CM REPORT

of Recent Decisions

2018 • Vol. 3

Clausen Miller Helps Develop Illinois Law On Contribution And The *Kotecki* Cap

Ohio's Rejection Of ALI Restatement Of The Law Of Liability Insurance

California Supreme Court Holds Clients Entitled To Notice Of Conflicts Of Interest

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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We are proud to present a "Guest Sidebar" in this issue, authored by our partner ***Paul Esposito****, a senior member of Clausen Miller's Appellate Practice Group. Paul has been handling appeals for over 40 years. He has briefed and argued appeals in federal and state reviewing courts all over the country, including the U.S. Supreme Court.*

Paul's appellate practice is not limited to the appellate courts. He strongly believes in a hands-on approach to appeals, one that has him working closely with defense counsel, both before and at trial. Paul has worked alongside some of the nation's best defense attorneys, against some of the nation's best plaintiff attorneys, in cases involving many millions of dollars in claimed damages. His goal is always the same: to help the firm's clients win at trial and on appeal.

In this "Guest Sidebar", Paul discusses how Clausen Miller's advocacy has helped shape the law of contribution and the ***Kotecki*** *cap in Illinois.*

SIDEBAR

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Clausen Miller Helps Develop Illinois Law On Contribution And The *Kotecki* Cap

by **Paul V. Esposito**

At least in Illinois, joint and several liability is a fact of life in personal injury cases. A defendant found at least 25% at fault can be forced to pay a plaintiff's entire judgment, even though multiple tortfeasors were involved. It's worse where medical payments are concerned. A defendant only 1% at fault may need to foot the entire bill. Bitter pills are hard enough to swallow. This one can be mighty expensive, too.

Through the Contribution Act, Illinois law has softened the harsh effects of joint and several liability to an extent. A defendant paying more than its proportionate share of liability as assessed by a jury may obtain contribution from co-defendants based on their proportionate shares. But things get sticky when a defendant seeks contribution from an employer paying workers' compensation benefits to the injured plaintiff. In *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991), the Illinois Supreme Court held that an employer's contribution share is based on the employer's workers' compensation liability, not on its proportionate share.

Left unresolved in *Kotecki* was the meaning of the phrase "workers' compensation liability." Does it cover an employer's contribution liability only to the date of the jury award, or does it also cover an employer's future liability for compensation? Fairness to all defendants would require that it cover both past and future liability. After all, an employer has workers' compensation liability for all future medical expenses that an employee incurs. Contribution should include those future liabilities, no different than when a jury awards a plaintiff damages for his future losses and expenses.

Paul V. Esposito
is a partner with Clausen Miller P.C. who was previously an Illinois assistant attorney general. He continues to research, write, and argue in federal and state courts all over the country, a personal passion to him. Paul has worked closely with some of the country's best trial lawyers, against some of the country's best trial lawyers. Whatever the issues, the goal always remains the same: win first at trial, and from there, win on appeal.
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For years we've been fighting the good fight on this issue, and in *Dempe v. Met. Pier & Exp. Auth.*, 2018 IL App (1st) 172357-U, we made progress. After finding against our client GES, a jury found that GES was entitled to 75% contribution from plaintiff's employer Coastal. After paying over $25 million to the injured plaintiff, GES sought contribution. GES offered evidence that Coastal's past and future workers' compensation liability was over $20 million. Coastal did not dispute the computation. Instead, it argued that its liability should be limited to its past payments of compensation liability—about $5.7 million. The trial court rejected Coastal's argument, and so did the Appellate Court. It found that Coastal's contribution liability covered both past and future workers' compensation liability.

Because it is unpublished, *Dempe* may not be cited as precedent in future cases. Despite this limitation, *Dempe* is a good-news order in which an Appellate Court has recognized a non-employer's right to the full measure of contribution from an employer. And the *Dempe* result can be duplicated by pulling from an Illinois Supreme Court case in which we had been involved—*Bayer v. Panduit Corp.*, 2016 IL 119553. There, the Court recognized that an employer's liability for workers' compensation continues even after an injured plaintiff recovers from a defendant. The *Bayer* ruling can provide the conceptual basis for future rulings like *Dempe*, since if workers' compensation liability continues, contribution liability should cover both past and future workers compensation liability. It's the winning argument we made in our appellate brief that carried the day in *Dempe*.

Progress sometimes comes in smaller steps. It's progress all the same.

CLAUSEN MILLER PARTNERS AMY PAULUS AND MELINDA KOLLROSS NAMED IN CHICAGO LAWYER 2018 "WOMEN IN LAW" EDITION

Clausen Miller partners **Amy Paulus** and **Melinda Kollross** were recognized among the "2018 Top Lawyers—Women Leaders" by Chicago Lawyer Magazine.

Amy is the Liability Coverage and Reinsurance Practice Group Leader, a senior shareholder and member of the Board of Directors of Clausen Miller. Amy has built a national reputation in all areas of liability insurance coverage law, professional liability, employment practices, transportation, claims handling issues and best practices, bad faith, excess insurance, intellectual property, cyber losses, and reinsurance matters and arbitrations.

Demonstrating her commitment to, and deep understanding of, the insurance industry, Amy is a CPCU (Chartered Property Casualty Underwriter). She is also AV® Preeminent™ rated by Martindale-Hubbell. Her AV® rating is a reflection of her expertise, experience, integrity and overall professional excellence.

Melinda is a shareholder and Co-Chair of Clausen's Appellate Practice Group, handling post-trial and appellate litigation for savvy clients nationwide. Licensed in Illinois and New York, Melinda has litigated more than 150 appeals in state and federal reviewing courts, including participation in two appeals before the United States Supreme Court.

AV-rated Preeminent™ by Martindale-Hubbell, Melinda is a proud member of the highly selective Federation of Defense & Corporate Counsel and has been named an Illinois Super Lawyer and Leading Lawyer in Appellate Practice. Melinda keeps clients informed of recent developments in the law through her work as editor-in-chief of Clausen Miller's quarterly CM Report of Recent Decisions, and is a frequent author and presenter for the Defense Research Institute (DRI). Her notable works include a chapter on post-trial motions in DRI's A Defense Lawyer's Guide to Appellate Practice (2004), and three feature articles published in DRI's For The Defense magazine: "Oral Argument: What It Really Takes To 'Please the Court' " (October 2015), "Evaluating, Negotiating and Effectuating Settlements on Appeal" (March 2016), and "Winning Your Appeal With Your 'Statement of Facts'" (Feb. 2018).

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.

SWINEHART, FERRINI, AIMONETTE, AND WYSOCKI SCORE RECENT VICTORY

In a case recently handled by Clausen Miller attorneys **Jim Swinehart**, **Joe Ferrini**, **Greg Aimonette**, and **Ken Wysocki**, the Eleventh Circuit Court of Appeals issued a significant decision relating to jurisdiction and international arbitration. The Eleventh Circuit held:

One—A District Court has federal subject matter jurisdiction, under 9 U.S.C. §205, when (1) there is an arbitration agreement that may fall under the New York Convention, and (2) that arbitration agreement sufficiently relates to the dispute in that it may conceivably affect the outcome of the case. This two-step inquiry is resolved based on a limited examination of the pleadings and removal notice.

Two—A more rigorous examination is required by the District Court to determine whether the parties may be compelled to arbitrate. The Eleventh Circuit held that the New York Convention requires that the arbitration agreement be signed by the parties before the court or their privities. Here, the appellee/defendant (a subcontractor for the construction of a mill) did not sign the agreement, so the appellants/plaintiffs (the mill owner and its insurers) could not be compelled to arbitrate.

Read the full decision at **https://www.clausen.com/wp-content/uploads/2018/09/11thCircuitdecision.pdf.**

GEORGE FLYNN AND EDWARD HYNES SNATCH VICTORY FROM THE JAWS OF A FAILED SETTLEMENT

Judge Matthew Kennelly, of the U.S. District Court for the Northern District of Illinois, granted summary judgment for the defense in a legal malpractice action defended by **George K. Flynn** and **Edward W. Hynes** of Clausen Miller. The complex matter arose out of attempts by their client, a New Jersey attorney, to collect unpaid legal fees stemming from his representation of the Plaintiff in Illinois litigation involving disputes with its clients over television services Plaintiff provided. The New Jersey attorney formed a corporation and purchased a judgment against his former client in order to collect the unpaid fees. In response, Plaintiff filed retaliatory claims of legal malpractice and breach of fiduciary duty alleging the improper use of confidential information and a conflict of interest. The case was settled in 2015, but the Plaintiff breached the settlement agreement. After a near settlement in principle in 2017, Plaintiff filed a motion to enforce settlement. The motion to enforce was denied by District Judge Amy St. Eve, after the Plaintiff attempted to alter material terms of a complex

settlement framework while moving to enforce those terms (2018 U.S. Dist. LEXIS 16792). Judge St. Eve was subsequently nominated to the United States Court of Appeals for the Seventh Circuit, and Judge Kennelly was assigned the case. Judge Kennelly ultimately found that the Plaintiff failed to establish that Defendant used confidential information in pursuit of the fees, and granted summary judgment, ending the case (2018 U.S. Dist. LEXIS 147412).

For more information about this case, please contact George Flynn (**gflynn@clausen.com**) or Edward Hynes (**ehynes@clausen.com**).

CLAUSEN MILLER PARTNERS COURTNEY MURPHY, JACOB ZISSU AND ERIC KREJCI OBTAIN JURY VERDICT IN FAVOR OF INSURER, DISMISSING MULTI-MILLION DOLLAR FIRST PARTY PROPERTY DAMAGE CLAIM

Clausen Miller partners **Courtney Murphy**, **Jacob Zissu** and **Eric Krejci** recently obtained a jury verdict in favor of a major property insurer, dismissing an insured's multi-million dollar first party property claim stemming from water loss and damage sustained to its vacant building located in Detroit, Michigan.

455 Companies LLC alleged that the insurer breached its property insurance contract by denying 455's claim for water loss and damage to its insured property. 455 owned a 114,000 square foot commercial building with five floors, a basement and two mechanical penthouses on the roof located at 455 West Fort Street in the downtown business district of Detroit, Michigan. The loss allegedly occurred in early January 2015, when a pipe broke in a women's restroom located on the fifth floor of the building causing extensive water loss and damage to all lower floors including the basement. An additional pipe was found to have cracked in the building's mechanical penthouse located just above the fifth floor restroom.

