CM REPORT

of Recent Decisions

2022 • Vol. 2

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Illinois Prejudgment Interest Statute Held Unconstitutional

Clausen Miller P.C.

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

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Gallardo v. Marstiller, No. 20-1263 (U.S. 6-6-22)—A Possible Chilling Effect On Personal Injury Litigation Brought By Medicaid Beneficiaries

by ***Melinda S. Kollross***

In *Gallardo*, the United States Supreme Court held that the Medicaid Act permits a State to seek reimbursement from tort settlement payments or judgments allocated for future medical care. This could cause Medicaid beneficiaries and their personal injury lawyers to think twice before undertaking personal injury litigation depending on the size of the case and the amount of the expected state reimbursement.

Facts

Gallardo suffered catastrophic injuries resulting in permanent disability when a truck struck her as she stepped off her Florida school bus. Florida's Medicaid agency paid $862,688.77 to cover Gallardo's initial medical expenses, and the agency continues to pay her medical expenses. Gallardo, through her parents, sued the truck's owner and driver, as well as the school board. She sought compensation in the amount of $20 million for past medical expenses, future medical expenses, lost earnings, and other damages. This litigation resulted in a settlement for $800,000, with $35,367.52 expressly designated as compensation for past medical expenses. The settlement recognized that some portion of the settlement could represent compensation for future medical expenses, but it did not specifically allocate an amount for future medical expenses.

Where a Medicaid beneficiary recovers an award or settlement from a tortfeasor for medical expenses, specific provisions of the Medicaid Act direct a State to reimburse itself from that recovery for care for which it has paid. Accordingly, a State may claim portions of the beneficiary's tort award or settlement representing payments for the beneficiary's medical care, but not any other types of personal injury damages.

To comply with its Medicaid obligations, Florida law required Medicaid beneficiaries like Gallardo to assign to the State any right to third party payments for medical care. By virtue of Florida law, a lien automatically attached on any recovery thru settlement or judgment of those medical expenses. The lien is imposed in a statutory amount representing 37.5% of the portion of the tort recovery that is for past and future medical expenses.

Florida sought to recover its statutory lien of 37.5% from the Gallardo settlement, or $300,000 contending it was entitled to a recovery of both past and future medical expenses and was not limited to collecting on the amount allocated for past medical expenses. Gallardo contended otherwise, and initially succeeded on summary judgment in federal court that Florida could not recover from

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portions of the settlement representing future medical expenses. The Eleventh Circuit reversed, but at nearly the same time the Florida Supreme Court in a different case ruled that Medicaid law allowed the State to obtain reimbursement from a personal injury settlement/judgment only from the portion of a settlement/judgment that represented past medical expenses. Because of the conflict between the Eleventh Circuit and the Florida Supreme Court, the United States Supreme Court granted *certiorari*.

Ruling

According to the Court, the plain language of the Medicaid statute resolved this case in favor of Florida. Federal law required the State to acquire from each Medicaid beneficiary an assignment of any rights of the individual to support for the purpose of medical care and to payment for medical care from any third party. Nothing in the statutory language limited a beneficiary's assignment to payment for past medical care already paid for by Medicaid. To the contrary, the grant of any rights to payment for medical care most naturally would cover not only rights to payment for past medical expenses, but also rights to payment for future medical expenses. According to the Court, the relevant distinction as to what can and cannot be recovered is "between medical and nonmedical expenses," not between past expenses Medicaid has paid and future expenses it has not yet paid.

Learning Point: Justice Sotomayor in her dissent observed that as a state's right of recovery from any damages payout expands, a Medicaid beneficiary's share shrinks, reducing the beneficiary's incentive to pursue a tort action in the first place. This is in fact the way commentators are viewing the effect of this decision. Stanford Law School professor Nora Engstrom stated "The court's decision will reduce the incentive for litigants to bring personal injury lawsuits" . . . "Damage is the fuel that powers the tort system. Without fuel, the system cannot run." Another observer noted that the decision would certainly have a "chilling effect" in small dollar personal injury cases that may now never be brought given the high Court's ruling. ♦

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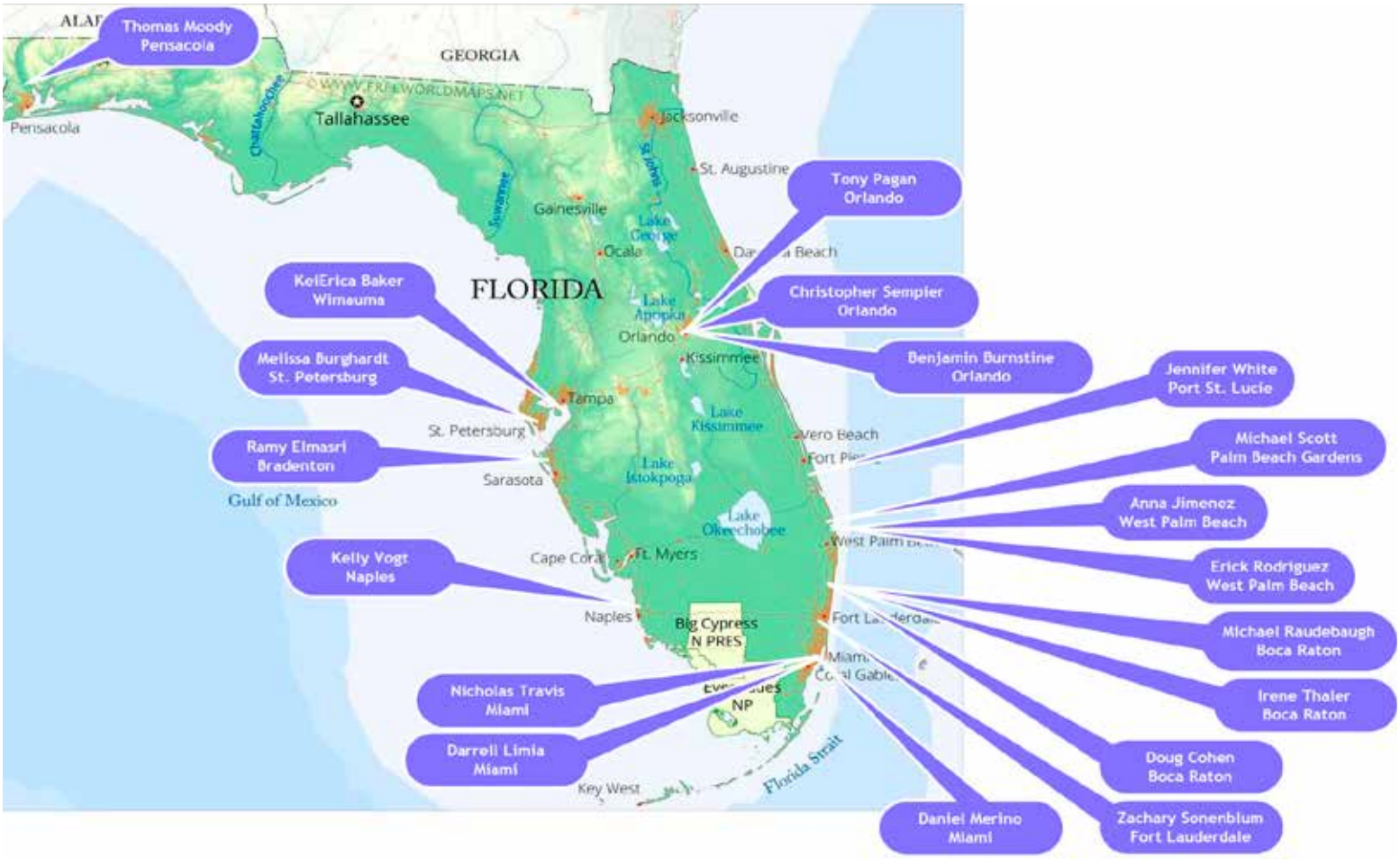
Celebrating 4 years in Florida



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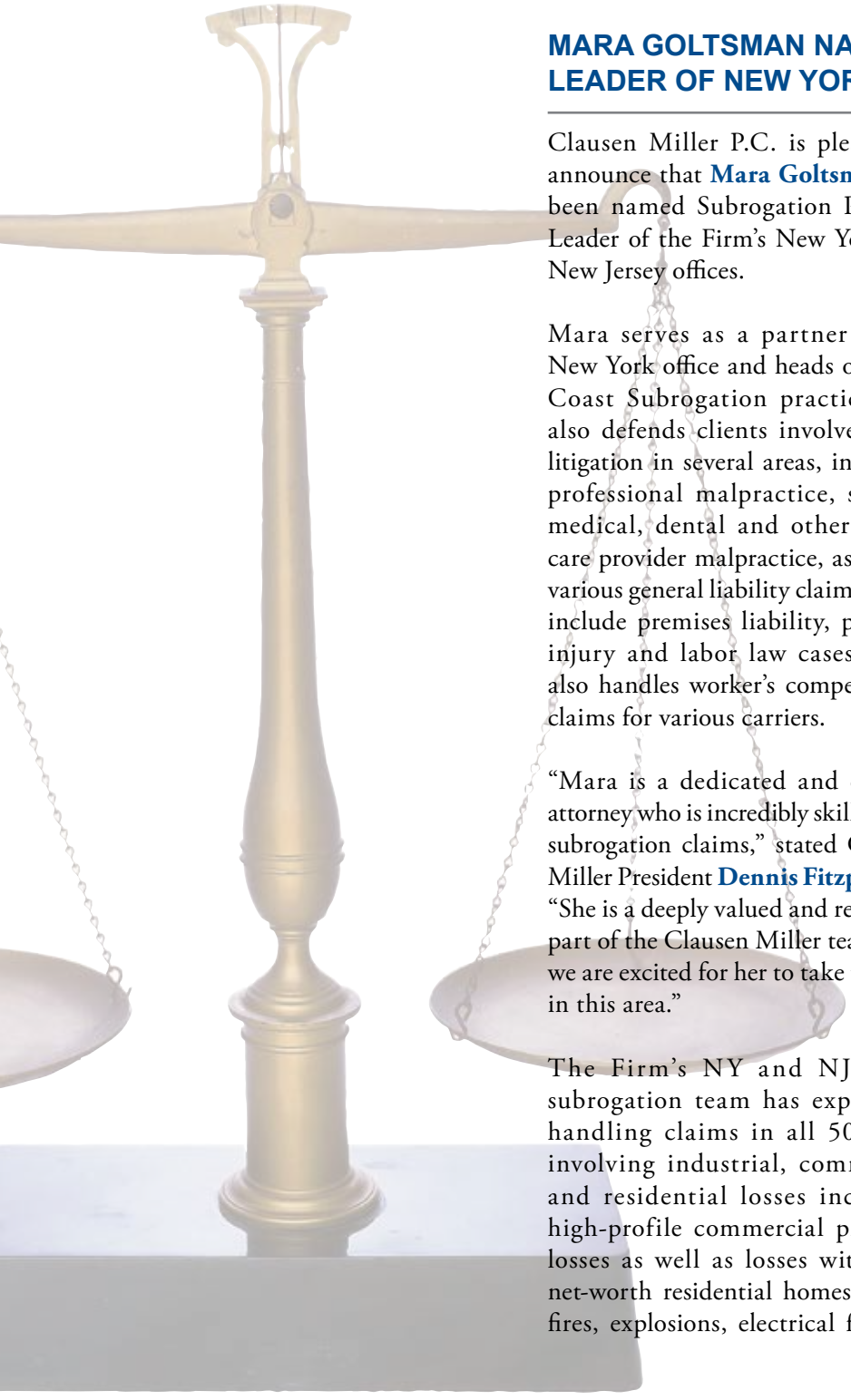

MARA GOLTSMAN NAMED SUBROGATION PRACTICE LEADER OF NEW YORK AND NEW JERSEY OFFICES

Clausen Miller P.C. is pleased to announce that **Mara Goltsman** has been named Subrogation Practice Leader of the Firm's New York and New Jersey offices.

Mara serves as a partner in the New York office and heads our East Coast Subrogation practice. She also defends clients involved with litigation in several areas, including professional malpractice, such as medical, dental and other health care provider malpractice, as well as various general liability claims which include premises liability, personal injury and labor law cases. Mara also handles worker's compensation claims for various carriers.

"Mara is a dedicated and capable attorney who is incredibly skilled with subrogation claims," stated Clausen Miller President **Dennis Fitzpatrick**. "She is a deeply valued and respected part of the Clausen Miller team, and we are excited for her to take the lead in this area."

The Firm's NY and NJ-based subrogation team has experience handling claims in all 50 states involving industrial, commercial and residential losses including high-profile commercial property losses as well as losses with high net-worth residential homes due to fires, explosions, electrical failures, structural collapses, construction collapse, machinery and equipment failures, environmental and energy failures, product defect, transportation and logistics accidents, gas and water leaks, and natural catastrophes.

"I am honored to have been selected to lead the subrogation practice for these two offices," said Mara. "I appreciate the opportunity and look forward to building on the Firm's accomplishments in this area."

ABOUT CLAUSEN MILLER P.C.

Clausen Miller is an insurance and defense law firm recognized as one of the top 10 Insurance Practice firms in the nation. Clausen Miller has offices in Chicago, Illinois; New York, New York; Orange County and San Francisco, California; Florham Park, New Jersey; Michigan City, Indiana; Appleton, Wisconsin; Stamford, Connecticut; Tampa, Florida; and London, England with affiliates located in Belgium, France, and Italy. Clausen Miller represents large commercial and personal lines insurance carriers, including reinsurers, throughout the United States and in Europe. Clausen Miller's attorneys generally practice in all areas of Insurance Coverage, all areas of Professional Liability and Casualty Defense, Subrogation, and Appeals.

