CM REPORT

of Recent Decisions

2019 • Vol. 2

Florida Appellate Court Enforces Mandatory Mediation Notice

The Wisdom Of Removing Personal Injury Actions From State To Federal Court

Florida Supreme Court Adopts *Daubert* Standard

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 managing Florida partner ***Anne Kevlin****, firm president* ***Dennis Fitzpatrick*** *in Chicago, Illinois, and Florida associate* ***Sean Kelly****. Anne has more than 25 years of insurance litigation, regulatory, and management experience, attained through private law practice as well as in-house roles with insurance entities. Dennis handles 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. Sean has litigation experience representing plaintiffs and defendants in various areas of law, including class actions, real property, mortgage foreclosures, timeshares, contracts and consumer protection..*

In this "Guest Sidebar", the authors discuss the Florida Supreme Court's adoption of the Daubert *standard for admissibility of expert opinions – just seven months after rejecting* Daubert *in favor of* Frye.

The *Frye v. Daubert* Saga Continues; Florida Supreme Court Adopts *Daubert* Standard

by ***Anne E. Kevlin****,* ***Dennis D. Fitzpatrick****, and* ***Sean R. Kelly***

Introduction

The *Daubert* standard has found favor in most U.S. courts as encouraging expert opinions based on more reliable methods. Nevertheless, in October 2018, Florida's Supreme Court rejected *Daubert* as the standard, in favor of the *Frye* standard.

But now, just a few months later, and with a new makeup of justices, Florida's Supreme Court has reversed its October decision unilaterally and without petition, and has held that the *Daubert* standard is indeed the proper standard in Florida.

Background

The use of expert opinions in trials is to assist the trier of fact in the quest for truth in complex subject areas that are not commonly known to laypersons. Court proceedings would quickly become circuses if just any "expert" evidence were permitted for consideration by judge or jury. For this reason, courts employ standards by which evidence may, or may not, be admitted as expert evidence.

Almost twenty years ago, the U.S. Supreme Court abandoned the standard that had been in use since the 1923 case *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The so-called "*Frye*" standard for the admissibility of expert evidence required that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Florida courts over time began applying a "pure opinion" exception to the *Frye* standard, admitting into evidence the

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is managing partner of the firm's Florida offices, handling a variety of insurance law issues and disputes. Anne has more than 25 years of insurance litigation, regulatory, and management experience, attained through private law practice as well as in-house roles with insurance entities. She is passionate about measuring and continuously improving all components of her team's litigation performance, and on fully understanding and achieving the short and long-term goals of her clients.
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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. Dennis has tried jury cases involving complex insurance litigation (including bad faith defense) and construction cases (including subrogation and design professional defense), with trials in Florida, Tennessee, Oklahoma, Wisconsin and Illinois.
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Sean R. Kelly
joins the team in our Florida headquarters in Tampa Bay. Sean has litigation experience representing plaintiffs and defendants in various areas of law, including class actions, real property, mortgage foreclosures, timeshares, contracts and consumer protection. Sean received a Business Administration degree from Warner University in central Florida. Sean obtained his law degree from Stetson University College of Law.
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opinions of any expert who ignored scientific method but relied on his or her own experience or training.

Since the 1993 case from which it was derived, most U.S. courts have employed the *Daubert* standard to determine the admissibility of expert evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The *Daubert* Court noted that the *Frye* standard conflicted with Federal Rule of Evidence 702, and failed to require general acceptance of the theory or technique as a precondition of admissibility. The *Daubert* Court stressed that the purpose of Federal Rule of Evidence 702 is to ensure expert evidence is both relevant and reliable. The focus of the evidence under Rule 702, and under *Daubert*, is therefore not the opinion itself, but the principals and methods by which the opinion was formed. *Daubert* requires a three-part analysis of expert opinion: was it based upon sufficient facts or data, was it the product of reliable principles and methods, and did the expert reliably apply the principles and methods to the facts of the case.

Facts

Florida's Supreme Court in October 2018 found unconstitutional the Florida Legislature's attempt to codify the *Daubert* standard regarding admissibility of expert testimony. *DeLisle v. Crane Co.*, 2018 Fla. LEXIS 1883 (Fla. 2018). The attempted codification of the *Daubert* standard, in the view of the Florida Supreme Court in October, violated the separation of powers given its exclusive authority to set court procedures. Further, the high court at that time held that the *Frye* standard is the better standard, and the one to be used in Florida courts rather than *Daubert*.

Analysis

But now, Florida's Supreme Court has receded from its position in *DeLisle*, and issued a 5-2 opinion adopting the *Daubert* standard for evidence throughout Florida. *In re Amendments to the Fla. Evidence Code*, No. SC19-107, 2019 Fla. LEXIS 818 (May 23, 2019). The amendments replace the *Frye* standard with the *Daubert* standard for admitting expert testimony to align with Federal Rule of Evidence 702. The Court stated that *Daubert* provides that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The Court went on to reason that by adopting the *Daubert* standard, creating consistency between state and federal courts, the amendments "will promote fairness and predictability in the legal system, as well as help lessen forum shopping."

Learning Point: In Florida, *Daubert* is now the prevailing standard for expert witness evidence. Going forward, Florida requires a three-part analysis of expert opinion: was it based upon sufficient facts or data, was it the product of reliable principles and methods, and did the expert reliably apply the principles and methods to the facts of the case.

CLAUSEN MILLER WELCOMES HILLARD STERLING AND SCOTT WARD TO ITS CHICAGO, ILLINOIS AND IRVINE, CALIFORNIA OFFICES

Hillard M. Sterling is a commercial litigator and trial lawyer with thirty years of experience bringing cases to successful resolutions through settlement, judgment, and verdict in tribunals across the country. Hillard brings a strategic, creative, and focused approach to his clients' cases and disputes, and a wealth of litigation and trial experience at firms ranging from big law (Kirkland & Ellis, Arnold & Porter) to boutique.

Hillard's matters span the spectrum of commercial and insurance-defense matters, including professional liability cases (defending agents, brokers and financial advisors), technology system-implementation disputes (representing vendors and customers), cyber matters (breach coaching and counseling clients on risk reduction), privacy cases (defending clients against allegations of wrongful disclosures and access), defamation claims (defending and bringing claims on behalf of private and public figures), intellectual property (defending against infringement allegations), and a panoply of other business disputes representing companies, shareholders and LLC members.

Hillard has served as an expert commentator in print and broadcast media on breaking stories in the technology-law realm. He also speaks at conferences across the country regarding a wide range of technology and cyber issues as well as other insurance-defense topics.

Scott P. Ward is a partner in the Firm's Irvine, California office. For over 15 years, Scott has devoted his practice to representing carriers in complex insurance matters involving first-party and third-party coverages. Scott has drafted opinions analyzing general liability, commercial property, personal injury and advertising injury, homeowners', commercial and personal auto, directors and officers and professional liability coverages provided under standard ISO and manuscript policies.

Scott also has significant insurance litigation experience, prevailing in bad faith, declaratory relief and equitable contribution cases filed in California state and federal courts. Scott's approach is to thoroughly analyze the coverage issues of each case early in the litigation to develop strategies leading to the insurer's prompt and successful resolution of the case.

Scott graduated from the University of Washington in 1991, *cum laude* and Phi Beta Kappa, and graduated from the UCLA School of Law in 1995. After graduating law school, Scott worked for a Los Angeles full-service law firm. Since 2003, Scott has worked exclusively in insurance law for firms located in Southern California.

Anne Kevlin

Michael Colgan

Sean Kelly

Thomas Moody

Clausen Miller Continues Expansion In... Florida

As our Firm's statewide Florida practice continues to grow, we are pleased to announce the addition of attorneys **Michael Colgan**, **Sean Kelly** and **Thomas Moody** to our Clausen Miller Florida team, managed by Tampa Bay Area partner, **Anne Kevlin**.

Mike Colgan, based in Orlando, has more than 12 years of litigation experience, most recently as in-house counsel for a Florida-based insurance company. Mike began his legal career advising and defending municipalities in central Florida, and later handled matters involving questions of state employee liability, followed by practice involving condominium property insurance claims and first-party property insurance for both plaintiff and defense. Mike graduated from Yale University with a bachelor of arts degree, and earned his J.D. from Indiana University in Bloomington, Indiana. Mike is admitted to the Florida Bar, as well as the bars of all federal district courts in Florida, the District of Connecticut, and the U.S. Court of Appeals for the Eleventh Circuit.

Sean Kelly joins the team in our Florida headquarters in Tampa Bay. Sean has litigation experience representing plaintiffs and defendants in various areas of law, including class actions, real property, mortgage foreclosures, timeshares, contracts and consumer protection. Sean received a Business Administration degree from Warner University in central Florida. Sean obtained his law degree from Stetson University College of Law. Being the son of two United States Air Force veterans, while attending Stetson, Sean volunteered at Stetson University College of Law's Veteran Law Institute.

Thomas Moody is an associate out of the firm's Pensacola office. Tom focuses his practice on civil litigation defense, with an emphasis on first party property disputes. Tom also has extensive experience successfully representing civil defendants in matters including insurer bad faith, commercial premises liability, professional liability and malpractice, governmental entity liability, pre-suit coverage analysis, admiralty and maritime claims, wrongful death claims, and personal injury claims.

