

# CM REPORT

of Recent Decisions

2020 • Vol. 4

**Out On A Limb:  
Ditching Collectability  
In Legal Malpractice Actions**

**10 Tips For Securing Beneficial  
Amicus Support On Appeal**

**Can Policy Language Preclude  
Assignment Of Benefits In Florida?**

*Clausen  
Miller* PC

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

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# Illinois Supreme Court Creates New Law And Shows Why It Is Crucial To Argue In The Alternative

by *Melinda S. Kollross*

In *Dameron v. Mercy Hosp.*, 2020 IL 125219, the Illinois Supreme Court answered a question of first impression regarding discovery in a medical malpractice case. The Court ruled that a party is permitted to redesignate an expert from an Illinois Supreme Court Rule 213(f) controlled expert subject to full disclosure to a Rule 201(b)(3) consultant not subject to full disclosure if done in a reasonable amount of time before trial and where the expert report has not been disclosed. The Court also demonstrated the “appellate wisdom” of always arguing in the alternative on appeal, instead of just trying to go for the “home run” on the main issue.

## Facts

Dameron underwent a robotic-assisted hysterectomy that she alleged was negligently performed. Dameron initially disclosed a Dr. Preston as a Rule 213(f) controlled expert witness who was going to perform a comparison EMG on Dameron and prepare a report of his study and evaluation. About a month later, after Dr. Preston did his study and prepared his report, but before the report was disclosed to defendants, Dameron emailed defendants advising that Dr. Preston was being withdrawn as a 213(f) witness and instead was a non-testifying expert per Rule 201(b)(3). Dameron also moved the trial court to redesignate Dr. Preston as a consultant, but that motion was denied and Dameron was ordered to produce Dr. Preston’s records. Dameron asked for a “friendly contempt” to challenge the order, which was given. The appellate

court reversed, and the case came to the Illinois Supreme Court.

## Decision/Analysis

The Supreme Court ruled in favor of Dameron that Dr. Preston’s report was not subject to disclosure, addressing several arguments made by defendants.

## Dameron Was Not A Treater

The Court gave short shrift to defendants’ contention that Dr. Preston was one of plaintiff’s treating physicians, and thus his report was subject to disclosure when Dameron filed her medical malpractice suit placing her physical condition at issue. According to the Court, nothing was presented showing that plaintiff was referred to Dr. Preston for treatment of her injuries. Simply because Dr. Preston evaluated Dameron and conducted a study of her condition did not *ipso facto* make him a treater.

## Dr. Preston Could Be Redesignated

The Court found that the rules on discovery as well as existing Illinois case law were silent on whether a controlled expert could later be designated as a consultant. But looking at both Illinois law allowing the abandonment of an expert witness and “compelling” federal law, the Court concluded that Dameron was entitled to redesignate Dr. Preston from controlled expert to consultant under these circumstances. First, the redesignation would cause defendants no unfair surprise “at trial” because the trial was almost a year away. Second, the contents of



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the report were not yet disclosed. This was key to the Court because under federal law, an expert loses the shield from full disclosure once his report is disclosed. And in the absence of the report, defendants could not say that they were looking to have Dr. Preston participate at trial. Further, as noted in the federal law, discovery of the redesignated witness could be obtained by showing exceptional circumstances. The bottom line, according to the Court, was that a party should be able to change its mind regarding who it presents as an expert witness where the requisite Rule 213(f)(3) report has not yet been disclosed.

**Work Product**

The Court further ruled that nothing in Illinois law on work product required the disclosure of Dr. Preston’s report even as just a consulting expert, absent exceptional circumstances. According to the Court, the rules themselves and the Committee Comments demonstrated that discovery of consultants will only be had in “extraordinary cases.” and protected not only a consultant’s opinions in the first instance but also the facts informing the consultant’s opinions, *i.e.*, objective data.

**No Alternative Argument Made on “Exceptional Circumstances”**

The Court specifically noted that defendants never argued in the alternative that exceptional circumstances existed justifying disclosure of Dr. Preston’s report. According to the Court, defendants made “nothing more than a conclusory statement that they are unable to obtain the same information.” But the Court noted that there were several arguments defendants might have made that could have been considered exceptional circumstances:

Defendants do not contend, for example, that the results of Dr. Preston’s EMG study would not be replicable if the same study were conducted by a different doctor. *See, e.g., Costa*, 268 Ill. App. 3d at 8 (explaining that the plaintiff failed to demonstrate exceptional circumstances where she did not show it was impracticable to obtain opinions on what disease process caused her husband’s death, she could do any testing she wished, there was enough tissue sample for testing, and she did not show

that the tissue sample defendants received was unique); *see also* Ill. S. Ct. R. 215 (eff. Mar. 28, 2011) (stating that, if a court grants a party’s request to order a party to submit to a physical examination by a licensed professional where the physical condition is at issue, that party will receive a written report of the examination along with the examiner’s findings, test results, and the examiner’s diagnosis and conclusions); *see also In re ‘Agent Orange’ Product Liability Litigation*, 105 F.R.D. 577, 581 (E.D.N.Y. 1985) (finding exceptional circumstances existed where certain information possessed by nontestifying experts could not be readily obtained from other sources).

**Learning Point:** The new rule of discovery established is clear, but this case also speaks to good appellate advocacy. Everyone wants to create new law with a favorable Supreme Court decision, such as this one on whether expert witnesses can be redesignated. Some may consider that “hitting the home run”, but that view is short-sighted. Hitting a home run in this case might also mean getting Dr. Preston’s report and evaluation. And one way that might have happened was by making the alternative “exceptional circumstances” argument the Court noted was never made. Some advocates may think that making alternative arguments denigrates their main argument in the eyes of the court. But good, solid alternative arguments may also give a court a favorable option it was looking for—as might have been the case here. ♦



## CLAUSEN MILLER RANKED AMONG THE BEST OF THE BEST IN APPELLATE PRACTICE, INSURANCE LITIGATION AND CONSTRUCTION LAW

U.S. News and World Report recently placed Clausen Miller's Appellate, Insurance Litigation and Construction Law practices among the Best of the Best in its 2021 Best Lawyers Best Law Firms rankings. The U.S. News—Best Lawyers® “Best Law Firms” rankings are based on a rigorous evaluation process.

The Appellate Practice Group achieved a Tier 2 ranking nationally and regionally. The firm achieved a Tier 2 regional

ranking for its Insurance Litigation practice and a Tier 3 regional ranking in Construction Law.

Clausen Miller congratulates all of the attorneys whose outstanding work is reflected in these rankings.

<https://bestlawfirms.usnews.com/profile/clausen-miller-pc/overview/39045>

## ABOLITION OF ILLINOIS PUBLIC DUTY IMMUNITY DOCTRINE IS PROSPECTIVE ONLY

*Coleman v. East Joliet Fire Protection District*, 2016 IL 117952 (2016), was another politically charged decision from the Illinois Supreme Court where the four Democratic Justices ruled over three Republican Justices to abolish a long-standing Illinois legal precedent upholding the public duty immunity rule. In the words of dissenting Justice Thomas, this four Justice majority created new precedent eliminating this immunity without being presented with any compelling reason to do so, contrary to the principle of stare decisis. In Volume 1 of our 2016 *CM Report*, **Kimbley Kearney** of our Appellate Practice Group, who acted as lead appellate counsel before the Illinois Supreme Court in *Coleman*, more fully analyzed the public duty doctrine and the *Coleman* decision

abolishing this immunity. We wish to report to our friends in the defense and insurance industry that the Illinois Supreme Court recently ruled that its *Coleman* decision should be applied prospectively only. In *Tzakis v. Maine Township*, 2020 IL 125017, the Court held that *Coleman* should be given prospective application only because it represented a clear departure from prior precedent and fairness so required to defendants currently involved in litigation predating *Coleman* who might be relying on the public duty doctrine to shield them from liability. If any of our friends in the insurance and defense industry have any questions about *Coleman* or the public immunities, please contact Kim ([kkearney@clausen.com](mailto:kkearney@clausen.com)).

## CLAUSEN MILLER PARTNERS JACOB ZISSU AND SERENA SKALA OBTAIN S.D.N.Y. TRIAL DECISION IN FAVOR OF UNDERWRITER, DISMISSING MULTI-MILLION DOLLAR BREACH OF CONTRACT ACTION



In one of the first few trials to proceed remotely in the Southern District of New York during the COVID-19 pandemic, Clausen Miller partners **Jacob Zissu** and **Serena Skala** recently obtained a trial decision in favor of an underwriting managing general agent, dismissing a breach of contract action stemming from an alleged \$47 million underwriting loss.

Plaintiffs were insurers who had engaged the services of our client to underwrite a program of taxi and limousine risks for a period of years. At the conclusion of the program, the aggregate amounts incurred for individual accident claims and allocated loss adjustment expenses greatly exceeded the premiums collected. Using *post hoc ergo propter hoc* logic, Plaintiffs concluded that fault must lie with their managing general agent underwriter, ignoring fortuity and a general downturn in commercial auto insurance profitability across the industry during the years at issue.

Without a true understanding of the cause of their unprofitability, Plaintiffs made various unsupported allegations against our client, including improper selection of risks, failures of due diligence, and intentional manipulation of loss histories, across approximately 1,500 taxi and limousine accounts and 2,400 policies in the program. Through years of discovery (including the exchange of over 1 million pages of documents), as well as the filing of partial summary judgment motions, the multitude of Plaintiffs' malfeasance claims were eventually whittled away, leaving three discrete allegations affecting only 15 large taxi accounts.

In the end, Plaintiffs were left to claim at trial that the true source of their unprofitability was an algorithm error contained in their own internal system—but that our client had somehow failed to alert Plaintiffs to their own error. The effect of this algorithm error, as well as the correction of the error through manual overrides, was alleged to have underpriced policy premiums by approximately \$30-40 million in the aggregate. Additional underpricing was also alleged to have occurred as a result of our client's application of ISO Rules in regard to allocated loss adjustment expenses and loss histories for accounts with deductibles.

