a resulting duty to take reasonable measures to prevent student suicide. But it limited the circumstances. A school must have actual knowledge of a student's suicide attempt either while enrolled or recently before enrollment. Alternatively, it must have learned of a student's stated plans or intentions to commit suicide. Non-clinicians are not expected to know suicidal tendencies. A student's general statements or ideations about suicide are also not enough to trigger a duty.

What constitutes reasonable care includes creating a suicide prevention protocol within the institution to timely alert persons trained to help. In emergencies, it includes contacting police, fire, or medical personnel. Though the duty of non-clinicians is limited, trained professionals must meet the standards of their professions.

Learning Point: The law tends to catch up to the needs of society, and this is an area where that is happening. Expect other states to follow suit. Unfortunately, the epidemic of student suicide is not going away anytime soon. ♦

AUTO INSURANCE

BUSINESS-USE EXCLUSION INAPPLICABLE TO VEHICLE CRASH

Am. Access Cas. Co. v. Cincin. Ins. Co., 2018 Ind. App. LEXIS 173 (Ind. App.)

While traveling to a patient's residence, home health aide struck a vehicle. ***Held:*** The business-use exclusion in health aide's policy did not bar coverage. The exclusion applied to "any automobile while used in the delivery, or any activity associated with delivery, of food, mail, newspapers, magazines, or packages for an employer or business or in any trade or business." It was limited to activities involving deliveries. Moreover, the aide was not reimbursed by her employer for time and expense in driving to patients.

CIVIL PROCEDURE

ANTI-SLAPP MOTION MAY ADDRESS CLAIMS FOR RELIEF WITHIN CAUSE OF ACTION THAT INVOLVE PROTECTED ACTIVITY

Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism, 23 Cal.App.5th 28 (Cal. Ct. App.)

Plaintiff sublessee of real property filed complaint against defendant property owner and lessee for breach of contract, declaratory relief and intentional interference with contract. The defendants filed a special motion to strike under the California anti-SLAPP statute as to specific allegations of protected activity constituting a claim for relief within a pleaded count that also included allegations of unprotected activity. ***Held:*** Defendants met their burden with respect to allegations related to protected activity and appropriately shifted the burden to the plaintiff to show a probability of prevailing on the claims based on allegations of protected activity. As to the claims that do not arise out of protected activity, the burden did not shift to the plaintiff to show a probability of prevailing on those claims.

ELECTION OF REMEDIES PROHIBITS LAWSUIT ON SAME ALLEGATIONS DISMISSED IN ADMINISTRATIVE COMPLAINT

Luckie v. Northern Adult Day Health Care Ctr., 73 N.Y.S.3d 454 (N.Y. App. Div. 2d Dep't)

Plaintiff filed an administrative complaint against his employer with the New York State Division of Human Rights ("Division") for unlawful discriminatory practices under the New York State Human Rights Law ("NYCHRL"). The Division determined there was no probable cause to believe the employer engaged in the practice. Article 78 review resulted in dismissal of his proceeding. Thereafter, he commenced an action in Supreme Court alleging discrimination and retaliation under NYCHRL. ***Held:*** Under the election of remedies doctrine, plaintiff is precluded from commencing an action in Supreme Court as to the same discriminatory acts for which he filed a complaint with the Division.

DAMAGES

TREATMENT ON A LIEN MUST STILL BE SUPPORTED BY EXPERT TESTIMONY AS TO REASONABLE VALUE OF MEDICAL SERVICES

Pebley v. Santa Clara Organics, LLC, 22 Cal.App.5th 1266 (Cal. App.)

Plaintiff involved in motor vehicle accident had health insurance, but chose to treat on a lien. During trial, the court allowed the plaintiff to introduce his full medical bills. The defendants introduced expert testimony that the reasonable and customary value of the medical services was substantially less than the amounts billed, but the jury awarded the full bill amounts. On appeal, the court considered whether plaintiff was to be classified as insured or uninsured in light of the treatment outside his insurance plan. ***Held:*** Evidence of the full amounts of the plaintiff's medical bills was properly before the jury and the plaintiff should be considered uninsured because he had a right to choose to treat on a lien. The medical bills themselves, however, were insufficient and plaintiff needed expert testimony to establish the reasonable value of services rendered.

