CM REPORT

of Recent Decisions

2019 • Vol. 4

California Enacts Significant Changes To Davis-Stirling HOA Laws

Illinois Supreme Court Clarifies Trigger Of Coverage For Malicious Prosecution

Connecticut Supreme Court Affirms Continuous Trigger And Unavailability Exception

Clausen Miller PC

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

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Clausen Miller Litigating International Arbitration Issue In The United States Supreme Court

The United States Supreme Court typically accepts fewer than 150 cases for review each year. Clausen Miller is currently litigating one of those rare cases. *Outokumpu Stainless USA, LLC et al v. Converteam SAS*, No. 18-1048. The CM team includes members of the Appellate Practice Group (Chair Melinda Kollross and Joe Ferrini), First-Party Property Practice (Jim Swinehart and Kelly Jorgenson) and Subrogation Practice (Greg Aimonette and Ken Wysocki). The CM team, together with co-counsel, prevailed in the Eleventh Circuit, which held that the New York Convention on the Recognition and Enforcement of Arbitration Awards (the "Convention") does not permit non-party, non-signatories to a contract containing an arbitration provision to use an idiosyncratic U.S. "equitable estoppel" doctrine to compel international arbitration against a party to the contract. (See *CM Report 2018 Vol. 4*)

Facts

Outokumpu Stainless USA and several of its Insurers sued defendant Converteam SAS, subsequently known as GE Energy Power Conversion France SAS, Corp. (GE France), in Alabama state court seeking damages resulting from the failure of multiple motors designed, manufactured, and supplied by GE France, the electrical subcontractor for construction of three cold rolling (steel) mills in Alabama. GE France removed the action to federal court and sought to compel arbitration in Germany under the Convention based upon an arbitration provision in the general contracts between Outokumpu, the owner, and the general contractor for the construction of the cold rolling mills. GE was neither a named party nor a signatory to the general contracts. The district court held that GE qualified as a party to the general contracts and entered an order compelling arbitration.

The Eleventh Circuit reversed, agreeing with Outokumpu and the Insurers that GE did not qualify as a party to the general contracts, and could not compel arbitration because it was not a signatory or in privity with a party to the general contracts containing the arbitration clause it was trying to enforce.

GE filed a petition for a writ of certiorari, which the Supreme Court granted in June 2019.

Analysis

GE argues that equitable estoppel—an idiosyncratic U.S. doctrine available under certain U.S. state's laws to compel domestic arbitration by or against non-signatories under Chapter 1 of the Federal Arbitration Act ("FAA") should apply to international arbitration under the Convention as implemented by FAA Chapter 2. GE claims that because the Convention allows treaty members to use more favorable domestic laws to enforce arbitration *awards* the Convention itself would not enforce—the Convention drafters must have likewise intended to allow countries to use their domestic laws to liberally

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enforce arbitration *agreements*. GE also stresses the federal policy favoring arbitration in asking the Supreme Court to rule in their favor.

In response, Outokumpu and its Insurers argue that consent to arbitration is fundamental. This is demonstrated by the language of the Convention itself—which expressly requires either an agreement in writing signed by the parties or an exchange of letters or telegrams documenting the parties' consent to arbitration. It is additionally supported by the Convention's drafting history, which contains the comments of drafters from many nations emphasizing that there must be written evidence of consent to arbitrate by the parties seeking to compel arbitration or against whom arbitration is to be compelled. Equitable estoppel, which is not recognized in civil law countries and takes variant forms in common law nations, cannot be used to compel arbitration in the absence of consent. Reading the Convention as GE suggests allows those who never agreed or intended to give up their litigation rights to be forced into arbitration in a foreign land under foreign laws without their consent—a dangerous proposition. The Convention's basic requirements are mandatory and give businesses predictability as to when they will be subject to arbitration. This stability and certainty in turn serves to encourage companies to agree to arbitrate and is the true pro-arbitration position.

Further Proceedings: This case is set for oral argument before the United States Supreme Court on January 21, 2020. We will report further following oral argument and again once the Supreme Court issues a decision, which we expect by June 2020.

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As part of our commitment to impeccable client service, we are proud to provide client work-site presentations for Continuing Legal Education ("CLE") and/or Continuing Education ("CE") credit. You will find available courses listed below. Please view the complete list of individual course descriptions at www.clausen.com/education/ for information regarding the state specific CE credit hours as well as course and instructor details.

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An Insider's Guide To New York Practice

Appellate And Trial Protocols For Resolving Coverage, Casualty And Recovery Issues Facing The Insurance Claims Professional

Assignments Of Benefits In Florida: How Did We Get Here?

Attorney Fees And Costs In Florida: Can We Avoid A Stick Up?

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

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

CALIFORNIA SETS NEW MAXIMUM CONTAMINANT LEVEL ON HEXAVALENT CHROMIUM IN DRINKING WATER: The Background, Remediation, Litigation And Related Claims-Handling And Coverage Issues

Coverage And Trial/Appellate Litigation— Strategies Affecting Coverage Determinations

Coverage Summer School: "Hot" Insurance Topics For "Cool" Claims Handling

Developments In Insurance For The Claims Professional: Time Limit Settlement Demands; Insurance And Legal Issues Related To Drones; And Ensuing Losses Under First Party Property Insurance Policies

Developments In Insurance For The Claims Professional: (1) The New Restatement Of The Law Of Liability Insurance; (2) Protecting Insureds In The Transportation Industry From The Dangers Of Plaintiffs' Reptile Theory; (3) Coverage Issues Regarding "Rip And Tear" Or "Get To" Costs In Construction Defect Claims; (4) When A Collapse Claim Involves More Than "Collapse"; And (5) The Law Of Golf: A Short Course

Developments In Property Insurance Coverage Law

Jumping Over The Evidentiary Hurdles To Victory

Miscellaneous Issues Of Interest Relating To Property Insurance

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

Premises Liability/Liquor Liability And Security/Architects And Engineers Construction And Environmental Claims

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

Strategies For Increasing The Settlement Offer

Subrogation: Initial Recognition, Roadblocks And Strategies

The Latest Coverage Battles In Construction Defect And Faulty Workmanship Claims

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

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

Winning Through Motions And Setting The Stage If All Else Fails

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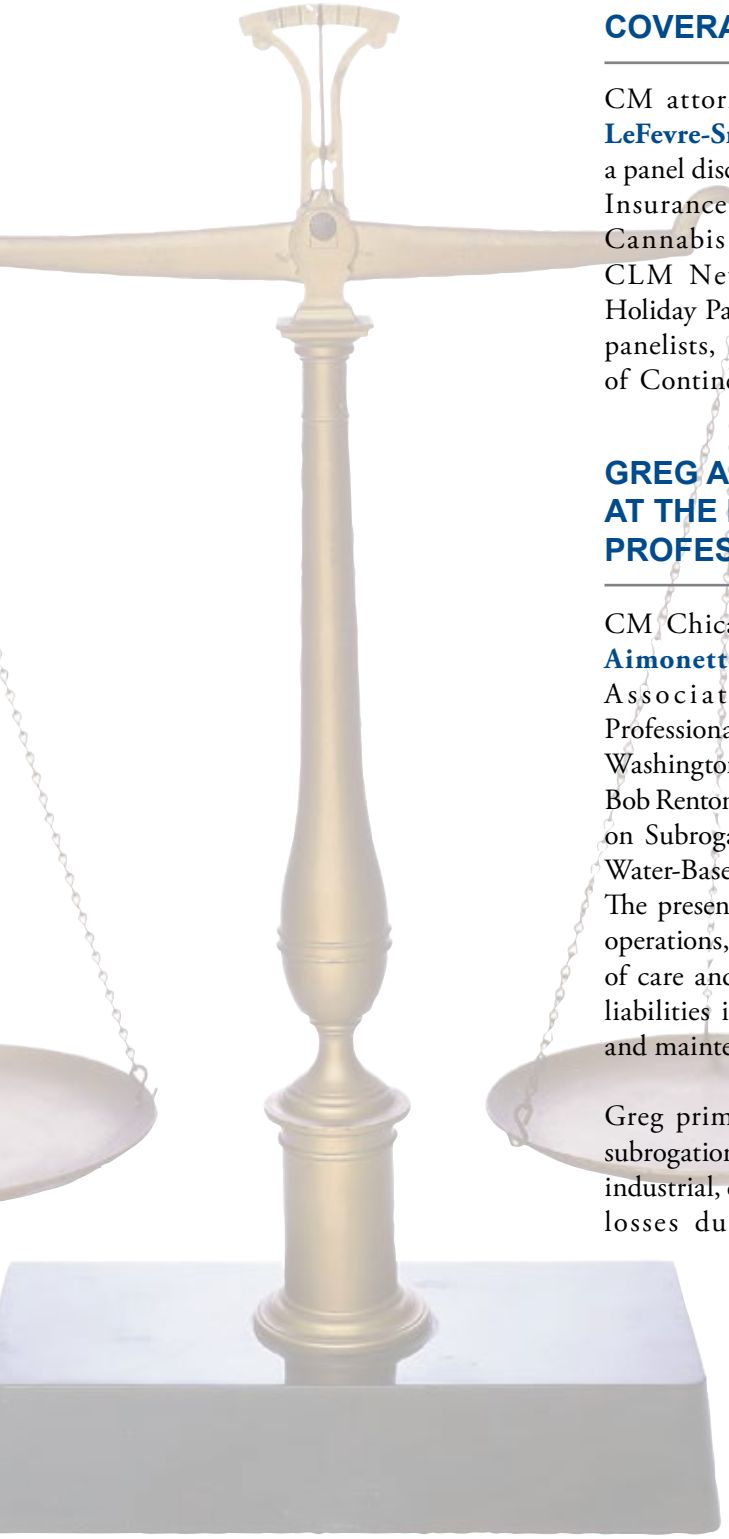