Several fact and expert witnesses testified in support of the parties' respective claims and defenses, including actuarial and underwriting experts who assisted the Court in understanding the application of ISO Rules and state filings by insurers. Having found that our client's lead underwriter was credible, and that the testimony and written communications of two program managers formerly employed by Plaintiffs supported our client's defenses, the Court held that our client had not breached its contract with Plaintiffs.

Partners **Tyler Jay Lory**, **John DeFilippis**, **Don Sampen**, and **Joe Ferrini** assisted in leading and coordinating a firm-wide team of attorneys to handle the volume and complexity of the allegations and discovery over the years. Clausen Miller support staff, including the firm's IT department, were also integrally involved in remotely preparing the case for electronic trial, a testament to the firm's ability to improvise, adapt and overcome the challenges presented by the coronavirus pandemic.

# 10 Tips For Securing Beneficial Amicus Support On Appeal

by *Melinda S. Kollross*

## Introduction

*Amicus curiae* or “friend of the court” briefs are submitted by persons or entities who are not parties to a given lawsuit. Originally intended as neutral, objective third party pieces, today’s amicus briefs usually take sides, advocating in favor of a particular party or outcome. Thousands of these amicus briefs are filed every year in cases pending before the United States Supreme Court, state supreme courts, and intermediate appellate courts throughout the federal and state judicial systems. The potential influence of such briefs is manifest—reviewing courts regularly cite to them in their opinions. As stated in an American Bar Association article on the topic: “One study showed that between 1986 and 1995 the U.S. Supreme Court referred to at least one amicus brief in 37 percent of its opinions; another study revealed that state supreme courts acknowledged or cited amicus briefs in 31 percent of cases and discussed arguments made in amicus briefs in 82 percent of the cases sampled.” (See [https://www.americanbar.org/groups/gpsolo/publications/gp\\_solo/2015/september-october/amicus\\_briefs\\_how\\_write\\_them\\_when\\_ask\\_them/](https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2015/september-october/amicus_briefs_how_write_them_when_ask_them/)).

\* \* \*

The following tips can help you decide when amicus support should be sought, how it can most readily be obtained, and how to maximize its effectiveness in your case.

## 1. Assess the Need for Amicus Support Promptly

It is never too early to begin thinking about amicus support. If your case involves a legal issue with potential significance beyond the parties to the action, amicus support should at least be considered. In most instances, of course, amicus support will not be pursued. Whether for strategic, tactical, economic or other reasons, the majority of appeals are resolved without amicus input. The one exception is United States Supreme Court practice, where amicus participation is the norm rather than the exception. In fact, over 800 amicus briefs were filed in the Court’s 2017 Term alone. (See <https://www.scotusblog.com/2018/07/empirical-scotus-getting-rid-of-those-amicus-blues/>).

So what factors should weigh in the amicus analysis? First and foremost is the significance of the legal issue(s) being addressed—beyond the instant litigants. Will the appellate tribunal’s ruling in this case make new law or change existing law to a significant degree? Are major economic or social policies involved? Will thousands of people, businesses, organizations or governmental entities potentially be affected? Are “hot button” issues in play? If the answer to any of these questions is “yes”, a reasonable basis for seeking amicus support exists.

A second consideration is the position and preferences of the parties. Is this a



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good test case for the issue(s) at hand? Does the party litigant desire amicus involvement? Is counsel an experienced appellate practitioner who knows the benefits of obtaining amicus support and how to secure that support if desired? How does the court view amicus filings? Is it welcoming like the United States Supreme Court or leery of amicus briefs like the Seventh Circuit Court of Appeals?

The amicus analysis should be performed sooner rather than later. Doing so will afford more time for the rest of the process if amicus support is going to be pursued.

## 2. Review Applicable Amicus Rules and Deadlines

The procedural rules governing amicus filings vary from state to state and between the federal circuit courts of appeal and the United States Supreme Court. It is imperative that any litigant seeking amicus support review the applicable amicus rules at the outset to gain a complete understanding of the process. Of particular note are: (1) the means by which amicus filings are permitted, (2) whether amicus briefs are allowed at the present stage of the proceedings, (3) deadlines for filing amicus briefs; and (4) content and format requirements for amicus briefs.

### a. Permission

In the federal system, amicus briefs are permitted by leave of court (*i.e.* upon motion), at the court's request, or with the consent of all parties. (See S. Ct. R.37 and FRAP 29). Governmental entities and their officers may file an amicus brief without the consent of the parties or leave of court. (*Id.*) The states each set their own rules for permitting

amicus briefs, which may include leave of court, at the court's request, upon written consent of all parties, or some other requirement(s). Where a motion is required, the states vary as to whether the proposed amicus brief must be filed with the motion. In federal court, the proposed amicus brief must accompany the motion. (*Id.*)

### b. Stage(s) Allowed

The United States Supreme Court allows amicus briefs in support of or in opposition to a petition for a writ of certiorari and at the merits stage. The states vary as to whether amicus briefs may be filed concerning requests for permissive appeals. For example, Illinois does not allow amicus briefs supporting or opposing a petition for leave to appeal to the Illinois Supreme Court. New York does allow amicus briefing on motions for permission to appeal, provided leave of court is obtained. And Pennsylvania allows amicus briefs in support of or against a petition for allowance of appeal, if the amicus curiae participated in the underlying proceeding as to which the petition for allowance of appeal seeks review, or by leave of court. Some courts allow amicus briefs on petitions for rehearing, some do not. Always check the rules and speak with court personnel to confirm whether amicus support is allowed at your stage of the litigation. Doing so can save time, effort and money—not to mention the potential embarrassment of asking for amicus support (or attempting to file an amicus brief) where the rules do not allow it.

### c. Deadlines

Rule 29(6) of the Federal Rules of Appellate Procedure specifies that for amicus briefs during initial consideration of a case on the merits, “[a]n amicus curiae must file its brief,

accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.”

United States Supreme Court deadlines depend on the stage of the action. At the certiorari stage, the deadline to file an amicus brief in support of the petitioner or appellant is 30 days after the case is placed on the docket or the Court calls for a response, whichever is later. (S. Ct. R. 37.2). These deadlines may not be extended. The deadline to file an amicus brief in support of a respondent or appellee is the same as the deadline to file a brief in opposition or motion to dismiss or affirm. This amicus deadline is extended when the deadline to file the brief in opposition or motion to dismiss or affirm is extended. (*Id.*)

At the merits stage, the deadline to file an amicus brief is 7 days after the brief for the party supported. If the amicus does not support either party, the deadline is 7 days after the time allowed for filing the petitioner's or appellant's brief, irrespective of when briefs are actually filed. These deadlines may not be extended. (S. Ct. R. 37.3(a)).

State court deadlines for filing amicus briefs vary from state to state. Be sure to check them at the outset so you know what time frame you have to work with and can advise prospective amici accordingly.

#### d. Brief Content and Format

The applicable rules governing content and format for amicus briefs must be followed precisely. This includes all requirements concerning the amicus statement of interest, which may or may not include disclosure of information concerning who paid for and/or participated in authoring the amicus brief. Some courts, like the Seventh Circuit, will pre-approve briefs for filing. Failure to scrupulously abide by all content and format rules risks rejection of the amicus brief entirely, or diminished credibility if the brief is accepted.

### 3. Identify Potential Amicus Filers

Amicus support can come from many sources. These include academics or other experts, businesses, professional and trade associations, all manner of nonprofits, and governmental entities at the local, state and federal level. Such individuals and groups may be interested in getting involved in your case because:

- They possess expertise in the subject matter of the litigation and thus stand in a position to educate the court;
- The court's resolution of the case may impact the members of a particular business, industry, profession or trade and the amicus wants to speak to the court on their behalf;
- They espouse a particular value, mission or world view that may be advanced or hindered by a ruling on the issue(s) at hand;

- Governmental policy concerns or operational interests may be directly or indirectly impacted by the court's decision.

Several of these considerations might be implicated in a given case. Thus, it is not unusual for multiple amici to file briefs in particularly significant matters. A high profile United States Supreme Court case may garner 50-100 amici.

Sometimes a party litigant knows of many potential amicus supporters, other times a few brainstorming sessions may be necessary to prepare a list of amicus candidates. In either case, one amicus might be able to help identify other individuals and entities to be contacted for additional amicus support. Indeed, organizations that regularly file amicus briefs frequently have a network of other organizations that they are used to working with on amicus filings.

### 4. Summarize Key Facts and Issue(s) To Be Addressed

Before contacting individuals or entities to inquire about amicus support, it helps to prepare a succinct written summary of the key case facts and issue(s) to be addressed. This is essential if "cold calling" a major national organization like the American Medical Association or the US Chamber of Commerce for amicus assistance. But it is also beneficial when reaching out (by telephone, email or in person) to smaller groups and individuals or organizations with whom you have personal contacts. Think of it as your amicus "elevator speech." You want to be able to explain in just a few sentences what type of

case you have, where it is pending, what the key issue is, and why you think whomever you are addressing would want to get involved as an amicus. Also know the applicable deadline for the amicus brief you are requesting... it is one of the first things many recipients of your speech are going to ask.

### 5. Contact Amicus Candidates

Once you have your elevator speech prepared, you are ready to start contacting amicus candidates. The process for doing so depends on the party litigant's relationship to the prospective amicus candidates. If the party is a member of prospective amicus organizations or has used amici in the past, a few telephone calls or emails to contacts may get the ball rolling. In cases with less preexisting contacts, "cold-calling" via an organization's website, amicus committee, or general information number may be in order. The goal here is to generate enough interest with your elevator speech to get in front of the right decision makers who can approve amicus participation. Be prepared for a few rejections. Prospective amici usually have time, budget, personnel, and policy constraints that limit the number of cases they can get involved in, especially if they will be responsible for preparing their own amicus brief rather than just joining someone else's.