With this further expansion in Florida, Clausen Miller will continue to perform outstanding legal work for our clients in all Florida state and appellate courts, as well as the federal district courts and 11th Circuit Court of Appeals.

Clausen Miller Opens Office In... San Francisco

Clausen Miller has expanded its ability to service clients in California by opening a new office in San Francisco located at 100 Pine Street Suite 1250. With the addition of Clausen Miller's new Bay Area office, Clausen Miller enhances its ability to offer its full array of legal services throughout all of California including all state and federal courts. The Firm's Southern California office is located in Irvine and both offices are managed by **Ian Feldman**, who has over twenty years of experience defending general, product, professional, premises, construction, trucking and transportation, and commercial litigation matters.

Joining us in the San Francisco office is **Mick Rubio**, a native of the Bay Area, who brings years of litigation experience to Clausen Miller's new San Francisco office. Mick has vast experience providing a vigorous defense against general and professional liability claims. Mick's clientele includes attorneys, accountants, economic consultants, insurance brokers, real estate agents, product distributors, landowners, construction contractors, and homeowner associations.

Headquartered in Chicago, the Firm also maintains U.S. offices in New York, New Jersey, Southern California, Indiana, Wisconsin, Connecticut and Florida. Clausen Miller LLP is located in London, England, in the heart of the global insurance market. Clausen Miller P.C. is also the founding member of Clausen Miller International, a cooperative of leading independent law firms with affiliates in Paris, Rome and Brussels that practice in all aspects of insurance and reinsurance law.

Ian Feldman

Mick Rubio

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

CM president **Dennis Fitzpatrick** recently co-presented "Shutdown of Business Operations for Cyber Events" at the PLRB Claims Conference and Insurance Services Expo. 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.

APPELLATE PRACTICE GROUP CO-CHAIR MELINDA KOLLROSS CITED IN ABA ARTICLE ON DIVERSITY OF APPELLATE COUNSEL AND FEATURED IN *AM BEST BESTCONNECT*

Clausen Miller Appellate Practice Group co-chair **Melinda Kollross** is cited in "Oyez Us Roar: Reflections on the Diversity of Appellate Counsel" in the Spring 2019 Issue of the American Bar Association's *The Woman Advocate*. (**https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2019/spring2019-oyez-us-roar-reflections-on-the-diversity-of-appellate-counsel/**). Read Melinda's thoughts on becoming a successful appellate practitioner who argues cases for her clients before appellate tribunals nationwide in the full article at **https://www.clausen.com/wp-content/uploads/2019/02/Preparing-Effective-Appeal-Assessments.pdf**.

Melinda was also recently featured in the Member Spotlight of the *AM Best BestConnect* newsletter for her work publishing an article titled "Preparing Effective Appeal Assessments" in the February 2019 edition of DRI's *For The Defense* magazine. (**https://www.clausen.com/wp-content/uploads/2019/04/Clausen-Miller_Member-Spotlight-4-2019.pdf**).

ANNE KEVLIN PRESENTS AOB WEBINAR FOR CLM

CM partner **Anne Kevlin** co-presented a webinar for CLM titled "Florida AOB Reform: The Calm After the Storm?" on June 5, 2019. This webinar discussed Florida's new AOB reforms, what it means for insurers and claims adjusters, and whether this legislation will "fix" the AOB problem in Florida. The panelists discussed new requirements and obligations for AOBs, and new requirements and obligations for insurers and policyholders. Finally, the panelists discussed the expected impact, and any expected pushback from the plaintiff bar or the courts.

For more information, please contact Anne at **akevlin@clausen.com**.

CLAUSEN MILLER PREPARES FLORIDA AOB REFERENCE GUIDE FOR ADJUSTERS

Clausen Miller's Florida attorneys recently prepared the *Florida Assignment of Benefits Adjuster Reference Guide* (**https://www.clausen.com/wp-content/uploads/2019/05/Assignment-of-Benefits-Reference-Guide.pdf**) to better assist insurance professionals with navigating the new Florida AOB law signed by Florida Governor Ron DeSantis. The new law becomes effective for AOBs executed on or after July 1, 2019.

For more information about Florida AOB or Clausen Miller's Florida practice, please contact **Anne Kevlin** at **akevlin@clausen.com**.

KATHLEEN KLEIN ADMITTED TO PRACTICE IN INDIANA

Clausen Miller is pleased to announce that **Kathleen Klein** has been admitted to the Indiana state bar.

Kathleen is a partner based in Chicago, and will now also work out of the firm's Michigan City, Indiana office. After fulfilling all the requirements of admission, including passing the Indiana bar exam, Kathleen is now licensed in both Illinois and Indiana, and can serve clients local to Indiana, as well as clients with unique issues spanning the Illinois-Indiana state line.

Kathleen has extensive litigation and trial experience, and regularly defends doctors, health professionals, laboratories, restaurants, financial advisors and brokers, and other businesses and professionals facing or threatened with legal action.

COLLEEN BEVERLY PRESENTS WEBINAR ON DRONE TECHNOLOGY FOR PERRIN CONFERENCES

CM partner **Colleen Beverly** presented a webinar for Perrin Conferences titled "The Rise of Drone Technology: The Impact on Litigation & the Insurance Industry".

The program provided an overview of drone technology and regulations, how drone usage is impacting the insurance industry, and applications of drone technology in various types of litigation.

Colleen represents insurance companies throughout the United States in a multitude of complex insurance coverage matters, including environmental, asbestos, silica, manganese, mold, semiconductor clean room, construction defect and advertising injury claims. In addition to this large scale litigation, Colleen often consults clients on coverage decisions, prepares opinion letters and assists clients in the drafting of declination and reservation of rights letters with respect to general and excess liability policies, workers compensation/employers' liability policies and professional liability policies.

Please contact Colleen with any questions at **cbeverly@clausen.com**.

CLAUSEN MILLER ATTORNEYS NAMED 2019 LEADING LAWYERS AND EMERGING LAWYERS

The Law Bulletin Publishing Company, through its subsidiary *Leading Lawyers of Chicago*, has named 20 Clausen Miller attorneys Leading Lawyers and two attorneys Emerging Lawyers for 2019.

2019 Leading Lawyers

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

2019 Emerging Lawyers

Mindy M. Medley
Paige M. Neel

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

NOWIK & SAMPEN TEAM UP FOR SUMMARY JUDGMENT VICTORY

CM trial attorney **Valeri Nowik** and Appellate Practice Group partner **Don Sampen** combined forces to obtain a major summary judgment win. Plaintiff was struck by a car in a shopping center parking lot and suffered severe injuries. The driver surrendered her small policy limits and was dismissed from the case. Plaintiff made a $600,000 demand to our insured. In another recent case a woman who sustained spine and ankle injuries after she was hit by a car in a parking lot settled her lawsuit for $3.5 million. Plaintiff claimed that our client's parking lot was improperly designed which caused her to be struck.

In response to our summary judgment motion, plaintiff filed the report of a professional safety expert. Valeri and Don replied by filing a motion to strike that affidavit, and otherwise contested the response to the motion for summary judgment. Valeri argued the motion before DuPage County Circuit Court Judge Dorothy French Mallen. After a lengthy hearing, Judge Mallen granted our motion for summary judgment and struck the affidavit.

NEEL AND FERRINI SECURE BIG WIN AGAINST SERIAL LITIGANT

CM Appellate Practice Group partner **Joe Ferrini** recently obtained appellate affirmance of CM partner **Paige Neel**'s trial court victory against a serial litigant. The Illinois Appellate Court, First District issued a published opinion affirming the trial court's dismissal of plaintiff's second lawsuit against multiple defendants in this Cook County litigation. The Appellate Court methodically analyzed, and agreed, with all the arguments we offered in favor of affirmance. The Court found that plaintiff had failed to adequately state a claim for relief in her complaint and that she had both waived and forfeited her arguments through her conduct below and on appeal. The court also disagreed with plaintiff's contention that the trial judge should have recused herself, finding that any perception of bias due to a lawsuit plaintiff filed against the judge was of plaintiff's own making.

The Appellate Court further agreed to grant sanctions against plaintiff for her pattern of litigious behavior. Acknowledging that a direct fine would have little impact, the Court instead imposed strictures that plaintiff will have to comply with in the future before any appeal makes its way in front of the Court for disposition. Courts are extremely hesitant to impose sanctions on *pro se* litigants so this was a big victory and should stem the tide of litigation from this serial plaintiff.

KOLLROSS OBTAINS AFFIRMANCE OF $3.65 MILLION REMITTITUR IN COOK COUNTY PERSONAL INJURY ACTION

Clausen Miller was retained to act as post-trial and appellate counsel in a personal injury action with a $10 million jury verdict—including a $7.3 million future medical expense award. After lengthy post-trial briefing and argument, the trial court entered a remittitur of the future medical

expense award in the amount of $3.65 million. Such a large remittitur is essentially unheard of in Cook County, especially with a well-known plaintiff's attorney on the other side.

