CM REPORT

of Recent Decisions

2022 • Vol. 4

COVID-19 Pandemic Coverage Claims Update

Big Illinois Supreme Court Win For Condominium Property Managers

Minnesota Supreme Court Requires More Specificity In Exculpatory Clauses

Clausen Miller P.C.

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

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United States Supreme Court Set To Decide "Game Changing" Case On General Personal Jurisdiction Over A Foreign Corporation

by ***Melinda S. Kollross***

We wish to alert our friends in the defense and insurance industries of a case that will soon be decided by the United States Supreme Court. *Mallory v. Norfolk Southern Railway Company*, 266 A.3d 542 (Pa. 2021), *cert. granted*, No 21-1168, 2022 U.S. LEXIS 2118 (U.S. April 25, 2022). It squarely addresses whether "due process allows a state to assert general personal jurisdiction over a foreign corporation simply because it registers to do business there, as required by state law." The Pennsylvania Supreme Court said "no", but if SCOTUS reverses, it could severely increase "forum shopping" and impact the way personal injury and wrongful death cases involving foreign corporate defendants are tried in the various states of the United States.

The Underlying *Mallory* Facts:

Under Pennsylvania law, foreign corporations must register with the state to do business in the state. This registration under the Pennsylvania statutory scheme constitutes "a sufficient basis" by itself to enable Pennsylvania trial courts to exercise general personal jurisdiction over a foreign corporation.

Mallory filed a Federal Employer's Liability Act suit in a Pennsylvania state court against Norfolk Southern Railway (Norfolk) which was incorporated and had its headquarters in Virginia. Norfolk is an interstate carrier owning approximately 2,200 miles of track in Pennsylvania. Norfolk registered to do business in Pennsylvania pursuant to Pennsylvania law. Mallory, who was a resident of Virginia, alleged that he developed colon cancer because of his exposure to asbestos while working for Norfolk in both Virginia and Ohio. Mallory did not allege that he suffered any harmful occupational exposures in Pennsylvania. Simply put, Mallory's case had nothing to do with Pennsylvania and could not have been brought in Pennsylvania against Norfolk but for the Pennsylvania statutory scheme where the mere act of registration acts as a consent to general personal jurisdiction over registered foreign corporations such as Norfolk.

The Pennsylvania High Court Decision:

Norfolk moved to dismiss Mallory's action contending that it would violate its federal due process rights to have the case tried in Pennsylvania because of a lack of both personal and general jurisdiction since the case did not arise in Pennsylvania and Norfolk was not otherwise "at home" in Pennsylvania by being incorporated there or having its principal place of business in Pennsylvania. The trial court dismissed the action, and further granted Norfolk's motion to transfer Mallory's appeal to the Pennsylvania Supreme Court for a direct appeal.

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The Pennsylvania Supreme Court affirmed the trial court's decision dismissing Mallory's action on jurisdictional grounds. The Court expressly ruled that the Pennsylvania statutory scheme of conditioning the privilege of doing business in Pennsylvania on the submission of the foreign corporation to general jurisdiction in Pennsylvania courts deprived foreign corporations of the due process safeguards guaranteed in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 571 U.S. 117 (2014). The Court found that legislatively coerced consent to general jurisdiction was not voluntary consent and could not be constitutionally sanctioned. Accordingly, the Court held that the Pennsylvania statutory scheme was unconstitutional to the extent that it afforded Pennsylvania courts general jurisdiction over foreign corporations that were not at home in the Commonwealth by being either incorporated in Pennsylvania or having their principal place of business there.

The SCOTUS Proceedings:

The United States Supreme Court granted Mallory's petition for certiorari, meaning that at least four Justices on the court want to hear the case involving registration jurisdiction. The case has been fully briefed and oral argument was held on November 8, 2022.

According to one long-time court observer who listened to and reviewed the oral argument, the jurisdictional issue presented by the *Mallory* case appears to cut across the ideological predilections of the several justices, and a final decision could see some strange "bedfellows" on both the majority and dissenting sides, unless a unanimous opinion is issued. According to this observer, Justices Gorsuch, Sotomayor, and Jackson appeared to side with Mallory and against Norfolk. Justice Alito acknowledged that Norfolk was a large corporation that could litigate anywhere, but Justice Kagan was skeptical of the arguments advanced by Mallory. Amy Howe, "Jurisdictional Dispute Appears to Scramble the Court's Usual Ideological Lines." **https://www.scotusblog.com/2022/11/jurisdictional-dispute-appears-to-scramble-the-courts-usual-ideological-lines/**

A further illustration of how *Mallory* presents unusual alignments is shown by the fact that the Solicitor General appeared for the Biden Administration to support the corporate defendant instead of the personal injury plaintiff. The Biden Administration argued that upholding the notion of registration jurisdiction "poses risks to international comity by allowing state courts to hear cases against foreign defendants arising out of occurrences in foreign countries".

Learning Point: Several industry groups and associations have filed amici briefs before the Supreme Court explaining the dire consequences that will occur across the national litigation landscape if the Supreme Court reverses and upholds the notion of registration jurisdiction over foreign corporations. Amici such as the National Association of Manufactures and the Product Liability Council have argued to the Court if it holds for the plaintiff Mallory, manufacturers may be subject to the jurisdiction of courts in states that have little or no relationship to the lawsuit and that unfairly subject them to liability exposure greater than the appropriate state forums.

We are monitoring the *Mallory* proceedings and will immediately report on the Supreme Court's decision when issued.

DENNIS FITZPATRICK ELECTED FOR 10TH TERM AS CLAUSEN MILLER PRESIDENT AND CEO

Clausen Miller is proud to announce the re-election of Firm President **Dennis D. Fitzpatrick**. Mr. Fitzpatrick will serve his 10th term as President and CEO in 2023. Clausen's General Counsel **Amy Paulus** commented, "Dennis has orchestrated unparalleled focus on serving the firm's insurance industry clients, combined with impressive growth and demonstrable commitment to diversity and inclusivity over the past 9 years. Under Dennis' continuing leadership, 2023 promises to exceed all expectations."