LEFEVRE-SNEE PRESENTS ON EMERGING INSURANCE COVERAGE ISSUES IN THE CANNABIS INDUSTRY

CM attorney **Henry ("Mackie") LeFevre-Snee** recently participated in a panel discussion entitled "Emerging Insurance Coverage Issues in the Cannabis Industry" at the 2019 CLM New York Conference & Holiday Party. Mackie and the other panelists, including Wes Gilbreath of Continental Heritage Insurance Company and Kieran O'Rourke of Cannasure Insurance Services, discussed how claims professionals and the insurance industry are being impacted by the legalization of recreational marijuana in many states. For more information on this timely topic, please contact Mackie at **hlefevresnee@clausen.com**.

GREG AIMONETTE SPEAKS AT THE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS ANNUAL CONFERENCE

CM Chicago based partner **Greg Aimonette** spoke at the National Association of Subrogation Professionals Annual Conference in Washington, DC with Chris Culp and Bob Renton of Henderson Engineering on Subrogation Considerations with Water-Based Fire Protection Systems. The presentation focused on systems operations, applicable codes, standard of care and discovering subrogatable liabilities in the design, installation and maintenance of such systems.

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, and gas leaks. He has also defended these same types of matters and has even practiced as a criminal prosecutor. Greg has handled and litigated matters involving sprinkler failures, water intrusion, defective mechanical product designs, green construction, agricultural loss, and broad scale industry loss including production plants and steel mill losses.

If you have questions regarding Greg's presentation or any subrogation matter, please contact him at **waimonette@clausen.com**.

CLAUSEN MILLER SUCCESSFULLY DEFENDS INSURANCE BROKER IN NY TRIAL AND APPELLATE COURTS

The New York Appellate Division, Second Department, recently affirmed a judgment in favor of an insurance broker claimed to have failed to give adequate notice of a cancellation to an insured. *Maad Construction, Inc. v. Cavallino Risk Management, Inc.*, 2019 N.Y. App. Div. Lexis 8867.

Maad was in the trucking and hauling business. It procured insurance coverage for its trucks through an insurance broker, Cavallino, and with the use of insurance financing. After a number of months, its insurer cancelled one of its policies, allegedly for non-payment of premium. As a result, the trucks were uninsured at the time they sustained damage from a hurricane in 2012. Maad blamed Cavallino and others for the lapse in coverage. It claimed Cavallino was at fault because it failed to give notice to Maad of the insurer's cancellation of the policy.

The case took an unusual appellate twist. Cavallino moved for summary judgment, the motion was denied, and Cavallino appealed. During the pendency of the appeal, however, Cavallino successfully moved for reargument of the denial its motion. The motion to reargue was granted and summary judgment granted, thus mooting Cavallino's appeal, which was dismissed. At that point, Maad took its own appeal, and it was that appeal that the Second Department ultimately decided.

The Second Department rejected Maad's argument that Cavallino had a duty to give notice of the cancellation. Rather, the court observed that a broker has an obligation to advise the insured on insurance matters beyond the procuring of coverage only when a "special relationship" develops between the broker and client.

In this case, Cavallino procured the coverage requested by Maad. And Maad failed to present a triable issue of a resulting special relationship with Cavallino giving rise to an obligation to give continuing advice or guidance, including notice of cancellation. Hence, the court affirmed summary judgment in favor of Cavallino.

CM partner **John De Filippis** represented Cavallino in the trial court. CM Appellate Practice Group partner **Don Sampen** handled the case on appeal.

CLAUSEN MILLER SECURES AND PRESERVES DEFENSE WIN FOR ELEVATOR INSPECTION COMPANY

In *Baez v. 1749 Grand Concourse LLC*, 2019 N.Y. App. Div. LEXIS 8980, plaintiff sought damages for decedent's death from a fall down an elevator shaft at an apartment building he was moving into. Plaintiff brought claims against the building owner, its elevator maintenance company, and an elevator inspection company but ultimately dropped the claims against the inspection company. The building owner, however, pursued a cross-claim against the inspection company. CM partners **Carl Perri** and **Matt Leis** successfully obtained dismissal at the summary judgment stage on behalf of the elevator inspection company, arguing the company owed only a contractual duty to the building owners to inspect, not to maintain.

On appeal, partner **Joseph Ferrini** of the CM Appellate Practice Group argued that the inspection company had ably performed its limited, one-time inspection role and that the building owners had presented no evidence sufficient to rebut this. The Appellate Division, First Department affirmed the grant of summary judgment for CM's client.

California Enacts Significant Changes To Davis-Stirling Homeowners Association Laws

*by **Ian R. Feldman** and **R. Mick Rubio***

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Introduction

On October 12, 2019, California Governor Gavin Newsom signed Senate Bill 323 ("SB 323") into law. This new statute makes significant changes to Civil Code § 4000 et seq., also known as the "Davis-Stirling Act." These revisions to Davis-Stirling touch upon serious functions of homeowners associations ("HOA" or "association") and their management companies. SB 323's enactment will have the practical effect of requiring HOAs and their management companies to revisit election procedures, board nominee disqualifications, and the functions of inspectors of elections.

The new laws detailed below are effective January 1, 2020.

Analysis

Elections

SB 323 imposes certain new requirements related to elections by acclamation and the timing of director elections.

While common in HOA governing documents, director elections by acclamation had never been explicitly addressed by the Davis-Stirling Act. Typical bylaws provide that if the number of nominees does not exceed the number of director vacancies in any given election, those nominee directors are or may be elected by acclamation. The new statute provides a limit on the use of election by acclamation.

Under SB 323, if the number of nominees is not more than the number of vacancies to be elected as determined by the inspector of elections, nominees shall be considered elected by acclamation only if: (1) the association includes 6,000 or more units; (2) the HOA provided individual notice of the election and the procedure for nominating candidates at least 30 days before close of nominations; and (3) the association permits all "qualified" candidates to run if nominated.

In addition, the new statute also provides clarification regarding the timing of director elections. HOAs are required to hold elections for a seat on the board of directors at the expiration of a director's term and at least once every four years.

Conditions That Disqualify Nominees

Under SB 323, there are limitations to the restrictions that an HOA may impose on board nominees.

Required Disqualifications —Non-Members

Under the new statute, an association is required to disqualify nominees who are not members of the association at the time of the nomination. This disqualification, however, would not restrict real estate developers from making nominations of non-member candidates under regulations contained under the Department of Real Estate or as set forth in an HOA's governing documents. This is a common disqualifying feature in HOA

Covenants, Codes, & Restrictions ("CC&Rs") or director bylaws. If not already done by HOAs, the new statute makes this disqualifying feature explicit by operation of law.

Permissive Disqualifications

SB 323 also provides limitations on when an HOA can disqualify nominees for election to the board.

Failure Of A Member To Be Current On Assessments

First, an association may disqualify a nominee for their failure to be current in their payment of regular and special assessments. There are exceptions to this disqualification. An HOA may not disqualify a nominee for failure to be current in their payment of assessments if the nominee paid the assessments "under protest" under Civil Code § 5658. In addition, a nominee may not be disqualified for nonpayment of assessments if they entered into a repayment plan under Civil Code § 5665.

It is also necessary to note that under the new statute, an HOA may not disqualify a nominee for nonpayment of "fines" (as opposed to assessments), fines renamed as assessments, collection charges, late charges, or costs levied by a third party.

Furthermore, SB 323 also requires that if the HOA requires a nominee to be current in the payment of regular and special assessments, then the HOA must also require a director to be current in the payment of regular and special assessments.