Having previously granted the insurer's prior summary judgment motion relative to the meaning, scope and application of the Policy's Protective Safeguard Endorsements, the court earlier held that the Endorsements, taken together, added a condition and an exclusion to the Policy which conditioned coverage on maintaining the building's heat at or above 55 degrees. The Court further held that losses caused by water damage are excluded to the extent that 455 failed to maintain the heat at 55 degrees prior to the loss.

At issue during the trial was whether the insured actually maintained the building's heat at or above 55 degrees as was required by the Endorsements. In support of the insurer's position,

the Clausen team presented various experts with specialties in metallurgical engineering, HVAC engineering and structural engineering to address the manner and means of the pipe failure, the alloy composition of the failed pipe as a causal/contributing factor, the operability of the building's heating system, and the effect of the water loss on the building's structure generally.

For its part, 455 presented testimony of "first responders", photographs taken of purported temperature gauges with correlating metadata, and expert analysis to demonstrate that the building was at or above 55 degrees at all times prior to and immediately after the loss was discovered. Notwithstanding 455's presentation, the jury sided with the insurer and dismissed all claims including, but not limited to, water remediation costs in excess of $1,200,000 dollars.

455 Companies' claims for $4,250,000 for consequential damages relative to loss sale/rental value was also previously dismissed by way of summary judgment.

Partner **Joseph Ferrini** of Clausen's Appellate Practice Group assisted in reviewing/editing proposed jury charges and verdict sheet to ensure that the record was properly protected from an appellate standpoint, efforts taken in recognition of the importance of collaborative coordination between trial and appellate counsel.

ESPOSITO AND NOWIK SAVE INSURER SIGNIFICANT DOLLARS IN COOK COUNTY JURY TRIAL

CM attorneys **Kristin Esposito** and **Valeri Nowik** recently tried a rear end accident case before a Cook County jury. The insurer offered $50,000 to settle the case. The Plaintiff rejected the offer and demanded $140,000. At trial, the Plaintiff demanded between $250,000 and $350,000. The jury returned a verdict for the Plaintiff but for only $8,000.00—a fraction of the settlement offer and far less than Plaintiff's requested damages award. This was Kristin Esposito's third verdict as a first chair, but first as a defense attorney. It was Valeri Nowik's first jury trial.

Congratulations to them for such a tremendous outcome!!

Three Federal Appeals Courts Find Coverage For Cyber-Fraud

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

In *Spec's Family Partners, Ltd. v. Hanover Ins. Co.*, No. 17-20263, 2018 U.S. App. LEXIS 17246 (2d Cir. June 25, 2018) ("*Spec's Family Partners*"), *Medidata Sols. Inc. v. Fed. Ins. Co.*, 729 Fed. Appx. 117 (2d Cir. 2018) ("*Medidata Solutions*"), and *Am. Tooling Ctr., Inc. v. Travelers Cas. & Sur. Co. of Am.*, No. 17-2014, 2018 U.S. App. LEXIS 19208 (6th Cir. July 13, 2018) ("*American Tooling*"), three federal courts of appeal found insurance coverage for various cyber-frauds under Texas, New York, and Michigan law, respectively.

Spec's Family Partners

Facts

Spec's Family Partners, Ltd. ("Spec's"), a retail chain, entered into an agreement with First Data Merchant Services, LLC ("First Data"), for First Data to process Spec's credit and debit card transactions ("Merchant Agreement"). Criminals hacked Spec's credit card network, resulting in First Data reimbursing issuing banks for the costs associated with the fraudulent transactions.

First Data sent Spec's a demand letter, claiming there was evidence of a breach of the "cardholder environment" at Spec's, and that Spec's was non-compliant with Payment Card Industry Data Security Standard requirements. First Data established a Reserve Account in the amount of $7,624,846.21 to fund MasterCard fines and anticipated Visa fines, listing the fees, fines, and reimbursement costs it relied upon. First Data also demanded that Spec's provide documentation and proof of security compliance, including a MasterCard Site Data Protection Account Data Information Form, and an Attestation of Compliance from a Qualified Security Assessor.

First Data then sent Spec's a second demand letter, notifying Spec's of the establishment of a second Reserve Account in the amount of $1,978,019.49, which comprised MasterCard fines related to monitoring, replacement costs, and fraud reimbursement.

Policy Language

Hanover Insurance Company ("Hanover") issued to Spec's a Private Company Management Liability Insurance Policy ("Policy"). The Policy's Directors, Officers and Corporate Liability Coverage provided as follows:

> **B. Corporate Entity Liability**
>
> We will pay "Loss" which the "Insured Entity" is legally obligated to pay because of "Claims" made against the "Insured Entity" during the "Policy Period" and reported to us during the "Policy Period" for any "Wrongful Act" to which this insurance applies.

The Policy defined "Claim" and "Loss" as follows:

> **A.** "Claim" means:
>
> 1. Any written demand presented for monetary "Damages" or non-monetary relief for a "Wrongful Act"; or

Henry (Mackie) T.M. LeFevre-Snee
focuses his practice on insurance coverage disputes involving mass torts, environmental pollution, and construction defects in state and federal court. Prior to joining Clausen Miller in Chicago, Mackie was an associate at a New York City-area firm, litigating insurance coverage disputes in state and federal courts in New York, New Jersey, and Delaware. Mackie also served as a law clerk in the Superior Court of New Jersey, for the Hon. Kenneth J. Grispin, P.J.Cv.
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2. Any complaint or similar pleading initiating a judicial, civil, administrative, regulatory, alternative dispute or arbitration proceeding, including any appeal result from it, to which an "Insured" is provided notice and which subjects an "Insured" to a binding adjudication of liability for monetary or non-monetary relief for a "Wrongful Act."

However, "Claim" shall not include a labor or grievance proceeding pursuant to a collective bargaining agreement.

All "Claims" made on account of a single "Wrongful Act" shall be treated as a single "Claim" made on the date the earliest of the "Claims" was made, regardless of whether that date is before or during the "Policy Period" or, if applicable, during an Extended Reporting Period.

***

H. "Loss" means the amount the "Insured" is legally obligated to pay for "Damages" and "Defense Expenses" for a covered "Claim" under this Coverage Part. "Loss" does not include:

1. Any amounts which an "Insured" is obligated to pay as a result of a "Claim" seeking relief or redress in any form other than monetary "Damages;"

The Policy included the following provision with respect to the defense of "Claims":

VI. Defense Of Claims

We have the right and duty to defend "Claims," even if the allegations in such "Claims" are groundless, false or fraudulent. We have no duty to defend "Claims" or pay related "Defense Expenses" for "Claims" to which this insurance does not apply . . .

The Policy also included the following exclusion ("Exclusion N"):

This insurance does not apply to:

N. "Loss" on account of any "Claim" made against any "Insured" directly or indirectly based upon, arising out of, or attributable to any actual or alleged liability under a written or oral contract or agreement. However, this exclusion does not apply to your liability that would have attached in the absence of such contract or agreement.

The Decision Below

After Hanover disclaimed coverage, Spec's brought a declaratory judgment action. Hanover moved for judgment on the pleadings, asserting that Exclusion N foreclosed coverage under the Policy for First Data's demand letters. The district court agreed, and Spec's appealed.

Analysis

Spec's and Hanover disagreed over whether First Data's demand letters alleged an occurrence giving rise to the duty to defend, or whether Exclusion N barred coverage.

The Second Circuit held, under Texas law, that Hanover's duty to defend was triggered, because Spec's demand letters included the potential for liability on non-contractual grounds, even if those letters also asserted contractual liability that would be barred by Exclusion N. First Data's demand letters alleged Spec's "non-compliance" with third-party security standards and demanded non-monetary relief, such as the completion and submission of certain forms and an Attestation of Compliance from a Qualified Security Assessor, which were separate from Spec's obligations under the Merchant Agreement. First State's demand letter also asserted that Spec's had obligations for assessments, and demanded that Spec's pay certain sums to First State. Construed liberally and in light most favorable to Spec's, these allegations implicated theories of negligence and general contract law that implied liability separate from any obligations "based upon, arising out of, or attributable to" the Merchant Agreement. In fact, the Policy contemplated that a claim could arise out of contractual liability and still be covered, because Exclusion N did not apply to "liability that would have attached in the absence of such contract." Accordingly, Exclusion N did not apply, and Hanover was obligated to defend Spec's with regard to the claims in First Data's demand letters.

Learning Points: Under Texas law, an insurer has a duty to defend where at least one claim falls within an

insurance policy's scope of coverage, even if other claims are not covered. Accordingly, where an insured faces potential liability for a claim on a non-contractual ground, a contractual liability exclusion does not bar coverage, even if that claim arises out of contractual liability.

Medidata Solutions

Facts

Medidata Solutions, Inc. ("Medidata") provided cloud-based services to scientists conducting research in clinical trials. Medidata used Google's Gmail platform for company emails, which were routed, processed and stored by Google.

An employee in Medidata's accounts payable department, Alicia Evans ("Evans") received an email purportedly sent from Medidata's president, stating that Medidata was close to finalizing an acquisition, and that an attorney named Michael Meyer ("Meyer") would make contact. The email contained the president's name, email address, and picture in the "From" field. Meyer then called Evans, demanding a wire transfer. Evans explained to Meyer that a wire transfer required an email from Medidata's president requesting the wire transfer, as well as approval from Medidata's Vice President, Ho Chin ("Chin"), and its Director of Revenue, Josh Schwartz ("Schwartz"). Evans, Chin, and Schwartz then received a group email purportedly sent from Medidata's president, instructing them to process and approve the transfer requested by Meyer. The email contained the president's email address in the "From" field and his picture next to his name. Evans then logged on to Metadata's bank's online system, entered the banking information provided by Meyer, and submitted the wire transfer for approval. Chin and Schwartz also logged on to Medidata's bank's online banking system and approved the wire transfer. The bank then wired $4,770,226.00 to the bank account provided by Meyer.

Following a second attempt by Meyer to secure a wire transfer, Evans sent an email to Medidata's president, who responded that he had not requested the wire transfers. Subsequent investigations revealed that an unknown actor had altered the emails that were sent to Evans, Chin, and Schwartz to appear as if they were sent from Medidata's president.

Policy Language

Federal Insurance Company issued an Executive Protection Policy to Medidata ("Policy"). The Policy's "Computer Fraud Coverage" covered the "direct loss of Money, Securities or Property sustained by an Organization resulting from Computer Fraud committed by a Third Party."