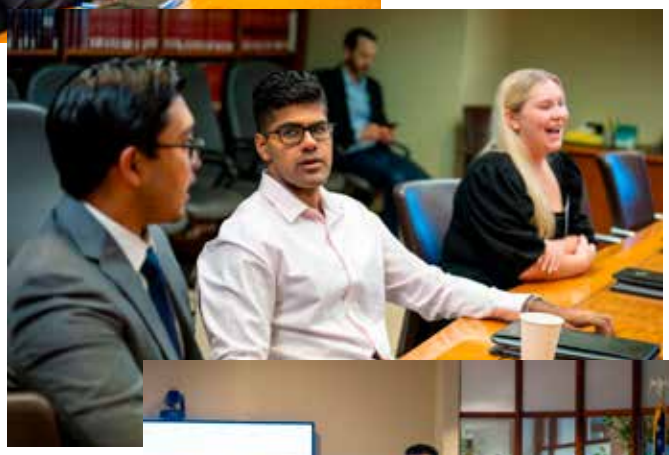
CLAUSEN COVERAGE CARES SUPPORTS CBA'S ANNUAL MOOT COURT COMPETITION

Liability Coverage Practice Group members **Amy Paulus**, **Mitch Torrence** and **Davy Raistrick** brought their advocacy skills to assist the Chicago Bar Association's 40th Annual Moot Court Competition. Amy, Mitch and Davy graded appellate briefs and served as appellate justices for oral arguments when 30 student teams from across the country competed in the CBA's prestigious annual competition on November 17–19, 2022. Watch out, future advocates—Clausen's Liability Coverage Practice Group is a hot bench!

SOUTHERN DISTRICT OF FLORIDA AMENDS LOCAL RULES TO ALLOW MEDIATION VIA VIDEOCONFERENCE

On October 26, 2022, the Southern District of Florida released amended local rules effective December 1, 2022. Local Rule 16.2 was amended to address the format of court annexed mediation, adding that "[u]nless the Court orders otherwise, the parties shall decide whether their mediation conference will be conducted in person or by video-conference and, if the parties cannot agree, the mediation conference shall be held by videoconference." This amendment, barring any Court order, specifically allows parties to attend mediation via videoconference, cutting down on the time and expense associated with in-person mediation for out-of-state clients. It also defaults that mediation will be held via videoconference if the parties cannot agree, so opposition's acquiescence to mediation by videoconference is unnecessary.

CLAUSEN MILLER HOSTS INAUGURAL "DAY IN THE LIFE" DIVERSITY PROGRAM FOR PROSPECTIVE LAWYERS



Providing future lawyers with an exciting firsthand glimpse into law firm life and introduction to the profession, Clausen Miller's Chicago office hosted their "Day in the Life" program for students from Loyola and UIC Colleges of Law on Friday, October 14.

The program, organized by Clausen's Diversity, Inclusion and New Talent Committee, welcomed students with diverse backgrounds to watch Clausen attorneys in action, and to engage during presentations on topics ranging from business and operational considerations for law firms, to the intersection of technology and the law. President & CEO **Dennis Fitzpatrick** also addressed the aspiring lawyers to share his perspective on why Clausen Miller is unique among firms and why he has remained at the firm since his days as a summer intern at Clausen.

The program received universal positive feedback from the law students, with one attendee writing to express their appreciation for the opportunity:

> Thanks again for taking the time to organize the program yesterday! It was such a cool and unique idea, and everyone at the firm was extremely kind, approachable, and most importantly honest. Better yet, it seemed like they really enjoyed working at the firm! Yesterday's program certainly convinced me to apply to Clausen Miller's summer internship program. This seems like a great place to be, and I'm looking forward to hearing from you!

Clausen Miller will host another "Day in the Life" Program for diverse law students again in the spring, and plans to expand the program to other Clausen offices in the near future.

Paul V. Esposito

James M. Weck

PAUL ESPOSITO AND JAMES WECK TEAM UP IN BIG ILLINOIS SUPREME COURT WIN FOR CONDOMINIUM PROPERTY MANAGERS

Clausen Miller trial attorney **James Weck** and appellate attorney **Paul Esposito** battled their way through the Illinois court system to secure victory for condominium property managers statewide. Two unit-sellers brought a class action alleging that a property manager overcharged them for providing disclosure documents to buyers required under the Condominium Property Act. The trial court rejected the manager's defense that the statute does not provide a right of action against property managers. The Illinois Appellate Court sided with the trial court.

But in this case of first impression, the Illinois Supreme Court agreed with Paul and Jim. The Court unanimously ruled that the statute was not intended to benefit sellers claiming overcharges for disclosure documents. Instead, the legislature imposed an obligation on sellers to timely provide documents to buyers. *Channon v. Westward Mgmt., Inc.*, 2022 IL 128040.

Channon provides a big win for property managers and their insurers. The courts were seeing a rise in class actions against property managers for alleged overcharges. The problem was serious because allowing suit against a property manager exposes it and its insurer to liability for alleged overcharges at every condominium it managed, not just at the unit-seller's condo. Now, sellers disgruntled with charges for documents must seek relief from their own condo associations, which could have set the fee rates for documents. This greatly reduces the potential for needless and expensive class actions against managers.

The case was also covered in *Law360* (subscription required).

Douglas M. Cohen

Christopher D. Sempier

DOUGLAS COHEN AND CHRISTOPHER SEMPIER SECURED A SUMMARY JUDGMENT RULING IN THE INSURED'S CASE AND DISMISSAL OF AN ASSIGNMENT-OF-BENEFITS CASE ARISING OUT OF THE SAME CLAIM FOR INSURER CLIENT

Clausen Miller attorneys **Douglas Cohen** and **Christopher Sempier** obtained a summary judgment ruling for their insurer client in the U.S. District Court for the Middle District of Florida, which dismissed the insured's claim with prejudice. The defense's Motion for Summary Judgment, based in part on the plaintiff's failure to timely disclose experts, was granted by Judge Paul G. Byron, who found that the plaintiff failed to timely respond to the Motion for Summary Judgment, and dismissed the complaint with prejudice.

Douglas and Christopher also obtained dismissal for their insurer client in an assignment-of-benefits claim in Seminole County Court arising out of the same claim, as the assignment failed to comply with Florida Statute § 627.7152.

Douglas focuses his practice on complex coverage issues, good faith claim handling, ADR, and litigation involving first-party property insurance matters as well as a variety of liability coverage and defense matters. Throughout his career, Douglas has assisted insurers in all aspects of coverage disputes from pre-suit investigations and coverage evaluations, through full litigation practice, resourcefully defending insurers against a multitude of property claims. Douglas is skilled in negotiation and mediation, having worked extensively with Florida and national insurers, self-insureds, third party administrators, municipalities, and businesses to resolve cases efficiently.

Christopher's practice focuses primarily on defending insurers in first-party property coverage cases throughout the central Florida region.