Serving At The Same Time As Co-Owner Of Property

Second, an association may disqualify a nominee if, at the time of the nominee's election, that nominee would be serving on the board at the same time as another person who holds a joint ownership interest in the same property as the nominee, and the other person is either properly nominated for the current election, or is an incumbent director.

Member Of HOA For Less Than One Year

Third, SB 323 allows an HOA to disqualify a nominee if they have been a member of the association for less than one year.

Past Criminal Convictions Terminating Fidelity Bond Coverage

Lastly, an association may disqualify a person from nomination as a candidate if the HOA becomes aware that the nominee has a past criminal conviction which, if the nominee is elected, would either prevent the HOA from purchasing fidelity bond coverage, or cause such coverage to terminate.

Requirement For Internal Dispute Resolution

SB 323 further provides that an HOA cannot disqualify a person from nomination if that disqualified person has not been provided the opportunity to engage in internal dispute resolution ("IDR") under Civil Code § 5900. This provision has the practical effect of requiring HOAs to provide disqualified nominees with some notice of their disqualification, a reason for the disqualification, and an invitation by the board to engage in IDR.

It is important to note that the only required disqualifying condition is the provision regarding membership. The new Civil Code § 5105(b) states that an association shall disqualify a person from nomination as a candidate for not being a member of the association at the time of the nomination. The other disqualifying conditions listed above are merely permissive; new Civil Code § 5105(c) states that an HOA through its bylaws or election operating rules "may disqualify a person from nomination as a candidate" pursuant to the above restrictions.

The new law has been drafted such that the above permissive disqualifying conditions are the only disqualifying conditions that an HOA may impose upon nominees. This has the practical effect of precluding HOAs from imposing other disqualifying restrictions that do not conform to any of the categories above.

Nomination Procedures

The new statute provides more detailed procedures on the nomination process for HOA director elections.

Nomination Procedures Notice

An HOA is to provide "general notice" (see Civil Code § 4045) of the nomination procedures and the deadline for submitting nominations at least 30 days prior to any deadline for submitting a nomination. Individual notice (see Civil Code § 4040) is required only if a member requests individual notice.

Pre-Voting Notice

An HOA is required to provide general notice of all of the following at least 30 days prior to ballots being distributed: (1) the date and time by which, and the physical address where ballots are to be returned by mail or handed to the inspector or inspectors of elections; (2) the date, time, and location of the meeting at which ballots will be counted; and (3) the list of all the candidates' names that will appear on the ballot. Again, individual notice is required only if a member requests individual notice.

Inspector Of Elections

SB 323 also imposes significant changes to inspectors of elections.

Management Companies May No Longer Be Inspectors Of Elections

A management company may no longer be the inspector of elections for HOAs. The Davis-Stirling Act provides that an inspector of elections must be an "independent third party." Previously, under Civil Code § 5110(b), an inspector of elections "may not be a person, business entity, or subdivision of a business entity who is currently employed or under contract to the association for any compensable services unless expressly authorized by rules of the association adopted pursuant to Civil Code § 5105(a)(5)." SB 323 amends Civil Code § 5110(b) and does away with this express authorization exception.

This revision has the practical effect of precluding management companies, or their affiliates, from acting as the inspector of elections for HOA board elections.

Enhanced Inspector Of Elections Duties

The new statute requires that an HOA adopt rules regarding an inspector of election's distribution of election materials. These rules must require that 30 days before an election, inspectors of elections must deliver to each member a ballot, and a copy of the election operating rules. Election operating rules may be delivered by either: (1) posting the election operating rules to an internet website and including the corresponding internet website address on the ballot, together with the phrase in at least 12-point font: "The rules governing this election may be found here [insert website address]"; or (2) individual delivery to each member.

Document Retention By Inspectors Of Elections

The new statute also enhances document retention by inspectors of elections. In addition to sealed ballots, inspectors of elections must now also retain signed voter envelopes, voter lists, proxies, and candidate registration lists. As per the original statute, these items are to remain in the custody of the inspector(s) of elections until the time allowed by Civil Code § 5145 for challenging the election has expired.

Election Operating Rules and HOA Retention of Election Materials

Under SB 323, election operating rules may not be amended less than 90 days prior to an election.

Furthermore, the new statute requires that the HOA adopt operating rules requiring an HOA to retain association election materials which should include: (1) a candidate registration list, and (2) the voter list. The voter lists must include the following information for each member-voter: name, voting power, and either: (1) the physical address of the voter's separate interest; (2) the parcel number of the voter's separate interest; or (3) both. The mailing address for the ballot shall be listed on the voter list if the mailing address differs from the physical address of the voter's separate interest, or if only the parcel number is listed. Under this same provision, the HOA is now required to permit members to verify the accuracy of their individual information on both lists at least 30 days before ballots are distributed. The HOA or member shall report any errors or omissions in either list to the inspector or inspectors who shall make the corrections within two business days.

Association Records

The new law is revised to define "association records" as inclusive of "Association election materials." The new statute defines "Association election materials" as returned ballots, signed voter envelopes, the voter list of names, parcel numbers, and voters to whom ballots were to be sent, proxies, and the candidate registration list. This enhanced definition of "association records" has the practical effect of requiring HOAs to make the "association election materials" available to members for inspection and copying pursuant to the timelines stated in Civil Code § 5210(a)-(b). See Civil Code § 5205(a), (c)

As a limitation, however, the new statute makes clear that signed voter envelopes may be inspected but not copied.

Right To Vote

The new statute requires that the election operating rules prohibit the denial of a ballot to a member for any reason other than not being a member at the time when ballots are distributed. Furthermore, the new statute prohibits denying members' attorneys-in-fact who have obtained such status by way of a duly executed general power of attorney from voting.

As a practical matter, it is typical for HOAs to implement voting restrictions for members who are past due in fines, assessments, or other charges. The new statute precludes such restrictions. Under SB 323, the only reason an HOA can deny a ballot to a potential voter is due to potential voter not being a member at the time of distribution of the ballots.

Changes To Judicial Enforcement Of Elections Violations

SB 323 also revises several provisions affording relief to members seeking civil remedies for elections violations.

Statute of Limitations

The previous statute contained a provision allowing a cause of action to be brought within one year of the date when the cause of action accrues. The statute is now revised to allow a member to bring a cause of action within one year of either: (1) the date that a cause of action accrues; or (2) the date that the inspector of elections notifies the board and membership of the election results – whichever of these dates is later.

Evidentiary Burden

SB 323 also does away with any ambiguity on a member-plaintiff's evidentiary burden in a lawsuit for election violations. SB 323 provides that, in order to prevail, a member must establish their case by a "preponderance of the evidence."

Mandatory Voiding Of Elections Results

The new statute also eliminates the permissive language of Civil Code § 5145(a). The prior statute stated that, upon a finding that the election procedures were not followed, a court "may void any results of the election." By contrast, the new law states that if election procedures were not followed, a court "shall void any results of the election…" However, the statute provides that the election shall be voided "unless the association establishes, by a preponderance of the evidence, that the association's noncompliance with this article or the election operating rules did not affect the results of the election."

Costs And Attorneys' Fees In Small Claims

The new statute makes clear that a member prevailing in small claims is entitled to court costs and reasonable attorneys' fees incurred for consulting an attorney in connection with this civil action. Furthermore, SB 323 allows a member-plaintiff to bring a cause of action for elections violations in either the superior court or small claims court.

Required Internal Dispute Resolution

Notably, the new statute requires IDR before an HOA commences a lawsuit against a member. An HOA may not file a civil action regarding a dispute in which the member has requested dispute resolution, unless the association has complied with the internal dispute resolution procedures specified under Civil Code § 5910 by engaging in good faith in the internal dispute resolution procedures after a member invokes those procedures.

Learning Point: The new laws under SB 323 undoubtedly affect the way in which homeowners associations and management companies continue to handle their specific statutory duties in common interest developments. Given these amendments are effective January 1, 2020, HOAs and management companies will have to revisit their governing documents to ensure minimum compliance with the Davis-Stirling Act. Even for experienced HOAs and management companies, these revisions are complex. Clausen Miller attorneys Ian Feldman and R. Mick Rubio can provide further information regarding the continually changing landscape of common interest developments, and advice on how HOAs and management companies can avoid the pitfalls of these changes to the Davis-Stirling Act. ♦

Delaware Supreme Court Holds "Securities Claim" Must Implicate Regulation, Rule Or Statute Specifically Directed Towards Securities

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

Henry (Mackie) T.M. LeFevre-Snee
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In *In re Verizon Ins. Coverage Appeals*, No. 558, 2018, No. 560, 2018, No. 561, 2018, 2019 Del. LEXIS 488, the Supreme Court of Delaware held that claims for violation of fraudulent transfer statutes, payment of unlawful dividends in violation of Delaware General Corporation Law, and common-law counts for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, promoter liability, unjust enrichment, and alter ego liability did not come within the subject policy's definition of "Securities Claim". The subject claims did not implicate a "regulation, rule or statute" specifically directed towards securities law, and therefore were not covered.

