# CM REPORT

of Recent Decisions

2019 • Vol. 1

## The Wisdom Of Using Appellate Counsel At Trial

## Illinois' Biometric Information Privacy Act

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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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# Illinois Supreme Court Decision Proves The Wisdom Of Using Appellate Counsel At Trial

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

## Introduction

The authors of this Sidebar have long advocated the wisdom of using appellate counsel at trial, not only to preserve error for appeal, but to help ensure a defense verdict. A recent Illinois Supreme Court decision proves again that wisdom with respect to the expertise of appellate counsel in carefully drafting special interrogatories, which as this decision shows, was crucial to a defense victory. *Stanphill v. Ortberg*, 2018 IL 122974.

## Facts

*Stanphill* involved a wrongful death action arising from the suicide of plaintiff's decedent. Plaintiff sued a clinical social worker (Ortberg) for professional negligence in failing to diagnose that decedent was suicidal. During the instructions phase of the jury trial, defendant proffered a special interrogatory to test the jury's general verdict, which read: "Was it reasonably foreseeable to Lori Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005?" The jury entered a general verdict for plaintiff awarding $1,495,151 but answered "No" to the special interrogatory. Because of the negative answer to the special interrogatory, the trial court entered judgment in favor of defendant and against plaintiff.

## Decision-Plaintiff Wins

The Supreme Court ruled that the jury's answer to the special interrogatory was of no effect and did not wipe out plaintiff's verdict because it was in the wrong form. Special interrogatories test an element of the plaintiff's cause of action. The *Stanphill* Court found that this interrogatory was given to test the legal cause aspect of proximate causation. Legal cause is established only when an injury—in this case, decedent's suicide—is "reasonably foreseeable" and is an objective not a subjective test. But the defendant's special interrogatory was phrased in the "subjective" and not the "objective" because it asked whether decedent's suicide was reasonably foreseeable *to Ortberg* rather than "a reasonable social worker." Accordingly it was not in proper form, and the jury's negative answer favoring defendant had no effect on the jury's general verdict for plaintiff. The bottom line: plaintiff's verdict was reinstated.

***Learning Point:*** It might seem like a small point ... using "Lori Ortberg" instead of "a reasonable social worker" ... in the special interrogatory, but that small difference made all the difference in the world between getting a defense win or a plaintiff's verdict. In all likelihood, had the interrogatory been phrased in an objective way, the jury would have still answered it "No" insuring a defense win. These are the "little" but essential points that more than pay for the added costs of having appellate counsel assist at trials. In fact, using appellate counsel at trial can no longer be viewed as a luxury, but today should be viewed as a necessity. The *Standphill* case shows why.

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# Illinois Super Lawyers 2019

Edward M. Kay

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### Civil Litigation: Defense

Kim is a partner with Clausen Miller P.C. and is AV® Preeminent™ rated by Martindale-Hubbell. She has successfully litigated cases involving catastrophic personal injury, wrongful death, property loss, class actions, mass toxic tort, employment discrimination, insurance coverage and commercial disputes in trial and appellate courts throughout the United States. Kim is a Proctor in Admiralty and a former Member of the Board of Directors of the Maritime Law Association of the United States. She received her Juris Doctor, *cum laude*, and M.B.A. from Tulane University.

## Melinda S. Kollross
### Appellate

Melinda is a senior partner and co-chair of Clausen's Appellate Practice Group, specializing in post-trial and appellate litigation nationwide. She is AV® rated AV® Preeminent™ by Martindale-Hubbell. Melinda has litigated more than 150 appeals in state and federal reviewing courts, including participation in two appeals before the United States Supreme Court. Melinda has a winning record in appeals, she has argued before the Illinois Supreme Court, and has been named an Illinois Super Lawyer and a Leading Lawyer in Appellate practice. Her work spans all areas of firm practice, including commercial, first-party property, liability insurance coverage and liability defense. Melinda is a member of the highly selective Federation of Defense and Corporate Counsel (FDCC).

## Amy R. Paulus
### Insurance Coverage

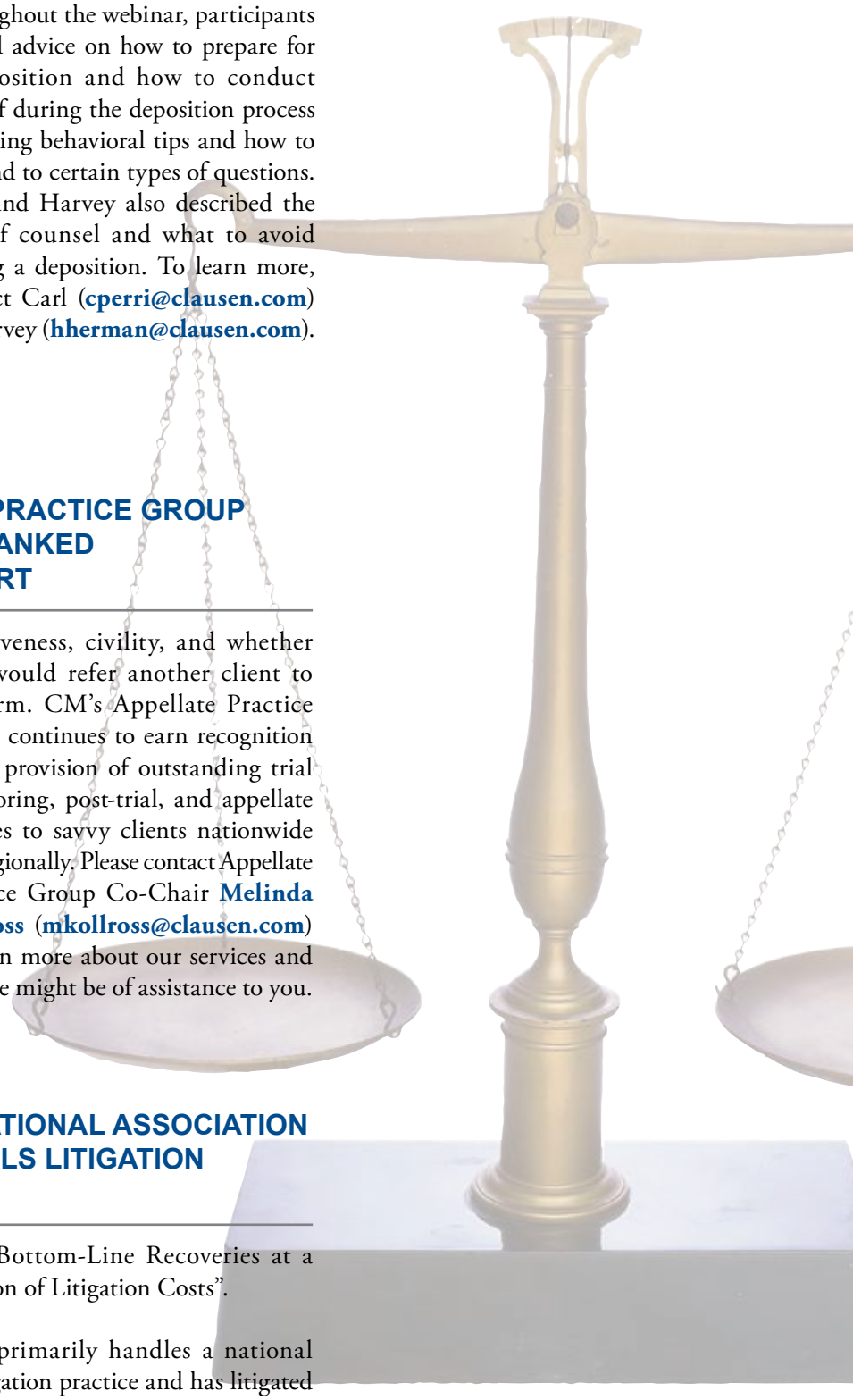
Amy is the Liability Coverage and Reinsurance Practice Group Leader, a senior shareholder and member of the Board of Directors of Clausen Miller. Amy has built a national reputation in all areas of liability insurance coverage law, professional liability, employment practices, transportation, claims 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. Amy has earned designations as a Super Lawyer, Leading Lawyer, Top Women Attorneys, and was named a Top Civil Defense Lawyer in Illinois. In addition, Amy is a Fellow of the prestigious Litigation Counsel of America Trial Lawyer Society.

## Don R. Sampen
### Insurance Coverage

Don has over 30 years of trial and appellate experience in various areas, including insurance coverage and commercial litigation. Don is a *magna cum laude* graduate of Northwestern University College of Law, where he was Executive Editor of the *Northwestern Law Review*, and is currently an Adjunct Professor at Loyola University College of Law teaching a course in Insurance Law. Don is also a prolific writer, authoring articles and book chapters in various areas of the law, including antitrust and whistleblower litigation. He also writes a column in the *Chicago Daily Law Bulletin* which appears twice monthly on insurance coverage matters. He has maintained an AV® Preeminent™ rating (highest possible peer review rating for legal ability and ethical standards) with Martindale-Hubbell for 25 years.