The Policy defined "Computer Fraud" as: "[T]he unlawful taking or the fraudulently induced transfer of Money, Securities or Property resulting from a Computer Violation." A "Computer Violation" included both "the fraudulent: (a) entry of Data into . . . a Computer System" or "(b) change to Data elements or program logic of a Computer System, which is kept in machine readable format . . . directed against an Organization." The Policy defined "Data" broadly to include any "representation of information." The Policy defined "Computer System" as "a computer and all input, output, processing, storage, off-line media library and communication facilities which are connected to such computer, provided that such computer and facilities are: (a) owned and operated by an Organization; (b) leased and operated by an Organization; or (c) utilized by an Organization."

The Decision Below

The district court held that Medidata's losses were directly caused by a "Computer Violation", and that the Computer Fraud clause therefore provided coverage for the theft. Under the Policy, a computer violation occurred upon "the fraudulent: (a) entry of Data into or deletion of Data from a Computer System" or "(b) change to Data elements or program logic of a Computer System, which is kept in machine readable format." To mask the true origin of the spoofed emails, the thief embedded a computer code, which caused Medidata's president's email address to appear in the "From" field of the emails received by Medidata's employees. Medidata employees only initiated the transfer as a direct result of the thief sending spoof emails posing as Medidata's president. Coverage existed under the Policy for fraud because the perpetrator violated the integrity of a computer system through unauthorized access, and the losses were a direct result of that violation.

Federal appealed.

Analysis

On appeal, Federal argued that the spoofing attack was not covered, because the Policy only applied to "hacking-type" intrusions. The Second Circuit disagreed, holding that, under New York law, while no hacking may have occurred, the thieves manipulated Medidata's email system, which constituted a "computer system", enabling the thieves to send messages that misleadingly appeared to be from

Medidata's president. Because the attack represented a fraudulent entry of data into the computer system, which made a change to a data element, Medidata's losses were covered under the computer fraud provision of the Policy.

Federal further argued that Medidata did not sustain a "direct loss" under the Policy as a result of the spoofing attack. The Second Circuit again disagreed, noting that, because the spoofed emails directed Medidata employees to transfer funds in accordance with an acquisition, and the employees made the transfer that same day, the spoofing attack was the proximate cause of Medidata's losses. The actions of Medidata's employees were not sufficient to sever the causal relationship between the spoofing attack and Medidata's losses.

Learning Points: Under New York law, actual "hacking" into a computer system is not necessary for a cyber-fraud to constitute "violation of the integrity of the computer system through deceitful and dishonest access." Accordingly, a "spoofing" attack, whereby fraudsters disguise an email to appear as if it came from an address that it did not, is a "Computer Violation", where the definition of that term does not require actual "hacking." Finally, where a spoofing attack causes a company's employees to transfer funds to a fraudster, that spoofing attack is the proximate cause of that transfer, causing the insured to suffer a "direct loss."

American Tooling

Facts

American Tooling Center, Inc. ("American Tooling") was a tool and die manufacturer that produced stamping dies for the automotive industry, and outsourced some of its manufacturing orders to Shanghai YiFeng Automotive Die Manufacture Co., Ltd. ("YiFeng"), a China-based company.

American Tooling's Vice President and Treasurer, Gary Gizinski ("Gizinski"), emailed YiFeng employee Jessie Chen ("Chen") requesting that Chen provide American Tooling all outstanding invoices. An unidentified third party intercepted this email and corresponded with Gizinski about the outstanding invoices, impersonating Chen. The impersonator requested that American Tooling wire its payments to a different account from usual. To initiate the wire transfer, Gizinski signed into a banking portal using software on his computer, and manually entered the payee's name, banking information, and the amount to be wired. After Gizinski submitted the wire transfer request, American Tooling's Assistant Comptroller logged into the banking portal to approve it. Gizinski then wired the money to the new account.

The impersonator then emailed Gizinski again, requesting that Gizinski instead wire the money to a different bank account, which Gizinski did. The impersonator ran this scam two more times and Gizinski wired additional payments of $1575 and $482,640.41. When the real YiFeng demanded payment, American Tooling realized it had wired the money to an imposter. American Tooling subsequently paid YiFeng approximately 50% of its outstanding debt.

Policy Language

Travelers Indemnity and Surety Company of America ("Travelers") issued a "Wrap+" business insurance policy to American Tooling ("Policy"). The Policy provided as follows, in relevant part:

> **F. Computer Crime**
>
> 1. Computer Fraud
>
> The Company will pay the **Insured** for the **Insured's** direct loss of, or direct loss from damage to, **Money**, **Securities** and **Other Property** directly caused by **Computer Fraud**.

The Policy defined "Computer Fraud" as follows:

> The use of any computer to fraudulently cause a transfer of **Money**, **Securities** or **Other Property** from inside the **Premises** or **Financial Institution Premises**:
>
> 1. to a person (other than a Messenger) outside the **Premises** or **Financial Institution Premises**; or
>
> 2. to a place outside the **Premises** or **Financial Institution Premises**.

The Policy also contained exclusions, referred to as "Exclusion R", "Exclusion G", and "Exclusion H." Exclusion R stated as follows, in part:

> This **Crime Policy** will not apply to loss resulting directly or indirectly from the giving or surrendering of **Money**, **Securities** or **Other Property** in any exchange or purchase, whether or not fraudulent, with any other party not in collusion with an **Employee** . . . .

Exclusion G stated as follows, in part:

> This **Crime Policy** will not apply to loss or damages resulting directly or indirectly from the input of **Electronic Data** by a natural person having the authority to enter the **Insured's Computer System** . . . .

The Policy defined "Electronic Data" as "facts or information converted to a form: (1) usable in a **Computer System**; (2) that does not provide instructions or directions to a **Computer System**; or (3) that is stored on electronic processing media for use by a **Computer Program**.

The Policy defined "Computer System" as "a computer and all input, output, processing, storage and communication facilities and equipment that are connected to such a device and that the [sic] operating system or application software used by the **Insured** are under the direct operational control of the **Insured**. . . ."

Exclusion H provided that:

> This **Crime Policy** will not apply to loss resulting directly or indirectly from forged, altered or fraudulent documents or written instruments used as source documentation in the preparation of **Electronic Data** . . . .

The Decision Below

American Tooling sought coverage from Travelers, asserting that its loss fell within the "Computer Fraud" provision of the Policy. Travelers denied the claim, and American Tooling sued Travelers for breach of contract. The district court granted summary judgment to Travelers, holding that American Tooling's loss was not covered under the Policy. American Tooling appealed.

Analysis

On appeal, American Tooling argued that there was coverage, because its loss was a result of "Computer Fraud." Travelers argued that there was no coverage, because (1) American Tooling did not suffer a "direct loss"; (2) "Computer Fraud" did not take place; and (3) American Tooling's loss was not "directly caused by Computer Fraud." The Sixth Circuit disagreed with each of Travelers' arguments, and held that, under Michigan law, American Tooling's loss was covered by the Policy.

American Tooling argued that it suffered a direct loss the moment it paid the impersonator, because it no longer had that money in its bank account. Travelers argued that American Tooling's loss did not arise when American Tooling paid the impersonator, because American Tooling had already contracted with YiFeng to pay that amount of money. Rather, according to Travelers, American Tooling's loss arose later, after the fraud was discovered, when American Tooling paid YiFeng half of the money it owed. The Sixth Circuit held that American Tooling suffered a "direct loss", because there was no intervening event between American Tooling's transfer of funds to the impersonator and American Tooling's loss of money. The fact that American Tooling owed that money to YiFeng and that American Tooling agreed to pay YiFeng 50% of the amount owed was irrelevant.

Travelers also argued that the Policy's definition of "Computer Fraud" required a computer to fraudulently cause the transfer, and that it was not sufficient to simply use a computer and have a transfer that is fraudulent. The Sixth Circuit disagreed, holding that the definition didn't require that the fraud cause any computer to do anything. The definition of "Computer Fraud" was not limited to situations where someone gained access to and/or controls the insured's computer. The scheme therefore constituted "Computer Fraud" under the Policy.

The Sixth Circuit further held that the "Computer Fraud" "directly caused" American Tooling's loss. American Tooling received the fraudulent email, which caused American Tooling's employees to conduct a series of internal actions, which led to the transfer of money to the impersonator, which constituted the "loss."

Travelers further argued that Exclusion R precluded coverage, because American Tooling transferred money to the impersonator, believing it to be YiFeng, in exchange for the goods it had received from YiFeng. American Tooling argued that Exclusion R was inapplicable, because American Tooling did not receive anything from the impersonator in exchange for the money that it transferred to the impersonator. The Sixth Circuit agreed with American Tooling, holding that Exclusion R was inapplicable, because American Tooling did not wire money to the impersonator in an "exchange or purchase."

Travelers also argued that Exclusion G precluded coverage, asserting that, when Gizinski manually entered the impersonator's name, banking

information, and the amount to be wired, he was inputting "Electronic Data". The Sixth Circuit again disagreed, noting that the definition of "Electronic Data" excluded "instructions or direction to a **Computer System**". Further, the physical pressing of the keyboard and mouse sent instructions to the computer to display specific values, which combined to form "instructions or directions" to transmit the entered values from American Tooling to the banking portal via the "communication facilities" of the "Computer System." Exclusion G was therefore inapplicable, because the fraudulent bank-routing instructions did not constitute "Electronic Data" under the Policy.

Finally, Travelers argued that Exclusion H precluded coverage, because the impersonator's emails constituted "fraudulent documents", and Gizinski relied upon those emails when entering the information into the banking portal to initiate the wire transfer. The Sixth Circuit disagreed, holding that, because Gizinski's entries into the banking portal did not constitute "Electronic Data", Exclusion H was inapplicable.

Learning Points: Under Michigan law, a "direct loss" takes place where there is no intervening event between a transfer of funds to an impersonator and the transferor's loss of that money. Where a definition of "Computer Fraud" is not limited to gaining access to and/or controlling the insured's computer, it is not necessary for a fraudulent scheme to cause a computer to do anything, for that scheme to constitute "Computer Fraud." Further, "Computer Fraud" "directly cause[s]" an insured's "loss", where the insured receives a fraudulent email, which causes its employees to engage in actions leading to the transfer of money to an impersonator. Moreover, where a business transfers funds to an impersonator under the mistaken belief that those funds are paying for goods already received, that transfer is not an "exchange or purchase." Finally, where a definition of "Electronic Data" excludes "instructions or direction to a Computer System", the entering of the impersonator's name, banking information, and the amount to be wired is not "Electronic Data." ♦

Old And Somewhat Forgotten: Dusting Off Supreme Court Law On Emotional Distress Damages

by **Paul V. Esposito**

Introduction

It's amazing what we can find by going through the attic. There's the old black and white television, complete with rabbit ears and TV tubes. Should be easy to hook up to the digital entertainment system, right? And look at this: a pile of tie dye tunics and foot-wide bell bottoms. Add headbands, and they'll be perfect for the Woodstock 50-year reunion. Oh my, it's the orange tuxedo and ruffled shirt! Wanna make a statement no one will forget? They're all you'll need. Have fun rummaging up there. But be careful not to step on that pet rock.