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CLAUSEN MILLER EXPANDS TO TEXAS WITH ADDITION OF HOUSTON OFFICE

Clausen Miller is proud to announce the opening of its newest office location in Houston, Texas, expanding the Firm's full line of legal services in the Southwest. This latest office—Clausen Miller's eleventh worldwide—provides the Firm and its clients access to the "Energy Capital of the World" in the areas of insurance coverage, litigation defense, appeals, subrogation, and technology and cyber law.

"We are thrilled to establish our office in Houston, a city that has experienced remarkable growth and development in recent years and in which Clausen Miller already has deep connections," said **Dennis Fitzpatrick**, Clausen Miller President & CEO. "The Firm continues to be committed to further serving our clients in this vibrant market."

Our Florida partner, **Ramy Elmasri,** is returning home to Texas, where he has maintained an active law license, to lead the office.

Ramy's experience includes first-party property and casualty/liability defense including the representation of insurers and their insureds in large exposure claims. He is rated AV® Preeminent™ Peer Review Rated by Martindale Hubbell, has been named a Rising Star by Super Lawyers and has extensive state and federal court litigation, trial and appellate experience.

"It is my privilege to enhance the Firm's footprint in Houston," Ramy commented. "The market in Texas is made up of top-notch clients, and I look forward to building upon our strategic growth and expanding client relationships there."

CLAUSEN MILLER CELEBRATES FOUR YEARS OF CLIENT SERVICE IN FLORIDA

Clausen Miller P.C. is delighted to celebrate four years of client service in Florida as of July 1. The Firm is proud of its continued and ever-expanding presence in the state, increasing the Firm's ability to serve clients in the Southeast region.

"We appreciate the dedication of our attorneys and staff whose hard work allows us to celebrate this milestone," said Clausen Miller President & CEO, **Dennis Fitzpatrick**. "We have enjoyed four years of providing excellent service to our clients in Florida, and we look forward to celebrating many more."

DON SAMPEN'S HISTORICAL NOVEL *THE WHIMS OF WAR* REVIEWED IN CBA RECORD

Clausen Miller Appellate Practice Group partner and prolific writer **Don Sampen**'s historical fiction novel, *The Whims of War*, was recently reviewed in the Chicago Bar Association's CBA Record. The novel tells the story of a family businessman in Philadelphia who is drawn reluctantly into taking sides in the Revolutionary War.

Clausen Miller PC is proud to announce the opening of an additional office location

Ramy P. Elmasri

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COVID-19 Casualty Update: California Supreme Court Denies Review Of Appellate Decision That COVID-19 Death Suit May Proceed Against Widow's Employer, But Accepts Certified Questions From 9th Circuit

by ***Melinda S. Kollross***

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In Volume 4 of our 2021 *CM Report*, I discussed *See's Candies, Inc. v. Superior Court*, 73 Cal. App. 5th 66 (2021), and analyzed the ramifications for future litigation arising from this decision. In *See's Candies*, the Court held that a plaintiff's employer must face a lawsuit alleging that plaintiff contracted COVID-19 at work and infected her husband, causing his death.

On January 28, 2022, See's Candies petitioned the California Supreme Court to review the Court of Appeals decision. The California Supreme Court denied the petition for review without comment on April 13, 2022. Although the California Supreme Court's denial of review does not have precedential value and is not to be regarded as expressing approval of the propositions of law set forth in the Court of Appeals opinion, it does not follow that such a denial is without significance as to the views of the Supreme Court. In *Di Genova v. State Board of Education*, 57 Cal. 2d 167, 177 (1962), the California Supreme Court stated: "The order of this court denying a petition for a transfer . . . after . . . decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all of the reasoning contained in that opinion." (Quoting *Cole v. Rush*, 45 Cal 2d 345, 351, fn. 3 (1955)). *See also*, 16 Cal. Jur. Courts § 318.

This, however, may not be the last word from the California Supreme Court on this novel issue. A case currently pends before United States Court of Appeals for the Ninth Circuit entitled *Kuciemba v. Victory Woodworks Inc.*, No. 21-15963. In that case, the Ninth Circuit recently certified these two questions to the California Supreme Court for decision:

1. If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer?

2. Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

According to the Ninth Circuit, these matters warranted certification because there was no controlling

decision on these issues, *i.e.*, no California Supreme Court precedent. Further the issues, according to the Ninth Circuit, were matters of great public importance:

> [T]he scope of an employer's liability in tort for the spread of COVID-19, the application of the public policy exception to Cal. Civ. Code § 1714(a)'s general duty of care in the context of a pandemic, and—perhaps most sweepingly—whether California's derivative injury doctrine applies to injuries derived in fact from an employee's workplace injury.

On June 29, 2022, the California Supreme Court agreed to answer these two certified questions. We will monitor these proceedings for our friends in the insurance and defense industry and report on the same in future issues of the *CM Report.* ♦

New Florida Legislation Enacted Addressing Property Insurance Crisis

by ***Michael J. Raudebaugh***

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is a partner in the Tampa, Florida office who focuses his practice in the area of first party property litigation. He has spent his entire legal career litigating civil disputes in the State of Florida, representing insurers in both state and federal court. Michael's extensive litigation experience has also given him the opportunity to represent businesses and individuals on both the plaintiff and defense sides, with a particular emphasis on contractual and real estate disputes.
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Introduction

At the end of a special session called to address the growing insurance crisis within the state, the Florida Legislature passed two bills, Senate Bill 2-D and Senate Bill 4-D, that were signed into law by Governor DeSantis on May 26, 2022. The new legislation is directed toward the conditions developing within Florida's insurance market that prompted the call for a special legislative session in the first place, including rising premiums, carrier insolvencies, and the high rate of property insurance lawsuits. The short- and long-term effects of the legislation are uncertain, but insurance carriers and their counsel must be aware of these changes and how they will alter the property insurance landscape moving forward.

Analysis

Senate Bill 2-D

Senate Bill 2-D's provisions are intended to assist carriers and insureds by stabilizing the reinsurance market, incentivizing homeowners to retrofit their property against hurricanes, limiting the use of attorney fee multipliers, and imposing disincentives on assignment of benefit contracts.

1. Reinsurance Assist Program

In an effort to shore up the reinsurance market and provide premium relief to consumers, the bill allocates $2 billion to a newly-created reinsurance fund, the Reinsurance to Assist Policy ("RAP") program. The RAP fund intends to provide eligible property insurers access to a low-cost reinsurance pool, backed by the State of Florida, for catastrophic losses where private reinsurance is unavailable. The bill also requires any carrier enrolled in the RAP program to file a supplemental rate filing in the hope that discounted reinsurance rates will be passed onto homeowners in the form of reduced premiums.

2. Attorney Fees

The bill further assists carriers by revising how courts may award prevailing party attorney fees in property insurance lawsuits. SB 2-D amends Section 627.70152, Florida Statutes, to allow for an award of attorney fees to a carrier if a lawsuit is dismissed due to an insured's failure to file a notice of intent to initiate litigation. This offers an additional incentive for carriers to challenge pre-suit notices before filing a responsive pleading. The bill also changes how courts are to calculate fee awards by creating a "strong presumption" that the lodestar fee is sufficient and reasonable, which may only be rebutted "in a rare and exceptional circumstance with evidence that competent counsel could not be retained in a reasonable manner." If this change is applied as intended, the current scheme of awarding contingency risk multipliers to attorney fee awards should all but disappear. This would undoubtedly provide a significant reduction in the

amount of a carrier's total fee exposure in the event of an adverse judgment.

3. Assignment of Benefit Contracts

Perhaps the most significant immediate change made by SB 2-D relates to assignment of benefit contracts. The bill amends Section 627.7152, Florida Statutes, which governs assignment agreements. It first expands the definition of "Assignment agreement" to include the assignment of post-loss benefits for "inspecting, protecting, repairing, restoring, or replacing" insured property, while specifically excluding public adjuster fees. The bill maintains the requirement for assignees to provide the insurer with a pre-suit notice of intent to initiate litigation, but removes the ability of assignees to recover attorney fees and costs except through Section 57.105, Florida Statutes. In effect, it prevents assignees from recovering prevailing party attorney fees in litigation. This statutory change has such a profound effect on the economics of assignments that a lawsuit has been filed by two restoration companies that rely heavily on assignment agreements, Restoration Association of Florida, Inc. and Air Quality Assessors, LLC, challenging the new law on equal protection and due process grounds.

4. Hurricane Retrofitting

Senate Bill 2-D also attempts to assist homeowners affected by the insurance crisis. One path is through $150 million allocated to the My Safe Florida Home Program, which offers two-to-one matching grants to homeowners for hurricane retrofitting. Eligibility for the program is reserved to homes with an insured value of $500,000 or less, located within certain regions of the state susceptible to wind-borne debris, and where the building permit application for initial construction was made before January 1, 2008. The bill also prohibits carriers from refusing to issue or renew coverage solely based on the age of a property's roof if the roof is less than 15 years old or if the roof is determined to have at least 5 years of useful life remaining. Carriers are also now permitted to offer a policy with a separate roof deductible of up to two percent of the policy's dwelling limit or 50% of the cost to replace the roof, whichever is lower. This opt-out roof deductible, however, does not apply in the event of a total loss, damage caused by a hurricane, or damage requiring the repair of less than 50% of the roof.

5. Bad Faith

Finally, SB 2-D imposes an additional requirement for insureds in bad faith lawsuits. The bill creates Section 624.1551, Florida Statutes, which requires a claimant to establish that the carrier breached the insurance contract to prevail in a claim for extracontractual damages. This provision does not appear to alter the conditions precedent necessary to file a bad faith action, but rather creates a specific element that must be established by plaintiffs before recovering damages in a bad faith suit.

Senate Bill 4-D

The other bill passed by the Florida Legislature, SB 4-D, is less broad in scope but could have a significant impact on roof claims. The bill amends the Florida Building Code to allow for repairs to more than 25% of a roof if the rest of the roof was built, repaired, or replaced in compliance with the requirements of the 2007 Florida Building Code. This proposed change was already being reviewed by the Building Commission, but SB 4-D fast tracks its adoption. Finally, SB 4-D creates increased inspection requirements for condominium buildings. This change appears to have been made in direct response to the deadly June 2021 condominium collapse in Surfside, Florida.

Learning Point: The new laws generated by the Legislature's special session and enacted by Governor DeSantis are sure to impact all facets of an insurance carrier's operations within Florida, from reinsurance to litigation. The breadth and scope of the changes are such that one can only speculate as to their long-term effects on the broader insurance market. What is certain is that carriers will need to rely on competent counsel to navigate the new framework to ensure that they are on the leading edge of developing strategies to maximize the beneficial impact of these new laws. ♦

The Decline Of The Proposal For Settlement

by ***Ramy P. Elmasri*** *and* ***Erick R. Rodriguez***

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Introduction

In the four decades since the Florida Legislature passed the offer of judgment statute, Fla. Stat. § 768.79, the Proposal for Settlement ("PFS") has become an indispensable part of many litigants' toolkits. In concert with the Florida Legislature, the Florida Supreme Court sought to implement the procedural framework for the PFS through Fla. R. Civ. P. 1.442 to help achieve the intended goal of reducing litigation. New changes will dramatically alter the legal landscape.

Analysis

Proposals For Settlement May No Longer Contain Certain Nonmonetary Terms

The most recent amendment to Fla. R. Civ. P. 1.442(c)(2), set to go into effect July 1, 2022, states that "A proposal shall ... exclude nonmonetary terms, with the exceptions of a voluntary dismissal of all claims with prejudice and any other nonmonetary terms permitted by statute," eliminating the language in the rule discussing nonmonetary terms. In other words, non-monetary conditions, other than a dismissal of the lawsuit, will no longer be permitted to accompany a PFS under Rule 1.442. This amendment will have far-reaching implications, especially for private insurance companies defending first-party lawsuits.

The amendment's new language forbidding nonmonetary terms in a PFS precludes conditioning acceptance of the PFS upon execution of a release. While dismissal of the litigation at hand would effectively preclude a future lawsuit based on the same ***scope*** of the loss, a resolution in this manner absent a global release as to the claim could permit future litigation over the same claim if supplemental damage was submitted thereafter. Likewise, if a civil remedy notice has been filed, the acceptance of settlement and dismissal of the litigation would not preclude a bad faith action because a bad faith cause of action does not accrue unless and until the insured's underlying first-party action for insurance benefits is resolved favorably to the insured. *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991).

In addition, the Florida Supreme Court has specifically stated that an insured is not obligated to obtain the determination of liability and the full extent of damages through trial, but may do so through other means, including a settlement. *Fridman v. Safeco Ins. Co. of Ill.*, 185 So. 3d 1214, 1224 (Fla. 2016). Therefore, a proposal for settlement under the new rule greatly restricts the negotiation capabilities of a settling defendant because the PFS may not contain any nonmonetary conditions, including a release for a bad faith cause of action under the same claim. On the contrary, the PFS itself may serve as the very evidence a bad faith plaintiff would need to establish that the underlying action for insurance benefits resolved in favor of the insured.

Procedural Rules With Substantive Effects

The Florida Constitution empowers the Florida Supreme Court to adopt rules for the practice and procedure of Florida courts. *See Kuhajda v. Borden Dairy Co.*, 202 So.3d 391, 394 (Fla. 2016). Considering the anticipated impact of this change in rule 1.442 begs the question of how this amendment amounts to mere procedural governance by the Florida Supreme Court. The Court's justification for this change is that the "amendments are intended to align rule 1.442 with the substantive elements of Florida's settlement proposal statutes. Fla. Stat. § 768.79 does not provide for the inclusion of nonmonetary terms in a proposal for settlement." *See In re Amends. To Fla. Rules of Civ. Proc.*, No. SC21-277 (Fla. 2022).