COVID-19 Pandemic Coverage Claims Update: The Appellate Tribunals Are Still Overwhelmingly Ruling In Favor of Insurers.

by ***Melinda S. Kollross***

Although some state intermediate appellate tribunals have issued rulings favorable to insureds, the Supreme Courts from Delaware, Maryland and Ohio have added their voice to other state high courts holding that there is no business interruption coverage for pandemic related economic losses. Additionally, the federal appellate tribunals continue to rule for insurers on these claims.

State Appellate Tribunals

CALIFORNIA

Amy's Kitchen Inc. v. Fireman's Fund Ins. Co., No. A163767 (Cal. App. 4th Dist. 10-4-22)

This decision turned upon a "communicable disease event" term in the policy. The policy defined this term as "an event in which a public health authority has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease at such location." Under that provision, according to the Court, the need to clean or disinfect infected or potentially infected covered property would constitute "direct physical loss or damage" of that property within the meaning of the policy. While the Court found that the insured had failed to allege a "communicable disease event" in its initial complaint, the Court nonetheless ruled that the insured should have been allowed leave to file an amended complaint to allege facts showing such an event that would trigger coverage under the policy.

Grech Motors Inc. v. Travelers Property Casualty Co. of Am., No. E077303 (Cal. App. 4th Dist. 10-11-22)

In a published opinion, the Court found *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*, 77 Cal.App.5th 753 (5th Dist. 2022), controlling holding that the phrase "direct physical loss of or damage to property" requires some negative occurrence to befall the physical aspect of the property; the phrase does not encompass a temporary restriction on using property that is physically intact and still in the physical possession of the insured.

Shusha Inc. v. Century-National Ins. Co., No. B313907 (Cal. App. 2nd Dist. 12-14-22)

The Court reversed the dismissal of the insured's complaint for pandemic related economic losses holding that the insured's allegations that its property became contaminated with COVID-19 was sufficient to satisfy the physical loss or damage requirements of the policy. According to the Court, the insured was not required to provide authority at the pleading stage to support its position that contamination with the COVID-19

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virus caused damage to the surfaces of the premises.

The Court also rejected an argument made by amici for the insurer that allowing the complaint to proceed would destabilize insurance markets by upholding claims for losses due to any regulation that limits a business's operations, such as a noise ordinance mandating early closure or a fire regulation reducing occupancy and requiring reconfiguration. The Court stated that these types of regulations would not involve allegations that an external force acted on the insured property causing a physical change in the condition of the property, as alleged by the insured in this case.

DELAWARE

APX Operating Co. v. HDI Global Ins. Co., No. 393, 2021 (Del. 10-5-22)

In a short 1-page order, the Delaware Supreme Court adopted the reasoning and decision of the trial court in dismissing the insured's suit for coverage. The trial court had relied upon a contamination exclusion that defined contamination in part as including a virus, and the trial court ruled that the exclusion barred the entirety of the insured's claim for pandemic related losses.

LOUISIANA

Cajun Conti LLC v. Certain Underwriters at Lloyds London, No. 2021-CA-0343 (La. App. 8-8-22), *review granted* (La. 11-22-22)

We had reported on this 3-2 split insured decision in Volume 3 of our 2022 CM Report where the Louisiana Court of Appeals 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.

On November 22, 2022, the Louisiana Supreme Court granted discretionary review of the Court of Appeals split decision. We will monitor these proceedings and immediately report on the same once a decision is issued.

MARYLAND

Tapestry, Inc. v. Factory Mut. Ins. Co., Misc. No. 1 (Md. Sup. Ct. 12-15-22)

Maryland's high court (now known as the Maryland Supreme Court) ruled in favor of the insurer regarding pandemic related economic losses. The case came to the Court from a question certified by a federal court in Maryland. The question as reformulated by the Court was:

"When a first-party, all-risk property insurance policy covers 'all risks of physical loss or damage' to insured property from any cause unless excluded, is coverage triggered when a toxic, noxious, or hazardous substance—such as Coronavirus or COVID-19—is physically present in the indoor air of that property; is also present on, adheres to, and can later be dislodged from physical items on the property; and causes a loss, either in whole or in part, of the functional use of the property?"

A unanimous Court answered this question in the negative, holding that there would be no coverage if COVID-19 caused neither tangible, concrete, and material harm to the insured property nor deprivation of the possession of the property.

NEW YORK

Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp., No. 450839/21 (N.Y. App. 4-7-22), *review granted* (N.Y. 11-17-22)

We had reported on this New York appellate decision in our summary contained in Volume 2 of our CM Report. The Appellate Division held, consistent with then prevailing New York law, that where a policy states that coverage is triggered only where there is "direct physical loss or damage" to the insured property, there must be actual, discernable, quantifiable change in the property. Here, there was no such change because of exposure to the virus, and thus the insured had no coverage.

On November 17, 2022, the New York Court of Appeals granted discretionary review of the appellate division's decision, and now we will get a definitive answer from New York's highest court on whether pandemic related economic losses are covered under business interruption provisions found in property policies. We will monitor these proceedings and immediately report on the same once a decision is issued.

Tina Turner Musical LLC v. Chubb Ins. Co. of Europe SE, No. 16804 (N.Y. App. Div. 1st Dep't 12-6-22)

The Court ruled for the insured holding that losses resulting from the cancellation of its Broadway show during the COVID-19 pandemic did not fall within the communicable

disease exclusion in the insurance policy because the exclusion did not clearly and unmistakably preclude from coverage losses caused by communicable diseases that were of such a systemic nature as to lead to quarantine or travel advisory orders by a national or international body or agency.

OHIO

Neuro-Communication Serv., Inc. v. Cincinnati Ins. Co., No. 2022-Ohio-4379 (12-12-22)

This case came to the Ohio Supreme Court on a question certified by an Ohio federal district court asking: "Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?" The Court agreed to hear the case and in a nearly unanimous opinion ruled for the insurer and against the insured.

The Court held that the definition of the term "loss" was clear and unambiguous. To obtain coverage, the insured had to show that there was loss or damage to covered property that was physical in nature. Such loss or damage did not include a loss of the ability to use insured property for business purposes. Accordingly, the Court answered the certified question by ruling that direct physical loss or damage to property did not arise from (1) the general presence of Covid in the community, (2) the presence of Covid on surfaces at a premises, or (3) the presence on a premises of a person infected with Covid. The Court found that its decision was consistent with the "clear trend" of federal and state appellate decisions holding that mere loss of use of a premises does not constitute a direct physical loss.

Only one Ohio Supreme Court Justice dissented, and then only on the limited ground that the Court shouldn't have agreed to answer the certified question stating that Ohio law was clear on the point.

