EAST COAST CM REPORT

of Recent Decisions

2018• Vol. 2

Florida Appellate Court Expands Insureds' Ability To Sue For Bad Faith

Claim Based Upon New York's Scaffolding Law Dismissed

High/Low Agreement On A Medical Malpractice Case Subject To Workers' Compensation Lien

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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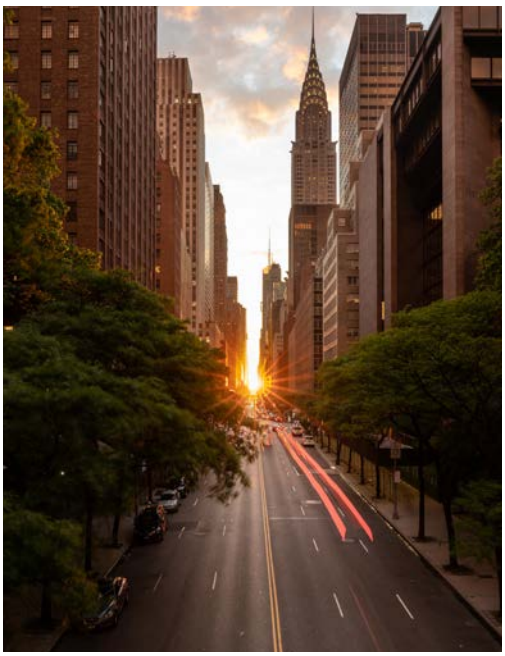

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FEATURES

ARTICLES

Florida Appellate Court Expands Insureds' Ability To Sue For Bad Faith

by ***Dawn M. Brehony***

A Florida Appellate Court ruled that homeowners can pursue a bad faith claim against their property insurer even absent a favorable coverage ruling because the insurer's tender of policy limits constituted a determination as to liability and damages. *See Demase v. State Farm Florida Ins. Co.*, No. 5D16-2390, Fla. App., 5th Dist., 2018 Fla. App. LEXIS 4335.

Thomas and Joanne Demase were insured under a homeowner's policy issued by State Farm. In October, 2009, they filed a claim under their policy for sinkhole damage. State Farm retained Geohazards, Inc., which confirmed the existence of sinkhole activity at the property and recommended certain repairs. The Demases performed the repairs, which resulted in additional damages to the home. Geohazards reinspected the home and made additional repair recommendations. In August, 2012, a neutral evaluator agreed there was sinkhole activity at the property, and recommended further repairs. The Demases agreed to perform these recommended repairs under protest, but in April, 2013, State Farm retained MCD of Central Florida to inspect the property, and MCD concluded that no sinkhole activity existed. Despite the findings of MCD, the Demases continued to pursue their insurance claim. *Id.* at *2.

The Demases complied with all of State Farm's requests for additional information and after receiving no payment, filed a civil remedy notice under section 624.155, Florida Statutes, alleging that the insurer failed to act with due diligence and good faith to resolve and pay the claim, among other unfair claims handling practices. They also demanded the immediate tender of all insurance monies due and owing that would reasonably place them back to their pre-loss condition. *Id.* at *2-3.

Under section 624.155, State Farm had a 60 day period in which to cure its alleged wrongful conduct. State Farm took no action during that time frame. Instead, months after the 60 days expired, State Farm tendered the policy limits. The Demases then sued State Farm for bad faith. State Farm moved to dismiss claiming that a judicial determination of liability and damages was a condition precedent to the bad faith suit. *Id.*

Agreeing with State Farm, the trial court dismissed the bad faith suit, reasoning that the bad faith claim could not proceed absent an appraisal award, an arbitration award or a judgment in an underlying civil action for insurance benefits. *Id.* at *3-4. The Appellate Court reversed the trial court, holding that an underlying action on the insurance

Dawn M. Brehony
is a senior associate at Clausen Miller P.C. in the New York office. She is a litigation attorney, representing domestic and foreign insurers in complex insurance coverage matters involving all aspects of general liability. She also prepares coverage analyses and provides counseling on insurance coverage matters involving first- and third-party property and casualty, directors and officers and professional liability claims. Her experience also includes representing a pharmaceutical manufacturer in pharmaceutical pricing litigation.
dbrehony@clausen.com

contract is not necessary and instead "only a determination of liability and a determination of damages" were required prior to the Demases commencing suit against State Farm for bad faith. *Id*. at *4, 10. The Court explained that: "[a]s happened here, the payment of the full policy limits after the sixty-day cure period provided in Section 624.155(3) satisfied the requirement that there has been a final determination of the insurer's liability and damages. In obtaining a determination of liability and a determination of damages, the 'key' is not the underlying breach of contract action, but rather, the payment by the insurer." *Id*. at 11.

