CM REPORT

of Recent Decisions

2020 • Vol. 3

Insurers Keep Successfully Defending Covid-19 Business Interruption Lawsuits At Trial Court Level

Clausen Miller Attorneys Named To Best Lawyers In America And Ones To Watch Lists For 2021

Federal Trial Court In Florida Enforces AOB Exclusion In Surplus Lines Policy

Clausen Miller P.C.

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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Insurers Keep Successfully Defending Covid-19 Business Interruption Lawsuits At The Trial Court Level, But The Real Battles Will Occur In The Reviewing Courts

by ***Melinda S. Kollross***

Introduction

We are currently monitoring Covid-19 decisions nationwide. Except for a few outlier decisions, the trial court rulings are predominantly going one way—towards dismissal of insured business interruption lawsuits because the insureds either cannot show direct physical loss or damage from the virus or cannot escape the consequences of virus exclusions in their polices. The following recent federal court decisions from Florida, California and Pennsylvania illustrate the approach being taken by federal courts across the nation. Additional cases are discussed in the feature article at page 16 of this CM Report.

Analysis

Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am., No. 20-401 (M.D. Fla. 9/2/20)

The insured dental practice suffered a loss of revenue due to a Florida closure order limiting the dental services that could be performed, and sued the insurer to recover for the monetary losses the business sustained because of the Covid-19 pandemic.

The policy provided for business income loss sustained by a suspension caused by a direct physical loss. It also provided for business income coverage when a civil authority order prohibits access to the insured premises because of damage to other property within 1 mile of the insured premises. The policy contained an exclusion for loss or damage caused "'directly or indirectly'" by "'[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.'"

The virus exclusion was deemed critical by the district court in ruling on the insurer's motion to dismiss. All loss or damage caused directly or indirectly by any virus, bacterium or other microorganism that induces or can induce physical distress, illness or disease was excluded from coverage. The district court found this exclusion was dispositive, holding that because all of the insured's damages resulted from Covid-19, which is clearly a virus, the virus exclusion barred coverage of all of the insured's purported damages.

Plan Check Downtown III v. AmGuard Ins. Co., No. 20-6954 (C.D. Calif. 9/16/20)

The insured operated restaurants in two different California locations and suffered loss of business income due to the shelter in place Covid-19 orders that required it to end on-premises dining.

The policy insured against loss of business income, but only where the loss of business income was due to the suspension of business operations due to any physical loss of or damage to the covered properties.

The insured sued its insurer for refusing to pay its claim, contending that while it may not have suffered any physical damage to property, it did suffer a physical loss of property, so that its

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loss fell within the ambit of the policy coverage. The insured took the position that "physical loss of" and "damage to" had to be read so that these terms had different meanings. Accordingly, the insured maintained that its inability to offer on-premise dining at its restaurants would be a physical loss of property covered by the policy, even though there was no physical alteration.

The district court rejected this interpretation and dismissed the insured's lawsuit holding that the insured's interpretation would be a sweeping expansion of insurance coverage contrary to the policy terms and existing law. The court pointed out that the "weight of California law" required some tangible alteration to property regardless whether the trigger language uses loss or damage. And, the court concluded that the insured's interpretation was unreasonable because it would represent a sweeping expansion of insurance coverage without any manageable bounds. According to the court, the insured's interpretation would mean that any regulation limiting a business would trigger coverage under the policy. Such a "major departure" from established California law was unwarranted.

Wilson v. Hartford Casualty Co., No. 20-3384 (E.D. Pa. 9-30-20)

Plaintiff-insured, a solo practitioner law office, had to shut down her practice in March because of government closure orders related to COVID-19. She filed an insurance claim on April 12, and Hartford denied coverage the next day. Wilson then sued Hartford for breach of contract, arguing that the policy provides civil authority coverage for business interruptions and that a $50,000 limited fungus and virus coverage was triggered.

The subject policy contains a civil authority provision providing for payment of lost business income due to suspension of the insured's operation caused by direct physical loss of or physical damage to property at the premises. It also contains an exclusion for damage caused by fungi, wet rot, dry rot, bacteria, and virus. Limited virus coverage may be triggered when a virus is caused by a "special cause of loss" such as an explosion, civil riot, water damage or windstorm.

The district court ruled for Hartford, finding that the Third Circuit and Pennsylvania courts have enforced similar virus exclusions as unambiguously barring coverage for losses such as those sustained by the insured in this case. The court explained that the virus exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss" and "whether or not the loss event results in widespread damage or affects a substantial area." The only exceptions to the virus exclusion require that the virus be caused either by fire and lightning or by a special cause covered under the limited virus coverage. Plaintiff's alleged COVID-19 related losses do not fall within these exceptions. The court also rejected the insured's argument that the governmental closure orders were a separate cause of its lost business income which are not excluded by the virus exclusion, because the virus exclusion is part of the same property coverage that includes the civil authority provisions.

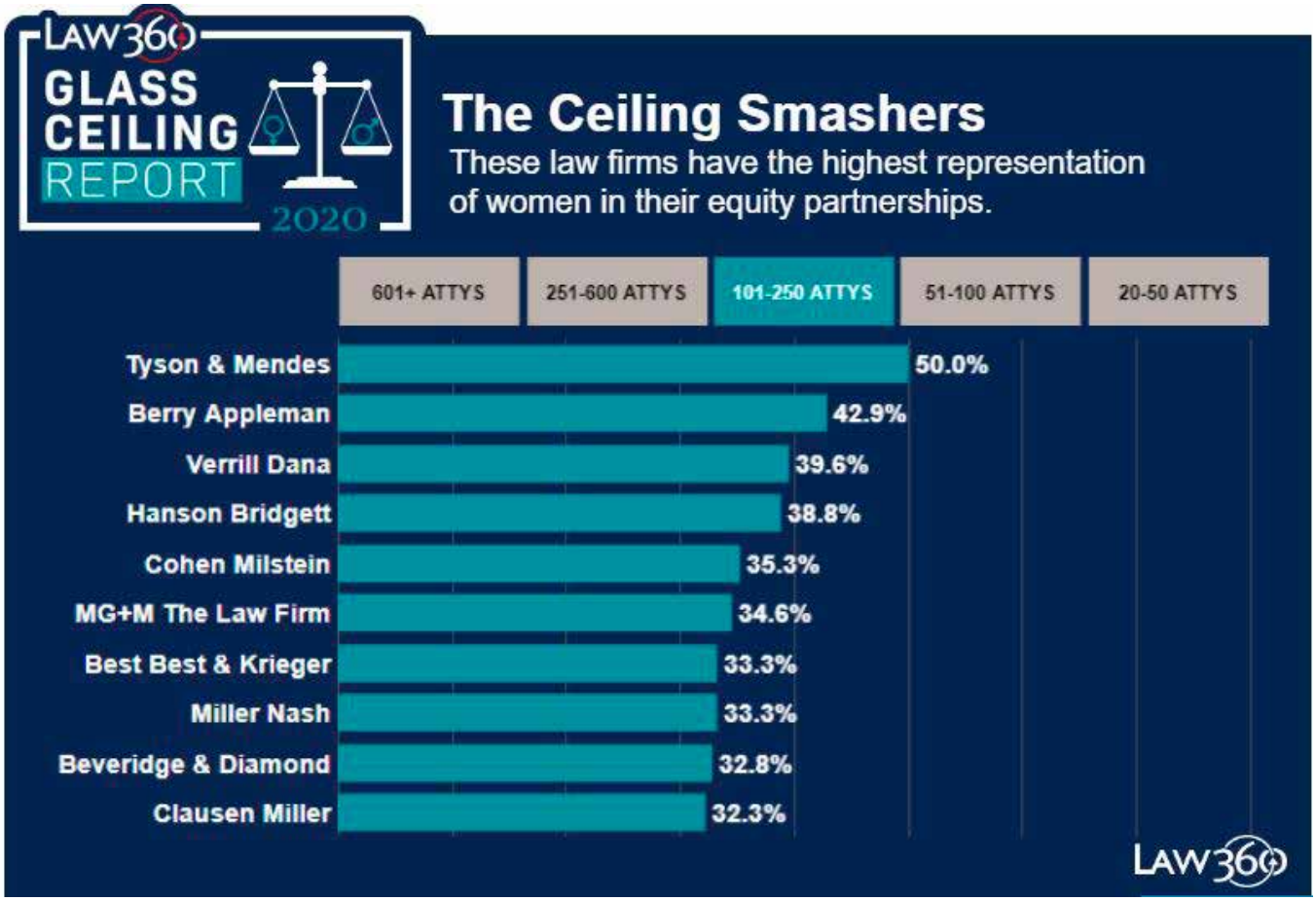
Wilson is a most significant decision for those involved in litigating COVID-19 business interruption claims in Pennsylvania. Prior to *Wilson*, several other federal district courts in Pennsylvania refused to accept and decide these cases that insurers sought to transfer to federal court, holding that there was a dearth of Pennsylvania law on the issues regarding the impact of COVID-19 on coverage for business interruption losses. *See, e.g., Dianoia's Eatery v. Motorists Mut. Ins. Co.*, No. 20-706 (W.D. Pa. 5-19-20); *Dianoia's Eatery v. Motorists Mut. Ins. Co.*, No. 20-706 (W.D. Pa. 8-27-20); *Greg Prosmushkin, P.C. v. The Hanover Insurance Group*, No. 20-2561 (W.D. Pa 8-14-20). But as shown by the *Wilson* decision, there was certainly ample Pennsylvania law "on the books" from both state and federal courts enabling the court to review the policy provisions and decide the merits of this case.

Practice Pointer: Certainly, being on the winning side of these and other decisions is a plus for our friends in the insurance industry. But the real battles are coming later, when these and other decisions are appealed and heard by three judge panels of the various federal Circuit Courts of Appeal, and potentially even *en banc* panels of all the Justices in these various Circuits. All of these cases will be reviewed *de novo* on appeal, meaning the reviewing courts will not be bound by any of the various trial court decisions. The various federal circuit judges will be free to look at these issues anew and make their own determinations on policy coverage. The temptation might be to use "what was done and won below", but in this author's appellate opinion, that would be a grave error. With so much on the line, especially with the first several appeals that will be heard and decided, best practices demand original briefing prepared and oral argument presented by a trained and experienced appellate practitioner.

CLAUSEN MILLER RECOGNIZED AS ONE OF THE TOP LAW FIRMS FOR WOMEN IN EQUITY PARTNERSHIPS

Clausen Miller not only "talks the talk" it "walks the walk" in promoting gender equality, diversity and inclusion. The firm was recently recognized in LAW360's Glass Ceiling Report as among the top 10 nationally for women in equity partnerships.