Eye Specialists of Delaware v. Harleysville Worchester Ins. Co., No. 21AP-90 (Ohio App. 12-15-22)

The Court ruled for the insurer based on a virus exclusion holding that the language of the exclusion, barring loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease, was clear and unambiguous and barred the entirety of the insured's claims for pandemic related losses.

PENNSYLVANIA

Macmiles, LLC d/b/a Grant Street Tavern v. Erie Ins. Exch., 2022 Pa. Super 203

The Court ruled for the insurer holding that the insured could not obtain coverage for its pandemic related economic losses under a policy requiring physical loss or damage. According to the Court, the insured's building was not rendered unusable or uninhabitable. And COVID-19, a primarily airborne illness, did no physical damage to covered property. In-person dining was prohibited to prevent infected diners from spreading the virus to others, not because any condition of the insured property rendered the building unusable by diners.

Timothy A. Ungarean, DMD d/b/a Smile Savers Dentistry, PC v. CNA and Valley Forge Ins. Co., 2022 Pa. Super 204

In an inconsistent decision issued the same day as *Macmiles*, five of the Justices who ruled for the insurer in *Macmiles*, ruled for the insured in *Ungarean* finding that the economic losses suffered by the insured dentist were covered despite policy language requiring physical loss or damage. A strong dissent of four other Justices who had ruled for the insurer in *Macmiles* accused the majority of strained and unsupported interpretation of the policy, stating: "The Majority and the trial court have engaged in a strained reading of a property insurance policy in order to find coverage for a purely economic loss. The conclusion they reach is unsupportable and unreasonable under the plain language of the Policy and case law governing the interpretation of insurance policies. While [we] sympathize with the plight of the many business owners who have suffered, and continue to suffer, significant financial hardship because of the Covid-19 pandemic, this Court must render decisions based on the law and the facts of each case. In [our] view, the applicable law, the Policy language, and the facts before us lead inexorably to the conclusion that the trial court erred in granting summary judgment in favor of Ungarean and denying Appellants' competing motion for summary judgment."

Federal Appellate Tribunals

SECOND CIRCUIT

In Re Generali COVID-19 Travel Insurance Litigation, No. 22-336 (2d Cir. 11-2-22)

The Court adopted the reasoning of the District Court and held for the insurer and against would be travelers who were impacted by stay-at-home orders, holding that under the laws of Georgia, Oregon, Missouri, Utah, Pennsylvania, and Florida the travelers' claims were barred by a travel restriction exclusion.

FOURTH CIRCUIT

Fountain Enterprises LLC et al. v. Markel Ins. Co., No. 21-2326 (4th Cir. 11-2-22)

The Court applied its previous decision in *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022), holding that coverage for business income loss and other expenses did not apply to claims for financial losses caused by the COVID-19 pandemic in the absence of any material destruction or material harm to the covered premises and further observing that this holding was consistent with the unanimous decisions by various sister circuits which have applied various states' laws to similar insurance claims and policy provisions.

SIXTH CIRCUIT

Brunswick Panini's LLC et al. v. Zurich Am. Ins. Co., No. 21-3222 (6th Cir. 12-21-22)

Ceres Enterprises LLC v. The Travelers Indem. Co. of Am., No. 21-3232 (6th Cir. 12-21-22)

Equity Planning Corp. v. Westfield Ins. Co., No. 21-3229 (6th Cir. 12-21-22)

Family Tacos LLC v. Auto-Owners Ins. Co., No. 21-3224 (6th Cir. 12-21-22)

Mikmar Inc. et al. v. Westfield Ins. Co., No. 21-3230 (6th Cir. 12-21-22)

These 5 decisions were all issued the same day and each ruled for the insurer based upon the Ohio Supreme Court's decision in *Neuro-Communication Serv., Inc. v. Cincinnati Ins. Co.*, No. 2022-Ohio-4379 (12-12-22). According to the Court, under *Neuro's* analysis, the insureds in these cases did not sustain the required "direct physical loss of or damage to" property simply from loss of use.

NINTH CIRCUIT

Caballero v. Massachusetts Bay Ins. Co., No. 21-35510 (9th Cir. 10-17-22)

Hot Yoga, Inc. v. Philadelphia Indem. Ins. Co., No. 21-35806 (9th Cir. 10-17-22)

Kara McCulloch, DMD v. Valley Forge Ins. Co., No. 21-35520 (9th Cir. 10-17-22)

Shokofeh Tabaraie DDS PLLC v. Aspen Am. Ins. Co., No. 21-35477 (9th Cir. 10-2-22)

In these 4 memorandum decisions, the Court ruled for the insurers holding that the insureds failed to show they suffered any direct physical loss or damage by sustaining economic losses due to the closure of their businesses because of COVID-19. The Court found its decision in each was governed by the Washington Supreme Court's decision in *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525, 532 (Wash. 2022), holding that losses due to the COVID-19 closure orders did not qualify for coverage as direct physical loss of or damage to property.

BA LAX LLC et al. v. Hartford Fire Ins. Co., No. 21-55109 (9th Cir. 10-21-22)

The Court found that *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021), as well as several decisions by the California Court of Appeals required a ruling for the insurer because the insured's economic losses did not arise from any physical loss or damage to insured property.

Protege Restaurant Partners LLC v. Sentinel Ins. Co. Ltd., No. 21-16814 (9th Cir. 10-25-22)

Relying on the California Court of Appeals decisions in *United Talent Agency v. Vigilant Insurance Co.*, 77 Cal. App. 5th 821 (2022), and *Musso & Frank Grill Co. v. Mitsui Sumitomo Insurance USA Inc.*, 77 Cal. App. 5th

753 (2022), the Court ruled for the insurer holding that the mere loss of use of physical property to generate business income, without any other physical impact on the property, did not give rise to coverage for direct physical loss.

Tao Group Holdings LLC v. Employers Ins. Co. of Wausau, No. 22-15506 (9th Cir. 11-22-22)

The Court applying California, Illinois and New York law held that the insured was not entitled to coverage for its pandemic related economic losses because it did not sustain any physical loss or damage to insured property. According to the Court, the insured did not allege that it had to repair, replace, or dispose of any property that would indicate that it has sustained such physical loss or damage entitling it to coverage.

Hoak et al. v. United Specialty Ins. Co., No. 21-16986 (9th Cir. 11-22-22)

Plaintiffs purchased ski pass insurance and sued to recover on the policy when a ski resort was shut down because of the pandemic. The Court ruled for the insurer holding that an "effective date of coverage" provision barred the insured's claim. According to the Court, the "effective date of coverage" provision made clear that coverage terminated on the date upon which ski operations ceased due to an unforeseen event if that date was earlier than the scheduled end of the season. Because the shutting of the ski resort due to the pandemic was an unforeseen event, the insured was not entitled to coverage because the ski resort closed earlier than the end of the ski season.