EMPLOYMENT LAW

TRADE SECRETS ACT CANNOT BE USED TO RESTRICT COMPETITION

Norton v. Am. LED Tech., Inc., 2018 Fla. App. LEXIS 5918 (Fla. App.)

Company sued its former employee and moved for temporary injunction based on violation of the Uniform Trade Secrets Act ("UTSA") and violation of a non-compete agreement. ***Held:*** The Court of Appeals of Florida reversed the trial court's order prohibiting the former employee from engaging in business in direct competition with the company for the earlier of one year or the conclusion of litigation. One year is not a brief respite from employment. The UTSA requires courts to take reasonable steps to preserve the secrecy of trade secrets but it cannot be used as a vehicle to restrict competition.

EVIDENCE

EXPERT OPINION EVIDENCE SUPPORTING CLASS CERTIFICATION MUST BE SCRUTINIZED

Apple, Inc. v. Superior Court, 19 Cal. App.5th 1101 (Cal. Ct. App.)

Plaintiffs alleged in a putative class action suit that Apple's iPhone 4, 4S and 5 smartphones were sold with a defective power button. Plaintiffs filed a motion to certify two classes of purchasers and supported the motion with an expert declaration as to costs of repair and diminution damages. Apple argued that the nature of the defect and its knowledge varied across the individual iPhones at issue and that the damages did not apply to all class members because some did not pay for repairs or suffer perceptible diminution in value. ***Held:*** The trial court erred in granting class certification without considering the materials and methodologies of plaintiffs' proposed expert opinion evidence. If the evidence had been analyzed for admissibility, it might have been excluded by the trial court, impacting the class certification decision.

EXPERT TESTIMONY NEEDED TO ESTABLISH SCHOOL SAFETY CARE STANDARD

Osborn et. al. v. City of Waterbury et. al., No. AC 39574 (Conn. App. Ct.)

Plaintiff mother and child sought damages from City for personal injuries sustained by child when assaulted by other students during school recess. Judgment was rendered in favor of plaintiffs. City appealed, arguing that the trial court improperly determined, without supporting expert testimony, that one student intern and three or four staff members were insufficient to control as many as four hundred students on the playground. ***Held:*** Reversed and remanded with direction to enter judgment for the City defendants. Plaintiffs were required to present expert testimony because the standards of care regarding the number of supervisors needed to ensure the safety of elementary school students on a playground was not a matter of common knowledge.

LANDLORD-TENANT WITHDRAWAL OF NOTICE TO QUIT FOR NONPAYMENT OF RENT RESTORES THE CONTINUATION OF A LEASE AGREEMENT

Aloysius Kargul et. al. v. Mika-Ela Smith et. al., No. AC 40196 (Conn. App. Ct.)

Plaintiff landlords sought to regain possession of premises rented to defendants by serving a notice to quit for nonpayment of rent and then filing a summary process action. Plaintiffs withdrew those papers and filed a second notice to quit and a new summary process action. After Defendants failed to comply with a stipulated judgment, Plaintiffs were granted an order of execution for possession. Defendants appealed arguing the trial court did not have subject matter jurisdiction since Plaintiffs had terminated the parties' lease agreement by serving the initial notice to quit possession, depriving the trial court of jurisdiction to entertain the second summary process action. ***Held:*** Affirmed. When Plaintiffs withdrew the first action prior to a hearing on its merits, the continuation of the lease agreement between the parties was restored.

LEGAL MALPRACTICE

MUST PLEAD SUFFICIENT FACTS IN MALPRACTICE CLAIM

Mid-Hudson Val. FCU v. Quartararo & Lois, PLLC, 2018 NY Slip Op 04034 (N.Y.)