We are proud of this distinction and will continue to actively promote and advance women to the highest levels of leadership and equity ownership at Clausen Miller.



APPELLATE PRACTICE GROUP WELCOMES SEASONED TRIAL AND APPELLATE LITIGATOR WILLIAM LEATHEM

William W. Leathem, a seasoned litigator with both law firm and in-house experience, has practiced in federal courts throughout the country. He has drafted dozens of briefs in the Illinois Appellate Court, the various Federal Circuit Courts of Appeal, and the United States Supreme Court, and successfully argued many of them.

As a litigator, William has conducted all phases of litigation in federal district courts from coast-to-coast. In foreign jurisdictions he selected local counsel, appeared pro hac vice or was admitted to the bar, served as lead counsel, directed the case and local counsel, took the laboring oar on case-related filings, and appeared before the courts. In both foreign and local jurisdictions (Illinois federal and state), he has engaged in every facet of litigation. William has drafted countless briefs and motions, conducted and defended hundreds of depositions, propounded and responded to written discovery, made extensive use of summary judgment motions, argued motions, and tried cases as both first and second chair. He has counseled clients—both plaintiffs and defendants —through all phases of litigation. William's litigation practice has afforded him the opportunity to handle complex commercial matters, employment/labor issues involving the ADA, FMLA, Title VII, and FLSA, as well as ERISA, employee benefits, bankruptcy, along with some class action, antitrust, and LMRDA matters.

One of William's cases, *Board of Trustees v. Board of Education of the City of Chicago*, 978 N.E.2d 692 (1st Dist. 2012), *rehearing denied* (2012), *appeal denied* by 982 N.E.2d 77 (2013), was headlined in the Chicago Daily Law Bulletin and gathered a good deal of local public interest as the outcome determined the application of a taxing statute for the next 40 years. There, William secured a reversal and remand with directions to the Cook County Circuit Court to enter summary judgment for his client and a judgment of more than $37 million for that particular fiscal year. The court on remand entered summary judgment and the entire judgment amount was collected.

Another of William's cases, *Anderson v. AB Painting, Inc.*, 578 F. 3d 542 (7th Cir. 2009), also was headlined in the Chicago Daily Law Bulletin. There, the Seventh Circuit held that attorney's fees in ERISA cases are not subject to a proportionality standard.

And, in *Chicago Truck Drivers v. Brotherhood Labor Leasing*, 406 F. 3d 955 (8th Cir. 2005), *rehearing and rehearing en banc denied*, *petition for certiorari denied*, the Eighth Circuit upheld the entry of contempt sanctions against the defendants' attorneys for advising their clients not to pay debts owed to the plaintiffs. The case was selected by the Missouri Lawyers Weekly as one of the 10 most important opinions of 2005.

CLAUSEN MILLER ATTORNEYS NAMED TO BEST LAWYERS IN AMERICA AND ONES TO WATCH LISTS FOR 2021

Clausen Miller is proud to announce **Amy R. Paulus**, **Sava Alexander Vojcanin** and **Edward M. Kay** have been named to the Best Lawyers in America ranking, and **Marisa G. Michaelsen** has been named to the Ones to Watch list for 2021.

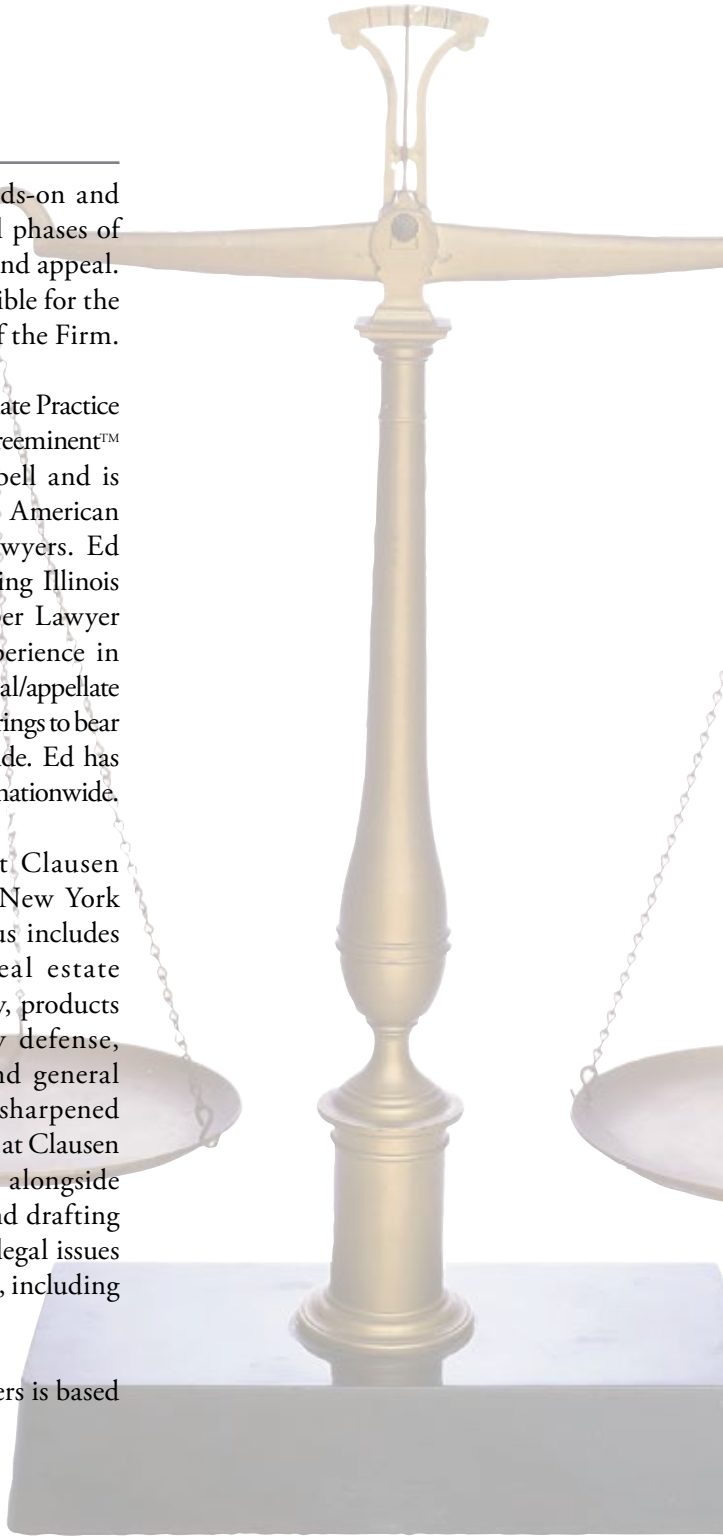
Amy is the Liability Coverage and Reinsurance Practice Group Leader, a senior shareholder and member of the Board of Directors of Clausen Miller. Amy has built a national reputation in all areas of liability insurance coverage law, professional liability, employment practices, transportation, claims handling issues and best practices, bad faith, excess insurance, intellectual property, cyber losses, and reinsurance matters and arbitrations. Demonstrating her commitment to the insurance industry, Amy is a CPCU (Chartered Property Casualty Underwriter). She is also AV® Preeminent™ rated by Martindale-Hubbell, and a member of the esteemed Litigation Counsel of America Trial Lawyer Society.

Sava is a senior shareholder whose practice focuses on resolving high-exposure property insurance matters. As coverage and litigation counsel, his experience includes appraisals, arbitrations, mediations, and litigation in jurisdictions across the United States and in England. As a litigator, Sava is hands-on and remains responsible for all phases of litigation, including trial and appeal. As a director, he is responsible for the day-to-day management of the Firm.

Ed is a Clausen Miller Appellate Practice Group partner. He is AV® Preeminent™ rated by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed has been chosen as a Leading Illinois Appellate Attorney, a Super Lawyer and has over 40 years experience in trial monitoring and post-trial/appellate litigation which he regularly brings to bear in significant cases nationwide. Ed has prosecuted over 500 appeals nationwide.

Marisa is an associate at Clausen Miller's New Jersey and New York offices. Currently, her focus includes professional liability, real estate litigation, premises liability, products liability, personal injury defense, commercial litigation, and general liability matters. Marisa sharpened her legal skills as a law clerk at Clausen Miller where she worked alongside attorneys in researching and drafting memoranda on numerous legal issues in preparation for litigation, including motions to the court.

Recognition by Best Lawyers is based entirely on peer review.



ESPOSITO SPEAKS TO APPELLATE LAWYERS ASSOCIATION ON APPELLATE TRIAL MONITORING

Clausen Miller Appellate Practice Group senior counsel **Paul Esposito** recently spoke to the Appellate Lawyers Association of Illinois about how appellate counsel can help trial counsel win their trials and so better the clients' chances for victory on appeal. Paul frequently participates as monitoring appellate counsel in high exposure cases nationwide. His input at the pre-trial, trial and/or post-trial stage of litigation helps position the case for the most successful resolution on appeal.

DENNIS FITZPATRICK ELECTED TO THE AMERICAN COLLEGE OF COVERAGE COUNSEL

Clausen Miller P.C. is proud to announce that its President, **Dennis D. Fitzpatrick**, was elected to The American College of Coverage Counsel (ACCC). Established in 2012, the ACCC is the preeminent association of U.S. and Canadian lawyers who represent the interests of insurers and policyholders. The ACCC's mission is to advance the creative, ethical, and efficient adjudication of insurance coverage and extracontractual disputes; to enhance the civility and quality of the practice of insurance law; to provide peer-reviewed scholarship; and to improve the relationship between and among the members of our profession.

Dennis Fitzpatrick is recognized as one of the premier coverage attorneys in the nation and spearheads Clausen Miller's First-Party Property COVID-19 Task Force which was formed to answer the specific needs of all property insurers who write insurance in the U.S. Our task force may be reached at **covid19taskforce@clausen.com**. Dennis is also a proud member of the Federation of Defense and Corporate Counsel ("FDCC") and Property Loss Research Bureau ("PLRB") 2020 Large Loss Planning Committee.

ESPOSITO AND KOLLROSS SUCCESSFULLY DEFEND TRIAL COURT RULING IN JURISDICTIONAL BATTLE

Clausen Miller Appellate Practice Group senior attorney **Paul Esposito** and Chair **Melinda Kollross** notched a victory in the Illinois Appellate Court in a battle over whether the circuit court lacked subject matter jurisdiction over a case involving Illinois' efforts to combat potential elder abuse. *Giovenco-Pappas v. Berauer*, 2020 IL App (1st) 19094. On appeal, they represented two social workers and a private agency asked to investigate suspicions of abuse. Plaintiff sued them in circuit court, seeking millions in compensatory and punitive damages.