Some stuff is meant to be thrown out, its useful life come and gone. But that's not usually true in the law. In fact, it's one of the law's beauties: old law can remain good law for centuries. That's because at its best, the law brings wisdom and common sense into play. Though statutes may come and go, wisdom and common sense are timeless. So it becomes unnecessary for modern courts to essentially reinvent the wheel when the old wheel still works just fine.

Analysis

In recent years, the Illinois appellate court has tussled with how to award damages for emotional distress to a person who suffered a physical-impact injury. Certainly, emotional distress damages are available. The issue is whether they are awardable as part of pain and suffering or are compensable as separate elements of damages. Defendants fear that separate awards for emotional distress and pain and suffering will likely lead to double recovery because of the inability to accurately parse the elements.

In *Babikian v. Mruz*, 2011 IL App (1st) 102579, a medical malpractice case, the Illinois Appellate Court, First District rejected an argument that emotional distress damages may only be awarded based on a claim of intentional or negligent infliction of emotional distress. The court found no evidence that the jury was confused or that it gave a double recovery. In *Marxmiller v. Champaign-Urbana Mass Transit. Dist.*, 2017 IL App (4th) 160741, involving a pedestrian-bus accident, a different appellate district ruled that emotional distress is a form of suffering. Moreover, separately itemizing emotional distress and pain and suffering on a verdict form does create a risk of double recovery. But the court found no evidence of it there. In *Jefferson v. Mercy Hosp. & Med. Ctr.*, 2018 IL App (1st) 162229, the First District agreed that emotional distress damages were available for medical malpractice. Like the other two cases, it found no evidence of a double recovery.

Interestingly, none of the appellate decisions analyzed Illinois Supreme Court law as to the threshold question: for a direct-injury plaintiff,

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is emotional distress separate from pain and suffering? The answer has been on the books for almost 150 years. In *Indianapolis & St. L. R.R. v. Stables*, 62 Ill. 313, 1872 Ill. LEXIS 2, a horse and wagon driver was severely injured when hit by a train at a crossing obstructed by an overgrowth of bushes. The trial court gave an instruction allowing the jury to consider plaintiff's "pain and anguish of mind" resulting from the injury. Affirming the verdict for plaintiff, the Supreme Court linked mental suffering with physical pain:

> [W]e cannot readily understand how there can be pain without mental suffering. It is a mental emotion arising from a physical injury. It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury, unless the mind is overpowered and consciousness destroyed. The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury, but was caused by some mental conception not arising from the physical injury. *Id*. at 320-21.

The Court has reaffirmed the rule a number of times. *Cicero & P. St. Ry. v. Brown*, 193 Ill. 274, 276-77 (1901); *Chic. Consol. Traction Co. v. Schritter*, 222 Ill. 364, 367-68 (1906); *Tomasi v. Donk Bros. Coal & Coke Co.*, 257 Ill. 70, 74-75 (1912); *Walsh v. Chic. Rys. Co.*, 303 Ill. 339, 346-47 (1922).

In *Marxmiller*, the appellate court picked up on the concept—though not on the case law:

> "[S]uffering" includes "emotional distress." In fact, "suffering" is another word for "distress." A dictionary defines "distress" as "pain or suffering affecting the body, a bodily part, or the mind" and lists "suffering" as a synonym. Merriam-Webster's Collegiate dictionary 338 (10th ed. 2000). The same dictionary defines "suffer" as "to endure death, pain, or distress." *Id.* at 1177. Suffering means distress, whether physical or emotional. Suffering can be physical, in the form of pain, fatigue, or other bodily distress. Suffering also can be mental, in the form of fear, shock, anxiety, frustration, grief, depression, or boredom. See *Holston v. Sisters of the Third Order of St. Francis*, 247 Ill. App. 3d 985, 1002, 618 N.E.2d 334, 187 Ill. Dec. 743 (1993). Emotional distress or mental anguish is a component of suffering, not an element of damages unto itself. See *id*. (holding that "*mental suffering* caused by physical injury even without pain is compensable" (emphasis added)).
>
> This is not to deny that emotional distress should be taken into consideration when assessing damages in a personal-injury action. See *id. at 1001-02*. If, as a result of a bodily injury, the plaintiff has suffered anguish of mind, the plaintiff deserves compensation for that aspect of his or her suffering, and the jury should be so instructed. *Id. It is one thing, however, to consider emotional distress when assessing damages for suffering, and it is another thing to make emotional distress an element of damages separate and distinct from suffering. Cf. Powers, 91 Ill. 2d at 383* ("But instructing a jury to consider the nature, extent[,] and duration [of the plaintiff's injuries] is not the same as instructing it to separately award for the nature, extent[,] and duration of the injury."). *The pertinent element of damages is suffering. Emotional distress is a form of suffering, not a separate element*. See *Holston, 247 Ill. App. 3d at 1002* ("Among the possible forms of mental suffering are fright, shock, and anguish ***."). *Marxmiller* at ¶52-53 (emphasis in original and supplied).

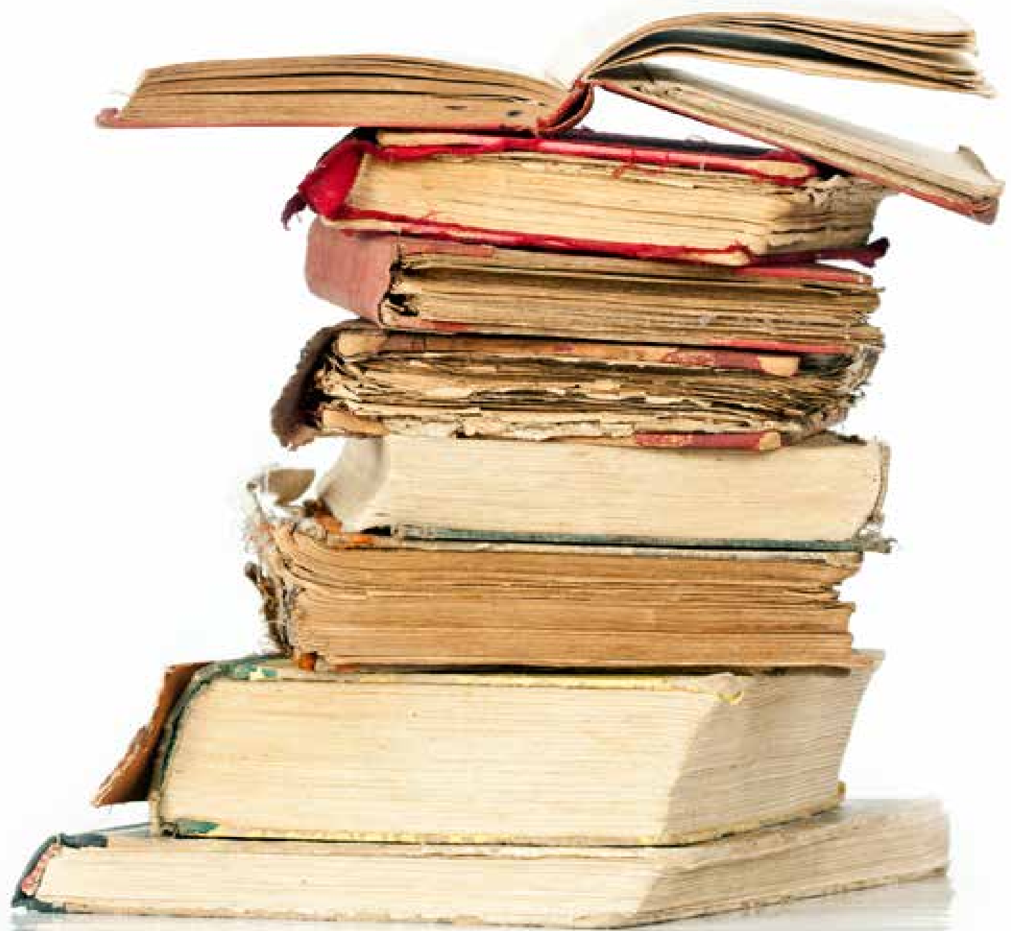
The reasoning behind these cases is sound. Whether injured by a train while driving a horse and wagon in 1870 or while driving a Ferrari in 2018, the resulting pain and suffering are no different. Human nature has not changed over the last 150 years, and neither has emotional suffering from a physical injury. So there is no need to separately itemize emotional distress.

Combining emotional distress and pain and suffering in a single award also helps prevent jury confusion as

to an award of damages. Basically, there are six elements of damages in Illinois personal injury cases: wages/earnings, medical care, assisted living care, disfigurement, loss of normal life (or disability), and pain and suffering. Each element is distinct, which allows a jury to easily compartmentalize its award. But as the case law shows, the difference between emotional distress and pain and suffering is non-existent.

The problem becomes evidentiary. If the two are treated as separate elements, when does suffering for pain and suffering purposes stop, and suffering for emotional distress purposes start? Typically, a jury is not instructed as to how to distinguish between the two. It will be easy for a jury to get confused, and with confusion comes the real risk of a duplicate award for the same injury. By combining the two into one, the risk disappears. It is a better and fairer way to instruct a jury on emotional distress damages suffered by a direct-impact plaintiff.

Learning Point: The Supreme Court decisions and *Marxmiller* provide the old and new case law supporting a single itemization for emotional distress damages. But the three appellate court decisions—*Babikian*, *Marxmiller*, and *Jefferson*—show that a defendants' most vigorous attack must be made at trial. When reviewing courts look back at trials, they find ways to rationalize what already happened below. Trial counsel must focus trial judges not only on the case law, but on what could happen in the future: a duplicate award. ♦



No Coverage For Fraudulent Wine Purchases Under "Private Collections" Policy

by **Melinda S. Kollross**

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Earlier this year, we wrote about a California Appellate Court case holding that an unsuspecting wine collector who purchased millions of dollars' worth of counterfeit wine from a "villainous wine dealer" sustained a financial loss, but no loss to property that was covered by his "Valuable Possessions" property insurance policy. "In other words, the wine collector is stuck with the devil wine without recompense. A Shakespearean tragedy, to be sure." *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33 (Cal. App. 4 Dist. 2018). See CM Report 2018 Vol. 1, "No Coverage For Counterfeit Wine Under 'Valuable Possessions' Policy" (**https://www.clausen.com/wp-content/uploads/2018/04/CMRpt2018vol1Final.pdf**).