## CARL PERRI AND HARVEY HERMAN PRESENT WEBINAR ON PREPARING FOR DEPOSITION

CM partners **Carl Perri** and **Harvey Herman** recently presented a webinar entitled "HOW TO PREPARE FOR A DEPOSITION: STRATEGIES FOR SUCCESS AND TRAPS TO AVOID" on behalf of the CPA Academy. The webinar was designed for CFOs, CPAs, and Controllers. Depositions are critically important in the defense of malpractice claims. This course described the process of depositions, when they are used, and what to expect when being deposed. Throughout the webinar, participants gained advice on how to prepare for a deposition and how to conduct oneself during the deposition process including behavioral tips and how to respond to certain types of questions. Carl and Harvey also described the role of counsel and what to avoid during a deposition. To learn more, contact Carl (**cperri@clausen.com**) or Harvey (**hherman@clausen.com**).



## CLAUSEN MILLER'S APPELLATE PRACTICE GROUP NATIONALLY AND REGIONALLY RANKED BY U.S. NEWS AND WORLD REPORT

Clausen Miller is pleased to announce that its Appellate Practice Group has once again been ranked both nationally and regionally (Chicago) in U.S. News and World Reports 2019 "Best Law Firms." (See **https://bestlawfirms.usnews.com/profile/clausen-miller-pc/overview/39045**). As part of the review process, clients and/or professional references are emailed a survey addressing a firm's expertise, responsiveness, understanding of a business and its needs, cost-effectiveness, civility, and whether they would refer another client to the firm. CM's Appellate Practice Group continues to earn recognition for its provision of outstanding trial monitoring, post-trial, and appellate services to savvy clients nationwide and regionally. Please contact Appellate Practice Group Co-Chair **Melinda Kollross** (**mkollross@clausen.com**) to learn more about our services and how we might be of assistance to you.

## GREG AIMONETTE SPEAKS AT NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS LITIGATION SKILLS CONFERENCE

CM partner **Greg Aimonette** spoke at the (NASP) National Association of Subrogation Professionals – Litigation Skills Conference in Palm Springs, California March 28 and 29th on "Pre-Suit Negotiations: How to Maximize Your Bottom-Line Recoveries at a Fraction of Litigation Costs".

Greg primarily handles a national subrogation practice and has litigated industrial, commercial and residential

losses due to fires, explosions, product defect, design and improper installation, toxic losses, floods, freezes, roof collapse, construction collapse, defective design, agricultural losses, steel mill losses, ground water pollutants and gas leaks. He has defended these same types of matters and previously practiced as a criminal prosecutor in Cook County, Illinois.

For more information, please contact Greg at **waimonette@clausen.com**.

## CALIFORNIA PARTNER IAN FELDMAN PRESENTS AT ORANGE COUNTY BAR ASSOCIATION CONSTRUCTION LAW MEETING

On February 9, 2019, CM partner **Ian Feldman** co-presented "Preparing for Mediation: How to Achieve Success". The program discussed methods and potential practice pointers for the preparation for mediation from a variety of perspectives, including that of a plaintiff/owner, developer or general contractor, claims professional, and subcontractor attorney. This program also included a discussion regarding updated California law due to SB954 (Evid. Code § 1122) and its new disclosure requirements as well as an examination of Evid. Code § 1119.

Ian has extensive litigation and trial experience defending contractors, design professionals, property managers, retail businesses, manufacturers, landowners, lawyers, accountants, brokers and healthcare professionals in all areas of professional, products, premises and construction liability matters.

## FIRM PRESIDENT DENNIS FITZPATRICK PRESENTS AT PLRB CLAIMS CONFERENCE AND INSURANCE SERVICES EXPO

On April 2 and 3, **Dennis Fitzpatrick** co-presented "Shutdown of Business Operations for Cyber Events". The program described the types of cyber losses that adjusters are most likely to encounter, explaining the cause of the interruption and the resulting financial impact, reviewing the coverage issues resulting from a cyber event, outlining some recent cyber events and the actual impacts from real-world examples, and detailing a step-by-step guide on how to handle these losses.

Dennis is the Firm President and a Shareholder with Clausen Miller P.C., handling first-party property insurance, coverage and defense, including All-Risk, Energy, Builders Risk, Boiler and Machinery, and cyber risk coverage, as well as professional liability defense, construction litigation and subrogation matters.

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## CLAUSEN MILLER APPELLATE AND SUBROGATION GROUPS TEAM UP FOR APPELLATE VICTORY, UPHOLDING BIG SUMMARY JUDGMENT WIN

The Clausen Miller Appellate Practice and Subrogation Groups teamed up for an appellate victory in the Illinois Appellate First District in *Travelers Property Casualty Company of America v. Arcelormittal USA Inc.* As previously reported, Clausen Miller partner **Greg Aimonette** and **Ken Wysocki** won a hard-fought summary judgment battle below, obtaining a subrogation recovery for Travelers for the entirety of the hundreds of thousands of dollars it paid to an insured for a tractor that was badly damaged in a fire while being operated by defendant. This rare result of an insurer plaintiff's summary judgment on both liability and damages was upheld by the combined forces of Clausen Miller's Appellate and Subrogation Groups on appeal.

On appeal, defendant Arcelormittal tried to apply subrogation waiver language in its contract with the insured to avoid Arcerlormittal's contractual responsibility to pay for damage to tractors under its care and use. Appellate Practice Group partner **Joseph Ferrini** and subrogation attorney Ken Wysocki successfully argued that the subrogation waiver language cited did not encompass the type of insurance policy under which payment to the insured had been made. They also beat back damages arguments that Arcelormittal tried to raise for the first time on appeal. For any subrogation needs, please contact Greg Aimonette at **waimonette@clausen.com**. For appellate needs, please contact Joe Ferrini at **jjferrini@clausen.com**.

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# Georgia Supreme Court Holds No Bad Faith Failure To Settle Where Settlement Offer Did Not Contain Express Time Limitation

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

***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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In *First Acceptance Ins. Co. of Ga. v. Hughes*, No. S18G0517, 2019 Ga. LEXIS 161, 2019 WL 1103831, the Supreme Court of Georgia held that a plaintiff's settlement offer did not contain an express time limitation on its acceptance, where a plaintiff's communications (1) expressed interest in attending an insurer's proposed settlement conference; (2) in the alternative, offered to settle the plaintiff's claim for the available policy limits; (3) requested that the insurer provide certain insurance information within 30 days and that insurer amend that information if inconsistent facts subsequently came to light; and (4) stated that any settlement would be conditioned upon receipt of that insurance information. Therefore, the insurer did not act negligently or in bad faith in not accepting the plaintiff's offer to settle, and the insurer was not liable for the excess award against its insured.

## Facts

First Acceptance insured Ronald Jackson under an automobile policy with bodily injury liability limits of $25,000 per person and $50,000 per accident. Jackson caused an accident that injured, among others, Julie An and her minor daughter, Jina Hong. Jackson later died from his injuries.

First Acceptance sent a letter to An and Hong proposing a joint settlement conference. On June 2, 2009, An and Hong sent two letters (the "June 2 Letters") to First Acceptance. The first letter expressed An and Hong's interest in a settlement conference, and, in the alternative, offered to settle their claims for the available policy limits. The second letter requested that First Acceptance provide certain insurance information within thirty days, that First Acceptance amend that information if inconsistent facts subsequently came to light, and further stated that any settlement would be conditioned upon An and Hong's receipt of that insurance information.

First Acceptance did not immediately respond. An and Hong then filed a complaint seeking damages arising out of the automobile collision. Then, forty-one days after making their offer to settle, An and Hong sent a letter to First Acceptance revoking their offer. First Acceptance then invited An and Hong to another settlement conference. An and Hong declined to attend. First Acceptance offered to settle An and Hong's claims for $25,000 each, which An and Hong rejected. A jury returned a verdict in favor of An and Hong, and the trial court awarded Hong $5.3 million against Jackson's Estate.

### *The Decision Below*

Hughes, the administrator of Jackson's Estate, sued First Acceptance alleging that it acted negligently and in bad faith by failing to settle Hong's claim within the policy limits, and seeking $5,309,220.25, as well as punitive damages and attorney fees. First Acceptance moved for summary judgment, and Hughes moved for partial summary judgment on the issues of liability and compensatory damages.