Paul and Melinda successfully argued that plaintiff's suit was an action for money damages against the State of Illinois and so could only be brought in the Illinois Court of Claims. The Appellate Court found no reason to deviate from the strong legislative policy limiting the circuit court's jurisdiction.

Feel free to contact Paul (**pesposito@clausen.com**) or Melinda (**mkollross@clausen.com**) for further details.

CLAUSEN MILLER ASSISTS IN SECURING DEFENSE VERDICT

On September 30, 2020, CM partner **Ian Feldman** of California's Irvine and San Francisco offices helped to secure a defense verdict in a construction defect lawsuit in favor of its developer client. In a two-part bifurcated matter, the litigation stemmed from purported defects on a multi-building development located in the East Bay Area. Phase one of the lawsuit dealt with whether or not the lawsuit was filed timely within California's ten-year Statute of Repose. Much of the evidence dealt with whether the development was indeed one building or five buildings, and the appropriate date of substantial completion.

Following testimony from city officials, experts, and percipient witnesses, the jury concluded that the development consisted of five separate improvements, and also determined that the date of substantial completion of each of those five buildings fell outside of the ten year statute of repose. Thus, the jury determined that the lawsuit was time-barred. Clausen Miller is proud to have provided assistance to the lead trial counsel to help secure a positive outcome for its client. As far as we know, this was the first in-person civil jury trial in the State of California since the COVID-19 pandemic shutdowns began.

Seventh Circuit Certifies Illinois Contribution Act Issue To Illinois Supreme Court: Preserve Your Record

by ***Melinda S. Kollross***

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On August 5, 2020, the Seventh Circuit issued its decision in *Roberts v. Alexandria Transp.*, 968 F.3d 794 (7th Cir. 2020), certifying to the Illinois Supreme Court a previously unanswered question arising under the Illinois Contribution Act.

Facts

Plaintiff Roberts was driving a truck through a construction zone. A flagger abruptly turned a flag from slow to stop. Roberts slammed on his brakes and was hit from behind by a driver working for the Alex Parties. Roberts sued the Alex Parties, and the Alex Parties sued EK (the general contractor) and Safety (a sub EK retained to manage the site worker safety program) for contribution. Roberts settled with EK for $50K, and EK was dismissed from the suit. Roberts also settled with the Alex Parties for a confidential sum, and that settlement released claims against Safety as well.

The Alex Parties continued their contribution claim against Safety. The trial court determined that the Alex parties, EK and Safety all had to be on the verdict form so that the jury could properly apportion fault. The trial court also determined however that any fault of EK would not be redistributed between the Alex Parties and Safety. Rather, Safety would just owe Alex its own share of fault and the Alex Parties would be liable for EK's share along with its own.

At the end of the trial, the jury determined fault as follows: 10% Safety; 15% The Alex Parties; 75% EK.

Appeal Rulings

The Alex Parties appealed and Safety cross-appealed that it owed no duty to plaintiff, but the Seventh Circuit gave Safety's appeal short shrift and basically rejected it.

The importance of the case concerned the issue as framed by the Seventh Circuit as follows: "[W]hether the obligation of a settling party is uncollectible pursuant to the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/3 (2019)." If EK's share was deemed "uncollectible", then under section 2b of the Contribution Act, EK's fault would be apportioned between the Alex Parties and Safety according to their respective shares of fault under section 2b:

> However, no person shall be required to contribute to one seeking contribution an amount greater than his *pro rata* share unless the obligation of one or more of the joint tortfeasors is uncollectible. In that event, the

> remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their *pro rata* liability.

The Seventh Circuit could find no law specifically addressing this issue and therefore certified the issue to the Illinois Supreme Court for decision.

MAKE SURE YOUR RECORD IS PRESERVED:

We've always advised our friends in the industry about the wisdom of using appellate counsel to help preserve and posture a case for appeal, and this recent decision by the Seventh Circuit makes those preservation issues even more critical. Whether you are prosecuting a contribution case right now or defending against one . . . or even if you are in the initial stages, you want to make sure you are making the right arguments and asking for the right jury verdict forms depending upon which way the Illinois Supreme Court rules on the issue certified. Appellate counsel can help you and your trial counsel with those preservation points at any trial. ♦

No "Direct Physical Loss Or Damage" Where Property Merely Needs To Be Cleaned

by ***Christopher D. Sempier***

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is an associate in the Orlando, FL office at Clausen Miller P.C. Chris completed his undergraduate studies at the University of Central Florida and ultimately earned his law degree from Florida State University, where he was an active member of multiple law journals. His prior legal experience includes litigating and trying family law cases in a number of counties throughout central Florida. Chris focuses primarily on first-party property coverage cases in the central Florida region.
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With implications for COVID-19 loss of rent and business interruption claims, the Eleventh Circuit has held that an item or structure that merely needs to be cleaned has not suffered a loss that is both "direct" and "physical." Since the emergence of the COVID-19 pandemic in 2020, many businesses and property owners throughout the United States have claimed that their property insurance policies should respond to related financial losses. Policyholder attorneys argue, among other things, that an insurance policy's coverage for "direct physical loss or damage" is triggered when the virus is present in or on the insured property.

But a recent Eleventh Circuit decision concludes that under Florida law, an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical." *Mama Jo's Inc., d.b.a. Berries v. Sparta Ins. Co.*, No. 18-12887, 2020 U.S. App. LEXIS 26103 (11th Cir. Aug. 18, 2020).

Facts

The policyholder, an open-air restaurant, claimed physical loss or damage when dust from a nearby construction site infiltrated the restaurant and had to be cleaned; the policyholder also claimed lost business income under its business interruption coverage. The policyholder claimed that there was "physical loss or damage" because the structure had to be cleaned to remove the dust; however, there was no evidence that any items had to be replaced. A trial court granted summary judgment for the insurer, concluding that a "direct physical loss" requires a showing that the property was rendered uninhabitable or unusable, and a "direct physical loss" does not occur where an item or structure merely has to be cleaned.

Analysis

The Eleventh Circuit upheld summary judgment for the insurer, explaining that **the policyholder did not establish that it suffered direct physical loss or damage to property because an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical" under Florida precedent requiring that the loss amount to an actual, tangible change in the property**. The Eleventh Circuit further concluded that summary judgment was properly entered for the insurer on the policyholder's business interruption claim because the policyholder only showed that the structure had to be cleaned because of the dust, which did not amount to a "direct physical loss," so business interruption coverage was not triggered.

Learning Point: Under Florida law, absent evidence of something more than the need to clean, a claim brought pursuant to a property policy may not be covered. ♦

Florida's Cast Iron Pipes Problem: "Tear Out and Replacement"

by ***Joseph R. Paxton***

Introduction

The use of cast iron for residential plumbing system pipes was common in Florida until about 1980, when PVC pipes became prevalent. Cast iron pipes tend to fail faster in Florida, likely due to humidity and salt content in soil. A recent trend in Florida courts, driven largely by extensive television advertising by Florida plaintiff firms, involves insurance coverage for failed or deteriorated cast iron pipes within a building or property's plumbing system.

Analysis

As cast iron pipes fail over time, insurers may be left paying for potentially expensive "gut remodeling" required to replace the underground pipes. Florida courts have ruled that if the pipe failure occurs within the property's boundaries and the failure results in damage to the property during the policy period, then ensuing damage is covered under the policy. Furthermore, several Florida trial courts have ruled that sub limits are not applicable to the cost of tearing out and building back the property for replacement of pipes.

There is little dispute that failed or corroded pipes are not covered pursuant to wear and tear and other exclusions contained within the property insurance policy. However, common homeowner policy language states in relevant part that "[u]nless the loss is otherwise excluded," the policy covers loss "resulting from an accidental discharge or overflow of water . . . from within a (i) Storm drain, or water, steam or sewer pipe, off the 'residence premises'; or (ii) Plumbing . . . on the 'residence premises'. This includes the cost to tear out and replace any part of a building, or other structure, on the "residence premises", but only when necessary to repair the system or appliance."

Generally, the policy provides further that "[w]e do not cover loss to the system or appliance from which this water or steam escaped." The policy does exclude water damage defined as "Water, or water-borne material, which: (1) Backs up through sewers or drains."

Many homeowner insurance policies afford coverage for ensuing water damage, and for tear out and build back needed to replace bad pipes, pursuant to this language:

> *Unless the loss is otherwise excluded, we cover loss to property covered under Coverage A or B resulting from an accidental discharge or overflow of water or steam from within a:*
>
> * * *
>
> *ii. Plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance on the "residence premises". This includes the cost to tear out and replace any part of a building, or other structure, on the "residence premises", but only when necessary to repair the system*

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or appliance. However, such tear out and replacement coverage only applies to other structures if the water or steam causes actual damage to a building on the "residence premises".

We do not cover loss to the system or appliance from which this water or steam escaped.

An example of the court's treatment of the premises requirement is a ruling from Florida's Third District Court of Appeal in *Cheetham v. S. Oak Ins. Co.*, 114 So. 3d 257 (Fla. 3d DCA 2013). After the insurer denied the Cheethams' water damage claim, the Cheethams filed suit, claiming the loss was covered by their all-risk homeowners' insurance policy. In response, the insurer asserted that a water damage exclusion in the policy excluded the claim for tear out and build back needed to replace the pipes, and, therefore, the Cheethams' loss was not covered. The Court concluded that the exclusions from coverage contemplated by the water damage exclusion related to damage caused by water originating from somewhere other than the premises' plumbing system. The Cheethams' claimed loss was caused by the deterioration of a pipe within the home's plumbing system, which caused water or water-borne material emanating from the premises' plumbing system to back up into the premises. The Court held that the Cheethams' ensuing water damage was not excluded.

The United States Court of Appeals for the Eleventh Circuit held similarly in *Cameron v. Scottsdale Ins. Co.*, 726 F. App'x 757 (11th Cir. 2018). In *Cameron*, a pipe in a rental dwelling building's plumbing system collapsed, causing water damage to interior surfaces of the dwelling and necessitating additional damage to access and repair the affected plumbing. The cause of the plumbing problem was an age-related "acute pipe failure" of one of the building's sanitary lines, which carried wastewater out of the building. The pipe failure was discovered when a tenant reported an overflow of water from a kitchen-sink drain. After the incident, the Camerons reported the loss to their commercial property insurer, which investigated and then denied the claim. Thereafter, the Camerons filed this lawsuit challenging the denial of coverage.

The *Cameron* Court analyzed the policy, noting that the wear and tear exclusion contains an exception for damages resulting from a "specified cause of loss," which in the Camerons' case, included water damage. However, the policy also contained a "Water Exclusion." Based upon the Court's application of *Cheetham*, the water-damage exclusion applies only to damage caused by water not originating from the residence premises' plumbing system. Thus the *Cameron* Court ruled that the water exclusion "relates to water damage caused in part by outside forces, such as weather-induced flooding, but not to damage caused by the failure of the premises's [sic] plumbing system due to age or deterioration."