### 6. Define Amicus Roles

An effective amicus curiae brief can assist the court in one or more well-recognized roles.

First, an amicus brief can clarify and/or supplement the main legal and factual arguments made in a party's

brief. This may be particularly helpful in complex cases, or those where space limitations impact a party’s ability to comprehensively address the issues in their own brief. It may also be useful where additional non-record facts and data would assist the court in making a more fully informed decision. A “me too” amicus brief that simply repeats a party’s arguments using slightly different language does not assist the court and should be avoided.

Second, an amicus brief can advise the reviewing court of the potential legal, social and/or economic impact of its decision on particular individuals, groups, businesses, industry or the public at large—beyond the parties to the present case. Such briefs typically include non-record facts such as social science data, research studies, economic analysis, and other supporting information.

Third, an amicus brief can provide a more complete and comprehensive view of the larger legal landscape for the appellate court’s decision. Such a brief may inform the court of other pending cases that may be impacted by its ruling, note variations and distinguishing factors among the cases, and propose a refined legal analysis or limited ruling in light of the “bigger picture.” This type of amicus brief can also present in depth analysis of a statutory or regulatory framework beyond that contained in the party briefs.

Fourth, an amicus brief can offer deep expertise in specialized fields beyond that possessed by the parties. Amicus briefs from academia, subject matter experts, professional, business, or trade associations, and various governmental entities can all educate the court on

issues that the parties may not fully recognize, understand or explore in their briefs.

## 7. Coordinate Amicus Strategy

Whether you have one amicus or several amici, coordination is key to maximizing effectiveness. The party and its amicus supporter(s) should confer early on concerning record materials, existing research, applicable rules and deadlines, the supported party’s main arguments, known opposing arguments, and the role each amicus brief will fulfill. Doing so can save time and money while avoiding duplicative arguments and other needless redundancies.

Sophisticated parties and their appellate counsel will continue to communicate regularly with their amicus supporters throughout the briefing process. Draft briefs (main and amicus) should be circulated for review and comment among all concerned so that everyone stays informed and aligned. For respondents/appellees, opposition briefs (party and amicus) should likewise be circulated for review (and possible refutation) by supporting amicus curiae. Amicus briefs filed in support of neither party must also be considered as such briefs may favor one side or the other despite its professed neutral stance.

## 8. Encourage Joint Amicus Briefs

The Circuit Advisory Committee Note to Rule 29.1 of the United States Court of Appeals for the Ninth Circuit States: The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective

amici are encouraged to file a joint brief. Movants are reminded that the Court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties.... (Rev. 7/94; 12/1/09)

These words of wisdom apply beyond the Ninth Circuit. No appellate court wants to read multiple “me too” amicus briefs raising the same facts and arguments as the party brief or the briefs of other amicus filers. A joint brief filed on behalf of multiple amici is vastly preferable to a series of repetitive briefs that dilute the impact of key points and reduce persuasive value overall. More is not better in this context. It is counterproductive.

## 9. Assist Amicus in Effectively Presenting Their Perspective

Parties and their counsel should not write or pay for any part of an amicus brief, which would seriously undermine its credibility. However, it is perfectly appropriate for parties and their counsel to meet with amici, suggest approaches for briefing, and provide feedback on draft briefs circulated for review. An effective amicus brief should be short, simple, complete and compelling. It should offer the court something new and significant to consider in its analysis. Avoid exaggeration, overstatement, and attacks on opposing counsel (or their *amici*).

The most powerful amicus briefs contain more than a thorough legal analysis of cases and statutes. As one commentator explains: “[c]ommon-

sense reasoning, addressed to real consequences, has great importance to the Court....The amicus brief that puts technical legal reasoning into a pragmatic context will receive the most attention.” (See <https://www.mayerbrown.com/en/perspectives-events/publications/no-date/amicus-briefs-in-the-supreme-court>).

Unlike party briefs, amicus briefs may cite facts and materials outside the record. But they may only do so in analyzing general legal principles and policy issues. They may not seek to “supplement” the record on appeal by citing evidence specific to the parties or the instant case that was not made part of the record below.

Finally, amicus briefs should focus on the proper development of the law and not just the desired result in the case at hand.

**10. Leverage Amicus Support in Party Brief(s) and at Oral Argument**

Do not assume that the reviewing court will necessarily read all, or any, of the amicus briefs filed in your

case as a matter of course. Instead, leverage the most compelling points from your supporting amicus briefs by referencing them directly in your party briefs and potentially at oral argument as well. Doing so may convince the court to review an amicus brief it otherwise would not have read, or at least be made aware of the most critical information contained in such briefs so that it may be considered in the court’s decision-making process.

**Conclusion**

Securing high quality, compelling amicus support for your position in a significant case can increase its persuasiveness and improve your chances of success on appeal. As Justice Ruth Bader Ginsburg has noted: “There is useful knowledge out there in friend of the court briefs.” (See <https://empiricalscotus.com/2016/05/11/the-most-effective-friends-of-the-court/>). Justice Breyer has likewise commented that amicus briefs “play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of

our decisions.” Justice Alito concurs, observing that “[e]ven when a party is very well represented, an amicus may provide important assistance to the court . . . [by] collect[ing] background or factual references that merit judicial notice.” (Allison Orr Larsen, William & Mary Law School Research Paper No. 09-273, 100 Va. L. Rev. 1757 (2014)).

Take it from these experts: a well-written amicus curiae brief presenting compelling information and argument beyond that contained in the party briefs truly is a “friend of the court.” Such briefs are well worth a party litigant’s efforts in obtaining them to provide the appellate tribunal with additional insights into why that party’s position is the correct one, promoting the proper development of the law and maximizing its chances of prevailing on appeal.

*This article first appeared in the Federation of Defense & Corporate Counsel Insights publication, and is reprinted with permission. Some material has been deleted to meet space requirements. ♦*



## **Florida Courts Analyze Compliance With The Civil Remedy Notice Specificity Requirement In Bad Faith Claims Under Florida Statute § 624.155(3)**

by *Michael H. Scott*



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In Florida first party property matters, a party may not assert a statutory bad faith action against an Insurer without first complying with the Civil Remedy Notice (CRN) requirements. The CRN is a condition precedent to asserting a statutory bad faith action and provides the Insurer an opportunity to "cure" specific bad faith allegations within 60 days of receiving notice.

The specific requirements originate in Fla. Stat. § 624.155(3), which states that a CRN shall be on a form provided by the department and shall state with specificity:

- 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.

Additionally, the Florida Department of Financial Services (DFS) provides that CRNs contain additional

information relating to the claim, including the complainant name, complainant address, and reason for notice. Fla. Admin. Code Ann. r. 69J-123.002.

Recently, the United States District Court for the Middle District of Florida and United States District Court for the Southern District of Florida evaluated compliance with the CRN specificity requirement in Fla. Stat. § 624.155(3) and exceptions to the rule. *Astorquiza v. Covington Specialty Ins. Co.*, 2020 U.S. Dist. LEXIS 200617 (M.D. Fla. Oct. 28, 2020); *Pin-Pon Corp. v. Landmark Am. Ins. Co.*, 2020 U.S. Dist. LEXIS 212941 (S.D. Fla. Nov. 9, 2020).

### ***Astorquiza v. Covington Specialty Ins. Co.***

#### **Facts**

In *Astorquiza*, the Insurer prevailed in challenging a deficient CRN where the Plaintiffs' CRN lacked specific information required by the DFS, including the complainants' and their attorney's email addresses, the policyholder's address, and the Insurer's address.

#### **Analysis**

The Defendant successfully argued that the Plaintiffs' CRN was deficient

and that the Plaintiffs had not satisfied the CRN specificity requirements as a condition precedent to asserting their bad faith claim. The United States District Court for the Middle District of Florida held that the requirements under the statute must be strictly construed and found that the CRN lacked information required by the DFS. Accordingly, the bad faith lawsuit count was dismissed.

***Pin-Pon Corp. v. Landmark Am. Ins. Co.***

**Facts**

In *Pin-Pon Corp.*, the Plaintiff filed three separate CRNs which did not strictly comply with the CRN specificity requirements, and the United States District Court for the Southern District of Florida allowed the bad faith lawsuit

to proceed because it determined that the Plaintiff’s three nearly complete and nearly accurate CRNs substantially complied with Fla. Stat. § 624.155(3).

**Analysis**

The Court held the failure of the CRN to strictly comply with the DFS requirements will not necessarily foreclose a statutory bad faith action if the defect was purely technical in nature, the party substantially complied, the notice purpose of the statute has been fulfilled, and the Insurer has not been prejudiced by the error. *QBE Ins. Corp. v. Chalfonte Condominium Apartment Ass’n, Inc.*, 94 So. 3d 541 (Fla. 2012).

The Court found that the Insurer had actual notice of the Insureds’ intent to pursue a statutory bad faith action, noting it substantively responded to

the three CRNs. Additionally, the Court found that, by responding to the CRN and not raising the technical deficiencies with the CRN in the Response, the Insurer waived the argument of technical deficiencies.

**Learning Point:** Insurers should always be cognizant whether the CRN complies with Fla. Stat. § 624.155(3) and DFS notice requirements. Should the CRN lack the specific information required as a precondition for asserting a bad faith claim, it is imperative that Insurers object to the deficiency in the Response to the CRN to avoid waiving this as a defense. Although Florida courts are not consistent in their treatment of CRN compliance, Insurers should raise the CRN deficiency argument where appropriate. ♦





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A federal trial court in Florida recently held that “assuming for argument’s sake that Plaintiffs had alleged facts triggering coverage under the Policy, the virus exclusion would still apply to bar coverage for Plaintiffs’ losses.” *Nahmad v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833, 2020 U.S. Dist. LEXIS 203838, at \*23 (S.D. Fla. Nov. 1, 2020).