Giorgio Cosani Menswear Inc. et al. v. AmGuard Ins. Co., No. 22-55541 (9th Cir. 12-12-22)

The Court ruled for the insurer holding that an exclusion stating that coverage was excluded for any "loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease," was clear and unambiguous and barred the entirety of the insured's claim for coverage for pandemic related economic losses.

ELEVENTH CIRCUIT

15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London, No. 21-10949 (11th Cir. 10-11-22)

The Court found its prior decision in *SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London*, 32 F.4th 1347 (11th Cir. 2022), dispositive and held for the insurer. *SA Palm Beach* held that losses stemming from the suspension of business operations and extra costs incurred because of COVID-19 were insufficient under Florida law to trigger insurance coverage because they lacked the requisite "tangible alteration of the insured properties."

Zurich Am. Ins. Co. v. Tavistock Restaurants Group LLC, No. 21-14215 (11th Cir. 11-17-22)

In a case involving Georgia law, the Court found that its previous decision in *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, 35 F.4th 1318, 1320–21 (11th Cir. 2022), was controlling and required that the insured's claim for coverage for its pandemic related economic losses be denied. Georgia law as applied in *Henry's* required a showing of physical alteration to property to satisfy the requirements of physical loss or damage, and the insured sustained no such loss in this case.

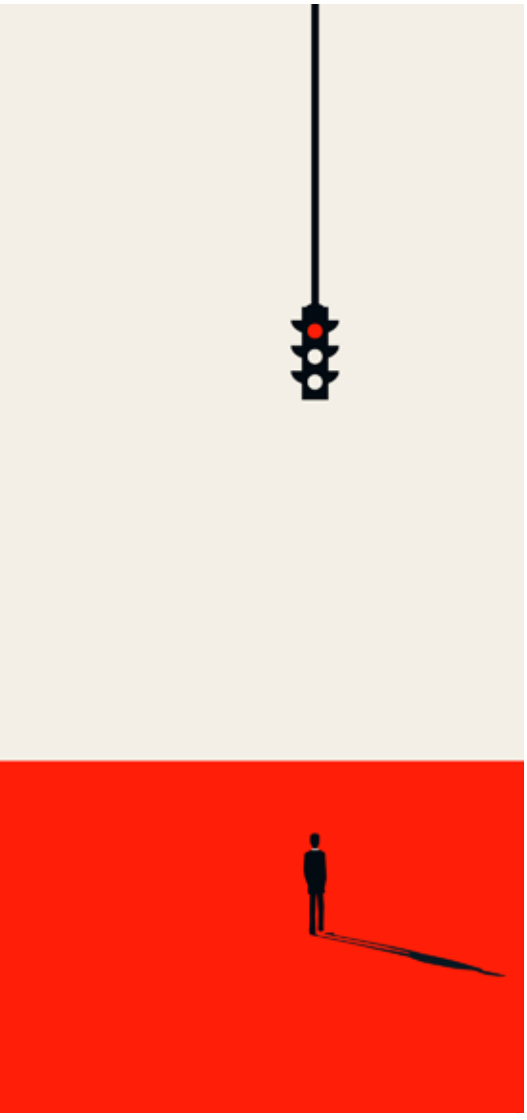
Federal and State Supreme Court Denials of Petitions for Further Review

For informational purposes only, these Supreme Courts denied petitions seeking further review of decisions favorable to the insurance industry. We wish to caution, however, that these denial orders mean nothing: A denial order simply means that the Supreme Court has decided not to hear the case. It should not be interpreted or cited for high court approval of the lower court decision.

Goodwill Indus. of Central Oklahoma Inc. v. Philadelphia Indem. Ins. Co., No. 21-1358 (U.S. 6-6-22), *denying cert., Goodwill Indus. of Central Oklahoma Inc. v. Philadelphia Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021)

Bel Air Auto Auction Inc. v. Great Northern Co., No, 22-392 (U.S. 11-21-22), *denying cert., Bel Air Auto Auction Inc. v. Great Northern Co.*, No. 21-1493 (4th Cir. 6-14-22)

Sweet Berry Cafe, Inc. v. Society Ins., Inc., No. 128399 (Ill. 9-28-22), *denying leave to appeal, Sweet Berry Cafe, Inc. v.*



***Society Ins., Inc.*, 2022 IL App (2d) 210088**

***Alley 64, Inc. v. Society Ins.*, No. 128576 (Ill. 9-28-22), *denying leave to appeal, Alley 64, Inc. v. Society Ins.*, 2022 IL App (2d) 210401**

***Gourmet Deli Ren Cen Inc. v. CB Farm Bureau Gen. Ins. Co. of Michigan*, No. 164578 (Mich. 12-7-22), *denying leave to appeal, Gourmet Deli Ren Cen Inc. v. CB Farm Bureau Gen. Ins. Co. of Michigan*, No. 357386 (Mich. App. 5-26-22)**

***Three Won Three Corp. v. CB Property-Owners Ins. Co.*, No. 164565 (Mich. 12-7-22), *denying leave to appeal, Three Won Three Corp. v. CB Property-Owners Ins. Co.*, No. 356791 (Mich. App. 5-19-22)**

***Gavrilides Management Co. LLC et al. v. Michigan Ins. Co.*, No. 164166 (Mich. 12-7-22), *denying leave to appeal, Gavrilides Management Co. LLC et al. v. Michigan Ins. Co.*, No. 354418 (Mich. App. 2-1-22)**

***Apple Annie, LLC v. Oregon Mut. Ins. Co.*, No. S276814 (Cal. 12-14-22), *denying leave to appeal, Apple Annie, LLC v. Oregon Mut. Ins. Co.*, 82 Cal. App.5th 919 (Cal. App. 1st Dist. 9-2-22)**

Learning Point: To date these high courts have all issued opinions in favor of insurers regarding pandemic related loss claims: Iowa, Maryland, Massachusetts, Ohio, Oklahoma, South Carolina, Washington and Wisconsin. As noted in this update, the Delaware Supreme Court adopted the reasoning of a trial court finding that a contamination exclusion barred the insured's claim for pandemic loss coverage. And the Virginia Supreme Court refused to review a trial court decision finding no error in the trial court's ruling that an insured suffered no physical loss or damage. In all trial and appellate cases moving forward, it is important to stress the nationwide consensus growing among the high courts stretching across the nation that there is no property coverage for pandemic related economic losses, just as the Ohio Supreme Court stated in its recent *Neuro-Communications* decision. ♦

Insurer Alleges No Coverage For Double-Charges By McDonald's Mobile App

by ***Mitchel D. Torrence***

American Family Mutual Insurance Company ("American Family") recently filed a declaratory judgment action in the Circuit Court of Cook County, IL, seeking a declaration that it owes no duty to defend its insured, a McDonald's franchise owner, for an underlying suit claiming that the insured reaped the benefit of a flaw in McDonald's mobile app that charged patrons twice. *American Family Mutual Insurance Co., S.I. v. Karavites Management Inc., Carolyn Dodd, and Adyen Inc.* ("American Family").