The trial court denied Hughes' motion and granted First Acceptance summary judgment. Hughes appealed, and the Court of Appeals reversed, concluding that the June 2 Letters created genuine issues of material fact as to, among other issues, whether Hong's offer included a 30-day deadline for a response.

The Supreme Court of Georgia granted First Acceptance's petition for certiorari. Hughes contended that First Acceptance failed to respond to the offer within the 30-day deadline. First Acceptance argued that the June 2 Letters contained no such deadline.

### Analysis

Under Georgia law, an insurer may be liable for an excess judgment against its insured for bad faith or negligent refusal to settle a claim within the policy limits. An insurer is negligent in failing to settle if an ordinarily prudent insurer would conclude that trying the case created an unreasonable risk of an excess judgment. An insurance company acts in bad faith in refusing to settle if the insurance company acts unreasonably in responding to a settlement offer, bearing in mind that the insurer must give the insured's interests the same consideration that the insurer gives its own. Generally, it is for the jury to decide whether the insurer, in view of the existing circumstances, has accorded the insured the same faithful consideration it gives its own interest. An insurer's duty to settle arises when the injured party presents a valid offer to settle within the insured's policy limits.

The Court held that whether Hong's offer contained a 30-day deadline was an issue of law, and further held that Hong's offer did not include a 30-day deadline for acceptance. An and Hong presented their offer to settle as an alternative to An and Hong's participation in the proposed global settlement conference. An and Hong did not demand a set time for the settlement conference, did not provide any time limitation on their attending the conference, and did not set any express deadline to settle beforehand. Further, the second letter's request that insurance information be amended was not logically consistent with a 30-day deadline for accepting the settlement offer. Because An and Hong's offer was not a time-limited settlement demand, First Acceptance was not put on notice that its failure to accept within any specific period would constitute a refusal.

Hughes argued that First Acceptance knew or should have known that Hong's claim was the most severe, and that insurance industry custom and practice required First Acceptance to resolve the most serious claim, in order to limit its insured's exposure. Hughes further argued that because a liability insurer may, in good faith and without notification to others, settle part of multiple claims against its insured even though such settlements deplete or exhaust the policy limits, a jury should consider whether First Acceptance was acting as an ordinarily prudent insurer in failing to simply accept an offer that would eliminate the most serious claim.

The Court disagreed, noting that an insurer is not required to settle part of multiple claims. Further, a settlement of all the claims, including Hong's, was in the insured's best interest, because it would reduce the overall risk of excess exposure, and An and Hong had expressed their interest in attending a settlement conference. First Acceptance's failure to promptly accept An and Hong's offer was reasonable, because an ordinarily prudent insurer could not be expected to anticipate that, having specified no deadline for the acceptance of their offer, An and Hong would withdraw their offer and refuse to participate in the settlement conference.

Accordingly, First Acceptance was entitled to summary judgment in its favor.

***Learning Points:*** In Georgia, for an insurer to be potentially liable for an excess judgment for negligent or bad faith failure to settle within limits, a settlement offer must clearly put the insurer on notice that its failure to accept that offer within a specific time period will constitute a refusal. Where an offer to settle does not provide such notice, an insurer's failure to immediately accept that offer does not constitute negligence or bad faith as required to hold the insurer liable for a subsequent excess judgment. ♦

# Illinois' Biometric Information Privacy Act: What Does It Mean To Be "Aggrieved"?

*by* ***Clausen Miller's Data Privacy*** *and* ***Security Practice Group***

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On January 25, 2019, the Illinois Supreme Court decided in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186 (Ill. January 25, 2019), whether a person is "aggrieved" under the Biometric Information Act ("Act"), 740 ILCS 14/1, *et seq.*, where there is no specific allegation of "some actual injury or adverse effect, beyond violation" of the Act. In other words, is an individual entitled to the relief prescribed by the Act, *even* where that individual has not alleged a separate injury or harm? The Illinois Supreme Court held that yes, that individual very well may be. A technical violation of the Act may be enough to recover under the Act.

As an initial matter, the Act "imposes numerous restrictions on how private entities collect, retain, disclose and destroy biometric identifiers, including retina or iris scans, fingerprints, voiceprints, scans of hand or face geometry, or biometric information." The Act requires private entities to, for example, "inform[] the subject … in writing that a biometric identifier or biometric information is being collected or stored … inform[] the subject … in writing of the specific purpose and length of term for which a biometric identifier or biometric is being collected, stored, and used; and … receive[] a written release executed by the subject of the biometric identifier …". 740 ILCS 14/1 § 15(b). The Act creates a cause of action, and allows a claimant to recover for "each violation" "the greater of liquidated damages [$1,000 or $5,000] or actual damages, reasonable attorney fees and costs, and any other relief, including an injunction, that the court deems appropriate."

## Facts

In *Rosenbach*, the plaintiff's teenage son provided his fingerprint to Six Flags during a school field trip in connection with the purchase of a season pass. He, however, allegedly did not receive any paperwork from Six Flags regarding the use of this biometric information, and Six Flags has retained this identifier and related information. Additionally, Six Flags allegedly does not have a "written policy" available that advises on a protocol regarding the retention or destruction of the biometric information. Plaintiff filed suit on her son's behalf, as well as all others similar situated, under the Act. Six Flags moved to dismiss the complaint contending that "plaintiff had suffered no actual or threatened injury and therefore lacked standing to sue, and that plaintiff's complaint failed to state a cause of action for violation of the Act …".

The trial court denied the motion in part, and Six Flags certified two questions to the Appellate Court:

> (1) whether an individual is an aggrieved person under §20 of [the Act] … and may seek statutory liquidated damages authorized under §20(l) of the Act when the only injury he alleges is a violation of §15(b) of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required

> disclosures and obtaining his written consent … and
>
> (2) whether an individual is an aggrieved person under §20 of [the Act] … and may seek injunctive relief under §20(4) of the Act when the only injury he alleges is a violation of §15(b) of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent …

The Appellate Court answered both questions in the negative, holding that more than a technical violation is necessary to recover under the Act. The Illinois Supreme Court in *Rosenbach* reversed the Appellate Court.

## Analysis

In reaching its decision, the *Rosenbach* Court looked at "basic principles of statutory construction." The Court held that Six Flags' construction—that there must be "some actual damage, beyond violation of the rights conferred by the statute"—was "untenable." The Court drew a comparison between Illinois' AIDS Confidentiality Act, which also uses the term "aggrieved," and also does not require "proof of actual damages" to recover.

> As with the AIDS Confidentiality Act, the Act does not contain its own definition of what it means to be 'aggrieved' by a violation of the law. Where, as here, a statutory term is not defined, we assume the legislature intended for it to have its popularly understood meaning. Likewise, if a term has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate that established meaning into the law. … Applying these canons of construction, it is clear that defendants' [Six Flags'] challenge to Rosenbach's right to bring suit on behalf of her son is meritless.

Relying on an over-100-year-old case, the Court stated that, "to be aggrieved simply 'means having a substantial grievance; a denial of some personal or property right.'" "A person who suffers actual damages as the result of the violation of his or her rights would meet this definition of course, but sustaining such damages is not necessary to qualify as 'aggrieved.'" The Court in *Rosenbach* went on to describe the Illinois legislature's intent with the Act to support its' technical interpretation of the Act: "The Act vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent. … When a private entity fails to adhere to the statutory procedures … 'the right of the individual to maintain … biometric privacy vanishes into thin air. … This is no mere 'technicality.' The injury is real and significant." The *Rosenbach* case was remanded to the circuit court for further proceedings consistent with the Illinois Supreme Court's analysis.

***Learning Point:*** The *Rosenbach* decision is expected to open the floodgates for plaintiff class action litigation under the Act in Illinois, and, potentially serve as precedent for recovery in other similar cases where personal identifying information is handled contrary to particular requirements of a statute. ♦

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***Harvey R. Herman***
is a partner of Clausen Miller P.C. and he is a member of the Clausen Miller Business Practice Group. He specializes his practice in the handling and trial of complex litigation. Harvey has represented large corporations, insurance companies, closely held companies, corporate officers and directors, investment firms, banks, broker-dealers, financial representatives and large insurance companies. As part of his practice, he has both defended and prosecuted business and commercial-based claims on behalf of his clients.
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# No "Collapse" Where Cracked Basement Walls Remain Standing

*by* ***Melinda S. Kollross***

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Dozens of suits are currently pending in state and federal courts arising from faulty concrete used to pour the foundations of roughly 35,000 homes across northeastern Connecticut. Those foundations are exhibiting visible cracking which can allegedly cost up to $250,000 per home to fix. The United States Court of Appeal for the Second Circuit holds that the "collapse" provision in an Allstate homeowner's policy doesn't cover the cost of fixing cracking in a home's still-standing basement walls due to a defective concrete foundation, affirming district court decisions denying coverage to three sets of Connecticut homeowners in these so-called "crumbling concrete" cases. *Valls v. Allstate Ins. Co.*, No. 17-3495-cv, 2019 U.S. App. LEXIS 9596 (2d Cir. Apr. 2, 2019).