## Facts

*Nahmad* involves Plaintiffs whose dental practice was suspended due to orders issued by Florida’s Governor and Mayor of Miami-Dade County requiring “non-emergent or elective dental care be postponed indefinitely” due to COVID-19. Plaintiffs claim for

# Florida Federal District Court Finds Virus Exclusion Bars Covid-19 Claim Even If Plaintiffs Allege Facts Supporting Existence Of Coverage

by *Ross S. Felsher*

business interruption loss was denied by the Defendant because “the loss at issue did not come within the coverage grant of the Policy and because certain ‘potentially applicable exclusions’ may bar coverage.” Plaintiffs sued for breach of contract and declaratory relief (alleging that their losses were caused by actions taken to stop the spread of COVID-19) and Defendant moved to dismiss the lawsuit arguing that: (1) Policy’s virus exclusion bars coverage; (2) Even if virus exclusion didn’t apply, “Plaintiffs are not entitled to business income coverage because they do not allege any direct physical loss or damage to their property, which is required for coverage”; (3) “Plaintiffs are not entitled to ‘civil authority’ coverage under the terms of the Policy”; and (4) “There is no breach of contract given the lack of coverage under the Policy, Count I fails and, as a consequence, Count II fails.”

## Analysis

The Court did not agree that “Plaintiffs’ distinction between the government orders versus the virus as the immediate cause of their losses avoids the plain language of the virus exclusion.” Despite COVID-19 having been at least a partial cause of Plaintiffs’ losses, the policy exclusion in question applies “regardless of any other cause or event that contributes concurrently or in any sequence to the loss.” The Court found

that the several courts around the nation that “considered whether the virus exclusion applies where government closure orders themselves rather than the virus are alleged to be the cause of Plaintiff’s business losses, have rejected similar arguments and determined that coverage is excluded.” The Court also rejected Plaintiffs’ argument that the exclusion was vague because the Policy didn’t define the term “virus.” The Court determined that Plaintiffs had no basis for misinterpreting either “COVID-19” or “pandemic” “as a non-virus for purposes of [the] exclusion.”

Finally, despite maintaining “that the anti-concurrent causation language contained in the virus exclusion rests on ‘shaky ground,’ [Plaintiffs failed] to establish that the exclusion contain[ed] an ambiguity precluding this clause’s application.” The Court agreed with Defendant that Florida courts do in fact “enforce anti-concurrent causation clauses where the excluded peril is one cause of the loss,” and that “even if the Complaint’s allegations came within the Policy’s coverage grants, the virus exclusion applies to bar coverage.” The Court therefore dismissed both of Plaintiffs’ Counts with prejudice.

**Learning Point:** While this trial court decision is non-binding, it illustrates a willingness by Florida federal courts to enforce virus exclusions. ♦

# Can Policy Language Preclude Assignment Of Benefits In Florida?

by Ross S. Felsher

## Introduction

Many Florida insureds choose to assign their first party property insurance policy benefits to vendors such as roofing contractors or water mitigation companies via an assignment of benefits (“AOB”). These vendors frequently work to maximize and inflate the claims, and litigate aggressively if the insurer balks at paying the inflated amount. Florida courts have routinely upheld the right of a policyholder to assign post-loss benefits, and Florida insurance regulators have not permitted insurers to add language to policies excluding or preventing this right to assign post-loss benefits.

In response to AOB litigation abuse that increased over the last decade, the Florida legislature enacted Fla. Stat. § 627.7153, effective July 1, 2019. This statute imposed requirements for AOB validity, and permitted insurers in limited circumstances to offer policies that do not permit AOBs:

(2) An insurer may make available a policy that restricts in whole or in part an insured’s right to execute an assignment agreement **only if** all of the following conditions are met:

(a) The insurer makes available to the insured or potential insured at the same time the same coverage under a policy that does not restrict

the right to execute an assignment agreement.

(b) Each restricted policy is available at a lower cost than the unrestricted policy.

(c) The policy prohibiting assignment in whole is available at a lower cost than any policy prohibiting assignment in part.

(d) Each restricted policy include on its face the following notice in 18-point uppercase and boldfaced type:

THIS POLICY DOES NOT ALLOW THE UNRESTRICTED ASSIGNMENT OF POST-LOSS INSURANCE BENEFITS. BY SELECTING THIS POLICY, YOU WAIVE YOUR RIGHT TO FREELY ASSIGN OR TRANSFER THE POST-LOSS PROPERTY INSURANCE BENEFITS AVAILABLE UNDER THIS POLICY TO A THIRD PARTY OR TO OTHERWISE FREELY ENTER INTO AN ASSIGNMENT AGREEMENT AS THE TERM IS DEFINED IN SECTION 627.7152 OF THE FLORIDA STATUTES.

Fla. Stat. § 627.7153 (Emphasis added).

However, this 2019 AOB statute is found within Chapter 627, and Chapter 627 of the Florida Code generally does not apply to surplus lines carriers pursuant to Fla. Stat. § 626.913, which states that:

(4) Except as may be specifically stated to apply to surplus lines insurers, the provisions of chapter 627 do not apply to surplus lines insurance authorized under ss. 626.913-626.937, the Surplus Lines Law.

Fla. Stat. § 626.913.

## Analysis

### The Conflict

As Florida courts have begun interpreting this 2019 statute, uncertainty has emerged regarding the right of a surplus lines insurer to employ policy language that prohibits assignment of benefits. A recent federal decision from the Southern District of Florida held that surplus lines insurers can contract away an insured’s ability to enter into AOBs because Florida law dictates that a surplus lines policy “shall not be more favorable to the insured as to the coverage or rate than under similar contracts on file and in actual current use” in Florida “by the majority of authorized insurers actually writing similar coverages on similar risks.” *Raven Emtl. Rest. Servs., LLC v. United Nat’l Ins. Co.*, 2020 U.S. Dist. LEXIS 179586 (S.D. Fla. Sep. 25, 2020). The Southern District

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specifically noted that §626.913(4) “mandate[s] that Chapter 627 does not apply to surplus lines insurers” and that no other provision of Chapter 626 negates its directive “that surplus lines insurers shall not be subject to the same chapter 627 requirements as are applicable to authorized insurers.” In *Raven*, the Southern District granted the Insurer’s motion to dismiss the AOB lawsuit as a result of the surplus lines policy’s Anti-Assignment Endorsement.

However, a recent state appellate decision from Florida’s Third District Court of Appeals rejected the same argument by Lloyd’s Underwriters that its surplus lines policy’s Anti-

Assignment Endorsement precluded the policyholder’s right to assign post-loss benefits, invalidating the AOB lawsuit. The state appellate court was not persuaded by Underwriters’ argument that it specifically negotiated the endorsement with the Insured, noting, in part, that anti-assignment provisions are prohibited, “whether that provision is placed in the application or in the policy itself.” *Extreme Emergency Fire & Water Rest. LLC v. Certain Underwriters at Lloyd’s of London*, No. 3D20-5, 2020 Fla. App. LEXIS 17882, at \*5 (3d DCA Dec. 16, 2020). The *Extreme Emergency* court also noted that Fla. Stat. § 627.7153 did not apply to the subject policy because the “new law

‘applies to a policy issued or renewed on or after July 1, 2019.’” It is not apparent from the decision whether the *Extreme Emergency* court contemplated the fact that the Lloyd’s Underwriters policy was a surplus lines policy not subject to or a beneficiary of the provisions of Fla. Stat. § 627.419(1), which permits AOB exclusionary language in some circumstances.

**Learning Point:** Surplus lines carriers should consider exclusionary policy language precluding AOBs in Florida, with the knowledge that the law in Florida is unsettled and evolving. ♦



# New California Law Requires Common Interest Developments To Allow For At Least 25 Percent Of Units To Be Rented

by *R. Mick Rubio*

## Introduction

Effective January 1, 2021, California law bars common interest developments from adopting or enforcing provisions in their governing documents that restrict the number of rentals to less than 25 percent of the total separate interests within a development. Assembly Bill 3182 (“AB 3182”) revises existing Civil Code § 4740 et seq., and adds an entirely new provision, Civil Code §4741.

## Analysis

Civil Code § 4741(b) states that common interest developments shall not adopt or enforce provisions in a governing document, or amendments to a governing document that restrict the rental or lease of separate interests within a common interest development *to less than 25 percent* of the total number of separate interests. In other words, with the passage of AB 3182, common interest developments such as homeowners associations (“HOAs”) may now only limit the number of rental units in their developments to no less than 25 percent of the total number of separate interests. The new law does not preclude a common interest development from allowing for a higher percentage limit of rentals.

By contrast, prior to the passage of AB 3182, California law did not restrict HOAs or other common interest developments from adopting rules that

limited the number of rental units in a development. Indeed, it has not been uncommon for HOAs to enact rules in their governing documents which placed strict limitations on leased separate interests, or even banning leasing outright. With the passage of AB 3182, HOAs and other common interest developments must enact rules that allow for at least 25 percent of separate interests in a common interest development to be rented.

AB 3182 also adds Civil Code § 4741(a). That provision states that owners of separate interests are not otherwise subject to provisions in a governing document or amendment to a governing document that has the “effect of prohibiting, or unreasonably restricts the rental or leasing of any of the separate interests, accessory dwelling units, or junior accessory dwelling units in that common interest development...” Irrespective of the new 25 percent rental requirement, Civil Code § 4741(a) makes clear that purported “unreasonable restrictions” on leasing a separate interest at a development is otherwise unenforceable. This provision is notable, as “unreasonable restrictions” appears to be an objective standard that could potentially be litigated before a fact finder. Thus, HOAs and other common interest developments should closely scrutinize any rental restrictions that it currently has in place.