Credit union sued law firm for legal malpractice. Appellate Division decided credit union failed to state claim against the firm. ***Held:*** Affirmed. The amended complaint failed to allege facts sufficiently particular to give the court and defendants notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved.

LIABILITY INSURANCE COVERAGE

NEGLIGENT HIRING MAY BE AN "OCCURRENCE" UNDER A COMMERCIAL GENERAL LIABILITY POLICY IF THE INJURY IS "ACCIDENTAL"

Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc., No. S236765 (Cal.)

Defendant contracted with a school district to manage a construction project at a school. A minor sued the defendant for negligent hiring, retention and supervision of an employee, whom she alleged sexually abused her. Defendant sought coverage but the insurer obtained summary judgment in federal court on the basis the minor's injury was not caused by an "occurrence" -- defined in the policy as an "accident" -- because the alleged negligent acts were antecedent to the sexual molestation. The federal court explained the acts were too attenuated from the injury-causing conduct committed by the employee to trigger coverage; however the Ninth Circuit then sought clarification from the California Supreme Court. ***Held:*** Under California law, negligent hiring, retention or supervision may be a substantial factor in a sexual molestation perpetrated by an employee. Thus, an insured employer may legitimately expect coverage for these types of claims under a general liability policy.

NO COVERAGE FOR SECURITY GUARD'S ASSAULT OF STORE PATRON

Talley v. Mustafa, 2018 Wisc. LEXIS 224 (Wis.)

Insurer sought declaration of no coverage after insured's security guard punched a store patron. ***Held in a split decision:*** When the negligent supervision claim rests solely on an employee's intentional and unlawful act without a separate basis in negligence, no coverage exists. Intentional assault is not a covered "occurrence" under the policy. If alleged negligent supervision only involves the failure to train an employee to not punch a customer, no coverage exists. The dissent argued that the majority should have assumed that plaintiff could prove negligent supervision before determining whether coverage existed.

MEDICAL MALPRACTICE

PLEADING DEFECT CANNOT BE CURED IN RESPONSE BRIEF AFTER APPLICABLE STATUTE OF LIMITATIONS HAS EXPIRED

Peters v. United Comm. & Fam. Servs., Inc.. No. AC 39559 (Conn. App. Ct.)

Plaintiff sought damages from defendant dental surgeon, alleging negligent performance of maxillofacial surgery. Plaintiff appended to his Complaint an opinion letter by a maxillofacial surgeon opining that there was medical negligence. The letter did not indicate whether the author was board certified. Defendant moved to dismiss claiming that the trial court lacked personal jurisdiction over him because the author was not a similar health care provider. Plaintiff opposed with an affidavit from the author attesting to his board certification. The trial court declined to consider the affidavit, filed outside the relevant statute of limitation period, and granted the motion to dismiss. ***Held:*** Affirmed. Plaintiff did not attempt to cure the defective opinion later by way of amendment of the pleadings, and, instead submitted the explanatory affidavit with his opposition to the motion to dismiss, after the expiration of the statute of limitations.

REPORTING SUSPECTED CHILD ABUSE NOT PROTECTED BY ANTI-SLAPP STATUTE

Gresk v. Demetris, 2018 Ind. LEXIS 329 (Ind.)

After doctor reported parents for suspected child abuse, parents sued her for malpractice. ***Held:*** Anti-SLAPP statute does not protect doctor. It protects individuals from suits seeking to discourage the exercise of their rights to speak on public issues. The doctor had a statutory duty to report suspected abuse. She had not engaged in a public discussion because, although child abuse is a matter of public importance, reporting abuse is not a public discussion.

MUNICIPAL LAW

ABANDONMENT OF PUBLIC LAND

Nichols et. al. v. Town of Oxford, No. AC 39366 (Conn. App. Ct.)