Thus, while the Court's decision does not resolve the merits of the insured's allegations of bad faith, the decision is significant in that it clarifies Florida law that payment of policy limits after the statutory cure period is sufficient to satisfy the requirement of a determination of liability and damages necessary to commence a bad faith action against an insurer.

Learning Point: Once an insurer gets served with a civil remedy notice under Section 624.155, the clock starts running. It is essential for an insurance carrier to pay attention to Section 624.155's "cure" period to avoid unnecessarily being in a situation of having to defend against a bad faith action. ♦

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

Tampa, Florida

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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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SUBROGATION GROUP'S SUCCESS CONTINUES

Confidential Pre-Suit Energy Loss Settlement

Due to the wording of the Confidentiality Agreement, this post is intentionally vague. CM Partner **Robert A. Stern** (New York/New Jersey) was retained following an Energy loss. The Insured owned and operated an energy producing plant. An important part of the energy production process was serviced by Defendant. After its service and during start-up, a catastrophic failure occurred.

Robert worked with the Insured to build a case against Defendant. Defendant agreed to a Tolling Agreement.

Some of the hurdles we were faced with: Although the loss happened during start-up, there was some serious issue as to whether Defendant's conduct actually caused the loss (it may have resulted from something completely outside the control of Defendant); the Insured did not believe recovery was going to be possible for many reasons; some of the Market Members did not believe recovery was permitted or was significantly limited; Economic Loss Doctrine; and the contract provisions addressing subrogation, limitation of liability and damages.

Thereafter, Robert's Market of insurers entered Mediation with Defendant. Although the dispute did not settle at Mediation, Robert continued discussions with defense counsel through the Meditator and a seven figure settlement occurred shortly thereafter. The Insured and clients were very pleased with the recovery.

If you have questions regarding Subrogation, product liability, economic loss doctrine and/or Mediation, please feel free to e-mail Robert (**rstern@clausen.com**) or call him (212-805-3900).

Achieving The Impossible: Defeating Plaintiff's Motion For Summary Judgment Premised On The Theory Of Labor Law Section 240(1)

by ***George Caran***

Attorneys that defend clients who are sued as a result of on the job accidents have a difficult task ahead of them. Defending these clients is especially difficult since the courts often impose absolute liability on the defendants if the accident involved elevation related risks. The most common of such risks are falls from a scaffold, roof or a fall into an open shaft or hole. If there is a semblance of an elevation related accident, the plaintiff will allege a statutory violation of Labor Law 240(1) which affords the plaintiff the opportunity to move for partial summary judgment on liability, at which point, if the plaintiff is successful, the only remaining issue for trial is the extent of the injuries the plaintiff suffered.

N.Y. Labor Law Section 240(1) states in part the following:

> Scaffolding and other devices for use of employees:
>
> 1. All contractors and owners and their agents . . . who contract for . . . the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The statute has been interpreted to impose a non-delegable duty on the owners or contractors to put in place proper safety measures to protect workers from elevation related risks. If there is a finding that the owners or contractors violated this statute then strict liability is imposed upon them irrespective of any comparative negligence by the worker. Some exceptions apply, such as if the worker is found to be the sole proximate cause of the accident or the worker is deemed to be a recalcitrant worker. Both theories lend themselves to a dismissal of Labor Law 240(1).

Although not uncommon, the case law provides limited and narrow instances when the defendant can

George Caran
is a senior associate in the firm's New York office. His practice is concentrated on the defense of casualty claims and various third-party claims matters. George's experience includes the defense of property owners, businesses, construction companies insurers and other insureds in construction-related litigation, property damage, premises liability and first-party claims.
gcaran@clausen.com

prevail on summary judgment by the use of those theories. However, two recent First Department cases seem to create the opportunity for defendants to defeat a plaintiff's summary judgment motion by raising triable issues of fact as opposed to an outright dismissal of plaintiff's case. This establishes the prominence of defendant's opposition to the motion and the need of a detailed and strong argument rather than the often utilized pro forma opposition which is a concession to the prevailing opinion that chances of raising a triable issues of fact in a Labor Law 2401(1) case are slim.