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AB 3182 also states that any contrary provision in a common interest development's governing documents will be deemed unlawful. Furthermore, developments will be required to revise their governing documents to be consistent with AB 3182 no later than December 31, 2021. In addition, the new law also carries civil penalties. The penalties for any "willful" violation of this new law shall result in actual damages incurred by a party, as well as civil penalties not to exceed \$1,000.

**Learning Point:** AB 3182 is significant given California's housing crisis in recent years. California's housing crisis has been underscored by the Covid-19 global pandemic and its subsequent economic effects. Quite simply, affordable housing has been a scarcity in many major California regions, and the pandemic has only exacerbated the housing crisis. It remains unclear whether AB 3182 will operate to provide more housing options to residents in an already

densely populated and expensive state. That said, homeowners, common interest developments, HOA board members, and property managers must be aware of the effects of AB 3182, and the potential litigation that might ensue for failure to properly conform to the new law's requirements. Indeed, the new law puts the onus on these common interest developments to revise their governing documents, or otherwise be subject to actual damages and/or civil penalties. ♦



## Out On A Limb: Ditching Collectability In Legal Malpractice Actions

by *Paul V. Esposito*

No one should be surprised to learn that lawyers tend to disagree. Put two or three together, and any hopes of unanimity fade. It doesn't change when they become judges. But generally, that's a good thing. Disagreement usually allows for a thorough exposition of the law.

Among the principles judges *have* agreed on is the collectability doctrine. A plaintiff in a legal malpractice action may only recover what the plaintiff could have recovered in an underlying action. The doctrine makes sense. If an underlying defendant is penniless, why should an attorney pay more than the defendant actually causing the harm? But now not all judges agree. At least they don't in Louisiana. *Ewing v. Westport Ins. Corp.*, 2020 La. LEXIS 2816.

### Facts

Marc Melacon injured Elaine Ewing in a car accident. Elaine hired attorney Chuck Granger to sue for damages. Granger fax-filed a petition for damages in state court but failed to forward it to the court within seven days. He did not file the petition until the prescription period passed. Not surprisingly, the court dismissed it.

Elaine sued Granger and his insurer for malpractice. Based on the collectability doctrine, defendants sought partial summary judgment capping damages at \$30,000. The parties agreed that an attorney-client relationship existed, Granger breached his duty, and that Melacon had only \$30,000 in insurance. Melacon testified

that he would file for bankruptcy if the judgment were higher. The district court granted the motion, otherwise a plaintiff "would be better off if [an] attorney committed malpractice, because the attorney would have more coverage than that underlying coverage."

The court of appeals reversed, ruling that a party's financial status is irrelevant to an award of compensatory damages. Noting that plaintiffs' rights in malpractice actions are no greater than their rights in underlying actions, the court applied the same rule to malpractice defendants. Because Elaine ultimately might collect full damages from Melacon despite his current poverty, she may collect them in full from Granger.

### Analysis

A divided Louisiana Supreme Court agreed with the court of appeals. The majority recognized that in most states, as part of proximate cause a plaintiff must prove that an underlying claim is collectible. A number of states have shifted the burden, making non-collectability an affirmative defense to be proved by the attorney. Non-collectability operates as a mitigation-of-damages type of defense.

The *Ewing* majority went further. It held that collectability plays no role whatsoever in legal malpractice cases. Years earlier, the Court eliminated the requirement that plaintiffs prove collectability. In the Court's mind, because attorneys usually don't accept meritless cases, there was an inference



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of recoverable damages. The Court shifted the burden of proving non-collectability to the malpractice defendants.

In *Ewing*, the majority further changed the law by holding that non-collectability is not even available as an affirmative defense. The majority reasoned that damages in negligence cases are not limited to what is collectable. The same rule should govern professional negligence cases. The general rule that malpractice plaintiffs have no greater rights against attorneys than against underlying defendants still applies when their claims are unprovable or have been discharged in bankruptcy. But claims resulting in enforceable judgments can be long-lived. If an impoverished defendant's financial posture improves during a judgment's life, a plaintiff may be able to fully collect it. Because an underlying defendant might ultimately pay a full judgment, a malpractice defendant should be required to do likewise.

To the dissent, the majority went too far by making collectability irrelevant to legal malpractice actions. Among

the 30 states addressing collectability, none has similarly ruled. The dissent found that the majority conflated what is relevant in an underlying action with what is relevant in a malpractice action. The purpose of an underlying action is to value the injuries caused by fault. By contrast, the purpose of a malpractice action is to value the opportunity lost by malpractice. This makes an underlying defendant's inability to pay irrelevant in the former action but relevant in the latter action, where an attorney's negligence did not cause the underlying harm. Keeping collectability in a case would leave to the factfinder the job of valuing the lost opportunity.

The dissent found that by giving malpractice plaintiffs greater rights than they possessed in underlying actions, the majority encourages malpractice suits. This "detrimentally alters insurance rates, increases the cost for attorneys to practice law, and creates a windfall for plaintiffs." The dissent had no problem with dropping a plaintiff's burden of proving the "case within a case." But doing so should not

eliminate the relevancy of collectability-related evidence. It merely changes who must prove the point.

As for the majority's claim that an underlying defendant's current insolvency is just a "snapshot," the dissent stated that accurately setting future damages is difficult in all cases. An award might be too high or low. But difficulties in accurately predicting the future should not bar factfinders in malpractice cases from valuing lost opportunities.

**Learning Point:** There may be a good explanation why *Ewing* stands alone on the issue of collectability. It might lie in the Court's unspoken assumption that lawyers are good business people. There is no reason to always assume that a lawyer would have rejected a case if damages were uncollectable. Sometimes lawyers make bad business decisions in accepting cases. But that is different from making professionally negligent decisions in handling them. Whether a plaintiff or the attorney sued for malpractice should bear the burden on collectability is a fair question. But the issue should remain for proof.

More problematic than the *Ewing* theory might be in its execution. It exposes attorneys to paying potentially huge damage awards even though they did not cause the underlying damages. Meanwhile, the persons causing them walk away scot-free. *Ewing* flows from a sense that the collectability doctrine itself is unfair to underlying plaintiffs. But by itself, *Ewing* is unfair to attorneys. Perhaps the law will ultimately recognize an attorney's claim for equitable indemnity or contribution against an underlying defendant. Until then, *Ewing* remains out on a limb. ♦



## New Jersey Tough Love: Protecting Underage Adults From Themselves

by Paul V. Esposito

A speeding car weaves through the nighttime traffic. The car's speed is too great, the driver's reactions too slow. The car crosses multiple lanes and hits a concrete divider. The impact ejects its unrestrained passenger. The car goes airborne, and after flipping several times lands on him. The passenger is dead at the scene; the driver survives. He is visibly intoxicated, his BAC about 0.16—twice the legal limit. Pleading guilty to vehicular homicide, the driver is sentenced to seven years in state prison. He is 20, his passenger 19.

Alcohol and young people are a frightening combination. It's the mixture of their youthful sense of invincibility with a chemical that dulls inhibitions. Having temporarily lost any fear of death, they open the door to it. Though making strides, legislatures and courts nationwide have been unable to solve the problem. Now the New Jersey Supreme Court has taken the next step. *Estate of Narleski v. Gomes*, 237 A.3d 933 (N.J. 2020).

### Facts

Along with two buddies, 19-year olds Mark Zwierzynski and Brandon Narleski drove to a liquor store where Narleski bought beer and vodka. The store clerk did not card him. Zwierzynski lived in a house owned by his parents, and he invited the group to drink there. His mother was out; his father lived elsewhere. After drinking 2-3 cups of vodka, Narleski texted 20-year old Nicholas Gomes, asking him to join them. Gomes came in his

parents' car. Zwierzynski gave Gomes a cup, and in Zwierzynski's presence Gomes drank two cups of vodka and juice. He and Narleski later drove in Gomes' car to a friend's home. By that time, Gomes was buzzed and Narleski was slurring his words. The accident happened on the way.

Narleski's parents sued the liquor store, Gomes, and his parents for wrongful death. The store sought contribution from Zwierzynski. The trial court ruled that Zwierzynski owed no legal duty to Narleski because of Gomes' intoxication. The Appellate Division affirmed, finding that Zwierzynski owed no duty to prevent underage drinking in a home he neither owned, rented, nor managed. But it ruled that going forward, underage drinkers owe a common law duty to not facilitate underage drinking in their residences, even if they lack ownership, possession, or control of them.

Strangely, despite not having liability Zwierzynski appealed.

### Analysis

The Supreme Court examined the history of the state's efforts in fighting underage drinking. Decades earlier, the legislature banned taverns from selling liquor to minors, and the Supreme Court created a cause of action for third-parties injured from a sale. The Appellate Division extended liability to social hosts serving alcohol to visibly intoxicated underage guests unfit to drive. The Supreme Court



extended that ruling to social hosts serving known, intoxicated adult guests unfit to drive. The legislature then created a third-party cause of action against of-age social hosts who serve alcohol to intoxicated persons old enough to legally drink. Though the statute failed to cover underage servers and drinkers, it operated as a public policy warning: don't serve, and don't drink.

Given the difficulties in curbing underage drinking, the Supreme Court considered whether to impose a duty on underage adult servers. It examined “the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.” All factors supported a finding of duty. Zwierzynski was a legal adult who controlled access to his house. He invited his friends to illegally drink. He provided the cups. That he did not directly serve or make alcohol available was irrelevant. So was his lack of house ownership or tenancy. He allowed the drinking to happen there.

The attendant risks were high. Drunk driving is a well-known killer. At 0.16% BAC—Gomes' level—an intoxicated driver is between 82 and 1,772 times more likely than a sober one to have a fatal accident. Zwierzynski could have prevented the drinking, or at

least stopped it before anyone became visibly intoxicated. And he could have arranged to keep intoxicated drinkers safe. Finally, the public interest calls for the exercise of responsibility by legal adults to control what happens in their residences. Immunizing underage adults is inconsistent with negligence law and unfair to the victims of illegal conduct.