## Facts

In October 2015, the Valls noticed several horizontal and vertical cracks in the basement wall of their home in Coventry, Connecticut. The degree of damage is disputed; however, it is undisputed that the walls remain standing. Allstate issued an "all risk" homeowner's Policy to the Valls covering "sudden and accidental direct physical loss to property . . . except as limited or excluded in this policy." The Policy generally excludes "[c]ollapse" from its all-risk coverage. However, in a section entitled "Additional Protection," the Policy reinstates coverage for a limited class of collapses:

> We will cover:
>
> a) the entire collapse of a covered building structure;
>
> b) the entire collapse of part of a covered building structure; and
>
> c) direct physical loss to covered property caused by (a) or (b) above.
>
> For coverage to apply, the collapse of a building structure specified in (a) or (b) above must be a sudden and accidental direct physical loss caused by one or more of the following: . . .
>
> b) hidden decay of the building structure; . . .
>
> f) defective methods or materials used in construction, repair, remodeling or renovation.
>
> Collapse does not include settling, cracking, shrinking, bulging or expansion.

After Allstate denied the Valls' claim for coverage under the Policy, the Valls sued Allstate in Connecticut state court alleging breach of contract, bad faith, and unfair/deceptive trade practices. Allstate removed the action to federal court. The district court granted Allstate's Rule 12(b)(6) motion to dismiss. The Valls appealed.

## Analysis

The sole issue on appeal is whether the gradual deterioration of the Vallses' still-standing basement walls constitutes a covered "collapse" under the subject Policy provision. Applying Connecticut law, the Second Circuit found that the Policy terms do not afford coverage for the type of structural damage at issue. The Policy language only covers the "entire" and "sudden and accidental" collapse of all or part of a building, and those terms are not fulfilled by cracking to basement walls that still remain standing, the Second Circuit held.

The Valls relied heavily upon the Connecticut Supreme Court's ruling in *Beach v. Middlesex Mutual Insurance Co.*, 205 Conn. 246 (1987), which found that in the context of a homeowners policy, the term "collapse" is ambiguous and can encompass a "substantial impairment" to a home's structural integrity. The Valls argued that the gradual but inevitable destruction of their faulty foundation meets the *Beach* decision's definition of collapse.

However, the Second Circuit found the policy at issue in *Beach* is "easily distinguished" from Allstate's:

> Unlike the Allstate Policy, the policy in *Beach* did not define or otherwise qualify the term "collapse." Indeed, it was the absence of such clarifying language that rendered the term "collapse" ambiguous in the *Beach* policy. Based on this ambiguity, the court in *Beach* concluded that the term "collapse," left undefined, encompasses "substantial impairment of the structural integrity of the building."

Allstate's Policy, by contrast, expressly circumscribes the definition of collapse by requiring that it be "entire," "sudden," and "accidental." Under Connecticut law, the phrase "sudden and accidental" requires that the collapse occur both abruptly and unexpectedly. "Here, the gradual erosion and cracking of the basement walls was not sudden," the Second Circuit wrote. "Thus, the inclusion of the words 'sudden and accidental' in the collapse provision is sufficient to bar coverage under the policy for the damage sustained to the Vallses' basement walls."

Moreover, even if the cracking could be characterized as sudden or accidental, coverage would still be barred because the Policy require an "entire collapse." As the Second Circuit explained: "[w]hatever the term 'entire collapse' encompasses, it must entail more than mere 'cracking,' since cracking is expressly excluded under the policy's provision that '[c]ollapse does not include settling, cracking, shrinking, bulging or expansion.'"

***Learning Point:*** Cracked walls which remain standing do not constitute a covered "collapse" under policy language requiring such collapse to be "entire", "sudden" and "accidental"—and further expressly stating that "collapse" does not include "cracking." ♦

# Malicious Prosecution Coverage: Court Creates Conflict In Illinois

*by* ***Don R. Sampen***

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Liability policies issued to municipalities and law enforcement agencies, as well as CGL policies generally, typically provide coverage for the tort of malicious prosecution. Most definitions of the tort provide that it does not "accrue" until the claimant, who has been wrongfully prosecuted and perhaps convicted and jailed, has been fully exonerated. Since exoneration can occur many years after the actual prosecution and conviction, courts around the country disagree on when coverage for the tort is triggered and what policies are responsible. In Illinois, the state courts until now have consistently held that the triggering event for coverage is the wrongful prosecution commenced during the policy period. A recent Illinois appellate court decision, however, bucked this trend and, over dissent, found that coverage applied only after all the elements of the tort, including exoneration, were satisfied. Hence, coverage had to be provided by the policies in effect at the time of exoneration. *Sanders v. Illinois Union Insurance Co.*, 2019 IL App (1st) 180158 (Jan. 15, 2019).

## Facts

Sanders sued the City of Chicago Heights and others claiming that members of the City's police department coerced false witness identifications and withheld exculpatory information, resulting in his murder conviction in 1993. Sanders' convictions were vacated in 2011. Following a second retrial in 2014, he was acquitted. These events occurred during the time period of primary liability insurance coverage issued by Illinois Union Insurance Company to the City. The acquittal also occurred while an excess insurance policy issued by Starr Indemnity & Liability Company was in place.

Sanders ultimately settled his suit for $15 million. Under the terms of the settlement, the City paid $2 million, and one of the City's insurers at the time of his prosecution paid $3 million. The City also assigned to Sanders its rights to pursue recovery from Illinois Union and Starr, whose policies were in effect at the time of exoneration.

Sanders then brought this coverage action. The trial court dismissed the action, holding that coverage for malicious prosecution under the policies was triggered by the initiation of Sanders' prosecution, not his subsequent exoneration, consistent with prior Illinois decisions. It also rejected the argument that the retrials of Sanders were additional triggers of coverage.

Sanders, along with the City, which joined him as a plaintiff, brought this appeal.

## Analysis of Policy Language

In a 2-1 split opinion authored by Justice Aurelia Pucinski and joined by Justice Michael Hyman, the First District reversed. The Appellate Court

observed at the outset that the issue was whether the coverage for malicious prosecution under the policies was triggered by the actual prosecution of Sanders, which took place in the 1990s, or by his exoneration, which effectively took place upon the vacating of his conviction and subsequent acquittal.

Turning to the language in the Illinois Union policies, the majority noted that the tort of malicious prosecution was one of several "offenses" within the definition of "personal injury" for which the policy provided coverage. The policies, moreover, required that the "offense" take place within the applicable policy period. The Starr excess policies followed form to the Illinois Union policies.

Based on the policy language, Sanders argued that the "offense" of malicious prosecution did not happen until all the elements of the tort were satisfied, which included exoneration. Under his view, the two policies would be triggered.

The insurers, however, contended that the "offense" of malicious prosecution was not the completed tort but the offensive act of maliciously prosecuting someone. In their view, coverage would be provided by the policies in effect at the time of prosecution, not the defendants' policies.

Relying on a dictionary definition, the First District majority concluded that "offense" in the policies referred to the legal cause of action, not just the wrongful conduct. This interpretation, authoring Justice Pucinski said, is what the average person would understand the policies to cover. She believed her view to be bolstered by the fact that the policies coupled the term "offense" with the titles of legal causes of action, and not specifically base wrongful acts alone.

## Analysis of Precedent

The First District majority then addressed a series of Illinois appellate decisions that reached a contrary result. The court distinguished several of the cases based on differing policy language. It concluded that another case, *County of McLean v. States Self-Insurers Risk Retention Group, Inc.*, 2015 IL App (4th) 140628, although having similar language, was not properly reasoned.

Justice Pucinski devoted extra attention to *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, a First District decision construing policy language similar to that found in the Illinois Union policies. While disagreeing with the *First Mercury* result, Justice Pucinski also found a technical ground for distinction.

The policy in *First Mercury* required the offense to have been "committed" during the policy period, while the Illinois Union policies required the offense to "happen" during the period. According to Justice Pucinski, "happen," unlike "commit," suggests the completion of the tort during the policy period, and not just the initiation of the prosecution.

She also rejected the insurers' argument that exoneration should not be the trigger of coverage since there is nothing offensive about exoneration. Rather, according to the insurers, exoneration is a step in rectifying the wrong done to the claimant. Justice Pucincki found this contention without merit because, in her view, the trigger of coverage is not the exoneration alone but the satisfaction of all the elements of the tort.