Facts

American Family seeks a declaration that it owes no duty to defend Karavites Management, Inc. ("KMI") in an underlying suit brought by Carolyn Dodd against KMI and Adyen, Inc. The suit alleges that Dodd, and other similarly situated individuals, were charged twice for orders placed via the McDonald's mobile app due to a design flaw in the app. It also alleges that KMI unjustly enriched itself through the double payment it received.

According to its complaint, American Family issued six general liability policies to KMI effective from 3/1/2017 until 3/1/2023. The policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Bodily injury" is defined as "bodily injury, sickness, or disease sustained by a person including death resulting from any of these at any time." The policy also provides coverage for personal and advertising injury. The policies include an Electronic Data endorsement which excludes coverage for "bodily injury," "property damage," or "personal and advertising injury" arising out of "actual or alleged failure[s], malfunction[s], or inadequacy[,] of certain computer operations." The exact policy terms vary slightly but largely provide the same coverage and contain similar Electronic Data endorsements.

Analysis: Coverage Issues Presented

American Family alleges that its policies do not provide a duty to defend KMI against the *Dodd* suit. American Family contends that *Dodd* does not allege an "occurrence," nor does it seek damages because of bodily injury or property damage, since the *Dodd* plaintiffs allege solely economic injury.

American Family also relies on the Electronic Data exclusions to bar coverage because *Dodd* is predicated upon allegations of a design flaw within the McDonald's app. American Family contends that the alleged app design flaw constitutes a failure or malfunction of computer operations. It also alleges that the policies do not provide coverage for contractual liabilities, which *Dodd* alleges.

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Given the proliferation of mobile apps for all manner of commerce, this suit bears monitoring, and we will be following and reporting on developments.

Learning Point: American Family provides an opportunity for an Illinois court to interpret the scope of coverage, or lack thereof, under the American Family policies where damages are alleged arising out of the use of a mobile application, including the app's contractual terms of use, which result in financial loss. This case also serves as a good reminder to check your receipts when making purchases on a mobile app. ♦

Out Of Bounds: The Lower Standard Of Supervisory Liability For Sporting Events

by ***Paul V. Esposito***

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Times have changed. Back in the day, high school sports were generally limited to four: football, basketball, league baseball, and track. Not so today. Students also can play soccer, lacrosse, rugby, golf, tennis, softball, badminton, ice hockey, and cross-country—just to mention the outdoor sports. Now add indoor sports like fencing, swimming, water polo, wrestling, cheerleading, gymnastics, and volleyball. That's a good thing. It allows students to find and use their talents productively.

But it makes demands on school facilities, a demand that doubled as girls became more involved. Scheduling is increasingly complicated. And practices are more congested. There are only so many places to put so many kids at any given time. Safety, always an issue, becomes a greater one.

It became a greater issue in New Jersey when a goalie was injured during warm-ups. For her coach, it has become a potential liability based on a seemingly surprising new standard. *Dennehy v. East Windsor Reg. Bd. of Ed.*, 267 A.3d 1156, 2022 N.J. LEXIS 87.

Facts

Dezarae Fillmyer coached a girls' field hockey team. The athletic director scheduled Fillmyer's team to practice immediately after the boys' soccer team finished practicing. While the girls awaited their turn, Coach Fillmyer instructed them to warm up in the D-zone, an area between fields. The school had installed 20-foot high nets at the ends of the soccer field to prevent balls from intruding into other areas. But during the warm-up, two soccer balls landed near the girls.

Morgan Dennehy was the goalie for the girls' team. She was not involved with other girls in the warm-ups. At Morgan's request, Coach Fillmyer allowed her to take a practice shot. As Morgan shot, a soccer ball cleared the net and hit the base of her skull.

Morgan sued Coach Fillmyer, the board of education, school, athletic director, and others for their allegedly negligent failure to supervise and provide warnings and safeguards. The trial judge ruled for defendants because Morgan's allegations did not support a claim of intentional or reckless conduct. Morgan's appeal only challenged the recklessness standard applied to Fillmyer. The Appellate Division reversed, ruling that because Fillmyer was not a co-participant, her conduct must be measured under a negligence standard. The New Jersey Supreme Court decided to look deeper.

Analysis

Morgan's was not the first New Jersey case to consider the issue of liability for injuries incurred during sporting events. The issue arose when during a scheduled informal softball game, a catcher sustained injuries resulting from a play at the plate. The Supreme Court ruled

that to promote active participation and to avoid excessive litigation, the duty to participants is to refrain from reckless or intentional conduct. *Crawn v. Campo*, 136 N.J. 494 (1994). The Court later extended *Crawn's* applicability to other recreational sporting events, whether involving contact or non-contact sports.

But the Court saw Morgan's case differently because she did not allege that Fillmyer was actively participating in the warm-ups. The "essence of [Morgan's] theory" was that Fillmyer chose the wrong time and place to start practice. The Court compared it to "a biology teacher taking a class out to study marine life at the beach"—an act that should impose a duty of reasonable care. So, the Court ruled that Fillmyer is subject to liability for her conduct. What will happen remains to be seen.

Learning Point: The decision seems surprising because the Court simultaneously subjects coaches to liability while minimizing their roles in a sport. A coach is an active participant in organized sports because at every level, organized sports do not happen without one. A coach tries out the players, assesses their skills, assigns positions, sets lineups, and makes needed substitutions during games—all essential to the game itself. A coach meets with players before, during, and after practices and games. A coach's active participation is as critical as a player's talent. Without a coach, players will likely not get a chance to compete. It seems unfair to lower the liability standard for the coach when a player's liability standard is high.