The Court imposed a duty on an underage, adult social host if an injured person shows:

- (1) the host knowingly allowed and facilitated the drinking of alcohol by an underage guest in the host's residence, despite the lack of ownership or leasehold;
- (2) the host knowingly provided alcohol to a visibly intoxicated underage guest, or knowingly permitted that guest to serve himself or be served by others, even if the guests brought the liquor;
- (3) the host knew or should have known that the visibly intoxicated guest would operate a vehicle and foreseeably endanger others;
- (4) the host did not take reasonable steps to prevent the visibly intoxicated guest from driving; and

(5) as a result of intoxication facilitated by the host, the guest negligently operated a vehicle and injured a third party.

To make its point absolutely clear, the Court applied the duty to Zwierzynski himself. The law had already provided enough early warning.

**Learning Point:** This issue bears watching. It goes far beyond the death at the accident scene. Drunk driving forever touches the lives of parents, spouses, children, brothers, sisters, relatives, and friends. Time doesn't always heal wounds. Not this one. Despite the best efforts of so many people to eradicate the problem, it is still there. And with the advent of legal marijuana, it may get worse. Gomes admitted that he smoked marijuana earlier in the evening. It won't take much for legislatures or other courts to follow New Jersey's lead in imposing a new duty.

Strategically, Zwierzynski should not have appealed. He was in the clear; he could have left well enough alone. But if his appeal ultimately saves lives and prevents needless suffering, he unwittingly performed a service. ♦



## Middleman: The Impact Of Products Liability Law On Internet Distributors

by Paul V. Esposito

Where there's a will, there's a way. If nothing else, the marketplace is resilient. A few months ago, usually-filled shopping centers were ghost towns. Heavily dependent on walk-in traffic, many businesses failed. Despite an improving business climate, COVID still confounds the efforts of owners to draw pre-virus customers through store doors. But some have found a way to adapt. The difference between failing and surviving businesses often is the latter's ability to work the Internet into their operations.

For those businesses that already used the Internet, sales have boomed. It's easy to understand why. Every purchase comes with perks—no driving, no lines, and no COVID. Think Amazon.com. Projections for Amazon's net-operating income in 2020 range up to \$5 billion, easily surpassing the enormous \$3.2 billion figure for 2019.

It's a gross understatement that Amazon.com sells lots of products. Amazon reportedly catalogues 12 million. Combined with products sold through Amazon Marketplace, the number jumps to 350 million. Of course, Amazon doesn't manufacture the products it sells. It facilitates sales, essentially acting as a middleman. So the question arises: when Amazon sells a product, is it a distributor subject to state product liability laws? The answer? It depends. *Stiner v. Amazon.com, Inc.*, 2020 Ohio LEXIS 2205.

### Facts

A friend gave Logan Stiner, age 18, caffeine powder she bought off Amazon's website. That day, Logan was found dead from cardiac arrhythmia due to acute caffeine toxicity. In response to an FDA warning, Amazon removed caffeine-powder listings from its website two months later. Logan's father sued Amazon.com under the Ohio Products Liability Act, claiming that Amazon supplied a defective product.

A third-party vendor had listed the product on Amazon.com Marketplace under a virtual storefront trade name. Vendor agreements with Amazon required vendors to “source, sell, fulfill, ship, and deliver” their products, including proper packaging, marking, and labeling. Vendors needed to provide accurate and updated information for Amazon's website. Vendors set prices, subject to certain restrictions, and could warrant their products. They were responsible for product defects. The powder vendor declined the option to store it at an Amazon facility (for a fee). Amazon never possessed or had contact with the powder. The purchase order for the powder directed the purchaser to contact the storefront with questions or concerns.

Amazon moved for summary judgment on the ground that it was not a “supplier” under the statute. The Ohio Supreme Court agreed.

### Analysis

Under the statute, a supplier may be treated as a manufacturer if the latter is unreachable or insolvent. The statute defines a “supplier” as one who “sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce.” A supplier does not include (1) a financier in a product sale, or (2) a financial lessor not involved in product selection, possession, maintenance, or operation. The key distinction is that unlike a financier or a financial lessor, a supplier must exert some control over the product or its preparation for use or consumption.

Amazon lacked the necessary product control to be a supplier. Amazon's contractual relationship with vendors distanced Amazon from control. Amazon did prevent vendors from contacting customers, retained website control, reserved the right to alter product descriptions, and imposed pricing restrictions. But those were controls over the Amazon/vendor relationships, not controls over the products. The Supreme Court gained support for the control requirement in decisions from courts considering New Jersey, Tennessee, and California statutory or common laws.

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“*Middleman...*”, continued on pg. 25

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## Balance Of Power: Constitutional Limits On Retroactive Reviver Statutes For Child Sexual Abuse Claims

by Paul V. Esposito

Sometimes the good news never seems as good as the bad news is bad. The good news is that the rate of sexual assault and rape has dropped by 63% since 1993. The bad news is that another American is sexually assaulted every 73 seconds. About 63,000 children annually are sexually abused, 66% between ages 12-17.

It's no wonder that legislatures nationwide have worked to solve the problem. Because victims often repress memories of abuse, some states have substantially extended the periods for bringing accrued claims. Other states have gone further, enacting laws reviving sexual abuse claims expired under then-existing limitations statutes.

From a social policy perspective, it's hard to argue against these reviver statutes. But are they constitutional exercises of legislative powers? Analyzing its state constitution, the Utah Supreme Court has said no. *Mitchell v. Roberts*, 2020 UT 34, 469 P.3d 901.

### Facts

Terry Mitchell, age 16, witnessed a crime. That can be traumatic enough. According to Mitchell, it became much worse when in 1981 prosecuting attorney Richard Roberts sexually assaulted her. Thirty-six years later, Mitchell sued Roberts in federal court. Roberts moved to dismiss Mitchell's

case as barred by the statute of limitations. Mitchell responded that the Utah legislature amended the statute to revive her time-barred claims. Under the reviver, otherwise-barred claims may be brought within the later of 35 years from the victim's 18th birthday or three years after the amendment's effective date. Unsure of Utah's approach to the retroactive revival of barred claims, the district court certified the question to the Utah Supreme Court.

### Analysis

Reaching an answer required the Supreme Court to analyze the due process limitations on legislative power to retroactively revive an untimely claim. The Court considered Utah cases, the original understanding of state constitutional due process, and the limits on legislative policy judgments.

The Court has held for over a century that the legislature may not enact laws retroactively negating a defendant's vested rights. The issue first arose when the legislature enacted a statute effectively overriding a judicial decision that children of a polygamous marriage may not inherit. The Court invalidated the statute as violating the constitutional separation-of-powers. The legislature was wrongly attempting to retroactively take away a party's vested rights—and make a court enforce it.

The Court also applied its vested-rights analysis in statute of limitations cases. In the first case, a claimant argued that by virtue of a statutory amendment, she had an additional two years to file suit on a note. The Court disagreed, holding that once the original limitation ran, defendant acquired a vested right the legislature lacked power to disturb. Similar decisions in other cases followed. The *Mitchell* Court ruled that those decisions were entitled to respect under the doctrine of *stare decisis*.

The Court found that the vested-rights limitation was firmly grounded in the original understanding of the Utah constitution. In the late 19th century, “due process” was understood as prohibiting legislatures from acting as courts. Because a legislature may not retroactively negate vested rights—a term including a limitations defense—reviver statutes amounted to “judicial decrees in disguise.” Delegates ratifying the constitution viewed the

tampering with vested rights as beyond the legislature’s power—a violation of state constitutional due process. So a vested right in a limitations defense was protected by the constitution itself.

The Court drew further support for its analysis from commentators and from rulings of the majority of jurisdictions considering the issue.

The *Mitchell* Court was very sympathetic with legislative efforts to provide justice for the abused. But for the Court, its first duty was to the constitution and the balance of power it created.

**Learning Point:** The *Mitchell* decision is significant, not just for its holding but for its analysis. The Court correctly focused on constitutional law as written and originally intended, not on what justices would prefer today as a matter of social policy. In doing so, the Court properly limited the roles of the legislature and the

judiciary. And it protected defendants from accusations and huge financial exposures arising out of acts allegedly occurring sometimes decades earlier.

Courts in other states have also rendered decisions barring the retroactive divestment of limitations defenses. But the tragedy of child sexual abuse will challenge some courts’ willingness to abide by those rulings. Not all judges will see things as the Utah justices did. It may come down to individual judges’ philosophies on interpreting constitutional law.

Given the stakes involved, state laws should be closely analyzed whenever a reviver-statute issue arises. Those laws might be favorable to the defense. *Mitchell* will provide a useful template for the analysis. ♦

“*Middleman...*”, continued from pg. 23

The Court ruled that its decision squared with the policy objectives behind the Ohio statute. It found nothing in the statute imposing strict liability on a distributor lacking control over a product and product safety. Though noting Amazon’s market dominance and ability to compensate victims, the Court left those considerations to the legislature.

**Learning Point:** Actually, there are two—one almost too obvious to mention. An Internet distributor of third-party products must have a

level of control over the product itself. Product control allows a distributor to have an impact on safety. The element of product control must be the starting point in analyzing a distributor’s potential liability.

The second point comes from the “reluctant” concurrence of a justice. Ohio’s statute was a product of the 1980s, when stores were made of bricks and e-commerce through virtual sellers was not even on the horizon. Back then, mail-order retailers were more closely involved with filling product orders. But the more recent marketing model allows Internet distributors to

be involved in a transaction without being involved with the product or the transfer of ownership. It renders the statute obsolete, unable to incentivize all players in today’s supply chain to take an active interest in the quality of products sold.