More recently, in *Hasan v. AIG Property Casualty Co.*, 1:16-cv-02963-RM-MLC (D. Colo. Aug. 2, 2018), the insureds did not even receive "the devil wine"—they were victims of a Ponzi scheme who paid over $1.7 million for 2400-plus bottles of wine "purchased" from a fraudster but never delivered. Serving as coverage counsel, Clausen Miller partners **Dennis Fitzpatrick** and **Erin Pellegrino** correctly advised AIG that there was no coverage for the insureds' claimed economic loss under these circumstances. The federal district court agreed, granting summary judgment to AIG on all claims and denying plaintiffs' motion for leave to file an amended complaint.

Facts

Since 2000, Malik and Seeme Hasan placed online orders for bottles of wine and "wine futures" from Fox Ortega Enterprises, Inc. d/b/a Premier Cru ("Premier Cru"). The wines purchased were of two types: (1) wine that was physically located in Premier Cru's Berkeley, California warehouse; and (2) wine futures or "pre-arrival" wine that customers paid Premier Cru for and which Premier Cru promised to deliver at some later time. Premier Cru's principal, John Fox, admitted in a plea agreement that the "pre-arrival" wine sales were a fraudulent Ponzi scheme to induce customers to pay for wine that Fox knew would not be delivered.

The Hasans were insured under a "Private Collections" Policy issued by AIG. In February 2016, the Hasans submitted a claim for benefits under the Policy seeking $1,707,985 based on 2,448 bottles of wine that had been purchased but not delivered. AIG denied coverage for the Hasans' claim on two grounds: (1) the Hasans did not own or possess the wine; and (2) the Hasans did not suffer direct physical loss or damage to the wine. The Hasans filed suit and the case was removed to federal district court in Colorado.

Applying Colorado law, the federal district court granted AIG's motion for summary judgment on all claims finding that there was no physical loss or damage as required for coverage under the Policy.

Analysis

The Private Collections Policy insures against "direct physical loss or damage to valuable articles anywhere in the world unless stated otherwise in this policy or an exclusion applies." Valuable articles are defined as "personal property you own or possess[.]" Neither party argued that the Policy was ambiguous and the court did not find it to be. The Policy must accordingly be enforced as written.

The court first addressed AIG's contention that plaintiffs cannot establish that a "direct physical loss" of property covered by the Policy occurred. Plaintiffs argued that all of the cases relied upon by AIG finding no direct physical loss or damage—and thus no insurance coverage—for purely economic losses were distinguishable because those cases did not involve the purchase of a physical object like the bottles of wine at issue here. The court agreed with AIG. Although the issue has not been directly addressed by Colorado state courts, the Tenth Circuit has concluded that economic loses are not "direct physical loss or damage to property." The district court also cited Couch on Insurance in its decision:

> The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

10 Couch on Insurance § 148:46 (3d ed. 2018).

The court further explained that cases from other jurisdictions consistently hold that losing money in a fraudulent transaction is not physical loss or damage.

The court rejected plaintiffs' argument that their claim involved a covered direct physical loss because they sought to purchase physical bottles of wine that were never received. As the court noted:

> Plaintiffs completely fail to present any evidence that the wine they sought to purchase suffered a distinct, demonstrable, or physical alteration. And Plaintiffs cite no authority for the proposition that the failure to receive a physical item, purchased online, constitutes a direct physical loss under the terms of an insurance policy. To the contrary, all that has been lost is money which does not trigger coverage.

In short, the Policy does not cover failed investments or failed purchases. Because there was no evidence of direct physical loss or damage to property as required under the Policy, the court declined to reach the issue of whether plaintiffs owned, possessed, or obtained title to any of the wine.

Learning Point: Under property insurance policy language affording coverage for "direct physical loss or damage to covered property," no coverage is provided for the loss of value to the insured for property that is purchased but never delivered in a fraudulent scheme, absent proof of any physical loss or damage to that covered property. For more information about this case or other first-party property matter, please contact Dennis (**dfitzpatrick@clausen.com**) or Erin (**epellegrino@clausen.com**). ♦

Federal Law Governs Arbitration Determination Where At Least One Party To Policy Not A U.S. Citizen

by **Anne E. Kevlin**

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In a question involving the propriety of arbitration in a Hurricane Irma property insurance dispute, the federal trial court for Florida's Southern District held that federal law applied and that it had original jurisdiction over the matter, rather than the state court, under 9 USCS § 203, because the arbitration clause fell within both the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *VVG Real Estate Invs. v. Underwriters at Lloyd's*, 2018 U.S. Dist. LEXIS 129938 (S.D. Fla. August 1, 2018).

Facts

The Lloyd's policy contained the following arbitration language:

> If the Assured and Underwriters fail to agree in whole or in part regarding any aspect of this Policy, each party shall, within ten (10) days after the demand in writing by either party, appoint a competent and disinterested arbitrator and the two chosen shall before commencing the arbitration select a competent and disinterested umpire. The arbitrators together shall determine such matters in which the Assured and the Underwriters shall so fail to agree and shall make an award thereon, and if they fail to agree, they will submit their differences to the umpire and the award in writing of any two, duly verified, shall determine the same.
>
> The Parties to such arbitration shall pay the arbitrators respectively appointed by them and bear equally the expenses of the arbitration and the charges of the umpire.

Plaintiff owned properties in Hollywood, Florida that were damaged during Hurricane Irma. Plaintiff alleged nearly $250,000 in lost income as a result of the damage, and filed suit in Florida state court asserting breach of contract. Underwriters removed the lawsuit to federal court and sought a dismissal, citing the policy's arbitration clause as a condition precedent to litigation. Plaintiff objected, arguing that the policy was governed by Florida law and that the Federal Arbitration Act did not apply.

Analysis

The court agreed with Underwriters that although the McCarran-Ferguson Act mandates that "only states can regulate the substantive content of insurance contracts," this would include arbitration agreements within the United States only. Where an arbitration agreement is between the United States and other nations, the Federal Arbitration Act prevails

over state laws. Here, the arbitration agreement was between a Florida corporation and certain underwriters domiciled in the United Kingdom. As such, it was governed by both the Federal Arbitration Act, and by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an international treaty. Pursuant to 9 USCS § 203, federal district court has jurisdiction on issues "deemed to arise under the laws and treaties of the United States."

The court analyzed the case pursuant to four factors outlined in *Bautista v. Star Cruises*, 396 F. 3d 1289 (11th Cir. 2005), finding that 1) there was a written arbitration agreement within the meaning of the Convention, 2) the agreement provided for the arbitration to take place in the United States, a treaty signatory, 3) the legal relationship between the parties to the policy was commercial in nature, and 4) at least one party to the policy was not an American citizen. In this case, Underwriters demonstrated that one of the underwriting syndicates subscribing to the policy was wholly owned by Amlin Underwriting Ltd., a citizen of the United Kingdom.

Based on its *Bautista* analysis, the federal court held that arbitration was required. The court further stayed the lawsuit pending arbitration.

Learning Point: Where it can be shown that an insurer, or at least one underwriting entity subscribing to an insurance policy, is not a U.S. citizen, or is organized and domiciled outside the United States, an arbitration clause in an insurance policy may give rise to federal jurisdiction and federal law regardless of the existence of complete diversity. ♦

Ohio's Rejection Of ALI Restatement Of The Law Of Liability Insurance Underscores Need For ALI To Reconsider Use Of Custom, Practice And Usage Evidence

by **Amy R. Paulus** *and* **Henry T.M. LeFevre-Snee**

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Introduction

The American Law Institute's ("ALI") draft Restatement of the Law of Liability Insurance's ("Restatement") use of "custom, practice and usage" evidence to determine the plain meaning of unambiguous terms does not find support in a majority of states, highlighting the need for the ALI to rethink this and other decisions prior to the issuance of the Restatement's final version. The urgency for these revisions is underscored by Ohio's recent rejection of the Restatement in its totality.

Facts

Section 3 of the Restatement, entitled, "The Plain Meaning Rule," provides as follows:

(1) The plain meaning of an insurance policy term is the single meaning to which the language of the term is reasonably susceptible when applied to facts of the claim at issue in the context of the entire insurance policy.

(2) If an insurance policy term has a plain meaning when applied to the facts of the claim at issue, the term is interpreted according to that meaning.

(3) An insurance policy term is ambiguous if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy. An ambiguous term is interpreted as specified in § 4.

The Restatement distinguishes the "plain meaning" approach set out above from what it labels the "contextual" approach. Under the "contextual" approach, "courts interpret insurance policy terms in light of all the circumstances surrounding the drafting, negotiation, and performance of the insurance policy." *Restatement, Section 3, Comment a*. As the Restatement (perhaps begrudgingly) concedes, the vast majority of jurisdictions apply some variation of the "plain meaning" rule. *Id*. Acceptable sources of "plain meaning" include "dictionaries, court decisions, statutes and regulations, and secondary legal authority such as treatises and law review articles." *Restatement, Section 3, Comment b.*

By contrast the "contextual" approach is a decidedly minority rule. Regardless, the Reporters' Note goes on at length about legal justifications for application of the "contextual" approach. *Restatement, Section 3, Reporters' Note*

a. This exposition may be a left-over from earlier drafts' adoption of a plain-meaning "presumption," which was wisely rejected by ALI Reporter Tom Baker after jurists swayed him that the proposed rule was unwieldy and likely to cause more problems than it would solve.

Contrary to the majority rule, the Restatement adopts "custom, practice and usage" as a source of plain meaning. *Restatement, Section 3, Comment c*. The Restatement limits consideration to such custom, practice, and usage in effect at the time the transaction was entered into, and where such meaning "can be discerned from public sources and with only limited discovery (such as through an affidavit of an expert in the trade or business, who is subject to deposition, but without the need for extensive document requests)". *Id*.

Analysis

While the Restatement vaguely posits that "[m]any courts that follow a strict plain-meaning rule also consider custom, practice, and usage when determining the plain meaning of insurance policies", a more precise reflection of fact is that the majority of courts reject such evidence to interpret unambiguous contract provisions. Thirty-one jurisdictions, including New York, Illinois, and Florida, permit such evidence only to clarify ambiguous terms, or add a non-contradictory term. By contrast, only twenty jurisdictions permit "custom, practice and usage" evidence to provide meaning to unambiguous terms. Such explicit reliance upon a non-majoritarian rule undermines the authority of the Restatement as a supposed reflection of settled law, and instead casts it as an advocate for what the law "ought to be." *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1064, 191 L. Ed. 2d 1, 23 (2015) (Scalia, J., concurring in part and dissenting in part).

