CM EAST COAST REPORT of Recent Decisions

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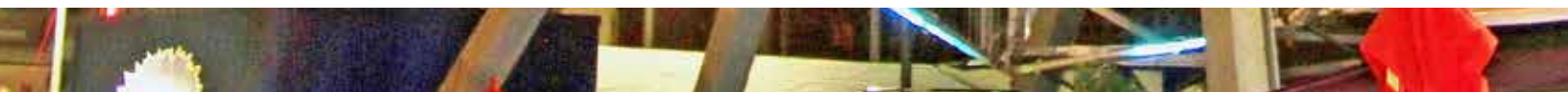
A summary of significant recent developments in the law focusing on substantive issues of litigation and featuring analysis and commentary on special points of interest.



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Tolled Versus Suspended, The Second Department Interprets Governor Cuomo's Executive Order Extending Legal Deadlines

by ***Djordje Caran***

As a result of the COVID-19 pandemic, New York State Governor Andrew Cuomo issued a number of Executive Orders that had a wide ranging effect on the legal system and certainly on the society at large. The flurry of Executive Orders included directives such as the declaration of a Disaster Emergency in the State of New York, EO 202, or EO 202.1 which allowed a bevy of action, including allowing hospitals to exceed maximum patient capacity, allowing over the phone diagnosis of patients and allowing temporary hospitals to be established, to name a few. Some of the more controversial directives included the suspension of all large gatherings and the service of food or beverages in restaurants after 8:00 p.m. EO 202.1. Of course, one of the most controversial orders was EO 202.4 which closed all schools. Besides the societal toll, two Executive Orders issued by the Governor had wide ranging effect on how the legal profession practices. Aside from the closing of courts, Governor Cuomo issued EO 202.7 which allowed for notary acts to be administered virtually and which in turn allowed depositions, the swearing to affidavits and other legal proceedings to be conducted electronically. Executive Order 202.8 (9 NYCRR 8.202.8), tolled or suspended most legal filings. Executive Order 202.8 stated, in part, the following:

> "I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 19, 2020 the following:…any specific time limit for the commencement, filing, or service of any legal action, notice, motion or other process or proceeding as described by the procedural laws of the state, including but not limited to… the civil practice law and rules… local law, ordinance, order rule or regulation…"

The executive order was renewed nine separate times by the Governor which extended the deadlines imposed by various laws and statutes up to and including November 3, 2020.

Inevitably, some controversy arose as to any filings which were done after November 3, 2020 and whether such filings were late. The argument was made that the Governor's authority to extend deadlines was derived from Executive Law 29-a. It was claimed that the law allows the Governor to suspend deadlines, but not to toll them. Therefore, any filings which needed to be made before November 3, 2020, but which were made after were late.

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In *Brash v. Richards*, 2021 N.Y. App. Div. LEXIS 3555, 2020 NY Slip Op 03436 (2d Dep't June 2, 2021), the Court analyzed the two competing arguments and stated that Governor Cuomo's Executive Orders constituted a tolling of any legal deadlines. In *Brash*, Plaintiff filed an appeal on November 10, 2020. Defendants opposed the filing and argued that it was untimely as the appeal should have been filed on or before November 3, 2020. Plaintiff claimed that the Executive Orders tolled any statutory deadlines. Because the time was tolled, Plaintiff argued, she had another thirty days from the date that the Executive Order expired to file her appeal. Defendants argued that the Executive Order instituted a suspension, which meant that Plaintiff had only until the end date of the suspension to file her appeal, that is, November 3, 2020. In addition, Defendants argued that even if the language of the Executive Order expressly references tolling, the Governor had no authority to toll a deadline, but merely suspend one. The Second Department acknowledged that there is a distinction between a suspension of a deadline and a tolling of a deadline, and elected to resolve the controversy.

In analyzing the issues, the Court explained that a toll includes the time period of the toll duration and the "effective duration" from the end of the tolling period. On the other hand, a suspension simply delays the expiration of a time period only until the end date of the suspension. The Court then looked at the language of Section 29-a of the Executive Law to assess Defendants' argument that the law only allows the Governor to suspend a deadline rather than toll it. It answered the question in the negative. The Court cited to the Executive Orders and claimed that the intent of the executive branch was for a tolling, rather than suspension. The Court then looked at the applicable portion of Section 29-a and stated that the statute allows the Governor to alter or modify the requirements of a statute or law. It stated that the language authorizes the Governor to: "do more than just 'suspend' statutes during a state disaster…" and interpreted the authority to modify or alter as meaning that the Governor's authority is broader than Defendants argued. Ultimately, the Court determined that Plaintiff's appeal was timely and allowed it to proceed.

It should be noted that a number of cases discussed the tolling statute in very brief terms and most of them were decided while the Governor continued to extend the Executive Order, and while the parties were still getting the benefit of the extensions. One case of note is, *Matter of People of the State of New York v. Norther Leasing Sys., Inc.*, 193 A.D.3d 67, 142 N.Y.S.3d 36 (1st Dep't 2021). The First Department very briefly, as dicta, touched upon the issue of whether a cross-appeal was timely and stated that it was because CPLR deadlines were "suspended" due to COVID-19 pandemic. No further details are given and conspicuously absent was any mention of whether the First Department deems the Executive Orders as a tolling of deadlines or suspension. Without further guidance or interpretation from other Departments, or the Court of Appeals, the Second Department's analysis is the prevailing law.