The court therefore reversed in favor of coverage for Sanders.

Justice Mary Anne Mason dissented, arguing that the outcome should be controlled by *First Mercury* and other cases distinguished by Justice Pucinski, and that the "[t]he overwhelming weight of authority in Illinois supports the conclusion that it is the commencement of prosecution, and not exoneration, that triggers coverage for malicious prosecution."

***Learning Point:*** A split of authority now exists at the appellate level in Illinois concerning whether malicious prosecution coverage is triggered by the prosecution itself or by the exoneration of the claimant. ♦

# "Knowing Violation" And "Criminal Acts" Exclusions Do Not Preclude Duty To Defend Where At Least Some Underlying Claims Do Not Require Proof Of Insured's Knowledge/Intent Or Criminal Conduct

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

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In *West Bend Mut. Ins. Co. v. Ixthus Med. Supply, Inc.*, 2019 WI 19, the Supreme Court of Wisconsin affirmed an appellate court's holding that there was a duty to defend under a commercial general liability insurance ("CGL") policy where the underlying pleadings alleged that the insured had engaged in advertising activities that caused injury to the underlying plaintiff. Further, the policy's knowing violation exclusion did not preclude a duty to defend where the underlying complaint asserted claims that did not require proof that the insured acted with knowledge or intent to violate rights and inflict injury. Finally, the policy's criminal acts exclusion did not apply where the complaint asserted claims that were not dependent on a showing of criminal conduct.

## Facts

Ixthus Medical Supply, Inc. was insured under a CGL policy issued by West Bend. The policy provided coverage for "personal and advertising injury."

Abbott Laboratories manufactured and sold blood glucose test strips in domestic and international markets. The labeling and instructional inserts and price and available rebates differed substantially between the boxes used domestically and internationally. Abbott also sold test strips internationally at a much lower price than those sold in the United States.

Abbott filed a lawsuit in New York federal court against Ixthus and over 100 other defendants, asserting thirteen federal statutory and common law claims based on the defendants' alleged importing, advertising, and subsequent distribution of boxes of Abbott's international test strips in the United States. Ixthus tendered its defense to West Bend, which denied Ixthus's tender.

## Policy Language

The CGL policy provided, in part:

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this

insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply . . . .

SECTION V—DEFINITIONS of the CGL policy defined "advertisement" and "personal and advertising injury" as follows:

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

   a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

   b. Regarding web-sites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

* * *

14. "Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:

* * *

   f. The use of another's advertising idea in your "advertisement", or

   g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

* * *

The CGL policy also contained exclusions for "Knowing Violation of Rights of Another" and "Criminal Acts":

2. Exclusions

   This insurance does not apply to:

   a. Knowing Violation of Rights of Another

      "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."

* * *

   d. Criminal Acts

      "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

* * *

## The Decision Below

West Bend filed a declaratory judgment action seeking a ruling that West Bend had no duty to defend or indemnify Ixthus, and moved for summary judgment. The circuit court granted West Bend's motion, concluding that, although the allegations in Abbott's complaint fell within the initial grant of coverage, the knowing violation exclusion applied, thereby eliminating any duty to defend.

Ixthus and Abbott appealed. The Court of Appeals reversed, concluding that the knowing violation exclusion did not apply, because several of the claims did not require proof that Ixthus's actions were intentional. Therefore, the complaint asserted potentially covered claims not precluded by the knowing violation exclusion, and West Bend had a duty to defend Ixthus.

West Bend then petitioned for review by the Supreme Court of Wisconsin, which granted the petition.

## Analysis

In analyzing the duty-to-defend under a CGL policy's advertising injury provision, Wisconsin courts ask three questions: (1) Does the complaint allege a covered offense? (2) Does the complaint allege that the insured engaged in advertising activity? (3) Does the complaint allege a causal connection between the plaintiff's alleged injury and the insured's advertising activity? The

parties disputed whether the allegations satisfied the third factor, causation.

West Bend argued that the complaint did not allege any advertising activity by Ixthus that caused injury. Rather, the underlying allegations focused on importation and distribution, not advertising. West Bend further contended that Ixthus was not an "advertising" defendant, but instead a "distributing" defendant that did not advertise or sell products directly to end users. As a result, the allegations were insufficient to connect Ixthus's activity to the advertising injury coverage, and did not come within the policy's initial grant of coverage.

The Court disagreed, holding that the complaint sufficiently alleged causal connection. In Wisconsin, the test for causal connection focuses not on whether the injury could have taken place without the advertising, but on whether the allegations sufficiently assert that the advertising contributed materially to the injury. The complaint alleged that the "Defendants" (including Ixthus) engaged in advertising activity that caused injuries to Abbott, i.e., that the defendants used Abbott's trademarks and trade dress in advertising to consumers and the marketplace through websites, emails, facsimiles, point-of-sale displays and other media, and that these actions caused a variety of injuries to Abbott, including loss of millions of dollars in rebates, damage to Abbott's goodwill and trademarks, and consumer confusion, mistake, and disappointment. It was therefore reasonable to infer that Ixthus's alleged advertising activity contributed materially to Abbott's alleged injuries. Accordingly, the allegations in the complaint fell within the initial grant of coverage.

West Bend also argued that the knowing violation exclusion applied, because the complaint alleged that Ixthus acted intentionally and with knowledge that it was defrauding Abbott, by buying international test strips at the lower price and selling them domestically to increase profit

The Court held that a knowing violation exclusion precludes coverage at the duty-to-defend stage only when every claim requires proof that the insured acted with knowledge that its actions would violate the rights of another and would inflict personal and advertising injury. If a complaint alleges any claims that could be proven without such a showing, then the insurer is required to provide a defense.

The Court cited to multiple claims that came within West Bend's personal and advertising injury coverage provision and that did not require proof that Ixthus acted with knowledge or with intent to violate Abbott's rights and inflict injury, including federal and state claims for trademark dilution, and a state claim for deceptive business practices. The complaint therefore alleged at least one potentially covered advertising-injury claim that did not depend on whether Ixthus acted with knowledge that it was violating Abbott's rights or inflicting advertising injury.

West Bend also argued that the criminal acts exclusion precluded coverage, contending that the complaint specifically alleged that some of Ixthus's acts constituted crimes, such as illegal mail, wire, and insurance fraud. The Court disagreed, noting that the complaint also alleged claims that were not dependent on a showing of criminal conduct, such as Lanham Act violations. Accordingly, the criminal acts exclusion did not stand in the way of West Bend's duty to defend.

***Learning Points:*** In analyzing the duty-to-defend under a CGL policy's advertising injury coverage, Wisconsin courts ask three questions: (1) Does the complaint allege a covered offense? (2) Does the complaint allege that the insured engaged in advertising activity? (3) Does the complaint allege a causal connection between the plaintiff's alleged injury and the insured's advertising activity? The test for causal connection focuses not on whether the injury could have taken place without the advertising, but on whether the allegations sufficiently assert that the advertising contributed materially to the injury.

Further, a knowing violation exclusion precludes coverage at the duty-to-defend stage only when every alleged claim requires proof that the insured acted with knowledge that its actions would violate the rights of another and would inflict personal and advertising injury. If a complaint alleges any claims that could be proven without such a showing, then the insurer is required to provide a defense. Finally, a criminal acts exclusion does not preclude coverage where a complaint also alleges claims that are not dependent on a showing of criminal conduct. ♦

# Drone Technology Is Taking Off—Are Insurance Companies Ready For It?

*by* ***Colleen A. Beverly***

Given the explosion of drone technology in recent years, it was only a matter of time before a coverage dispute arose over the use of drones. On December 7, 2018, that time came when the United States District Court for the Central District of California issued an opinion on whether an aircraft exclusion applied to damages sustained by a wedding guest when she walked into the photographer's drone. *Philadelphia Indemnity Insurance Company v. Hollycall Productions, Inc. et al.*, 2018 WL 6520412 (C.D. Cal. Dec. 7, 2018).

## Facts

In *Hollycall*, the photographer's liability insurer agreed to defend the photographer in a lawsuit brought by a wedding guest against a photographer after she became blind in one eye after walking into the photographer's drone. In defending the underlying lawsuit, the insurer reserved the right to challenge its coverage obligation including its right to seek reimbursement for the defense costs it incurred. The insurer filed a declaratory judgment action and moved for summary judgment on the basis that the aircraft exclusion in its policy precluded coverage for the injuries to the wedding guest. Under the aircraft exclusion, the policy did not apply to bodily injuries "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented to or loaned to any insured".