Plaintiff sought an order directing the defendant Town to repair and maintain unimproved sections of a certain highway. Twenty-five years had passed since the unorganized public last used the challenged sections of the road as a highway and the Town had refused to acknowledge those sections as part of the road, did not develop or maintain them, and had no plans to develop or maintain them in the future. Trial court denied plaintiff's request. ***Held:*** Affirmed. Abandonment of a highway may be inferred from circumstances or presumed from long continued neglect.

FIREFIGHTER PROPERLY PLED LABOR LAW ACTION AGAINST CITY

Shea v. New York City Economic Dev. Corp., 2018 N.Y. App. Div. LEXIS 3098 (N.Y. App. Div. 2d Dep't)

Firefighter claimed he was injured during the course of his employment and sued the city, which owned the property, and the New York City Economic Development Corporation ("EDC"), which maintained the property, under Labor Law §27-a. ***Held:*** §27-a states that every employer shall furnish a place of employment free from recognized hazards that are likely to cause physical harm to employees. Plaintiff submitted evidence that the city, his employer, failed to furnish him with such a workplace. ***Further held:*** The Labor Law is inapplicable to EDC as it was not plaintiff's employer and he failed to demonstrate that EDC created the allegedly defective condition or had either actual or constructive notice of same.

CITY IMMUNE FROM LIABILITY FOR POLICE OFFICER'S FENDER BENDER

Ibrahim v. City of Dayton, 2018 Ohio App LEXIS 1443 (Ohio App.)

Responding officer backed his vehicle into plaintiff's car. ***Held:*** City was immune because the officer was responding to an emergency. The situation did not need to be inherently dangerous. Officer's conduct was not willful and wanton. He was driving slowly, and the probability of harm was not high. His failure to check rear-view mirror was not much worse than negligence.

NEGLIGENCE

ERRATIC DRIVERS ARE NOT FORESEEABLE IN SUDDEN EMERGENCY

Shiver v. Laramee, 2018 Cal.App. LEXIS 535 (Cal. Ct. App.)

Plaintiff brought negligence action against truck driver and driver's employer after truck driver rear-ended plaintiff. The accident occurred when plaintiff had to brake suddenly due to an erratic driver in front of her on an on-ramp. The truck driver was unable to take evasive action before the front of his truck struck plaintiff's car. The trial court found the sudden braking created a sudden and unexpected emergency, which caused the accident. ***Held:*** No negligence under the sudden emergency doctrine. The driver of a motor vehicle who has the right of way is not required to foresee road rage or that cars on a freeway on-ramp will unsafely merge and then slam on the brakes.

SENIOR CITIZEN FACILITY SUBJECT TO LIABILITY FOR RESIDENT'S SLIP IN PARKING LOT

Dehoyos v. Golden Manor Apts., 2018 Ind. App. LEXIS 158 (Ind. App.)

Resident exiting her building fell on icy sidewalk. ***Held:*** Owner had sufficient notice of conditions. It allowed snow to remain on the ground for several days and retained a service to clean the walks on the day of accident. The ice on the sidewalk was hard to see.

WAREHOUSING COMPANY NOT LIABLE FOR TRUCKING ACCIDENT

Estate of Staggs v. ADS Logistics Co., LLC, 2018 Ind. App. LEXIS 172 (Ind. App.)

After a steel coil rolled off a truck during a haul, plaintiffs sued the company loading it. ***Held:*** Defendant loading company was not responsible to secure load. Its crane operator merely placed the coil where requested by the driver, who secured it. The driver did not check the load in transit despite a braking incident that made load feel funny. Loading company's contract with the coil manufacturer did not require securement. Company did not assume a duty to secure. It had no relationship with carrier and should not have foreseen the accident. The driver and carrier were best positioned to prevent injuries.

UNIVERSITY LACKED DUTY TO PREVENT SUICIDE

Nguyen v. Mass. Inst. of Tech., 2018 Mass. LEXIS 249 (Mass.)