Learning Point: There is now case law within the Second Department holding that Governor Cuomo's Executive Orders regarding filing deadlines for legal documents during Covid-19 was a toll. Hence, if a deadline expired on or before November 3, 2020, the deadline is actually extended to November 3, 2020, plus the statutory time period. ♦

Federal Appeals Court Finds That Entitlement To Indemnification Requires "Unmistakable Intent" Under New York Law

by ***Alexandra DiFusco***

The Second Circuit Court of Appeals affirmed the judgment of the Western District, finding that by the terms of the relevant contractual agreements, Plaintiff Firemen's Insurance Co. owed no duty to defend and indemnify Defendant Story. *Firemen's Ins. Co. v. Story*, 2021 U.S. App. LEXIS 15852 (2d Cir. 2021).

The case arises out of an accident at a Wegmans construction site. Wegmans Food Market, Inc. ("Wegmans") entered into an agreement with Aerotek, Inc. ("Aerotek") for Aerotek to provide Wegmans with certain staffing services (the "Staffing Agreement"). *Id.* at *2. The Staffing Agreement, by its terms, defined the relationship between Wegmans and Aerotek's "vendor assigned employees" as independent contractors and not "employer and employee[s]." *Id.* The Staffing Agreement further clarified that the aforesaid "vendor assigned employees" were employees of Aerotek and not Wegmans. *Id.*

Pursuant to the Staffing Agreement, Aerotek assigned Thomas Story ("Story") to serve as foreman on a Wegmans construction site. *Id.* Wegmans later entered into a contract with MP Masonry Inc. ("MP Masonry") to perform construction work at the site (the "Construction Contract"). *Id.* Under the Construction Contract, MP Masonry agreed to defend, indemnify and hold harmless Wegmans, and "its agents, employees and representatives." *Id.*

During the course of construction work for Wegmans, an MP Masonry employee, Joseph Holguin ("Holguin"), was injured on site. *Id.* Holguin subsequently sued Wegmans and Story, and Wegmans and Story tendered their claims to MP Masonry, seeking to enforce the Construction Contract's defense and indemnity provision. *Id.* at*3. MP Masonry's insurance company, Firemen's Insurance Co. ("Firemen's") accepted Wegmans' tender and denied MP Masonry's, bringing this action in New York district court, and seeking a declaratory judgment that MP Masonry was not obligated to defend and indemnify Story in the underlying action. *Id.* Aerotek filed a cross-claim seeking a contrary declaration and reimbursement after incurring costs defending Story in the underlying action. *Id.*

The Court, in beginning its review of the Construction Contract's indemnification clause, opined that "an unmistakable intention to indemnify… before enforcing such an obligation" is required. *Id.* (citations omitted). The Court further maintained that where

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a contract assumes an obligation to indemnify where a party is under no legal duty to do so, such an assumption "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Id.* (citations omitted).

Applying the outlined principles to the instant action, the Court found that neither the Staffing Agreement nor the Construction Contract contained any language to suggest that Story was an "agent" of Wegmans under either agreement. *Id.* at *4. The Court noted that even if there were some ambiguity as to whether Story was entitled to indemnification, the language utilized by the parties fell short of expressing an *unmistakable intent* as required by New York law ("if parties intend to cover a potential indemnitee, they have only to say so *unambiguously*"). *Id.* at *4. (citations omitted).

The Court swiftly refuted Aerotek's argument that it would be unreasonable to require Story to be listed by name in the agreements to be covered. The indemnification clause was not ambiguous because it did not list Story by name, the Court explained, but because it failed to include his role as foreman, construction manager, or member of the construction team. *Id.* at *4-5. As such, the District Court affirmed the Western District's holding that Firemen's and MP Masonry were not required to defend and indemnify Story. *Id.* at *5.

Learning Point: When seeking indemnification in New York, the terms of the subject contract must unambiguously outline such a duty. ♦

New Jersey Appellate Division Clarifies The Standard For Motions For Reconsideration

by ***Veronica Abraham***

In *Lawson v. Dewar*, 2021 N.J. Super. LEXIS 69, the Appellate Division provided distinctions between motions seeking reconsideration of final orders and motions seeking reconsideration of interlocutory orders.