In *Santos v. Condo 124 LLC*, 2018 NY Slip Op 03799 (1st Dep't 2018), in a 3 to 1 decision the First Department opined that a triable issue of fact existed as to whether the plaintiff can claim liability against the defendants under Labor Law 240(1). Plaintiff alleged that he fell several feet off a scaffold through a hole created by a missing plank. The Court stated that Plaintiff met his *prima facie* burden as a matter of law by showing that he was not provided with a safety device and that the scaffold was missing a plank. However, the Court then stated that a triable issue of fact existed through the testimony of Plaintiff's supervisor and a safety inspector who were on site; they testified that there was nothing wrong with the wooden planking and that Plaintiff was observed not to have fallen but to have been leaning against the cross bars on the side of the scaffolding, albeit several feet down from where he said that he was standing when he fell. The Court claimed that the deposition testimonies and the inconsistencies in Plaintiff's own testimony and supporting Affidavits raised a triable issue of fact as to whether Plaintiff actually fell off of the scaffolding. The lone dissenter wrote his opinion based the theory that the absence of safety equipment was enough to grant Plaintiff's motion.

In *Aspromonte v. Judlau Contr., Inc.*, 2018 NY Slip Op 04288 (1st Dep't 2018), the Appellate Division, First Department, issued a brief, but interesting decision. Plaintiff, a worker, was injured when a railing broke or gave way and he fell down a shaft. The accident circumstances were corroborated by Plaintiff's coworkers. Plaintiff moved for summary judgment in what appeared to be a seemingly straight forward Labor Law 240(1) statutory violation by Defendants. Defendants opposed the motion by submitting expert reports of a neuroradiologist and a biomechanical engineer who both concluded that Plaintiff's injuries are inconsistent with Plaintiff's fall. In upholding the denial of the summary judgment, the First Department stated that a triable issue of fact existed necessitating the denial of Plaintiff's motion based on the argument that Plaintiff's injuries did not occur in the manner described by Plaintiff. In formulating its opinion, the Court drew inspiration from auto accident cases where biomechanical engineers are often used as experts.

Learning Point: The *Santos* case teaches that when defending a labor law case, defendant must be alert and vigilant for any inconsistencies in the alleged accident circumstances. Depositions should be as detailed as possible as to what occurred, when it occurred and how it occurred. Evidence and testimony as to the occurrence or condition in question should be gathered from as many witnesses as possible as it may prove to be valuable information in raising a triable an issue of fact and avoiding liability through summary judgment and the imposition of interest on any potential judgment. The *Aspromonte* case teaches that a summary judgment motion based on Labor Law 240(1) can also be defeated, even if there is an established elevation related fall, through the use of defense experts that may provide an opinion as to whether the accident occurred in the manner described. ♦

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Claim Based Upon New York's Scaffolding Law Dismissed Where Plaintiff Injured While Lifting A Heavy Object

by ***Gregory J. Popadiuk***

Gregory J. Popadiuk
is a senior associate in the New York office of Clausen Miller P.C. His areas of practice include labor law, premises liability, property damage and construction. He has successfully defended property owners and contractors in a variety of personal injury cases. Greg received his B.S. degree at University of Maryland, College Park and his J.D. Touro College, Jacob D. Fuchsberg Law Center.
gpopadiuk@clausen.com

In *Sullivan v. New York Athletic Club of City of N.Y.*, 2018 NY Slip Op 04591 (2d Dep't 2018), the Appellate Division, Second Department reversed an order from the trial court denying Defendant general contractor's motion for summary judgment which was for dismissal of Plaintiff's causes of action based upon alleged violations of Labor Law §§ 240(1) and 200. The motion for summary judgment also sought dismissal of the cross-claims for contractual indemnification and contribution asserted against the general contractor by the property owner. However, the Appellate Division upheld the trial court's ruling dismissing Plaintiff's Labor Law § 200 and common law negligence cause of action. In reaching its decision, the Appellate Division noted that Labor Law § 240(1) protects a worker from a specific gravity-related risks such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured, and, to be applicable, the harm must flow directly from the application of the force of gravity to an object or person. Labor Law § 200 is a codification of the common law duty imposed upon an owner and general contractor to provide construction site workers with a safe place to work. There is no liability under Labor Law § 200 or the common law unless the owner or general contractor exercised supervision or control over the work performed.