Troubled off-campus grad student jumped off campus building. ***Held:*** School lacked a duty under the facts. Generally, no duty to prevent suicide exists, but a special relationship may impose a duty where (1) school actually knows of student's prior suicide attempt while enrolled or recently before, or (2) student has stated intent to commit suicide. Non-clinicians are not expected to discern suicidal tendencies based on ideation alone. Student had not expressed suicidal intentions. He lived off campus and was not daily observed. School did not assume a duty by providing campus-wide mental health support services.

STATE HAS BURDEN TO REMEDY DANGEROUS CONDITION

Brown v. State of New York, 2018 N.Y. LEXIS 1352 (N.Y.)

Passenger in motorcycle accident sued State on behalf of self and deceased husband, alleging improper design of an intersection. The Department of Transportation had begun a study of the potentially dangerous intersection but did not complete the study, nor did it take any remedial action. The truck driver who hit the motorcycle was found to have taken reasonable care in approaching the intersection. ***Held:*** State was ineligible for qualified immunity because it did not complete the study. Upon notice, State must take reasonable steps in a reasonable amount of time to remedy a dangerous condition.

DEFECT IN LAUNDROMAT WASHER OPEN AND OBVIOUS

McLaughlin v. Andy's Coin Laundries, LLC, 2018 Ohio App. LEXIS 2015 (Ohio App.)

Patron was severely injured when he stuck his hand in a malfunctioning washer while the drum was spinning. ***Held:*** The danger was open and obvious. A label warned about the dangers of a rotating drum. Patron was not distracted. He opened the machine to retrieve his clothes. ***Further held:*** The patron's conduct constituted an unforeseeable misuse of the product. The manufacturer did not have prior knowledge of similar misuse.

OWNER FACES TRIAL FOR DOG BITE TO DELIVERY MAN

Gillespie v. Waterwheel Farms, Inc., 2018 Ohio App. LEXIS 1686 (Ohio App.)

Dog bit delivery man entering through wrong door. ***Held:*** Criminal-trespass defense raised a genuine issue of fact. Although a sign warned of dog, man was not a trespasser on arrival, nor did he hear dog or see sign. There was conflicting evidence on whether dog attacked before signs became visible. Though man used wrong door, there was a genuine issue whether owner should have anticipated his presence.

PROPERTY LAW

ESTABLISHING A PRESCRIPTIVE EASEMENT

Ciringione v. Ryan, 2018 N.Y. App. Div. LEXIS 3976 (N.Y. App. Div. 2d Dep't)

A driveway is located on plaintiff's and defendants' respective properties. Plaintiff commenced an action for a judgment stating that she acquired a prescriptive easement over that portion of defendants' property that contains the driveway. ***Held:*** Plaintiff satisfied the requisite requirement and was declared to have a prescriptive easement over defendants' property. The elements of a prescriptive easement must be established by clear and convincing evidence, namely that the use was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of ten years.

STATUTE OF LIMITATIONS

ACTUAL INJURY TRIGGERS STATUTE OF LIMITATIONS

Lederer v. Gursey Schneider LLP, 22 Cal.App.5th 508 (Cal. Ct. App.)

Plaintiff employed firm to purchase insurance for her. Plaintiff requested uninsured/underinsured insurance with a policy limit of $5 million; however, firm purchased policy with limit of $1.5 million. An accident involving her son occurred in 2010 and the firm tendered the policy limits in 2012. Plaintiff then sued in 2013, alleging damages because she and her son could not collect additional benefits. Firm successfully moved for summary adjudication on the grounds that the lawsuit was untimely. ***Held:*** Plaintiff did not incur actual damages until her son received the policy payment. Thus, the March 2013 lawsuit was within the applicable two year statute of limitations. A right to UIM motorist coverage does not accrue until the insured has reached a policy-exhausting settlement or judgment.