Alfred Lawson filed a Complaint in October, 2017, against the Borough of Bound Brook and numerous Bound Brook police officers alleging that he was beaten when he was arrested two years prior. *Id.* at *2. Discovery was extended and continued until February, 2020. *Id.* At a Case Management Conference in March, 2020, Plaintiff was invited to move for a discovery extension, the right to conduct depositions, a reconsideration of an order barring Nestor Crespo from testifying at trial because he failed to appear at his subpoenaed deposition, an amendment to the Complaint to add a civil conspiracy claim, and the turnover of all use of force reports for all the officers. *Id.* On May 14, 2020, the judge denied most of that relief, but allowed additional time to exchange expert reports. *Id.* at *2-3. The judge found that turnover of the use of force reports was barred by an earlier protective order, leave to amend was barred because it would cause undue delay, and the order barring Nestor Crespo's testimony at trial was authorized by Rule 4:23-2. *Id.* at *3. Plaintiff moved for reconsideration of those three rulings in the May 14, 2020 Order. *Id.* The reconsideration motion was argued on February 19, 2021 in a new venue, Middlesex County. *Id.* The judge denied all relief that same day. *Id.* Plaintiff moved for leave to appeal the February 19, 2021 order, which was granted. *Id.* at *4. The Appellate Division vacated the February 19, 2021 order and remanded to the trial judge for further consideration. *Id.*

The Appellate Division found that the May 14, 2020 order was an interlocutory order, therefore Rule 4:49-2 does not apply. *Id.* at *6. Rule 4:49-2 only applies to motions to alter or amend final judgments and final orders. *Id.* It sets a twenty-day time bar for filing those motions. *Id.* at 5. In a motion for reconsideration of a final order, the movant must demonstrate that the challenged order resulted from a "palpably incorrect or irrational analysis or of the judge's failure to consider or appreciate competent and probative evidence." *Id.* at *6.

For motions seeking reconsideration of interlocutory orders, judges should be guided by Rule 4:42-2 only, which provides a more liberal approach. *Id.* Pursuant to Rule 4:42-2, "interlocutory orders shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." *Id.* According

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to the Appellate Division, "if a prior judge erred or entered an order that has ceased to promote a fair and efficient processing of a particular case, the new judge owes respect but not deference and should correct the order." *Id.* at *7. "The polestar is always what is best for the pending suit." *Id.*

The Appellate Division further concluded that nothing in their jurisprudence suggests that reconsideration of an interlocutory order is prohibited unless the movant is able to provide something new or unless the previous judge acted arbitrarily, capriciously or unreasonably. *Id.* at *8.

The Appellate Division acknowledged that some reconsideration motions may be frivolous or repetitive. *Id.* at *9. However, they urged judges not to view reconsideration motions as "hostile gestures" because some of the motions may contain good faith arguments regarding a prior mistake, a change in circumstances, or the court's misappreciation of prior arguments. *Id.* Those motions provide the court with a chance to provide an analysis as to why the prior ruling was correct or to correct an erroneous order. *Id.*

Ultimately, the Appellate Division determined that the trial judge applied the wrong standards. It vacated the February 19, 2021 order and remanded to the trial judge to determine whether any of the challenged interlocutory rulings serve the interest of justice. *Id.* Interestingly, in light of the cessation of most civil trials due to the pandemic, trial judges should consider the merits of the parties' arguments and whether a brief delay caused by additional discovery, by an amendment of the Complaint, or due to the relief plaintiff seeks will further delay the trial. *Id.* at 12-13.

Learning Point: For motions seeking reconsideration of interlocutory orders, the movant must argue in good faith a prior mistake, the court's misappreciation of prior arguments, or a change in circumstances, and that a revision of the prior order is in the interest of justice pursuant to Rule 4:42-2. ♦

The Relationship Of Reimbursement To Subrogation Under Federal ERISA Regulations And Common Law Equitable Principles

by ***Douglas M. Allen***

In *Freitas v. Geisinger Health Plan,* No. 4:20-CV-01236, 2021 U.S. Dist. LEXIS 100325 [M.D. Pa. May 27, 2021], the United States District Court for the Middle District of Pennsylvania denied Defendant Geisinger Health Plan's ("Geisinger") motion to dismiss Plaintiffs Lori Freitas and Kaylee McWilliams' ("Plaintiffs") claims, pursuant to *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted. Defendant Geisinger, an employee welfare benefits plan governed by ERISA, sought reimbursement under the plan's subrogation clause from plan participants Plaintiffs for Defendant's payments to Plaintiffs under the plan. The Court denied Defendant's motion because the plan did not specifically include a reimbursement provision requiring a member to reimburse the plan for benefits paid if the member receives compensation from a third-party tortfeasor who injures her.

Plaintiffs each received individual healthcare benefits from Defendant. While insured under the plan, Plaintiffs each received benefit payments for injuries suffered as the result of separate, individual accidents caused by third-party tortfeasors. Sometime thereafter, Plaintiffs settled their claims against the tortfeasors who injured them. In turn, SCIOinspire, a "plan fiduciary responsible for enforcing the plan's subrogation rights," demanded reimbursement for the cost of medical benefits Plaintiffs received. *Freitas*, 2021 U.S. Dist. LEXIS 100325, *3. Plaintiffs paid some of what was requested, followed shortly thereafter by a class-action lawsuit on May 21, 2020, seeking recovery of those payments under Section 502(a)(3). ERISA was passed in an attempt to regulate private pension and welfare benefit plans by creating uniform minimum standards. As ERISA is governed by federal law, state laws governing such benefit plans are preempted by federal common law, which controls plan interpretations.

