CM REPORT

of Recent Decisions

2022 • Vol. 3

Thermonuclear Verdicts: A Suggestion For Combatting Them

Texas Flood Limit Does Not Cap Insured's Claim For Loss Of Business Income

Meaning Of "Penalty Imposed By Law" Under Wrongful Act Professional Liability Policy

Clausen Miller PC

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

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Cover Photo: Downtown Houston, Texas

Nuclear Verdicts Are Becoming Thermonuclear Verdicts: A Suggestion For Combatting Them

by ***Melinda S. Kollross***

Some commentators have defined a "nuclear verdict" as a verdict of $10 million or greater. Based upon recent verdicts, however, that definition may need changing.

The Thermonuclear Verdict

Two recent verdicts show that things are getting worse on the defense front and not better.

In June of 2022, a Los Angeles, California jury went "thermonuclear" in a sexual harassment employment case with a verdict of $464.5 million. The verdict was comprised of $24.6 million in compensatory damages and $440 million in punitive damages. The plaintiffs were men who claimed that they were forced out of their jobs after complaining about sexual and racial harassment.

And in August of 2022, a Georgia jury awarded a staggering $1.7 billion in punitive damages against Ford Motors a day after awarding $24 million in wrongful death damages. Plaintiffs claimed that their decedent parents were killed by a design defect in the roof of the Ford F-250 which failed to protect the decedents in a rollover crash. Plaintiff's counsel likened the protections offered by the Ford roof as driving in a "convertible".

These verdicts are nowhere near a level of just $10 million. These verdicts are instead "thermonuclear" verdicts, which are more aptly defined, as one commentator put it, as a "classic disproportionate response" …a verdict that "far exceeds a reasonable damages amount that only emotional or punitive juror motives can adequately explain it".

A Suggestion For Combatting The Nuclear/ Thermonuclear Verdict: Embed Appellate Counsel At Trial

If the insurance and defense industry is to corral these runaway verdicts, they must stop the game-playing the plaintiff's personal injury bar is so good at. The plaintiff's PI bar utilizes these "games" not for the sake of justice, but for the sake of getting a thermonuclear award. Appellate counsel can help put a stop to this; while your trial counsel focuses on trying your case, appellate counsel can focus on stopping or curtailing the "games plaintiff's play," while at the same time making sure your record is properly preserved for any appeal.

Third-party Funding:

Appellate counsel can handle the research, brief writing, and oral motion practice to demand discovery of who has the real financial interest in PI litigation—and argue for letting the jury hear this.

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The Reptile:

Through aggressive motion in *limine* practice, Appellate counsel can show the trial court that any use of this "reptile strategy" should be barred as being nothing more than an illegal Golden Rule argument.

Anchoring the Jury:

Another favorite ploy of the plaintiff's PI bar to hike up a damage award is to take numbers out of thin air and suggest those to the jury in closing argument as reasonable compensation, especially for non-economic losses and punitive damages. The "game" is called "anchoring", and countless studies have shown a correlation between the numbers the plaintiffs throw out and the amount a jury eventually awards. Again, through an aggressive motion in *limine* practice, Appellate counsel can help to put a stop to this.

A Real-Life Example Of The Wisdom Of Embedding Appellate Counsel

The author, and her Appellate and Trial Monitoring Practice Group, are routinely retained to work high exposure trials as embedded Appellate counsel to combat nuclear and thermonuclear verdicts and make sure a record is preserved for appeal. In one such case that was tried in the dangerous venue and recognized judicial hellhole of Cook County Illinois, our embedded Appellate counsel researched the plaintiff's counsel, discovering that plaintiff's counsel had put on his website the closing argument in another case where he had obtained a "thermonuclear" verdict. Upon close examination of the closing argument, it was determined that most of it was objectionable, and a motion in *limine* was prepared to prevent plaintiff's counsel from repeating these objectionable arguments in the case being monitored. The motion in *limine* was presented to the trial court right before closing argument, and the trial court granted most of the motion. This left plaintiff's counsel almost "speechless" during his closing argument and a not guilty was returned by the jury. Hence, the wisdom of embedding Appellate counsel in high exposure trials. ♦

CLAUSEN COVERAGE CARES SPONSORS SPARK 2022 HONORING TRANS- AND BIPOC-LED LEGAL WORK

Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has.

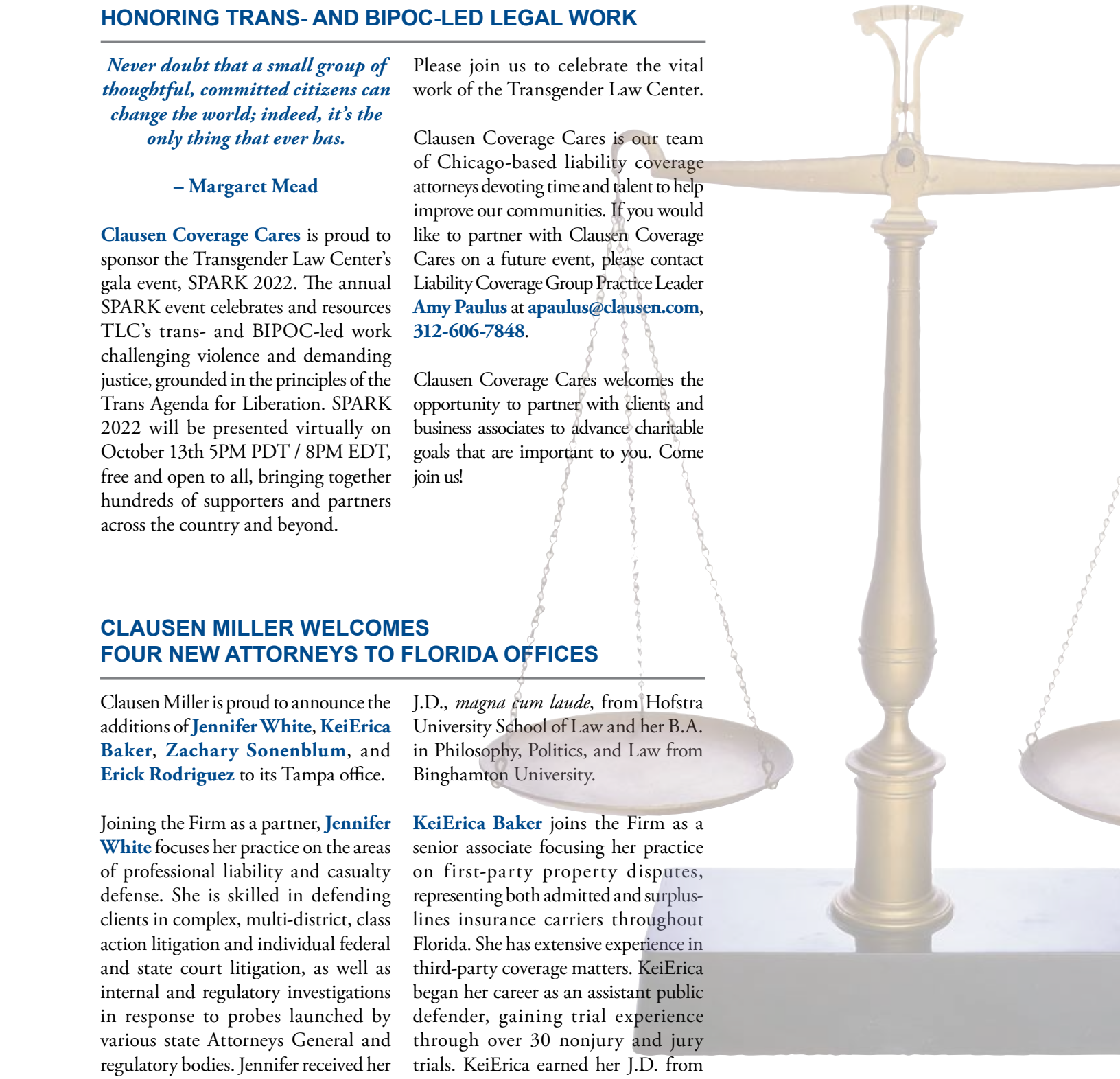
– Margaret Mead

Clausen Coverage Cares is proud to sponsor the Transgender Law Center's gala event, SPARK 2022. The annual SPARK event celebrates and resources TLC's trans- and BIPOC-led work challenging violence and demanding justice, grounded in the principles of the Trans Agenda for Liberation. SPARK 2022 will be presented virtually on October 13th 5PM PDT / 8PM EDT, free and open to all, bringing together hundreds of supporters and partners across the country and beyond.

Please join us to celebrate the vital work of the Transgender Law Center.

Clausen Coverage Cares is our team of Chicago-based liability coverage attorneys devoting time and talent to help improve our communities. If you would like to partner with Clausen Coverage Cares on a future event, please contact Liability Coverage Group Practice Leader **Amy Paulus** at **apaulus@clausen.com**, **312-606-7848**.

Clausen Coverage Cares welcomes the opportunity to partner with clients and business associates to advance charitable goals that are important to you. Come join us!



CLAUSEN MILLER WELCOMES FOUR NEW ATTORNEYS TO FLORIDA OFFICES

Clausen Miller is proud to announce the additions of **Jennifer White**, **KeiErica Baker**, **Zachary Sonenblum**, and **Erick Rodriguez** to its Tampa office.

Joining the Firm as a partner, **Jennifer White** focuses her practice on the areas of professional liability and casualty defense. She is skilled in defending clients in complex, multi-district, class action litigation and individual federal and state court litigation, as well as internal and regulatory investigations in response to probes launched by various state Attorneys General and regulatory bodies. Jennifer received her J.D., *magna cum laude*, from Hofstra University School of Law and her B.A. in Philosophy, Politics, and Law from Binghamton University.

KeiErica Baker joins the Firm as a senior associate focusing her practice on first-party property disputes, representing both admitted and surplus-lines insurance carriers throughout Florida. She has extensive experience in third-party coverage matters. KeiErica began her career as an assistant public defender, gaining trial experience through over 30 nonjury and jury trials. KeiErica earned her J.D. from

Western Michigan University Cooley Law School and her B.A. from the University of South Florida.

Zachary Sonenblum is a senior associate who concentrates his practice on civil litigation defense, primarily related to first-party property disputes. He has previous experience in insurance defense litigation and handles matters in both Florida state courts and Florida federal courts, including the U.S. District Courts for the Southern, Middle, and Northern Districts of Florida. Zachary earned his law degree from the University of Miami School of Law after receiving his B.S. in Business Administration from the University of Florida.

Associate **Erick Rodriguez** concentrates his practice on first-party property matters. He is also experienced in third-party liability, including premises liability, defamation, contractual disputes, personal injury, motor vehicle accidents, and HOA/condo law. In addition, he has previously represented contractors in high-exposure worker's compensation cases with favorable outcomes, and has secured the dismissal of multiple fraudulent injury and insurance claims. Erick earned his J.D. from the University of Miami School of Law and his B.A., with honors, from the University of Central Florida.