Defendant New York Athletic Club of City of New York ("NYAC") hired Defendant Talisen Construction Corporation ("Talisen Construction") as a general contractor to renovate a bathroom on NYAC's premises. As part of the contract, Talisen Construction agreed to indemnify NYAC "[t]o the fullest extent permitted by law," including the payment of legal fees and costs arising from defending an action in connection with the work to be performed. Talisen Construction hired Plaintiff's employer, Premier Woodcraft, Ltd. ("Premier") as a subcontractor for the bathroom renovation. As part of the work in renovating the bathroom, Plaintiff and a coworker were carrying a heavy steel beam on their shoulders from their truck located outside of the premises to the bathroom. The beam weighed approximately three hundred pounds and had to be brought into the building through the front entrance and then down a six step interior stairway. Plaintiff felt his "knee go forward" as he

neared the bottom of the steps with the beam on his shoulder, and he subsequently dropped the beam and fell to the floor sustaining a left knee quadriceps tendon rupture.

Talisen Construction moved for summary judgment dismissing the Complaint and all cross-claims asserted against it. In support of its request for dismissal of Plaintiff's Labor Law § 240(1) claim, Talisen Construction submitted the Affidavit of a professional engineer who asserted that Plaintiff's fall was caused by his own misstep or a biomechanical failure on Plaintiff's part, and not due to any action or inaction on the part of Defendants. Plaintiff opposed the motion arguing that the origin of the accident was elevation-related; that the height differential of the stairs was not *de minimis*; and that one or more of the safety devices enumerated in Labor Law § 240(1) would have prevented his injuries. Plaintiff relied upon the Affidavit of his own consulting engineer who stated that appropriate safety devices given to Plaintiff would have prevented the accident. With respect to Plaintiff's Labor Law § 200 and common law negligence claims, Talisen Construction argued that the testimony of its deposition witness established that it did not direct Plaintiff as to the method by which he was to complete his work.

The trial court denied those branches of Talisen Construction's motion which requested dismissal of Plaintiff's Labor Law § 240(1) cause of action and NYAC's cross-claims for indemnification and contribution. The trial court held that the disparities in the opinion evidence presented by the Parties' experts created triable issues of fact and credibility as to whether Labor Law § 240(1) applied. This included whether there was an elevation-related risk or hazard present at the accident site and whether Plaintiff's injuries resulted from harm directly flowing from the application of the force of gravity. However, the trial court granted Talisen Construction's motion to the extent that it dismissed Plaintiff's Labor Law § 200 and common law negligence causes of action. Finally, regarding NYAC cross-claims for contribution and indemnification, the trial court held that while Talisen Construction tendered sufficient evidence to demonstrate, *prima facie*, its lack of control over the work site, or any negligence on its part, it failed to demonstrate that Plaintiff's injuries were not caused by an act, omission or negligence on the part of Premier. The indemnity agreement in the contract between NYAC and Talisen Construction required Talisen Construction to indemnity NYAC for any negligent acts or omissions of Talisen Construction or Premier. Therefore, Talisen Construction's motion for summary judgment to dismiss NYAC's cross-claims for contribution indemnification was denied as premature.

The Appellate Division reversed stating that Talisen Construction established its *prima facie* entitlement to summary judgment by demonstrating that Plaintiff's injury was not caused by an elevation-related hazard encompassed by Labor Law § 240(1) but rather from the usual and ordinary dangers of the work site. Since the underlying causes of action asserted by Plaintiff against Talisen Construction were without merit, the Appellate Division reversed the trial court and also dismissed NYAC's cross-claims for contractual indemnification and contribution.

Learning Points: Conflicting expert reports or affidavits will not automatically serve as a basis for finding an issue of fact in order to defeat a motion for summary judgment that seeks dismissal of a plaintiff's Labor Law § 240(1) claim when a plaintiff is injured while lifting a heavy object. Labor Law § 240(1) does not encompass any and all perils that may be connected in some tangential way with the effects of gravity. ♦

New Jersey Supreme Court Applies Continuous-Trigger Doctrine To Allocate Liability To Insurers In *Honeywell* Asbestos Claims

by **Kristian E. Alfonso**

Kristian E. Alfonso
is an associate in the Subrogation Department. She has prior litigation experience representing plaintiffs and defendants in various areas of law, including employment discrimination, legal malpractice, eminent domain and personal injury. Kristian has argued before the Second Circuit Court of Appeals, and has acted as first and second chair for jury and bench trials. She has mediated and negotiated many cases to resolution for her clients, and she is trained Mediator.
kalfonso@clausen.com