ERISA provides plan participants two provisions under which they may seek recourse when they are denied benefits. Section 502(a)(1)(B) may be used where a plan participant is denied benefits under the terms of the plan or another ERISA provision. Under this provision, federal common law is used to determine the plan's meaning. Section 502(a)(3) provides for recourse where a remedy is not otherwise available. While both permit plan participants to challenge plan violations, 502(a)(1) allows only for the payment of benefits due, and 502(a)(3) allows only for a remedy typically available in equity. It should be noted that although 502(a)(3) allows plan violations to be redressed through "appropriate equitable relief," "it does not permit courts to apply equitable

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doctrines or rules of decisions to override plan language." *Freitas*, 2021 U.S. Dist. LEXIS 100325, *9.

This distinction is important because ERISA plans frequently use 502(a)(3) to enforce reimbursement provisions against plan beneficiaries, where the beneficiary has received both plan benefits and third-party compensation. In the case at bar, the plan did not feature a reimbursement clause. Instead, Defendant insurer sought reimbursement against its insured under the plan's subrogation clause. Among other arguments, Defendant claimed that since subrogation was a creation of the court of equity, it could not be separated from the doctrine of equitable subrogation, under which courts have found a right of reimbursement under an equitable principle disfavoring double recoveries.

The Court stated that reimbursement and subrogation are two separate and distinct legal doctrines, subrogation being a creature of state law where the carrier steps into the shoes of its insured, and reimbursement being the creation of contractual agreements governed by ERISA, and comes into play only after a plan member has received personal injury compensation. The Court pointed out that the insurers in the cases cited by Defendant were asserting rights of equitable subrogation, "untethered from contractual language." *Id.* at *32.

The Court also distinguished between equitable, contractual and statutory subrogation. As the benefits at issue arose under the plan, and therefore the right of subrogation was contractual in nature, the Court determined that the plan was not subject to equitable subrogation, which operates by law. "ERISA preempts any and all state laws that relate to employee benefit plans. Accordingly, ERISA precludes application of any and all common-law doctrines, including, by necessity, the doctrine of equitable subrogation."

Defendant also argued that the subrogation clause created a priority right which required any payments plan participants received from third-party tortfeasors to be paid to the plan first, as the plan had priority over any rights claimed by the insured.

The Court dismissed this argument as contrary to established subrogation rights precedents, which allowed an insurer to sue third-parties, but did not necessarily allow the insurer to recover first, contrary to the made-whole doctrine, which establishes that any such payments favor the insured, not the insurer. The common law made-whole rule states that the beneficiary is to be made whole before the plan receives any reimbursement. Thus, the Court found that Defendant's argument that it receives priority for repayment was without merit and that it also conflicted with the United States Supreme Court decision in *U.S. Airways v. McCutchen*, 569 U.S. 88 (2013). In *McCutchen*, the Supreme Court declined to implement the made-whole rule as the plan had expressly disavowed its application. The Supreme Court held that the language of ERISA plans dictate whether the made-whole rule was applicable, which would otherwise be applied by default, unless specifically abrogated by the parties.

Finally, Defendants asked the Court to adopt a new rule under federal common law creating a right of reimbursement "where a beneficiary prejudices a plan's subrogation rights in violation of the plan's terms," based on the adoption of this same rule in *Provident Life and Accident Insurance Co. v. Williams*, 858 F. Supp. 907 [W.D. Ark. 1994]. *Freitas*, 2021 U.S. Dist. LEXIS 100325, *33. The Court declined to create the requested rule as the *Williams* court based its ruling on state common law and equitable principles, which the Court acknowledged was preempted by ERISA, and that the use of equitable principles was overruled by *McCutchen*.

Learning Point: The right of reimbursement allows insurers to recoup payments to ERISA plan participants when they receive third-party tortfeasor compensation only where specifically provided in the plan. Subrogation does not provide for a right to reimbursement, as they are separate and distinct legal doctrines. ♦

First Department Further Clarifies On What May Constitute Reversible Error When It Comes To The Mentioning Of Insurance During Trial

by ***Grace Guo***

The purpose of a trial is to win, whether it is Plaintiffs going after monetary compensation or Defendants going for full dismissal of the case. Attorneys will try to present the facts in the most favorable way in front of a jury. Plaintiff's counsel will often attack the credibility of Defendant's witnesses and Defendant's counsel will often highlight Plaintiff's own fault. The jury is tasked to weigh all the evidence presented and decide the outcome of the trial. The jury will be given instructions to help guide them through complex fact patterns and legal standards both before and during the trial. These instructions or the lack thereof may sway the outcome of a trial; thus, failure to instruct the jury properly will result in mistrial.

The First Department recently reversed a lower court's judgment, granted Defendant St. Barnabas Hospital's Motion for a New Trial, and remanded the case for a new trial because the lower court failed to give proper instructions to the jury. *Campbell v. St. Barnabas Hosp.*, 2021 N.U. Slip. Op. 03404 (1st Dept. 2021). According to the First Department, the trial court judge in *Campbell* failed to properly instruct the jury twice, and either one of these failures would result in a mistrial.