The ruling puts coaches in difficult positions. Morgan's theory was that the coach put her in the wrong field at the wrong time. But unlike a biology teacher's unnecessarily sending students to a beach, a practice field is the normal classroom for student-athletes. The athletic director scheduled the practice for immediately after the boys' practice. Fillmyer needed to be there on time to take full advantage of the field, so she and the team arrived early. They were essentially waiting just outside the classroom door. To keep the team organized and focused, she had them warm up behind a 20-foot fence—the *school's* answer to the risk of errant shots. One more: Morgan, not the coach, wanted the practice shot that put her in position for injury. Why would a coach want to risk personal liability under those or similar circumstances? At least in New Jersey, the decision should make people think twice about coaching.

And with all the need for good coaching, that's not a good thing. ♦

Security Consultant Reports Are Not Protected By The Medical Studies Act

by ***Kathleen M. Klein***

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Introduction

In a case brought on behalf of an active shooter victim against a hospital, the Illinois Appellate Court, First District recently considered whether the Medical Studies Act protects a consultant report developed by a hospital consultant following an active shooter incident. The opinion further crystallizes the boundary around the MSA privilege in Illinois and demonstrates how facilities can help avoid production of consultant reports. *Less v. Mercy Hospital and Medical Center, et al.*, 2022 IL App (1st) 220247.

Facts

Plaintiff's decedent was killed by an active shooter at the defendant hospital. Following the incident, the hospital retained two consultants, Sako and Carmen, to assess whether safety improvements could be made at the hospital. Both wrote reports. Subsequently, Plaintiff filed suit, alleging various negligent security theories. The hospital withheld both reports in the litigation, citing privilege under the Medical Studies Act.

Analysis

Application Of The Medical Studies Act To Patient Safety And Security

This opinion continues the Court's strong efforts to limit the reach of the Medical Studies Act to medical malpractice issues. In the past, courts have rejected claims of privilege under the Medical Studies Act for documents it found not related to patient care; for example, in a patient-on-patient assault, *Giangiulio v. Ingalls Memorial Hospital*, 365 Ill. App. 3d 823 (2006), and in a patient fall down stairs, *Dunkin v. Silver Cross Hospital*, 215 Ill. App. 3d 65 (1991).

In this case, the Appellate Court analyzed the reports and the factual record against the requirements of the Medical Studies Act, focusing on whether the reports were used for one of the purposes specified in the Act. The privilege applies where documents are "used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation." The Court held that the Act refers only to activities related to "improving patient care," and that this did not include security reviews, hospital security, or safety. "Morbidity and mortality," as used in the statute, refers to the context of medical care, not security. Thus, as in the *Giangiulio* and *Dunkin* cases, the report was discoverable and had to be produced.

Learning Point: Protecting outside consultants' reports from discovery

Less offers a broader practice pointer for healthcare facilities: litigation privilege is a more viable, though still difficult, path to privilege over non-patient care consultants' reports.

In this case, the hospital itself initially retained consultant Sako. The next day, defense counsel retained Sako as an expert consultant in the lawsuit. Though the hospital attempted to characterize Sako as a nontestifying consultant, the Court noted that Sako was retained by the hospital committee initially, and only retained the next day by defense counsel. His report reflected only interactions with hospital staff, not with counsel. Thus, the Court drew a distinction between his expert work for counsel, which would be privileged, and his consultative work for the hospital, which was not. The Court found the report was part of his consultative work, and thus found the report not privileged.

This opinion reinforces that healthcare facilities cannot rely on the Medical Studies Act for protection over their consultants' reports about operations and safety practices, whether or not those practices affect patients. Had Sako been retained solely by defense counsel, rather than first by the hospital, and had defense counsel been involved in developing or carrying out the investigation, it is possible that this holding might have been different.

Where a significant injury or fatality occurs within a medical facility that does not arise directly out of medical care, the facility may wish to conduct an internal review, or bring in a consultant to evaluate their applicable procedures, as the hospital did in this case. This could occur outside the rare active shooter incident—for example, a premises-type incident might require an engineer, or an assault might warrant advice on security. If suit has not been filed, the hospital has the option to retain counsel to provide pre-suit advice, and to participate in the conduct of the review by the consultant, thus supporting an eventual claim of privilege. Counsel can advise the consultant and facility alike as to materials to include within the report, to strengthen a claim of privilege on future *in camera* review, and also advise as to anything potentially nonprivileged along the way. If suit *has* been filed, the absence of a 2-622 affidavit of merit attached to the complaint may indicate a case alleging non-medical negligence and should prompt caution by the facility in conducting any internal review. Best practice to protect such a review would be the involvement of defense counsel as soon as possible. ♦

Not Good Enough: The Minnesota Supreme Court Requires More Specificity In Exculpatory Clauses

by ***Paul V. Esposito***

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What was the greatest single advance in human history? Some might say the discovery of how to create and harness fire. After all, raw meat can get nasty in short order. Others might argue that it was the discovery of the wheel. It made doable what otherwise could be impossible.

But there's a pretty good argument that the greatest advancement was the formation of language. It allowed human interaction to extend beyond grunting or pointing. As words became common, it allowed for understanding and direction among peoples. Language allowed civilization to move forward.

In the law, language is huge. The meaning of words used in contracts is often at the center of disputes. In resolving them, courts interpret words as they are popularly understood. It provides the best explanation of what people were thinking about when they agreed to them.

Recently, the Minnesota Supreme Court struggled over how to treat the words "any and all" in an exculpatory clause. The Court's split decision will impact the language of those clauses going forward. *Justice v. Marvel, LLC*, 2022 Minn. LEXIS 369.

Facts

Michelle Sutton took her seven-year-old son Justice to a friend's venue birthday party. Pump It Up Parties, owned by Marvel LLC, provided an inflatable amusement park area for kids' events. Before entering, Michelle signed a waiver of liability specifically naming herself and Justice. Michelle agreed to:

> [R]elease and hold harmless MARVEL, LLC . . . from and against any and all claims, injuries, liabilities or damages arising out of or related to our participation in any and all Pump It Up programs, activities, parties, the use of the play area and/or inflatable equipment.

Michelle acknowledged the "inherent risks" of using the area and equipment; she "knowingly and freely assume[d] all such risks, both known and unknown." She also agreed that she was signing in consideration of receiving permission to enter the play area.

Justice fell off an inflatable object and hit his head on the carpeted concrete floor. He sustained severe head and brain injuries. On turning 18, Justice sued Marvel for negligently failing to pad the floor. The district court granted Marvel's motion for summary judgment because the waiver was unambiguous and did not violate public policy. The court of appeals agreed. Although finding the release overly broad by including claims of "intentional, willful or wanton acts," it noted that Justice only pled a negligence claim.