Facts

In 2006, Verizon spun off its print and electronic directories business, thereby creating Idearc, Inc. ("Idearc"). Idearc obtained Verizon's print and online directory business in exchange for about 146 million shares of Idearc stock, $7.1 billion in Idearc debt, and $2.5 billion in cash. Verizon then distributed Idearc common stock to Verizon shareholders.

Idearc filed for bankruptcy in 2009. The bankruptcy court appointed U.S. Bank N.A. ("U.S. Bank") as trustee of a litigation trust to pursue claims on behalf of creditors. In 2010, U.S. Bank sued Verizon, among others, seeking $14 billion in damages caused by saddling Idearc with excessive debt at the time of the spin-off. The U.S. Bank complaint alleged violations of fraudulent transfer statutes, payment of unlawful dividends in violation of Delaware General Corporation Law, and common-law counts for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, promoter liability, unjust enrichment, and alter ego liability.

Verizon prevailed at trial and on appeal, incurring more than $48 million in defense costs during the course of the litigation.

Policy Language

Verizon and Idearc purchased primary and excess Executive and Organizational Liability Policies. Several other carriers issued follow form excess policies.

The policies provided that "[i]n connection with any Securities Claim," and "for any Loss . . . incurred while a Securities Claim is jointly made and maintained against both the Organization and one or more Insured Person(s), this policy shall pay 100% of such Loss up to the Limit of Liability of the policy."

"Securities Claim" was defined as a Claim made against any Insured Person:

> (1) Alleging a violation of any federal, state, local or foreign regulation, rule or statute regulating securities (including, but not limited to, the purchase or sale or offer or solicitation of an offer to purchase or sell securities) which is:

(a) brought by any person or entity alleging, arising out of, based upon or attributable to the purchase or sale or offer or solicitation of an offer to purchase or sell any securities of an Organization; or

(b) brought by a security holder of an Organization with respect to such security holder's interest in securities of such Organization; or (2) brought derivatively on behalf of an Organization with respect to such security holder of such Organization, relating to a Securities Claim as defined in subparagraph (1) above.

The Decision Below

In 2014, Verizon filed suit in the Superior Court of Delaware against its primary and excess insurers seeking coverage for its defense costs in the U.S. Bank action and related lawsuits. The parties cross-moved for summary judgment on whether the U.S. Bank action came within the definition of a "Securities Claim". Upon finding the definition of "Securities Claim" to be ambiguous, the Superior Court resolved the issue in Verizon's favor under the rule of contra proferentum, and granted Verizon summary judgment.

The insurers appealed.

Analysis

Before the Supreme Court of Delaware, the insurers asserted that the U.S. Bank complaint did not raise a violation of any "regulation, rule or statute regulating securities", because the words "regulating securities" limited coverage to specific securities activities. The insurers further argued that a contrary reading rendered superfluous the "regulating securities" qualifier, because of the separate requirement that a Securities Claim arise from a "purchase or sale" of securities or be brought by a security holder. Further, the common law claims in the U.S. Bank complaint were not "regulations, rules or statutes" within the meaning of the policy, which referred to federal and state securities law claims.

Verizon argued in response that the inclusion of "any . . . regulation, rule or statute regulating securities (including but not limited to, the purchase or sale . . . [of] securities)" showed that the parties did not intend to exclude common law "rules" or claims that did not "specifically" or "principally" regulate securities. Further, because the policy stated "including but not limited to" in reference to securities law claims, "any . . . regulation, rule or statute regulating securities" should be construed broadly to include breach of fiduciary duty, unlawful dividend, and fraudulent transfer claims.

The Court found the definition of "Securities Claim" to be unambiguous, and held that the insurers' interpretation was correct. The definition of "Securities Claim" mirrors those used in securities regulation law, which typically apply to "the purchase or sale, or offer for sale" of securities, and govern fraud "in connection with the purchase or sale of any security." The definition was therefore aimed at securities laws specifically, rather than other areas of the law. The policy also contained the limiting phrase "regulating securities", which meant that the regulations, rules, or statutes must be those that "regulate securities", *i.e.*, those specifically

directed towards securities, such as the sale, or offer for sale, of securities, rather than common law or statutory laws outside the securities regulation area. The definition also separately required that the claim either arise from a "purchase or sale" of securities or be brought "by a security holder", which necessarily pertained to a law one must follow when engaging in a securities transaction. Accordingly, regulations, rules, or statutes must be directed specifically towards "regulating securities" to have meaning within the definition.

The U.S. Bank complaint alleged fiduciary duty violations, unlawful dividends under Delaware law, statutory fraudulent transfer claims, and unjust enrichment and alter ego common law claims. Because none of these claims implicated a "regulation, rule or statute" specifically directed towards securities law, none of the claims came within the definition of "Securities Claim".

The Court also rejected Verizon's arguments that "rules" regulating securities should encompass "common law rules", and that "regulating securities" should include any "laws one must follow when engaging in securities transactions". The Court also disagreed with Verizon's position that the parenthetical "(including, but not limited to, the purchase or sale or offer or solicitation of an offer to purchase or sell securities)" after "regulating securities" did not restrict the meaning of "regulating securities" to laws specific to securities transactions because it is expressly "not limited."

Learning Points: The subject policies provided coverage for claims "[a]lleging a violation of any federal, state, local or foreign regulation, rule or statute regulating securities (including, but not limited to, the purchase or sale or offer or solicitation of an offer to purchase or sell securities)". Claims for violation of fraudulent transfer statutes, payment of unlawful dividends in violation of Delaware General Corporation Law, and common-law counts for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, promoter liability, unjust enrichment, and alter ego liability related to a corporate spin-off did not come within that definition, because those claims did not pertain to laws regulating securities specifically, but instead pertained to other areas of the law. ♦

Illinois Supreme Court Clarifies Trigger Of Coverage For Malicious Prosecution

by ***Michelle R. Valencic***

On November 21, 2019, the Illinois Supreme Court resolved what had been a split of authority in Illinois as to the appropriate trigger of coverage in the context of malicious prosecution and wrongful incarceration cases. In *Sanders v. Illinois Union Ins. Co.*, 2019 IL 124565 (Ill. 2019), the Court held that occurrence-based insurance coverage was only triggered at the time the claimant was wrongfully charged, not at the time of his later exoneration, or at the time he was re-tried.

As previously reported, Illinois state and federal courts have been grappling with this issue in recent years with conflicting results. *Compare, e.g., Indian Harbor Ins. Co. v. City of Waukegan*, 2015 IL App (2d) 140293 and *St. Paul Fire & Marine Ins. Co. v. The City of Zion*, 2014 IL App (2d) 131312 (coverage triggered at the time of prosecution); with *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 678 F.3d 475 (7th Cir. 2012) and *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124 (7th Cir. 2012) (coverage triggered at the time of exoneration).

The *Sanders* decision now clarifies the law on trigger in Illinois, a state that consistently ranks at or near the top for number of people exonerated. For example, Illinois had the highest number of exonerations in the country in 2018.[1]

[1] See, National Registry of Exonerations: www.law.umich.edu/special/exoneration/Documents/2018_Exonerations_Report.pdf

Facts

Mr. Sanders spent nearly 20 years in prison after being charged with murder in 1994. He was initially convicted in 1995, based upon allegedly fabricated evidence by the Chicago Heights police department. His conviction was overturned in 2011, and he was later re-tried in 2013 and 2014, and was ultimately acquitted. Mr. Sanders filed a civil rights lawsuit against Chicago Heights, asserting claims for malicious prosecution. A consent judgment was eventually entered in his favor for $15 million.

Coverage litigation later ensued between Sanders and certain insurers of Chicago Heights under policies issued between 2001 and 2014. The policies at issue were occurrence-based policies and required the "offense of malicious prosecution" to occur during the policy period. The Illinois Appellate Court found that the "offense" of malicious prosecution occurred in 2014 at the time when all of the elements of the tort of malicious prosecution were satisfied (*i.e.*, including exoneration). The insurers appealed.

Analysis

The Supreme Court sided with the insurers and reversed, interpreting the term "offense" as triggering coverage only in the year when the offensive conduct occurred. Under the Court's ruling, the "personal injury" giving rise to coverage occurred at the time of

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the initiation of the murder case based upon falsified evidence, not at the time Mr. Sanders was re-tried or exonerated.