On appeal, Clausen Miller Appellate Practice Group Co-Chair **Melinda Kollross** convinced the Illinois Appellate Court, First District to preserve the full $3.65 million remittitur. Melinda tried to persuade the Appellate Court reduce the award even further, but the Appellate Court deferred to the trial court's considerable discretion in ordering the remittitur and setting the amount. In any event, maintaining this outstanding result for the defense is a most significant achievement.

WISCONSIN OFFICE EXTENDS SUMMARY JUDGMENT WINNING STREAK

In three recent cases, Clausen Miller's Wisconsin office has added to its string of success in obtaining summary judgment on behalf of our clients.

Canyon Partners Real Estate, LLC v. Newbanks/ Washington Construction Consulting Services, Inc. (E.D. MI)

Plaintiff was the lender on a $60 million mixed use real estate development project in Ann Arbor, Michigan and hired Newbanks to serve as a construction consultant. In that role, Newbanks was to provide monthly progress draw and review reports, observations as to construction progress and recommendations regarding pay applications from the project's general contractor. Plaintiff sued Newbanks alleging negligence, negligent misrepresentation and breach of contract.

Newbanks moved to dismiss arguing that, because the parties entered into a contract for the services to be provided by Newbanks, the tort based claims were barred by the Economic Loss Doctrine. The motion was granted, leaving only the breach of contract count.

Following discovery, Newbanks filed a Motion for Summary Judgment, arguing that a consequential damages waiver and a limitation of liability provision in the contract precluded recovery. In response, Plaintiff sought to cast its damages as direct damages that were not subject to the waiver. Plaintiff also argued that the liability limitation provision in the contract created an ambiguity that precluded summary judgment. The court rejected both arguments, finding that the damages sought by Plaintiff were not based on the value of the services to be provided pursuant to the contract, but for losses allegedly suffered as a result of Newbanks' breach of the contract. As such, the alleged damages were consequential in nature. Accordingly, the Court found that Plaintiff was not entitled to any recovery and granted summary judgment.

Holcombe v. American Asphalt of Wisconsin (Clark County, WI)

The Wisconsin Department of Transportation ("WDOT") hired American Asphalt to construct a portion of Highway 73 in Neillsville, Wisconsin. American Asphalt resurfaced the northbound lane of Highway 73 on September 19, 2017. Plaintiff alleged that, at approximately 3:00 a.m. on September 20, 2017, as he was travelling north on Highway

73, his vehicle left the roadway and encountered the gravel shoulder adjacent to the paved surface. He returned to the roadway, crossed both lanes of traffic, left the roadway again and entered a cornfield where the vehicle rolled over numerous times. Plaintiff alleged that he lost control due to a dangerous change in elevation between the paved roadway and the gravel shoulder caused by American Asphalt's paving operations. Plaintiff also alleged that American Asphalt had failed to adequately warn motorists of the shoulder drop-off condition. Plaintiff suffered serious injuries, including a fractured neck.

American Asphalt performed the project pursuant to a contract and project specifications issued by WDOT. The specifications provided that a change in elevation between a paved surface and an adjacent shoulder must be eliminated within forty-eight hours of the end of a day's paving operations. American Asphalt "pulled up" the shoulder adjacent to the northbound lane of Highway 73 (thereby eliminating the change in elevation) at approximately noon on September 20, 2017. The specifications did not require signs warning of a change in elevation between the paved road surface and adjacent shoulders.

American Asphalt moved for summary judgment, arguing that, because it had performed the project and constructed the roadway in accordance with precise specifications issued by WDOT, it was entitled to governmental immunity under Wis. Stat. §893.80(4). Immunity under Wis. Stat. §893.80(4) extends to private contractors acting as agents of a governmental entity. A contractor asserting immunity must establish that it adhered to reasonably precise specifications issued by the governmental entity and that, in issuing the reasonably precise specifications, the governmental entity was exercising its legislative, quasi-legislative, judicial or quasi-judicial function. Following extensive briefing on the motion, the Court granted summary judgment to American Asphalt, finding that it had performed the project pursuant to reasonably precise specifications issued by a government entity during the exercise of its quasi-legislative, judicial or quasi-judicial function. Thus, American Asphalt was entitled to immunity under Wisconsin Statute §893.80(4).

Schroeder v. Fahrner Asphalt Sealers, LLC, (Rock County, WI)

Schroeder involved a motorcycle accident in which Plaintiff lost control of his motorcycle while riding through a construction zone where loose aggregate material had recently been placed on the roadway. A few days prior to the accident, Fahrner had begun a procedure, known as a chip seal, to re-surface the involved roadway. In a chip seal, a layer of hot asphalt is applied to the existing roadway. Next, aggregate material is spread on top of the hot asphalt. Once the aggregate is applied, vehicles are allowed to travel the roadway. The vehicular traffic serves to compact the aggregate into the asphalt. After a period of several days, excess aggregate is swept off of the road surface.

Fahrner had been selected by the Town of Fulton, Wisconsin to perform the chip seal process. Fahrner performed the project pursuant to a contract and specifications issued by the Town of Fulton. Plaintiff alleged that Fahrner had negligently performed its work because it failed to warn motorists of a loose gravel condition on the roadway. Fahrner argued that "Loose

Gravel" signs had been placed at points along the involved roadway and, in any event, the project specifications did not require Fahrner to place "Loose Gravel" signs. Instead, Fahrner produced evidence that the Town of Fulton had requested that Fahrner not place the signs because it had arranged for the signs to be placed by the Rock County Public Works Department. Fahrner argued that, regardless of whether the signs were placed or by whom, it was entitled to immunity pursuant to Wisconsin Statute §890(4). Fahrner contended that it had performed the project pursuant to precise specifications issued by the Town of Fulton. The specifications at issue dictated the type of resurfacing, the materials to be utilized and the equipment to be used in completing the work. Because it had followed precise specifications issued by the Town of Fulton, Fahrner was entitled to immunity under Wis. Stat. §893.80(4). The Court found that, pursuant to the contract, Fahrner was not required to place "Loose Gravel" signs. In any event, the Court held, Fahrner had performed its work on the project pursuant to precise specifications issued by a governmental entity and, accordingly, was entitled to immunity pursuant to Wis. Stat. §893.80(4).

In each of these cases, the terms of the contracts that governed the projects were thoroughly analyzed by the trial court. Through extensive witness preparation and supporting affidavits, as well as deposition testimony from individuals familiar with the implementation of the projects at issue, we were able to utilize the contract terms to establish that summary judgment was warranted.

KOLLROSS PRESERVES SUMMARY JUDGMENT WIN IN WISCONSIN APPELLATE COURT

CM partner **Patrick Breen** obtained the summary judgment win in *Fahrner*, Plaintiff appealed to the Wisconsin Court of Appeals. CM Appellate Practice Group Co-Chair **Melinda Kollross** successfully defended the appeal before the Wisconsin Appellate Court, District IV. The Appellate Court agreed with our position that Fahrner was entitled to governmental immunity because it was acting as an agent of the Town of Fulton. It rejected plaintiff's contentions that: (1) the contract specifications were not reasonably precise; and (2) Fahnrer knew of dangers which it failed to communicate to the Town.

The Court did not buy plaintiff's attempt to hold Fahrner responsible for the alleged lack of "Loose Gravel" warning signs near the resurfacing project, noting that the undisputed evidence from Fahrner and Fulton established that Fulton contracted with Rock County for the placement of these warning signs. The Court's opinion also pointed out deficiencies and misstatements made in plaintiff's appellate briefs, which we had discussed in our Respondent's Brief. The Appellate Court decided the case without oral argument, saving our client thousands of dollars in litigation costs.

Iowa Supreme Court Declines To Recognize A Common Law Cause Of Action For Bad Faith Against A Claims Administrator Of A Workers' Compensation Insurer

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

In *De Dios v. Indem. Ins. Co. of N. Am. & Broadspire Servs.*, No. 18-1227, 2019 Iowa Sup. LEXIS 56 (Iowa 2019), the Supreme Court of Iowa held that under Iowa law, there is no common law cause of action for bad faith failure to pay workers' compensation benefits against a third-party claims administrator of a worker's compensation insurance carrier.

Facts

Brand Energy & Infrastructure Services ("Brand Energy") employed Samuel De Dios to work on a construction site. After De Dios entered the site, a vehicle crashed into the back of his car, causing a lower back injury.

Indemnity Insurance Company of North America ("Indemnity") issued a workers' compensation policy to Brand Energy. Indemnity delegated its authority of investigating, handling, managing, administering, and paying benefits under Iowa Workers' Compensation Laws to Broadspire Services, Incorporated ("Broadspire").

Broadspire or Indemnity subsequently decided to deny De Dios workers' compensation benefits. De Dios then filed a workers' compensation claim with the Iowa Workers' Compensation Commissioner against Indemnity and Broadspire. De Dios alleged that Indemnity and Broadspire did not convey to him the basis for their decision to deny his claim, that they had no reasonable basis for denying his claim, and that they knew or should have known that no reasonable basis existed to deny his claim.

The defendants then removed the action to federal court. The district court certified the following question of Iowa law to the Supreme Court of Iowa: "In what circumstances, if any, can an injured employee hold a third-party claims administrator liable for the tort of bad faith for failure to pay workers' compensation benefits?"