"These new additions to our Florida offices are excellent examples of Clausen Miller's strong growth in the Southeast," said Firm President & CEO, Dennis Fitzpatrick. "Jennifer, KeiErica, Zachary, and Erick each bring a unique set of skills and experience to offer our clients in Florida and elsewhere."

ELMASRI SELECTED AS FLORIDA TREND LEGAL ELITE

Clausen Miller is proud to announce that partner **Ramy Elmasri** is being recognized by Florida Trend as a Legal Elite 2022 honoree.

Ramy, who was recently named as Managing Partner of Clausen Miller's new Houston, Texas office, was selected to be on the list of honorees that represent just over one percent of active Florida Bar members, including those in private practice as well as government and non-profit attorneys.

Florida Trend invited all actively practicing Florida lawyers to name attorneys they hold in high regard—specifically those with whom they have worked personally and would recommend to others.

"It's an honor to be recognized as a Legal Elite," said Ramy. "I am grateful to the Firm and my peers, and I strive to continue exemplifying the professionalism and client dedication that allowed me to receive this prestigious honor."

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.

CM ATTORNEYS PUBLISHED IN *CLM MAGAZINE*

CM shareholders **Amy Paulus**, **Melinda Kollross**, **Ian Feldman** and partner **Tami Kay Lee** published the following case law update in the August 2022 edition of *CLM Magazine*:

The Inns by the Sea v. California Mutual Ins. Co., 2022 Cal. LEXIS 1412 (March 9, 2022)

The California Supreme Court summarily denied review of now the seminal case, *Inns By The Sea v. California Mutual*, regarding no coverage for business interruption losses due to government orders shutting doors of hospitality businesses in order to stop spread of the COVID-19 virus. The Fourth Appellate District had affirmed the trial court's dismissal after an order sustaining a demurrer by the insurer. The Appellate Court also commented that despite Inns' allegation that the COVID-19 virus was present on its premises, its complaint did not sufficiently identify any direct physical damage to property that caused it to "suspend" its operations and defined "loss of usability" must be causally connected to "a distinct, demonstrable, physical alteration of the property" which could not be found to arise out of the government closure order. In contrast, in a very recently published case the Second Appellate District in *Marina Pacific Hotel v. Fireman's Fund Ins.* (July 13, 2022) found the complaint was adequately pled as to "direct physical loss" to covered property due to robust allegations of presence of the virus that could not be eradicated and reversed the trial court's order dismissing the complaint under a demurrer. *Marina Pacific* has been the only case thus far adverse to California insurers regarding artful pleading of direct physical damage to property arising out of COVID-19. Complaints that inescapably allege losses caused solely by government orders are still controlled by the *Inns* case.

CLAUSEN MILLER SPONSORS LAWYERS' ASSISTANCE PROGRAM'S 2022 ANNUAL EVENT

On behalf of sponsor Clausen Miller P.C., President and CEO **Dennis Fitzpatrick** was honored to attend the Lawyers' Assistance Program (LAP) 2022 Annual Event "Have a Roaring Good Time" at Brookfield Zoo with honored special guest speaker Dan K. Webb, former U.S. Attorney for the Northern District of Illinois. During the event, Dennis had the pleasure of meeting with LAP Executive Director Dr. Diana Uchiyama, JD, PsyD, CAADC, and was happy to spend time with another hero, his sister, Daneen Berres, Esq., who is bravely battling cancer and serves as a peer support mentor and role model for others struggling for a variety of reasons in the legal profession. It's time to shed the taboo and stigma of seeking help for mental health and addiction issues!

Lawyers' Assistance Program (LAP) supports well-being within the legal profession by offering resources and counseling solutions for attorneys, judges and law students. LAP goes beyond traditional services as the only nonprofit in Illinois that focuses on well-being for attorneys by attorneys. LAP's services span short-term counseling, support groups, referrals, interventions, help with ARDC concerns and advocating for well-being related topics statewide. LAP can help with stress, anxiety, grief, depression, career transitions, addiction, substance use and more. All of LAP's services are completely confidential with no fees. To learn more please visit **https://illinoislap.org/**.

LIMIA AND PAGÁN GRANTED DISMISSAL IN INSURANCE POLICY DISPUTE

Clausen Miller partner **Darrell Limia** and senior associate **Tony Pagán** successfully obtained a dismissal for their client in an insurance policy dispute concerning a 2017 Hurricane Irma claim.

Judge Carlos Guzman of the Miami-Dade Circuit Court granted the defense's motion to dismiss the plaintiffs' complaint in its entirety for their failure to comply with Fla. Stat. § 627.70152, finding that a notice of intent to initiate litigation was not given as required by the statute.

Though the damage was alleged to have occurred in 2017, the suit was filed in June 2022. The court found that the pre-suit notice requirements provided by the statute are procedural, retroactive and applicable to all suits filed after July 1, 2021.

The proposed dismissal order reflecting the court's ruling was then sent to plaintiffs' counsel for review and approval. A version of that order was submitted with altered language that had not been discussed during the previous hearing on the defense's motion to dismiss. The amended language altered the court's ruling to allow the plaintiffs' twenty days to "file an amend complaint after compliance with Fla. Stat. § 627.70152" and excluded the court's ruling on attorneys' fees and costs.

In response, the defense filed a motion to vacate the plaintiffs' order for containing language unapproved by the court, and the court subsequently granted the defense's motion to dismiss.

Darrell concentrates his practice in the areas of first- and third-party insurance coverage and litigation.

Tony focuses his practice on counseling, defending, and litigating matters for international and national insurance carriers in state and federal courts.

RIORDAN AND DICKINSON SUCCESSFUL IN LEGAL MALPRACTICE SUIT

Clausen Miller shareholder **Brian Riordan** and partner **William Dickinson** successfully defended a client against a legal malpractice suit. In *Concepts Design Furniture, Inc. et al v. Fisher & Broyles LLP et al.*, Magistrate Judge Jeffrey Cole of the Northern District of Illinois ruled that the complaint was outside the state's statute of limitations.

The suit, filed in December 2021, alleged that Concepts' former representation, Fisher & Broyles, did not adequately review the company's insurance policy and advised them not to file an insurance claim in relation to an intellectual property dispute. Concepts asked for over $9 million in damages, which was denied.

Judge Cole noted that the statute of limitations for legal malpractice is two years and that Concepts' malpractice claim originally dates to 2014. He also stated that he did not believe that attorney Warr and Fisher & Broyles had anything to do with the company's decision not to file an insurance claim, as Warr did not represent Concepts when it would have been time to file the claim.

Judge Cole further found that it would have been more appropriate for Concepts to file the malpractice claim either in 2014 when the intellectual property dispute first arose, or in 2019 when their insurer rejected their claim.

This victory was reported on in *Law360 Pulse*, read the full article at **https://www.law360.com/pulse/mid-law/articles/1505921/fisherbroyles-beats-ex-client-s-suit-over-insurance-coverage**. Subscription required.

Brian Riordan represents professional indemnity and general liability carriers and their insureds in the full range of both litigated and non-litigated matters. He also specializes in the defense of cases involving commercial and professional liability, including the representation of attorneys, architects, engineers, insurance and investment advisors and broker/dealers.

William Dickinson is an experienced litigator whose practice includes commercial litigation, products liability, personal injury, professional liability and construction law. Will has successfully defended clients in diverse areas of law, including claims for wrongful death, personal injury, breach of contract, and property damage, achieving the positive resolution of cases through pretrial negotiation, mediation, summary judgment, and trial.

MOODY GRANTED SUMMARY JUDGMENT FOR CLIENT IN INSURANCE-POLICY DISPUTE

Clausen Miller partner **Tom Moody** recently secured summary judgment for his client against a lawsuit alleging breach of an insurance policy filed in the Northern District of Florida. In *McPherson et al v. Lexington Insurance Company*, District Judge T. Kent Wetherell, II granted the defense's motion for summary judgment and entered a judgment in favor of the defendant.

The plaintiffs' home in Panama City Beach, Florida was insured under a homeowners' policy through Lexington Insurance Company in 2018, when it suffered damage from Hurricane Michael. In response, Lexington paid plaintiffs $457,000 for the damage—over $25,000 of which was meant to replace windows and doors. However, the plaintiffs then claimed they were owed additional payouts for additional property damaged by the hurricane. The plaintiffs filed suit against Lexington in October 2020 alleging that Lexington did not pay the full amount owed under the insurance policy.

The defense argued that the plaintiffs' insurance policy excluded damage caused by latent defaults or faulty design. Experts on behalf of the defense claimed that the water intrusion and interior damage were caused by design and construction defects, hence rendering them ineligible for coverage under their insurance policy.

Judge Wetherell found that the plaintiffs did not provide sufficient evidence that the defendant breached its insurance contract. He also cited the expert testimony presented by the defense arguing the damage was caused by attributable design and construction in his decision.

Tom focuses his practice on civil litigation defense, with an emphasis on first-party property disputes. He also has extensive experience successfully representing civil defendants in matters including insurer bad faith, commercial-premises liability, professional liability and malpractice, governmental-entity liability, pre-suit coverage analysis, admiralty and maritime claims, wrongful-death claims, and personal injury claims.

MOODY AND SONENBLUM OBTAIN DISMISSAL FOR INSURER CLIENT BASED ON INSURED'S FAILURE TO COMPLY WITH FLA. STAT. 627.70152

Clausen Miller attorneys **Tom Moody** and **Zachary Sonenblum** recently defended their client against a two-count complaint for breach of contract and declaratory relief in Florida's Circuit Court of the Fourth Judicial Court in Duval County, FL.

Judge Bruce R. Anderson agreed with Zach's argument that the §627.70152 pre-suit notice requirement is a procedural condition precedent to filing suit, and that plaintiff's failure to provide notice required dismissal of the lawsuit. He declared that the Notice of Intent to Initiate Litigation Requirement per Fla. Stat. 627.70152(3)(a) is a procedural condition precedent that must be applied. Additionally, in issuing the ruling, Judge Anderson "severed" section (3)(a) from the rest of Fla. Stat. 627.70152 and specifically refrained from issuing any ruling regarding whether any other portions of the statute are procedural or substantive in nature.

In April 2022, the plaintiffs sued Olympus Insurance Company alleging in count one that the defendant breached the terms of its homeowner insurance policy by failing to respond to a pre-suit settlement demand when their property suffered a loss in December 2020. In count two, the plaintiffs also argued that Florida Statute 627.70152 requiring notice of intent should not apply as their insurance policy was in place prior to the enactment of the statute in July 2021.