Whether the rules governing proposals for settlement are in fact substantive or procedural in nature has been the subject of myriad appeals producing mixed results throughout Florida's appellate courts. In fact, the Florida Supreme Court previously affirmed the validity of a PFS that complied with Fla. Stat. § 768.79 but failed to include all the details listed by Fla. R. Civ. P. 1.442(c)(2). *Kuhajda* 202 So. 3d 391, 394 (Fla. 2016). However, six months earlier, the Fourth DCA concluded the exact opposite, holding that a PFS "could not form a basis for the attorney's fees award" because it "failed to strictly comply with Fla. R. Civ. P. 1.442(c)(2)(F)." *See Deer Valley Realty, Inc. v. SB Hotel Assocs. LLC*, 190 So. 3d 203, 207 (Fla. 4th DCA 2016). Despite the conflict, the *Kuhajda* opinion does not explicitly overrule *Deer Valley*.

The *Kuhajda* Court considered "a circumstance in which Fla. R. Civ. P. 1.442(c)(2)(F) contains a requirement to include in a settlement proposal a specific element that § 768.79 does not require" and declined to invalidate a PFS "solely for violating a requirement in rule 1.442 that section 768.79 does not require." Justice Canady artfully takes the position that "the procedural rule should no more be allowed to trump the statute here than the tail should be allowed to wag the dog. A procedural rule should not be strictly construed to defeat a statute it is designed to implement." *Kuhajda*, 202 So. 3d 395-96. In fact, a long line of Florida Supreme Court opinions affirm that "the offer of judgment statute is *procedurally* buttressed by Florida Rule of Civil Procedure 1.442." *See Se. Floating Docks v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 79 (Fla. 2012) (emphasis added).

Although the Florida Supreme Court drafted and ratified rule 1.442 and its amendments, the components of the rule with a substantive effect, such as the section permitting joint proposals for settlement, were struck down by the same court that implemented them. Justice Polston asserts in the *Gorka* dissent that, "joint proposals have become a trap for the wary and unwary alike," warning that "the majority's opinion 'effectively eliminates the ability to make joint offers.'" *Pancheco v. Gonzalez*, 254 So. 3d 527 (Fla. 4th DCA 2018) (citing *Attorneys' Title Insurance Fund, Inc. v. Gorka*, 36 So.3d 646, 654 (Fla. 2010) (Polston, J., dissenting).

Learning Point: Proposals for settlement are a well-known tool, with both litigators and their clients marking their calendars for the 91st day after a suit is filed to make note of when one may be served. As the legal landscape for the use of this tool changes, it is worth contemplating whether this amendment to rule 1.442 is substantive or procedural in nature. Moreover, the Florida Supreme Court's rationale for the change remains altogether questionable. In particular, we are left to wonder how the mere absence of a provision in Fla. Stat. § 768.79 regarding the use of nonmonetary terms warrants the implementation of a "procedural" rule explicitly prohibiting the inclusion of nonmonetary terms in proposals for settlement. ♦

Update: Insurers Continue To Succeed On Appeal On COVID-19 Property Claims

by Melinda S. Kollross

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The body of federal and state appellate precedent keeps growing, with nearly every appellate tribunal holding that there is no property insurance coverage for pandemic related economic losses in the absence of physical loss or damage.

There are just two contrary decisions nationwide: A New York appellate decision favoring an insured, but not involving the physical loss or damage issue (*New York Botanical Garden*), and a split 3-2 Louisiana Court of Appeals decision (*Cajun Conti*) finding coverage through policy ambiguity.

State Appellate Tribunals:

CALIFORNIA

United Talent Agency LLC v. Vigilant Ins. Co., No. B314242 (Cal. App. 4-22-22)

Adhering to *Inns-by-the-Sea v. California Mutual Ins. Co*, 71 Cal. App.5th 688 (2021), the Court ruled that it is now widely established that temporary loss of use of property due to pandemic related closure orders, without more, does not constitute direct physical loss or damage.

FLORIDA

Commodore Inc. v. Certain Underwriters at Lloyd's London, No. 3D21-0671 (Fla. App. 5-11-22)

Under Florida law and the plain language of the policy, loss of intended use alone does not constitute "direct physical loss." Instead, "direct physical loss of or damage to property" requires actual, tangible alteration to the insured property for coverage to be triggered. The insured's allegation that it suffered economic losses due to closure orders did not satisfy this requirement. According to the Court, the difference between the insured's loss of use theory and something clearly covered—like a hurricane—is that the insured's property did not change; the world around it did.

ILLINOIS

ABW Development, LLC v. Continental Casualty Co., 2022 IL App (1st) 210930

The Court held that "physical loss of or damage to" property required that the property has been altered in appearance, shape, color or in other material dimension. The insured failed to meet this requirement because the mere presence of the virus on surfaces did not constitute "physical loss of or damage to property." COVID-19 did not physically alter the appearance, shape, color, structure, or other material dimension of the property.

Alley 64 Inc. v. Society Ins. Co., 2022 IL App (2d) 210401

The Court rejected an insured's attempt to pigeonhole its COVID-19 losses into a contamination coverage provision holding that the insured's failure to allege the presence of the virus in its products, merchandise, or premises

defeated the claim for contamination coverage. The contamination coverage required that the insured's operations be suspended due to contamination. The insured never alleged that its premises were contaminated. Without contamination, there was no contamination coverage.

Firebirds Int'l, LLC v. Zurich Am. Ins. Co., 2022 IL App (1st) 210558

The insured alleged property damage and business losses due to the presence of the COVID-19 virus on its properties. But, according to the plain language of Zurich's policies, the COVID-19 virus was not a covered cause of loss. Each of the provisions under which the insured sought recovery—time element, civil authority, and protection and preservation—required physical loss or damage caused by a covered cause of loss, and there was no such damage or loss in this case.

GPIF Crescent Court Hotel LLC v. Zurich Am. Ins. Co., 2022 IL App (1st) 211335-U

The Court applied *Sweet Berry Cafe, Inc. v. Society Ins. Inc.*, 2022 IL App (2d) 210088, and *Lee v. State Farm Fire & Casualty Co.*, 2022 IL App (1st) 210105, holding those cases controlling. The insured's allegations were, in all material respects, no different than those made by the insureds in those two cases: containment measures and government orders limited its use of its property, creating an economic loss in the form of lost income and added expenses. Without an allegation of a change to the physical nature of the existing property, those allegations were insufficient to establish a physical loss.

Ortiz Eye Assoc., P.C. v. Cincinnati Ins. Inc., 2022 IL App (1st) 211312-U

The Court applied *Sweet Berry Cafe, Inc. v. Society Ins. Inc.*, 2022 IL App (2d) 210088, and other Illinois and Seventh Circuit COVID-related cases in holding that the insured failed to plead any facts showing that the presence of the COVID-19 virus caused any direct accidental physical loss or direct accidental physical damage to property that altered its appearance, shape, color, structure or material dimension necessitating any repairs or requiring a move to a new location.

Ark Restaurants Corp. v. Zurich Am. Ins. Co., 2022 IL App (1st) 211147-U

Applying Illinois law, the Court held that the insured did not suffer direct physical loss of or damage to property within the meaning of its commercial property insurance policy when the insured suspended or scaled back restaurant operations in early 2020 as required by government-imposed restrictions intended to curb COVID-19 pandemic.

LOUISIANA

Cajun Conti LLC v. Certain Underwriters at Lloyds London, No. 2021-CA-0343 (La. App. 6-15-22)

In a 3-2 split decision, the Court held that direct physical loss of or damage to property was ambiguous in the context of the presence of COVID-19 and construed coverage in favor of the insured. Of the three-judge majority, one judge concurred in the judgment, while just two others in the opinion. Two other judges dissented on the basis that there was no coverage for the insured's pandemic related economic losses.

MARYLAND

GPL Enters., LLC v. Certain Underwriters at Lloyd's, --- A.3d ---, 2022 WL 1638787 (Md. Ct. Spec. App. 5-24-22)

In this first opinion by a Maryland state court addressing pandemic related lost business income claims, the Maryland Court of Special Appeals held that although no Maryland appellate court had decided this specific question of whether COVID-19 or the closure orders constituted physical loss or damage, hundreds of courts throughout the United States have decided it in interpreting policies that were substantially identical to the policy in this case. Although the policies do not define the operative terms, those courts have held, almost unanimously, that the phrase "physical loss of or damage to" property is unambiguous and that the policies afforded no coverage for pandemic related economic losses.

NEW JERSEY

Mac Property Group LLC et al. v. Selective Fire and Casualty Ins. Co., No. A-0714-20 (N.J. App. 6-20-22)

The New Jersey Appellate Division disposed of 6 appeals in favor of various insurers holding that under New Jersey law, the insured's business losses were not caused by physical loss or damage to their properties, as required for coverage under their insurance policies with defendants, but by governmental restrictions imposed to curb the COVID-19 pandemic.

Rockleigh Country Club LLC v. Hartford Ins. Group, No. A-1826-21 (N.J. App. 6-21-22)

The Court ruled for the insurer holding that the insured had not shown that it suffered any physical loss or damage, and that in any event, a virus exclusion barred the entirety of the claim.

NEW YORK

Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp., No. 450839/21 (N.Y. App. 4-7-22)

The issue of whether business interruptions due to COVID-19 was caused by direct "physical" damage to property presented an issue of first impression for an appellate court in New York. The Court found though that previous New York decisions construed the phrase "direct physical loss or damage" in other contexts involving similar insurance contracts. Accordingly, the Court held that where a policy states that coverage is triggered only where there is "direct physical loss or damage" to the insured property, there must be actual, discernable, quantifiable change in the property. Here, there was no such change because of exposure to the virus, and thus the insured had no coverage.

New York Botanical Garden v. Allied World Assur. Co., No. 2021-04319 (N.Y. App. 6-14-22)

In a ruling for an insured under a "Pollution Legal Liability" policy, the insurer had admitted that COVID-19 was a pollution incident under the policy, and the Court held that the insurer had failed to show that contingent business interruption coverage was available only if the insured had been completely denied access to its property. According to the Court, the policy contemplated coverage for periods when the insured had some temporary access to its property.

VIRGINIA

Crescent Hotels & Resorts, LLC v. Zurich Am. Ins. Co., No. 211074 (Va. Sup. Ct. 4-14-22)

The Virginia Supreme Court refused to review a trial court's ruling that a hotel management company failed to show physical loss or damage in its COVID-19 coverage suit against its insurers, finding "no reversible error in the judgment complained of." Under Virginia procedure, a denial of a petition for appeal based on "no reversible error" is a decision on the merits. Although not precedential, it may still be cited as a decision on the merits.

WISCONSIN

Colectivo Coffee Roasters, Inc. v. Society Ins., No. 2021AP463 (Wis. S. Ct. 6-1-22)

In a unanimous decision, the Wisconsin Supreme Court ruled for the insurer holding that for a harm to constitute a physical loss of or damage to the property, it must be one that requires the property to be repaired, rebuilt, or replaced and it must alter the property's tangible characteristics. The Court further held that a contamination provision was inapplicable because the insured did not close its business specifically because its site was contaminated, but rather from the governmental closure order.

Federal Appellate Tribunals:

FIRST CIRCUIT

Legal Seafoods, LLC v. Strathmore Ins., No. 21-1202 (1st Cir. 6-3-22)

American Food Systems, Inc. v. Fireman's Fund Ins. Co., No. 21-1307 (1st Cir. 6-3-22)

SAS Int'l Ltd. v. General Star Indem. Co., No. 21-1219 (1st Cir. 6-3-22)

In these cases, arising under Massachusetts law, the Court found that the recent decision in *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022), was controlling. *Verveine* held that direct physical loss of or damage to property required some distinct, demonstrable, physical alteration of the property. Here there was no such damage to any insured property, and thus no coverage for any of the insured's pandemic related economic losses.

SECOND CIRCUIT

BR Restaurant Corp. v. Nationwide Mut. Ins. Co., No. 21-2100 (2d Cir. 4-8-22)

Adhering to its prior decision in *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216, 220 (2d Cir. 2021), the Court found its decision was consistent with New York state law that economic losses arising from loss of use did not constitute physical loss or damage.

Abbey Hotel Acquisition LLC v. National Surety Corp., No. 21-2609 (2d Cir. 5-27-22)

Applying Florida law, the Court held that the insured's COVID-19 losses were not covered as a "covered communicable disease event" because even if it were true that a communicable disease event occurred, the insured would still be entitled to reimbursement only for "direct physical loss or damage" "caused by or resulting from" such an event. And "physical loss or damage" did not extend to the mere presence of COVID-19 particles in the air or on surfaces.

Farmington Village Dental Assoc., LLC v. Cincinnati Ins. Co., No. 21-2080 (2d Cir. 6-8-22)

The Court held that under Connecticut law, the insured's deprivation of the use and benefits of its property was not enough to trigger coverage. Further, the insured's allegations that COVID caused physical loss or physical damage to its property by way of its transmissibility through physical particles in the air and on surfaces failed to allege how the presence of those virus-transmitting particles tangibly altered or impacted the property.

FOURTH CIRCUIT

The Cordish Companies, Inc. v. Affiliated FM Ins. Co., No. 21-2055 (4th Cir. 4-14-22)

National Coatings and Supplies, Inc. v. Valley Forge Ins. Co., No. 21-1421 (4th Cir. 6-2-22)

Summit Hospitality Group, Ltd. v. The Cincinnati Ins. Co., No. 21-1362 (4th Cir. 6-2-22)

Bel Air Auto Auction, Inc. v. Great Northern Ins. Co., No. 21-1493 (4th Cir. 6-14-22)

Adhering to its previous decision in *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022), the Court held in each of these appeals that there was no coverage for an insured's pandemic related economic loss in the absence of physical loss or damage to insured property.