Plaintiff/Respondent Ms. Campbell was a home health aide who tripped and fell in Defendant/Appellant's physical therapy clinic when she took her client there for treatment. While she was inside the clinic with her client, Ms. Campbell was walking along the left side of a table while talking with her client. She all of the sudden fell and landed on her left side. When she looked back, she saw a step stool lying on its side and believed that was the reason for her fall. Ms. Campbell claimed that she did not see the stool before. Ms. Campbell's client testified that she saw someone pick the stool up and move it upon their initial arrival; however, she was not sure where the stool was moved to.

Attorneys for both sides requested the trial court to charge Pattern Jury Instructions ("PJI") 2:36 for Comparative Fault, which is a standard jury charge. However, the trial court denied the request and instructed the jury with PJI 2:90 "Possessor's Liability for Condition

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or Use of Premises—Standard of Care" because the court believed it to be sufficient to cover the concept of comparative negligence. The specific jury instruction reads as follow:

> "If you find that the defendant's negligence was a substantial factor in causing plaintiff's injury, you will proceed to consider comparative fault. If you find that the placement of the stool was open and obvious, you should consider that fact in deciding whether plaintiff was also at fault for causing her injuries. The burden is on the defendant to prove that plaintiff was at fault and that plaintiff's conduct contributed to causing her injuries. If you find that plaintiff was not at fault or if at fault her conduct did not contribute to causing her injuries you must find that the plaintiff was not at fault . . . If, however, you find that the plaintiff was at fault and her conduct contributed to causing her injuries, you must then apportion the fault between the plaintiff and the defendant. Weighing all the facts and circumstances, you must consider the total fault, that is the fault of both plaintiff and the defendant and determine what percentage of fault is chargeable to each."

Based on this instruction, the jury ultimately found that the Hospital was 100% negligent because Ms. Campbell's negligence was not a substantial factor in causing her accident.

The First Department found that it is clear that the jury had a fundamental misunderstanding of the concept of comparative negligence, otherwise the verdict would not have been reached on any fair interpretation of the evidence. The jury instruction confused the jury to believe that comparative negligence hinges on whether Ms. Campbell's negligence was "substantial." As such, the jury's verdict relying on the improper comparative negligence instruction constituted reversible error and required a new trial.

The trial court in *Campbell* also failed to give curative instruction to the jury during trial. Ms. Campbell's doctor was questioned about his knowledge of the independent medical examination results on the stand. The doctor answered in the affirmative and stated that the doctor who did the examination was hired by an insurance company. Defendant's attorney immediately objected and requested a curative instruction to the jury. The court instead asked Ms. Campbell's doctor if he knew the answer to the question. The doctor further testified that such examiners are generally hired by an outside agency and their opinions are not on diagnosis or treatment of the injuries claimed.

The First Department found that although passing reference of insurance or other similar benefits would not necessarily result in reversible error; however, if the testimony went beyond mere mention of insurance, then a mistrial may be warranted. Ms. Campbell's doctor's testimony, together with the trial court's failure to immediately give a curative instruction constituted reversible error, and warranted a new trial.

Learning Points: This ruling makes it clear that the First Department is joining the Second and Fourth Departments in setting clear instructions when it comes to what may be presented before a jury regarding insurance. Based on the ruling, trial courts must give curative instructions to the jury when it comes to passing reference of insurance or similar benefits; however, if the reference goes beyond mere mentioning, it may constitute reversible error and warrant a mistrial. ♦

New Jersey Employers Required To Reimburse Injured Workers' Costs Of Medical Marijuana

by ***Marisa G. Michaelsen***

The Supreme Court of New Jersey recently upheld a Workers' Compensation Court Order requiring an employer to reimburse ongoing costs of medical marijuana prescribed after a work-related injury. In *Hager v. M&K Construction*, 2021 LEXIS 332 (N.J. April 13, 2021), Plaintiff Vincent Hager suffered a back injury while working for Defendant M&K Construction ("M&K") in 2001. Hager underwent surgical procedures and continued with opioid medication for chronic pain, but this was not successful. In 2016, Hager's treating physician enrolled him in New Jersey's medical marijuana program, both as a means of pain management and to overcome an opioid addiction. Hager sought reimbursement for his $600/month medical marijuana expenses, and the trial court granted this along with a permanent partial disability rating to his spine.

M&K appealed this decision, arguing three main points: (I) medical marijuana is not reimbursable as reasonable or necessary treatment under the New Jersey Workers' Compensation Act ("WCA"); (II) M&K fits within an exception to the New Jersey Compassionate Use Medical Cannabis Act ("Compassionate Use Act"); and (III) compliance with this Court Order would subject it to potential federal criminal liability under the federal Controlled Substances Act ("CSA"). The New Jersey Supreme Court denied M&K's claims, and held that M&K was required to reimburse Hager's prescription for medical marijuana.