Learning Point: Perhaps rejecting an attempted encroachment on its sovereignty, the State of Ohio recently passed a law declaring that "The 'Restatement of the Law, Liability Insurance' that was approved at the 2018 annual meeting of the American Law Institute does not constitute the public policy of this state and is not an appropriate subject of notice." Ohio Rev. Code Sec. 3901.82. The ALI's Deputy Director, Stephanie Middleton, has confirmed that such a wholesale rejection of the ALI's prescriptions was unprecedented. Middleton has also stated that the ALI is in the process of making some changes to the draft Restatement, in response to written comments. The Restatement's position regarding custom and practice evidence should be among the changes made. We will continue to monitor and report on further Restatement developments in future editions of the CM Report.

For more information, please contact a member of Clausen Miller's ALI Restatement Task Force: **Amy Paulus** (**apaulus@clausen.com**); **Colleen Beverly** (**cbeverly@clausen.com**); **Ilene Korey** (**ikorey@clausen.com**) or **Mark Zimmerman** (**mzimmerman@clausen.com**). ♦

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Silver Lining: Illinois Municipalities Gain Discretionary-Acts Immunity For Failure To Maintain Property

by **Paul V. Esposito**

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Given a choice, most people would rather be happy than sad. Laugh than cry. Succeed than fail. Of course, it's not always possible. Life just doesn't work that way. It can rain cats and dogs on our best-planned parades.

But life is often what we make of it. The poet John Milton must have thought so when he penned, "Every cloud has a silver lining." For those willing to look, good can be found even in seemingly bad situations. It's often true in tort litigation, where the possibility of losing is always present. And now it's true for Illinois municipalities faced with the daunting task of maintaining public property. *Monson v. City of Danville*, 2018 IL 122386.

Facts

Barbara Monson was returning to her car when her foot hit a seam where sidewalk slabs had shifted. She fell and was injured.

About nine months earlier, the City of Danville had completed a program designed to inspect and repair downtown sidewalks. There was no written policy. The City's public works director worked walk-by-walk. He considered the concrete condition, height variations, pedestrian travel paths, the intended use of the area, its proximity to various objects, and time and costs.

The director did not recall inspection or decision as to the area where Monson fell. He believed that he considered a repair but thought the area was either not prioritized for immediate replacement or not fixed because of time and budget.

Monson sued the City for negligence and willful and wanton misconduct in failing to maintain the sidewalk. The City claimed immunity under §§2-109 and 2-201 of the Local Government and Governmental Employees Tort Immunity Act. Those sections immunize decisions of public employees serving in positions involving policy determinations or the exercise of discretion. The City also argued that the defect was both *de minimis* and open and obvious. Monson countered that under §3-102(a) of the Act, the City owed a duty to reasonably maintain its property, a duty superseding its discretionary-acts immunity.

The trial court granted the City's motion for summary judgment based on immunity. The appellate court affirmed. A divided Supreme Court reversed.

Analysis

The Majority Opinion

Section 2-201 immunizes a local public entity if an employee exercises discretion pursuant to a policy. But §2-201 immunity is inapplicable if

"otherwise provided by Statute." The issue was whether §3-102(a) provided the exception:

> Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

The Court rejected Monson's argument that §3-102(a) supersedes discretionary-acts immunity. The majority reasoned that §3-102(a) does not provide specific immunities that prevail over the more general immunity contained in §2-201. To the majority, §3-102(a) does not contain any immunities. It merely codifies a local public entity's common law duty to reasonably maintain its property.

Monson argued that discretionary-acts immunity was unavailable because §§2-109 and 2-201 are not found in the same article of the Act as §3-102(a). Under §3-102(a), a public entity has a duty of care "[e]xcept as otherwise provided in this Article." But the majority rejected her argument, ruling that the quoted language only limited of the scope of the duty, not the available immunities.

After concluding that §3-102(a) did not bar the assertion of immunity, the Court examined the scope of §2-201 immunity. The majority ruled that it covers both negligent and willful and wanton misconduct. A public employee must hold a position involving a determination of policy or an exercise of discretion. The employee's conduct must involve both. Policy determinations are those that balance competing interests. Discretionary decisions must be particular to a public office and require personal deliberation and conscious judgment about whether or how to perform an act. Discretionary decisions are different from non-immune ministerial acts—those acts prescribed in obedience to legal authority.

Whether a discretionary act has been proven is a question of law, and the Court ruled that the City failed to do so. There was no City policy governing decisions to repair or not repair sidewalks. The director's memory of his decision-making was general and vague. The City could not produce documents revealing the considerations as to the slabs in question. Liberally reading the facts to find immunity would effectively eliminate the City's duty to maintain its property.

As to the City's argument that any defect was *de minimis*, the Court identified the relevant factors: the height differential between slabs, the anticipated volume of foot traffic, and the sidewalk's location. Unless a defect is so minimal that danger is not reasonably foreseeable, the issue goes to the fact-finder. Given the scarcity of evidence, summary judgment was not warranted.

The Special Concurrence

Although agreeing with the outcome, three justices dissented from the majority's reasoning as to immunity. The duty under §3-102 to maintain property overrides discretionary-acts immunity. Because §2-201 provides for immunity "[e]xcept as provided by [s]tatute," §3-102(a) must control. By contrast, §3-102(a) only allows those exceptions "provided in this Article," which does not include discretionary-acts immunity. Under the majority analysis, "a municipal official could simply inspect and list everything that is defective and dangerous and simply institute a 'policy decision' not to repair it, thus obliterating section 3-102."

Learning Point: Whether the concurrence's fears are justified remains to be seen. But *Monson* now opens a whole new area in which discretionary acts can play a big role in determining municipal liability. Local public entities looking to take advantage should develop written policies regarding property maintenance, and document those decisions based on them. Given the dark cloud of mega-million dollar judgments, *Monson* can be a real silver lining. ♦

California Supreme Court Holds Clients Are Entitled To Notice Of Conflicts Of Interest Without Exception

*by **Tyler M. Costanzo***

The Rules of Professional Conduct heavily regulate an attorney's ability to represent clients with conflicting interests. Some attorneys try to circumvent these limitations by providing advance waivers to clients, relieving lawyers of liability for conflicts of interest that don't yet exist. However, in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co.*, No. S232946, 2018 LEXIS 6399 (Cal. Aug. 30, 2018), the California Supreme Court recently bolstered these restrictions, making it harder for attorneys to waive future conflicts. In reaching its decision, California's highest court invalidated an arbitration award consisting of the plaintiff law firm's fees from a previous case where it represented the defendant manufacturing company. This award was invalidated on the basis that the parties' engagement agreement, including the accompanying arbitration provision, was invalid because the law firm represented an adverse party in an unrelated matter, therefore creating an impermissible conflict of interest. While the law firm included advance waivers in its engagement agreements, the Court in *Sheppard Mullin* ultimately ruled that such waivers do not allow for sufficient informed consent by the clients.

Facts

The law firm of Sheppard, Mullin, Richter & Hampton ("Sheppard Mullin") agreed to represent J-M Manufacturing ("J-M") in a federal *qui tam* action filed in 2010 in which a number of public entities intervened, including South Tahoe Public Utility District ("South Tahoe"). Between 2002 and 2009, an attorney from Sheppard Mullin had represented South Tahoe in employment law matters unrelated to the *qui tam* suit. Both J-M and South Tahoe had executed agreements with Sheppard Mullin that purported to waive all current or future conflicts of interest. However, Sheppard Mullin did not disclose its representation of either client to the other. When South Tahoe discovered the conflict during the *qui tam* action, it successfully moved to have Sheppard Mullin disqualified. However, Sheppard Mullin had performed approximately 10,000 hours of work for J-M in the action, accumulating over three million dollars in billings, of which over one million remained unpaid. The parties disputed payment of these remaining fees in arbitration and, when the arbitrators ruled in favor of Sheppard Mullin's full payment, the Superior Court confirmed the award. The Court of Appeal reversed, concluding that the matter should never have been arbitrated because the conflict of interest rendered the parties' entire agreement unenforceable, including the arbitration clause. The Court of Appeal further held that this conflict disentitled Sheppard Mullin from receiving any compensation

whatsoever for the work completed while also representing South Tahoe in other matters. The California Supreme Court recently affirmed this judgment in part, while reversing and remanding the Court of Appeal's ordered disgorgement of all fees collected.

Analysis

Under the scheme set forth by the California Supreme Court in *Loving & Evans*, an excess-of-authority exception applies and an arbitral award must be vacated when a court determines that the arbitration has been undertaken to enforce a contract that is illegal or against public policy. *Loving & Evans v. Blick*, 33 Cal.2d 603 (1949). The *Sheppard Mullin* Court recognized that a contract or transaction, such as the contracts between Sheppard Mullin and J-M and South Tahoe, may be found contrary to public policy for violating the Rules of Professional Conduct. Typically, an arbitration decision is final. That is, unless the arbitration occurs pursuant to an arbitration provision from an agreement which is illegal or unenforceable as a whole. The Court analyzed the agreements between Sheppard Mullin and its clients under Rule 3-310(C)(3) of the Rules of Professional Conduct, which prohibits an attorney's concurrent representation of clients with adverse interests, even in separate matters, without informed written consent. The Court concluded that Sheppard Mullin's concurrent representation of J-M and South Tahoe violated this rule and rendered the agreements unenforceable based on three findings: (1) at the time Sheppard Mullin agreed to represent J-M, it also represented a client with conflicting interests, South Tahoe; (2) because Sheppard Mullin knew of that conflicting interest and failed to inform J-M of it, J-M's advanced waiver was not "informed consent" within the meaning of the Rules of Professional Conduct; and (3) Sheppard Mullin's unconsented-to conflict of interest affected the whole of its engagement agreement with J-M, rendering it unenforceable in its entirety. Since the agreement was deemed unenforceable in its entirety, that determination rendered unenforceable the arbitration provision upon which Sheppard Mullin's arbitration award was based. While the Court invalidated the arbitration award, it did leave open the possibility of non-contractual recovery by overruling the Court of Appeal's bright-line holding barring all compensation for services performed subject to an improperly waived conflict of interest and remanding the issue to the trial court.