In *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067 (Fla. 3d DCA 2017), Florida's Third District Court of Appeal held that if an insured "suffered consequential loss as a result of the corroded pipe and that consequential or 'ensuing' loss is not excluded under another provision of the policy, the loss is covered." In *Maspons*, the homeowners noticed that their kitchen sink was draining slowly. The Maspons hired a leak detection company that determined through underground videography a pipe failure beneath the kitchen floor. A public adjuster retained by the Maspons reported the pipe failure to the insurer, and the insurer's inspection found multiple holes in the piping. At the time of trial there was no evidence of any water damage suffered by the insured. The Court concluded that pursuant to the "ensuing loss" provision of the policy, unless specifically excluded, if the Maspons "suffered consequential loss as a result of the corroded pipe . . . the loss is covered." The Appellate Court reversed the lower court's entry of summary judgment against the insurer finding that at the time of entry of summary judgment, "there was no evidence that the water exiting the pipe had caused any damage to its surroundings," and therefore remanded the case for entry of summary judgment in favor of the insurer. The Third District did, however, state that the summary judgment should be entered without prejudice to the insured, as the insured could file another claim of loss at a later date—presumably if the failed pipe eventually caused water damage.

Learning Point: If a pipe failure occurs within the property boundaries and causes water damage during the policy period, a Florida claim for ensuing damage likely will be covered and the "tear out and replacement" language in the policy will be honored by the Florida courts. Furthermore, water damage sub limits likely will not apply to the expenses related to tear out and build back. ♦

Florida Bad Faith Action Against Insurer Permitted Notwithstanding Timely Payment Of Appraisal Award

by ***Benjamin S. Burnstine***

In a recent decision by Florida's Second District Court of Appeal, the court held that a Civil Remedy Notice of Insurer Violations ("CRN") filed after the invocation of appraisal was sufficient to satisfy the requirements for bringing a statutory bad faith action against an insurer, even when there had been timely payment of the appraisal award. *Fortune v. First Protective Ins. Co.*, No. 2D19-2209, 2020 Fla. App. LEXIS 12540 (Fla. 2d DCA Sept. 4, 2020).

Facts

Fortune involves a homeowner's insurance claim dispute between the policyholder and the insurer as to the amount of the loss. Given this disagreement, the insurer invoked the appraisal process pursuant to the provision of the insurance policy. A Florida statute requires that an insurer be provided a 60-day period to "cure" any alleged bad faith violations raised in the filing of a CRN before a first-party bad faith lawsuit can be brought against it. Florida law specifically provides that a statutory bad faith lawsuit cannot be brought against an insurer if "the damages are paid or the circumstances giving rise to the violation are corrected" within 60 days after filing the CRN. In accordance with this requirement, the policyholder filed a CRN alleging statutory bad faith violations against the insurer; however, the CRN failed to include any specific amount sought to "cure" the alleged bad faith. Following the appraisal, the insurer timely paid the full amount of the appraisal award, albeit more than 60 days after the CRN was filed. The policyholder filed a bad faith lawsuit against the insurer a few months later. The trial court granted summary judgment in favor of the insurer finding that the insurer cured the CRN by invoking appraisal before the CRN was filed and paying the appraisal award timely, albeit more than 60 days after the CRN was filed.

Analysis

In reversing the trial court's summary judgment for the insurer, the appellate court found that pursuing the appraisal process did not constitute a "cure" of the bad faith alleged in the CRN. The appellate court explained that an appraisal is not a condition precedent to the insurer fulfilling its obligation to fairly evaluate the claim and to either deny coverage or to offer an appropriate amount based on that fair evaluation, and that a "lowball" offer made in bad faith is not cured by an insurer ultimately paying what it is later found to owe via the appraisal process. The court further noted that a CRN need not include a specific amount sought to "cure" the alleged bad faith. The appellate court therefore concluded that the invocation of appraisal did not constitute a cure of the alleged bad faith contained in the CRN, and that a CRN filed after the invocation of appraisal is sufficient to trigger a statutory bad faith lawsuit even where payment of the appraisal award is timely made.

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Learning Point: Absent review by Florida's Supreme Court, the decision by the Second District, which is one of five appellate districts in the State of Florida, will be binding on all courts within the Second District and potentially influential in other appellate districts in Florida. Insurers should be mindful that policyholders in Florida have the right to bring bad faith actions even when an insurer properly participates in appraisal and timely pays an appraisal award, and that any determination of bad faith is ultimately a question for the jury. ♦

In Recent Rulings, State And Federal Courts Find No Coverage On Covid-19 Business Interruption Claims, Citing Lack Of Direct Physical Loss And Virus Exclusion

by ***Celeste A. Hill*** *and* ***Jacob R. Zissu***

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Introduction

In three recent decisions, courts sitting in different jurisdictions concluded that policyholders' claims for business interruption coverage arising out of COVID-19 were precluded. In these cases, governmental entities had issued executive orders limiting or eliminating the operation of the involved businesses in light of the COVID-19 pandemic. The courts all determined that because there was no direct physical loss under the policies, no coverage was afforded to the policyholders. One court found that the policy's civil authority coverage did not apply because there was no direct physical loss to property other than plaintiff's property. Another court cited the policy's Virus Exclusion as an additional basis for declining coverage.

Analysis

Rose's 1, LLC v. Erie Insurance Exchange, No. 2020 CA 002424 B (D.C. Super. Aug 6, 2020)

On August 6, 2020, in *Rose's 1, LLC v. Erie Insurance Exchange*, No. 2020 CA 002424 B, 2020 WL 4589206 at *5 (D.C. Super. Aug 6, 2020), the Superior Court of the District of Columbia issued an order denying the policyholders' Motion for Summary Judgment and granting the insurer's Cross-Motion for Summary Judgment on the policyholders' COVID-19 business interruption claims. In *Rose's 1*, the policyholders (plaintiffs) owned and operated a number of restaurants in the District of Columbia. They purchased property insurance coverage from defendant Erie Insurance Exchange covering loss of income and/or rental income due to partial or total interruption of business resulting directly from loss or damage to property insured. The policy language stated that the "policy insures against direct physical loss" except as excluded.

As a result of COVID-19, D.C. Mayor Muriel Bowser declared a state of emergency and issued a series of orders that limited operation or resulted in the closure of plaintiffs' restaurants. Consequently, plaintiffs suffered serious revenue losses, for which they filed insurance claims with Erie through their commercial property insurance policy. Erie denied the claims. The dispute centered on whether the closure of plaintiffs' restaurants due to Mayor Bowser's orders constituted "direct physical loss" under the Erie policy. The word "loss" was defined in the policy as "direct and accidental loss or damage to covered property."

The *Rose's 1* court rejected plaintiffs' contention that the loss of use of their restaurants was "direct" because the closures were the direct result of the mayor's orders without intervening

action. The court stated that absent intervening actions by individuals and businesses, the orders themselves did not affect any direct changes to the insured properties. The court also rejected plaintiffs' arguments that their losses were "physical" because the COVID-19 virus is "material" and "tangible." The court pointed out that there was no evidence that COVID-19 was actually present on the insured properties at the time they were forced to close.

Plaintiffs also argued that by defining "loss" in the policy as encompassing either "loss" or "damage," Erie must have intended to treat the term "loss" as distinct from "damage," which connotes physical damage to the property. Plaintiffs argued that "loss" incorporated "loss of use," which only required that they be deprived of the use of their properties, not that the properties suffer physical damage. The court also rejected this argument, pointing out that the term "direct physical loss" required a direct physical intrusion onto the insured property. The court also distinguished the cases cited by plaintiffs, finding that none of the cases stood for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy.

Citing to *Roundabout Theatre Co. v. Continental Casualty Co.*, 302 A.D.2d 1, 2-3 (N.Y. App. Div. 2002), and *Newman Myers Kreines Gross, P.C. v. Great Northern Insurance Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014), the *Rose's 1* court found that "direct physical loss or damage" required actual physical damage to the insured premises to invoke the business income coverage. The court concluded that both dictionary definitions and the weight of case law supported Erie's interpretation of the term "direct physical loss." The court rejected plaintiffs' argument that there should be coverage because, unlike some similar insurance policies, their policies did not include a specific exclusion for pandemic-related losses, since plaintiffs would still be required to show a "direct physical loss." Accordingly, the court found that there was no coverage under the Erie policy for plaintiffs' claims.

*Diesel Barbershop LLC, et al. v. State Farm Lloyds, 2020 WL 4724305 at *5 (W.D. Tex. Aug. 13, 2020)*

On August 13, 2020, the United States District Court for the Western District of Texas issued *Diesel Barbershop LLC, et al. v. State Farm Lloyds*, ____ F. Supp. _____, 2020 WL 4724305 at *5 (W.D. Tex. August 13, 2020), granting defendant State Farm Lloyds' motion to dismiss against plaintiffs, a group of barber shops seeking business interruption coverage after a series of COVID-19-related executive orders allegedly caused losses to their businesses. In *Diesel Barbershop*, the insurance policies stated that State Farm would pay for "accidental direct physical loss" to Covered Property at the premises described in the Declarations caused by any loss described under Section 1–Covered Causes of Loss. The Covered Causes of Loss form stated that State Farm would "insure for accidental direct physical loss to Covered Property" unless the loss was excluded under the policy's exclusions. Plaintiffs cited a number of cases that arguably found physical loss without tangible destruction to Covered Property. However, the *Diesel Barbershop* court found that the line of cases requiring tangible injury to property were more persuasive and that the cases cited by plaintiffs were distinguishable. The court stated:

> It appears that within our Circuit, the loss needs to have been a "distinct, demonstrable, physical alteration of the property." *Hartford Ins. Co. of Midwest, v. Mississippi Valley Gas Co.*, 181 F. App'x 465, 470 (5th Cir. 2006) ("The requirement that the loss be "physical" given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.") (citation omitted)); *see also Ross v. Hartford Lloyd Ins. Co.*, 2019 WL2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires "a distinct, demonstrable, physical alteration of the property") (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).)

The *Diesel Barbershop* court further found that plaintiffs' claims were excluded by the State Farm policy's Virus Exclusion. The policy contained an anti-concurrent causation ("ACC") clause that preceded the Virus Exclusion. The court determined that the State Farm ACC clause was unambiguous and enforceable. Plaintiffs pleaded that COVID-19 was the reason for the governmental orders being issued and the underlying cause of plaintiffs' alleged losses. Although the orders technically forced the properties to close to protect public health, they only came about sequentially as a

result of the COVID-19 virus. Thus, the court found that COVID-19 was the primary root cause of plaintiffs' businesses temporarily closing, and the Virus Exclusion applied to preclude coverage. Accordingly, the court granted State Farm's motion to dismiss on plaintiffs' business interruption claims because there was no direct physical loss, and even if there were direct physical loss, the Virus Exclusion applied to bar plaintiffs' claims.