In the end, the concurring justice was advocating the modernization of product statutes to reflect the realities of the virtual marketplace. How the legislature in Ohio—and possibly other states—react to his call will be interesting to watch. ♦

## ARBITRATION

### COURT JUDGMENT IN ACCORDANCE WITH ARBITRATOR DECISION IS ON THE MERITS FOR RES JUDICATA PURPOSES

*Phyllis Larmel v. Metro North Commuter Railroad Co.*, AC 42647 (Conn. App.)

In premises action, arbitrator issued decision finding for defendant and plaintiff failed to request a trial *de novo* within twenty days of decision as required by statute. Court then rendered judgment in accordance with the arbitrator's decision. Plaintiff filed new action pursuant to an accidental failure of suit statute. The trial court dismissed the action, finding a lack of subject matter jurisdiction because there had been a final judgment on the merits. Plaintiff appealed. **Held:** Reversed. Dismissal on jurisdictional grounds was improper. However, the prior judgment was a judgment on the merits and the trial court should have rendered judgment for the defendant on that basis rather than dismiss the action.

### ARBITRATION PROVISION BINDS ELDERLY RESIDENT INJURED IN FALL

*Roberts v. K&D Devel. 51, L.L.C.*, 2020-Ohio-4986 (Ohio App.)

Woman injured in nursing home fall protested use of arbitration provision. **Held:** Provision was enforceable. It was signed by defendants and consistent with statute. It was neither procedurally nor substantively unconscionable. Agreement was executed by woman's representative. There is no evidence

she was rushed or documents were inadequately explained.

## CIVIL PROCEDURE

### ACTION DISMISSED FOR FAILURE TO PROSECUTE DESPITE ATTEMPTED ATTORNEY WITHDRAWAL

*Admin. of Estate of Marie J. Vaccaro v. Christopher P. Loscalzo*, AC 42951 (Conn. App.)

Plaintiffs sued defendants for wrongful death. One plaintiff died and despite efforts by defendants, plaintiffs did not serve any discovery, take any depositions, close the pleadings, disclose any experts, or respond to outstanding discovery requests or substitute the estate as a proper party. Nearly two years later, plaintiffs' counsel sought to withdraw and the living plaintiff objected. The trial court denied the motion to withdraw and granted the defendants' motion to dismiss for failure to prosecute. **Held:** Affirmed. There was a pattern of misconduct by plaintiffs over the course of three years and they were on notice of the possibility of dismissal since defendants repeatedly requested it. Plaintiffs were aware of their attorneys' misconduct.

### SUBPOENA SEEKING JUDGE'S TESTIMONY PROPERLY QUASHED

*Van Ryn v. Goland*, 2020 NY Slip Op 07263 (N.Y. App. Div. 3d Dep't)

Plaintiff served subpoena commanding supreme court justice to testify as witness on plaintiff's behalf as to prior proceedings before the justice. **Held:** Plaintiff failed to establish good faith

factual basis for overriding prohibition against requiring judges to testify in same matters over which they are presiding. Plaintiff's former counsel and defendant's counsel also witnessed the disputed events, and plaintiff failed to show judge had any knowledge not available to them.

## CONSTITUTIONAL LAW

### FAILURE TO EXERCISE DISCRETION TO GRANT A DEPORTATION PAROLE ELIGIBILITY HEARING IS NOT PROTECTED BY § 1983

*Wright v. Giles*, AC 42686 (Conn. App.)

Plaintiff brought a § 1983 action against defendants for allegedly violating his due process rights by failing to implement policies, procedures and/or regulations providing him with a deportation parole hearing and/or with eligibility. The trial court dismissed the complaint on sovereign immunity grounds. **Held:** Affirmed on the alternative ground that plaintiff lacked standing. The possibility of deportation parole does not create a legal interest in parole eligibility.

## DAMAGES

### NON-ECONOMIC DAMAGES IN PERSONAL INJURY ACTION NEED SUPPORT OF SUBJECTIVE COMPLAINTS AND MEDICAL SCIENCE

*La Tanya Autry v. Brendon Hosey*, AC 42869 (Conn. App.)

Plaintiff sought economic and noneconomic damages from being

struck by police cruiser while crossing street. Court found in plaintiff's favor at bench trial. In calculating noneconomic damages, court found emotional trauma suffered by pedestrians struck by vehicles is "generally greater" than that suffered by motor vehicle occupants. **Held:** Reversed and remanded for new hearing on damages. There was both lack of subjective complaint from plaintiff and lack of verification by medical science to support conclusion pedestrians struck by motor vehicles suffer greater emotional trauma than motor vehicle occupants.

## EVIDENCE

### EVIDENCE HEARING NOT AUTOMATICALLY REQUIRED FOR MOTION TO DISMISS

*Nationstar Mortgage, LLC v. Robert Gabriel*, AC 42747 (Conn. App.)

Plaintiff mortgage company sought immediate possession of premises because defendants' rights to occupy had terminated. Each defendant was served with copy of the notice to quit by abode service. Trial court rendered judgment of possession for plaintiff. Defendants filed a motion to dismiss for lack of subject matter jurisdiction, claiming the notice to quit was not served on all designated occupants of the property, attaching an affidavit of one of the occupants. The trial court denied defendants' request for an evidentiary hearing. **Held:** Affirmed. There was ample evidence supporting that defendants were served. The marshal's return of service was *prima facie* evidence of service. A hearing was not required.

## FIRST-PARTY PROPERTY

### REFUSAL TO SUBMIT TO APPRAISAL VALID BASIS FOR CLAIM

*Creekside Crossing Condo. Ass'n v. Empire Indem. Ins. Co.*, 2020 U.S. Dist. Lexis 189384 (M.D. Fla.)

Insurer moved to dismiss an association's amended complaint, which included a claim to compel appraisal due to insurer's failure to honor a written demand for appraisal. **Held:** Given refusal to submit to appraisal process, insured can state a claim for breach of contract based solely on the insurer's noncompliance with the appraisal provision.

### INSURED MAY REMEDY APPRAISAL OBLIGATIONS AFTER FILING SUIT

*Diamond Lake Condo. Ass'n v. Empire Indem. Ins.*, 2020 U.S. Dist. Lexis 181392 (M.D. Fla.)

Insured invoked policy's appraisal provision and ultimately, insurer disagreed with amounts claimed and stated they would continue investigation. About the same time suit was filed, insurer stated investigation complete and issued payment. However, after negotiating the appraisal process for months, the insured then asserted appraisal was premature because it had yet to complete its investigation. **Held:** Insured had not waived right to appraisal and may remedy any post-loss and pre-filing appraisal obligations after filing suit.

*Sunflower Condo. Ass'n v. Everest Nat'l Ins. Co.*, 2020 U.S. Dist. Lexis 213157 (S.D. Fla.)

More than 10 months elapsed between Hurricane Irma and insured's submission of insurance claim. Insured was aware of damages shortly after hurricane and began making roof repairs that same month. Insured did not provide notice because it did not believe the loss exceeded the deductible. Insurer claimed it was prejudiced by the late reporting. **Held:** Ability to assess and address any damage was prejudiced. An insured's good faith belief damage is trivial or not covered by policy is insufficient to justify non-compliance with policy's notice provision.

### CONTINGENCY FEE MULTIPLIER REQUIRES SPECIFIC PROOF

*Univ. Prop. & Cas. Ins. Co. v. Deshpande*, 2020 Fla. App. Lexis 16067 (Fla. App.)

Insurer litigated amount of attorneys' fees and costs. At hearing, plaintiff's firm testified generally to the accuracy of the firm's billing and that each attorney's hourly rate was reasonable based on the South Florida market and the attorney's respective experience. Fee expert also opined 2.0 multiplier was appropriate based on favorable outcome achieved and likelihood of recovery at case outset. **Held:** Absent evidence the relevant market requires a contingency fee multiplier to obtain competent counsel, a multiplier should not be awarded. Insured must prove that without risk-enhancement it would have faced substantial difficulties in finding counsel in relevant market.

**STATUTORY REQUIREMENT STRICTLY CONSTRUED IN COVERAGE ACTION**

*Julien v. United Prop. & Cas. Ins. Co.*, 2020 Fla. App. LEXIS 13520 (Fla. App.)

Insured sued insurer but failed to file civil remedy notice with Department of Financial Services and with insurer before commencing suit. **Held:** Statute required notice of specific statute and specific policy provision relevant to the insurer’s alleged violation. As insured failed to provide these, he failed to satisfy a condition precedent to suit, which was fatal to claim.

**DAMAGE NOT A COVERED “COLLAPSE” UNDER POLICY**

*Parauda v. Encompass Ins. Co. of Am.*, 2020 NY Slip Op 06802 (N.Y. App. Div. 2d Dep’t)

Plaintiffs filed claim with defendant insurer under homeowner’s policy for alleged damage to home, including decayed framing behind brick facade due to water infiltration. **Held:** Trial court should have granted insurer summary judgment. Claimed damage did not involve an abrupt falling down or caving in of any part of the property which was no longer “standing,” as required to constitute a covered “collapse” under the policy. Claimed damage fell within certain exclusions.

**INSURANCE LITIGATION**

**POLICYHOLDER PHYSICIAN ENTITLED TO CASH PROCEEDS FROM INSURANCE CONVERSION**

*Maple Med., LLP v. Scott*, 2020 N.Y. App. Div. LEXIS 7587 (N.Y. App. Div. 2d Dep’t)

Dispute arose as to whether physician policyholder or practice that paid premiums was entitled to cash consideration paid as part of insurance company’s conversion from mutual insurance company to stock insurance company. **Held:** Insurance Law § 7307 and the plan of conversion made clear the physician, as policyholder, was entitled to the consideration.