Learning Points: *Sanders* is one of the few state Supreme Court decisions to address the trigger of coverage in the context of a wrongful conviction scenario. It clarifies that the term "offense" in the context of occurrence-based "personal injury" coverage refers to the time when the wrongful conduct giving rise to a malicious prosecution occurred, not when the tort of malicious prosecution culminates in an acquittal. The ruling clarifies the law in Illinois in this area, given previously conflicting state and federal cases. It is also in line with what appears to be the majority of state and federal courts around the country which have addressed the issue. That said, most decisions on trigger appropriately turn on the specific policy terms at issue and the facts of a given case. There are many states which have not addressed the trigger of coverage in the context of a malicious prosecution, or which haven't addressed it at the state Supreme Court level. Fortunately for insurers, *Sanders* should result in more situations where earlier policy periods respond to long-term malicious prosecution matters, and in many instances, those earlier policy periods mean lower overall policy limits available to respond as compared to more recent years.

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Connecticut Supreme Court Affirms Continuous Trigger And Unavailability Exception, Reads Pollution Exclusion Narrowly But Occupational Disease Exclusion Broadly

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

In *R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 333 Conn. 343 (2019), the Supreme Court of Connecticut held that a continuous trigger of coverage would apply to long-tail bodily injury claims, and applied the "unavailability exception" to the time-on-risk rule for periods during which coverage for asbestos claims was commercially-unavailable. The Court further held that the pollution exclusions at issue applied only to traditional environmental pollution. The Court also held that occupational disease exclusions contained in the policies were not limited only to occupational diseases allegedly contracted by the insured's employees.

Facts

From 1948 to 2008 R.T. Vanderbilt Company, Inc. ("Vanderbilt") produced industrial talc. Thousands of claimants filed suit against Vanderbilt alleging that talc and silica mined and sold by Vanderbilt contained asbestos or otherwise caused asbestos-related disease.

Vanderbilt sued its primary-level insurers, which had issued Vanderbilt policies between 1948 and 2008. Vanderbilt alleged that these primary carriers had breached their defense and indemnity obligations, and sought a declaratory judgment. Certain of the primary carriers then filed a third-party complaint against Vanderbilt's umbrella and excess carriers. Vanderbilt then brought direct claims against the umbrella and excess carriers.

Policy Language

The policies typically provided coverage for defense and indemnity costs for bodily injury caused by an "occurrence." For example, one policy provided that "[The insurer] will pay on behalf of the [i]nsured the [u]ltimate [n]et [l]oss, in excess of the applicable underlying or retained limit, which the [i]nsured shall become legally obligated to pay as damages because of . . . [p]ersonal [i]njury . . . to which this policy applies, caused by an [o]ccurrence." The policy further defined an occurrence as "an accident, a happening, an event, or a continuous or repeated exposure to conditions which results during the policy period in [p]ersonal [i]njury . . . ."

Many of the policies at issue also contained the following pollution exclusion:

> Exclusion (Contamination or Pollution)
>
> It is agreed that the insurance does not apply to personal injury or property damage arising out of the discharge, dispersal,

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> release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Two versions of the occupational disease exclusions were also at issue. The first version provided that "this policy shall not apply . . . to personal injury (fatal or non-fatal) by occupational disease." The second version stated that "This policy does not apply to any liability arising out of: Occupational Disease." None of the policies defined the term "occupational disease".

The Decision Below

The trial court applied pro rata, time-on-the-risk allocation, which assumes that continuous injuries take place from the time of initial exposure until disease manifestation. Defense and indemnity costs are allocated across all of the policies on the risk during that period. The trial court further held that Vanderbilt would be responsible for a pro rata share of costs for any period during which it was uninsured or underinsured, including periods covered by policies that were lost, destroyed, or issued by insolvent insurers. The trial court also applied an "unavailability exception" to the time on risk rule, pursuant to which there was no proration to Vanderbilt for periods during which insurance was commercially unavailable.

The trial court also concluded that the pollution exclusions contained in certain excess and umbrella policies were ambiguous as applied to the asbestos related claims and that the exclusions therefore did not preclude coverage. However, the occupational disease exclusions were unambiguous and barred coverage only for claims brought by Vanderbilt's own employees.

Vanderbilt and several of its insurers appealed.

Analysis

The Decision on Appeal

1. Trigger and Allocation

The Connecticut Appellate Court concluded that the efficient administration of justice required that the applicable trigger theory be determined as a matter of law, rather than as a question of medical fact, and adopted the continuous trigger theory. According to the plain language of the policies, each insurer was liable for costs resulting from injuries sustained while a particular policy is in effect. Accordingly, every policy in effect from initial asbestos exposure, through the latency period, and up to manifestation was on the risk for defense and liability costs. The continuous trigger theory was most compatible with the prevailing understanding of the nature and etiology of asbestosis and asbestos related cancers, i.e., that asbestos begins to injure the body within hours or days of initial exposure and progressively aggravates asbestosis and precancerous conditions until manifestation of disease. Further, the continuous trigger theory was the best way to address unknown factors regarding the progression of asbestos-related diseases, in the context of thousands of claimants alleging various asbestos-related diseases, each with its own etiology and course of progression. Finally, the continuous trigger theory was the fairest and most efficient way to distribute indemnity and defense costs among the various policies in effect over the course of a long latency disease claim.

2. Unavailability of Insurance

The Appellate Court further held that the trial court properly applied the "unavailability exception" to the time on risk rule, and declined to prorate indemnity and defense costs to Vanderbilt for periods during which insurance was commercially unavailable. The court reasoned that holding insurers collectively responsible for the full injury up to their policy limits maximizes resources for responding to asbestos-related claims. Additionally, making insurers responsible when unforeseen risks arise incentivizes insurers and policyholders to identify and investigate previously unknown risks. Further, an unavailability of insurance rule best comported with the reasonable expectations of the insured. Finally, insurers have a better ability to manage long-tail risk by continuing to accept, pool, and spread the risk, pricing coverage accordingly.

3. Allocation Formula

The Appellate Court held that periods during which no insurer issued coverage and which came within the "unavailability exception" should not be included in the total allocation block. Accordingly, the total allocation period would be from January 1, 1948, when Vanderbilt began producing talc, until its occurrence-based policies

expired on March 3, 1986. Vanderbilt was responsible for the period of self-insurance from 1948 through 1955, when it was unable to determine its coverage. Vanderbilt also was responsible for any additional periods of self-insurance or underinsurance during the allocation block, including periods of insurer insolvency. While 1948 to 1986 was the maximum period of injury for allocation purposes, the actual allocation block and the parties' shares would be determined on a case-by-case basis. Where claims triggered both occurrence and claims-made policies, the allocation block would be expanded to include the claims-made policy period during which the claim was brought.

4. Pollution Clauses

The Appellate Court concluded that the pollution exclusions barred coverage only for traditional environmental pollution, such as when disposal of asbestos waste materials cause asbestos fibers to migrate onto neighboring properties or into the natural environment.

5. Occupational Disease Exclusions

The parties stipulated that none of the claimants in the underlying actions were Vanderbilt employees. Accordingly, application of the occupational disease exclusions to nonemployees of Vanderbilt would likely bar coverage for some, but not all of the underlying complaints.

The Appellate Court held that the occupational disease exclusions did not preclude coverage only for claims brought by Vanderbilt's employees. Rather, the policy language reflected the insurance industry's concern about litigation by workers who, having developed long latency diseases after exposure to asbestos and other alleged industrial toxins, sought to circumvent the workers' compensation system and sue manufacturers of those products. Accordingly, the exclusion precluded coverage for claims alleging bodily injury arising from exposure in any occupational setting.

Once again, Vanderbilt and its insurers appealed.

The Connecticut Supreme Court's Decision

The Connecticut Supreme Court adopted the Appellate Court's holdings that a continuous trigger applies to asbestos-related disease claims as a matter of law. The Supreme Court further adopted the Appellate Court's ruling regarding the "unavailability of insurance" exception to the "time on the risk" rule, as well as the Appellate Court's holding that the pollution exclusions at issue applied only to claims arising from "traditional environmental pollution," rather than to asbestos exposure in indoor working environments.

The Supreme Court also considered Vanderbilt's appeal of the Appellate Court's holding that the occupational disease exclusions applied to non-Vanderbilt employees. The Court noted the lack of any express limitation of the definition of occupational disease to the worker's compensation context in commonly-used dictionary definitions. It was therefore significant that the occupational disease exclusions did not contain language expressly limiting their application to Vanderbilt's employees. In contrast, the employer's liability and workers' compensation exclusions in the policies expressly contained such limiting language. This indicated that when the policy drafters wanted to limit the application of an exclusion to a certain group of individuals, they did so, rendering the lack of any such express limitation in the occupational disease exclusions even more unambiguous.