Sandy Point Dental, PC, v. The Cincinnati Insurance Company, No. 20 CV 2260 (N.D. Ill. Sept. 21, 2020)

On September 21, 2020, another federal district court, applying Illinois law, similarly held that a policyholder's business interruption claim arising out of COVID-19 was not covered because plaintiff could not show "direct physical loss" as a result of either inability to access its own office or the presence of the virus on its physical premises. In *Sandy Point Dental, PC, v. The Cincinnati Insurance Company*, No. 20 CV 2260, plaintiff, a dental practice, filed suit alleging that as a result of Illinois Governor Pritzker's March 20, 2020 order instructing all "non-essential businesses" to close to slow the spread of COVID-19, plaintiff was effectively forced to shut down during the crisis. Even though the governor's order allowed dental offices to perform emergency and non-elective work, plaintiff's practice consisted primarily of routine work, and the shut down allegedly resulted in a substantial loss of revenue for plaintiff.

Defendant Cincinnati's Business Income Coverage Form required "direct physical 'loss' to property at 'premises'" caused by or resulting from any Covered Cause of Loss. Covered Cause of Loss was in turn defined as "RISKS OF DIRECT PHYSICAL LOSS," unless expressly excluded by the policy. Cincinnati moved to dismiss under Fed. R. Civ. P. 12(b)(6), asserting that the closure of the dentist office due to the governor's orders did not constitute a "direct physical loss" under the policy. Plaintiff argued that partial loss to its property from loss of use was sufficient and further argued that the policy contained no exclusion for pandemics. The U.S. District Court for the Northern District of Illinois disagreed, stating that plaintiff had not pled any facts showing physical alteration or structural degradation of the property since the date of the governor's order. Further, plaintiff was not required to make any repairs or change any part of the building to continue its business.

Plaintiff also argued that the policy's civil authority coverage applied. The court noted that the civil authority coverage only applied if there was a Covered Cause of Loss, meaning a direct physical loss, to property other than plaintiff's property. Even then, there would only be coverage if the civil authority order prohibited access to plaintiff's premises due to direct physical loss to property other than plaintiff's premises caused by or resulting from a Covered Cause of Loss. The court stated, "just as the coronavirus did not cause physical loss to plaintiff's property, the complaint has not (and likely could not) allege that the coronavirus caused direct physical loss to other property." For these reasons, the district court dismissed plaintiff's complaint.

Learning Point: As the world copes with the COVID-19 pandemic, we find ourselves in a brave new world. However, as the above cases demonstrate, fundamental property insurance terms, such as "direct physical loss or damage," still carry their same pre-coronavirus meaning. While some may lack coverage for non-physical losses, a predictable and steady insurance market will ultimately benefit all insureds. ♦

Florida Supreme Court To Decide Whether Insured May Recover Consequential Damages Against Property Insurer In Non-Bad Faith Case

by ***Ross S. Felsher***

On September 8, 2020, the Florida Supreme Court heard arguments on review of the Florida Fifth District Court of Appeal's decision in *Manor House, LLC v. Citizens Prop. Ins. Corp.*, 277 So. 3d 658 (Fla. 5th DCA 2019), after that court certified the following question:

> In a first-party breach of insurance contract action brought by an insured against its insurer, not involving [bad faith] under section 624.155, Florida Statutes, does Florida law allow the insured to recover extra-contractual, consequential damages?

Facts

In *Manor House*, the Fifth District found that the trial court erred in awarding partial summary judgment to Citizens on Manor House's claim regarding lost rental income—not covered under the property policy—as consequential damages. The Fifth District determined that Citizens, which is statutorily immune from bad faith claims, was not statutorily immune from consequential damages. The Fifth District held that the consequential damages suffered by Manor House arose out of the breach of the insurance contract, requiring no demonstration that Citizens acted in bad faith.

Analysis

A. First Party Bad Faith Law In Florida Is Statutory

"There are three prerequisites to filing a statutory bad-faith claim in Florida: (1) determination of the insurer's liability for coverage; (2) determination of the extent of the insured's damages; and (3) the required notice must be filed under section 624.155(3)(a). *See Cammarata v. State Farm Fla. Ins. Co.*, 152 So. 3d 606, 612 (Fla. 4th DCA 2014)." *Landers v. State Farm Fla. Ins. Co.*, 234 So. 3d 856, 859 (Fla. 5th DCA 2018).

Pursuant to Fla. Stat. § 624.155, "Any person may bring a civil action against an insurer when such person is damaged . . . (b) by the commission . . . by the insurer [of the act of] 1. Not attempting in good faith to settle claims when, *under all the circumstances*, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests." (Emphasis added). The language "under all the circumstances" tends to be relied on by the courts to deny insurers' motions for summary judgment, thereby leaving the determination of bad faith up to juries. *See Bryant v. GeoVera Specialty Ins. Co.*, 271 So. 3d 1013, 1023 (Fla. 4th DCA 2019);

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Fla. Indus. Mach., Inc. v. Exec. Life Ins. Co., 560 So. 2d 413, 415 (Fla. 1st DCA 1990).

In Florida, "[u]nlike common law causes of action for third-party bad faith, first-party bad faith actions are purely a creature of statute [*i.e.*, Fla. Stat. § 624.155] that did not previously exist at common law." *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n*, 164 So. 3d 663, 667 (Fla. 2015).

"A third-party bad faith action (that is, a claim against one's own insurer for failing in good faith to settle a third-party's claim, thus exposing the insured to liability in excess of the available insurance coverage), was recognized in Florida as part of the common law as early as 1938. The foundation for this claim is found in the fiduciary nature of the insurance carrier's relationship with the insured. The carrier was required to act in good faith to negotiate a settlement for the benefit of its insured, and not to protect its own interest alone. Because of the perceived absence of the fiduciary relationship, however, there was no first-party bad faith action by an insured against the insurer recognized at common law. Thus, unless the insured could allege an independent tort such as fraud, the only relief available on a first-party claim was a cause of action for breach of contract. The Legislature addressed this issue in 1982 by the adoption of section 624.155, Florida Statutes. As [Florida] Supreme Court has indicated, '[t]hrough this statute, the Legislature created a first-party bad faith cause of action . . . . ' . . . Thus . . . statutory first-party bad faith causes of action' now exist in Florida not because they are torts, but because they are a statutory cause of action. Accordingly, a first-party bad faith claim cannot be wedged into the statutory exception for willful torts because it is not a tort of any variety.' . . . *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n*, 164 So. 3d 663, 667 (Fla. 2015).

Section 624.155(3)(a) requires a first party policyholder to file a Civil Remedy Notice (CRN) as a condition precedent to pursuing a statutory bad faith action. The statute provides that "the authorized insurer must have been given 60 days' written notice of the violation." "Florida Supreme Court has instructed that this notice condition 'must be strictly construed' . . . and the statute provides that the notice must 'be on a form provided by the department' and must specify the following:

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.

2. The facts and circumstances giving rise to the violation.

3. The name of any individual involved in the violation.

4. Reference to specific policy language that is relevant to the violation, if any.

5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section."

Evergreen Lakes HOA, Inc. v. Lloyd's Underwriters at London, 230 So. 3d 1, 3 (Fla. 4th DCA 2017).

The insurer has a 60-day cure period as governed by Department of Finance (DFS) acceptance date to respond to the CRN and "cure" the claim in order to prevent a bad faith action. However, the insurer's ability to "cure" or reach a settlement within the 60-day cure period is often hindered by vague CRNs, lacking in clear allegations of bad faith or specific "cure" amounts.

So, for first-party property matters in Florida, a bad faith lawsuit cannot be brought unless a CRN has expired, and a policyholder generally must wait until the breach of contract has been adjudicated before filing a bad faith lawsuit.

B. Citizens' Position

Citizens' view is that Manor House's consequential damages claim was a "bad faith claim dressed in breach-of-contract clothing" and that Florida law does not allow the recovery of consequential damages in a breach-of-contract action based on an insurer's alleged failure to timely investigate and pay a claim. In briefs filed with the Florida Supreme Court, Citizens argued that the appellate court's decision should be overturned because the essence of Manor House's breach-of-contract count—that the insurer "failed to timely adjust and pay" the insurance claim—is the "essence of a bad faith claim." Citizens also noted that what the parties contemplated as a remedy for breach, outside the express policy terms, is irrelevant because Florida has not adopted the doctrine of reasonable expectations in the insurance context. Citizens argued that Manor House cannot avoid the state-backed insurer's immunity to bad faith claims by presenting a bad

faith count as one rooted in an alleged breach of contract.

Citizens also argued that because Manor House's policy did not cover lost rent, Manor House could not seek lost rent as consequential damages. Citizens reasoned that Manor House could not invoke the doctrine of "reasonable expectations" to collect these damages on the grounds that the parties anticipated that Manor House would suffer lost rental income if Citizens breached its policy obligations. Citizens also asserted that "Florida law forbids granting Manor House the 'opportunity to prove' what the parties contemplated at the time of contracting [and that] Manor House [could not] use extrinsic evidence to gain additional coverage under the policy without having bargained for it and paid an additional premium." Citizens put forth that Manor House's sole remedy for any delay in payment is prejudgment interest from the date policy benefits were owed.

C. Manor House's Position

Manor House countered that Citizens should be barred from arguing that its bad faith immunity defeats Manor House's contract-based claim, because Citizens did not raise that contention before the trial or appellate courts. Moreover, Manor House stated that consequential damages are a common law breach of insurance contract remedy unconnected to the reasonable expectation doctrine. In addition, Manor House argued that a long series of Florida cases have recognized the right to recover consequential damages in a breach of contract suit, and the bad faith statute did not eliminate this remedy.

Manor House argued its consequential damages claim is firmly rooted in Citizens' alleged breaches of the policy and that enactment of Fla. Stat. § 624.155 did not transform common law breach of contract consequential damages into bad faith damages. Specifically, Manor House has claimed that Citizens breached three policy provisions by failing to pay the undisputed actual cost value for the hurricane damage; rejecting Manor House's initial appraisal demand; and failing to timely pay the appraisal award.

Manor House alleged that Citizens acknowledged the validity of consequential damages by including a consequential damage exclusion in its policy. Manor House contended that "[a]bsent a consequential damage waiver, Florida's rules of policy interpretation preclude Citizens from limiting Manor House's breach of insurance contract remedies." Manor House argued that the reasonable expectation doctrine is not synonymous with Florida's consequential damages standard. Finally, Manor House stated that the legislature did not limit the remedies available against Citizens in a breach of contract action.