FIFTH CIRCUIT

Louisiana Bone & Joint, L.L.C. v. Transportation Ins. Co., No. 21-30300 (5th Cir. 3-29-22)

Adhering to its prior decision in *Q Clothier New Orleans, LLC v. Twin City Fire Ins. Co.*, 2022 U.S. App. LEXIS 7565, __ F.4th __ (5th Cir. 2022), the Court held that the insured's losses from the closure of its clinic during the COVID-19 pandemic were not covered in the absence of any physical loss or damage to insured property.

Ferrer & Poirot, GP v. The Cincinnati Ins. Co., No. 21-11046 (5th Cir. 6-9-22)

In a case arising under Texas law, the Court adhered to its previous decision applying Texas law in *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 6 22 F.4th 450 (5th Cir. 2022), and held that the insured's COVID related economic losses were not covered in the absence of physical loss or damage to insured property.

SIXTH CIRCUIT

Renaissance/The Park, LLC v. Cincinnati Ins. Co., No. 21-6016 (6th Cir. 5-20-22)

Adhering to its prior decision applying Kentucky law in *Estes v. Cincinnati Ins. Co.*, 23 F.4th 695, 699 (6th Cir. 2022), the Court rejected the insured's argument that *Estes* was wrongly decided under Kentucky law holding that until the Kentucky Supreme Court holds differently that physical loss or damage does not mean tangible destruction or deprivation, *Estes* would remain the law of the Sixth Circuit.

Troy Stacy Enter. Inc. v. Cincinnati Ins. Co., No. 21-4008 (6th Cir. 6-8-22)

Adhering to its prior decisions in *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021), and *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645 (6th Cir. 2021), the Court held that the insured's pandemic related economic losses were not covered by its property policy in the absence of physical loss or damage to insured property.

Henderson Road Restaurant Sys. v. Zurich Am. Ins. Co., No. 21-4148 (6th Cir. 6-13-22)

In a case arising under Ohio law, the Court adhered to its previous decision applying Ohio law in *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645 (6th Cir. 2021), and ruled for the insurer. According to the Court, unambiguous policy language required the insured to demonstrate either destruction of the property or the insured's dispossession to show loss and a direct physical alteration of the

property to show damage. Loss of use alone does not meet this requirement under Ohio law.

SEVENTH CIRCUIT

East Coast Entertainment of Durham LLC v. Houston Casualty Co., 31 F.4th 547 (7th Cir. 2022)

The Court here found that its prior decision in *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021), barred coverage for the insured's pandemic related losses, despite the insured's contention that *Sandy Point* involved Illinois law, and its case involved the law of North Carolina. According to the Court, the growing national consensus regarding the meaning of "direct physical loss" underscored that this case did not turn on variations in state contract law.

Paradigm Care and Enrichment Center, LLC v. West Bend Mut. Ins. Co., No. 21-1695 (7th Cir. 5-3-22)

In a case arising under Michigan law, the Court applied *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021), barring coverage for the insured's pandemic related losses, holding that the Michigan Supreme Court would agree with its decision. According to the Court, the Michigan Court of Appeals reached the same conclusion as *Sandy Point* in *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, __ N.W.2d __, __, No. 354418, 2022 WL 301555, at *4 (Mich. Ct. App. Feb. 1, 2022), holding that a "direct physical loss," must "have some manner of tangible and measurable presence or effect in, on, or to the premises." Additionally, the unanimity of decisions from other federal courts of appeals reinforced the prediction that the Michigan Supreme Court would rule the same way.

Green Beginnings LLC v. West Bend Mut. Ins. Co., No. 21-02186 (7th Cir. 5-27-22)

ABC Diamonds Inc. v. Hartford Casualty Ins. Co., No. 22-1026 (7th Cir. 6-3-22)

Melcorp, Inc. d/b/a Great Steak & Potato Co. v. West Am. Ins. Co., No. 21-2448 (7th Cir. 6-8-22)

In these cases, arising under Illinois law, the Court applied *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021), holding that the insured's economic losses did not arise from physical loss or damage to insured property and thus were not covered. The Court in *Green Beginnings* also rejected the insured's claim that a communicable disease provision afforded coverage holding that the insured's business was closed by governmental order as a prophylactic measure for the entire state and not just because of conditions at the insured's business.

Windy City Limousine Co., LLC v. Cincinnati Fin. Corp., No. 21-3296 (7th Cir. 6-6-22)

The Court applied *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021), and *East Coast Entm't of Durham, LLC v. Houston Cas. Co. & Am. Claims Mgmt., Inc.*, 31 F.4th 547 (7th Cir. 2022), holding that under Illinois law, "direct physical loss" requires a "physical alteration" to property. Because the insured never alleged any physical alteration to property, its complaint was properly dismissed. The Court also rejected the insured's attempt to apply definitions from the commercial general liability part of the policy to the terms under the first-party property part of the policy holding that there is a difference between a policy's third-party liability coverage and its property coverage, and the insured could not simply import contractual language from one policy section to another.

AFM Mattress Co. LLC v. Motorists Commercial Mutual Ins. Co., No 21-1865 (7th Cir. 6-16-22)

The Court adhered to its prior decision in *Mashallah, Inc. v. West Bend Mut. Ins. Co.*, 20 F.4th 311 (7th Cir. 2021), holding that all the insured's losses were barred by a virus exclusion in the policy.

EIGHTH CIRCUIT

United Hebrew Congregation of St. Louis v. Selective Ins. Co. of Am., No. 21-2752 (8th Cir. 4-5-22)

Monday Restaurants et al. v. Intrepid Ins. Co., No. 21-2462 (8th Cir. 4-22-22)

Glenn R. Edwards Inc. v. Travelers Casualty Ins. Co., No. 21-3035 (8th Cir. 5-13-22)

In these appeals all arising under Missouri law, the Court found in each that pandemic related economic losses did not constitute a direct physical loss

of property under *Oral Surgeons, PC v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021), which held that direct physical loss required some physicality to the loss or damage of property and mere loss of use without physical loss or damage did not suffice.

Planet Sub Holdings, Inc. v. State Auto Property & Casualty Ins. Co., Inc., No. 21-2199 (8th Cir. 6-6-22)

In a case involving Kansas, Missouri, and Oklahoma law, the Court found that the law of each state was similar and not different than the Court's holding in *Monday Restaurants et al. v. Intrepid Ins. Co.*, No. 21-2462 (8th Cir. 4-22-22), that direct physical loss required some physicality to the loss or damage of property, such as physical alteration, physical contamination, or physical destruction and mere loss of use without physical loss or damage did not suffice.

NINTH CIRCUIT

Circus Circus LV, LP v. AIG Specialty Ins. Co., No. 21-15367 (9th Cir. 4-15-22)

Rialto Pockets, Inc. v. Beazley Underwriting Ltd., No. 21-55-196 (9th Cir. 4-20-22)

In these two appeals, the Ninth Circuit found *Inns-by-the-Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688, 699 (2021), review denied (Mar. 9, 2022), controlling in ruling for the insurers and against the insureds.

Circus Circus arose under Nevada law, but the Court found that Nevada courts often look to California decisions for guidance on insurance issues. The controlling California decision regarding an insured's pandemic related losses is *Inns-by-the-Sea*, which held that an insured's economic losses caused by closure orders did not constitute any physical loss or damage. Because the insured here suffered no district alteration of its property, it was not entitled to coverage.

Rialto Pockets arose under California law and *Inns-by-the-Sea* was dispositive against the insured because its losses were economic only and not arising from any physical loss or damage.

Palmdale Estates, Inc. v. Blackboard Ins. Co., No. 21-15258 (9th Cir. 5-2-22)

This appeal was governed by *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021), and *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, No. 20-17422, 2022 WL 171936 at *2 (9th Cir. Jan. 19, 2022), which held that a virus exclusion was applicable barring all the insured's losses because the insured could not show that the government's response to the virus in closing businesses was the product of anything other than the virus.

ELEVENTH CIRCUIT

Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am., No. 20-14156 (11th Cir. 6-3-22)

In a case arising under Georgia law, the Court found that the Georgia Court of Appeals interpreted "direct physical loss of, or damage to" in *AFLAC Inc. v. Chubb & Son, Inc.*, 260 Ga. App. 306, 307 (2003). The term required proof of "an actual change in insured property." Being "physical" meant that the loss or damage had to make the property "unsatisfactory for future use" or meant that the property would need "repairs" before it would be usable again. So, under Georgia law, "direct physical loss" always involves a tangible change to property. Here, there was no such change and thus no coverage for the insured's pandemic related economic losses.

Dukes Clothing, LLC v. The Cincinnati Ins. Co., No. 21-11974 (11th Cir. 6-6-22)

In a case arising under Alabama law, the Court found that Alabama courts would agree with its decisions in *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, No. 20-14812, 2022 WL 1421414 (11th Cir. 5-5-22), and *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 20-14156 (11th Cir. 6-3-22), and hold that the insured's economic pandemic related losses without any tangible damage to insured property are not covered under a property policy.

Restaurant Group Management, LLC v. Zurich Am. Ins. Co., No. 21-12107 (11th Cir. 6-6-22)

In a case arising under Georgia law, the Court found that its decision in *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 20-14156 (11th Cir. 6-3-22), resolved the case in the insurer's favor because there was no coverage for the insured's pandemic related losses.

Café Int'l Holding Co. v. Westchester Surplus Lines Ins. Co., No. 21-11930 (11th Cir. 5-13-22)

Gio Pizzeria & Bar Hospitality, LLC v. Certain Underwriters, No. 21-12229 (11th Cir. 5-17-22)

Left Field Holdings III v. Colony Ins. Co., No. 12124 (11th Cir. 5-24-22)

Frontier Dev. LLC v. Endurance Am. Specialty Ins. Co., No. 21-13449 (5th Cir. 6-1-22)

The Eleventh Circuit disposed of these appeals in favor of the insurers adhering to *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, No. 20-14812, 2022 WL 1421414 (11th Cir. May 5, 2022). The Court held that intangible or incorporeal losses were excluded from coverage to preclude any claim against a property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

First Watch Restaurants, Inc. v. Zurich Am. Ins. Co., No. 21-10671 (11th Cir. 5-24-22)

Royal Palm Optical, Inc. v. State Farm Mut. Auto. Ins. Co., No. 21-11335 (11th Cir. 5-25-22)

Town Kitchen LLC v. Certain Underwriters, No. 21-10992 (11th Cir. 5-27-22)

PF Sunset View LLC et al. v. Atlantic Specialty Ins., No. 21-11580 (11th Cir. 6-2-22)

The Eleventh Circuit disposed of these appeals in favor of the insurers holding that the recent decision by the Florida Court of Appeals in *Commodore Inc. v. Certain Underwriters at Lloyd's London*, No. 3D21-0671 (Fla. App. 5-11-22), demonstrated that its decision in *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, No. 20-14812, 2022 WL 1421414 (11th Cir. May 5, 2022), was consistent with Florida law, requiring actual alteration to insured property to trigger coverage.

Learning Point: In my prior reports on COVID-19 appellate decisions, I have provided various "appellate recommendations" for appeals going forward involving these property policy pandemic related claims such as:

— Stressing the public policy considerations.

— Stressing the (now nearly) unanimous body of federal and state appellate precedent.

— Stressing the admonition that once a federal appellate decision is made, future panels in that Circuit should not lightly disregard the prior decision merely because three different judges might be deciding another case.

Based upon my analysis of these recent decisions, I can now make an additional recommendation for all future appeals:

-- To rebut any *Erie* type arguments by insureds that only state appellate tribunals should decide these cases, stress the finding made by the Seventh Circuit in *East Coast Entertainment of Durham LLC v. Houston Casualty Co.*, No. 21-2947 (7th Cir. 4-12-22), that the growing national consensus regarding the meaning of "direct physical loss" underscores that these cases do not turn on variations in state contract law. ♦

Spotlight On PFAS: Fall 2022 PFAS National Drinking Water Regulations And The Ensuing Impact On Insurance Coverage

by ***Colleen A. Beverly***

Per- and polyfluoroalkyl substances (PFAS) are commonly referred to as "forever chemicals" because of their persistence, widespread distribution in the environment, and potential human-health impacts. Since they were first created in the 1940s, over 6,300 different chemicals have been produced within this class of compounds, with common names such as Teflon and GORE-TEX, and are found in a variety of products, including carpets, leather, paints, cleaners and firefighting foams. Nearly every American has forever chemicals in their blood, according to the U.S. Centers for Disease Control and Prevention.