Learning Points: In *Sheppard Mullin*, the California Supreme Court has provided a clear message to the legal community as to the Court's interpretation of the rules governing conflicts of interest. Every client, regardless of sophistication, must receive notice of all actual or potential conflicts of interest. Advance waivers do not satisfy this requirement and will not be construed as a means of circumventing conflict disclosures. In the wake of this decision, it appears that California attorneys are better off adopting a conservative approach regarding conflicts of interest. While this has long been a wise practical strategy, it is now further supported by clear and unambiguous California precedent. ♦

BREACH OF CONTRACT

CLEARLY ERRONEOUS FACTUAL FINDING REQUIRED NEW TRIAL

Christine Downing v. Emmanuel Dragone et al., AC 39942 (Conn. App.)

Plaintiff professional auctioneer sought damages for breach of contract from Defendant automobile retail company and its operator. The parties disagreed as to compensation for auction work Plaintiff performed. At trial, Defendant testified that Plaintiff should receive her standard auction fee, plus expenses. Plaintiff testified that the Defendants owed her a certain percentage of the gross auction proceeds pursuant to an unsigned, written agreement she had drafted. The trial court found that the alleged agreement was an implied in fact contract and that the individual Defendant was charged with knowledge of its contents because Defendant testified that the contract sat unread on his desk for four months. ***Held:*** Reversed. Contrary to the trial court's statements, there was no evidence that the Defendant had the written contract on his desk and did not read it until four months after the auction. Since the trial court's decision rested on a clearly erroneous factual finding unsupported by any evidence in the record, a new trial was necessary.

DAMAGES

SURVIVAL DAMAGES MEASURED BY PRE-DEATH YEARS, NOT POST-MORTEM

Williams v. The Pep Boys Manny Moe & Jack of Cal., 26 Cal.App.5th 672 (2018)

Decedent died after alleged exposure to asbestos in brakes he purchased from defendant auto parts retailer. After a bench trial, decedent's children were awarded some, but not all, asserted damages. ***Held:*** Reversed. Decedents can recover damages incurred before death, but not the value of services or damages had he survived. Thus trial court erred in failing to award damages for the reasonable value of the medical and other services decedent's children provided to the decedent before his death. Further, household services damages for care decedent would have provided his wife before his death were recoverable.

DEFENSE ENTITLED TO OFFSET ACCIDENT DISABILITY BENEFITS

Andino v. Mills, 31 N.Y.3d 553 (2018)

Retired police officer injured on duty in car accident received injury verdict from jury. Defendants moved to offset award, arguing that plaintiff's accident disability retirement ("ADR") benefits entitled them to an offset. Trial court concluded defendants failed to establish a sufficient nexus between plaintiff's lost earnings and pension and her projected ADR benefits. ***Held:*** Since ADR benefits replace earnings and pension, it is a collateral source within the meaning of the applicable statute that a court must set off against any earnings or pension award.

ELDER ABUSE

SUBSTANTIAL EVIDENCE OF RECKLESSNESS NEEDED FOR ELDER ABUSE CLAIM

Cochrum v. Costa Victoria Healthcare, LLC, 25 Cal. App. 5th 1034 (2018)

Skilled nursing facility and owner were sued for elder abuse, negligence and wrongful death. After jury verdict in favor of plaintiffs, trial court granted defense motion for judgment notwithstanding the verdict on the elder abuse cause of action on the grounds that there was insufficient evidence of recklessness to support the claim. ***Held:*** Affirmed. There was no substantial evidence of recklessness, which is needed to support an elder abuse claim. There was no evidence of deliberate conduct undertaken despite knowledge of a probable injury.

EMPLOYMENT LAW

CREDIBILITY ATTACKS ALONE CANNOT OVERCOME SUMMARY JUDGMENT

Ayon v. Esquire Deposition Solutions, LLC, 2018 Cal. App. LEXIS 846

Defendant employer was granted summary judgment based on evidence employee driver was not acting within the scope of her employment at time of accident, despite being on phone with another employee. Evidence included testimony from the employees denying that they were discussing anything concerning work. In opposition, Plaintiff only pointed to discrepancies between the testimony of the driver and the other employee. ***Held:*** Statutory authority does not allow summary judgment to be denied solely on grounds of credibility.

INSURANCE AGENTS/ BROKERS

BROKER OWED NO DUTY TO INSURED TO SECURE ADEQUATE COVERAGE

Perreault v. AIS Affinity Ins. Agency of New Eng., Inc., 2018 Mass. App. LEXIS 99

Following malpractice settlement, attorney assigned his claim against broker for failure to obtain adequate insurance. ***Held:*** Absent a special relationship, insurance agent lacks a duty to ensure that coverage is adequate for insured's needs. Factors creating special relationship include: (1) prolonged business relationship, (2) complexity and comprehensiveness of coverages, (3) frequency of customer-agent contacts, and (4) extent of customer's reliance on broker given complexity of policies. None applied to the attorney/broker relationship.

LEGAL MALPRACTICE

ATTORNEY-CLIENT RELATIONSHIP CONSULTATION REQUIREMENT CAN BE MET THROUGH AGENTS

JBJ Inv. of South Fla., Inc. v. Southern Title Grp., Inc., 2018 Fla. App. LEXIS 9652

Plaintiff sued former attorney arguing that the attorney prepared a mortgage containing incorrect legal descriptions of properties securing a loan. Law firm argued that it did not directly consult or meet with plaintiff and that an attorney-client relationship was not established. The trial court ruled that because plaintiff's title agent contacted and retained the law firm to prepare the note and mortgage, which the attorney prepared and was paid for, a consultation occurred. ***Held:*** Consultation requirement can be met when a client's agent consults with an attorney on behalf of the client.

LACK OF VIABLE UNDERLYING CLAIM THWARTS MALPRACTICE ACTION

Blair v. Loduca, 2018 NY Slip Op 05744 (N.Y. App. Div. 2d Dep't)

Plaintiff sued her former attorneys claiming malpractice in their representation of her in seeking damages for injuries sustained when she slipped and fell near a building she worked at as a security guard. Trial court denied summary judgment to defendant firm, finding issues of fact on the underlying claim that was the subject of the malpractice allegations. ***Held:*** The malpractice claim should have been dismissed. The storm was in progress at the time of plaintiff's accident, there was no preexisting ice on the ground, and there was no evidence the owner created or exacerbated any allegedly dangerous condition.

LIABILITY INSURANCE COVERAGE

INSURER MUST INDEMNIFY AFTER FOUR-MONTH DISCLAIMER DELAY

Robinson v. Global Liberty Ins. Co. of New York, 2018 NY Slip Op 06128 (N.Y. App. Div. 2d Dep't)

Plaintiffs sought declaration that insurer owed indemnification regarding underlying vehicle accident. Trial court granted insurer summary judgment based on insurer's prior disclaimer of coverage based on lack of cooperation. ***Held:*** Reversed. The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer and must occur as soon as reasonably possible. Here, insurer took too long to disclaim since it had sufficient information to support its disclaimer four months before it disclaimed coverage. Insurer owed indemnification.

LIMITATIONS OF ACTIONS

EQUITABLE SUBROGATION LIMITATIONS PERIOD DIFFERS FROM UNDERLYING TORT CLAIM

Gov't. Employees Ins. Co. v. Arly Barros et al., AC 40315 (Conn. App.)

Plaintiff insurance company brought equitable subrogation action, seeking uninsured motorist benefits it had paid its insured for motor vehicle accident injuries allegedly caused by Defendants. Defendants asserted Plaintiff's claim was barred by statutes of limitations applicable to the underlying claims of negligent operation of a motor vehicle. The trial court ruled in favor of Plaintiff. ***Held:*** Affirmed. Plaintiff's equitable subrogation claim, as pleaded, sounded in equity only and, therefore, the claim was not subject to any statute of limitations and the proper inquiry was whether Plaintiff's claim was precluded under the doctrine of laches.

STATUTE OF REPOSE BARRED FRAUD ACTION

Garofalo v. Proskauer Rose LLP, 2018 Fla. App. LEXIS 10846

Plaintiff appealed dismissal of its complaint against defendant law firm that prepared a 2002 opinion letter on the validity of an investment strategy. Plaintiff claimed a tax loss based on the law firm's statement that this was a legitimate strategy. The IRS subsequently concluded that the strategy was an abusive tax shelter. Law firm filed motion to dismiss arguing that the complaint was barred by the

fraud statute of repose as they had no contact with plaintiff in approximately 14 years. ***Held:*** Trial court properly concluded that the time limitation for plaintiff to commence action expired under the fraud statute of repose, which is constitutional.

PATIENT'S INVASION OF PRIVACY SUIT FILED TOO LATE

Dotson v. Stryker Corp., 2018 Ind. App. LEXIS 272

Patient sued for invasion of privacy after non-medical personnel observed her operation. ***Held:*** Patient failed to file her claim within the two-year limitations period. Patient knew of non-medical personnel's presence in the operating room, and they made her uncomfortable. Her lack of information about their names did not suspend the running of the statute.

SAVING STATUTE INAPPLICABLE WHERE FIRST SUIT FILED IN ANOTHER STATE

Portee v. Cleveland Clinic Found., 2018 Ohio LEXIS 2052

After plaintiff's negligence suit in Indiana was dismissed for lack of jurisdiction, plaintiff refiled in Ohio. ***Held in a split decision***: Ohio's saving statute is inapplicable if the first action was brought in a state or federal court outside Ohio. Timely filing an action in one state does not toll another state's limitation period. Ohio's procedural rules pertain to suits filed in Ohio and limit the applicability of the saving statute. The dissent contended that the language of the saving statute permitted a broader reading.

MEDICAL MALPRACTICE

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW

Shands Jacksonville Med. Ctr., Inc. v. Pusha, 2018 Fla. App. LEXIS 12138

Hospital moved for certiorari relief from the denial of their motion to dismiss plaintiff's medical malpractice complaint for failing to comply with pre-suit statutory requirements. Trial court held that Hospital waived its entitlement to an expert opinion by failing to produce patient's requested medical records. Hospital had requested additional information in order to ensure the individual seeking confidential medical records was legally authorized to receive them. ***Held:*** Reversed. Hospital was not required to produce the medical records as no valid authorization for their release was received from plaintiff. As Hospital did not refuse to provide the records, plaintiff was required to obtain a medical expert opinion corroborating the claim before filing suit. Plaintiff did not obtain the opinion and the statute of limitations expired, meriting dismissal.