Practice Pointer: The Florida Defense Lawyers Association and insurance trade groups submitted amicus briefs backing Citizens, warning that if Manor House is allowed to prevail, other policyholders would copy its strategy to pursue bad faith damages in breach-of-contract suits, without having to first comply with the numerous prerequisites of Florida's bad faith statute.

Clausen Miller will provide an updated analysis once the Florida Supreme Court issues its decision. ♦

Federal Trial Court In Florida Enforces AOB Exclusion In Surplus Lines Policy

by ***Anna P. Jiménez***

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On September 25, 2020, a federal trial court in Florida held that, unlike admitted insurance carriers in Florida, surplus lines carriers are free to preclude assignment of benefits ("AOBs") via policy exclusions, which this court held are enforceable. The court further held that the 2019 statutory revisions that tighten standards for AOBs in Florida—reflected in Fla. Stat. § 627.7152—do not apply to surplus lines carriers.

Facts

In *Raven Envtl. Restoration Servs. v. United Nat'l Ins. Co.*, 2020 U.S. LEXIS 179586, the plaintiff AOB, a water mitigation company, filed suit against United National, a surplus lines carrier, alleging breach of contract stemming from mitigation services following a fire loss at the insured commercial property. United National moved to dismiss the lawsuit arguing that: (1) an exclusionary endorsement in the policy specifically barred recovery from claims submitted by or on behalf of any third-party pursuant to a post-loss assignment, and (2) even if the policy did not contain an anti-assignment endorsement, the plaintiff AOB failed to comply with the statutory requirements of Fla. Stat. § 627.7152.

Analysis

The court analyzed whether a surplus lines insurance policy's prohibition of post-loss assignment is valid under Florida law, noting that surplus lines carriers are not subject to the same regulatory oversight—namely policy form approval—as admitted carriers. Florida's insurance regulators have not permitted admitted carriers to use policy language to prohibit the assignment of post-loss benefits. But the provisions of Florida Statutes Chapter 627, governing insurance rates and contracts, do *not* apply to surplus lines policies. The court distinguished that "[n]othing in chapter 626, which governs surplus lines insurers, or in chapter 627, refers to assignment with respect to surplus lines insurers."

However, restating its logic regarding the inapplicability of chapter 627 to surplus lines policies, the court also held that the 2019 legislative limitations on the rights of AOBs in Florida do not apply to surplus lines carriers.

Learning Point: Notably, this trial court decision is subject to appellate review, and is not binding authority. However, this decision suggests that other Florida courts may also enforce anti-AOB endorsements in surplus lines policies. ♦

California Appellate Court Limits Vicarious Liability By Addressing Exceptions To The "Going-And-Coming" Rule

by ***Tyler M. Costanzo***

In *Savaikie v. Kaiser Foundation Hospitals*, 52 Cal.App.5th 223, California's Second Appellate District further analyzes the "going-and-coming" rule, concerning an employer's potential vicarious liability for an employee's negligence during travel to or from work. We previously reported on *Bingener v. City of Los Angeles* (2019) 44 Cal.App.5th 134, and the *Savaikie* court has now provided further clarification on three exceptions to the "going-and-coming" rule discussed in *Bingener*: the "required vehicle use" exception, the "incidental benefit" exception, and the "special mode of transportation" exception. In affirming summary judgment in favor of the defendant employer, the courts continue to limit employers' liability for the conduct of employees during travel.

Facts

Ralph Steger was a volunteer of defendant Kaiser Foundation Hospitals ("Kaiser"). On July 16, 2015, Steger drove his own vehicle home from an assisted living facility where he provided dog therapy to a Kaiser patient and after completing the therapy session, drove to a credit union to conduct personal business. On the way home after this business was completed, Steger struck and killed 14-year-old Wyatt Savaikie, a pedestrian in a crosswalk. Savaikie's surviving family sued Kaiser, among several other defendants. Plaintiffs acknowledged the well-established "going-and-coming" rule—that an employer is generally not liable for the acts of employees while they are coming to or going from their place of employment—but argued that exceptions to the general rule applied in this case. When Kaiser filed a motion for summary judgment based on the fact that Steger was not acting within the scope of his employment at the time of the collision, Plaintiffs opposed based on the "required vehicle use" exception. They also asserted two related exceptions, which they referred to as the "incidental benefit" and "special mode of transportation" exceptions. These exceptions purportedly arose from the fact that Steger traveled in his vehicle between a number of different work sites, and his vehicle had special harnessing to allow him to transport his dog.

Analysis

In response to numerous lawsuits attempting to hold employers liable for the negligence of their employees committed during commutes, courts have adopted the "going-and-coming" rule which provides that an employee is generally not considered to be acting within the course and scope of his employment when going to or coming from his or her regular place of

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work. *Depew v. Crocodile Enterprises, Inc.* (1998) 63 Cal.App.4th 480, 486; *Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 804.

The "going-and-coming" rule has a number of exceptions in which employers can be held liable for employees' negligence during commutes. The so-called "required vehicle use" exception applies when an employer requires an employee or volunteer to furnish a vehicle for transportation on the job. *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723; *Tryer v. Ojai Valley School* (1992) 9 Cal.App.4th 1476, 1482. *Savaikie* found no evidence that Kaiser required Steger to use his own vehicle to volunteer, even though Kaiser offered to reimburse his travel expenses. Kaiser and Steger's arrangement did not fit the court's meaning of "required," with respect to Steger's use of his vehicle. Similarly, the court found that Steger's travel among multiple job sites does not make his regular commute to and from work part of his job. *See Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 405.

Plaintiffs suggested a variation of the "required vehicle use" exception which they referred to as the "incidental benefit" exception. This exception focuses on whether the employer derives an incidental benefit from the employee's use of their vehicle. *See Pierson v. Helmerich & Payne Industrial Drilling Co.* (2016) 4 Cal.App.5th 608, 625 [the phrase "incidental benefit exception" is used as the equivalent of the required vehicle exception]. However, cases in which the incidental benefit exception applies include an express or implied requirement that the employee provide a vehicle as a condition of employment. *See, e.g., Lobo v. Tamco* (2010) 182 Cal.App.4th 297. Here, there was no evidence that Steger was required to drive his own vehicle to therapy sessions.

Finally, plaintiffs attempted to argue that a "special mode of transportation" exception applied because Steger specially equipped his vehicle to transport his dog. This argument was based on the holding in *Wilson v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 181, 185 [transporting materials "may have been essential to applicant's employment, but unless such materials require a special… mode of transportation…their mere transport does not warrant exception from the going and coming rule"]. The court dismissed the application of this exception because there was no evidence to suggest that the dog's harness was permanently installed or in any way modified the car. Moreover, the plaintiffs did not provide evidence that a specially outfitted vehicle was necessary to transport the therapy dog. Since none of these claimed exceptions applied, the court affirmed summary judgment in favor of defendants, which provided that the going-and-coming rule exempted Kaiser from liability for Steger's negligence during his drive.

Learning Points: *Savaikie* limits exceptions to the "going-and-coming" rule by holding the three claimed exceptions were inapplicable. The "required vehicle use" exception was limited by the court's holding that an employee's need to transport work material (here, a dog) does not support a reasonable inference that the employer *required* the employee's use of a personal vehicle for transportation.

The court questioned whether the so-called "incidental benefit" exception is an independent basis for an exception rather than merely a factor to be considered in deciding whether an implied vehicle use requirement exists. It also clarified the incidental benefit test as being whether the employee used his vehicle during work hours to carry out the employer's business, rather than the employer merely benefitting from the employee commuting in the personal vehicle from home to the worksite.

Finally, the court recognized that if a "special mode of transportation" exception exists, it is narrowed by the requirement that the employee must be required to modify his vehicle or permanently install special equipment for the purpose of transporting work materials. ♦

California Appellate Courts Split On Reimbursement Of Defense Costs Under Equitable Subrogation Theory

by ***Ian R. Feldman*** *and* ***Kris K. Spiro***

Introduction

We previously discussed *Pulte Home Corporation v. CBR Electric, Inc., et al.* (2020) 50 Cal.App.5th 216, wherein California's Fourth Appellate District held that an insurer who provided an additional insured defense to a general contractor may pursue reimbursement of defense costs under an equitable subrogation theory against subcontractors who were also obligated to defend the general contractor in suits involving allegations related to the subcontractors' work. 2020 CM Report, Vol. 2. In considering this same issue in *Carter, et al. v. Pulte Home Corp., et al.* (2020) 52 Cal.App.5th 571, the First Appellate District came to the exact opposite conclusion.

Facts

Pulte Home Corporation ("Pulte"), the developer and general contractor of two housing developments, hired numerous subcontractors to work on the developments. The subcontractors were required to indemnify Pulte against "all liability, claims, judgments, suits, or demands for damages to persons or property arising out of, resulting from, or relating to Contractor's performance of work under the Agreement ('Claims') unless such Claims have been specifically determined by the trier of fact to be the sole negligence of Pulte . . . ." In addition, the subcontractors were required to name Pulte as an additional insured under their commercial general liability insurance policies.

The owners of 38 homes in the developments filed a Complaint alleging construction defects against Pulte. Pulte filed a Cross-Complaint against certain subcontractors, and also tendered its defense of the homeowners' suit to the subcontractors and their insurers. Travelers Property Casualty Company of America ("Travelers"), which insured four of the subcontractors, accepted the tender and provided Pulte with a defense as an additional insured. Seven other subcontractors and their insurers either did not respond to Pulte's tender or denied that they owed a duty to defend Pulte.

Travelers filed a Complaint-In-Intervention seeking to shift its loss entirely to certain subcontractors by alleging that they were jointly and severally liable for defending Pulte on the basis of equitable subrogation.

Travelers premised its argument on the ruling in *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, wherein the California Supreme Court held that, when a subcontractor is required to defend and indemnify a general contractor against all claims for damages growing out of the execution of the subcontractor's work, the subcontractor must "defend, from the outset, any suit" against the general contractor insofar as the suit includes claims alleging damage or loss arising from the subcontractor's work. Traveler argued that, because

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it was obligated to defend the entire action if any of the claims against its insureds were potentially covered, the subcontractors were similarly obligated to defend the entire action, despite the contractual limitation which only required each subcontractor to defend claims related to its own scope of work. The subcontractors argued that Travelers precluded its own recovery by improperly seeking to impose joint and several liability rather than seeking a portion of the defense costs proportional to each subcontractor's potential liability.