Analysis

To prove a claim for bad faith under Iowa law, a plaintiff must show "the absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." A bad faith cause of action arises from "(1) the special contractual relationship between insurer and insured, (2) the specific statutory and administrative duties imposed on insurers, or (3) some combination of the two."

The Court held that "[t]he grounds for bad-faith liability in the workers' compensation field do not apply to third-party administrators. . . . [which are] not in an insurer/insured relationship with anyone." Further,

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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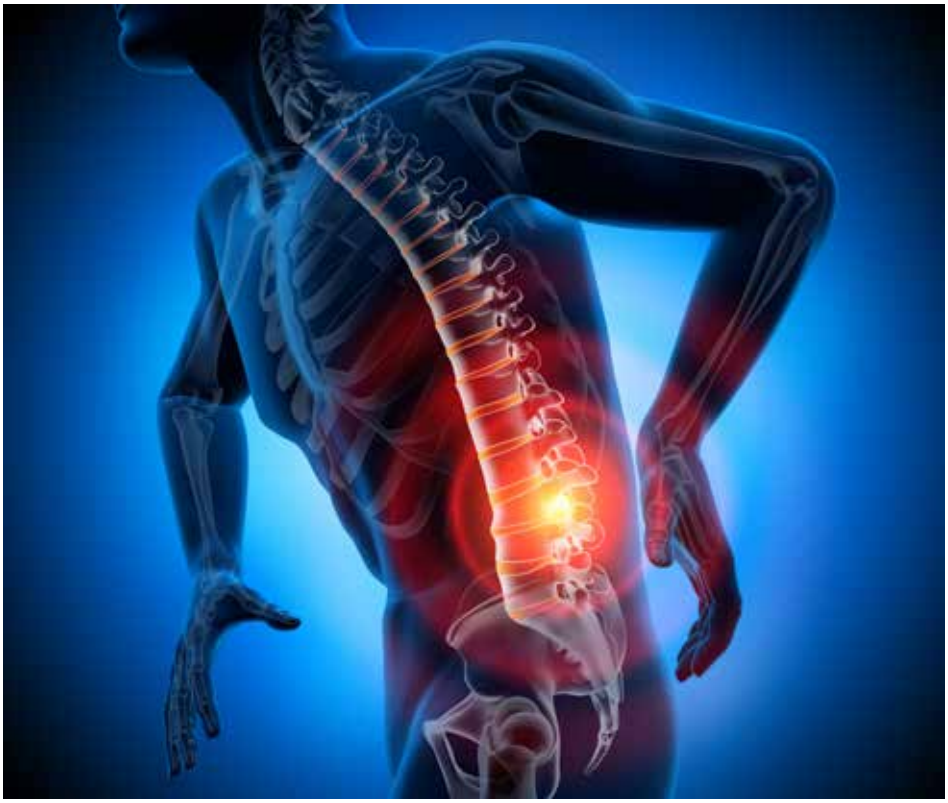
"unlike a self-insured employer, a third-party administrator does not have to meet rigorous financial requirements and is not under the ongoing supervision of the workers' compensation commissioner." Nor do Iowa's workers' compensation statutes impose upon third-party administrators any "affirmative obligations" applicable to insurers. Also, while the Iowa workers' compensation law refers to third-party administrators, it "imposes no obligations on them relative to the handling of workers' compensation claims." Accordingly, the Court concluded that the legislature "recognized a distinction between insurers and third-party administrators, and opted to impose 'affirmative obligations' only on the former."

The Court dismissed concerns that "the workers' compensation carrier could 'completely delegate its authority to a third-party administrator and that third party administrator [could] arbitrarily deny coverage and delay payment of a claim to an injured worker with minimal consequences.'" First, "if the third party is an agent, then vicarious liability applies." Secondly, the Court reasoned that "the nondelegable duties imposed by Iowa statutes and administrative regulations remain on the carrier regardless of any attempt to pass them to a third party." Accordingly, "[a] n insurer cannot delegate its duty of good faith." Further, "an agent of the insurer, while acting on the insurer's behalf by carrying out the insurer's contractual obligations, is under the same duty of good faith as the insurer itself. . . . This duty, however, only runs so far." Because the agent is not in contractual privity with the insured, the agent, while subject to the insurer's duty of good faith, cannot incur personal liability to the insured.

Learning Point: Under Iowa law, a common law cause of action for bad faith failure to pay workers' compensation benefits is not available against a third-party claims administrator of a worker's compensation insurance carrier. ♦



Florida Appellate Court Enforces Mandatory Mediation Notice

by ***Sean R. Kelly***

Introduction

Florida's Third District Court of Appeals, which includes the Miami area, recently held that once a dispute arises in a property insurance claim, an insurer is precluded from demanding appraisal under the policy, prior to providing the insured with notice of the right to participate in the mediation program provided for under Section 627.7015. *Kennedy v. First Protective Ins. Co.*, 2019 Fla. App. LEXIS 3443 (Fla. 3d DCA).

Section 627.7015, Florida Statutes sets forth alternative procedures for resolution of disputed property insurance claims. The statute provides for a non-adversarial mediation process to both personal lines and commercial residential policies. Importantly, this statute does not apply to surplus lines insurers. *See* Fla. Stat. § 626.913(4). Notwithstanding Chapter 627's inapplicability to surplus line insurers, some surplus lines policies contain this requirement within the policy terms, and thus, as a contractual obligation, courts likely would enforce it under a similar analysis as *Kennedy* discussed below.

Facts

In October 2017, the insureds, Michael and Debra Kennedy (the "Kennedys") placed the insurer, First Protective Insurance Company d/b/a Frontline Insurance ("Frontline"), on notice that their windows needed to be replaced in the wake of Hurricane Irma. Approximately three months later, Frontline issued a written demand for appraisal pursuant to the policy's terms. Frontline's demand for appraisal was delivered to the Kennedys *before* a statutory notice of the Kennedys' right to mediate under Section 627.7015. The Kennedys subsequently filed suit.

Analysis

The *Kennedy* Court explained that the purpose of the statutory notice is to provide an informal, nonthreatening forum for helping parties avoid the potentially expensive and time-consuming adversarial appraisal process or litigation. In the Court's view, Frontline's actions of waiting until *after* making its demand for appraisal to provide the statutory mediation notice, deviated from the "salutary purpose of section 627.7015, *i.e.*, to expeditiously bring the parties together for a mediation without any of the trappings of an adversarial process." The Court concluded that once a dispute has arisen, an insurer may not demand appraisal prior to providing the insured with notice of the right to mediate—and an insurer's failure to comply with this results in a waiver of its right to appraisal.

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Kennedy conflicts with the Second District's opinion in *Am. Integrity Ins. Co. of Fla. v. Gainey*, 100 So. 3d 720 (Fla. 2d DCA 2012). In *Gainey*, the Second District Court of Appeals (presiding over the central and gulf coast areas of Florida) reasoned that Section 627.7015(1) permits the parties to a property insurance claims dispute to use the mediation process to encourage an inexpensive and speedy resolution of insurance claims *prior* to commencing the appraisal process, or commencing litigation. Since Gainey prematurely commenced litigation, the notice requirements under Section 627.7015 did not apply.

Learning Point: Best practices would suggest that as soon as a first-party claim is filed by a policyholder, the insurer should immediately issue the statutory notice required by Section 627.7015 in order to preserve the right to invoke appraisal. Failure to provide this notice may result in the insurer's right to invoke the appraisal process being waived. ♦

Florida Reforms Assignment Of Benefits

by ***Anne E. Kevlin***

After years of failed efforts by Florida lawmakers to curb rampant abuse of assignment of benefits ("AOB") applied to property insurance policies, Florida Governor Ron DeSantis has signed into law sweeping AOB reform approved by the Florida Legislature. The new law becomes effective for AOBs executed on or after July 1, 2019.

Background

Florida law has long permitted a policyholder the right to assign to a third-party the claim benefits of an insurance policy. Combined with Florida's "one-way" attorney fee statute, which allows a policyholder (or an AOB) to recover its full attorney fees from the insurer for the recovery of any amount of benefits following the filing of a lawsuit, AOB litigation in Florida has become increasingly prevalent. Industry and business leaders have for many years cautioned that the permissive AOB environment in Florida has driven up insurance premiums, and is harming both businesses and consumers. Assignees such as water mitigation and roofing companies have increasingly filed lawsuits against insurers seeking inflated amounts for property damage repair or mitigation. Insurers struggled to resolve AOB disputes given the attorney fee exposure, which often dwarfs the amount in dispute.

Analysis

Assignment Agreement Requirements

Florida's new legislation creates Florida Statute § 627.7152, which defines an assignment agreement as:

> *any instrument by which post-loss benefits under a residential property insurance policy or commercial property insurance policy . . . are assigned or transferred, or acquired in any manner, in whole or in part, to or from a person providing services to protect, repair, restore, or replace property or to mitigate against further damage to the property.*

Under the new law, to be valid, an assignment agreement **must**:

1. Be in writing and executed by and between the assignor and the assignee.

2. Contain a provision that allows the assignor to rescind the assignment agreement without a penalty or fee by submitting a written notice of rescission signed by the assignor to the assignee within 14 days after the execution of the agreement, at least 30 days after the date work on the property is scheduled to commence if the assignee has

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not substantially performed, or at least 30 days after the execution of the agreement if the agreement does not contain a commencement date and the assignee has not begun substantial work on the property.