To date, the EPA has regulated more than 90 drinking water contaminants but has not established national drinking water regulations for any PFAS. **https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf**. In March 2021, EPA published the Fourth Regulatory Determinations, including a final determination to regulate Perfluorooctanoic acid (PFOA) and Perfluorooctane sulfonic acid (PFOS) in drinking water. In the Fall of 2022, the EPA will release its proposed National Primary Drinking Water Regulations (NPDWRs) for PFOA and PFOS. In formulating this proposal, the EPA is evaluating additional PFAS beyond PFOA and PFOS. The EPA anticipates issuing a final regulation in Fall 2023 after considering public comments on the proposal. *Id.*

Further, on June 15, 2022, the United States Environmental Protection Agency (EPA) released four drinking water health advisories for per- and polyfluoroalkyl substances (PFAS) under the Biden administration's plan to deliver clean water. **https://www.epa.gov/newsreleases/epa-announces-new-drinking-water-health-advisories-pfas-chemicals-1-billion-bipartisan**. These advisories indicate the level of drinking water contamination below which adverse health effects are not expected to occur. These advisories also provide technical information that federal, state and local agencies can use to pursue actions to address PFAS in drinking water. The EPA is also encouraging states to apply for $1 billion in funds—the first of $5 billion in Bipartisan Infrastructure Law grant funding—to address PFAS and other contaminants in drinking water. *Id.*

In addition to the proposed NPDWRs, the EPA also intends to restrict PFAS discharges from industrial sources through Effluent Limitations Guidelines (ELGs). These guidelines will include rulemaking to restrict PFAS discharges from industrial categories where the EPA has the data to do so (organic chemicals, plastics and synthetic fibers, metal finishing and electroplating); launch detailed studies on facilities where the

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EPA has preliminary data on PFAS discharges but insufficient knowledge for rulemaking (electrical and electronic components, textile mills and landfills); initiate data reviews for industrial categories for which there is little known information (leather tanning and finishing, plastics molding and forming and paint formulating); monitor industrial categories where the phaseout of PFAS is projected by 2024 (pulp and paper, paperboard and airports). **https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf**

This heightened federal regulatory activity will inevitably drive additional lawsuits regarding PFAS. PFAS lawsuits to date include those for medical monitoring, personal injury based on PFAS exposure in drinking water, public and private nuisance, and claims for diminished value of property. Consequently, policyholders have turned to their insurers seeking coverage for such claims. Since PFAS have been used in manufacturing for many decades, companies that have received citations or cleanup orders relating to PFAS pollution look to legacy general liability policies for coverage of such claims. **https://www.law360.com/insurance-authority/articles/1466772/greater-pfas-scrutiny-has-manufacturers-insurers-worried**

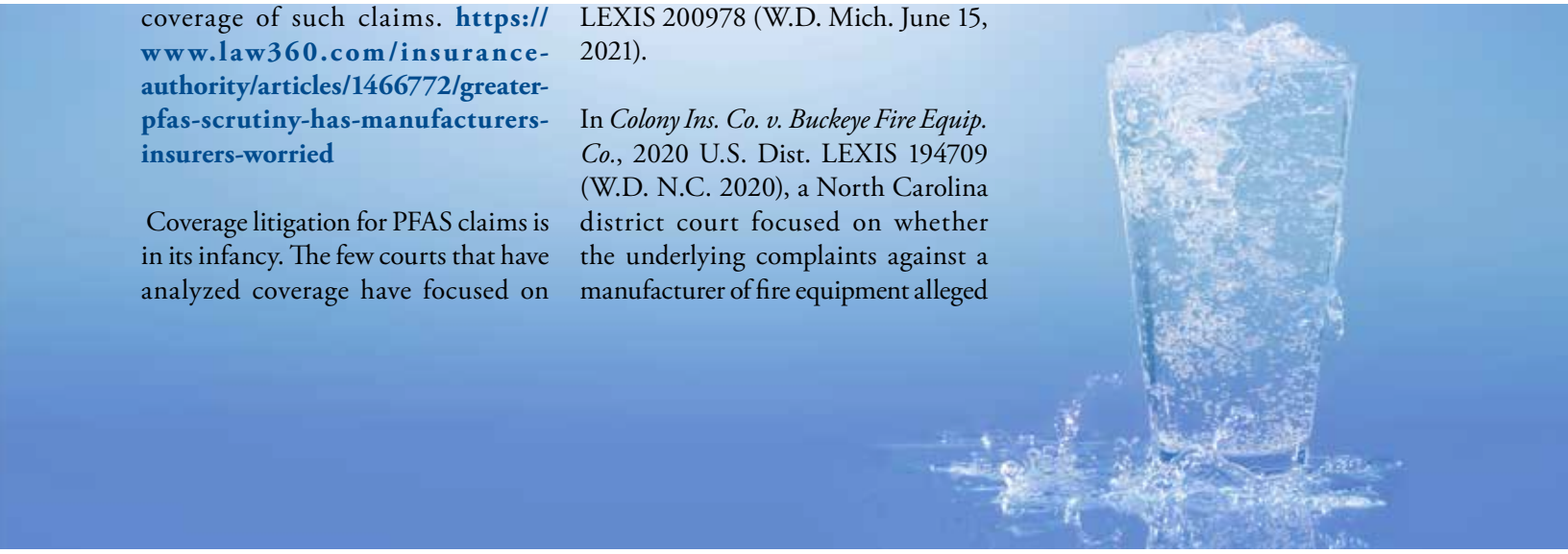
Coverage litigation for PFAS claims is in its infancy. The few courts that have analyzed coverage have focused on whether pollution exclusions preclude coverage for such claims. The rulings in these decisions vary. For example, a New York state appellate court recently held that an insurer did not have a duty to defend a manufacturer of synthetic materials accused of discharging PFAS into local water supplies because the court found that PFAS fell within the definition of "pollutant" and the allegations did not fall within the sudden and accidental exception to the pollution exclusion. *Tonoga v. New Hampshire Insurance*, 159 N.Y.S.3d 252 (N.Y. App. Div. 2022). The *Tonoga* court specifically stated that "allegations that a solution was dumped over a period of many years suggests 'the opposite of suddenness'". *Id.* at 258.

In contrast, a Michigan district court found that an insurer had a duty to defend the owner and operator of a tannery that used Scotchgard (containing PFAS) in its operations. The court found that it was possible that the release of PFAS fell within the sudden and accidental exception of the pollution exclusion, thus finding a duty to defend. *Wolverine World Wide v. American Insurance*, 2021 U.S. Dist. LEXIS 200978 (W.D. Mich. June 15, 2021).

In *Colony Ins. Co. v. Buckeye Fire Equip. Co.*, 2020 U.S. Dist. LEXIS 194709 (W.D. N.C. 2020), a North Carolina district court focused on whether the underlying complaints against a manufacturer of fire equipment alleged traditional environmental pollution as to fall within the pollution exclusions within the policies at issue. The court concluded that direct contact with or exposure to aqueous film-forming foams (AFFF) which contain PFAS did not constitute traditional environmental pollution, thus the insurers could not deny coverage to the manufacturer for claims alleging direct exposure. *Id.* at *10.

In addition to applicability of pollution exclusions, PFAS claims will give rise to a host of other coverage issues, such as lost policies given that claims will involve decades-old legacy policies, coverage for successor liabilities, trigger and allocation, other insurance, product/non-product limits and aggregate issues, drop down and set off—just to name a few.

Clausen Miller continues to monitor emerging state and federal regulation of PFAS, the claims asserted against companies in light of these regulations, and the coverage issues that arise. Please contact CM Partner **Colleen Beverly** if you have any questions regarding these issues. ♦



Client Alert: Cook County Judge Rules Illinois Prejudgment Interest Statute Unconstitutional

*by **Thushan M. Sabaratnam** and **Morgan A. Dilbeck***

Cook County Circuit Court Judge Marcia Maras has ruled that the prejudgment interest Amendment to 735 ILCS 5/2-1303 violates the Illinois Constitution. The 2021 Amendment requires a defendant to extend a settlement offer within one year of plaintiff filing a major tort claim, including personal injury and wrongful death. *See Hyland et al., v. Advocate Health and Hospital Corp. et al.*, Case No: 2017-L-3541, Order entered May 27, 2022. In *Hyland*, Judge Maras recognized that a defendant served more than one year after a case is filed is arbitrarily penalized and deprived of any potential benefit of any earlier made settlement offer. As such, the Amendment penalizes a defendant regardless of whether they contributed to any delay in the litigation. Further, the Amendment allows a plaintiff to reap the benefit of prejudgment interest despite their failure to diligently prosecute their case.

Background: Illinois Prejudgment Interest Statute

On July 1, 2021, Senate Bill 0072 was passed by the Illinois General Assembly and signed into law by Governor Pritzker. This law became known as the Pre-Judgment Interest Statute under tort law, amending 735 ILCS 5/2-1303.

Understandably, the defense bar and their clients throughout the State of Illinois were alarmed by the Amendment's potential consequences, namely the possibility of significant prejudgment interest amounts being added to high-value cases. In *Hyland*, a medical malpractice action filed in 2017, Defendants moved to declare the Amendment invalid, arguing it deprived them of the right to a jury trial, was "special legislation," violated separation of powers principles, was not read three times, and failed the single-issue requirement—all violative of the Illinois Constitution. The court granted Defendants' motion and declared the Amendment unconstitutional as discussed below.

Court Analysis & Reasoning

Ripeness

The court first assessed ripeness, a justiciability doctrine that pertains to whether an actual or threatened harm has matured sufficiently to warrant judicial relief. As the Illinois Supreme Court noted in *Best*, the requirement of ripeness is met where a challenge to the constitutionality of Illinois legislation "portends the ripening seeds of litigation," and where "the course of future litigation will be controlled by the resolution of constitutional challenges." *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). Here, Judge Maras found that because the prejudgment interest Amendment applies to major tort cases as of July 1, 2021, and the challenge

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to its constitutionality would control future litigation and trial strategy, it is ripe for decision.

Right to a Jury Trial

Next, the court addressed the right of trial by jury protected by Sections 1 and 13 of the Illinois Constitution of 1970. As stated in many prior court decisions, it is the jury's right—not the legislature's—to assess damages at trial upon the hearing of the evidence to compensate a plaintiff for their injury. The Amendment violates that fundamental right by imposing prejudgment damages. As noted by Defendants, juries—especially those in Cook County—are aware of the time-period between injury and trial. Relying on an earlier study, the court determined that jury awards include interest as part of their damages analysis. *See* Michael S. Knoll, A Primer on Prejudgment Interest, 75 Texas Law Review 293 (1996).

Special Legislation

The court also examined the Amendment as "special legislation." It applied the strict scrutiny test to determine whether the Amendment was enacted to permit an injured party to be made whole for their injury from the date of the occurrence until judgment is entered. The requirement that prejudgment interest be added to the jury's award prevents the jury from considering facts as to the reasonableness of just compensation. The court determined that automatically adding prejudgment interest when the verdict exceeds a time-limited offer removed the litigant's right to have damages decided by a jury and did not pass the strict scrutiny test. Based on this determination, the court found the Amendment violates the Illinois Constitution.

The Amendment does not satisfy the rational basis test either. Even if prejudgment interest would incentivize settlement offers and relieve docket backlogs, its manner of doing so violates the Illinois Constitution. The Amendment discriminates against other tort plaintiffs who do not have personal injury or death claims such as privacy, emotional distress, fraud, conversion, and attorney malpractice claims. Litigants in similar situations would continue to be discriminated against even with the Amendment, and a plethora of cases on the Cook County docket would remain. Thus, there would be continued congestion for all other tort actions.

The court further addressed how the Amendment's interest penalty applied to a defendant who was served more than a year after the case was filed. The Amendment deprives such a defendant of any potential benefit afforded by extending settlement offers. With a delay in service, a defendant may not be able to adequately investigate the facts of the case to make a liability and damages assessment, which then hinders the defendant's ability to make a fair offer. There may even be situations where a plaintiff prolongs the case to increase the interest tacked onto a putative judgment. The Amendment unfairly penalizes defendants, leading to hefty amounts in interest applied to judgments. Therefore, as not all tort parties are treated equally under the Amendment, and the Amendment is not rationally related to any State interest, the Amendment is unconstitutional.

Other Challenges

The court did not reach the other grounds raised by Defendants, including separation of powers and the legislative requirement to have a bill read three times and relate to a single-issue.

Practice Pointers:

1. Potential Appeal

The *Hyland* plaintiffs will likely seek an appeal to the Illinois Supreme Court. However, Judge Maras's Order is not immediately appealable under Illinois Supreme Court Rule 302(a) because it does not constitute a final judgment. *See* Ill. S. Ct. R.302(a) (**Cases Directly Appealable**. Appeals from final judgments of circuit courts shall be taken directly to the Supreme Court (1) in cases in which a statute of the United States or of this state has been held invalid…"). Plaintiffs will instead need to seek and obtain a Rule 304(a) finding of no just reason to delay enforcement or appeal of the Order. Even with such a finding, Illinois law appears somewhat unsettled law about whether Rule 304 (a) can be used in this situation. *See Trent v. Winningham*, 172 Ill. 2d 420, 424 (1996):

> Rule 302(a) is not expressly designed to confer interlocutory jurisdiction. And so the intended scope of review is not really one tailored to particular issues, as with Rule 304(a); jurisdiction under Rule 302(a) extends to "cases."

However, in the later case of *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 226 (2010), the Court noted the trial court order contained a Rule 304(a)

finding in an appeal brought directly to that Court under Rule 302(a).