The Court rejected M&K's claims that medical marijuana is not reimbursable as reasonable or necessary under WCA. The WCA was enacted in 1911 to compensate workers injured in industrial accidents. Today, it requires employers to provide medical, surgical and other treatment necessary to cure and relieve the worker of the effects of the injury. Further, palliative care may also be properly authorized under the WCA, and entitles workers who are permanently disabled to continued treatment and services. Competent medical testimony that a particular treatment or service will reduce symptoms or restore function is sufficient to satisfy this reasonable and necessary requirement. The Court highlighted the Legislature's express findings of marijuana's ability to relieve pain in the Compassionate Use Act, thus establishing competent evidence relating to medical marijuana's ability to restore function or relieve symptoms such as chronic pain and discomfort. The Court also noted the potential harm to Hager by the alternate available opioid treatment, such as worsening addiction.

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The Court also held that M&K does not fit within the Compassionate Use Act's limited reimbursement exception. The Compassionate Use Act was enacted in 2010, recognizing the beneficial uses of marijuana and to protect authorized individuals from criminal and civil penalties. Specifically, the Compassionate Use Act provides that reimbursement for medical marijuana costs is not required of "government medical assistance program or private health insurer." N.J.S.A. 24:61-14. The Court in this matter read "OR" to limit the applicability of the exception to only the two entities listed, holding that the Legislature did not intend for workers' compensation insurers to be treated as private health insurers or government medical assistance programs. In further support, the Court called attention to various other states that have explicitly included workers' compensation exclusions for medical marijuana reimbursement (such as Florida, Michigan, Montana, Oklahoma, Rhode Island, and Utah). Therefore, M&K is not exempt from reimbursement obligations under the Compassionate Use Act.

The more significant analysis provided by the Court focused on whether the federal Controlled Substances Act (CSA) (which classifies marijuana among the highest controlled substance and criminalized possession and distribution of marijuana) extinguishes M&K's obligations under state law. New Jersey law diverges from federal law with regard to medical (and more recently, recreational) marijuana. Federal preemption is rooted in the Supremacy Clause of the United States Constitution, which unambiguously provides that if there is any conflict between federal and state law, federal law must prevail. To determine whether a certain state action is preempted by federal law, congressional intent must be examined.

The CSA was enacted by Congress in 1970 to strengthen drug laws, and separated controlled substances into five schedules based on accepted medical use, risk of abuse, and physical and psychological effects. Marijuana was placed in the strictest schedule, Schedule I, at the time of the CSA's enactment, which it remains today, despite repeated efforts to petition for its rescheduling. The CSA makes it unlawful to knowingly or intentionally "possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Currently, as a result of its Schedule I category, the CSA prevents marijuana from being validly prescribed because it has 'no currently accepted medical use' per the Schedule I criteria.

As to enforcement of the CSA specifically to marijuana, the Department of Justice ("DOJ") has deprioritized, but not prohibited, federal prosecution of marijuana activities that are legal under state law. Congress has also deprioritized prosecution for possession of medical marijuana, while otherwise leaving the CSA unchanged. In recent riders to the federal Appropriations Act, Congress prohibited the DOJ from using allocated funds to prevent States from implementing their medical marijuana laws. These riders have contained similar language dating back to the 2015 federal budget. The Court notes these Riders reflect Congress's intention to limit the role of federal policy in the matters of criminal justice (originating in the Tenth Amendment, which reserves to the States powers not granted to the federal government). These Riders have effectively changed federal law, by prohibiting the DOJ from spending funds to prosecute individuals who are in compliance with their State's medical marijuana laws, and restricting the Federal Government from superseding state law as to medical marijuana. Thus, this Court found that readings of the Appropriations Acts are signifiers of legislative intent to suspend earlier statutory enactments. Here, the DOJ enforcement of the CSA may not interfere with activities compliant with the Compassionate Use Act. Therefore, the federal and state acts can consistently stand together, and M&K can comply with both. It is noted, however, that this coexistence is dependent on future acts of Congress through Appropriation Riders to continue the currently enacted suspensions.

Learning Points: This case denotes a step towards more palliative care being required under workers compensation claims, which may substitute more expensive pain management treatments such as opioids, injections, and even surgery. Further, the Court does call attention to the Appropriations Riders implied *suspension* of the federal CSA, as opposed to implied repeal. This is significant as each Rider is confined to a particular fiscal year. Therefore, although the federal CSA and New Jersey Compassionate Use Act can currently coexist, it is dependent on the future acts of Congress to maintain. ♦

DEFAULT JUDGMENT

REASONABLE CAUSE MUST BE SHOWN FOR FAILURE TO APPEAR

Jean M. Disturco v. Gates in New Canaan, LLC, AC 44115 (Conn. App.)

Plaintiff became trapped in restaurant restroom and was struck by defendant employee trying to force door open with piece of wood. Defendant's registered agent was served but defendant did not file appearance until nine months later, after entry of default judgment due to failure to appear. Defendant claimed broker did not notify insurer until after judgment but motion to open judgment was denied. ***Held:*** Affirmed. There was no reasonable cause for defendant's failure to appear. Defendant's sending of summons and complaint to its broker under assumption broker would inform insurer constituted negligence rather than a mistake or other reasonable cause.

FIRST-PARTY PROPERTY

AGENT'S STATEMENT DID NOT EXTEND DEADLINE TO OBTAIN REPLACEMENT COST COVERAGE

Baber v. Ohio Mut. Ins. Co., 2021 Ohio App. LEXIS 1581 (Ohio App.)