Learning Points: Under Connecticut law, a continuous trigger of coverage applies to long-tail bodily injury claims, which assumes that continuous injuries take place from the time of initial exposure until disease manifestation. Defense and indemnity costs are then allocated across all of the policies on the risk during that period. Connecticut law also applies the "unavailability exception" to time-on-risk allocation, under which periods when coverage for asbestos claims was commercially unavailable are not apportioned to the insured. Pollution exclusions such as the ones at issue apply only to traditional environmental pollution, rather than asbestos exposure in indoor working environments. Finally, the occupational disease exclusions contained in the policies broadly preclude coverage for occupational disease, and are not limited to claims brought by employees of the insured. ♦

APPRAISAL

APPRAISAL DEEMED WAIVED AFTER LITIGATING FOR EIGHT MONTHS

Tamiami Condo. Warehouse Plaza Ass'n v. Markel Am. Ins. Co., 2019 U.S. Dist. LEXIS 200255 (S.D. Fla.)

Plaintiff sued insurer for breach of homeowner's policy after insurer determined hurricane damages fell below applicable deductible. Eight months after filing suit, plaintiff sought appraisal. ***Held:*** Plaintiff waived appraisal where plaintiff propounded interrogatories, request for production, and request for admissions; responded to request for production; participated in depositions; filed motions to remand; and did not issue pre-suit appraisal demand.

INSURED'S PUBLIC ADJUSTER CANNOT SERVE AS DISINTERESTED APPRAISER

State Farm Fla. Ins. Co. v. Valenti, 2019 Fla. App. LEXIS 18432 (Fla. App.)

Plaintiff assigned to public adjuster twenty percent of any recovery from plaintiff's insurer for home water leak. Insurer demanded appraisal pursuant to policy appraisal clause, which provided that both parties "will select a qualified, disinterested appraisal." Insurer rejected public adjuster's attempt to name himself as plaintiff's appraiser. ***Held:*** Public adjuster could not serve as plaintiff's disinterested appraiser where adjuster was entitled to a percentage of any recovery, inspected property and submitted claim for plaintiff, and sent letter appointing himself appraiser.

ARBITRATION

ARBITRATOR DID NOT EXCEED AUTHORITY BY FAILING TO APPLY RULES ARBITRATION AGREEMENT DID NOT REFERENCE

Asselin and Vieceli Partnership, LLC v. Steven T. Washburn, AC 41439 (Conn. App.)

Plaintiff sought damages from condo association and property manager for negligence related to defendants' construction of a bulkhead at a marina on plaintiff's property. Arbitration occurred pursuant to an arbitration clause in the construction contract and the arbitrator found defendants negligent and awarded damages. The trial court denied the defendants' demand for a trial *de novo* and confirmed the arbitration award over their objection that the arbitrator should have applied the construction industry rules of the American Arbitration Association. ***Held:*** The arbitrator did not exceed her authority when she did not apply the construction industry rules. The arbitration agreement lacked any reference to those rules.

BAD FAITH

CONSENT JUDGMENT INSUFFICIENT FOR BAD FAITH ACTION

Cawthorn v. Auto-Owners Ins. Co., 2019 U.S. App. LEXIS 32037 (11th Cir.)

Plaintiff passenger was injured in single vehicle accident and sued driver. Parties settled with court entering consent judgment for amount exceeding applicable auto policy limits. Driver assigned right to sue auto insurer for bad faith to plaintiff. Insurer was not party to the settlement agreement. ***Held:*** A necessary element of an insurer bad faith cause of action is an excess judgment, a "final decision—a verdict—reached by a factfinder" in an amount exceeding policy limits, or the functional equivalent thereof. A consent agreement to which the insurer was not a party does not qualify.

CIVIL PROCEDURE

CHOICE OF LAW FAVORS LAW OF STATE WITH LEGITIMATE INTEREST

Chen v. Los Angeles Truck Centers, LLC, 42 Cal.App.5th 488 (Cal. App.)

Plaintiff Chinese nationals brought tort action in California following tour bus accident in Arizona. The defendants included a California tour bus operator and driver, the Indiana manufacturer of the bus and a California distributor. Defendants successfully argued below that Indiana law applied to the plaintiffs' claims. ***Held:*** Under the governmental interest test, while there was no actual conflict of interest between California and Indiana law, the Court found Indiana had a "real" interest in application of its law because its products liability law was business-friendly, making it an attractive forum to the manufacturer and those with whom it does business. The Court also found that the primary issue in the case was whether the tour bus was defective to warrant imposing liability on the defendant. As such, Indiana had a legitimate interest in providing a business-friendly environment and Indiana law correctly applied.

CIVIL RIGHTS

PRISON DOCTOR'S SURGERY DENIAL NOT CRUEL AND UNUSUAL PUNISHMENT

Stewart v. Lewis, 2019 U.S. App. LEXIS 31399 (11th Cir.)

Defendant, a Georgia Department of Corrections medical director, denied plaintiff's request for toe surgery and instead recommended conservative management. Plaintiff sued, arguing denial of surgery constituted cruel and unusual punishment in violation of the Eighth Amendment. ***Held:*** Whether correctional facility doctors should have employed additional diagnostic techniques or forms of treatment is a classic example of a matter for medical judgment and not an appropriate basis for Eighth Amendment liability.

DAMAGES

ADDITUR MOTION NOT PERMITTED AS TO HEARING ON DAMAGES

Kathleen Telman v. Gary W. Hoyt, et. al., AC 41599 (Conn. App.)

Plaintiff sought damages in connection with false representations made during defendants' sale of real property to plaintiff. Defendants were defaulted and plaintiff was awarded damages including $4,000 in attorney's fees. Plaintiff filed a motion for an additur as to attorney's fees, which was denied. ***Held:*** Trial court did not abuse its discretion in denying plaintiff's additur motion. Connecticut rules of practice provide for a motion for an additur in connection with a jury trial, not with respect to a hearing on damages.

E&O INSURANCE

BREACH OF CONTRACT EXCLUSION HELD UNENFORCEABLE

Crum & Forster Specialty Ins. Co. v. DVO, Inc., 939 F.3d 852 (7th Cir.)

Engineering firm was sued for breach of contract for failing to properly design an anaerobic digester. Engineer's liability insurance policy included E&O among other types of coverage. The insurer refused to defend the engineer, who was found liable at trial. Insurer filed declaratory judgment action seeking a declaration of no coverage.

The parties agreed that the conduct giving rise to the underlying breach of contract claim fell within the professional malpractice coverage of the E&O policy and that the policy's breach of contract exclusion for any claim "based upon or arising out of breach of contract" eliminated coverage for said breach of contract claim. The sole issue was whether that breach of contract exclusion rendered the E&O coverage illusory and was therefore unenforceable.

Applying Wisconsin insurance law, the Seventh Circuit found the exclusion's use of the "arising out of" language rendered the exclusion so broad as to cover claims by third-parties and thereby eliminate all E&O coverage. The Court reasoned that any work by an engineer will be pursuant to a contract and therefore, given the broad effect of the "arising out of" language, any claim against the engineer would be barred by the exclusion and coverage would be illusory.

FIRST-PARTY PROPERTY

COVERAGE FOR MATCHING REQUIRED ONLY AFTER INSURED INCURS COSTS ATTRIBUTABLE TO MATCHING

Vazquez v. Citizens Prop. Ins. Corp., 2019 Fla. App. LEXIS 16008 (Fla. App.)

Water intrusion damaged ceramic tiles and a kitchen cabinet in plaintiff's home. Plaintiff sued insurer based upon a repair estimate, the majority of which included prospective matching costs. Following judgment in favor of insurer, plaintiff appealed a trial court ruling excluding evidence of prospective damages attributable to matching. ***Held:*** The insurer was not liable to pay for damages attributable to matching until "the repairs are made" per Florida's matching statute and the policy's loss settlement provision. As such, the court had properly excluded the prospective damages evidence.

IMMUNITY

LEGAL MALPRACTICE IMMUNITY GRANTED TO UNIONS EXTENDS TO THEIR ATTORNEYS

Zander v. Carlson, 2019 Ill. App. LEXIS 181868 (Ill. App.)

Terminated police officer sued his union-appointed attorney after losing arbitration that attorney had recommended. Circuit court dismissed officer's complaint, holding that his attorney was immune from suit. A union may be held liable to a member for breaching its duty of fair representation only where it commits intentional misconduct. In a

legal malpractice action, by contrast, an attorney may liable for merely negligent conduct. Allowing union members to file malpractice suits against union attorneys for actions taken in connection with the collective bargaining process would hold union agents or employees to a far higher standard than the union itself. ***Held:*** Affirmed. Union agent is immune from liability for actions taken on union's behalf in collective bargaining process.