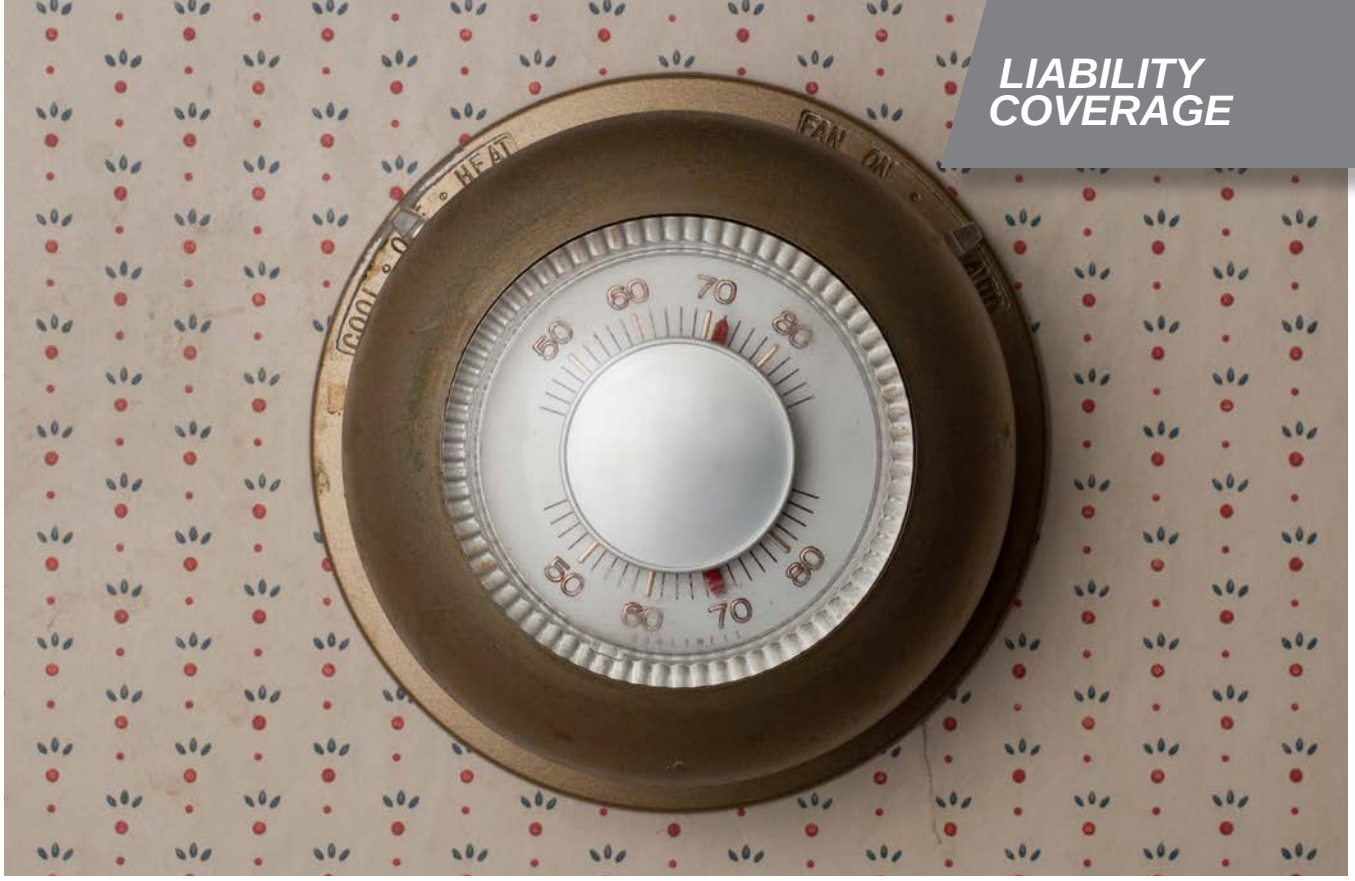
In *Continental Ins. Co. v. Honeywell International Inc.*, 2018 NJ Slip Op 078152 (N.J. 2018), the New Jersey Supreme Court affirmed the decisions of the appellate and trial courts applying the unavailability exception to the continuous-trigger doctrine set forth in *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437 (1994). The *Honeywell* decision reinforces the Court's fidelity to *Owens-Illinois, Inc.*, which held that an insured cannot be forced to assume responsibility in the allocation of liability among insurers for years in which insurance is not reasonably available for purchase. *See id.* at 478-79.

While Bendix, Honeywell's predecessor, manufactured and sold products that contained asbestos until 2001, insurance for asbestos-related claims became unavailable after April 1, 1987. Travelers's issued eight excess policies to Bendix from 1977 to 1983 and St. Paul issued policies to Bendix from 1968 to 1970. It was undisputed that asbestos in the subject products caused bodily injury to their users. As a result, Honeywell faced approximately 147,000 asbestos-related claims and its insurers have already paid more than $1 billion in connection with those claims.