3. Contain a provision requiring the assignee to provide a copy of the executed assignment agreement to the insurer within three business days after the date on which the assignment agreement is executed or the date on which work begins, whichever is earlier. Delivery of the copy of the assignment agreement to the insurer may be made:

   a. By personal service, overnight delivery, or electronic transmission, with evidence of delivery in the form of a receipt or other paper or electronic acknowledgement by the insurer;

   or

   b. To the location designated for receipt of such agreements as specified in the policy.

4. Contain a written, itemized, per-unit cost estimate of the services to be performed by the assignee.

5. Relate only to work to be performed by the assignee for services to protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property.

6. Contain a specified notice in 18-point uppercase and boldfaced type advising insureds of rights they may lose upon executing the AOB.

Florida's new AOB law further invalidates assignment agreements that contain: (1) a penalty or fee for rescission, (2) a check or mortgage processing fee, (3) a penalty or fee for cancellation of the agreement, or (4) an administrative fee. A non-compliant assignment agreement is invalid and unenforceable.

Assignee's Burden

Florida's new AOB law places the burden on the assignee to demonstrate that an insurer is not prejudiced by an assignee's failure to maintain records, cooperate with the insurer, provide requested documents and records, or deliver a copy of the executed assignment agreement. Additionally, an assignee is required to provide the policyholder with accurate and up-to-date revised estimates of the

scope of work to be performed as supplemental or additional repairs are required. The assignee must perform the work in accordance with accepted industry standards. An assignee is also precluded from seeking payment from the assignor in excess of the applicable policy deductible, unless the insured has requested additional work to be completed at the insured's own expense.

Conditions Precedent to Filing Suit

Under the new law, an assignee must provide the insured, insurer, and the assignor (if not the insured) with a written notice of intent to initiate litigation, at least ten days before filing suit. This notice cannot be served prior to the insurer's determination of coverage. For its part, the insurer must respond to the AOB's notice of intent to litigate in writing within ten business days. The insurer must respond with either a settlement offer, a demand for appraisal, or another method of alternative dispute resolution. And, if the policy requires, and the insurer requests, that the insured(s) submit to examinations under oath ("EUO") or alternative dispute resolution methods, including appraisal, such requirements are also conditions precedent to filing suit pursuant to an AOB.

Attorney Fee Shifting Provisions

The new AOB law revises, as it pertains to AOBs, Florida's "one-way" attorney fee statute, replacing it with a formula that encourages reasonable resolution prior to litigation:

- ***For the Insurer (<25%)***: If the difference between the judgment obtained by the assignee and the insurer's pre-suit settlement offer is less than 25 percent of the disputed amount, the insurer is entitled to reasonable attorney's fees.

- ***For the Assignee (>50%)***: If the difference between the judgment obtained by the assignee and the insurer's pre-suit settlement offer is greater than 50 percent of the disputed amount, the assignee is entitled to reasonable attorney's fees.

- ***For Neither (25.1% – 49.9%)***: If the difference between the judgment obtained by the assignee and the pre-suit settlement offer is between 25.1 and 49.9 percent of the disputed amount, then neither the assignee nor the insured is entitled to reasonable attorney's fees.

Consumer Policy Options

Under Florida's new AOB law, insurers as of July 1, 2019 may sell insurance policies that preclude AOBs altogether, so long as the insurer also offers an identical policy with the assignment option (which can be offered at higher cost). Insurers selling policies precluding AOB must provide a consumer protection notice attached to the notice of premium, in 18-point, uppercase and bold font that clearly explains that the policy is unassignable. This explanatory notice must also be given to the insured "at least annually." If an insured elects the non-assignable policy, then such rejection of a fully assignable policy must be in writing or electronically.

Reporting Requirements

Finally, the Florida Legislature has implemented insurer reporting requirements. Beginning on January 30, 2022, admitted Florida insurers will be required to furnish to Florida's Office of Insurance Regulation certain specified data on each commercial and residential property insurance claim paid pursuant to an AOB. Included in the data to be furnished is specific information related to claims adjustment, settlement timeframes, trends, information about the loss adjustment expenses incurred in the process, and this data must distinguish between litigated and non-litigated claims. While these reporting requirements may place a burden on insurers, it will be a guide post for legislators going forward to evaluate the effectiveness of the AOB reform bill, and whether additional steps should be taken to combat AOB abuse.

Learning Point: Florida's new AOB law should help curb the rampant abuse of AOB by permitting non-assignable policies, requiring assignees to bear the burden of proof on insurer prejudice and to provide pre-litigation notice to insurers and insureds, affording insurers more resolution options, and implementing a more equitably balanced attorney fee shifting provision. The new law should ultimately reduce costs for insurers and consumers alike. ♦

Premises Provision In Definition Of "Occurrence" Requires That Each Location Where Exposures To Asbestos-Containing Products Took Place Constitutes A Separate Occurrence

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

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In *Cont'l Cas. Co. v. Hennessy Indus.*, 2019 IL App (1st) 180183, the Appellate Court of Illinois, First District, held that, where the subject "occurrence" definition provided that "All such exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence", each location where exposures to asbestos took place as a result of handling the insured's products constituted a separate occurrence.

Facts

Over the course three decades, Ammco Tools, Inc. ("Ammco") manufactured automobile brake equipment that was subsequently combined with asbestos-containing brake shoes. Thousands of plaintiffs later sued Hennessy Industries, Inc. ("Hennessy"), Ammco's successor-in-interest, alleging personal injuries caused by exposure to asbestos through the use of Ammco's products. The plaintiffs alleged that these exposures took place at numerous locations throughout the country.

Continental Casualty Company ("Continental") and Columbia Casualty Company ("Columbia") filed a declaratory judgment action seeking a determination of the insurance coverage available to Hennessy for the underlying suits. Hennessy, Continental, and Allstate Insurance Company, as successor-in-interest to Northbrook Excess and Surplus Insurance Company, f/k/a Northbrook Insurance Company ("Northbrook"), subsequently filed cross-motions for summary judgment on the number of occurrences.

The Policy Provisions

Continental issued three umbrella policies to Ammco, which defined "occurrence" as:

> [A]n event or continuous or repeated exposure to conditions, which unexpectedly causes Personal Injury and/or Property Damage and/or Advertising Liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence.

Northbrook issued a single umbrella policy that defined "occurrence" as:

> [A]n accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

The Decision Below

Hennessy argued that the underlying suits must be grouped by location, with each location constituting a separate occurrence. In opposition, Continental and Northbrook argued that Ammco's continuous manufacture of the allegedly defective products constituted a single occurrence. The trial court agreed with the insurers, holding that the provision requiring grouping of exposures based on location did not apply, and that the continuous manufacture of the allegedly defective products constituted a single occurrence.

Hennessy appealed.

Analysis

On appeal, Hennessy argued that all claims arising at a single location constituted a separate occurrence. Continental and Northbrook argued that the court should employ the "cause test," which the insurers argued required that all of the claims arising from Ammco's manufacture of allegedly defective products constitute a single occurrence.

The First District reversed the trial court's ruling, holding that the premises language of the policies provided that "where multiple exposures to substantially the same conditions occur at the same premises location, those multiple exposures should be considered a single occurrence." Further, "where exposures occur at multiple locations, multiple occurrences will result."

The First District also rejected the argument that the premises language is a "premises deemer" clause that "consolidate[s] claims arising from a single cause into one occurrence when that cause originates . . . at one location and then either recurs at the same location or spreads to others". The court reasoned that, "[a]lthough the premises language states that the same conditions must 'exist[] at or emanat[e] from the premises location,' it says nothing about the cause originating at the premises location and then recurring at the location or spreading to different locations."

What Is An "Occurrence" Definition For?

The First District's number of occurrences decision, while supported by the applicable policy language, highlights the lack of textual support for the judicially-created "cause" and "effects" tests. In essence, the First District stated that, in the absence of the premises language at issue, the subject "occurrence" definitions contained no textual basis for determining the number of occurrences under the facts of the case. In rejecting the insurers' invitation to apply the "cause test", the First District stated that "[t]he cause test was adopted by Illinois courts to assist in determining the number of occurrences under an insurance policy when the terms of the policy do not otherwise clarify the issue". Further, there was "no need to employ the cause test because there is no question whether or how the numerous claims at issue should be bundled into occurrences, [because] the premises language clearly requires the bundling of claims that arise from substantially the same conditions at the same location." Nor did the "effects test" apply, because, "like the cause test, the effects test has no application in this case because there is no need for an interpretative aid where the policy language is clear on if or how claims should be bundled for the purpose of determining the number of occurrences." The First District also reasoned that there was no conflict between its interpretation of the premises language and the first sentences of the "occurrence" definitions, because "the first sentences of the [occurrence] definitions merely provide a general definition of what an occurrence is and do not provide any mechanism or guidelines for bundling claims, regardless of whether they arise out of substantially the same conditions."