INTERVENTION

INSURER'S CONTINGENT INTEREST INSUFFICIENT TO ALLOW INTERVENTION

Prime Ins. Co. v. Wright, 133 N.E.3d 749 (Ind. App.)

After insured defaulted in personal injury case, trial court denied insurer's request to intervene to vacate judgment. ***Held:*** Insurer's contingent interest did not support intervention. Insurer obtained federal judgment that it lacked duty to defend. Allowing insurer to litigate the merits after avoiding a duty to defend would give it an unwarranted chance to avoid its financial obligations.

LIABILITY INSURANCE COVERAGE

DRAMSHOP EXCLUSION APPLIED

AIX Specialty Ins. Co. v. Members Only Mgmt., LLC, 2019 U.S. App. LEXIS 36656 (11th Cir.)

Nightclub patron drank too much and crashed her vehicle, resulting in passenger death. Passenger's estate sued club per Florida Dram Shop Act. Club tendered defense to insurer who sought declaration of no coverage under the policy's Absolute Liquor Liability Exclusion. District court granted insurer summary judgment, holding exclusion unambiguously barred coverage. Estate appealed. ***Held:*** Exclusion provides no coverage for a claim seeking recovery for bodily injury under "[a]ny statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages." The sole count against the club is under the Dram Shop Act, a statute relating to the "distribution or use of alcoholic beverages". The claim, therefore, falls outside coverage and there is no duty to defend.

NO POTENTIAL FOR INDEMNITY MEANS NO DUTY TO DEFEND

Target Corp. v. Golden State Ins. Co. Ltd., 41 Cal.App.5th 13 (Cal App.)

Customer sued retailer for injuries from purchased pharmaceutical product. Retailer sought defense from supplier and its insurer based on an indemnification and defense clause in the supplier's contract with the retailer and an additional insured endorsement. The indemnification clause did not indemnify for claims arising out of or due to the negligence or willful misconduct or omission of the retailer. ***Held:*** While the terms "arising out of" or "arising from" carry a broad interpretation in California, the customer claimed her injury arose from the retailer's failure to warn, not from a defective product. In other words, the customer's claim arose solely out of retailer's own alleged negligence. As such, there was no potential duty to indemnify and, therefore, no duty to defend.

FAILURE TO PROVIDE TIMELY NOTICE UNDER CLAIMS-MADE POLICY DOOMS SUIT

ISCO Indus., Inc. v. Great Am. Ins. Co., 2019 Ohio App. LEXIS 4949 (Ohio App.)

Insured notified insurer of lawsuit 17 months after claims-made policy expired, but within the renewal coverage. ***Held:*** Notice was insufficient. The unambiguous policy language required notice to insurer as soon as practicable after insured's receiving notice, but no later than 90 days after the end of the policy period. Given the language, policy renewal did not create an expectation of continuous coverage. For like reason, the notice-prejudice rule was inapplicable. The policy's savings clause could not save the claim without rendering the notice provision meaningless.

LIMITATIONS OF ACTIONS

DISCOVERY OF VOID JUDGMENT TRIGGERS LIMITATIONS PERIOD

Sharon v. Porter, 41 Cal.App.5th 1 (Cal.App.)

Plaintiff received default judgment against a defendant who informed the plaintiff that the judgment was void as it was greater than the amount specifically demanded in complaint. The client then sued the lawyer for legal malpractice but initiated the lawsuit over one year after the notice that the judgment was void. At trial, the lawyer admitted malpractice, but challenged the legal malpractice action as barred by the statute of limitations. The trial court found the statute of limitations was tolled until the client began to incur fees opposing the judgment debtor's attempt

to vacate the underlying judgment. ***Held:*** Reversed. Statute of limitations was not tolled, but rather, began to run when the client was put on notice that the judgment was void.

REVIEW OF PATIENT RECORDS CONSTITUTES GIVING HEALTHCARE FOR LIMITATIONS PURPOSES

Strickholm v. Anonymous Nurse Practitioner, 2019 Ind. App. LEXIS 506 (Ind. App.)

Nurse practitioner electronically reviewed LPN's report on patient's blood pressure without recommending further action. ***Held:*** Although practitioner treated patient more than two years before suit was filed, her review of records within two years of the suit made it timely. By reviewing records, practitioner had a reasonable opportunity to render treatment. A face-to-face meeting with the patient is not needed to establish provision of healthcare.

MEDICAL MALPRACTICE

REQUIRED PRE-SUIT MEDICAL MALPRACTICE INVESTIGATION REQUIRES FINDING OF INJURY DUE TO ALLEGED MALPRACTICE

Howell v. Balchunas, 2019 Fla. App. LEXIS 18638 (Fla. App.)

Plaintiffs submitted a Notice of Intent to Initiate Litigation supported by an expert radiologist affirmation stating that defendant doctor interpreted a pulmonary CT angiogram incorrectly, below the standard of care. The expert further affirmed that this misreading could have led the referring physician to miss the correct diagnosis, which could have led to incorrect or no treatment and could have led to harm to plaintiff. ***Held:*** An injury that could have been caused by a medical professional's action does not provide corroboration of reasonable grounds to believe that the claimed negligence resulted in injury.

MUNICIPAL LAW

NO MINISTERIAL DUTY TO OBEY EVERY VEHICLE STATUTE WHILE ENGAGED IN DISCRETIONARY POLICE ACTIVITY

Daley v. Zachary Kashmanian, et. al., AC 41393 (Conn. App.)

Plaintiff sought damages from police detective and city related to his ejection from his motorcycle after it was struck by unmarked police vehicle, which was not equipped with lights or a siren, while the defendant police detective was surveilling plaintiff and traveling above the speed limit in the wrong lane of traffic. The court set aside a jury negligence verdict in favor of plaintiff. ***Held:*** Affirmed as to negligence issue. The police detective was engaged in the discretionary police activity of surveilling plaintiff and thus did not have a ministerial duty to follow every motor vehicle statute.

CITY IMMUNE FROM LIABILITY ARISING OUT OF HOT-PURSUIT ACCIDENT

McConnell v. Dudley, 2019 Ohio LEXIS 2389 (Ohio)

While chasing suspected car thief, officer collided with another car. ***Held:*** Exception in immunity statute for vehicle accident within scope of employment is inapplicable to claims of negligent hiring, training, and supervision. The exception is limited to the driver's "operation" of a vehicle and does not include a city's hiring, training, or supervising an employee.

NEGLIGENCE

MERE KNOWLEDGE OF POSSIBLE CRIMINAL ACTS INSUFFICIENT TO IMPOSE DUTY TO HIRE SECURITY

Williams v. Fremont Corners, Inc., 37 Cal. App.5th 654 (Cal. App.)

Plaintiff sued shopping center after he was assaulted in parking lot. Plaintiff claimed shopping center owed duty to keep premises safe and free from criminal acts of third parties. Plaintiff claimed shopping center had duty to provide security, monitor parking lot and provide proper lighting. Shopping center moved for summary judgment arguing there was no duty because the assault was not reasonably foreseeable. ***Held:*** While the evidence demonstrated the shopping center was generally aware of the possibility of fights occurring at or near the bar, that general knowledge of a "possibility" was not enough to create a duty under California law. The court further found the shopping center was unaware of prior similar incidences of criminal conduct and that plaintiff failed to show the shopping center had a legal duty to employ measures to uncover incidents of criminal acts at the property for the purpose of preventing future harm.

NO DUTY TO WARN PLAINTIFF OF OBVIOUS DANGERS OF HIS ACTIONS

Daniel Klein v. Quinnipiac Univ., AC 41964 (Conn. App.)

Plaintiff sought damages from defendant private university for injuries sustained when he hit a speed bump on defendant's campus with his bike. Plaintiff alleged that the speed bump was a dangerous, defective and unsafe condition. The trial court declined to instruct the jury on the definition of, and the duty owed to, a licensee. The jury returned a general verdict in favor the defendant. ***Held:*** Affirmed. There was no evidence that the defendant explicitly or implicitly expressed a desire that plaintiff enter its campus or a willingness that he do so sufficient to send the licensee question to the jury. Defendant was not required to warn plaintiff of the obvious dangers of his action.

NO DUTY OWED BY SCHOOL TO GANG-RAPED TEEN

Weikart v. Whitko Cmty. Sch. Corp., 2019 Ind. App. LEXIS 448 (Ind. App.)

Gang-raped teen sued school after a resource officer failed to report assaults to the sheriff. ***Held:*** No private cause of action exists for failing to report child abuse or neglect. A special duty arises only when a citizen collaborates with police in a way making criminal retaliation reasonably likely. Although the teen provided information about drug activity, the officer did not ask her to be an informant.