The policyholder argued that the aircraft exclusion did not apply because a drone cannot transport persons or cargo and thus, does not constitute an "aircraft". Because the term "aircraft" was not defined in the policy, the court turned to the Merriam-Webster dictionary which defined "aircraft" as a "vehicle (such as an airplane or balloon) for traveling through the air". The court concluded that the term was unambiguous and did not require the carrying of passengers or cargo. The court further noted that the fact a drone is unmanned and operated remotely does not make it any less of an aircraft. Thus, the court found the aircraft exclusion applicable, and that the insurer did not have a duty to defend or indemnify the photographer and was entitled to reimbursement of the defense costs incurred.

## Analysis

The *Hollycall* case demonstrates just one of the many types of coverage issues that will arise with the increased use of drones.

Standard first party property policies do not provide coverage for commercial use of drones. The Insurance Services Office, Inc. (ISO) 2011 form CP 00 10 10 12 states that "covered property does not include personal property which is airborne". Depending on the size and sophistication of the drone, the amount of first party coverage needed by operators will vary.

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Typical third party liability policies do not specifically reference drones, other than through the aircraft exclusion. As discussed in the *Hollycall* case, Coverage Part A includes an aircraft and watercraft exclusion which does not distinguish between manned and unmanned aircrafts—"no coverage for liability arising out of the ownership, maintenance, or use of aircraft or watercraft that is owned, operated by, rented to, or loaned to an insured." However, Coverage Part B (personal and advertising liability) does not contain an aircraft exclusion. In order to address new drone liabilities, ISO has developed several drone-specific endorsements which extend or exclude coverage for drone liabilities. These forms allow an insurer to insure or exclude Coverage A and Coverage B exposures. Under these endorsements, the drone must be scheduled and the operations site must be designated. The endorsements allow for a separate drone liability aggregate limit.

The Unmanned Aircraft exclusion found at form CG 21 09 addresses drone liability in the following ways: 1) excludes bodily injury, property damage and personal and advertising injury arising out of the ownership, maintenance, use or entrustment to others of an unmanned aircraft; 2) replaces the aircraft and watercraft exclusion with a bifurcated exclusion to address a) unmanned aircrafts and b) aircraft (other than unmanned aircraft), auto or watercraft; 3) adds an exclusion under Coverage B for unmanned aircrafts and 4) adds a definition of "Unmanned Aircraft" to the definitions section of the policy ("an aircraft that is not 1. Designed; 2. Manufactured; or 3. Modified after manufacture; to be controlled directly by a person from within or on the aircraft.")

Other ISO endorsements stem from the language of form CG 21 09. Endorsement CG 21 10 contains the bifurcated exclusion in Coverage A but does not modify Coverage B; CG 21 11 contains the Coverage B exclusion but no exclusion in Coverage A; CG 24 50 provides limited coverage for drone operations or projects described in the schedule and allows an aggregate limit specific to the endorsement, and CG 24 51 and CG 24 52 provide limited coverage under Coverage A only and Coverage B only.

Homeowners' policies will also be impacted by the increase in drone claims. Homeowners' policies typically cover physical damage to drones used for personal use as a hobby. They may also cover third party claims of bodily injury and property damage. However, they are unlikely to cover liability arising from the personal use of drones that involve trespass, stalking, harassment or other criminal laws.

Other policies will need to evolve with the increase in drone use, including cyber liability and drone-specific policies. Drone operators will need cyber liability policies to cover the cost to investigate data breaches, defend privacy claims and repair damage to systems caused by hackers. Drone operators may even look to cyber liability policies for coverage of bodily injury and property damage claims caused by cyber attacks on moving vehicles. At this point in time, several insurers are offering drone-specific policies. Coverage currently available under these policies include third party liability, physical damage to the drones and product liability. The drone-specific policies do not typically provide coverage for invasion of privacy, nuisance or trespass claims.

***Learning Point:*** *Hollycall* may be one of the first drone insurance coverage cases, but it certainly will not be the last. As drone technology and usage continues to expand, so will the losses and the lawsuits. Whether insurers will provide coverage for such drone-related injuries will depend primarily on the terms and conditions of the policies at issue. ♦

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## AUTO INSURANCE

### INSURER LIABLE FOR INSURED DRIVING UNDER SUSPENSION

*Ind. Farmers Mut. Ins. Co. v. Weaver*, 2019 Ind. App. LEXIS 91 (Ind. App.)

Driving on a suspended license, insured hit a house. ***Held:*** Exclusion for "[u]sing a vehicle without a reasonable belief that that 'insured' is entitled to do so" was ambiguous. "Using" is not synonymous with "operating". A vehicle can be used without being operated. Insurer could have clarified its intent through better drafting.

## EMPLOYMENT LAW

### SUMMARY JUDGMENT APPROPRIATE WHERE INSUFFICIENT EVIDENCE TO INFER DISCRIMINATION

*Drey Andrade v. Lego Systems, Inc.*, AC 41322 (Conn. App. 2019)

Plaintiff sued defendant alleging he was terminated based on his sexual orientation. Plaintiff had been informed by his supervisor that his performance with respect to his communication skills, collaboration, and trust building with his manager and employees needed improvement. A performance plan was prepared. In subsequent performance reviews, concerns regarding his job performance persisted and he was offered a transfer to another position where he would be free of managing other employees. Another performance plan was prepared, which plaintiff did not satisfactorily address, and he was terminated. The trial court granted defendant summary judgment. ***Held:*** Affirmed. There was insufficient evidence from which a reasonable jury could infer discrimination from the circumstances surrounding the termination.

### PARTY WHO RECEIVED INJUNCTIVE RELIEF IS A PREVAILING PARTY

*ERHM Orthopedics, Inc. v. Edwards*, 2019 Fla. App. LEXIS 129 (Fla.)

Company selling surgical products entered employment agreement with defendant under which he could not compete where the company did business. The agreement also provided that the prevailing party in a lawsuit was entitled to attorney's fees. Defendant resigned and began working for competitor in the same market. Company sued and won temporary injunction against defendant, but its request for attorneys' fees was denied. ***Held:*** Reversed. Company clearly prevailed on a significant issue in the litigation, entitling it to the fees per the agreement.

## EVIDENCE

### UNSUBSCRIBED, UNSWORN AFFIDAVIT AND UNAUTHENTICATED POLICE REPORTS INSUFFICIENT TO OPPOSE SUMMARY JUDGMENT

*Francis Anderson v. Charles Dike, et. al.*, AC 40799 (Conn. App. 2019)

Plaintiff patient sued defendant hospital employees after one allegedly closed a door on his hand and intentionally kicked his hand into the door. Plaintiff claimed employees' conduct violated the patients' bill of rights. The trial court granted summary judgment to defendants. ***Held:*** Affirmed. Plaintiff's affidavit opposing summary judgment could not be considered since it was neither subscribed nor sworn to before a notary. Also, the police reports attached to the plaintiff's opposition were improper because they were not authenticated.

### DEFENDANT'S PRIOR SAFETY EXPERIENCE AND PLAINTIFF'S PRIOR WORK HISTORY PROPERLY ADMISSIBLE IN NEGLIGENCE CASE

*Zaida Melendez v. Spin Cycle Laundromat, LLC*, AC 41410 (Conn. App. 2019)

Plaintiff filed negligence lawsuit after a table on which she was folding clothes in the defendant's laundromat collapsed on her foot. The jury returned a defense verdict. Plaintiff filed a motion to set aside the verdict, claiming the trial court improperly allowed the defendant to present evidence of the condition of the table prior to the incident, and to question her regarding her disability and prior work history. The trial court denied the motion. Plaintiff appealed. ***Held:*** Affirmed. Evidence regarding the defendant's prior safety experience with laundry folding tables and the plaintiff's prior work history were relevant to issues of liability and damages and were properly admitted into evidence

## FIRST-PARTY PROPERTY

### CAUSATION OF DAMAGES MAY BE HEARD BY COURT AS TO COVERAGE OR APPRAISERS AS TO LOSS AMOUNT

*People's Trust Ins. Co. v. Garcia*, 2019 Fla. App. LEXIS 791 (Fla.)

Insurer sought to compel an appraisal. Insurer admitted coverage for property damage from roof leak but disputed cause of damage to roofing system. Trial court held issue was an amount-of-loss question for appraisers. ***Held:*** Trial court erred in denying motion to compel appraisal. Further, as the insurer did not wholly deny coverage, causation is an amount-of-loss question for the appraisal panel rather than a coverage question that can only be decided by the court.

## LABOR LAW

### COURT DEFERENTIAL TO REASONABLE DEPARTMENT OF LABOR INTERPRETATION OF LABOR LAW

*Andryeyeva v. New York Health Care, Inc.*, 2019 N.Y. LEXIS 617 (N.Y.)