These statements lay bare the conflict between application of the "cause" and "effects" tests and the rule that courts' primary function is to ascertain and give effect to the intention of the parties, as expressed in the unambiguous written policy language. In the context of claims alleging exposures to an insured's asbestos-containing products, courts should be able to identify the "accident or [] happening or event or [] continuous or repeated exposure to conditions", and how many of them are at issue. In so doing, courts might question whether, under any acceptable plain language definition, the manufacture of an asbestos-containing product over the course of several decades is an "accident", or "happening", or "event", or "exposure to conditions". Courts might also question how a "claim" or "suit" could also fit within any of those definitions. The answers to these questions might remove the dissonance created by application of the "cause" and "effects" tests and the requirement that courts adhere to the plain language of insurance contracts.

Learning Points: Under Illinois law, where the subject "occurrence" definition provides that "All such exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence", each location where exposures to asbestos took place as a result of handling the insured's products constitutes a separate occurrence. ♦

Firearms Exclusion in CGL Policy Bars Coverage For Premises Liability Claim Arising From Fatal Bar Shooting

by ***Melinda S. Kollross***

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The U.S. District Court for the Middle District of Georgia holds that a firearms exclusion in a general liability insurance policy applied to preclude coverage for an underlying action arising from a shooting at the insured's bar in *Hudson Specialty Insurance Co. v. Snappy Slappy LLC*, No. 5:18-cv-00104-TES (M.D. Ga. May 1, 2019).

Facts

A bar patron shot and killed two other patrons. The mother of one of the decedents filed a wrongful death action against the bar, alleging that it negligently failed to keep its premises safe. Prior to the shooting, Hudson Specialty Insurance Co. had issued a commercial general liability policy to the bar. The policy provided insurance for "'bodily injury' . . . caused by an 'occurrence.'" A firearms exclusion broadly excluded coverage for "'bodily injury' . . . arising out of the . . . use of firearms."

Hudson filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the bar in the wrongful death action because, among other reasons, the firearms exclusion applied to preclude coverage. Hudson moved for judgment on the pleadings, asking the court to decide as a matter of law that the firearms exclusion applied. The court, however, denied the motion, finding that the firearms exclusion was ambiguous because it did not specify who must use the firearm in order for the exclusion to apply. The court found the exclusion could be interpreted to apply solely to the insured's use of a firearm, as the bar argued in opposition to Hudson's motion.

Hudson moved for reconsideration or, in the alternative, a certification to permit an interlocutory appeal of the court's denial. Hudson argued that the plain language of the exclusion did not specify an actor because its application was not limited by actor — the firearms exclusion applied whenever bodily injury arises out of the use of a firearm by anyone. Hudson further argued that the insured's narrow interpretation of the exclusion was an attempt to read in limitations not otherwise present on the face of the policy.

Analysis

The district court granted Hudson's motion for reconsideration and reversed its prior ruling. The court found that its prior order improperly "changed the language of the Firearms Exclusion and inserted modifying language not otherwise present in the exclusion agreed upon by the parties." It acknowledged that "[t]he absence of limiting language as to whose use is excluded does not render the exclusion ambiguous because breadth does not equate to ambiguity." Because there was no limiting language, the court found that the exclusion applied to anyone's use of a firearm. Since the underlying action clearly alleged "'bodily injury' arising out of the ... use of firearms," the court found that the firearms exclusion applied to bar coverage.

The district court's decision accords with two other decisions applying similar firearms exclusions to premises liability actions under Georgia law: *United States Liab. Ins. Co. v. Griffith*, No. 1:16-cv-01735-ELR, 2017 WL 3521644 (N.D. Ga. May 10, 2017); *Powe v. Chartis Specialty Ins. Co.*, 1:16-cv-01336-SCJ, 2017 WL 3525441 (N.D. Ga. June 1, 2017).

Learning Point: Insurers writing liability policies in Georgia may seek to limit their exposure for damages arising out of the use of firearms by including a broadly-worded firearms exclusion in their policies. ♦

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The Wisdom Of Removing Personal Injury Actions From Illinois State Court To Federal Court Again Illustrated By The Seventh Circuit's Decision In *McCarty v. Menard*

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

In *McCarty v. Menard, Inc.*, No. 18-3069, 924 F.3d 460 (7th Cir. 2019), the Seventh Circuit once again shows why defendants should remove a personal injury action out of Illinois state court and into federal court whenever possible . . . defendants always stand a better chance of having their duty arguments accepted as a basis for summary judgment in federal court, especially when that duty argument is based upon the open and obvious doctrine.

Facts

Plaintiff went to a Menard store to purchase 3/4 inch sheets of strand boards for a construction project. Plaintiff drove a pickup truck to the store's lumber shed and found the boards stacked side by side behind display signs. The display signs were knee high with protruding wooden legs. Plaintiff moved a few of the top boards from a central pile onto an adjacent pile while searching for undamaged boards. After moving a few other boards, plaintiff tripped over a piece of wood that was part of the display sign in front of a pile of boards. Plaintiff sued for his injuries, and according to the District Court record, filed his suit in the Circuit Court of Lake County, Illinois. Defendant removed the case to federal court based on diversity jurisdiction. After some discovery, defendant moved for summary judgment contending the display sign was an open and obvious hazard to plaintiff, which plaintiff should have taken care to avoid, and thus defendant owed no further duties of care to him. The federal district court agreed, and granted Menard summary judgment holding that Menard owed no duty of care to plaintiff.

Analysis

Open and Obvious

On appeal, the Seventh Circuit affirmed, finding first that Menard owed no duty to plaintiff because his tripping over the display sign was open and obvious. According to the Seventh Circuit, the only "reasonable" conclusion based upon plaintiff's deposition testimony was that he saw the protruding sign while standing right in front of it, and therefore should have taken steps to avoid tripping over it. In so holding, the Seventh Circuit rejected plaintiff's attempt to create an issue of fact with his assertion that the District Court made impermissible credibility determinations by disregarding his testimony that he was unaware of the display sign—and thus the display sign

was not open and obvious. The Seventh Circuit rejected this contention stating:

> The open and obvious inquiry is an objective one. Even when viewed in his favor, McCarty's subjective testimony does not create a triable issue of material fact on whether a reasonable person in his position would have been aware of the display sign.

Menard Had Reasonable Safety Inspections

The Seventh Circuit also found that Menard internal policies required safety inspections to fix tripping hazards and the store's employees regularly monitored and inspected the outside lumberyard and were available to assist customers when needed. The record showed that Menard's staff routinely cleaned the yard and pushed display signs back against the stacks of lumber. The Seventh Circuit found that Menard's actions were adequate to guard against safety hazards and Menard was under no legal obligation to provide any constant surveillance as that would be unreasonably onerous on the defendant. Thus, in the absence of any duty of care, summary judgment was properly entered in favor of Menard and against plaintiff.

Learning Point: The *McCarty* decision illustrates that defendant's first step in removing this matter to federal court was probably the most crucial step taken to insure a successful outcome, especially when making a duty argument based upon the open and obvious doctrine. As seen by the decision here, the Seventh Circuit was not about to let plaintiff create any kind of issues of fact just based upon his own self-serving testimony that he never saw the display sign—when based upon the deposition testimony, he had to be looking right at it and thus had to have been aware of its existence, and thus should have taken steps to avoid tripping on it. ♦

CIVIL PROCEDURE

PROSECUTION AFTER DISCOVERY THAT CLAIM IS UNTENABLE INFERS MALICE

Cuevas-Martine v. Sun Salt Sand, Inc., 2019 Cal. App. LEXIS 520 (Cal. App.)

Employee sued employer and employer's attorney for malicious prosecution. The defendants filed an anti-SLAPP motion to strike the complaint. Trial court held entry of summary judgment on a prior lawsuit for insufficient evidence does not establish, by itself, that there is a probability of prevailing on the merits of a subsequent malicious prosecution claim. ***Held:*** Reversed. Malice could be inferred from the pursuit of an intentional interference with contractual relationships claim when discovery revealed there were no contracts. Thus, the plaintiff demonstrated a probability of prevailing by demonstration of a *prima facie* case of lack of probable cause.

CONTRACTS

COMMERCIAL TENANTS BOUND BY CONTRACTUAL WAIVER

159 MP Corp. v. Redbridge Bedford, LLC, 2019 NY Slip Op 03526 (N.Y.)

Commercial tenants who contractually agreed to waive the right to commence a declaratory judgment action as to the terms of their leases asked the court to invalidate that waiver on the rationale that the waiver was void as against public policy. Plaintiffs contended that the right to bring a declaratory judgment action is so central and critical to the public policy of the State of New York that it cannot be waived. ***Held:*** The waiver clause was valid because it was clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and did not violate a weighty public policy interest such as would outweigh the strong public policy in favor of freedom of contract.

DISCIPLINARY PROCEEDINGS

LITIGATION PRIVILEGE EXTENDS ABSOLUTE IMMUNITY TO STATEMENTS MADE TO ATTORNEY DISCIPLINARY AUTHORITY

Cohen v. King, 189 Conn. App. 85 (Conn. App.)

Plaintiff filed grievance complaint against defendant attorney with statewide grievance committee and asserted defamation and fraud based on defendant's alleged false and defamatory statements. The trial court granted defendant's motion to dismiss and plaintiff appealed. ***Held***: Affirmed. The purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that sometimes the public interest in having people speak freely outweighs the risk that people may at times abuse the privilege by making false and malicious statements.