The defense moved to dismiss the complaint as the plaintiffs did not comply with the pre-suit notice requirements mandated by the Florida statute. The defense also moved to dismiss count two of the Complaint for declaratory relief due to plaintiff's failure to state a cause of action and for lack of jurisdiction. The court granted the defense's motion and dismissed the complaint in its entirety without prejudice.

As a partner, Tom focuses his practice on civil litigation defense, with an emphasis on first party property disputes. Tom also has extensive experience successfully representing civil defendants in matters including insurer bad faith, commercial premises liability, professional liability and malpractice, governmental entity liability, pre-suit coverage analysis, admiralty and maritime claims, wrongful death claims, and personal injury claims.

Zach focuses his practice on civil litigation defense, with an emphasis in the area of first party property disputes. He is also experienced at insurance defense litigation.

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.

MOODY OBTAINS THIRD 2022 SUMMARY-JUDGMENT VICTORY IN CASE CHALLENGING A DENIAL OF COVERAGE FOR ALLEGED HURRICANE PROPERTY-DAMAGE

Clausen Miller attorney **Tom Moody** successfully defended his client against a claim alleging breaches of an insurance policy. United States District Judge Rodolfo A. Ruiz II granted his motion for summary judgment.

In *Janna Karpovtseva v. AIG Property Casualty Company*, plaintiff claimed that AIG improperly denied her first-party property insurance claim. Specifically, on Aug. 27, 2020, the plaintiff filed a claim seeking coverage because her property allegedly was damaged by Hurricane Irma on Sept. 10, 2017. AIG declined to cover the damage, as the policy required that the policyholder provide AIG "prompt notice" of loss to the property.

The defense argued that plaintiff failed to provide prompt notice as the claim was made 1,082 days after the alleged date of loss. Additionally, an expert witness retained by the defense to inspect the plaintiff's property was unable to attribute any roof damage to Hurricane Irma, instead stating that the roof's condition was due to normal wear and tear. After the defense successfully moved to strike the plaintiff's expert witnesses, the plaintiff was unable to provide adequate evidence to prove that Hurricane Irma caused the damage to her property.

Judge Ruiz II ruled that there is no disputed issue of material fact regarding causation and granted the defense's motion for summary judgment.

Tom focuses his practice on civil-litigation defense, with an emphasis on first-party property disputes. He also has extensive experience successfully representing civil defendants in matters including insurer bad faith, commercial-premises liability, professional liability and malpractice, governmental-entity liability, pre-suit coverage analysis, admiralty and maritime claims, wrongful-death claims, and personal injury claims.

If At First You Don't Succeed On A Post-Trial Motion—Take An Appeal! More Tales From The Minefield Of Post-Trial And Appellate Practice

by ***Melinda S. Kollross***

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The Seventh Circuit's recent decision in *Word Seed Church & Civil Liberties for Urban Believers v. Homewood*, 43 F.4th 688 (7th Cir. 2022), again shows why only experienced appellate advocates should navigate the minefield of post-trial and appellate litigation.

Facts

Plaintiff is a seven-member congregation that currently operates from the home of its pastor. Plaintiff sought to purchase property for worship services in Homewood, but the village's zoning ordinance required plaintiff to obtain a special use permit. Plaintiff sued Homewood alleging that the special use permit requirement violated the provisions of the Religious Land Use and Institutionalized Persons Act. The district court, concluding that plaintiff did not suffer an injury because they did not apply for a special use permit, dismissed the suit for lack of standing. Plaintiff then filed a timely motion to reconsider under Rule 59(e) alerting the district court to two cases issued after the court's order dismissing the suit; plaintiff argued that those cases established plaintiff's standing to sue Homewood. The district court disagreed and denied the motion.

Instead of then immediately appealing the decision to the Seventh Circuit, plaintiff filed another motion to reconsider, which the court treated as a Rule 60(b) motion. It denied that motion finding that the arguments plaintiff had advanced could have been made earlier but were not.

Analysis

Plaintiff finally appealed to the Seventh Circuit and challenged the original judgment dismissing the case for lack of standing arguing that plaintiff had standing to pursue this action against Homewood. But the Seventh Circuit found that it lacked subject matter jurisdiction to review the original judgment or the standing arguments because plaintiff did not appeal once its Rule 59(e) motion was denied. That left the Court with just addressing whether the district court abused its discretion in denying the second motion to reconsider, and given the highly deferential standard accorded to that district court decision under Rule 60(b), the Seventh Circuit affirmed.

Learning Point: There's an adage that says, "if at first you don't succeed, try try again". Well, that might be true in some pursuits such as sports, but it's not true in the minefield of post-trial practice. In *Word Seed Church*, plaintiff might have had valid, winning arguments on standing and would have enjoyed having the *de novo* standard of review on appeal—meaning that the Seventh Circuit would not have been bound by the trial court's decision but could come to its own decision on standing. But plaintiff blew its chances for a reversal on appeal by moving to reconsider again, instead of immediately appealing, which left it with only an appeal from the denial of a Rule 60(b) motion—an insurmountable challenge as shown by the Seventh Circuit decision.

A word to the wise: Don't try to navigate the post-trial and appellate minefield without the active participation of an experienced appellate advocate. ♦

Texas Appeals Court Determines Flood Limit Does Not Cap Insured's Claim For Loss Of Business Income

by ***Ramy P. Elmasri***

A three-judge panel for the Texas Fourteenth Court of Appeals recently held that the $4.5 million dollar limit for flood damage in a commercial insurance policy did not limit the insured from seeking loss of business income. *Hanover Casualty Co. v. Seven Acres Jewish Care Services Inc.*, No. 14-20-00736-CV, 2022 Tex. App. LEXIS 6288.

Facts

Seven Acres Jewish Care Services ("Seven Acres"), an assisted living facility, made a claim for property damage resulting from Hurricane Harvey. Seven Acres sustained extensive flood damage and its insurer Hanover Casualty Company ("Hanover") tendered limits pursuant to a special flood endorsement providing $4.5 million in coverage. Seven Acres also made a claim for loss of business income, which Hanover denied asserting that all claims arising from flood related damage were subject to the flood endorsement limit.

Seven Acres filed suit seeking payment for damages related to loss of business income and the trial court granted summary judgment finding that the policy's flood limit did not control the amount of coverage available for business income related losses. On appeal the Texas Fourteenth Court of Appeals upheld the ruling finding that the optional flood endorsement modified the policy to include flood, which is otherwise excluded, as a covered peril and contained a separate limit in addition to the business income endorsement.

Analysis

Hanover argued that the flood endorsement modified the terms of the policy, including the business income coverage form, relying on the language in the flood endorsement which stated the policy will only cover $4.5 million for *all loss and damage caused by flood*.

Seven Acres argued that the language of the policy was ambiguous, noting that the property coverage form covered *direct physical loss to real and personal property* and the business income form covered losses flowing from *a suspension of operations due to a covered direct physical loss* and had a separate premium and limit from the property coverage. Seven Acres also argued that if Hanover wanted to make the business income claims subject to the flood limit it could have added language as it did with the data breach coverage form, which was a part of and not in addition to the aggregate limit of insurance.

Learning Point: Insurers should take extra precaution in including language in any endorsement offering additional coverage to clarify whether the limit is intended to apply to other covered losses or is in addition to other coverages. ♦

Ramy P. Elmasri
is Managing Partner of our Houston, TX office and has spent his entire legal career fighting on behalf of insurers and their insureds. He understands the needs of insurance carriers for high quality, effective and expedient resolution of their cases. 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.
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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.

Three more high courts in Oklahoma, South Carolina and Washington have ruled against coverage for pandemic related economic losses. The Vermont Supreme Court, however, in a 3-2 split decision issued a ruling for an insured sending the case back for further proceedings to determine whether in fact the insured should prevail on its claims.

State Appellate Tribunals

CALIFORNIA

Marina Pacific Hotel and Suites v. Fireman's Fund Ins. Co., No. B316501 (Cal. App. 2d Dist. 7-13-22)

This outlier, result-oriented decision was issued by the California Court of Appeals for the Second District and reversed the dismissal of the insured's complaint on a demurrer. Holding that a communicable disease, such as a virus like COVID-19, could cause damage or destruction to property, the Court found the insureds adequately alleged losses covered by Fireman's Fund's policy such that they must be afforded an opportunity to present their case, at trial or in opposition to a motion for summary judgment.

Butter Nails and Waxing Inc. v. Underwriters at Lloyd's, London, No. B311455 (Cal. App. 2d Dist. 8-25-22)

The Court ruled for the insured under a broadly worded Civil Authority Endorsement that did not contain any requirement for physical loss or damage. According to the Court, the Civil Authority Endorsement had little explanation or qualification, and simply stated that the underwriters would pay for loss of business income or extra expense at the described premises caused by interruption of business due to civil authority action that required evacuation of the described premises. The Court held that the public health orders prohibited the insured from providing in-person services to their customers, resulting in business losses and thus constituted an evacuation of the premises under the endorsement.

Apple Annie LLC v. Oregon Mutual Ins. Co., No. A163300 (Cal. App. 1st Dist. 9-2-22)

Citing to an adverse "wall of precedent" facing the insured, the Court held that policy language requiring physical loss or damage is not ambiguous and that an insured must show physical

alteration to its property to trigger the coverage provisions. According to the Court, although COVID-19 has a physical presence, and while the insured may have suffered economic loss from the physical presence of COVID-19, it did not suffer any physical loss or damage to property.

Tarrar Enterprises Inc. v. Associated Indem. Corp., No. A162795 (Cal. App. 1st Dist. 9-22-22)

The Court followed its previous decision in *Apple Annie*, discussed above, and held that the insured did not allege the necessary direct physical loss of or damage to property to qualify for coverage for its pandemic related losses. But the Court threw the insured a bone—it ruled that the insured should have been allowed to amend its complaint to see if it could allege itself within the coverage of the policy.

FLORIDA

Suhaag Garden Inc. v. Certain Underwriters at Lloyd's London, No. 3D21-1803 (Fla. App. 8-3-22)

Relying on prior Florida precedent as well as cases from the federal Eleventh Circuit, the Court held that the term direct physical loss requires some actual alteration to the insured property, and that loss of intended use alone, without tangible alteration to the property, was not sufficient to trigger coverage under the plain language of the policy.

ILLINOIS

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

State & 9 Street Corp. v. Society Ins., 2022 Ill. App. (1st) 211222-U

Black Rock Restaurants LLC d/b/a/ The Marq v. Society Ins., 2022 Ill. App. (1st) 211215-U

Station Two LLC et al. v. Society Ins., 2022 Ill. App. (1st) 211217-U

R Restaurant Group LLC v. Society Ins., 2022 Ill. App. (1st)-U

JCJ Restaurant Co. d/b/a Pelican Harry's v. Society Ins., 2022 IL App (1st) 211225-U

Lodge Management Corp. v. Society Ins., 2022 IL App (1st) 211133-U

These 7 unpublished decisions from the Illinois Appellate Court, First District, sitting in Chicago all held that the insured did not suffer "direct physical loss of or damage to property" within the meaning of their 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 the COVID-19 pandemic.