Insured sued agency for promissory estoppel after insurer refused further deadline extension for barn reconstruction needed to qualify for full replacement cost coverage. ***Held:*** Agency's statement that insurer would be "fair" with further extensions was too ambiguous to be actionable promise. Insured could not explain its meaning under the circumstances. Absent explanation, "fair" could not induce reliance.

ATTORNEY FEES INAPPROPRIATE WHEN LAWSUIT DID NOT SERVE LEGITIMATE PURPOSE

People's Trust Ins. Co. v. Farinato, 2021 Fla. App. LEXIS 4949 (Fla. App.)

Insurer appealed final judgment on attorney's fees and costs entered in favor of insureds, arguing insureds did not have to file suit to force insurer to satisfy its obligations under policy because insurer did not refuse coverage. ***Held:*** Reversed. Insurer's coverage position prior to lawsuit was not anticipatory breach of contract because insurer requested appraisal, which would address insureds' claim.

BUILDING UNIT MISREPRESENTATION ON INSURANCE APPLICATION FATAL

Konstantakopoulos v. Union Mut. Fire Ins. Co., 2021 NY Slip Op 03256, (N.Y. App. Div. 1st Dep't)

Insurer sought ruling that insurance policy was void *ab initio* where the insured misrepresented on its insurance application that an apartment building had three units as opposed to four and further failed to list an ongoing eviction proceeding. ***Held:*** The policy was void. Insurer showed a material misrepresentation such that it would not have issued the policy if it had known the true nature of the risk. ***Further held:*** Even if plaintiff thought his eviction proceeding did not qualify as an eviction proceeding for purposes of the question asked on the insurance application, a misrepresentation need not be fraudulent to be material.

DISHONEST ENTRUSTMENT EXCLUSION APPLIES TO JEWELRY LOSS

Crown Jewels Estate Jewelry v. Underwrs. at Interest at Lloyd's London, 2021 NY Slip Op 03110 (N.Y. App. Div. 1st Dep't)

Plaintiff, a high-end jeweler, was contacted by a person claiming to work for Sony Pictures who was shooting a video with Jennifer Lopez and wanted to borrow pieces of plaintiff's jewelry for the shoot. In reality, the man was a member of the Gambino Organized Crime Family of La Cosa Nostra and made off with over $2 million dollars in jewelry. Plaintiff sought coverage. ***Held:*** Summary judgment for the insurer was proper because the loss of the insured's jewelry resulted from theft or an act of dishonest character on the part of the persons to whom the jewelry was entrusted. Plain language of the dishonest entrustment exclusion applied.

LIABILITY INSURANCE COVERAGE

NO COVERAGE FOR ACCIDENT OR INJURY OUTSIDE LIABILITY POLICY'S COVERAGE PERIOD

Certain Underwriters at Lloyd's v. Pierson, 2021 Fla. App. LEXIS 7940 (Fla. App.)

Police officers found liable in civil rights suit brought over twenty years earlier sued insurer for failing to indemnify. Trial court ruled in officers' favor, concluding policies were triggered because damages alleged extended into policy periods. Insurer argued that "occurrence" giving rise to liability under CGL policies must have happened during period of insurance, and officers' misconduct occurred twenty years before policies were executed. ***Held:*** Reversed. An occurrence insurance policy offers coverage where the negligent act or omission occurs within policy period, regardless of date claim is asserted

LACK OF INSURANCE CERTIFICATE CLARITY PRECLUDES SUMMARY JUDGMENT

County of Erie v. Gateway-Longview, Inc., 2021 NY Slip Op 02631, (N.Y. App. Div. 4th Dep't)

Defendant insurer sought summary judgment against plaintiff who claimed to be additional insured under policy. In response, insured submitted certificate of insurance listing it as additional insured. ***Held:*** An insurer that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the certificate of insurance to its detriment. Here, since the insurer presented no evidence establishing that neither it nor an authorized agent issued the certificate, summary judgment was properly denied.

LEGAL MALPRACTICE

UNDATED, UNSIGNED RETAINER DOES NOT WARRANT SUMMARY JUDGMENT

Fricano v. Law Offices of Tisha Adams, 2021 NY Slip Op 03306 (N.Y. App. Div. 2d Dep't)

Plaintiff sued her attorneys claiming they committed malpractice in failing to sue an insurer within the two-year period required by the insurance policy. Defendants disputed the contention that the attorney-client relationship included litigation of her insurance claim. ***Held:*** The retainer agreement submitted by defendants in support of a limited scope of retention was unsigned and undated. Thus, defendants failed to eliminate triable issues of fact as to whether their attorney-client relationship included litigation of the insurance claim.

LIMITATIONS OF ACTIONS

LIMITATIONS PERIOD FOR MALPRACTICE PURPOSES DID NOT BEGIN UNTIL SUPREME COURT RESOLVED TIMELY FILED APPEAL

Vega v. Rier, 2021 Fla. App. LEXIS 7499 (Fla. App.)

Plaintiff brought legal malpractice action against his attorney, who represented him in both his criminal trial and appeal. Trial court ruled that the action was untimely. ***Held:*** Reversed. Statute of limitations for legal malpractice action began to run from rendition of final order on appeal.