OUT-OF-POSSESSION LANDOWNERS POSSIBLY LIABLE FOR SLIP AND FALL

Xiang Fu He v. Troon Mgmt., Inc., 34 N.Y.3d 167 (N.Y.)

Plaintiff fell on ice that had accumulated due to defendants' alleged negligent maintenance of abutting sidewalk and sued. Trial court rejected defendants' arguments that out-of-possession landowners are not liable for personal injuries based on negligent sidewalk maintenance. The appellate court reversed. ***Held:*** Court of Appeals reversed the Appellate Division, stating that Administrative Code section 7-210 abrogated the common law, imposed a nondelegable duty of care, and shifted civil liability from the city to out-of-possession owners.

DEFENSE SUMMARY JUDGMENT PROPER WHERE VICTIM COULD NOT SHOW ASSAILANT WAS INTRUDER

Laniox v. City of New York, 34 N.Y.3d 994 (N.Y.)

City sought summary judgment based on lack of triable issue of fact as to whether plaintiff's assailant was an intruder. Plaintiff's deposition testimony revealed she was not a resident and did not know any other tenants in the building aside from her two patients. Plaintiff also testified she did not see her assailant's face because it was covered by hood of sweatshirt and she did not know if assailant was tenant or guest. ***Held:*** This evidence was sufficient to shift burden to plaintiff to provide evidence assailant was intruder, which she failed to do.

GROCER NOT LIABLE FOR IN-STORE MOTORIZED CART ACCIDENT

Rieger v. Giant Eagle, Inc., 2019 Ohio LEXIS 1831 (Ohio)

Shopper was hit by motorized shopping cart driven by untrained patron with dementia. ***Held:*** Shopper's negligence and negligent entrustment claims failed for failure to prove causation. Grocer's knowledge of prior incidents did not provide the evidence. There was no evidence that training would have prevented the accident. Patron's dementia was not a factor. She had regularly driven carts without incident.

FAILURE TO CALL MEDICAL EXPERT DOOMS CLAIM AGAINST NAIL SALON

Tate v. Nails, 2019 Ohio App. LEXIS 4148 (Ohio App.)

Customer complained of finger and nail infection following manicure. ***Held:*** Claim failed for lack of expert testimony. The existence and cause of infections are not within common knowledge. This was particularly true given that the customer did not allege the infection mechanism, *e.g.*, improper sanitation or disinfecting technique.

PERSONAL JURISDICTION

PLAINTIFF MUST USE DILIGENT, PERSISTENT EFFORTS TO DETERMINE ACTUAL ADDRESS OF DEFENDANT FOR SERVICE OF PROCESS

Eric Stevens v. Edward Khalily, et. al., AC 41801 (Conn. App.)

Plaintiff sought damages for intentional infliction of emotional distress. Defendants filed motion to dismiss due to improper service of process as a result of plaintiff's failure to serve them at their last known addresses, and neither of whom was a resident of Connecticut. The trial court granted the motion. Plaintiff appealed. ***Held:*** Affirmed. Plaintiff failed to sustain his burden that he properly served defendants at their last known addresses and that he made a reasonably diligent search to find out their last known addresses, within a reasonable time, before attempting service.

STATES RETAIN SOVEREIGN IMMUNITY AS TO PRIVATE ACTIONS BROUGHT IN OTHER STATES' COURTS

Daniel Reale, et. al. v. State of Rhode Island, et. al., AC 42044 (Conn. App.)

Plaintiff Connecticut resident brought spoliation of evidence action against certain Rhode Island state and town defendants in connection with certain petitions commenced against him in Rhode Island. The trial court granted the defendants' motion to dismiss for lack of personal jurisdiction. ***Held:*** Affirmed. The claims against the state defendants were barred by the doctrine of sovereign immunity and the town defendant was not considered a foreign corporation within the meaning of the applicable long-arm statute.

RESPONDEAT SUPERIOR

PRISON GUARD ACTED OUTSIDE SCOPE IN BRUTAL BEATDOWN

Rivera v. State of New York, 2019 NY Slip Op 08521 (N.Y.)

Inmate sued state under the doctrine of respondeat superior for injuries sustained during a brutal and unprovoked attack initiated by a correction officer but state was awarded summary judgment. ***Held:*** The gratuitous and utterly unauthorized use of force was so egregious as to constitute a significant departure from the normal methods of performance of the duties of a correction officer as a matter of law. This was a malicious attack completely divorced from the employer's interests.

TRIAL

NON-DISCRIMINATORY JUSTIFICATION FOR CHALLENGING JURORS REQUIRED ONCE COURT FINDS PRIMA FACIE SHOWING OF RACIAL BIAS

Unzueta v. Akopyan, 42 Cal.App.5th 199 (Cal. App.)

In medical malpractice trial, defense attorney exercised peremptory challenges to six prospective Hispanic jurors out of seven total challenges. Court brought Batson/Wheeler motion sua sponte and found prima facie showing of racial bias as to all six prospective jurors, but the motion was denied without requiring race-neutral justifications for each of the six prospective jurors. After defense verdict, plaintiff appealed claiming the Court erred by not requiring the defense attorney to offer nondiscriminatory reasons for his jury challenges. ***Held:*** The Court conditionally reversed and remanded to require the trial court to obtain justification from the defense attorney for challenging each of the six Hispanic prospective jurors and to determine whether the plaintiff proved purposeful racial discrimination.

JUROR MISCONDUCT, DECEIT, DESTRUCTION WARRANTS NEW TRIAL

People v. Neulander, 34 N.Y.3d 110 (N.Y.)

Trial court denied request of criminal defendant, convicted on charges of murdering his wife, for new trial based on juror misconduct. ***Held:*** Trial court abused discretion in declining to set aside verdict. Cumulative effect of juror's misconduct, deceit, and destruction of evidence—sending and receiving hundreds of text messages about case despite repeated instructions not to discuss case; accessing local media websites covering trial extensively; hiding misconduct by lying under oath to court, providing false affidavit, tendering doctored text messages in support of affidavit, selectively deleting text messages, and deleting irretrievable internet browsing history—may have affected substantial right to impartial jury.

TORTS

HARD CHECK IN YOUTH HOCKEY NOT ACTIONABLE

Borella v. Renfro, 2019 Mass. App. LEXIS 165 (Mass. App.)

Player sued opposing player and coaches, referees, and rink owners following hard-check injury. ***Held in a split decision:*** To be actionable, an opponent's misconduct must be extreme and outside range of ordinary activity in a contact sport. Penalties expected under normal play do not alter the analysis. There was no evidence of referees missing earlier penalties causally related to later injury. To be liable, coaches must recklessly use a player known for violent tendencies. Rink owners neither scheduled teams with lopsided skill levels nor failed to adopt appropriate rules of play. The dissent argued that majority ignored the prevailing standard and so will discourage participation for fear of injuries.

FICTIONAL PORTRAYAL OF DOCTOR FAILS TO SUPPORT DEFAMATION CLAIM

Dudee v. Philpot, 2019 Ohio App. LEXIS 4019 (Ohio App.)

Doctor sued retired judge for defamation and false light invasion of privacy following publication of novel about character supposedly representing him. ***Held:*** Issues about doctor's marital infidelity were previously litigated, barring further challenges. Some allegedly defamatory statements were substantially true. Others were insufficiently pled, non-verifiable, or mere hyperbole. Statements about doctor's relationship with his children were not defamatory per se, and doctor failed to allege special damages. To support his false-light claims, doctor needed proof of special damages, which were absent.

FORKLIFT INJURY TO EMPLOYEE NOT AN INTENTIONAL TORT

Turner v. Dimex, LLC, 2019 Ohio App. LEXIS 4348 (Ohio App.)

Employee was crushed by forklift with inoperable back-up alarm. ***Held***: Alarm did not qualify as an "equipment safety guard" under statute allowing intentional tort actions against an employer for removal of guards. Removed guard must be designed to protect an operator and others from danger. Under the statute, employer must intend to injure by deliberately removing guard. Mere knowledge of an uncorrected hazardous condition is insufficient.

UM/UIM INSURANCE

MOBILE GYM LOCATED INSIDE TRUCK NOT AN UNINSURED AUTO

Deutsch v. Geico Gen. Ins. Co., 2019 Fla. App. LEXIS 16455 (Fla. App.)

Plaintiff was injured while working out in the back of a truck operated as a mobile gym. Plaintiff sued her insurer, contending the mobile gym was an uninsured/underinsured auto under her policy. The central inquiry was whether the truck was "located for use as a . . . premises," defined as a "building, along with its grounds." ***Held:*** Plaintiff worked out in the truck only when it was stationary, parked, and connected to a power source, never when it was being driven. As such, when the negligence occurred the stationary truck was being used as a building or "premises" and was not an uninsured auto under the policy's terms.

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