LOUISIANA

Cajun Conti LLC v. Certain Underwriters at Lloyds London, No. 2021-CA-0343 (La. App. 8-8-22)

We had reported on this 3-2 split insured decision in our last issue where 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. The Court of Appeals subsequently granted rehearing "for clarification purposes" only, ruling that its initial decision still stands.

NEW JERSEY

AC Ocean Walk LLC v. American Guarantee and Liability Ins. Co., No. A-1824-21 (N.J. App. 6-23-22)

Reversing a trial court decision in favor of the insured, the Appellate Court ruled that the insured failed to show it suffered any direct physical loss or damage even if COVID-19 was on its premises, and that in any event, its losses were barred by a contamination exclusion in the policy.

NORTH CAROLINA

North State Deli LLC v. The Cincinnati Ins. Co., No. COA21-293 (N.C. Ct. App. 7-5-22)

Reversing a trial court decision in favor of the insured, the Court ruled that the policy provisions were unambiguous. The insured's desired definition of "physical loss" as a general "loss of use" was not supported by caselaw or the unambiguous language in the policy. According to the plain language of the policy, only direct, accidental, physical loss or damage to the property is covered, and no such damage occurred here.

Four Roses LLC v. First Protective Ins. Co., No. COA21-427 (N.C. Ct. App. 7-19-22)

The Court rejected the insured's argument that "direct physical loss"—which was not defined in the policy—should be broadly construed to include economic losses incurred because of the lack of, or limited access to, the property. The unambiguous terms of the policy required that there be some "direct physical loss" to the dwelling itself, and no such physical loss occurred here.

OKLAHOMA

Cherokee Nation v. Lexington Ins. Co., No. 2022 OK 71 (Okla. 9-13-22)

The Oklahoma Supreme Court ruled for the insurers, holding that the phrase "direct physical loss or damage" is not ambiguous and covers only those business interruption losses caused by actual tangible deprivation or destruction of property. The Court further stated that it could not rewrite the policy and expand coverage for losses that fell outside the plain and unambiguous terms of the insurance contract.

SOUTH CAROLINA

Sullivan Management LLC v. Fireman's Fund Ins. Co., No. 2021-001209 (S.C. 8-10-22)

The South Carolina Supreme Court ruled that the presence of COVID-19 in or near the insured's properties, and/or related governmental orders, which allegedly hindered or destroyed the fitness, habitability, or functionality of property, did not constitute "direct physical loss or damage" to trigger the policy's coverage provisions.

VERMONT

Huntington Ingalls Indus. Inc. et al. v. Ace Am. Ins. Co., 2022 VT 45 (Vt. 9-23-22)

In a 3-2 split decision, the Vermont Supreme Court became the first state high court to rule in favor of an insured on it claims for pandemic coverage, albeit in a very limited way. The Court found the policy language unambiguous. "Direct physical damage" requires distinct, demonstrable, physical change to property. "Direct physical loss" means persistent destruction or deprivation, in whole or in part, with causal nexus to a physical event or condition. The Court plainly stated that "[p]urely economic harm will not meet either of these standards." Nonetheless, given its liberal way of viewing pleadings, the Court held that the insured's allegations about COVID-19 adhering to surfaces was enough to get beyond the pleading stage and into discovery. The Court also stated it was not commenting on the merits of the insured's claims, and that the insured may very well not be able to show entitlement to coverage under the unambiguous policy provisions.

WASHINGTON

Hill and Stout PLLC v. Mutual of Enumclaw Ins. Co., No. 100211-4 (Wash. 8-25-22)

The Washington Supreme Court in a unanimous 9-0 *en banc* decision held that that government closure orders to curb COVID-19 did not constitute any kind of direct physical loss of or damage to property. In addition, the Court upheld the applicability of a virus exclusion holding that the exclusion was unambiguous and would bar the entirety of the insured's claim.

Federal Appellate Tribunals

FOURTH CIRCUIT

Skillets LLC et al. v. Colony Ins. Co., No. 21-01268 (4th Cir. 7-25-22)

Golden Corral Corp. et al. v. Illinois Union Ins. Co., No. 21-2119 (4th Cir. 8-11-22)

With respect to *Skillets* under Florida law and *Golden Corral* under North Carolina law, the Court ruled that there can be no coverage without physical alteration to the property, and in the absence of such damage, the insured was not entitled to coverage.

FIFTH CIRCUIT

Dickie Brennan and Co., L.L.C. v. Zurich Am. Ins. Co., No. 21-30776 (5th Cir. 8-1-22)

Adler & Sons LLC et al. v. Axis Surplus Ins. Co., No 21-30478 (5th Cir. 9-20-22)

Applying Louisiana law, the Court ruled in each of these cases that it was bound by *Q Clothier New Orleans, L.L.C. v. Twin City Fire Insurance Co.*, 29 F.4th 252 (5th Cir. 2022), holding that nearly identical policy language required tangible alterations of, injuries to, and deprivations of property. *Id.* at 257. *Q Clothier* concluded that business closures and suspensions related to the COVID-19 pandemic did not trigger coverage under this policy language because COVID-19 did not cause a tangible alteration or deprivation of the property. The Court further ruled that since the Louisiana Supreme Court has not yet rejected its application of Louisiana law in *Q Clothier*, it was not bound to follow the intermediate decision of the Louisiana Court of Appeals in *Cajun Conti LLC v. Certain Underwriters at Lloyd's*, No. 2021-CA-0343 (La. Ct. App. 6-15-22)

SIXTH CIRCUIT

Dana Inc. v. Zurich Am. Ins. Co., No. 21-4150 (6th Cir. 7-6-22)

The Court ruled that a contamination exclusion which defined contamination as including a virus applied to bar the entirety of the insured's claim for pandemic related losses. In so holding, the Court rejected the insured's contention that the exclusion only applied to traditional environmental contamination, and not COVID-19. According to the Court, COVID-19 is a disease caused by a virus. Therefore, the actual or suspected presence of COVID-19 on Dana's property was contamination as defined by the policy.

Wild Eggs Holdings Inc. v. State Auto Property & Casualty Ins. Co., No. 21-05962 (6th Cir. 9-9-22)

In a split 2-1 decision, the Court ruled for the insurer holding that under Kentucky law, civil authority orders to close the insured's business did not arise from the insured's exposure to COVID-19, but rather from the actions of the government to stem the spread of COVID-19 generally. A dissent argued that since both the insured and insurer's interpretations were reasonable, she would have ruled for the insured under the reasonable expectations doctrine.

SEVENTH CIRCUIT

Legacy Sports Barbershop LLC et al. v. Continental Casualty Co., No. 21-2517 (7th Cir. 7-22-22)

Jump Buffalo Grove LLC v. Cincinnati Casualty Co., No. 22-1006 (7th Cir. 9-15-22)

In a one paragraph order entered in each of these cases, the Court affirmed the dismissal of the insured's complaint for coverage based on its previous decision in *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021), which held that there must be some form of actual, physical damage to the insured premises to trigger coverage. A forced closure of the premises for reasons extraneous to the premises itself is not sufficient to fall within the policy's coverage.

Circle Block Partners LLC and Circle Block Hotel LLC v. Fireman's Fund Ins. Co., No. 21-2459 (7th Cir. 8-17-22)

Applying Indiana law, the Court ruled that in the absence of some physical harm to its property, the insured had not alleged a cognizable claim under its policy for coverage of its pandemic related losses. In so holding, the Court found that virus particles could not cause the kind of physical alteration to property required to trigger coverage. According to the Court, in ordinary parlance, the term "damage" connotes some kind of harm. The fact that "material matter" has been added to hotel surfaces did not mean the property was harmed.

EIGHTH CIRCUIT

Torgerson Properties Inc. v. Continental Casualty Co., No. 21-1663 (8th Cir. 6-28-22)

In this published opinion, the Court ruled that under Minnesota law, insurance provisions covering "direct physical loss of or damage to property" are not triggered unless "there [is] some physicality to the loss or damage of property." *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021) (relying on Minnesota law). Government orders that restrict the use or value of property, and which apply regardless of contamination status, are not a direct physical loss of property.

Robert Levy, D.M.D., LLC v. Hartford Casualty Ins. Co., No 21-1446 (8th Cir. 7-7-22)

Rock Dental Arkansas PLLC et al. v. Cincinnati Ins. Co., No. 21-2919 (8th Cir. 7-21-22)

The Court issued *per curiam* orders in these cases holding that in the absence of any physical harm or damage to the insured's property, there was no coverage under the respective policies. Although *Levy* involved Missouri law and *Rock Dental* involved Arkansas law, the Court found the result was the same. The policy could not reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage.

NINTH CIRCUIT

Palomar Health v. American Guarantee and Liability Ins. Co., No. 21-56073 (9th Cir. 7-28-22)

The Court ruled that a contamination exclusion applied to any cost due to contamination including the inability to use or occupy property and defined contamination to include any condition of property due to the actual presence of any virus. This exclusion barred the entirety of the insured's claim for pandemic related losses. The Court issued a memorandum decision; while the decision is not binding precedent, it can be cited in other cases.