THRESHOLD STATUTORY REQUIREMENTS MUST BE SATISFIED FOR MEDICAL MALPRACTICE CASE TO PROCEED

Manzaro v. HCA, Inc., 2018 Fla. App. LEXIS 10007

Plaintiff appealed orders dismissing medical malpractice and wrongful death complaint with prejudice due to plaintiff's failure to comply with statutory pre-suit requirements. ***Held:*** Affirmed. Trial court properly concluded plaintiff failed to comply with the statutory pre-suit requirements for investigation, corroboration, and written notice.

FAILURE TO KEEP ADEQUATE MEDICAL RECORDS DID NOT RENDER PHYSICIAN LIABLE FOR FOOT INJURY

Henderson v. Kleinman, 2018 Ind. App. LEXIS 192

Patient alleged that physician botched foot surgery. ***Held:*** Despite physician's failure to keep good records, patient did not create issue as to malpractice. The law did not impose a duty to maintain adequate records. Defense expert's affidavit stated that based on available records, physician met the standard of care. Patient failed to counter it. Concurring judge stated that physician's conduct was akin to spoliation of evidence, but patient failed to offer evidence of malpractice.

MUNICIPAL LIABILITY

FIELD TRIP IMMUNITY DOES NOT PRECLUDE LIABILITY FOR SCHOOL DISTRICT HOSTING AN INTERCOLLEGIATE SPORTING EVENT

Anselmo v. Grossmont-Cuyamaca Comm. College Dist., 25 Cal.App.5th 948 (2018)

Defendant community college district ("district") hosted interscholastic athletic competition. Plaintiff player from visiting team was injured.

Plaintiff alleged a dangerous condition of public property. A demurrer was sustained without leave to amend on the grounds of field trip and excursions immunity. ***Held:*** Reversed. Field trip immunity does not shield a district from liability because the district did not conduct a field trip for the injured player within the meaning of the applicable statute. Rather, the district provided the athletic facility to be used and it was responsible for its condition. As a result, a duty of care was owed to all event participants, of both teams.

SOVEREIGN IMMUNITY INAPPLICABLE WHEN ACTING AS AN AGENT OF TOWN AND NOT STATE

Estate of Bartlomiej F. Palosz v. Town of Greenwich, AC 40315 (Conn. App. 2018)

Plaintiffs sought damages from municipal defendants for the wrongful death of decedent, who committed suicide after being subjected to severe and continual bullying from his classmates while he was enrolled in the town's public school system. The board of education filed a motion to strike the complaint based on sovereign immunity, arguing it was acting as an agent of the state when it allegedly failed to carry out its statutory state mandated duties. The trial court denied the motion, concluding the board was acting on behalf of the town, not the state, when it allegedly failed to comply with the policy. ***Held:*** Affirmed. The board of education was acting as an agent of the town when the alleged failures occurred.

CITY IMMUNE FOR FAILURE TO REMOVE FOLIAGE NEAR STOP SIGN

Pelletier v. City of Campbell, 2018 Ohio LEXIS 1444

Driver who ran a stop sign claimed that city negligently failed to remove foliage in front of it. ***Held in a split decision***: City was immune from liability. The stop sign was not deteriorated or disassembled. The foliage was not an obstruction in the public road or on the sign. The legislature did not impose a duty to remove vegetation above or alongside a roadway that might hinder view of approaching traffic. Dissent argues that foliage need not touch a sign to obstruct it.

NEGLIGENCE

ABSENCE OF CONTRACTOR'S LICENSE OPENS HIRER TO LIABILITY FOR INJURIES SUFFERED BY CONTRACTOR'S "HIRED HELP"

Jones v. Sorenson, 25 Cal. App. 5th 933 (2018)

Plaintiff worker for gardener was injured when she fell from a ladder while trimming a tree at least 15 feet tall. Plaintiff then sued property owner claiming the work required a license that the gardener did not have. Plaintiff further alleged respondeat superior liability for the gardener's negligence. Summary judgment was entered for property owner. ***Held:*** Reversed. Under California law, a person acting as a "nurseryperson" may trim trees 15 feet tall or higher without a contractor's license, but a "gardener" cannot. The plaintiff's employer was a "gardener" and unlicensed. Thus, plaintiff could sue the property owner for the alleged negligence of the plaintiff's employer.

PSYCH PATIENT'S INJURY WHILE BEING RESTRAINED SOUNDS IN ORDINARY NEGLIGENCE

National Deaf Acad., LLC v. Townes, 242 So. 3d 303 (Fla. 2018)

Agitated patient was injured while residential treatment facility staff was restraining her. ***Held:*** Patient's claim was governed by ordinary negligence principles, not the more onerous medical malpractice statute. A malpractice claim requires evidence that conduct breached a professional standard of care and must relate to medical care requiring professional judgment or skill. Patient's injury resulted from a restraint that could have been be performed by non-medical personnel.

HOSPITAL OWED NO DUTY TO WOMAN KILLED BY FORMER PATIENT

Williams v. Steward Healthcare Sys. LLC, 2018 Mass LEXIS 554

Three weeks after release from involuntary hospital confinement, psychiatric patient killed his neighbor. ***Held:*** Hospital did not owe a duty of care to victim or her family. A mental health professional believed that patient did not pose a threat of serious harm. Once a court approved patient's release, hospital had no right to confine him. Though an involuntary commitment creates a special relationship giving rise to a duty, the duty ends when a court orders patient's release.

PREMISES LIABILITY

40 SECOND TIME PERIOD BETWEEN CREATION OF DEFECT AND ACCIDENT WAS INSUFFICIENT TO ESTABLISH ACTUAL OR CONSTRUCTIVE NOTICE

Rebecca Bisson v. Wal-Mart Stores, Inc., AC 39965 (Conn. App. 2018)

Plaintiff sought damages for injuries sustained when she allegedly slipped and fell on an accumulation of water while walking in the main aisle of Defendant's store. Defendant obtained summary judgment on the ground there was no factual basis on which a reasonable jury could find Defendant had actual or constructive notice of the alleged defect. ***Held:*** Affirmed. Defendant's evidence established a forty-second maximum time-period between the creation of the defect and Plaintiff's fall. Defendant did not have sufficient time to discover and remedy the alleged defect.

SQUARE WHERE PLAINTIFF TRIPPED HELD NOT A DANGEROUS CONDITION

TruGreen Landcare, LLC v. LaCapra, 2018 Fla. App. LEXIS 12403

Plaintiff alleged he tripped and was injured while cutting across a palm tree planter square in front of a movie theatre. Plaintiff sued defendant for negligent maintenance, landscaping and inspection of the planter square. ***Held:*** Defendant did not owe plaintiff a duty to keep the area in a safe condition or warn of a dangerous condition as landscaped areas are not generally dangerous as a matter of law and any change in surface level was open and obvious. Furthermore, there is no duty to make areas not designed for walking reasonably safe for that purpose or to warn that they are not safe for walking.

TORTS

INTENTIONAL TORT CLAIMS AGAINST LAWYER ARE SUBJECT TO SUBSTANTIAL CAUSE STANDARD

Knutson v. Foster, 25 Cal. App. 5th 1075 (2018)

Internationally ranked swimmer sued attorney for fraudulent concealment and breach of fiduciary duty. The plaintiff client hired defendant attorney to enforce an oral agreement reached with a former employee of USA Swimming. However, the defendant attorney was well-connected within the swimming world, including with USA Swimming. Ultimately, a settlement was reached with USA Swimming, but the defendant attorney did not explain significant settlement terms. Jury found for plaintiff but new trial was granted. ***Held:*** Reversed. The plaintiff's burden is to establish a reasonable basis for the conclusion that it was more likely than not the conduct of the defendant attorney was a substantial factor in the result. Here, a substantial factor in plaintiff's decision to enter into settlement agreement was the attorney's concealment of critical facts. ***Also held***: Plaintiff's testimony was sufficient to support an award of emotional distress damages as the claims were within common experience and did not need expert testimony.

PAWNBROKER LIABLE FOR RESELLING STOLEN JEWELRY

Danopulos v. Am. Trading II, LLC, 2018 Ohio App. LEXIS 2851

After unknowingly purchasing stolen jewelry, pawnbroker disassembled and sold it for scrap. ***Held:*** Even if pawnbroker lawfully possessed jewelry by substantially complying with statute, it was still liable for conversion. Pawnbroker could not obtain good title from a thief. It could not return possession to rightful owner because without title or permission it intentionally disassembled and sold the jewelry.

LANDOWNERS FAILED TO STATE CLAIM OF ANTICIPATED PRIVATE NUISANCE

Krueger v. Allenergy Hixton, LLC, 2018 Wisc. App. LEXIS 689

Landowners sued to enjoin construction and operation of adjacent frac sand mine. ***Held in a split decision:*** Claim for anticipated private nuisance must allege facts that: (1) defendant's conduct will necessarily or certainly create a nuisance, and (2) nuisance will cause inevitable and undoubted harm. Landowners' allegations were insufficient to establish the nature of the nuisance and the inevitability of specific harms to their properties. The dissent argued that the majority too strictly construed the pleading requirements.

TRIAL PRACTICE

JURY INSTRUCTION PROPERLY NOT GIVEN WHEN UNSUPPORTED BY EVIDENCE

Ellen Farmer-Lanctot v. Matthew Shand, AC 39488 (Conn. App. 2018)

Plaintiff sought damages for injuries sustained when, upon seeing the headlights of the defendant's motor vehicle, she jumped out of the road and into the grassy center island of the exit road, believing that the defendant was going to hit her. Jury verdict for defendant. Plaintiff appealed claiming her request for a jury charge on the sudden emergency doctrine, the pedestrian roadway standard of care and the defendant's duty to yield to pedestrians when making a right turn had been wrongly rejected.

Held: Affirmed. The trial court properly declined to instruct the jury because there was no evidence to suggest that Plaintiff was at or near a regular crossing, a crossing at an intersection of roads, or a crossing regulated by traffic signals. The instruction sought by the plaintiff could have misled the jury because there were no facts in the record to support a finding that Plaintiff was at or near a regular crossing or that the defendant was turning into a different street.

WRONGFUL DEATH

DEATH OF SURVIVOR DURING WRONGFUL DEATH SUIT WITHOUT WILL ENDS RIGHT TO SURVIVOR DAMAGES

Horejs v. Milford, 2018 Ind. App. LEXIS 208

During pendency of wrongful death suit following wife's death, husband died leaving no heirs or will. ***Held:*** Wife's estate not entitled to recover for lost wages and benefits or loss of services, love, affection, and society. If decedent is not survived by a spouse or statutory dependents, the estate may only recover final-expense damages and expenses of administration. This interpretation does not encourage defendants to delay cases. Problem could have been avoided by a will.

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