Plaintiffs sought certification of a class of home health care aides for alleged violations of the Labor Law based on their respective employers' failure to pay class members a required minimum wage for each hour of a 24-hour shift. Defendants relied on Department of Labor interpretation providing that employees assigned to 24-hour shifts, including home health care aides, would have up to 11 hours excluded from their compensable hours for sleep and meal breaks. ***Held:*** Department of Labor's interpretation of its own wage orders receive deferential treatment. The interpretation here was not unreasonable.

## LAND USE

### COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR THAT OF ADMINISTRATIVE OFFICIALS

*Matter of Save America's Clocks, Inc. v. City of N.Y.*, 2019 N.Y. LEXIS 631 (N.Y.)

Petitioners alleged that the Landmarks Preservation Commission's decision to approve the redevelopment of a historic building previously designated as a landmark was irrational and in error. ***Held:*** Reversed. Decision to close off clock tower in a historic building was not irrational. Decision was well within the discretion of the commission under the Landmarks Preservation Law, and courts lack the power to substitute their judgment for that of properly delegated administrative officials.

## LEGAL MALPRACTICE

### INSURER LACKS STANDING TO SUE FOR LEGAL MALPRACTICE AS LAW FIRM WAS NOT IN PRIVITY WITH INSURER

*Arch Ins. Co. v. Kubicki Draper, LLP*, 2019 Fla. App. LEXIS 866 (Fla.)

Insurer hired law firm to defend insured, then sued law firm for malpractice after suit settled. Insurer alleged law firm's delayed statute of limitations defense resulted in avoidable large settlement. Law firm successfully argued to trial court that they were not in privity, and insurer lacked standing to sue. Insurer appealed. ***Held:*** The law firm was not in privity with the insurer and the insurer was not an intended third party beneficiary of the relationship between the law firm and the insured. Insurer lacks standing to sue firm.

## LIABILITY INSURANCE COVERAGE

### ALLEGATIONS THAT INJURIES AROSE FROM SUBCONTRACTOR'S WORK TRIGGERS DUTY TO DEFEND OBLIGATION IN SUBCONTRACT

*Centex Homes v. R-Help Constr. Co., Inc.*, 32 Cal. App. 5th 1230 (Cal. App.)

Contractor hired subcontractor to install utility boxes in a subdivision. The subcontract contained a clause requiring the subcontractor to indemnify the contractor for all claims arising out of the subcontractor's work. Contractor sued subcontractor for breach of contract, indemnity and declaratory relief related to underlying tort claim. Jury was allowed to consider whether subcontractor had a duty to defend. ***Held:*** Jury resolution of issue was in error. A duty to defend arises as a matter of law from the mere allegation in the underlying tort action

that the plaintiff's injuries arose out of the subcontractor's work unless there is conclusive, undisputed evidence that the plaintiff's claim is not covered by the indemnity agreement (such as being outside the scope of work).

## LIMITATION OF ACTIONS

### PRE-SUIT NOTICE DOES NOT TOLL TIME FOR GOVERNMENT CLAIM BASED ON MEDICAL MALPRACTICE

*Last Frontier Healthcare Dist. v. Sup. Ct. (Harper)*, 2019 Cal. App. LEXIS 259 (Cal. App.)

Plaintiff sued for alleged medical malpractice arising from surgery performed at public entity hospital but failed to submit government claim within one year of date of accrual or date of surgery. Plaintiff moved for leave to file a late claim, which was granted and an alternative writ issued. ***Held:*** The trial court did not have discretion to grant the plaintiff's request for relief from the claims presentation requirement because the timeline for claims presentation is jurisdictional. While statutory law tolls the statute of limitations for a medical malpractice action if pre-suit notice is served within the last 90 days of the tolling of the statute of limitations, the timeframe within which to submit a government claim is not similarly extended.

### SIX-YEAR STATUTE OF REPOSE IN CONSTRUCTION SUITS APPLIES TO ASBESTOS CLAIMS

*Stearns v. Met. Life Ins. Co.*, 2019 Mass. LEXIS 105 (Mass.)

Decedent died of mesothelioma after decades-earlier exposure to asbestos during plant construction. ***Held:*** The six-year statute of repose applies to negligence actions arising out of the design, planning, construction, or administration of real property improvements. Its purpose was to eliminate the possibility of liability long after work had been completed. The Legislature intended an ironclad rule. No exception existed for diseases with extended latency or for defendants in control of an improvement at the time of an incident.

### PROCEDURAL CONDITIONS PRECEDENT DO NOT THWART SAVINGS STATUTE

*U.S. Bank Nat'l. Ass'n. v. DLJ Mtge. Capital, Inc.*, 2019 N.Y. LEXIS 160 (N.Y.)

Trustee of securities trust sued seller for alleged breach of representations and warranties. Seller obtained dismissal, without prejudice, of complaint due to condition precedent in contract requiring notification. Seller appealed, arguing dismissal should be with prejudice. ***Held:*** CPLR 205, which allows a subsequent action within six months of a non-merits dismissal, applied. Failure to comply with a procedural condition precedent prior to the expiration of the statute of limitations does not foreclose use of CPLR 205.

## MEDICAL MALPRACTICE

### COURT LOOKED TO COMPLAINT ALLEGATIONS TO DETERMINE TYPE OF HEALTH CARE PROVIDER THAT CAN OPINE AS TO THE NEGLIGENCE ALLEGED

*Caron v. Conn. Pathology Grp., P.C.*, 187 Conn. App. 555, 2019 Conn. App. LEXIS 33

Plaintiffs sued in medical malpractice for a false positive cancer diagnosis by anatomic pathologists and submitted an opinion letter from a board certified clinical pathologist in effort to comply with statute. Defendant successfully filed a motion to dismiss due to lack of personal jurisdiction, arguing that plaintiffs had to obtain an opinion letter from an anatomic pathologist. ***Held on appeal:*** The trial court properly interpreted plaintiffs' complaint, which alleged negligence by pathologists in their capacity as anatomic pathologists. The statute requires an opinion letter from a similar health care provider.

### STATUTE LITERALLY REQUIRES EXPERT BE IN SAME SPECIALTY AS DEFENDANT

*Riggenbach v. Rhodes*, 2019 Fla. App. LEXIS 946 (Fl.)

Petitioners sought certiorari review of an order denying their motion to dismiss a medical malpractice lawsuit as the pre-suit written expert report from a physician specializing in plastic surgery offered opinions regarding the

medical care provided by an orthopedic surgeon. ***Held:*** Reversed. The "same specialty" requirement is to be taken literally and is not synonymous with a physician of different specialty who provided treatment to the same area of the body.

### EXPERT TESTIMONY NEEDED FOR MALPRACTICE ACTION

*Speaks v. Rao*, 2018 Ind. App. LEXIS 505 (Ind. App.)

While under care for heart-related issues, patient developed clotting problems requiring repeated hospital visits. ***Held:*** Patient's failure to offer expert testimony doomed her malpractice claim. The failure to properly assess the risk of deep vein thrombosis was not a matter of common knowledge. Patient could not avoid the expert requirement by labeling her claim as one for mere negligence. The conduct still involved the healthcare provider's professional actions.

## MUNICIPAL LAW

### EXTERNAL STAIRS CONSIDERED "SIDEWALK" UNDER PRIOR NOTICE STATUTE

*Hinton v. Village of Pulaski*, 2019 N.Y. LEXIS 265 (N.Y.)

Plaintiff sued Village after falling down exterior stairway connecting public road to municipal parking lot. Village had not received pre-suit written notice of the alleged defect and the Village Code provided that such notice was necessary for liability to be possible with respect to bridges, roads and sidewalks. Village was granted summary judgment on this basis, which was affirmed by the intermediate appellate court. ***Held:*** Affirmed. A stairway may be classified as a sidewalk for purposes of a prior written notice statute if it functionally fulfills the same purpose that a standard sidewalk would serve.

## NEGLIGENCE

### ABSENT CONTROL OF DAY TO DAY ACTIVITIES, NATIONAL FRATERNITY OWES NO DUTY OF CARE TO CONTROL LOCAL FRATERNITY CHAPTER

*Baronberg v. Sigma Alpha Epsilon Fraternity*, 2019 Cal. App. LEXIS 222 (Cal. App.)

Plaintiff was injured at a party hosted by a local chapter of a national fraternity. She sued the national fraternity for negligence. The trial court granted the fraternity's motion for summary judgment on the issue of whether there was a special relationship between the plaintiff, the invitee of a local chapter of the fraternity, sufficient to give rise to a duty of care owed by the national fraternity defendant to control the local chapter's conduct or to protect the local chapter's guests. ***Held:*** Affirmed. The existence of general policies governing the operation of local chapters and the authority to discipline them for violation does not justify the imposition of a duty on a national fraternity. In addition, the Court held that national fraternities cannot monitor day-to-day activities of local chapters contemporaneously, and absent an ability to do so, there can be no duty to control their conduct.