Out West Restaurant Group, Inc, et al. v. Affiliated FM Ins. Co., No. 21-15585 (9th Cir. 9-2-22)

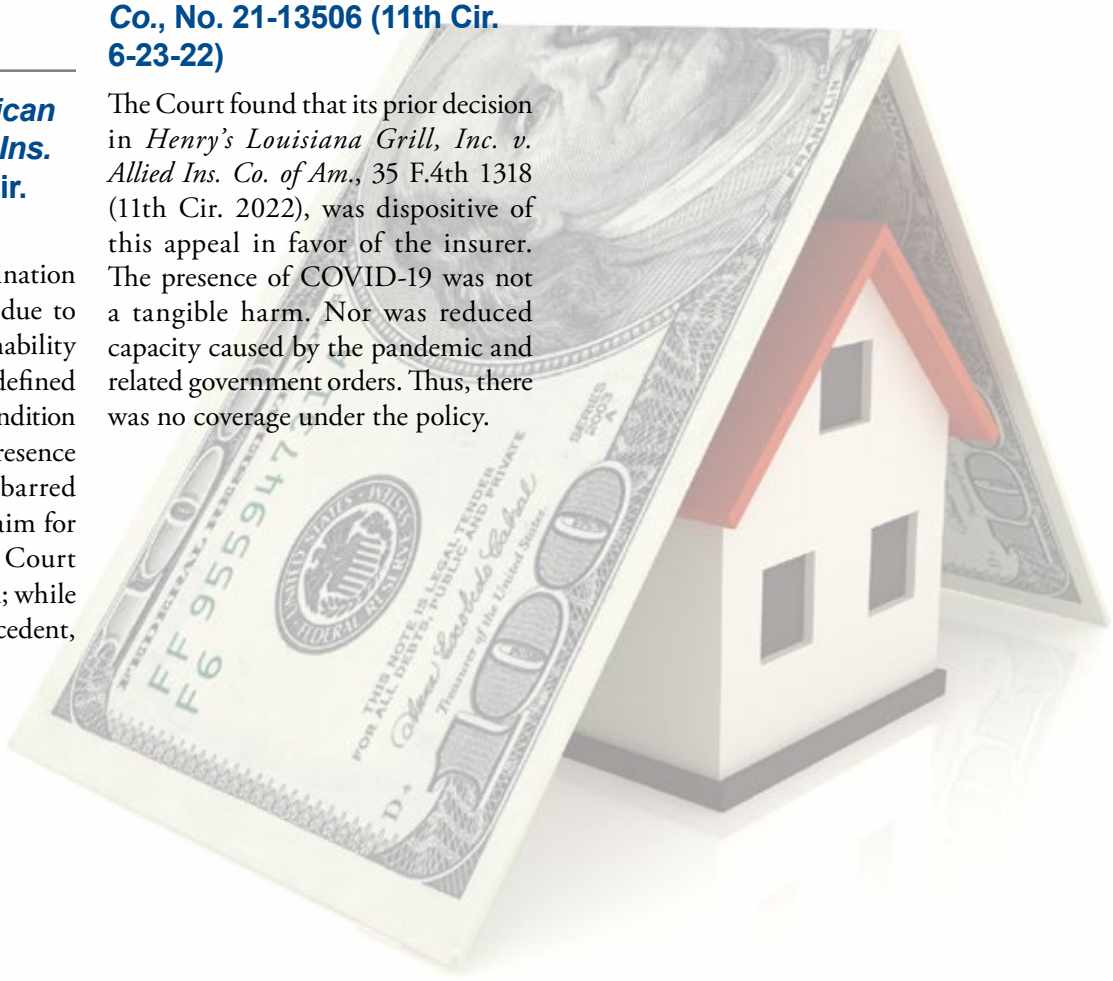
In another memorandum decision, the Court ruled for the insurer. The Court held that *Inns by the Sea v. Cal. Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576, 595–96 (Cal. Ct. App. 2021), was controlling and thus the insured had no coverage because there was no physical loss or damage and further there was no coverage under the civil authority provision because the shutdown orders were not based on direct physical loss or damage to property.

ELEVENTH CIRCUIT

AIKG LLC v. Cincinnati Ins. Co., No. 21-13506 (11th Cir. 6-23-22)

The Court found that its prior decision in *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 35 F.4th 1318 (11th Cir. 2022), was dispositive of this appeal in favor of the insurer. The presence of COVID-19 was not a tangible harm. Nor was reduced capacity caused by the pandemic and related government orders. Thus, there was no coverage under the policy.

Learning Point: To date, the following high courts have issued opinions ruling in favor of insurers on COVID-19 claims: Washington, Oklahoma, Wisconsin, Iowa, South Carolina and Massachusetts. The Virginia Supreme Court refused to review a trial court decision finding no error in its ruling that an insured suffered no physical loss or damage. In all trial and appellate cases moving forward, it is important to stress the nearly uniform nationwide consensus among state high courts that there is no property coverage for pandemic related economic losses. *Huntington Ingalls* does not dictate otherwise as it merely affords the insured an opportunity to get past judgment on the pleadings. ♦



New York Court Of Appeals Addresses The Meaning Of "Penalty Imposed By Law" Under Wrongful Act Professional Liability Policy

by ***Davy H. Raistrick***

J.P. Morgan Securities Inc. v. Vigilant Insurance Co., 182 N.E.3d 443 (2021), involves a dispute between insured securities broker-dealers Bear Stearns and certain of its excess insurers ("Excess Insurers") regarding the availability of coverage under a wrongful act professional liability policy for funds disgorged from the insured as part of a settlement with the Securities and Exchange Commission ("SEC"). In a reversal, the New York Court of Appeals held that the $140 million disgorgement for which Bear Stearns sought coverage was not excluded as a "penalty imposed by law" under the policies at issue. The Court of Appeals reasoned that at the time the parties contracted, a reasonable insured would have understood the term "penalty" to refer to non-compensatory, purely punitive monetary sanctions.

Factual Background

In 2000, Bear Stearns purchased a primary insurance policy and various excess insurance policies providing coverage for "wrongful acts" of the company and its subsidiaries. In 2003, the SEC and other regulatory agencies began investigating Bear Stearns concerning allegations that, between 1999 and 2003, Bear Stearns had facilitated late trading and deceptive market timing practices by its customers in connection with the purchase and sale of shares of mutual funds. Bear Stearns settled with the SEC in early 2006. Pursuant to the settlement order, the SEC censured Bear Stearns and ordered it to cease and desist from any future securities law violations. Without admitting or denying the findings and solely for the purpose of the SEC proceedings, Bear Stearns agreed to a $160 million disgorgement payment ($140 million of estimates of client gain and investor harm plus $20 million of Bear Stearns' own revenue) and a $90 million civil penalty. Both payments were to be deposited in a "Fair Fund" to compensate mutual fund investors allegedly harmed by the improper trading practices. Further, to preserve the deterrent effect of the civil penalty, the settlement order directed that the $90 million penalty payment—but not the disgorgement payment—was ineligible to offset any sums owed by Bear Stearns to private litigants injured by the trading practices. Bear Stearns was also required to treat the $90 million payment as a penalty for tax purposes. Following the settlement, Bear Stearns transferred the $160 million disgorgement and $90 million penalty payments to the SEC.

Bear Stearns' successor companies subsequently sued the Excess Insurers alleging breach of the insurance contracts and seeking a declaration of coverage for the disgorgement payment. Bear Stearns moved for

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summary judgment on the Excess Insurers' various defenses to coverage, and it argued that $140 million of the disgorgement payment represented disgorgement of its clients' gains, as compared with Bear Stearns' own revenue, and thus was an insurable "loss" under the policies. The Excess Insurers opposed and cross-moved for summary judgment, arguing that the $140 million disgorgement payment did not represent client gains. The New York Supreme Court denied the Excess Insurers' motions and granted summary judgment to Bear Stearns, concluding that the disgorgement of $140 million in client gains constituted an insurable loss. The Excess Insurers appealed. The Appellate Division, among other things, reversed and granted the Excess Insurers' cross-motions for summary judgment, declaring that Bear Stearns was not entitled to coverage for the SEC disgorgement payment. The Appellate Division determined that the relevant portion of the disgorgement payment was a "penalty" and, as such, was not an insurable loss under the language of the policies.

On appeal to the Court of Appeals, Bear Stearns argued that the $140 million disgorgement was derived from estimates of client gains and investor harm and, therefore, the Excess Insurers failed to meet their burden of establishing that the payment was not a covered loss because it was a "penalty imposed by law." The Court of Appeals agreed that the payment is not a "penalty" within the meaning of the policies.

Analysis

The Court of Appeals found that whether the $140 million SEC-ordered disgorgement constituted a "penalty imposed by law" such that it is not recoverable as a "loss" under the relevant insurance policies is a question of contract interpretation. It is well-settled in New York that insurance contracts are subject to the general rules of contract interpretation and that, like other agreements, insurance contracts are typically enforced as written. As such, the Court of Appeals looked to the specific language in the policies, and applied rules of interpretation according to common speech and consistent with the reasonable expectation of the average insured at the time of contracting, with any ambiguities construed in favor of the insured. The Court of Appeals recognized that while an insured must establish coverage in the first instance, the insurer bears the burden of proving that an exclusion applies to defeat coverage. Additionally, before an insurer is permitted to avoid policy coverage, it must satisfy the burden of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation. This standard may be implicated even when an insurer relies on "limiting language in the definition of coverage" instead of "language in the exclusions sections of the policy" because, in some circumstances, that limiting language functions as an exclusion.

In this case, the Court of Appeals attempted to interpret the various components of Bear Stearns' insurance coverage, particularly the definition of "loss". The policies stated that Excess Insurers agreed to pay all "loss" which Bear Stearns became legally obligated to pay as the result of any claim for any wrongful act by Bear Stearns while providing services as a securities broker and dealer. The policies defined "loss" to include compensatory damages, punitive damages where insurable by law, multiplied damages, judgments, settlements, costs, and expenses resulting from any claim. However, an exception in the definition of "loss" provided that "loss" shall not include fines or penalties imposed by law.

The Court of Appeals explained that although the policy limitation on the definition of "loss" as exempting "penalties imposed by law" is contained in the coverage section, the carve out excepting certain "penalties" from coverage amounts to an exclusion because, absent that language, the definition of "loss" would otherwise encompass such payments. Thus, the question shifts to whether the Excess Insurers demonstrated that a reasonable insured purchasing this wrongful act policy in 2000 would have understood the phrase "penalties imposed by law" to preclude coverage for the $140 million disgorgement payment. The Court of Appeals held that the Excess Insurers did not meet this burden, reasoning that, while the phrase "penalties imposed by law" was not defined in the insurance policies, the term "penalty" has been commonly understood to reference a monetary sanction designed to address a public wrong that is sought for purposes of deterrence and punishment rather than to compensate injured parties for their loss. In the context of statutory penalties, the word "penalty" does not apply to actual damages but, rather, exacts sums from a wrongdoer that exceed the injured party's actual damages. The Court of Appeals stated that this view is consistent with dictionary definitions in effect around the time the policies were issued, and the modern understanding that

recovery without reference or regard to the actual damage sustained is not designed to compensate anyone. Simply stated — a "penalty" is distinct from a compensatory remedy and a "penalty" is not measured by the losses caused by the wrongdoing.

The Court of Appeals ultimately held that the disgorgement payment clearly did not fall within the policy exclusion for penalties imposed by law, stating:

> Bear Stearns demonstrated the absence of any material question of fact as to what the $140 million payment represented. Bear Stearns submitted evidence regarding its communications with the SEC throughout the negotiation process indicating that, at the direction of the SEC, Bear Stearns undertook various valuation of its customers' and the corresponding injury suffered by investors as a consequence of the challenged trading practices. In particular, the correspondence—taken together with other collaborating testimonial and documentary evidence, supported its contention that, after negotiations regarding the appropriate valuation method, Bear Stearns estimated third-party gains to be approximately $140 million and Bear Stearns ultimately agreed with the SEC to incorporate that amount into the settlement as representative of client gains and the concomitant investor losses. Thus, Bear Stearns demonstrated that the $140 million disgorgement payment was calculated based on wrongfully obtained profits as a measure of the harm or damages caused by the alleged wrongdoing that Bear Stearns was accused of facilitating. This can be contrasted with the $90 million payment denominated a "penalty," which was not derived from any estimate of harm or gain flowing from the improper trading practices.