DISCOVERY

ABSENT EVIDENCE OF GAMESMANSHIP, SUPPLEMENTAL DISCLOSURE OF DAMAGES EXPERTS PERMITTED

Du-All Safety, LLC v. Sup. Ct., 34 Cal. App.5th 485 (Cal. App.)

Defendant in personal injury action initially made expert disclosure identifying two liability experts. The defendant thereafter served a supplemental expert disclosure identifying rebuttal experts. The plaintiff successfully moved to strike the supplemental experts. ***Held:*** Reversed. Defendant timely designated its initial experts and timely served a supplemental disclosure identifying rebuttal experts in the same fields as the plaintiff's initially designated experts. In the absence of evidence of unreasonable acts, gamesmanship or prejudice, the trial court erred in excluding defendant's supplemental experts.

EMPLOYMENT DISCRIMINATION

PLAINTIFF MUST PROVE DEFENDANT'S REASON FOR TERMINATION WAS PRETEXT FOR DISCRIMINATION

Mouy Taing v. Camrac, LLC, AC 40941 (Conn. App.)

Plaintiff sued defendant for wrongful termination on the basis of pregnancy discrimination. Plaintiff had received numerous performance evaluations and a written warning documenting that she was habitually tardy. Shortly after notifying defendant she was pregnant, plaintiff received a final written warning,

noting her habitual tardiness despite schedule adjustments and warning that her position would be terminated if she was tardy again. Plaintiff was terminated after she arrived late to work again. ***Held on appeal:*** Plaintiff failed to show the proffered reason for her termination had not been the only reason and failed to show her pregnancy was at least one of the motivating termination factors. Plaintiff also did not show that any of her fellow employees had the same history of chronic tardiness or warnings.

FIRST-PARTY PROPERTY

ASSIGNMENT EXTINGUISHES LEGAL INTEREST IN INSURANCE PROCEEDS

Liberty Transp., Inc. v. Massachusetts Bay Ins. Co., AC 41553 (Conn. App.)

Plaintiff brought breach of contract action against insurer in connection with hurricane damage to real property and lost rental income. Defendant asserted plaintiff lacked standing to pursue lost rental income because it had sold the property to a third party and assigned the rights to the insurance proceeds to that third party in the real estate purchase agreement. Plaintiff argued it had retained an interest in the damaged rental units as a result of its decision to exercise a leaseback provision in that agreement. ***Held on appeal:*** Plaintiff lacked standing because, by virtue of the assignment, it had no legal interest in the insurance proceeds.

INSURANCE AGENTS/BROKERS

INSURED FAILED TO PROVE PROXIMATE CAUSE FOR AGENT'S FAILURE TO PROCURE LOW-DEDUCTIBLE POLICY

Emer's Camper Corral, LLC v. Alderman, 2019 Wisc. App. LEXIS 151 (Wis. App.)

After insured lost low-deductible policy due to history of hail damage to its campers, agent failed to procure a similar policy. ***Held:*** By not proving availability of the coverage, insured failed to establish proximate cause in negligence claim. It was not enough to establish the general availability of coverage. Insured needed to prove that even with its history of two prior hail damage claims, insured could have obtained a low-deductible policy.

LEGAL MALPRACTICE

DEFENDANT WHO COMMITTED CRIME CANNOT SUE FOR MALPRACTICE

Skindzelewski v. Smith, 2019 Wisc. App. LEXIS 293 (Wis. App.)

Plaintiff roofing contractor was charged with theft for accepting money for roofing work he never performed and plead guilty. Post-conviction, plaintiff realized his attorney had miscalculated the statute of limitations and that the conviction was time-barred. Plaintiff brought malpractice action. ***Held on appeal:*** Public policy holds that someone who actually committed the criminal offense for which he or she was convicted should not be permitted to recover damages for legal malpractice from their former defense attorney. Proof of actual innocence is in addition to, not a substitution for, the causation element.

LAWYER NOT LIABLE FOR NEGLIGENT ADMINISTRATION OF ESTATE

Macleish v. Boardman & Clark LLP, 924 N.W.2d 799 (Wis.)

Beneficiaries unhappy with federal estate tax assessment sued lawyer for negligent administration of decedent's estate. ***Held:*** To establish malpractice, beneficiaries must prove that administration of a decedent's estate violated the decedent's clear testamentary intent. Contrary to beneficiaries' claim, decedent's will did not require the imposition of a trust on property passed to decedent's wife so as to reduce estate tax liability.

LIABILITY INSURANCE COVERAGE

DUTY TO DEFEND ARISES WHERE ADDITIONAL INSURED HAS OBJECTIVELY REASONABLE EXPECTATION OF BROAD COVERAGE

McMillin Homes Constr., Inc. v. Nat'l Fire & Marine Ins. Co., 35 Cal.App.5th 1042 (Cal. App.)

Insurer refused to defend general contractor named as additional insured under roofing subcontractor's general liability policy. Underlying lawsuit involved roofing construction defects. Trial court found insurer owed no duty to defend based on additional insured endorsement exclusion for damage to property in the additional insured's

care. ***Held:*** Reversed. The exclusion requires exclusive or complete control by the additional insured, but the underlying facts suggested the potential for indemnity due to shared control over the roofing at issue. This would be how an insured reasonably understood the contract at the time of contract formation.

PUNITIVE DAMAGE CLAIM IMPACTS COVERAGE DETERMINATION

Xtreme Prot. Servs., LLC v. Steadfast Ins. Co., 2019 Ill. App. LEXIS 301 (Ill. App.)

Plaintiff policyholder, sued in lawsuit claiming punitive and compensatory damages, sought coverage from insurer and requested permission to retain its own counsel due to an inherent conflict between the allegations of the amended complaint and the policy provisions. Thereafter, the insurer advised plaintiff that the policy excluded coverage for punitive damages and reserved all rights and defenses and appointed counsel to defend plaintiff. Plaintiff refused appointed counsel and filed declaratory action. Insurer claimed there was no conflict since only issue was punitive damages and claimed plaintiff breached policy's cooperation clause, prejudicing insurer by denying right to participate in and control defense. Trial court ruled for plaintiff. ***Held on appeal:*** Affirmed. In determining whether a conflict exists, courts should look at who bears the greater risk and interest in the allegations of the underlying complaint. As the amount of punitive damages sought in the lawsuit was significantly greater than the amount sought for compensatory damages, plaintiff had the greater interest and risk in the litigation.

LIMITATIONS OF ACTIONS

ONE YEAR STATUTE OF LIMITATIONS APPLIES TO ATTORNEY MALICIOUS PROSECUTION CLAIM

Connelly v. Bornstein, 33 Cal. App. 5th 783 (Cal. App.)

Plaintiff filed malicious prosecution action against law firm that filed unlawful detainer action against him. The detainer action was voluntarily dismissed. As the State of California has not prescribed by statute a specific period of limitations for malicious prosecution, the court had to make a determination as to whether to apply the one-year statute of limitations applicable to a legal malpractice claim or the two-year statute of limitations applicable to a personal injury claim. ***Held on appeal:*** The one-year statute of limitations applies to a malicious prosecution claim against an attorney. Malicious prosecution closely resembles legal malpractice, which is not a clearly defined term. Also, the effect that such lawsuits would have on the cost of malpractice insurance and the fact that the advice-of-counsel defense to malicious prosecution is available for litigants but not for attorneys factor in favor of the shorter period.

STATUTE OF LIMITATIONS BEGINS UPON ACTUAL INJURY FROM BAD ADVICE

Moss v. Duncan, 2019 Cal.App.LEXIS 564 (Cal. App.)

Plaintiff sued an accounting firm that performed accounting and tax services for plaintiff's tax returns in 2006. The Franchise Tax Board ("FTB") audited the 2006 return and issued a Notice of Proposed Assessment in 2011. The plaintiff settled with the FTB in 2015 and filed its lawsuit against the accountant later that year. The trial court found that the malpractice claim was barred by the two-year statute of limitations, which commenced upon the discovery of the accounting error when the FTB issued its proposed tax assessment in 2011. ***Held:*** Reversed. The statute of limitations on professional negligence claims begins to run on the date of the plaintiff's actual injury from the erroneous advice, which was the date the plaintiff settled with the FTB on the amount of tax deficiency.

THREE-YEAR STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE CLAIM

John K. Kaminski v. Davit Poirot, AC 41586 (Conn. App.)

Plaintiff sued defendant attorney for legal malpractice in connection with his representation of plaintiff in prior personal injury action. Plaintiff alleged defendant committed legal malpractice by withdrawing the complaint against certain defendants and by withdrawing from representing plaintiff. The trial court granted defendant summary judgment, concluding plaintiff's action was barred by the three-year statute of limitations for tort claims. Plaintiff appealed. ***Held:*** Affirmed. The time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs.

MEDICAL MALPRACTICE

MEDICAL MALPRACTICE ACT INAPPLICABLE TO HEALTH INFORMATION CLAIM

G.F. v. St. Catherine Hosp., Inc., 2019 Ind. App. LEXIS 204 (Ind. App.)