### SCHOOL DISTRICT LIABILITY LIMITED TO ALLEGED NEGLIGENCE IN OWNERSHIP AND MAINTENANCE OF PUBLIC PROPERTY

*Grossman v. Santa Monica-Malibu Unified Sch. Dist.*, 2019 Cal. App. LEXIS 256 (Cal. App.)

Plaintiff fell from 27 foot inflatable slide at carnival put on by a school booster group and held at a school owned by the school district defendant. The school district did not plan, set up, operate or supervise the carnival, including the inflatable slide. Plaintiff claimed that the slide was improperly set up on the playground and was not tethered to the ground. The school district successfully moved for summary judgment, arguing it did not participate in setting up or operating the slide. Plaintiff appealed. ***Held:*** The government code apportions liability between school districts and entities using school grounds for events such that the school district is only liable for negligence in the ownership or maintenance of school grounds. Here, there was no evidence the injury resulted from ownership or maintenance of school grounds.

### BAR OWNERS SUBJECT TO LIABILITY FOR ERRANT PUNCH OUTSIDE BAR

*Buddy & Pals III, Inc. v. Falaschetti*, 2019 Ind. App. LEXIS 20 (Ind. App.)

Patron exiting bar was injured when assailant mistook him for another

patron. ***Held:*** Owners owed a duty of care to patron. The likelihood of an attack was foreseeable because assailant had been ejected for fighting and the bouncers were alerted that he might try to regain entry. The foreseeability and nature of harm created a duty to protect other patrons.

### ESTATE NOT LIABLE FOR DECEDENT'S FATAL HEART ATTACK WHILE DRIVING

*Denson v. Estate of Dillard*, 2018 Ind. App. LEXIS 482 (Ind. App.)

Following a heart attack, decedent lost control of vehicle and crashed into a house. ***Held:*** Sudden emergency doctrine applies in assessing negligence. A defendant must show that (1) he did not negligently create emergency, (3) the danger left no time for deliberation, and (3) his apprehension of peril was reasonable. Heart attack was sudden, and decedent immediately lost consciousness. Despite a prior heart attack, decedent had no driving restrictions. He had no reason to foresee a heart attack while driving.

### SUPERMARKET NOT LIABLE FOR IN-STORE SHOOTING

*Rose v. Martin's Super Mkts L.L.C.*, 2019 Ind. App. LEXIS 88 (Ind. App.)

After cruising store aisles for 40 minutes, shooter killed employee and customer. ***Held:*** Store did not owe a duty of care. The shootings were unforeseeable. Shooter was not acting suspiciously, and he had previously shopped at the store without incident. The store's use of a protocol for shootings did not make the incident foreseeable. Once the shooting started, the store lacked notice that the customer remained alive so as to save her from the fatal second shot.

### LACK OF HANDRAIL ALONG STAIRWELL OPEN AND OBVIOUS

*Cika-Heschmeyer v. Young*, 2019 Ohio App. LEXIS 510 (Ohio App.)

While inspecting a home for purchase, visitor fell down steps leading to basement. ***Held:*** The lack of a handrail was open and obvious. Visitor had previously viewed the house, which imputed knowledge. It was irrelevant that she could not remember whether a handrail was then missing. A violation of residential code requirements is not negligence per se. As such, the open-and-obvious doctrine may be used as a defense.

### AMERICAN LEGION IMMUNE FROM LIABILITY FOR INJURY DURING VILLAGE FESTIVAL

*Langenhahn v. W. Bend Mut. Ins. Co.*, 2019 Wisc. App. LEXIS 76 (Wis. App.)

Leaving village festival, patron tripped on barricade near public crosswalk. ***Held:*** As the festival organizer, American Legion occupied the land and was immune under the recreational immunity statute. The crosswalk did not need to be completely withdrawn from public use to be part of the recreational activity. Patron was engaged in recreational activity at the time of injury. She was leaving a school reunion—the equivalent of picnicking under the statute. Walking to or from an immune activity is itself a recreational activity.

## PROXIMATE CAUSE

### ACT SETTING CHAIN OF EVENTS IN MOTION WAS SUFFICIENT PROXIMATE CAUSE

*Camila Coppedge v. Curtis Travis*, AC 40787 (Conn. App. 2019)

Defendant's dog bounded towards plaintiff, startling her. She tripped and fell trying to avoid dog's advance. Judgment in her favor. Defendant appealed arguing: 1) the trial court did not use the words "mischievous" or "vicious" to describe the dog's behavior; and 2) proximate cause could not be established without evidence how far the dog was from plaintiff when she fell. ***Held:*** Affirmed. The "exuberant" dog "bounded" toward the motel where plaintiff was, frightening her, indicating the dog's actions were not passive, innocent or involuntary. Further, it was reasonable to find that the dog charging toward plaintiff set in motion a chain of events that brought about her injuries. Finally, plaintiff's testimony that dog stood over her after she fell supported inference dog was close enough to be proximate cause of fall.

## SUBROGATION/LOSS RECOVERY

### SUBROGATION RIGHTS DO NOT EXTEND TO INSURER OF SUSPENDED CORPORATION

*Travelers Prop. Cas. Co. of Am. v. Engel Insulation, Inc.*, 29 Cal.App.5th 830 (Cal. App.)

Plaintiff insurers filed suit against certain subcontractors to recover attorneys' fees and costs incurred in defending additional insured developers in a prior construction defect action. The insurers' claims were based on alleged subrogation rights of their additional insured, which was a suspended corporation. A subcontractor defendant filed a motion for judgment on the pleadings and the trial court granted the motion. The insurers appealed. ***Held:*** An insurer may not file its own action to assert claims solely as a subrogee of a suspended corporation. The insurer subrogee cannot obtain a position more advantageous than its subrogor insured, which was a suspended corporation and the insurer lacked any right to do something the insured could not.

### TENANT NOT IMPLIED CO-INSURED UNDER POLICY OBTAINED BY LANDLORD

*Zurich Am. Ins. Co. v. Puccini, LLC*, 2019 Fla. App. LEXIS 1487 (Fla.)

Tenant leased restaurant space from landlord. Landlord's insurer paid landlord damages for building fire and then brought subrogation action against tenant. Tenant successfully argued they were an implied co-insured under policy. Insurer appealed. ***Held:*** Tenant was not implied co-insured. The lease: held tenant liable for damage caused by its negligence, required tenant to obtain fire insurance, included provisions holding landlord harmless, and tenant agreed to name landlord as additional insured. Parties clearly did not intend to shift risk of loss for tenant's negligence to landlord's insurer.

### AGREEMENT TO PROVIDE INSURANCE NIXES SUBROGATION CLAIM

*Youell v. Cincinnati Ins. Co.*, 2018 Ind. App. LEXIS 497 (Ind. App.)

Commercial lease required landlord to insure building and required tenant to insure personal property. ***Held:*** Landlord's insurer was barred from bringing subrogation action for the amount paid following a fire. Lease parties agreed to allocate losses to insurance. Landlord's failure to obtain adequate coverage did not justify subrogation. Because insurer stepped into landlord's shoes, it had no subrogation rights against tenant.

### COLLATERAL SOURCE RULE DOES NOT BAR OFFSET FOR REMEDIATION EXPENSES PAID BY TORTFEASOR'S INSURER

*Bunker Hill Ins. Co. v. G. A. Williams & Sons, Inc.*, 2018 Mass. App. LEXIS 179 (Mass. App.)

After homeowner's insurer obtained subrogation judgment against tank installer for oil spill, installer's insurer sought offset for its prior remediation payment. ***Held:*** Collateral source rule did not bar the offset. The purpose of the rule is tort deterrence. A tortfeasor may not be benefitted by an injured person's purchase of insurance or receipt of gifts. But because the tank installer purchased the policy that paid remediation expenses, the offset was permissible.

## TRIAL PRACTICE

### FAILURE TO OBJECT IS FUNCTIONAL EQUIVALENT OF FAILURE TO REQUEST

*Ussbasy Garcia v. Robert Cohen*, AC 41079 (Conn. App. 2019)

Plaintiff filed negligence lawsuit after she fell on the rear exterior stairs of a premises owned by defendants. Plaintiff requested to charge the jury and proposed jury interrogatories. The trial court declined to use the proposed charge and did not submit the interrogatories to the jury, which returned a general verdict for the defendants. Plaintiff appealed. ***Held:*** Affirmed. Plaintiff's failure to object when the trial court did not submit her interrogatories to the jury was a functional equivalent of a failure to request the interrogatories.

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