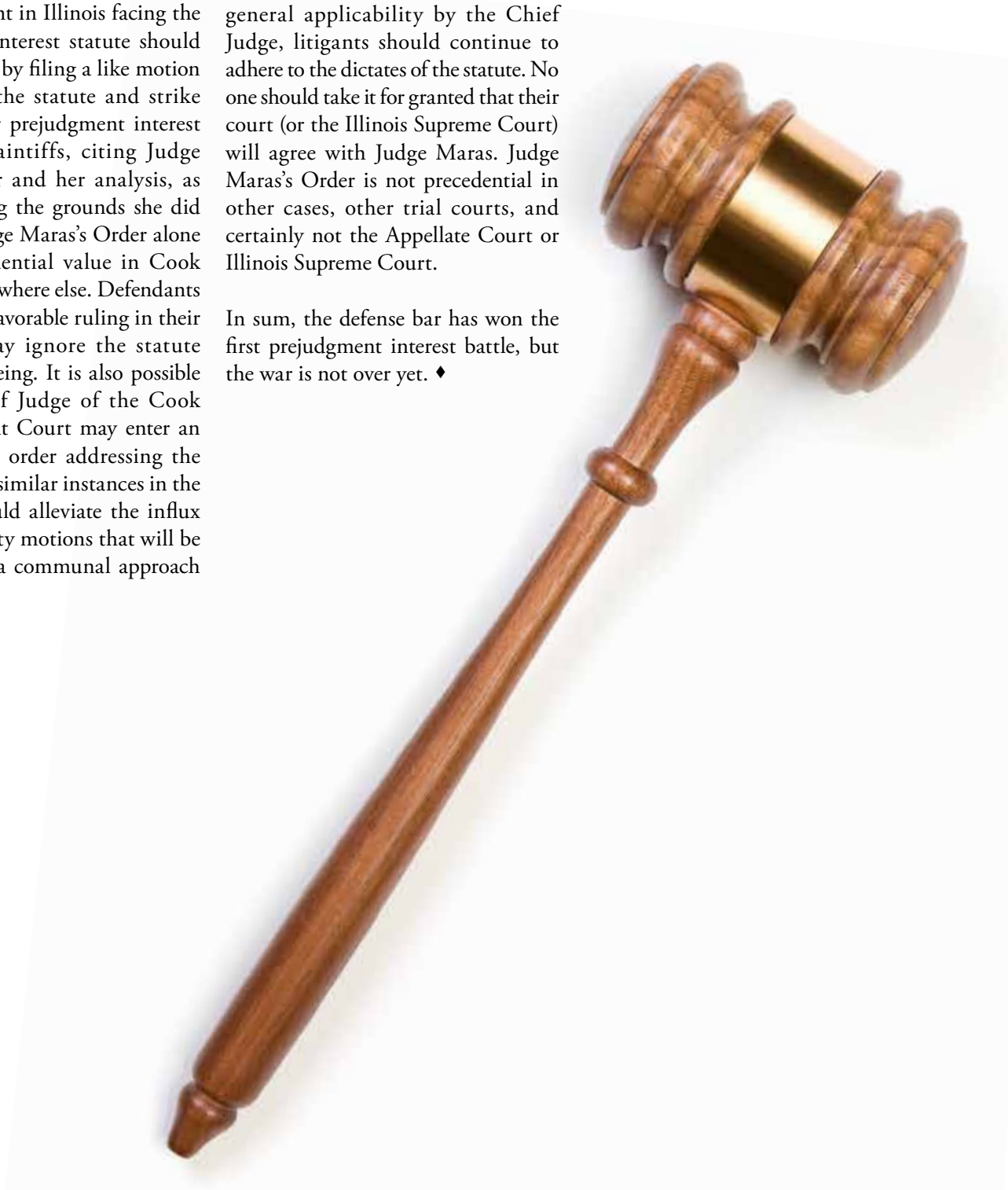
2. Move to Strike/Declare Unconstitutional

Every defendant in Illinois facing the prejudgment interest statute should act proactively by filing a like motion to invalidate the statute and strike any claims for prejudgment interest alleged by plaintiffs, citing Judge Maras's Order and her analysis, as well as arguing the grounds she did not reach. Judge Maras's Order alone has no precedential value in Cook County or anywhere else. Defendants who obtain a favorable ruling in their own cases may ignore the statute for the time being. It is also possible that the Chief Judge of the Cook County Circuit Court may enter an administrative order addressing the issue based on similar instances in the past. This would alleviate the influx of Cook County motions that will be filed and add a communal approach to the issue.

3. Absent A Favorable Ruling—Adhere To The Statute

Absent a favorable Order in each individual case or a declaration of general applicability by the Chief Judge, litigants should continue to adhere to the dictates of the statute. No one should take it for granted that their court (or the Illinois Supreme Court) will agree with Judge Maras. Judge Maras's Order is not precedential in other cases, other trial courts, and certainly not the Appellate Court or Illinois Supreme Court.

In sum, the defense bar has won the first prejudgment interest battle, but the war is not over yet. ♦



Inflation In The Economy And Its Impact On Claims

*by **Eli B. Vine** and **Kathleen M. Klein***

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Introduction

As inflation continues to run rampant throughout the United States economy, we have all experienced the effects of supply chain impediments, labor shortages, and increased costs in our daily personal lives. In our professional lives, these circumstances also warrant our attention. In that context, the question for insurers and claims departments is what adverse effects the economic inflation will have on claims and litigation, and perhaps more importantly, what insurers can do to mitigate these risks.

Facts

In the field of economics, inflation is typically defined as a general increase in the prices of goods and services in the economy over a given period of time. When prices rise, in general terms, purchases fall. Inflation tends to occur when prices rise due to increases in production costs or, alternatively, when the demand for a product exceeds it supply. Think of the empty toilet paper shelves in the early days of the Covid pandemic or current skyrocketing gas prices. Supply chain issues, surging demands for goods, increased production costs of goods, and trillions of relief fund dollars to fight COVID-19 via the American Rescue Plan of 2021 are all likely culprits of the current inflation in the United States. What does this mean for insurers?

Analysis

As with most financial institutions, high inflation negatively impacts claims departments and the cost of litigation. What are those expected impacts?

Impact on Loss Reserves

Runaway inflation may adversely impact insurers' liabilities. Insurers carry liability via loss reserves. A loss reserve is an estimate of an insurer's liability on future claims it will have to pay out. If inflation is higher than the rate built into the loss reserves, then future payments will be greater than the insurer bargained for. While one would expect the impact of inflation may vary by line of business, an increase of just one percent in inflation can raise the property and casualty industry combined ratios by two to three points.

Impact on insurer liability is further exacerbated by the types of risks insurers cover. For example, claims on personal lines, such as personal automobile coverage, are known and can be estimated relatively accurately in a fairly short period of time. Payouts on these claims tend to be shorter in duration, again typically resulting in a lower risk to insurers in underestimating loss reserves. Other liability lines may have longer payout periods; sometimes they may not be known or resolved for years after they occur. The increased length of time for

payouts, coupled with uncertainty over the nature and cost of future claims, can expose the insurer to a significantly higher risk of undervaluing current claims. In a period of economic inflation, these risks are magnified. Workers' compensation insurance, for example, has potentially longer payout periods and may also be impacted by accompanying changes in wages, medical expenses, and other related costs.

Thus, the impact of inflation on loss reserves may be nominal in personal lines of business, where liabilities are shorter in duration. A one percent increase in inflation may only increase the combined ratio by less than one point. In contrast, for medical professional liability, where the liabilities are generally longer in duration, the same one percent increase may raise the combined ratio by more than five points.

Impact on D&O Claims

Another consideration in evaluating the impact of economic inflation and supply chain issues, is whether this environment could lead to a wave of Directors and Officers ("D&O") claims and lawsuits. One can easily imagine securities class action lawsuits by plaintiff shareholders, directly relating to a company's less than anticipated earnings due to inflation and the surrounding circumstances, and the drop in stock price that results. A recent example is the New York class action suit, *Vinings v. Vertiv*, where the company allegedly failed to disclose to investors the anticipated effects of material and freight inflation. The company estimated fourth quarter 2021 earnings at $0.28, but its earnings report ultimately indicated only $0.06 per share. Now that economies have largely reopened, but supply chains and production struggle to catch up, suits like this could arise as more companies struggle with the effects of inflation on their bottom line.

Impact on Present Value of Future Loss

How will economic inflation impact litigation itself? What about assessments of damages, when a plaintiff asks for compensation for future losses, like wages and future medical expenses. These claims can extend far into the future. While a detailed discussion of the methods of calculating the present value of future losses is beyond the focus of this article, the pieces of this analysis, like "discount rates," are often hotly contested. We can be sure that vocational rehabilitation and life care planner experts will tap into favorable assumptions about inflation in their calculations of the current dollar value of future expenses.

Learning Point: What can claim departments due to combat the negative impacts of inflation? Maintaining claim reserves adequately, with an eye toward the potential exacerbating effect of inflation and the current economic environment, is one practical step. Another possibility is for claims departments to provide a systematic claims settlement strategy focused on curtailing excessive payout periods, or even a case by case or "soft" policy of advancing payout periods wherever possible, to help reduce the impact of long-term inflation risk. Proactive claims management and partnerships with outside counsel that explicitly acknowledge these risks and emphasize litigation goals in line with this strategy can move the ball forward on the micro level; consistency in this approach has the potential for macro effects. Finally, identification and targeting of emerging regulatory or legislative issues is always useful, to appreciate, act on, and ultimately attempt to influence long-term trends that will affect both the insurer and its insureds. ♦

Liability For Third Party Criminal Conduct—California Court Dismisses Claim Against Uber For Assaults By Individuals Pretending To Be Uber Employees

by **Tyler M. Costanzo**

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In *Doe v. Uber Technologies, Inc., et al.*, 2022 Cal. App. LEXIS 477, California's Second Appellate District analyzes liability for third-party criminal action; specifically, claims against Uber for sexual assault incidents perpetrated by individuals that misrepresented to victims that they were Uber drivers. In upholding the trial court's dismissal, the appellate court solidified existing limits of liability for third party criminal conduct.

Facts

Plaintiffs Jane Does 1, 2, and 3 (collectively, "Plaintiffs") were three women who were abducted and sexually assaulted by assailants posing as authorized Uber drivers. In fact, the assailants were not affiliated with Uber, but had obtained Uber decals for their vehicles from Uber's website, which has a "print at home" feature where anyone can print out the identifying emblem to affix to their vehicle. It was undisputed that Uber does not attempt to monitor the use or distribution of decals and does not receive returned decals from drivers who have deactivated for any reason. The three Plaintiffs were each abducted and assaulted between June of 2017 and February of 2018, and two of the Plaintiffs did not attempt to verify the identity of the driver before entering the vehicle. The third noted to the driver that the license plate did not match, but the driver convinced her that this was a mistake. Plaintiffs complained that Uber's business model created the risk that criminals could employ this scheme, and that Uber then failed to take measures to protect the public from such conduct. Plaintiffs further contended that Uber was put on notice of this type of scheme as early as November of 2014 based on reports throughout North America; particularly, there were several complaints as early as 2016 in the Los Angeles area.

The Los Angeles trial court dismissed Plaintiffs' case at the pleading stage following a successful demurrer by Uber, ruling that there was no special relationship between Plaintiffs and Uber giving rise to a duty to protect Plaintiffs from such assaults, or to warn of the danger of them. Plaintiffs appealed to the Second Appellate District, which affirmed the trial court's dismissal.

Analysis

California courts have "uniformly held" that a defendant "owes no legal duty to the plaintiff" if the defendant has neither "performed an act that increases the risk of injury to the plaintiff or sits in a relation to the parties that creates an affirmative duty to protect the plaintiff from harm." *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 216. Thus, as a general

matter, there is "no duty to act to protect others from the conduct of third parties." *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235. Courts consider whether a special relationship applies to provide an exception to this rule and, if so, then considers whether relevant policy considerations limit that duty.

Here, the Court found that there was no special relationship between Uber and Plaintiffs to impose an affirmative duty to act. Plaintiffs argued that they had been "accepted as passengers by Uber" at the time of their abductions, and therefore a common carrier/passenger special relationship existed. The Court rejected this argument, noting that while Plaintiffs were waiting for their respective drivers, Uber had no control over Plaintiffs' movements or their surroundings.

Plaintiffs also argued that there was a contractual relationship between them and Uber giving rise to a duty to protect. The Court rejected this argument, noting both that the contractual agreement does not contain any promise to protect and that a statement on Uber's website ("[s]afe pickups ... you stay safe and comfortable wherever you are until your driver arrives") does not create an implied contractual agreement to protect customers while they wait for their drivers.

The Court also found that Uber's conduct did not constitute actionable misfeasance or nonfeasance, which permit liability even absent a special relationship when a defendant has affirmatively "created a peril" that foreseeably leads to the plaintiff's harm. *Williams v. State of California* (1983) 34 Cal.3d 18, 23. Courts have clarified that misfeasance/nonfeasance require that defendant urge a third party to act in an inherently dangerous manner. *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, 408.

Plaintiffs allege that Uber actively concealed this "fake Uber" scheme and therefore its conduct constituted misfeasance/nonfeasance. The Court held that Uber's conduct did not create an unreasonable risk of harm constituting misfeasance or nonfeasance because the third-party conduct of abduction and assault was not a "necessary component" of Uber's business model. *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 534. The Court clarified that while the "fake Uber" scheme may have been a foreseeable result of the Uber business model, that does not establish that Plaintiffs' abductions and assaults were a "necessary component" of its business. Uber was not alleged to have taken affirmative action to stimulate the criminal conduct. In fact, the Court noted that Uber made efforts to prevent such occurrences by including matching system features in the Uber app (*i.e.*, including assigned driver names, photographs, and identifying vehicle information).

Learning Points: *Doe v. Uber* further solidifies existing limits of liability for third party criminal conduct under California law. The defendant rideshare service could not be found to have a special relationship with plaintiff passengers on the basis of a common carrier/passenger relationship because that relationship extends only to persons who are current or recent passengers, or are waiting in a location controlled by the defendant, which was not the case here. There was also no implied contractual relationship created by statements on Uber's website. Finally, the Court provided guidance on the limits of misfeasance and nonfeasance under California law, confirming that while the so-called "fake Uber" scheme may have been a foreseeable result of Uber's business model, the claim was defeated by the fact that Uber was not alleged to have taken any affirmative steps to stimulate the criminal conduct, nor was it a necessary component of Uber's business model. Thus, we can anticipate that both rideshare companies and businesses in general will use this ruling to argue that they cannot be held liable for third party criminal activity under the argument that they did not engage in conduct to "stimulate" the activity, nor is such activity a "necessary component" of their businesses. ♦

Illinois Appellate Court Reaffirms *Kimbrough* As "Mainstay" Authority For Obtaining Summary Judgment In Slip And Fall Cases

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In 1981, the Illinois Appellate Court decided *Kimbrough v. Jewel Cos.*, 92 Ill. App. 3d 813 (1981), holding that merely showing a slip and fall on a defendant's premises was insufficient to satisfy proximate causation requirements. Instead, the plaintiff had to show that some condition caused the fall, and this condition was caused by the defendant.

The recent decision in *Aalbers v. LaSalle Hotel Properties*, 2022 IL APP (1st) 210494, is significant for two reasons. First, *Aalbers* reaffirms the *Kimbrough* decision as the "seminal decision on proximate causation in slip and fall cases". Second, *Aalbers* contains an extensive 33-page discussion of what defendants need to adduce as facts to successfully move for summary judgment that a plaintiff cannot show with reasonable certainty the cause of a fall.