Because the Excess Insurers did not submit any evidence rebutting this proof, the Court of Appeals concluded that the Excess Insurers failed to establish that the disgorgement payment falls within the policies' exclusion for "penalty imposed by law" and that the Appellate Division erred in granting summary judgment to the Excess Insurers on that basis.

Learning Point: The Court of Appeals affirmed that penalties have consistently been distinguished from compensatory remedies, damages, and payments otherwise measured through the harm caused by wrongdoing. Accordingly, at the time the parties contracted, a reasonable insured would have understood the term "penalty" to refer to non-compensatory, purely punitive monetary sanctions. In this case, the Court of Appeals shifted the burden of proof to the Excess Insurers, and the lack of contrary evidence from the Excess Insurers provided the Court of Appeals with an avenue to find in favor of coverage. ♦

Insured Not Liable For Declining To Settle Within Its Self-insured Retention

by ***Don R. Sampen***

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When a primary liability insurer declines to settle a claim on behalf of its insured within the insurer's policy limit, and a judgment later is entered against the insured for an amount in excess of the policy limit, a question may arise whether the insurer's failure to settle was in good faith. If not, the insured—or an excess insurer who is stuck paying the excess verdict—may be able to recover against the primary insurer for the amount in excess of the primary insurer's limit.

The question then arises whether the same considerations apply to an insured whose coverage is subject to a self-insured retention (SIR). If the insured has the opportunity to settle within the SIR but refuses, may it likewise be vulnerable to a bad faith claim for failure to settle? The United States Court of Appeals for the Seventh Circuit, applying Illinois law, recently held that the insured has no similar exposure. *North American Elite Ins. Co. v. Menard, Inc.*, No. 21-1813, 2022 U.S. App. Lexis 21592 (7th Cir. Aug. 4, 2002).

Facts

A customer sued Menard, owner of a chain of home improvement stores, after being hit by a forklift in a store. At the time, Menard had a self-insured retention of $2 million, a primary layer of insurance with Greenwich Insurance Company subject to a $1 million limit, and an umbrella policy with North American subject to a $25 million limit per occurrence.

On the first day of trial, the customer offered to settle for about $1.9 million, within Menard's self-insured retention. Menard declined and the case continued nearly to verdict when the parties entered into a high-low agreement. That agreement required Menard to pay a minimum of $500,000 and a maximum of $6 million, depending on the verdict. The jury returned a verdict of $13 million for the customer.

North American indemnified Menard under the terms of the high-low agreement for the $3 million in excess of Menard's retention and the Greenwich policy limit, and then brought this suit seeking reimbursement. It claimed Menard violated its good faith duty to settle by rejecting the $1.9 million settlement offer. The district court dismissed the claim, and North American appealed.

Analysis

In an opinion by Judge Frank Easterbrook, the Seventh Circuit affirmed. The Court initially addressed North American's argument that Menard's SIR obligation vested Menard with a duty to settle similar to that of an insurance company. The argument was based in part on *Lexington Ins. Co. v. RLI Ins. Co.*, 949 F.3d 1015 (7th Cir. 2020), in which the Court referenced an SIR that, the Court said, made the insured "its own primary insurer."

The Seventh Circuit observed, however, that *Lexington* did not say that the self-insured business assumes the legal responsibilities of an insurer by bearing some of its own liability. It also pointed to one Illinois case, *Nicor, Inc. v. Associated Electric & Gas Ins. Services Ltd.*, 223 Ill. 2d 407 (2006), which characterized an SIR as a "deductible."

The Court then concluded that, however characterized, Menard's payment obligation was not insurance giving rise to a duty to settle.

Turning next to the language of North American's umbrella policy, the Seventh Circuit wrote that the company, while having no duty to defend, did have the right to participate in the defense of any claim, which North American did not do. The policy also imposed an obligation on Menard to cooperate with North American in various ways, but North American had not claimed a lack of cooperation.

The Court compared these provisions to the Greenwich policy, which required Menard to exercise the utmost good faith in administering the SIR and imposed the right and duty upon Greenwich to defend and to assume control of settlement. The Court found these types of provisions may have allowed Greenwich to impose a contractual good faith settlement obligation upon Menard. But such provisions were not a part of the North American policy, and that policy contained no "follow form" provision. Rather, Menard reserved more control over its litigation strategy under the North American policy than it did under the Greenwich policy.

The Seventh Circuit also rejected the notion that Menard had a common-law duty to settle. It did so in part based on its view that, under Illinois law, any claim by an insurer of another's breach of the duty of good faith would be contractual in nature. Here, the North American policy did not give rise to such a claim, and North American was not entitled to the benefit of the Greenwich policy language.

The Court therefore affirmed in favor of Menard.

Learning Point: According to this Court, absent policy provisions otherwise, an insurer has no cause of action for failure to settle against an insured that declines an opportunity to settle with the limits of its SIR. ♦

Illinois Appellate Court Strays From Established Faulty Construction Precedent To Find A Duty To Defend Vague Allegations Of Damage To "Other Property" In *Acuity v. M/I Homes Chi, LLC*

by ***Ilene M. Korey***

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Introduction

Illinois has consistently required damage to property other than repair and replacement of faulty construction to implicate coverage under a commercial general liability policy. The basis for doing so is rooted in the insuring language of the typical CGL policy that limits coverage to "property damage" caused by an "occurrence" in the policy period. The concept is best explained by the Illinois Supreme Court in *Travelers Ins. Co. v. Eljer*, that finding coverage for the cost of replacing or repairing defective work would transform the policy into something akin to a performance bond. *Travelers Ins. Co. v. Eljer*, 197 Ill. 2d at 312 (2001); *see, e.g., Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*, 358 Ill. App. 3d 34, 54-55 (Ill. App. 1st Dist. 2005) ("A line of Illinois cases holds that where the underlying complaint alleges only damages in the nature of repair and replacement of the defective product or construction, such damages constitute economic losses and do not constitute 'property damage.'"). The takeaway from this line of cases is that there is no coverage for "property damage" in a CGL policy for purely economic losses, such as damages for inadequate value, or costs of repair or replacement of faulty work. However, a recent decision issued by the First Appellate District, apparently swayed by criticism from policyholder counsel, held that a vague allegation that there is damage to "other property" triggers a duty to defend a construction defect case.

Facts

In *Acuity Ins. Co. v. M/I Homes Chi, LLC*, 2022 IL App (1st) 220023, the First Appellate District grappled with whether a duty to defend was owed to a general contractor for a lawsuit filed by a townhome homeowners' association for damages from alleged defects in the design and construction of the townhomes. M/I Homes was an additional insured on a CGL policy issued by Acuity to an exterior finishing subcontractor. Acuity denied that it had a duty to defend M/I Homes under the policy because, among other reasons, the complaint alleged damages "related only to the defective construction of the townhomes and specifically not any damage to any other property beyond the townhomes themselves." The parties filed cross motions for summary judgment and the trial court held in favor of Acuity.

Analysis

On appeal, the appellate court examined the underlying pleadings to determine whether Acuity had a duty to defend. Focusing on the plaintiffs' allegations

against the contractors/developers, the Court looked to what was alleged as "property damage." In reversing the trial court, the First District noted that the underlying complaint alleged property damage from faulty design and construction, and also that damage was incurred to "other property."

Acuity argued that the "other property" allegations were not enough to trigger a duty to defend because "the underlying complaint does not identify who owned that 'other property,' nor does it explain how the Association has standing to sue for that damage." Acuity pointed out that the First District itself had previously stated, "We do not believe a freestanding reference to a fact, that is not attached to any particular theory of recovery or particular party in the complaint, can trigger a duty to defend." *West Van Buren*, 2016 IL App (1st) 140862, ¶ 20.

Nonetheless, the bare allegations of damage to "other property" convinced the First District that the underlying allegations, broadly construed, implicated the duty to defend. "Liberally construing both the complaint and the policy in favor of the insured (*Metropolitan Builders*, 2019 IL App (1st) 190517, ¶ 28, 442 Ill. Dec. 49, 158 N.E.3d 1084), and applying the well-established principle that "[u]nless the complaint on its face clearly alleges facts which, if true, would *exclude* coverage," the potentiality of coverage triggering a duty to defend is present (emphasis added) (*Adams County*, 179 Ill. App. 3d at 756)." Thus, at the pleading stage, alleging "damage to other property" was enough to potentially satisfy the duty to defend under the policy's insuring language.

The First District apparently did not consider that the underlying complaint was drafted as a transparent attempt to trigger coverage by alleging elements taken from a CGL policy. For example, the underlying complaint contained the following allegations: "The Defects caused physical injury to the Townhomes (*i.e.*, altered the exteriors' appearance, shape, color or other material dimension) after construction…was completed from repeated exposure to substantially the same general harmful conditions. The property damage was an accident in that [M/I Homes] did not intend to cause the design, material and construction defects in the Townhome[s], and the resulting property damage… was neither expected nor intended from their standpoint. *** The work of the subcontractors and the designer caused damage to other portions of the Townhomes that was not the work of those subcontractor. Defects have caused substantial damage to the Townhomes and damage to other property."

Learning Point: The *Acuity* decision is instructive in that the Appellate Court rejected the insurer's argument that the underlying claim sought damage for only defective work. Instead, the Court determined that there was a potential for damage to repair not only the defective work, but also the unspecified "other property." The *Acuity* court applied the principle of construing allegations and the policy broadly to find a duty to defend. Thus, in this context, simply alleging damage to "other property" satisfied that threshold. A final note: the First District's decision invites other courts and the Illinois Supreme Court to weigh in on these issues in the hope of bringing clarity to the nuances of coverage for construction defect claims. ♦

Free Bite? Maybe Not: Expanded Liability For Dog Bites

by ***Paul V. Esposito***

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You can't help but love 'em. Dogs. Our relationship with these descendants of the gray wolf is unlike that with any other animal. To many people, they are like people—even like family. Maybe it's because they'll let you hug them. Maybe it is because they don't talk back. Whatever the reason, people want them. Just look out the window and notice how many owners are walking multiple dogs. They're everywhere, even in stores and shopping malls.

There is an adage: every dog gets a free bite. It generally means that unless an owner is aware that a dog has bitten someone, the owner had no duty to prevent it from recurring. But as dog owners Jeffrey and Lisa Drake learned, some adages are not what they used to be. *Daniels v. Drake*, 2022 Ind. App. LEXIS 303.

Facts

Jeffrey and Lisa Drake own 16 acres in rural Indiana. They have no neighbors but do have five dogs including Max, a two-year old, 140-pound male Great Dane. His head comes up to Lisa's waist. Max had the run of the roost. He had dealt with the outside world a few times, but largely did not encounter people other than delivery personnel—at whom he barked.