Pursuant to the allocation methodology announced in *Owens-Illinois, Inc.*, "[t]o avoid having its insurance triggered, an insurer has the burden of showing that exposure did not occur earlier or during the policy year for which it wrote coverage for the insured." *Honeywell*, supra, 2018 NJ Slip Op 078152 at *21. Thus, Travelers argued before the trial court that the allocation period should cease when Honeywell stopped manufacturing asbestos-based products in 2001, which would extend the coverage block of insurance. Conversely, Honeywell argued that the allocation period should cease on April 1, 1987, when commercial insurance for asbestos-related claims became unavailable. The trial court agreed with Honeywell, which established what policies could be used to satisfy asbestos-related claims arising from pre-1987 exposure to asbestos. The Appellate Division subsequently affirmed.

The New Jersey Supreme Court granted certification on: (1) the choice-of-law issue between New Jersey (where Honeywell's headquarters are located) and Michigan (where Bendix's headquarters were located when the policies were issued); and (2) allocation.

It is well-settled jurisprudence in New Jersey that there must be a



"substantive difference" between the laws of New Jersey and another state to implicate New Jersey law. *See DeMarco v. Stoddard*, 223 N.J. 363, 383 (2015). In *Honeywell*, the Supreme Court affirmed the Appellate Division's determination that New Jersey law should apply because there were substantive differences between New Jersey and Michigan allocation rules. While acknowledging that the continuous-trigger doctrine "involves a legal fiction," Justice LaVecchia, writing for the majority, also noted that, "by allocating responsibility based on the date of the initial exposure and every policy year thereafter, we maximize the insurance resources available to claimants suffering bodily injury." *Honeywell*, supra, 2018 NJ Slip Op 078152 at *13. In contrast, Michigan employs a *pro rata* allocation theory that allocates liability based on policy periods rather than policy limits. Based upon these substantive differences, the Supreme Court held that New Jersey allocation law should apply because, "in this contract setting where no provision of the contract or of state law compels application of a specific state's law, that conflicts-of-law principles favor application of New Jersey allocation law in the present dispute over liability among insurers." *Honeywell*, supra, 2018 NJ Slip Op 078152 at *53.

With regard to allocation, Travelers and St. Paul argued that the Court should create an exception to the unavailability rule that would deny insurance for corporations that continue to manufacture products that are ineligible for insurance. Conversely, Honeywell argued that the trial and appellate courts correctly applied *Owens-Illinois, Inc*. and underscored that it only sought coverage for claims arising from exposure prior to 1987. The Supreme Court held that the present case did not merit abandoning the unavailability rule or creating an exception to the rule "that would retroactively deprive parties of paid-for insurance coverage due to their post-coverage-period conduct." *Honeywell*, supra, 2018 NJ Slip Op 078152 at *62.

Learning Point: In New Jersey, an insured cannot be forced to assume responsibility in the allocation of liability among insurers for years in which insurance is not reasonably available for purchase. ♦

New York Appellate Court Requires Attentive Compliance To Guidelines For Both Claimants And Workers' Compensation Board

by ***Ian T. Williamson***

Ian T. Williamson
is a senior associate in the New York office of Clausen Miller P.C., where his areas of practice include premises liability, labor law, property damage, automobile accidents and construction. Prior to joining Clausen Miller, Ian defended a major utility company in bodily injury cases relating to construction site, premises liability and automobile accidents. He also has extensive experience representing defendants in New York State asbestos litigation.
iwilliamson@clausen.com

In the Matter of the *Claim of Scott Bloomingdale v. Reale Construction Co. Inc.*, Workers' Compensation Board, 2018 NY Slip Op 03575 (3d Dept. 2018), the Third Department opined on two different issues. The first issue was what level of activity constituted a claimant's "attachment to the labor market" for purposes of determining whether the claimant was entitled to his award. The second issue was whether the claimant's injuries warranted the Workers' Compensation Board revisiting the amount he was due based upon evidence presented regarding the extent of his disability.

The claimant, Scott Bloomingdale, was employed as a heavy equipment operator. In 1992, he injured his lower back and was deemed to have a non-schedule permanent partial disability. In 2011, he worked for Reale Construction Co., Inc. ("Reale") as an operating engineer and fell off an excavator sustaining injuries to his neck and back. In 2014, he amended his claim to also include post-concussion syndrome. Reale and its workers' compensation carrier raised the issue of the claimant not being attached to the labor market (sufficiently seeking employment) to justify release of his award. Though a Workers' Compensation Law Judge (WCLJ) determined the amount of claimant's suspended award to be a 33% loss of wage-earning capacity, claimant appealed the finding and contended that such percentage was not supported by substantial evidence. Claimant further maintained that he was attached to the market so as to render his award payable.