Facts

Plaintiff fell on a hotel lobby floor that had been recently renovated and suffered serious injuries. Plaintiff testified upon deposition that she did not slip, but instead had tripped on a ledge in the lobby where certain tiles were joined with carpeting. According to plaintiff, she felt something with the toe of her shoe ... something that caught her shoe as she fell. Although plaintiff testified she felt something catch her foot, she did not see what had caught her foot before or after she fell; she couldn't describe it at all and did not know if it was metallic wood or otherwise; and couldn't physically describe it other than to say it may have been a ledge.

Defendants produced several witnesses to testify upon deposition that there were no defects in the area where plaintiff fell. The hotel manager testified that he got down on the floor immediately after plaintiff fell and touched the carpet and tiles with his hands and found no rips, cracks, or other defects. Other defense witnesses testified after the hotel lobby renovations, thousands of people walked through the lobby area where plaintiff fell and no one complained of any defects and no one had slipped, tripped, or fallen or made any complaints about the tile or carpet. Defendant moved for summary judgment citing *Kimbrough*, and the trial court relying on *Kimbrough* granted summary judgment because the plaintiff failed to show there was any condition created by defendants that caused her fall.

Analysis

The Appellate Court affirmed finding *Kimbrough* dispositive. *Kimbrough* held that a plaintiff could not proceed with any personal injury claim for damages from a fall on defendant's premises unless the plaintiff could point "to an identifiable defect that caused the fall." The Court found the *Kimbrough* reasoning to still be sound today and that *Kimbrough* had remained on "solid legal footing as the mainstay of slip-and-fall summary judgment cases." Because the plaintiff

here could not identify the defect that caused her fall, she failed to show that defendants were responsible for her fall.

The Court also rejected plaintiff's attempts to distinguish *Kimbrough* based on her testimony that she could identify a defect because she felt her foot catch on something, and therefore there must have been a defective ledge between the carpeting and tiles. The Court dismissed plaintiff's argument as all conjecture that could not defeat a defense motion for summary judgment on causation. According to the Court, "equally plausible (and never dismissed by plaintiff in her testimony) is that the 'ledge' she felt was her other foot, her suitcase she was rolling behind her as she was walking, or even a strap on the bag she had on her shoulder, among a number of other scenarios." The Court held that plaintiff wrongly assumed that by merely stating the existence of something she caught her foot on, there must have been a defect in the flooring.

Learning Point: *Aalbers* together with *Kimbrough* now give the Illinois defense bar solid authorities to obtain summary judgment on causation in slip and fall cases. But those cases must be prepared properly. *Aalbers* provides a "blueprint" to help the defense bar formulate a deposition strategy on what to ask not only the plaintiff, but other defense witnesses as well to build a case for summary judgment on causation. ♦

Illinois Supreme Court Poised To Decide BIPA Claim Accrual Question

by ***Morgan A. Dilbeck, Mitchel D. Torrence*** *and* ***Alexander J. Brinson***

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Introduction

Today, most people are concerned about identity theft and wanting to ensure that their unique identifiers stay private. The Illinois legislature sought to address these concerns with the Biometric Information Privacy Act ("the Act"). 740 ILCS 14 *et seq.* The Act sets strict requirements for entities that capture a person's biometric identifiers and information in Illinois. Although the statute was unanimously enacted in 2008, it has only recently become a popular source of complaints in Illinois, often pled as class actions. A central issue in one such case, *Cothron v. White Castle Sys.*, 20 F.4th 1156 (7th Cir. 2021), is claim accrual, and the damages resulting from such accrual. Calling BIPA claim accrual "novel," the Seventh Circuit stated it was "genuinely uncertain" about the issue, and that the Illinois Supreme Court could side with either Cothron or White Castle. Consequently, the Seventh Circuit certified the question on December 20, 2021. The Illinois Supreme Court accepted the certified question three days later.

Analysis

1. White Castle's Position: Single Accrual

Defendant-Appellant White Castle argues that existing case law and legislative intent make clear that the Act protects an individual's power to say no to the collection of biometrics by preventing problems before they occur. As such, the Act's intent is to safeguard biometric data by requiring valid notice and knowing consent. A BIPA injury is the loss of control over and secrecy in one's biometrics without consent.

White Castle identifies three key legal principles which are determinative of when BIPA claims accrue: (1) where there is a single overt act from which subsequent damages may flow, a claim accrues on the date the defendant invaded the plaintiff's interest and inflicted injury; (2) BIPA claims are, at bottom, claims for the loss of the right to control one's biometric information, and once that control is lost, it cannot be recreated and any confidentiality right is lost as well; and (3) any invasion of the statutory rights conferred by the Act creates, in and of itself, a real and significant injury that is immediately actionable. White Castle concludes from these principles that claims accrue on the first loss of the right to control one's biometric information, not continually.

White Castle also asserts that a single-accrual rule is consistent with the remedial nature of the Act. If BIPA claims accrued with each scan of biometric information, the damages would be catastrophic for business, which was not the intent of the legislature. This would turn the Act from a supplemental enforcement aid into a harshly punitive measure. BIPA Section 15(b) and 15(d) claims therefore accrue upon the first unauthorized scan

or the first unauthorized disclosure or transmission of biometric information.

Several organizations filed *amicus* briefs in support of White Castle. These organizations represent the interests of Illinois businesses concerned about the Court interpreting the Act in a way that would expose them to exponential damages and threaten their existence. A "per-scan" theory of accrual or liability would lead to absurd results that could bankrupt many Illinois businesses. The Illinois Chamber of Commerce and Chamber of Commerce for the United States' brief provided a specific numerical example:

> Suppose an employee works 5 days a week for 48 weeks a year and clocks in and out of work via a fingerprint scanner once each day. Over just a single year, a "per-scan" accrual rule would imply 480 violations of Section 15(b), and a "per-disclosure" accrual rule would imply another 480 violations of Section 15(d). That would result in a statutory award of $960,000 to $4,800,000 in liquidated damages for one plaintiff in one year—before considering any awards for absent class members. Moreover, depending on the applicable statute of limitations . . . damages could extend for up to five years, producing a potential award of roughly $5 to $25 million for a single employee. If the employee similarly clocked in and out for lunch or other breaks, that amount could easily double or triple.

The *amici* further assert that the purpose of the Act is best served by a "first scan" theory because it encourages claimants to act quickly to seek redress and enjoin violations which serves the Act's aims to head off the risks posed by the use of biometric data before they occur. They also argue that a per scan theory which results in "staggeringly high and uncapped liquidated damages exposure for a BIPA defendant, even absent harm," raises due process concerns, and runs afoul of U.S. Supreme Court precedent against unlimited punitive damages.

2. Cothron's Position: Per Scan Accrual

Cothron primarily argues that a claim accrues under the Act at each and every collection or dissemination of biometric information and that the appellate court found as much in *Watson v. Legacy Healthcare Fin. Servs., LLC*. The plain text of Sections 15(b) and (c) necessitate accrual upon each collection or dissemination; in support thereof, the *Watson* court found that the term "first" within Section 15(b) modifies the words "informs" and "receives," not "collect" or "capture". The Act's requirements accordingly apply to *each and every* collection or capture of biometric information. Further, although Section 15(d) lacks the term "first," the use of the term "unless" achieves the same effect of "prohibiting an entity from disclosing an individual's biometrics until it obtained consent ... which, logically, must occur before disclosure." Accordingly, an entity like White Castle may not disclose or redisclose biometric data until it has secured consent.

Cothron argues that White Castle's accrual theory is contrary to the Act's text and the Illinois Supreme Court's holding in *Rosenbach v. Six Flags Entm't Corp.* and that its "loss of control theory" should accordingly be rejected.

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Cothron distinguishes Section 15(d) violations from publication-based privacy statutes because the heart of the Act is the securing of informed consent as opposed to defamation and related torts which are about damage done to a person's reputation by information publicized to the public. As noted, the Act does not provide "redress for harms that occur as a result of individual's biometrics being *actually compromised*." Cothron notes there is no risk of endless tolling of the statute of limitations, which would necessitate White Castle's proposed "one and done" rule, because a defendant's compliance with the Act's consent requirements are within defendant's control. Cothron also argues that White Castle and its amici's arguments regarding future damages awards and other "practicalities" are insufficient to invalidate the statutory text and that White Castle should not be free from its obligations under the Act because of "unsubstantiated" threats of "annihilative liability."

Several organizations filed *amicus* briefs in support of Cothron. The common theme was that the continuing violation doctrine should be applicable to BIPA claim because BIPA violations are comprised of "continuing unlawful acts and conduct" and therefore the statute of limitations "begins on 'the date of the last injury suffered or when the tortious acts cease." Each time White Castle took Cothron's fingerprints constituted a new BIPA violation, because the Act distinguishes between "collection" and "storage", and these constitute an ongoing failure to "perform its duties under BIPA."

The *amici* also argue that the constitutional issue regarding damages is not before the Illinois Supreme Court, and that the Act's damages are not constitutionally vulnerable because they are statutory, not punitive. These damages do not run afoul of *St. Louis, I.M. & S. Rc. Co v. Williams* and do not exceed Illinois Due Process Limits. BIPA's damages are statutory in nature because they "enable a plaintiff to recover when 'it might otherwise be difficult or impossible to prove the existence or amount of plaintiff's actual damages [,]" in contrast to punitive damages which are awarded against defendants to "punish [them] for [their] outrageous conduct and deter [them] and others like [them] from similar conduct in the future." The Act's damages are not wholly disproportioned to the offense because the "harm of a loss of privacy is 'real and significant' which can be connected to both economic and 'dignitary harm.'" The Act does not run afoul of Illinois Due Process concerns because the Act's damages clear the "low bar" of not being "in contravention of the express intent of the legislature" and are "rationally related to a legitimate goal."

Finally, the *amici* argue that the purpose of the Act is to give individuals the right to control their biometric data and give them an opportunity to "say no." An individual's right to control their own biometric data does not cease to exist the first time a company collects or discloses biometric data without consent. If a cause of action accrued only at the first collection or disclosure of biometric data, companies that systemically violate the Act would avoid liability if the first offense occurred outside the statute of limitations.

3. Oral Argument Before the Illinois Supreme Court

At argument, White Castle stressed prior cases provide guidance that accrual occurs when the privacy right is first invaded because that is when the loss of control occurs. White Castle noted that it has continuing duties to Cothron and that any disclosure to other parties or any different collection not subject to prior consent would result in a new claim accruing. White Castle also reiterated its textual argument that accrual should focus on loss of control. Finally, White Castle stressed that the issue of damages is necessarily intertwined with the issue of accrual and encouraged the Court to weigh the consequences of holding that accrual occurs at each collection. On rebuttal, White Castle argued that while Plaintiffs disclaimed the idea of per-scan damages, the only safeguard against future plaintiffs seeking the same are Due Process concerns and the possibility that lower courts may not find such large awards appropriate. As such, Cothron seeks to both continually toll any statute of limitations by accruing new claims and avoiding concerns regarding the logical outcome of such a theory.

Cothron conversely stressed the plain text of the statute makes clear that the term "first" modifies a defendant's duties to inform and receive consent as opposed to applying only to the first instance of collection and/or dissemination. Cothron cited *Rosenbach*'s holding that a plaintiff is injured at each collection without consent. Cothron also argued that a single accrual theory only works if a plaintiff loses all their rights at the first collection/dissemination, which

is not the case under the statute, and that loss of control is not the nature of the injury. Rather, it is the taking of biometrics in conjunction with the failure to obtain informed consent, which is true even if the purpose of the statute is to prevent the risks associated with the disclosure of biometrics that do not dissipate after the first collection. Cothron claimed that White Castle's view would obviate the need of potential defendants to course correct and would avoid consequences for existing issues, regardless of their continuing duties. Cothron further maintained that damages are separate from the issue of disclosure but conceded that the Court may spell out how damages should be determined. Cothron noted that they are not seeking per-scan damages and are unaware of any plaintiffs who have done so. However, Cothron conceded that anyone could seek such damages and argued that Due Process concerns would provide the necessary safeguards against such risks.

Learning Points: It remains to be seen how the Illinois Supreme Court will decide the accrual issue. The implications of a per-scan theory of accrual are potentially devastating to the business community. Such a theory could cost collectors of biometric information millions of dollars while encouraging employees to delay redress in an effort to pursue greater damages. While to date plaintiffs have not sought such damages, it is possible that the only safeguard against such damages would be Due Process concerns. The opposite is true for a plaintiff under a theory of first loss of control; namely, plaintiffs would likely be able to recover less in damages and be encouraged to act more quickly to seek redress. ♦

APPELLATE PRACTICE

ADEQUATE RECORD REQUIRED FOR APPELLATE REVIEW ON MERITS

Sitar v. Syferlock Technology Corp., AC 44244 (Conn. App.)

Plaintiffs sought damages from Defendant for breach of employment contracts and failure to pay wages. Trial court rendered judgment for Plaintiffs but declined to award double damages or attorney's fees as provided by statute or prejudgment interest. ***Held:*** Affirmed. Plaintiffs, as appellants, failed to provide the court with an adequate record, including transcripts, and court could not evaluate arguments without resorting to speculation.

ARBITRATION

ARBITRATOR'S DECISION CAN BE SENT ELECTRONICALLY ABSENT EXCLUSION

Pizzoferrato v. Community Renewal Team, Inc., AC 43956 (Conn. App.)

Arbitrator issued decision in favor of defendant in negligence action and provided electronic notice to the parties' counsel that same day. Neither party filed a demand for a trial *de novo* within twenty days of the electronic notice. Trial court rendered judgment in accordance with the arbitrator's decision. Plaintiff moved to open and vacate the judgment, which was denied. ***Held:*** Affirmed. Notice of an arbitrator's decision need only be sent electronically unless counsel obtains an exclusion from the electronic services requirement.