In the presence of hospital patient's visitor, physician told patient to see his infectious disease doctor as soon as possible. ***Held:*** Patient's claim was governed by ordinary negligence principles, not the Medical Malpractice Act. To fit within the Act, a provider's conduct must be undertaken in the interest of, or for the benefit of, a patient's health. The statement did not lead to an inaccurate diagnosis or improper treatment. The mere fact that the statement was made in a healthcare facility did not bring it within the term of the Act. The broadcast of confidential information to a third party did not constitute healthcare treatment. ***Further held***: Dual filing of a complaint with the Indiana Department of Insurance and the circuit court did not amount to an election that the Act applied.

DOING NOTHING IS NOT AN ALTERNATIVE MEDICAL TREATMENT OR DIAGNOSIS

Barney v. Mickelson, 2019 Wisc. App. LEXIS 205 (Wis. App.)

Plaintiffs sued defendant for medical malpractice for monitoring baby's heartbeat with external fetal heart monitor during labor and delivery. External heart monitor allegedly reported the mother's heart rate rather than the baby's. Plaintiffs argued defendant should have used pulse oximeter or fetal scalp electrode. Trial court allowed defense jury instruction that if jury found more than one method of treatment for or diagnosing plaintiff's condition was recognized as reasonable, the doctor was at liberty to select any of the recognized methods and was not negligent if she used reasonable care, skill and judgment in administering the method. Jury found defendant not negligent. ***Held on appeal:*** The alternative methods instruction is inappropriate where the alleged negligence lies in failing to do something, as opposed to negligently choosing between courses of action.

VERDICT NOT CONTRARY TO WEIGHT OF EVIDENCE

Swanson v. Gatzke, 2019 Wisc. App. LEXIS 245 (Wis. App.)

Plaintiff sued defendant for dental malpractice. Defendant admitted negligence but argued that plaintiff's negligence contributed to her injuries. The jury apportioned liability 60% to plaintiff and 40% to defendant. Plaintiff moved for a new trial. The court denied plaintiff's motion but sua sponte changed the jury's apportionment of liability to 50% each. ***Held on appeal:*** The trial court erred in changing the jury's apportionment of negligence. There was sufficient evidence from which a jury could reasonably infer that plaintiff's negligence was greater than defendant's.

MUNICIPAL LAW AND CORPORATIONS

NOTICE STATUTE INAPPLICABLE TO PRIVATE PARTIES CREATING DEFECTS ON PUBLIC WAYS

Meyer v. Veolia Energy N. Am., 2019 Mass. LEXIS 245 (Mass.)

Bicycler hit misaligned manhole cover maintained by a private corporation. ***Held:*** Road defect and notice statute applies only to claims against governmental and quasi-governmental actors responsible to maintain the public way. Imposing a duty on claimants to notify private corporations would be inconsistent with statutory language and legislative history and would create unnecessary difficulties in pursuing tort claims.

NEGLIGENCE

PROXIMATE CAUSE MUST BE PRESENT FOR NEGLIGENCE *PER SE*

Taulbee v. EJ Distrib. Corp., 35 Cal. App.4th 590 (Cal. App.)

Plaintiff drove his vehicle into the back of a truck operated by defendant, which was parked in the gore point by the freeway and the exit ramp, and sustained catastrophic injuries. At trial, the plaintiff proposed a negligence per se instruction related to a Vehicle Code violation for driving in the gore point. The trial court declined the jury instruction because the Vehicle Code section related to a moving violation, but the defendant had parked in the gore point. ***Held:*** Affirmed. The trial court did not err because, based on the evidence, the defendant's driving into the gore point was not a proximate cause of the collision.

NO BREACH OF DUTY BY COMPANY THAT FOLLOWED INDUSTRY STANDARDS AND DID NOT VIOLATE REGULATIONS

Daniel C. Seale v. Geoquest, Inc., et al., AC 41407 (Conn. App.)

Plaintiff sued defendant for negligence and negligent misrepresentation in connection with defendant's remediation of soil contamination on plaintiff's real property. Plaintiff appealed adverse trial result. ***Held:*** Affirmed. Testimony from three licensed environmental professionals indicated that the defendant had followed industry standards and had not violated any state or municipal regulations. The contaminated soil that remained on the property was in accordance with state agency remediation guidance documents. Plaintiff had incorrectly interpreted a soil remediation report prepared by defendant. There was no misrepresentation of fact.

NO LIABILITY FOLLOWING TRIP OVER SIDEWALK MAT

Ligon v. Winton Woods Park, 2019 Ohio App. LEXIS 1315 (Ohio App.)

Visitor to campground tripped on mat lying on sidewalk leading to park's laundry facility. ***Held:*** Park owner did not owe a duty to warn because the mat posed an open and obvious danger. Even though visitor did not observe a hump in the mat, it would have been visible to a reasonable person. Existence of garbage can or ashtray does not create a distraction reducing the degree of care to be exercised by an ordinary person at the time.

TRUCKING COMPANY SUBJECT TO LIABILITY AFTER LOAD SHIFTED IN TRANSIT

Wilkes v. Celadon Grp., Inc., 2019 Ind. App. LEXIS 161 (Ind. App.)

Carrier's driver was injured after cargo loaded by a shipper's contractor fell out of a trailer following transit. ***Held:*** Although driver had a duty to inspect and secure his load, the nature of the load and the limited time for inspection did not absolve the contractor of its own duty of care. ***Further held:*** The cargo shipper did not owe a duty to the driver. Shipper did not inspect or supervise the loading, nor did it make representations that the cargo had been safely loaded. It did not have a relationship with the driver or any control over the truck.

PERSONAL JURISDICTION

OHIO GUN MERCHANT SAFE FROM SUIT IN NEW YORK

Williams v. Beemiller, Inc., 2019 NY Slip Op 03656 (N.Y.)

An Ohio firearm merchant who sold a gun to an Ohio resident in Ohio, which was subsequently resold on the black market and used in a shooting in New York, was sued in New York by the injured party. ***Held:*** The merchant lacks sufficient minimum contacts with New York to satisfy due process requirements. The merchant did not maintain a website, had no retail store or business telephone listing, did no advertising of any kind, and only sold to Ohio residents.

PRODUCTS LIABILITY

HIGH COURT REJECTS RENTAL MARKET DISTINCTION OF *SCARANGELLA*

Fasolas v. Bobcat of N.Y., Inc., 2019 N.Y. LEXIS 1357 (N.Y.)

Decedent was killed while operating a rented Bobcat loader with a bucket attachment when a small tree entered the open operator cab, crushing him. Under the *Scarengella* exception, there is a strict liability exception where the manufacturer offers a product with an optional safety device and the purchaser chooses not to obtain it. The trial court ruled that since the defective product came into the injured end user's hands through the rental market, rather than by a purchase transaction, this exception did not apply. ***Held:*** Trial court's adoption of a rental market distinction was error because *Scarangella* already required assessment of a purchaser's knowledge of the scope of its product's intended uses and its ability to weigh the risks and benefits of optional safety devices.

COKE OVENS MIGHT BE "PRODUCTS"

Matter of Eighth Judicial District Asbestos Litigation, 2019 NY Slip Op 04640 (N.Y.)

Plaintiff sued defendant for injuries decedent sustained from coke oven located in decedent's steel plant workplace. Defendant obtained summary judgment on grounds that the large, industrial coke ovens were not products, such that defendant did not owe a duty to warn of their harmful nature. ***Held:*** Reversed. Court of

Appeals held defendant failed to meet burden of showing the coke ovens were not "products" for purposes of strict products liability. The ovens' installation into large buildings did not bar considering them to be products.

TORTS

FIREFIGHTER'S RULE INAPPLICABLE WHERE PLAINTIFF IS NOT HIRED TO PREVENT AN INHERENT RISK

Harry v. Ring the Alarm, LLC, 34 Cal. App.5th 749 (Cal. App.)

Plaintiff was hired to give tours at defendant's architectural residence. During tours, the plaintiff would warn people because there were no railings on a platform. One day, plaintiff fell from the platform. Plaintiff sued. At trial, defendant requested a primary assumption of risk instruction, arguing plaintiff accepted working on the platform without a railing and accepted an inherent risk ("firefighter's rule"). The jury returned a verdict for defendant and appeal followed. ***Held:*** The "firefighter's rule" did not apply because there was no evidence to suggest the plaintiff was hired to keep people from falling off the platform and defendant denied the platform was dangerous.

WORKERS' COMPENSATION

PLAINTIFF MUST SHOW HE COMPLETED HIS DEVIATION AND RESUMED BUSINESS TRAVEL FOR BENEFITS

John Rauser v. Pitney Bowes, Inc., et. al., AC 41025 (Conn. App.)

Plaintiff was assaulted in a parking lot following a social gathering with fellow employees while on work related travel for defendant. Plaintiff filed a Workers' Compensation claim. Plaintiff's claim for benefits was dismissed based on determination he failed to show his injuries arose out of and in the course of his employment. This was based on the finding that, between 8:00 p.m. and midnight on the night when plaintiff was socializing with his fellow employees at the restaurant, he was engaged in a substantial deviation from his work related activities. Plaintiff appealed. ***Held:*** Affirmed. The evidence that plaintiff relied on in support of his claim demonstrated only the location where the assault occurred, and his presence at that scene. These facts alone did not demonstrate that plaintiff had completed his deviation and had resumed business travel.

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