**LIABILITY INSURANCE COVERAGE**

**DEFENDANT DOES NOT ESTABLISH SUBCONTRACTOR’S WORK LED TO INJURY**

*Edward Horton Builders, Inc. v. Arch Specialty Ins. Co.*, 2020 NY Slip Op 07355 (N.Y. App. Div. 2d Dep’t)

Plaintiff sought defense and indemnification in underlying action. Defendant relied on policy exclusion excluding coverage for claims for bodily injury arising from work performed on plaintiff’s behalf by a subcontractor. **Held:** Defendant’s submissions (insurance policy, agreement between plaintiff and its subcontractor, and the underlying complaint) did not

establish that the underlying action arose from work performed by the plaintiff’s subcontractor.

**REPEATED FAILURE TO APPEAR FOR “IME” VITIATES COVERAGE**

*PV Holding Corp. v. Hank Ross Medical, P.C.*, 2020 NY Slip Op 06367 (N.Y. App. Div. 1st Dep’t)

Insurer sought summary judgment declaring no obligation to pay no-fault benefits to health care defendants who provided services to individual defendants who claimed injury arising from an automobile accident. **Held:** Insured’s repeated nonappearance for properly scheduled independent medical examinations (IME) was a failure on his part to fulfill a condition precedent to coverage, vitiating his coverage under the policy.

**INSUREDS TIMELY NOTIFIED OF DOG-BITE EXCLUSION**

*Villaos v. Nationwide Mut. Fire Ins. Co.*, 2020-Ohio-5123 (Ohio App.)

Amended homeowners policy excluded dog-bite coverage if dog had history of biting. **Held:** Insureds received timely notice of amendment. Insureds could not rebut mailbox-rule presumption that they received notice. Insureds merely could not remember receiving it. Equity did not support reforming policy to remove exclusion.

## LEGAL MALPRACTICE

### JURY AWARD NOT SUPPORTED BY EVIDENCE

*Morgan & Morgan, P.A. v. Pollock*, 2020 Fla. App. LEXIS 15885 (Fla. App.)

Plaintiffs won jury award in legal malpractice action. Defendant argued plaintiffs did not submit proof of the underlying defendant's financial status to satisfy their "collectability" burden of showing the judgment would have been collectible. **Held:** Jury award overturned. Requiring proof of collectability prevents a client from recovering more from the attorney than he could have obtained from the tortfeasor in the underlying action.

### SETTLEMENT DISSATISFACTION NOT LEGAL MALPRACTICE

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

Plaintiff claimed his attorney handled his divorce negligently. Plaintiff made only general allegations that he incurred additional legal fees and suffered financial damages and expense, which the trial court held were conclusory and inadequate to constitute actual, ascertainable damages and were inadequate to prove that the stipulation of settlement that plaintiff entered into was "effectively compelled" by his attorney's mistakes. **Held:** Affirmed. Plaintiff failed to plead specific factual allegations showing that, had he not settled, he would have obtained a more favorable outcome.

## LIMITATIONS OF ACTIONS

### STATUTE OF REPOSE SEPARATELY TRIGGERED FOR EACH BUILDING OF CONDO DEVELOPMENT

*D'Allessandro v. Lennar Hingham Holdings, LLC*, No. SJC-12891 (Mass.)

Condo developer built 28 buildings over seven-year period. **Held:** Six-year statute of repose for construction defect claims is separately triggered for each building. Statute triggers upon building's opening for intended use or substantial completion and possession for occupancy by owner. Triggering at completion of entire development extends potential liabilities too long. **Further held:** If integral improvement serves multiple buildings, statute starts when improvement is substantially completed and open for intended use.

### PATIENT'S MENTAL HEALTH TREATMENT NEGLIGENCE CLAIM BARRED

*Hall v. Coleman Behav. Health Servs.*, 2020-Ohio-4640 (Ohio App.)

Four years after treatment for mental health issues, patient claimed treatment caused him to commit burglary. **Held:** Action was barred by two-year negligence limitation. Patient did not allege facts occurring within limitations period. Nothing alleged would have triggered four-year statute for intentional infliction of emotional distress.

## MEDICAL MALPRACTICE

### AFFILIATION AGREEMENT CONFERRED SOVEREIGN IMMUNITY TO UNIVERSITY AS HOSPITAL'S AGENT

*Lazzari v. Guzman*, 2020 Fla. App. LEXIS 15288 (Fla. App.)

Medical malpractice suit was brought against university, which argued it was entitled to statutory sovereign immunity for services rendered by its employee, a doctor at a teaching hospital. The university and hospital also had entered into an affiliation agreement whereby the university was the hospital's agent. **Held:** All faculty and employees of the university acting pursuant to the agreement were the hospital's agents and could not be personally liable for acts or omissions in the scope of their employment.

### FAILURE TO NAME DOCTORS IN PROPOSED COMPLAINT NOT FATAL TO VICARIOUS LIABILITY CLAIM

*Anonymous Hosp. v. Spencer*, 20A-CT-393 (Ind. App.)

Proposed complaint to medical review panel did not name physicians. **Held:** Patient not required to present all negligence theories to review panel. Review proceeding is informal and not exhaustive. It is unnecessary to sue physicians to proceed against hospital on vicarious liability theory.

**BUSINESS CARD DOES NOT DEFEAT VICARIOUS LIABILITY CLAIM AGAINST HOSPITAL**

*Jernagen v. Ind. Univ. Health*, 20A-PL-41 (Ind. App.)

Patient received anesthesiologist’s business card listing him as partner in medical group. **Held:** Card did not establish doctor as independent contractor of hospital. It did not identify contractor relationship or disclaim employee/employer relationship. **Further held:** Because vicarious liability is indirect, including doctor in complaint to review panel was unnecessary.

**NEGLIGENCE**

**DESIGN IMMUNITY DEFENSE CAN TRUMP CONFLICTING EVIDENCE**

*Menges v. Dept. of Transp.*, 2020 Cal. App. LEXIS 1226 (Cal. App.)

Plaintiff sued the Department of Transportation (DOT) for catastrophic motor vehicle injuries. DOT successfully asserted a design immunity defense. Plaintiffs appealed, arguing design immunity should not apply because the approved design plans were unreasonable and the construction of the interstate off-ramp did not match the previously approved plans. **Held:** Affirmed. Design immunity defense applies upon a showing of substantial evidence of reasonableness, even if contradicted. Mere conflict of expert witnesses does not justify sending the matter to jury to second guess the judgment of skilled public officials.

**SCHOOL DISTRICT NOT LIABLE FOR COACH’S CONDUCT DURING DRILL**

*C.G. v. Union N. United Sch. Corp.*, 20A-CT-526 (Ind. App.)

During drill, ball blocked by coach injured player. **Held:** Coach did not breach duty of care. Absent intentional or reckless conduct, no duty is breached by conduct ordinary to sport. Coach neither intended harm nor believed it was substantially certain to occur. He was not consciously indifferent to safety, and acted in way ordinary to sport. Though not a player, coach was covered by rules applied to players.

**RESTAURANT PATRON FAILS TO PROVE CAUSE OF SLIP AND FALL**

*Matthews v. Texas Roadhouse Mgt. Corp.*, 2020-Ohio-5229 (Ohio App.)

Patron slipped on fluid in parking lot. **Held:** Patron failed to prove restaurant created hazard or had actual or constructive knowledge about it. Employees did not use area to remove grease or trash. There were no reports of foreign substances in area, and employees saw nothing.

**GROCER NOT LIABLE FOR ILLNESS FOLLOWING EGGPLANT PURCHASE**

*Sultaana v. Barkia Ents., Inc.*, 2020-Ohio-4468 (Ohio App.)

Nine days after purchasing eggplant, customer experienced stomach pain and nausea. **Held:** Customer failed to prove eggplant caused illness. Customer needed medical expert opinion tying her ailment to eggplant. Her medical records and affidavit were insufficient.

**PLEADINGS**

**FAILURE TO PERFORM DUTY MUST BE ALLEGED AS SPECIAL DEFENSE**

*Silver Hill Hosp., Inc. v. Dawn Kessler*, AC 42545 (Conn. App.)

Hospital sought damages for unpaid medical services it provided defendant. Medicare initially had paid the entire balance; however, it rescinded coverage for part of the services after discovering defendant had workers’ compensation coverage. Plaintiff asked defendant to contact Medicare to resolve the dispute and defendant refused. Fact finder found defendant owed a balance to plaintiff and that defendant failed to prove her special defense of *non compos mentis*. The trial court rendered judgment for plaintiff. **Held:** Affirmed. Defendant’s pleadings did not provide a legal framework from which fact finder could properly assess whether it was plaintiff’s duty to resolve the benefits issues.

**TORTS**

**VIRTUAL PRESENCE SUFFICES FOR NEGLIGENT INFLICTION OF DISTRESS**

*Ko v. Maxim Healthcare Servs., Inc.*, 2020 Cal. App. LEXIS 1222 (Cal. App.)

Plaintiffs alleged negligent infliction of emotional distress against a vocational nurse and her employer, who provided in-home care to Plaintiffs’ disabled son. Plaintiffs claimed the nurse abused their son and that they witnessed the abuse in real time through livestream video and audio on a smartphone captured through a “nanny cam” in the home. Defendants successfully sought dismissal because Plaintiffs

were not physically present when their son was abused and could not satisfy the requirements in the California Supreme Court case *Thing v. LaChusa* (1989), 48 Cal.3d 644. Under *Thing*, a bystander plaintiff must be present at the scene of an injury-producing event at the time it occurs. **Held:** Judgment reversed. In the decades since *Thing*, virtual presence has become possible because of the commonality of livestreaming video and audio and is consistent with the Supreme Court's bystander test.

### CHAT GROUP MEMBER USING PSEUDONYM FAILS TO STATE DEFAMATION CLAIM

*Li v. Zeng*, 19-P-1546 (Mass. App.)

Referring to plaintiff's pseudonym, defendant made allegedly defamatory statement about sexual impropriety. **Held:** Reference to pseudonym cannot be reasonably interpreted as referring to plaintiff. Because defendant did not unmask plaintiff's actual identity, plaintiff's reputation in community was undiminished.



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