3-YEAR STATUTE OF LIMITATIONS FOR NO-FAULT CLAIM

Contact Chiropractic, P.C. v. New York City Tr. Auth., 2018 N.Y. LEXIS 841 (N.Y.)

Chiropractic firm sued CTA for unpaid invoices. A woman was injured in a car accident with a city bus and assigned the right to recover to the firm. Lower courts found for the firm, holding a six-year statute of limitations applied because the claim was contractual in nature. ***Held:*** Reversed. Court of Appeals determined the case was under the no-fault law. The no-fault law was a creature of statute and a three-year statute of limitations applies to those claims.

INTENTIONAL SPOLIATION CLAIM UNAVAILABLE FOR INTERFERENCE OR CONCEALMENT OF EVIDENCE

Elliott-Thomas v. Smith, 2018 Ohio LEXIS 1106 (Ohio)

Woman claimed that attorneys concealed evidence in her wrongful-termination case. ***Held:*** The tort of intentional spoliation of evidence is limited to physical destruction of evidence. Other remedies are available to punish interference with or concealment of evidence. Expanding the tort would create difficulties in assessing spoliation and would overly burden the courts.

TORTS

RELIANCE AND CAUSATION REQUIRED FOR FRAUDULENT INDUCEMENT

Ambac. Assur. Corp. v. Countrywide Home Loans, Inc., 2018 NY Slip Op 04686 (N.Y.)

Insurer of residential mortgage-backed securities sued lender, alleging lender fraudulently induced insurer into backing with unconditional, irrevocable policies while many of the loans behind the securities were going into default. Trial court found that insurer need not prove justifiable reliance and loss causation to succeed on a claim of fraudulent inducement. Appellate Court disagreed and reversed. ***Held:*** Affirmed. Justifiable reliance and loss causation are elements of fraudulent inducement.

UM/UIM INSURANCE

UNDERINSURED MOTORIST COVERAGE NOT TRIGGERED UNLESS PHYSICAL CONTACT WITH VEHICLE

Wilson Puente v. Progressive Northwestern Ins. Co., No. AC 39708 (Conn. App. Ct.)

Plaintiff stepped out of insured vehicle and walked past rear of vehicle before he was struck by a vehicle operated by a third party. Plaintiff sought underinsured motorist benefits allegedly due under an auto policy issued by defendant to his business. Defendant's motion for summary judgment was granted. ***Held:*** Affirmed. Plaintiff was not a named "insured" within the meaning of the policy and failed to establish that he was "occupying" the vehicle in order to trigger coverage because he did not make physical contact with the vehicle.

WORKERS' COMPENSATION

INJURY COMPENSABLE WHEN OCCURS AT WORKPLACE REGARDLESS IF CAUSED BY INFIRMITY UNRELATED TO EMPLOYMENT

Sharon Clements v. Aramark Corporation, No. AC 39488 (Conn. App. Ct.)

While at work for defendant, plaintiff became lightheaded, passed out and fell backward on asphalt, hitting her head on ground, then suffered cardiac arrest. Plaintiff had a cardiac history. Workers' Compensation Commissioner determined plaintiff's head injury did not arise out of her employment but was caused by the heart episode. Review Board affirmed Commissioner's decision. ***Held:*** Reversed and remanded. Although plaintiff's personal infirmity that caused her to fall did not arise out of her employment, the resultant injuries that were caused by her head hitting the ground at her workplace did arise out of her employment and were compensable.

WRONGFUL DEATH

GRANDPARENT LACKS STANDING TO PURSUE CHILD'S CLAIM

Parsley v. MGA Family Group, Inc., 2018 Ind. App. LEXIS 174 (Ind. App.)

After fire killed parent and child, parent's mother brought a wrongful death action covering both. ***Held:*** Plaintiff lacked standing to pursue claim for grandchild. The Child Wrongful Death Statute grants standing only to a child's parent(s), custodian in case of divorce, or a guardian. The term "guardian" contemplates one appointed by a court and given legal charge over a ward.

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