A claimant's attachment to the labor market is a factual issue for the Board that will be upheld if supported by substantial evidence. *Matter of King v. Riccelli Enters.*, 156 A.D.3d 1095, 1096 (2017); *see Matter of Villalobos v. RNC Indus. LLC*, 151 A.D.3d 1156, 1157 (2017); *Matter of Pravato v. Town of Huntington*, 144 A.D.3d 1354, 1356 (2016). This includes the claimant "actively participating in a job location service, a job retraining program or a Board-approved rehabilitation program, or where there is credible documentary evidence that he or she is actively seeking work within his or her medical restrictions through a timely, diligent and persistent independent job search." *Matter of King v Riccelli*

Enters., 156 A.D.3d at 1096-1097; *see Matter of Palmer v Champlain Val. Specialty*, 149 A.D.3d 1342, 1342 (2017); *Employer: American Axle*, 2010 WL 438153, *4-5, 2010 NY Wkr Comp LEXIS 2560, *12 (WCB No. 8030, 3659, Feb. 4, 2010). Though claimant here had attended an orientation and contacted his union to inquire about work, the Board determined that such activity did not reach the threshold of remaining attached to the market. The Appellate Division agreed that it was within the Board's right to make that determination, and such determination was reasonable and sufficiently supported by substantial evidence given the claimant's minimal attempts to secure employment.

Broaching the question of whether the Board's assessment of 33% loss of wage-earning capacity was supported by substantial evidence in claimant's situation, the Court referenced Chapter 9 whereby such award would be based on three types of input, namely, "medical impairment, functional ability/loss and non-medical vocational factors." *Matter of Golovashchenko v Asar Intl. Corp.,* 153 A.D.3d 1475, 1476 (2017). Particularly of concern here was the last prong, "non-medical vocational factors," which focuses on a claimant's level of education, skill, age and literacy. Considering a claimant's functional abilities "is a key component in a WCLJ's determination of loss of wage earning capacity." *New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity* at 44-45 (2012). The Board is granted discretion to resolve disparate medical reports in assessing loss of wage-earning capacity. In reviewing claimant's 2015 independent medical report, the Court could not unequivocally agree that claimant's injuries yielded him only 33% loss of wage-earning capacity as a matter of law. As the report rendered claimant unable to return to his occupation of a heavy equipment operator and proscribed only limited sedentary work, the Court deemed this significant. With respect to the non-medical factors, the claimant's age of 55 coupled with his limited vocational experience ultimately reduced his wage-earning capacity. Claimant's testimony that he had difficulty with language and needed his wife's assistance to manage his daily care convinced the Court to allow reassessment of his award in further proceedings to determine his wage-earning capacity.

Learning Point: The Workers' Compensation Board is given wide latitude in discerning awards, but needs to be judicious in considering the totality of the evidence presented when computing wage-earning capacity. Non-medical factors can be instrumental in allowing a claimant to receive a higher or lower award and must be part of the calculations when determining "substantial evidence." ♦

New Jersey Appellate Court Upholds Decision Declaring That A High/Low Agreement On A Medical Malpractice Case Is Subject To Workers' Compensation Lien Even When No Liability Is Found

by ***Yesy Sanchez***

Yesy Sanchez
is an associate in Clausen Miller's New York office. He focuses his practice on the defense of personal injury, premises liability, and other tort cases. As a litigator, Yesy has argued cases in the Bronx, Queens, Kings, and New York County. As a trial attorney, Yesy has tried cases in Queens and New York County, as well as the United States District Court for the Eastern District of New York.
ysanchez@clausen.com

The New Jersey Superior Court, Appellate Division, recently affirmed a ruling on appeal that required the Plaintiff to satisfy the worker's compensation lien on a medical malpractice suit settled using a high/low agreement. The malpractice claim was based on treatment received by Plaintiff following a work-related injury.

In 2010, Plaintiff, Paolo Marano, injured his back while on duty as a Union Township Police officer. As a consequence of his injuries, Plaintiff sought treatment from Defendant Clifford J. Schob, M.D., an orthopedic surgeon. Plaintiff also received other treatment, including rehabilitative therapy which was paid for by Union Township's workers' compensation carrier, PMA Companies ("PMA").