NEGLIGENCE

MUNICIPALITY PRIMARILY RESPONSIBLE FOR PUBLIC SIDEWALKS

Lajeune Pollard v. City of Bridgeport, AC 43260 (Conn. App.)

Plaintiff was injured by defective, raised, uneven, and deteriorated public sidewalk located adjacent to defendant housing cooperative association. Defense expert determined sidewalk's condition was result of large tree root growing directly beneath it, which emanated from tree growing on defendant's property. The trial court awarded defendant summary judgment. ***Held:*** Affirmed. Primary responsibility for maintaining public sidewalks in reasonably safe condition falls

to municipalities, not abutting landowners. There was no statute or ordinance that shifted liability to landowner. Injury did not result from affirmative act of landowner.

NEW TENANT NOT BENEFICIARY OF LEAD PAINT INSPECTION YEARS AGO

Navarro v. Burgess, 2021 Mass. App. LEXIS 45 (Mass. App.)

Child contracted lead poisoning two years after family moved into apartment. ***Held:*** Contractor inspecting unit for prior owner 20 years earlier did not owe duty to injured child. Contractor's duty ran to building owner hiring him, not to future building owners. He did not know that injured child would become tenant. Contractor did not certify that apartment was free of lead paint or that paint would never peel, chip, or flake.

STANDING

DAMAGES CONTINGENT ON CONTINUED OWNERSHIP INTEREST

Daryl L. Starke v. The Goodwin Estate Assoc., Inc., AC 42736 (Conn. App.)

Plaintiff sued defendant for alleged failure to repair water damage to his condominium unit. Trial court granted defendant's motion to dismiss because plaintiff no longer owned condominium. Plaintiff appealed. ***Held:*** Affirmed. Plaintiff's complaint was based on his rights as a unit owner.

SUBJECT MATTER JURISDICTION

NOTICE TO MUNICIPALITY CONDITION PRECEDENT TO SUIT BASED ON DEFECTIVE HIGHWAY STATUTE

William Dobie v. City of New Haven et al., AC 42877 (Conn. App.)

Plaintiff was injured when vehicle struck open manhole on roadway maintained by defendant municipality. One of defendant's snowplows had knocked off manhole cover and its operator failed to stop and secure roadway. Defendant sought dismissal, arguing no subject matter jurisdiction because plaintiff failed to give notice required by defective highway statute. Plaintiff successfully responded that he was asserting negligence claims rather than a defective highway claim and obtained verdict. ***Held:*** Reversed. Plaintiff's injuries were caused by a highway defect, an object in the traveled path that obstructed or hindered use of road. Plaintiff failed to provide timely notice.

TRIAL PRACTICE

RECORD OF ALLEGED DELIBERATIONS ERROR MUST BE MADE PRIOR TO READING OF VERDICT

Ryan K. Brown, Jr. v. David Cartwright et al., AC 43415 (Conn. App.)

Jury returned verdict in favor of defendants in personal injury action stemming from single car accident. Plaintiff subsequently argued only defendants' exhibits and not plaintiff's were timely delivered to the jury room during deliberations. ***Held:*** Plaintiff presented no evidence the jury began deliberations prior to delivery of the exhibits. Plaintiff did not bring the late delivery of the exhibits to the attention of the trial court on the record prior to the reading of the verdict.

PLAINTIFF IMPROPERLY DENIED PROPOSED JURY CHARGE

Ussbasy Garcia v. Robert Cohen et al., AC 41079 (Conn. App.)

Plaintiff slipped on exterior apartment building staircase. Defendants removed snow and spread salt and sand on the staircase but no one returned to clear the staircase after spreading salt and sand. The trial court rejected plaintiff's request to charge and instruct the jury that the possessor of real property has a non-delegable duty to maintain premises in a reasonably safe condition and plaintiff appealed. ***Held:*** Reversed. Defendants' testimony that it employed contractors to remove snow and maintain the staircase implicated the non-delegable duty doctrine since it raised the issue of who was responsible for the staircase.

UM/UIM

PIP INSURER CANNOT REDUCE CHIROPRACTIC CLAIM PAYMENTS

Sunrise Chiropractic & Rehab. Ctr. v. Sec. Nat'l Ins. Co., 2021 Fla. App. LEXIS 7174

Facility sought reimbursement for chiropractic care from patient's insurer, through assignment of benefits. Insurer reduced its Personal Injury Protection ("PIP") payment per the Medicare/Worker's Compensation fee schedule. Insurer obtained summary disposition as to application of the reduction. ***Held:*** Reversed. Payment reduction was contradicted by plain language of Florida's No-Fault Statute, which allows an insurer to limit reimbursement of medical care to the treating chiropractor to "200 percent of the allowable amount under" the "participating physicians fee schedule of Medicare Part B." The Medicare Physician Fee Schedule ("PFS") does not include the two percent (2%) reduction for CPT codes 98940, 98941 or 98942 shown in the CMS Payment Files which the defendant had relied upon to underpay chiropractic claims by 2%.

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