The trial court determined that it would be inequitable to shift the entire cost of Pulte's defense to the subcontractors. In addition, the court declined to entertain a request that Travelers made in its closing argument—that it was alternatively entitled to allocation as opposed to no recovery at all—as it would have been unfair to consider this claim after all of the issues had been fully framed and briefed.

The Appellate Court affirmed.

Analysis

Upon review of the trial court record, the Appellate Court determined that there was no question that Travelers chose to frame the case as an all-or-nothing claim for equitable subrogation. Of note, prior to trial, Travelers dismissed the causes of action which sought to impose liability on each subcontractor for a proportional share of defense costs, leaving only its claim for equitable subrogation. Travelers also filed a motion *in limine* to exclude evidence or argument on allocation of the damages on the basis that such evidence was irrelevant because the subcontractors were jointly and severally liable for all of the defense costs.

In determining whether Travelers should have prevailed on its claim for equitable subrogation, the Court held that Travelers needed to satisfy the following eight elements: (1) the insured suffered a loss for which the defendant is liable; (2) the claimed loss was one for which the insurer was not primarily liable; (3) the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; (4) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer; (5) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (6) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (7) justice requires the loss to be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (8) the insurer's damages are in a liquidated sum. *Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal.App.4th 23, 33-34.

The First District agreed with the trial court that Travelers failed to prove three of these elements because: (1) Travelers failed to establish the loss was one for which any of the subcontractors was primarily liable; (2) justice did not require shifting the loss entirely from Travelers to the subcontractors, as none of the subcontractors were in an equitable position that was inferior to Travelers; and (3) Travelers failed to prove its damages because its proof included bills for work done for purposes other than Pulte's defense.

The underlying lawsuit against Pulte alleged many injuries and each of the subcontractors were potentially liable for only the injuries arising out of their own scope of work. As an insurer, Travelers was obligated to defend the entire case if any of the claims potentially involved the scope of work of its named insureds. In contrast, each subcontractor's liability was limited to a proportionate share based on its scope of work. Thus, none of the subcontractors were primarily liable for Pulte's defense.

With regard to whether justice required a shifting of the loss entirely from Travelers to the subcontractors, the Court stated that "there is no facile formula for determining superiority of equities," and noted that Travelers' own named insureds, in addition to the subcontractors, were alleged to be at fault for the alleged damages. Further, Travelers was seeking to shift costs for defending Pulte against claims unrelated to the scope of the subcontractors' work, claims for which the subcontractors did not promise to defend and indemnify Pulte. A subrogated insurer "stands in the shoes" of its insured, and has no greater rights than its insured. Because Pulte could not recover the entire costs of defense from the subcontractors, neither could Travelers.

Learning Points: Due to the vastly different outcomes in the First and Fourth Appellate Districts, we anticipate that the California Supreme Court will be asked to weigh in on this issue. In the meantime, given the First Appellate District focus on Travelers' "all-or-nothing" strategy, it may be prudent for an insurer seeking equitable subrogation to also seek allocation based on individual liability as an alternative. ♦

CIVIL PROCEDURE

UNENFORCEABLE PENALTY NOT PROPER MEASURE FOR STIPULATED JUDGMENT

Graylee v. Castro, 52 Cal. App. 5th 1107 (Cal. App.)

Parties entered into a stipulated judgment in an unlawful detainer action, by which tenants agreed to vacate the property by a certain date and time or pay landlord an amount exceeding unpaid rent. The tenants missed the deadline by a few hours and landlord successfully sought entry of judgment. ***Held:*** Judgment reversed. Court cannot enter a judgment that contains an unenforceable liquidated damages clause because such clauses are void as against public policy.

CONJUNCTIVE OFFER TO COMPROMISE HELD INVALID

Burchell v. Faculty Physicians & Surgeons of the Loma Linda Univ. Sch. of Med., 2020 Cal. App. LEXIS 861 (Cal. App.)

Plaintiff underwent a surgical procedure to remove a mass from the scrotum. Believing the mass was malignant, the surgeon conducted a more extensive procedure than was planned without consulting the patient or his medical proxy. Plaintiff won a verdict and sought recovery of costs, including expert fees and prejudgment interest based on an offer to compromise made and refused. ***Held:*** The compromise offer was invalid because conditioned on acceptance by both the surgeon and hospital defendants. One defendant had defenses unavailable to the other, making it impossible for either party to accept the offer because it required an entity not responsible for the surgeon's actions to accept liability.

COURT DENIES BROAD INTERPRETATION OF WHAT ACTS CONSTITUTE ASSISTING FEDERAL OFFICERS IN PERFORMING THEIR DUTIES

Estate of Maglioli v. Andover Subacute Rehab. Ctr. I, 2020 U.S. Dist. LEXIS 145055 (D.N.J.)

A lawsuit was brought on behalf of residents or patients at facilities owned and operated by privately owned nursing facilities who allegedly died due to negligent coronavirus infection care. Defendants sought removal to federal court arguing they complied with, and were paid through, Medicare and Medicaid such that they were assisting federal officers in the performance of official duties. ***Held:*** Remanded. The district court held such interpretation of what constitutes assisting federal officers in their duties was too broad and would have far-reaching consequences.

PLAINTIFFS RUN OUT OF TIME TO OPPOSE SUMMARY JUDGMENT

Vassiliou-Sideris v. Nautilus, Inc., 2020 NY Slip Op 05254 (N.Y. App. Div. 2d Dep't)

Medical malpractice action was dismissed after plaintiff failed to timely respond to opposition summary judgment motion despite having been granted four adjournments. ***Held:*** Affirmed. Supreme Court providently exercised its discretion in denying the request for yet another adjournment. The plaintiffs did not show the necessary good cause, did not offer a valid excuse for needing more time, and exhibited a lack of due diligence.

DAMAGES

PERSONAL INJURY DAMAGES NOT RECOVERABLE IN ACTION BASED ON IMPLIED WARRANTY OF HABITABILITY

Goreham v. Martins, 2020 Mass. LEXIS 325 (Mass.)

Tenant injured on icy driveway sued landlord for breach of implied warranty of habitability and violation of statutory covenant of quiet enjoyment. ***Held:*** Damages for personal injuries not recoverable in action for breach of implied warranty. Action applies to significant defects in property itself, which excludes ice and snow. Recovery remains available under negligence law. ***Further held:*** Although statutory right of quiet enjoyment considers landlord's negligence, there must be serious interference with tenancy. Ice on driveway does not impair value or character of tenancy.

DEFAMATION

SUBSTANTIALLY TRUE STATEMENTS ARE NOT DEFAMATORY

Michael Gerrish v. Paul Hammick, AC 41759 (Conn. App.)

Plaintiff was accused of insubordination and neglect of duty while a sergeant with the defendant, a town police department. Plaintiff retired before an investigation was completed and took a public safety officer position

with a new employer, who asked defendant for a letter of good standing. Defendant declined. Plaintiff's new employer terminated him and plaintiff sued defendant for defamation. Trial court granted defendant summary judgment. ***Held:*** Affirmed. The statements that plaintiff did not leave the town police department in good standing were substantially true and, therefore, not defamatory.

EVIDENCE

CLEAR AND CONVINCING BURDEN MUST BE EVALUATED ON APPEAL IN TERMS OF HIGH PROBABILITY

In re Conservatorship of O.B., 9 Cal.5th 989 (Cal.)

Probate court appointed limited co-conservators for a young woman with autism. On appeal, she argued that the proof before the probate court did not clearly and convincingly establish a limited conservatorship was warranted. ***Held:*** Appellate review of sufficiency of evidence supporting a finding requiring clear and convincing proof must analyze whether substantial evidence exists from which a reasonable fact finder could have found it highly probable the fact was true. The Court further held that the appellate court must view the record in the light most favorable to the prevailing party and must give appropriate deference to how the trier of fact may have evaluated credibility, resolved conflicts and drawn inferences.

EXCESS INSURANCE

VOLUNTARY PAYMENT DOCTRINE DOES NOT PREVENT EXCESS INSURER FROM SUING PRIMARY INSURER FOR BAD FAITH

Metro. Prop. & Cas. Ins. Co. v. GEICO Gen. Ins. Co., 2020 NY Slip Op 05045 (N.Y. App. Div. 2d Dep't)

Excess insurer that contributed to underlying settlement then sued primary carrier, alleging bad faith. Primary carrier unsuccessfully sought dismissal based on voluntary payment doctrine. ***Held:*** Despite an excess insurance carrier's decision to contribute to a settlement, it may later sue the primary insurer for breaching its duty of good faith in defending and settling claims over which it exercised exclusive control, provided that the excess insurance carrier reserved its rights at time of settlement. Applying the common-law voluntary payment doctrine to bar actions alleging bad faith would allow primary insurers to benefit from their own bad conduct.

LEGAL MALPRACTICE

DAMAGES ALLEGATIONS DISMISSED SINCE TOO CONCLUSORY

Katsoris v. Bodnar & Milone, LLP, 2020 N.Y. App. Div. LEXIS 5151 (2d Dep't)

Plaintiff sued attorney who had represented him in a matrimonial action against his wife before he switched attorneys. Trial court dismissed the action holding the complaint failed to adequately allege actual, ascertainable damages. ***Held:*** Affirmed. General allegations that plaintiff was caused to incur "additional legal fees," suffer "financial damages and expense," and "adverse financial consequences," were all conclusory and inadequate to constitute actual, ascertainable damage.

ACTUAL-INNOCENCE RULE BARS FORMER PRISONER'S CLAIM

Skindzelewski v. Smith, 944 N.W.2d 575 (Wis.)

Former prisoner claimed that attorney's failure to raise limitations defense resulted in conviction. ***Held in split decision:*** In criminal cases, showing legal malpractice requires proof of actual innocence of crime. Exception for malpractice resulting in excessive sentence was inapplicable; malpractice pertained to conviction itself. Dissent contends policy behind actual-innocence rule is inapplicable to statute of limitations cases.

LIABILITY INSURANCE COVERAGE

NEW JERSEY COURTS FAVOR INSURED IN ASSESSING DUTY TO DEFEND

Navigators Spec. Ins. Co. v. Inventiv Health Clin. Inc., 2020 U.S. App. LEXIS 28355 (3d Cir.)

Complaint was filed containing multiple alternative causes of action. Trial court held duty to defend would continue until every covered claim was eliminated and that complaint ambiguities be read liberally in insured's favor. ***Held:*** Affirmed. Under New Jersey law, the duty to defend is determined by comparing complaint

allegations and policy language and arises irrespective of claim's actual merit. If complaint is ambiguous, doubts are resolved in favor of insured and coverage.

INSURER'S SILENCE REGARDING EXTENT OF COVERAGE CREATED COVERAGE

Rabassa v. Cerasuolo, 2020 Mass. App. LEXIS 89 (Mass. App.)