Damon Daniels is a FedEx delivery driver, new to the Drake property. Damon honked to get Lisa's attention and asked if Max—who accompanied Lisa—was safe. After Lisa gave a thumb's-up, Damon walked a package over to her. With that, Max barked once and bit Damon on the abdomen. Thinking that Damon was exaggerating, Lisa insisted on seeing the bite. He showed her three puncture wounds. Max had lacerated Damon's abdominal wall and caused substantial swelling.

Damon sued Jeffrey and Lisa for damages arising out of the bite. The Drakes filed affidavits of Max's vet, as well as their own affidavits, as to their lack of knowledge of any dangerous or vicious propensities. Damon filed an affidavit of a canine behavior expert/animal control officer. For a while, things looked good for the Drakes. The trial court granted them summary judgment. But it didn't hold. The Indiana Court of Appeals has recently ruled that Damon is entitled to prove the Drakes' liability at trial.

Analysis

The Court of Appeals acknowledged that a dog owner is not always liable for the conduct of their dog. The Indiana Supreme Court has ruled that an owner must know or have reason to know a dog's dangerous or vicious propensities. But knowledge may be constructive, and it does not just apply to the dog involved in a biting incident. It applies to the dog's breed. Even if the dog had not previously bitten or attacked anyone, an owner is held to constructive knowledge of the dangerous propensities of the dog's breed.

That is what caused problems for the Drakes. Damon's expert submitted an affidavit stating: (1) Great Danes are bred to be guard dogs and wild boar hunters, (2) they have a natural tendency to be territorial and wary of strangers, (3) they will be defensive of their territory when a stranger approaches, (4) isolation from people, lack of socialization, and lack of roaming restrictions increase their territorial aggressiveness, (5) males are more aggressive than females, and (6) Great Danes are ranked as the 10th most dangerous dog in the U.S. and Canada. The affidavit created a genuine issue of fact that must be resolved at trial.

Learning Point: The adage that a dog is man's best friend probably still has a lot of mileage left on its tires. But it's important for people to understand that in getting a dog, they are getting history and breeding. Just one bite can cause serious legal issues, let alone the physical and emotional ones, for the owner, a loved one, or a mere passerby. In buying or keeping a dog, it is worth the time to learn the facts. ♦

§ 1983 ACTIONS

NO MALEVOLENT INTENT SHOWN

Francis v. Correction Officer Briatico, AC 44192 (Conn. App.)

Plaintiff inmate at state correctional institution sought damages from defendants for alleged violation of his constitutional rights in connection with injuries he allegedly sustained during electrical fire in his housing unit. ***Held:*** Defendants responded immediately to fire, fire was extinguished within three minutes of being reported, and plaintiff was offered medical attention within minutes and demonstrated no serious ill effects. None of this qualified as malevolent intent.

DELIBERATE INDIFFERENCE TO EXCESSIVE HEALTH, SAFETY RISK NOT SHOWN

Miller v. Doe, AC 43845 (Conn. App.)

Plaintiff state correctional institution inmate was in full restraints in rear seat of vehicle operated by Department of Corrections employee and claimed injuries from inability to sit upright at time accident occurred. Plaintiff had not asked for bigger vehicle, did not ask that his seatbelt be secured, and defendants did not check to see if his seatbelt was fastened. Defendants' motion for summary judgment was denied. ***Held:*** Reversed. Failure of prison officials to provide inmates with seatbelts alone does not violate their constitutional rights. Dangerous road conditions, distracted driving and speeding while transporting inmates does not give rise to a deliberate indifference claim.

ANTI-SLAPP

FEES WRONGLY DENIED TO PARTIES BASED ON NOT JOINING IN FIRST-FILED ANTI-SLAPP MOTION

Frym v. 601 Main Street LLC, 82 Cal. App. 5th 613 (Cal. App.)

Landlord sued tenant to collect past-due rent, property taxes, and insurance premiums allegedly owed by tenant under commercial lease. Tenant countersued landlord and its attorney alleging fraud and extortion. Landlord responded with anti-SLAPP motion and landlord's attorney also filed separate but identical motion with each party seeking statutory attorney fees. Trial court denied recovery of duplicate fees by both landlord and attorney for same anti-SLAPP motion. ***Held:*** Mandatory attorney fees are allowed to each prevailing party in anti-SLAPP context and failure to join in another identical motion by a different party is not grounds to deny those fees.

SUIT OVER ENTREATIES ON SOCIAL MEDIA SUBJECT TO SLAPP

Creative Care v. McEntyre, 2022 Cal. App. LEXIS 5069 (Cal. App.)

Substance abuse and mental health treatment facility sued woman for defamation because she asserted on social media the facility was a dangerous place. Co-owner of facility frequently appeared on the syndicated talk show known as "Dr. Phil." Woman posted on Facebook entreaties to Dr. Phil to stop advancing the facility as a place to send loved ones for care, asserting the facility had its license suspended. ***Held:*** Woman's anti-SLAPP motion granted because issue involved matter of public interest and facility could not show probability of prevailing since its license had in fact been suspended so there could be no actionable defamation.

APPELLATE

NO RELIEF FROM UNTIMELY NOTICE OF APPEAL

Garg v. Garg, 2022 Cal. App. LEXIS 761 (Cal. App.)

Defendant sought to appeal judgment in favor plaintiff. Original notice of appeal was timely but a failure occurred in the electronic transmission and receipt, which was not discovered until after California's 60-day deadline from time of entry of judgment. ***Held:*** Defendant could not rely on statute providing potential relief for notices of appeal suffering from electronic filer error. Defendant had delayed filing a corrected notice of appeal, causing a 29-day gap between the initial attempt and the follow-up filing. The Court held defendant's lack of diligence precluded relief.

CONTRACT

AGREEMENT CONTRADICTING STATUTE HELD UNENFORCEABLE

Mercado v. Schwartz, 2022 N.Y. LEXIS 4851 (N.Y.)

Contract provision granting right to depose other parties' expert witnesses prior to trial was held to violate New York public policy, specifically CPLR 3101(d) and, therefore, be

unenforceable. ***Held:*** Affirmed. Parties may incorporate into their contracts any provisions that are not illegal, unconscionable, restricted by legislation, or violative of public policy. Parties may also agree to waive statutory rights unless a question of public policy is involved.

INSURER DOES NOT OWE POLICYHOLDER COMMON-LAW FIDUCIARY DUTY EXCEPT WHEN CALLED UPON TO DEFEND ITS INSURED

Neurological Surgery P.C. v. MLMIC Ins. Co., 2022 N.Y. LEXIS 5103 (N.Y.)

Court granted insurance company's motion to dismiss plaintiff's complaint as it did not allege facts that would give rise to a fiduciary or special relationship between the parties. ***Held:*** A special relationship does not arise out of an ordinary arm's length business transaction between two parties.

DEFAULT JUDGMENT

REASONABLE CAUSE REQUIRED TO VACATE DEFAULT

Mercedes-Benz Fin. v. 1188 Stratford Avenue, LLC, AC 43463 (Conn. App.)

Plaintiff financing company sought damages from defendants for failing to make payments due under motor vehicle lease agreement. Defendants were defaulted for failing to appear. Trial court granted plaintiff's motion for judgment and denied defendants' motion to open and set aside default. ***Held:*** Affirmed. Defendants were not prevented from appearing as a result of mistake, accident or other reasonable cause.

FIRST-PARTY PROPERTY

COVERAGE, INCLUDING TEAR OUT, LIMITED BY LIMITED WATER DAMAGE COVERAGE ENDORSEMENT

Panettieri v. People's Trust Ins. Co., 2022 Fla. App. LEXIS 5132 (Fla. App.)

Trial court granted insurer summary judgment, holding policy's Water Damage Exclusion Endorsement applied to insured's cast iron pipe claim and limited entire claim, including tear out, to $10,000. ***Held:*** Affirmed. Tear out costs associated with loss were expressly excluded under policy. Insured was not entitled to tear out costs in excess of the $10,000 endorsement limit.

POLICY LANGUAGE REQUIRED INSURER TO SHOW PREJUDICE

Perez v. Citizens Prop. Ins. Corp., 2022 Fla. App. LEXIS 5435 (Fla. App.)

Trial court granted insurer summary judgment where insureds failed to comply with post-loss duty of prompt notice and failed to rebut presumption of prejudice. ***Held:*** Reversed. Insureds failed to provide prompt notice, however, the policy language shifted burden to insurer to show prejudice.

EXPERT AFFIDAVIT INSUFFICIENT TO REBUT PRESUMPTION OF PREJUDICE

Perez v. Citizens Prop. Ins. Co., 2022 Fla. App. LEXIS 4583 (Fla. App.)

Trial court held insured's delay in reporting claim prejudiced insurer's investigation and precluded it from making adequate coverage determination. ***Held:*** Affirmed. Insured's expert's affidavit was insufficient to rebut presumption of prejudice to insurer from late reporting of claim.

INSURED PROPERLY PLEAD CLAIM FOR DECLARATORY RELIEF

Comisar v. Heritage Prop. & Cas. Ins. Co., 2022 Fla. App. LEXIS 5439 (Fla. App.)

Trial court dismissed third amended complaint with prejudice for failure to properly plead a cause of action for declaratory relief. ***Held:*** Reversed. The third amended complaint properly set forth an actionable claim for declaratory relief.

POST-LOSS CONCEALMENT OR FRAUD REQUIRES PROOF OF INTENT

Gracia v. Security First Ins. Co., 2022 Fla. App. LEXIS 6197 (Fla. App.)

Trial court granted summary judgment to insurer, finding insured made affirmative misrepresentations regarding pre-loss condition of property that warranted forfeiture of coverage under concealment or fraud provision of policy. ***Held:*** Reversed. The alleged false statements were made in the post-loss context rather

than during the insurance application process. Proof of intent to mislead the insurer was required when analyzing a concealment or fraud provision in the post-loss context. Factual questions relating to fraudulent intent or state of mind are generally not ripe for summary judgment determination.

INDEMNIFICATION

ALLEGATIONS MUST BE WITHIN CONTRACT'S SCOPE TO TRIGGER CONTRACTUAL INDEMNITY

Brass Mill Center, LLC v. Subway Real Estate Corp., AC 44436 (Conn. App.)

Decedent pedestrian's administrator sued shopping mall after pedestrian was struck and killed while crossing roadway surrounding mall. Shopping mall then sought contractual defense and indemnification from defendant security company it had hired. ***Held:*** Wrongful death action did not trigger defendant's obligation to defend because it did not contain allegations of negligence or conduct that fell within the scope of the contractual responsibility to provide security services.