Plaintiff commenced a medical malpractice suit against Defendant alleging that Dr. Schob misdiagnosed Plaintiff's condition and failed to send him to the emergency room. To resolve the matter, the Parties agreed on a high/low settlement agreement with a maximum payment of $750,000 and a minimum payment of $250,000. A "high/low settlement" is an agreement wherein the plaintiff agrees to accept a maximum amount, in return for the defendant agreeing to pay the plaintiff a minimum sum—regardless of the outcome of the trial. Typically, high/low agreements are viewed favorably because they ensure that the plaintiff will receive a minimally-acceptable recovery while at the same time protecting the defendant from potentially high verdicts.

The Parties also agreed to resolve the medical malpractice claims via binding arbitration. The Arbitrator held that there was no liability against Defendant and dismissed the claims against him. Pursuant to the high/low agreement, Defendant's carrier paid Plaintiff the minimum amount of $250,000. Defendant's carrier wisely withheld part of the settlement agreement in trust, pending resolution of the workers' compensation lien. The Union Township's third-party administrator, PMA, moved to collect on the workers' compensation lien, Plaintiff objected.

Plaintiff argued that the "no cause" decision by the Arbitrator extinguished the workers' compensation lien. In support, Plaintiff cited *N.J.A.C. 11:1-7.3(a)(1)* which carved out an exception to the insurer's duty to notify the Medical Practitioner Review Panel of any malpractice claim settlement, including arbitration awards. The pertinent language states: "The notification requirement . . . shall not apply to payments made under agreements for minimum and maximum payments irrespective of the verdict (commonly referred to as high/low agreements) where there is a finding by an arbitrator or a verdict in a civil action of *no liability* [emphasis added] on the part of the practitioner." NJ Admin Code § 11:1-7.3

The Court disagreed with Plaintiff's interpretation of the reporting statute and clarified that the purpose of the statute was to avoid misleading information from being reported against the physician, and not to extinguish the workers' compensation lien. The Court explained, "the reporting of payments made in accordance with a 'high/low agreement' . . . could be misleading, in that it would indicate that the practitioner had committed malpractice when, in fact, no finding had been made in a legal proceeding to that effect."

The Court noted that these payments are still reported to the Medical Practitioner Review Panel, which monitors the medical malpractice liability insurance market. Notwithstanding, the physician is protected by statute because the report does not include any identifying information. The Appellate Court affirmed the Law Division's ruling on the enforceability of the workers' compensation lien and remanded the case on the limited issue of the disputed portions of the lien.

Learning Point: Prior to entering into a high/low settlement agreement, or any settlement agreement for that matter, the defendant should determine if a workers' compensation lien exists. If so, the defendant should determine the amount of the lien and incorporate language into the settlement agreement that allows for a portion of the funds to be held in trust, pending resolution of the Workers' compensation lien. As the court held in *Marano*, the existence of a statute exempting the insurer from reporting the settlement, where no liability is found, is of no consequence to the enforceability of the lien. ♦

CIVIL PROCEDURE

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.

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 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.

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 letter 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.

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

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

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.

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.

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.

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.

Clausen Miller P.C.

10 South LaSalle Street
Chicago, IL 60603
Telephone: (312) 855-1010
Facsimile: (312) 606-7777

28 Liberty Street
39th Floor
New York, NY 10005
Telephone: (212) 805-3900
Facsimile: (212) 805-3939

17901 Von Karman Avenue
Suite 650
Irvine, CA 92614
Telephone: (949) 260-3100
Facsimile: (949) 260-3190

100 Campus Drive
Suite 112
Florham Park, NJ 07932
Telephone: (973) 410-4130
Facsimile: (973) 410-4169

200 Commerce Square
Michigan City, IN 46360
Telephone: (219) 262-6106

4650 West Spencer Street
Appleton, WI 54914
Telephone: (920) 560-4658

68 Southfield Avenue
2 Stamford Landing Suite 100
Stamford, CT 06902
Telephone: (203) 921-0303

4830 West Kennedy Boulevard
Suite 600
Tampa, FL 33609
Telephone: (813) 509-2578

Clausen Miller LLP
34 Lime Street
London EC3M 7AT U.K.
Telephone: 44.20.7645.7970
Facsimile: 44.20.7645.7971

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Stephanie Cebuhar
Clausen Miller P.C.
10 South LaSalle Street
Chicago, IL 60603
(312) 855-1010

marketing@clausen.com
clausen.com

Clausen Miller International:

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

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

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

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

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