CONSTITUTIONAL RIGHTS

SPECIFIC ALLEGATIONS AND ACTUAL INJURY REQUIRED TO SUPPORT RECOVERY FOR CONSTITUTIONAL VIOLATIONS

Wine v. Mulligan, AC 44261 (Conn. App.)

Incarcerated plaintiff sued Department of Correction employees, alleging they improperly confiscated materials in his outgoing mail in violation of his constitutional right of access to the courts. Trial court granted motion to strike complaint. ***Held:*** Affirmed. Plaintiff failed to allege the specific personal involvement of defendants in the conduct claimed to constitute a constitutional violation. Plaintiff also failed to allege he suffered any actual injury as a result of the confiscation. Plaintiff did not allege the materials were being mailed to his attorney or the court and failed to plead that the confiscation hindered his efforts to pursue a legal claim or his access to the courts.

CONTRACTS

COVID NO EXCUSE FOR FAILURE TO PAY RENT

Fives 160th, LLC v. Zhao, 164 N.Y.S.3d 427 (N.Y. App. Div. 1st Dep't)

Plaintiffs sued defendant restaurant for unpaid rent. ***Held:*** Pandemic cannot excuse a party's lease obligations on the grounds of frustration of purpose or impossibility. Although pandemic made it more difficult and less profitable for defendants to run their business, they were never prevented from using the space or operating their restaurant, nor did the lease contain a force majeure clause.

DEFAMATION

FALSE STATEMENTS PROTECTED UNDER COMMON-INTEREST LITIGATION PRIVILEGE

Miles v. Sedgwick Claims Mgmt. Servs., Inc., Cal. App. LEXIS 2427 (Cal. App.)

Injured worker filed workers' compensation claim. Third-party claims administrator subsequently erroneously named worker's chiropractor on the California Department of Industrial Relations website in the list of medical providers who were indicted for fraud. Chiropractor sued for defamation. ***Held:*** Claim administrator's false statements made during underlying workers' compensation claim are protected under common-interest privilege. Also, there was no dispute of fact as to malice.

EVIDENCE

ADMISSIBLE EVIDENCE EXCLUDED GIVEN RISK OF MISUNDERSTANDING OR MISAPPLICATION BY JURY

Williams v. Lawrence & Mem. Hosp., Inc., AC 44065 (Conn. App.)

Plaintiff administrator brought medical malpractice action against emergency medicine physician who treated decedent for motorcycle accident injuries. Plaintiff unsuccessfully moved to admit into evidence medical text guidelines as statements in learned treatises. Two of Plaintiff's medical experts recognized these guidelines

and relied on them. ***Held:*** Affirmed. Court had the discretion to exclude evidence that carried the danger of misunderstanding or misapplication by the jury. Jury could have mistakenly assessed Defendant's conduct only in light of the guidelines rather than determining whether Defendant deviated from standard of care.

FIRST-PARTY PROPERTY

INSUREDS PERMITTED TO RECORD PROPERTY INSPECTION

Gesten v. Am. Strategic Ins. Corp., 2022 Fla. App. LEXIS 3715 (Fla. App.)

Trial court granted summary judgment to insurer in declaratory judgment action based on insurer's argument that policy did not permit insured to record the insurer's agent's inspection of a property loss. ***Held:*** Reversed. Insureds were not prohibited from making audiovisual recording of agent's inspection of property loss because underlying policy did not address issue, was thus uncertain in this respect, and was properly construed against insurer.

APPRAISAL PREMATURE WITHOUT DISAGREEMENT OVER AMOUNT OF LOSS

Certain Underwriters at Lloyd's v. Lago Grande 5-D Condo. Ass'n, 2022 Fla. App. LEXIS 3097 (Fla. App.)

Trial court granted insured's motion to compel appraisal where insured filed suit without ever providing its own estimate of loss, expressing disagreement with insurer's determination, or demanding additional payment, and then moved to compel appraisal. ***Held:*** Reversed. Because the parties never engaged in an exchange of information sufficient to establish a disagreement over the amount of the loss, the matter was not ripe for appraisal and the trial court erred in granting the premature motion to compel appraisal.

APPRAISAL OF DENIED SUPPLEMENTAL CLAIM PRECLUDED

Heritage Prop. & Cas. Ins. Co. v. Fairway Oaks, Inc., 2022 Fla. App. LEXIS 2898 (Fla. App.)

Trial court entered order compelling appraisal of insured's claim, including insured's supplemental claim, which insurer had denied. ***Held:*** Reversed. Insured's supplemental claim must be considered separately from initial claim, which had been fully adjusted. Because insured's supplemental claim was wholly denied by insurer, trial court was precluded from referring it to appraisal.

DATE AOB EXECUTED DETERMINES IF NOTICE STATUTE APPLIES

Total Care Restoration, LLC a/a/o Griffiths v. Citizens Prop. Ins. Corp., 2022 Fla. App. LEXIS 2787 (Fla. App.)

Trial court granted summary judgment to insurer based on statute requiring assignee to provide insured and insurer with 10 days' written notice of intent to initiate litigation before filing suit. Assignee argued the 2019 statute was improperly applied retroactively. ***Held:*** Affirmed. The statute applies to all assignments of benefits executed on or after July 1, 2019, the date the statute went into effect. Date assignment is executed determines whether statute applies, not policy effective date.

AOB SUIT DISMISSED FOR NONCOMPLIANCE WITH STATUTORY REQUIREMENTS

Kidwell Group, LLC d/b/a AQA of Fla. a/a/o Ben Kivovitz v. United Prop. & Cas. Ins. Co., 2022 Fla. App. LEXIS 4096 (Fla. App.)

Trial court granted insurer's motion to dismiss based in part on failure to comply with statutory sections setting forth specific requirements for an assignment of post-loss benefits under a property insurance policy. ***Held:*** Affirmed. The plain meaning of the statute requires that the assignee provide the assignor with a list of the itemized services to be performed by the assignee and the costs for same at the same time the assignment of benefits is signed. Though the assignee attached an invoice to the complaint along with the assignment of benefits, the invoice was unexecuted and dated five days after the assignment was executed.

LIABILITY INSURANCE COVERAGE

NO DUTY TO DEFEND OR INDEMNIFY LANDLORD– "IMPAIRED PROPERTY" EXCLUSION

Monterey Prop. Assocs. Anaheim, LLC v. Travelers Prop. Cas. Co. of Am., U.S. App. LEXIS 15818 (9th Cir. June 8, 2022)

Gym sued landlord alleging failure to repair roof over gym's swimming pool pursuant to lease contract forced it to permanently close pool. Landlord sought coverage for suit under commercial

liability policy, which was denied based on "impaired property" exclusion and fact roof damage was known loss. ***Held:*** Previously known roof damage was only proffered evidence establishing cause of pool closure. Landlord also did not identify any specific detriment suffered due to insurer's failure to mention impaired property exclusion in letters denying coverage. Further, no alternative interpretation for exclusion was offered whereby exclusion could be found ambiguous.

LIMITATIONS OF ACTIONS

NO CONTINUING-TREATMENT EXCEPTION TO STATUTE OF REPOSE

Moran v. Benson, 184 N.E.3d 1279 (Mass. App.)

Woman brought medical malpractice action over seven years after medical providers learned of her multiple sclerosis but failed to treat it. ***Held:*** Woman's action was barred by the seven-year statute of repose. Continued failure to treat condition did not constitute separate negligent acts for repose purposes.

MEDICAL MALPRACTICE

NON-HOSPITAL MEDICAL ENTITIES SUBJECT TO LIABILITY FOR CONDUCT OF APPARENT AGENTS

Arrendale v. Am. Imaging & MRI, LLC, 183 N.E.3d 1064 (Ind.)

Independent contractor doctor read MRI taken at outpatient diagnostic imaging center that was not qualified as healthcare provider under Medical Malpractice Act. ***Held in case of first impression:*** Apparent agency principles in Restatement (Second) of Torts apply to non-hospital claims of malpractice. Increased consumer use of outpatient ambulatory service sites requires change in law to meet patient expectations. Liability issues should not be treated differently between hospitals and non-hospital entities. Standards applicable to apparent agency in hospital and non-hospital settings should be identical.

CLAIMS EXIST AGAINST MEDICAL PROVIDERS FOR EARLY RELEASE OF MENTALLY ILL PATIENT

Miller v. Patel, 2022 Ind. App. LEXIS 2500 (Ind. App.)

Following early release from treatment, mentally ill patient killed grandfather. ***Held:*** Although person may generally not recover in civil action for results of own criminal acts, exception exists if person is not criminally responsible for acts. Patient pled guilty but mentally-ill. ***Further held:*** Collateral estoppel does not bar litigation of facts involved in guilty plea. Patient had incentive to negotiate plea. It would be unfair to bar patient from litigating medical providers' conduct in allowing early release.

PHYSICIANS' GROUP SUBJECT TO LIABILITY FOR THERAPIST'S ACTS DESPITE LACK OF LEGAL RELATIONSHIP WITH THERAPIST

Wilson v. Anon. Def. 1, 183 N.E.3d 289 (Ind.)

Physical therapist reinjured patient of physicians' group. ***Held in case of first impression:*** Apparent agency principles of Restatement (Second) of Agency apply despite lack of legal relationship between principal and apparent agent. Principal's representations must lead to reasonable belief in patient that therapist was principal's agent. Genuine issues of fact exist.

NEGLIGENCE

SCHOOL CORPORATION NOT LIABLE FOR STUDENT'S ACCIDENT

Tippicanoe Sch. Corp. v. Reynolds, 2022 Ind. App. LEXIS 106 (Ind. App.)

Cheerleader was injured when dropped on floor during warmup routine unprotected by mats and spotters. ***Held:*** Routine was part of conduct ordinary to cheerleading, negating breach of duty for failure to supervise activity. Parents failed to allege that coach was not participant or that accident involved intentional or reckless conduct. ***Also held:*** Claim of negligent supervision does not create exception to rule in sports cases.

SECURITY COMPANY SUBJECT TO LIABILITY FOR CROWD-SURFING ACCIDENT

Wiley v. ESG Security, Inc., 2022 Ind. App. LEXIS 111 (Ind. App.)

Concert patron dropped while crowd-surfing. ***Held:*** Question of fact existed whether security service assumed duty of care. Guards knew that patrons were surfing in violation of warnings, and guards prevented other patrons from injury. Patron's repetitive conduct did not constitute express consent to risk of injury.

HOMEOWNER NOT LIABLE FOR GRASS GROWING BETWEEN SIDEWALK SQUARES

Girdler v. Libassi, 2022 Ohio App. LEXIS 1709 (Ohio App.)

Pedestrian who tripped over uneven sidewalk claimed that homeowner allowed grass to grow in cracks between squares. ***Held:*** Homeowner owed no duty to maintain sidewalk. Homeowner did not expressly or impliedly authorize disrepair. Mowing over grass or weeds in sidewalk crack is not affirmative act supporting duty of care.

NUISANCE

CONDUCT AFFECTING MATTER OF PUBLIC CONCERN ACTIONABLE AS NUISANCE

Chapnick v. Dilauro, AC 43128 (Conn. App.)

Plaintiffs brought nuisance action alleging neighbors encouraged and allowed their dogs to urinate and defecate near the windows of Plaintiffs' condominium properties and made false or exaggerated statements to the police during an investigation of the interactions. Trial court granted Defendants' motion to dismiss. ***Held:*** Reversed. Conduct of allowing dog to urinate and defecate in a certain location and encouraging such behavior was not constitutionally protected and not done in connection with a matter of public concern.

PRODUCTS LIABILITY

COVID DISCOVERY ORDERS COULD NOT EXCUSE DISCOVERY FAILINGS

Little v. Steelcase, Inc., 2022 N.Y. App. Div. LEXIS 3557 (N.Y. App. Div. 4th Dep't)

Plaintiff brought products liability action after chair she was sitting on collapsed. Plaintiff failed to comply with court order requiring authorizations for several of her treatment providers and defendant moved to strike complaint. Plaintiff appealed, citing pandemic orders that had been issued allowing discovery delays. ***Held:*** Plaintiff failed to establish that her noncompliance with the deadline set forth in the court's order was for reasons related to the COVID-19 pandemic. Rather, plaintiff's opposition to the motion showed that the failure to comply was due to law office failure unrelated to the pandemic.

TORTS

HEALTHCARE PROVIDER NOT LIABLE FOR UNAUTHORIZED MEDICAL DISCLOSURES

Cmty. Health Network, Inc. v. McKenzie, 185 N.E.3d 368 (Ind.)

Family member sued medical provider for employee's unauthorized disclosure of information. ***Held:*** Provider not liable for tort of public disclosure of private facts. Family members failed to offer evidence that employee disclosed facts reaching or sure to reach public or many people. ***Further held:*** Claim not actionable under Medical Malpractice Act. ***Also held:*** Family member failed to establish damages for claims of vicarious liability and negligent supervision, training, and retention.

TRESPASS TO CHATTEL

NO ACTIONABLE CLAIM IF NO INJURY IDENTIFIED AS RESULT OF MINOR INTERFERENCE

Casillas v. Berkshire Hathaway Homestate Ins. Co., 2022 Cal. App. LEXIS 509 (Cal. App.)

Plaintiffs alleged defendants, three insurance companies and two investigators, copied their electronic litigation files from a third-party computer system, in violation of privacy and confidentiality interests. Plaintiffs conceded the copying did not cause any damage or disruption to the system and did not allege any injury to the copied files or their property interests therein. ***Held:*** Court of Appeals affirmed demurrer. The allegations did not state a claim for trespass to chattels because the files had not been corrupted, and Plaintiffs' own access to the files had not been impaired. Plaintiffs' reliance on their interests in privacy and confidentiality was rejected under a claim of trespass to chattels.

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