INSURER ESTOPPED FROM SEEKING INDEMNIFICATION

Lancer Indem. Co. v. Peerless Ins. Co., 2022 NY Slip Op 05030 (App. Div. 2d Dep't)

Plaintiff insurer sued other insurer seeking reimbursement for all costs spent defending and indemnifying an insured. The insurers had each agreed to pay half of a $500,000 settlement in an underlying negligence action. ***Held:*** The plaintiff did not reserve its right to commence an action to recover its defense and indemnity costs against Peerless in the settlement. As such it is estopped from seeking recovery from the other insurer.

LEGAL MALPRACTICE

LAWYER'S EXERCISE OF JUDGMENT NOT MALPRACTICE

Silverman v. Eccleston Law, LLC, 2022 N.Y. LEXIS 4871 (N.Y.)

Defendant was granted summary judgment because plaintiff failed to prove that, but for lawyer's alleged negligence, plaintiff would have obtained a more favorable outcome. ***Held:*** Conclusory allegations of damages or injuries are insufficient to prove malpractice.

LIABILITY INSURANCE COVERAGE

NO DUTY TO DEFEND OPIOID DISTRIBUTOR FROM LOCAL GOVERNMENT CLAIMS OF ECONOMIC LOSSES

Acuity v. Masters Pharma., Inc., 2022 Ohio LEXIS 1814 (Ohio)

Local governments sued wholesale distributor's insurer for economic losses caused by opioid epidemic. ***Held in a split decision:*** Insurer did not owe duty to defend opioid distributor. Policies provided coverage for "damages because of bodily injury." Governments sought damages for their economic injuries caused by epidemic, not for bodily injuries directly related to insured's alleged failure to prevent improper diversion of opioids. Policy language requires that coverage be tied into a particular body injury. Dissent contends claim was arguably within policy provision, so duty to defend arose.

EXCLUSION BARS COVERAGE FOR DRUNK DRIVING FATALITY

Ebert v. Ill. Cas. Co., 188 N.E.2d 858 (Ind.)

Insured sought coverage under businessowners policy following vehicle accident caused by over-served driver. ***Held:*** Unambiguous liquor liability exclusion barred coverage. Exclusion barred coverage for bodily injury arising out of, contributing to or causing intoxication, or furnishing liquor to an intoxicated person. It barred coverage even if claims allege negligent supervision or monitoring or failing to provide transportation. Because complaint allegations against insured were intertwined with service of alcohol, intoxication was the predominant cause of injuries, barring coverage.

CGL POLICY DOES NOT WAIVE EXCLUSIVE-REMEDY PROVISION OF WORK COMP STATUTE

Rood v. Selective Ins. Co., 2022 Wisc. App. LEXIS 721 (Wis. App.)

Employee injured in work accident involving telehandler sued employer's CGL insurer, claiming that policy endorsement expanding definition of "insured" waived statutory exclusive-remedy provision. ***Held:*** Endorsement did not alter or eliminate exclusion. Insurer did not intend to cover insured's obligations under workers' comp law. ***Further held:*** Accident did not fall under statutory exception for co-employee's negligent operation

of motor vehicle. Statute is narrowly interpreted to provide co-employee immunity. A "motor vehicle" only covers vehicles primarily intended for transportation on public roadways.

ATTORNEY'S FEES NOT COVERED BY POLICY

Vt. Mut. Ins. Co. v. Poirier, 189 N.E.3d 306 (Mass.)

Court assessed attorney's fees against insured in breach of warranty claim. ***Held:*** Commercial liability insurer not obligated to pay court-ordered attorney's fees. Those fees are not "damages because of bodily injury." They are awarded to deter misconduct and recognize public benefit of bringing misconduct to light. ***Further held:*** Attorney's fees are not "costs" under supplementary-payments provision. Costs ordinarily mean taxable costs, not attorney's fees.

LIMITATIONS OF ACTIONS

EXTENSION OF CHILD SEXUAL-ASSAULT LIMITATIONS PERIOD APPLIES TO ENTITIES BEYOND ABUSER OR A RELIGIOUS ORGANIZATION

Fleming v. AAU of the U.S., Inc., 2022 Wisc. App. LEXIS 626 (Wis. App.)

Before 35th birthday, child sexual abuse victim refiled negligent supervision claim based on misconduct of basketball coach. ***Held:*** Limitations statute does not restrict theory of liability on which suit is brought, nor limit liability to abuser or an involved religious organization. ***Further held:*** Claim was timely refiled within 30 days of dismissal of prior action.

MEDICAL MALPRACTICE

STATUTE OF LIMITATIONS INFANCY TOLL LIMITED TO 10 YEARS IN MEDICAL MALPRACTICE ACTIONS

Rojas v. Tandon, 2022 N.Y. LEXIS 4853 (N.Y.)

Defendant was granted judgment based on plaintiff's failure to commence action before expiration of statute of limitations. ***Held:*** Plaintiff's claim that physician's act in dropping her during birth sounds in medical malpractice, not negligence. As such, the statute of limitations was 10 years and her action was not timely commenced.

MUNICIPAL LAW AND CORPORATIONS

PLAINTIFF IN MUNICIPAL DEFENDANT'S CUSTODY NOT REQUIRED TO PLEAD AND PROVE DEFENDANT OWED HIM SPECIAL DUTY

Rojas v. Tandon, 2022 N.Y. LEXIS 4853 (N.Y.)

Court denied city's argument that action against it must be dismissed because plaintiff did not plead that city owed him special duty. ***Held:*** Affirmed. Because city assumed custody over plaintiff, who was thus unable to obtain medical treatment on his own, he had a fundamental right to reasonable and adequate medical care.

CITY IMMUNE FROM LIABILITY FOR PEDESTRIAN'S FALL THROUGH TREE GRATE

Winbush v. Cin. Music Festival, 2022 Ohio App. LEXIS 2655 (Ohio App.)

Walker was injured when she fell through mispositioned tree grate covering sidewalk hole. ***Held:*** City was immune from liability. Sidewalk and tree maintenance are governmental functions. No statutory exception to immunity exists. Wanton-misconduct rule only applies to employees of political subdivisions, not to subdivisions.

NEGLIGENCE

ONGOING STORM DOCTRINE INAPPLICABLE WHEN SNOW AND ICE NOT ALLEGED TO BE CAUSE OF ACCIDENT

Ocasio v. Verdura Constr., LLC, AC 44100 (Conn. App.)

Plaintiff sued defendant landlord for injuries resulting from allegedly defective porch railing on leased premises after he fell while freezing rain was falling. Defendant asserted ongoing storm doctrine as a special defense. Trial court instructed jury and provided set of interrogatories on ongoing storm doctrine over plaintiff's objection. Jury returned defense verdict. ***Held:*** Reversed and remanded for new trial. Trial court's instructions and interrogatories on ongoing storm doctrine were inapplicable, irrelevant and not supported by the evidence because plaintiff claimed his fall was due only to a defective railing.

INNKEEPER LACKS DUTY TO PREVENT GUEST'S SUICIDE

Bonafini v. G6 Hospitality Prop., LLC, 2022 Mass. App. LEXIS 91 (Mass. App.)

After motel personnel refused to check on guest's condition, guest was found dead by suicide. ***Held:*** Innkeeper did not owe a duty of care. Innkeeper must actually know of a guest's recent suicide attempt or stated plans or intentions to commit suicide. Personnel only knew guest was at risk for suicide.

STATUTE BARS STATEMENTS OF SYMPATHY BUT NOT OF FAULT

Nunes v. Duffy, 192 N.E.3d 285 (Mass. App.)

After hitting motorcyclist, driver said, "I'm sorry. It was all my fault." ***Held:*** To encourage decency, statute excludes admission of "benevolent gestures" of sympathy following accident, but statements of fault are properly introduced in negligence action.

WATER IN TRANSIT STATION OPEN AND OBVIOUS

Goddard v. Greater Cle. Reg. Transit Auth., 2022 Ohio App. LEXIS 2561 (Ohio App.)

Patron slipped on ramp wet from rainfall. ***Held:*** Condition was open and obvious, negating duty. Patron used station daily. Nothing blocked her view, and area was well lit. Everyone should have known of tracked-in water from inclement conditions.

UM/UIM

POLICY TIME LIMITATIONS MAY DIFFER FROM STATUTE OF LIMITATIONS

Pollard v. Geico Gen. Ins. Co., AC 44560 (Conn. App.)

Plaintiff sought underinsured motorist benefits pursuant to an auto policy issued by defendant for her 2012 motor vehicle accident injuries. Plaintiff's 2016 suit was nonsuited for failure to comply with discovery orders. Plaintiff then sued defendant in 2019 pursuant to an accidental failure of suit statute. Defendant was granted summary judgment. ***Held:*** Affirmed. Plaintiff failed to bring the suit within three years of the 2012 accident, per the terms of the policy. Plaintiff did not provide written notice of claim per a tolling provision in the policy.

TIMELY DISCLAIMER UNNECESSARY WHERE NO COVERAGE

D'Angelo v. Philadelphia Indem. Ins. Co., 172 N.Y.S.3d 315 (N.Y. App. Div. 4th Dep't)

Plaintiff sought supplemental uninsured/underinsured motorist benefits from her employer's insurer. Insurer disclaimed coverage 14 months later and plaintiff challenged. ***Held:*** Because defendant demonstrated that plaintiff was not insured under policy, defendant's disclaimer was based on lack of coverage rather than a policy exclusion and timely disclaimer was, therefore, not required.

WORKERS COMPENSATION

ALTER EGO CAN TRIGGER TORT EXCEPTION TO EXCLUSIVITY PROVISION

Lavette III v. Stanley Black & Decker, Inc., AC 44465 (Conn. App.)

Plaintiff employee, whose duties included painting, sought damages because defendant employer's safety manager informed him he was not authorized to use a respirator in workplace. Trial court held plaintiff's claim was barred by the Workers' Compensation Act exclusivity provision and that plaintiff could not state a sufficient cause of action for application of intentional tort exception. ***Held:*** Affirmed. Plaintiff failed to plead safety manager was defendant's alter ego such that safety manager's intentional torts could be attributed to defendant to pierce corporate veil and fall within exclusivity provision exception. Safety manager's creation of policy regarding respirator use did not establish requisite level of control over defendant.

WRITS

ELEPHANT NOT ELIGIBLE FOR WRIT OF HABEAS CORPUS

Matter of Nonhuman Rights Project, Inc. v. Breheny, 2022 NY Slip Op 03859 (N.Y.)

Non-profit corporation that characterized its mission as seeking to establish that at least some nonhuman animals were legal persons entitled to fundamental rights, sought writ of habeas corpus to secure the transfer to an elephant sanctuary of an elephant that was residing at a city zoo. ***Held:*** The writ of habeas corpus was intended to protect the liberty right of human beings to be free of unlawful confinement, and it had no applicability to a nonhuman animal that was not a "person" subjected to illegal detention.

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