Based on documents submitted to underwriter, insureds believed they had coverage regarding lead poisoning claim. ***Held:*** Though waiver and estoppel usually will not create coverage, insurer's misrepresentation about extent of coverage operated as an exception. Insurer delayed for years, until claim was filed, before telling insureds that documents were deficient. Because underwriter considered documents pertinent, insurer had duty to timely explain deficiencies. Insureds could reasonably believe coverage existed.

48 DAYS TOO LATE TO DISCLAIM WHEN USING SAME REASONS USED WITH DIFFERENT INSURED

Bowers v. Grier, 185 A.D.3d 998 (N.Y. App. Div. 2d Dep't)

A worker was injured at a construction site and sued the construction management firm and others. A subcontractor on the project sought indemnification from its insurer which disclaimed, invoking an employee exclusion. Later the construction firm made a similar request of the same insurer. The insurer took 48 days to disclaim coverage even though it disclaimed on the same basis it had used with the subcontractor. ***Held:*** In taking 48 days to respond using the very basis used earlier, the insurer failed to disclaim as soon as reasonably possible. Insurer must defend and indemnify.

INSURER OWES DUTY TO DEFEND PILL DISTRIBUTOR IN OPIOID LITIGATION

Acuity v. Masters Pharm., Inc., 2020 Ohio App. LEXIS 2381 (Ohio App.)

Local governments sued distributor for costs incurred combating opioid epidemic. ***Held:*** CGL insurer owes duty to defend distributor. Insurer agreed to defend and pay damages "because of bodily injury," broader coverage than "for bodily injury." "Damages" included those incurred by "organization" resulting "at any time from the bodily injury." Connection existed between insured's conduct and damages from fighting epidemic. ***Also held:*** Policies' loss-in-progress provisions did not excuse defense. Insured's knowledge of risk of future damages does not bar coverage.

LIMITATIONS OF ACTIONS

SAVING STATUTE DOES NOT REVIVE LATE ACTION

Moore v. Mt. Carmel Health Sys., 2020 Ohio LEXIS 1898 (Ohio)

Plaintiff filed suit one day before limitations period expired, but neither obtained service nor dismissed suit within one year. ***Held in split decision:*** Suit was timed-barred. Action is commenced on date of filing only if served within one year. Saving statute only applies to timely filed actions. When plaintiff asked clerk to serve summons, complaint remained pending. It had not already failed "otherwise than upon the merits"—another requirement for saving statute. Dissent argues that plaintiff's action should have been dismissed without prejudice.

MEDICAL MALPRACTICE

NO MALPRACTICE COVERAGE FOR PHYSICIAN'S ACTS OUTSIDE EMPLOYMENT

Fellus v. Select Med. Holdings Corp, 2020 U.S. App. LEXIS 26289 (3d Cir.)

Defendant physician engaged in sex with patient and was sued. Trial court held he was not acting within the scope of his employment as a doctor and would not be covered by his malpractice insurer in defending the resulting lawsuit. Such acts were not of the kind he was employed to perform, did not occur substantially within the time or space limits authorized by his employment, and were in no way in service to his employer. ***Held:*** Affirmed. Because physician's affair occurred outside scope of employment, employer and its malpractice insurer were not obligated to defend or indemnify.

COURT LACKS JURISDICTION OVER ALTERATION-OF-MEDICAL-RECORDS CLAIM

Cortez v. Ind. Univ. Health, Inc., 2020 Ind. App. LEXIS 308 (Ind. App.)

After learning hospital personnel altered medical records, plaintiff sued for fraud and perjury. ***Held:*** Court lacks subject matter jurisdiction. Plaintiffs' claims related to medical malpractice and should have been filed with medical review panel pursuant to statute.

COURT NEED NOT ADDRESS ARGUMENT FAILING TO RAISE TRIABLE ISSUE

Roizman v. Stromer, 185 A.D.3d 978 (N.Y. App. Div. 2d Dep't)

Trial court granted summary judgment to defendant physician on medical malpractice and negligence claims predicated on administration of epidural and anesthesia procedures. Trial court ruled defendant, who saw plaintiff once for an orthopedic consult, had no involvement with plaintiff's labor and delivery or anesthesia. ***Held:*** Affirmed. Defendant met initial burden and plaintiff failed to present any evidence raising a triable issue of fact.

NEGLIGENCE

LANDOWNER NOT LIABLE FOR ROADWAY COLLISION

Reece v. Tyson Fresh Meats Inc., 2020 Ind. App. LEXIS 361 (Ind. App.)

Motorcyclist was injured when tall grass on adjoining landowner's property obscured vehicle at intersection. ***Held in split decision:*** No duty owed to traveling public for activities wholly contained on landowner's property. Duty might arise depending on seriousness of danger and population/traffic densities. Landowner did not assume duty of care by periodically cutting grass two years prior to accident. Dissent argued that questions of fact existed as to population density and maintenance of property.

GOOD SAMARITAN LAW IMMUNIZES TRUCKER FROM LIABILITY

McGowen v. Montes, 2020 Ind. App. LEXIS 335 (Ind. App.)

Trucker was rear-ended after stopping on two-lane road to assist driver involved in accident. ***Held:*** Good Samaritan Law covered trucker's conduct. Under statute, gratuitous emergency care is broader than direct medical treatment. Trucker checked whether driver needed help. Trucker was not guilty of gross negligence or willful and wanton misconduct. When trucker stopped, no one was behind him. He engaged his rear break light, and accident happened only 15-30 seconds after stop.

UNIVERSITY NOT LIABLE FOR SEXUAL ASSAULT FOLLOWING PARTY

Helfman v. Ne. Univ., 2020 Mass. LEXIS 338 (Mass.)

After getting drunk at campus party hosted by under-aged resident assistants, plaintiff was sexually assaulted by companion. ***Held:*** Although school's special relationship with students imposed duty of care, school did not owe duty to protect student from assault. It lacked actual knowledge of conditions reasonably suggesting imminent danger to intoxicated student unable to seek help. Companion did not pose foreseeable risk to student. No school personnel were aware of imminent risk of alcohol-related harm. ***Further held:*** No basis existed for vicarious liability or for liability for negligent supervision of resident assistants.

PREMISES LIABILITY

MODE OF OPERATION RULE INAPPLICABLE WHERE NO EVIDENCE RISK OF INJURY WAS CONTINUOUS OR FORESEEABLY INHERENT

Alicia Hill v. OSJ of Bloomfield, LLC, AC 42397 (Conn. App.)

Plaintiff sued when two empty boxes fell off a shelf and struck her in an aisle of defendant's store. Store manager and another employee had been stocking merchandise in an adjacent aisle when a box on the top shelf of their aisle allegedly toppled into, and knocked over, the boxes that hit plaintiff. Trial court applied the mode of operation rule and concluded the boxes fell and struck plaintiff as a result of defendant's negligence. ***Held:*** Reversed. The record did not demonstrate that defendant had a specific method of operation different from the general operation of a similar business. Also, there was no evidence plaintiff's injuries occurred within a limited zone of risk where the risk of injury was continuous or foreseeably inherent as a result of the mode of operation used.

CONTRACTUAL UNDERTAKING CAN TRIGGER DUTY IN TORT

Tina M. Carrico v. Mill Rock Leasing, LLC, AC 42460 (Conn. App.)

Plaintiff slipped on ice accumulation, sustaining injuries. Plaintiff sued independent contractor hired by possessor of land to provide snow and ice removal/remediation services. Trial court held that defendant did not owe duty to plaintiff as defendant did not possess and control premises. ***Held:*** Reversed. The duty defendant owed plaintiff arose from the snow service agreement it had with the third-party land possessor. Defendant should have recognized its performance of snow removal services on the premises was necessary for plaintiff's protection.

SUMMARY JUDGMENT

COURT MUST CONSIDER EVIDENCE IN LIGHT MOST FAVORABLE TO NON-MOVING PARTY ON SUMMARY JUDGMENT

Sandra Augustine v. CNAPS, LLC, AC 42987 (Conn. App.)

Plaintiff fell on restaurant stairway, allegedly as a result of loosely affixed carpeting and uneven padding and sought damages from restaurant owner. Plaintiff testified at deposition that her heel got caught in the carpeting, which was squishy, uneven and bumpy, and that her shoe remained in the carpeting as she stepped forward while descending the stairway. Trial court ruled her amorphous descriptions of alleged defect failed to sufficiently allow a jury to conclude the allegedly defective condition caused her injuries. ***Held:*** Reversed. Plaintiff's deposition testimony and affidavits of two guests needed to be viewed in light most favorable to plaintiff and created genuine issue of material fact as to causation.

TORTS

NO INVASION OF PRIVACY FOR CONSENSUAL DIRECT-OBSERVATION DRUG TESTING

Lunsford v. Sterilite of Ohio, L.L.C., 2020 Ohio LEXIS 1907 (Ohio)

Without objection, at-will employees gave urine samples while directly observed by person. ***Held in split decision:*** Consent given by at-will employee negates claim for invasion of privacy. Drug testing is allowed by law. Although consent form did not mention direct-observation method, employees were told before giving samples. At-will employment doctrine allowed them to refuse test. Dissent argued that method is offensive, unnecessary, effectively non-consensual, and not protected by at-will doctrine.

TRIAL PRACTICE

TRIAL COURT ABUSED DISCRETION IN FAILING TO IDENTIFY RECORD SUPPORT FOR ITS CONCLUSION

William Maldonado v. Kelly C. Flannery, AC 43154 (Conn. App.)

Plaintiffs sought damages from defendants for injuries allegedly sustained in motor vehicle accident. After trial, jury awarded plaintiffs economic damages but not non-economic damages. Plaintiffs filed a joint motion for *additurs*, which was granted. ***Held:*** Reversed. The trial court abused its discretion because it did not identify the part of the trial record supporting its conclusion the jury's failure to award non-economic damages was unreasonable.

CLOSING REMARKS MUST DEPRIVE PARTY OF FAIR TRIAL TO MERIT NEW TRIAL

Carole Audibert v. Wesley Halle, AC 42654 (Conn. App.)

Plaintiff sued defendant in negligence for motor vehicle accident injuries. Jury returned verdict in plaintiff's favor. Plaintiff filed motion to set aside verdict and for new trial, claiming that during closing argument defense counsel had alluded to matters unsupported by the evidence, had asserted personal knowledge of the facts, had stated his personal opinion as to plaintiff's credibility, and had improperly attacked plaintiff's character. The trial court denied plaintiff's motion. ***Held:*** Affirmed. There was little risk defense counsel's closing remarks distracted the jury from focusing on the relevant issues and deciding the case solely on the evidence.

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