Analysis

The Supreme Court majority saw in the case an issue of first impression: does an exculpatory clause release all claims of liability without specifically mentioning negligence? The majority held that the strict construction rule governing indemnity clauses also applies to exculpatory clauses. Contract language need not mention the word "negligence" but "must use specific express language that 'clearly and unequivocally' states the contracting parties' intent." Treating the clauses similarly was appropriate because both shift responsibility and so are disfavored under the law.

Looking at Michelle's waiver, the majority agreed that "Justice's negligence claim is definitionally under the umbrella of 'any and all claims.'" But it held that the issue is whether, despite its unambiguity, the waiver "specifically provide[d]" that it released Marvel from liability for negligence. Finding no such provision, the majority held the waiver insufficient.

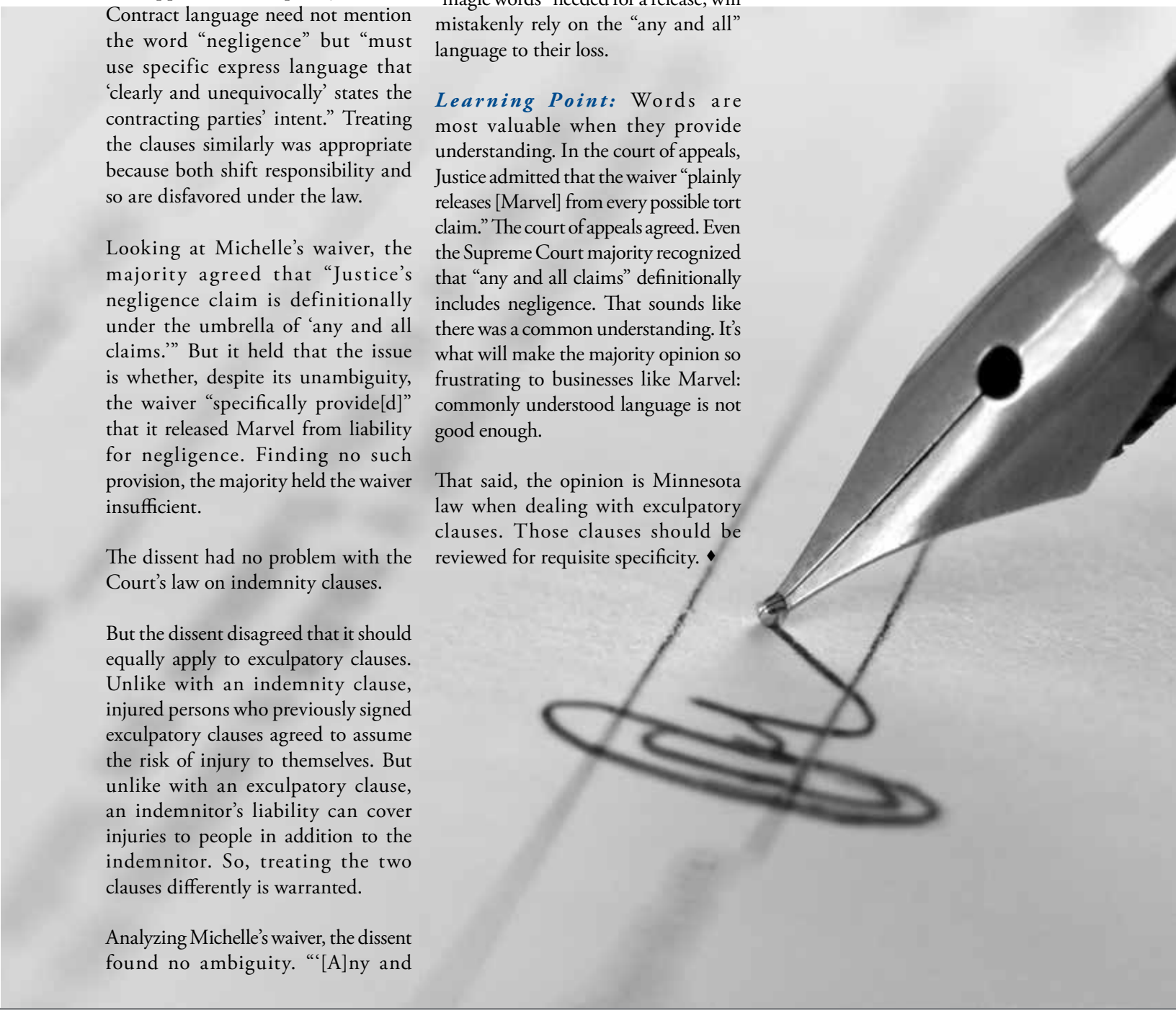
The dissent had no problem with the Court's law on indemnity clauses.

But the dissent disagreed that it should equally apply to exculpatory clauses. Unlike with an indemnity clause, injured persons who previously signed exculpatory clauses agreed to assume the risk of injury to themselves. But unlike with an exculpatory clause, an indemnitor's liability can cover injuries to people in addition to the indemnitor. So, treating the two clauses differently is warranted.

Analyzing Michelle's waiver, the dissent found no ambiguity. "'[A]ny and all' means 'any and all.'" The risk of ignoring unambiguous language is that it deprives parties what they bargained for. The problem goes well beyond Justice and Marvel. The "any and all" language is often used in waivers covering recreational activities—of which Minnesota has many. Less sophisticated parties, unaware of the "magic words" needed for a release, will mistakenly rely on the "any and all" language to their loss.

Learning Point: Words are most valuable when they provide understanding. In the court of appeals, Justice admitted that the waiver "plainly releases [Marvel] from every possible tort claim." The court of appeals agreed. Even the Supreme Court majority recognized that "any and all claims" definitionally includes negligence. That sounds like there was a common understanding. It's what will make the majority opinion so frustrating to businesses like Marvel: commonly understood language is not good enough.

That said, the opinion is Minnesota law when dealing with exculpatory clauses. Those clauses should be reviewed for requisite specificity. ♦



ATTORNEY'S FEES

AGREEMENT LACKED UNMISTAKABLE INTENT TO INDEMNIFY AS TO FEES

Sage Systems, Inc. v. Liss, 2022 N.Y. LEXIS 2017 (N.Y.)

Defendant unsuccessfully brought partnership dissolution action against plaintiff. Plaintiff then sued defendant seeking attorney's fees and costs incurred defending the dissolution action. Plaintiff claimed broad indemnification provision in partnership agreement allowed attorney's fees. ***Held:*** Indemnification provision lacked express language or indicia of parties' unmistakably clear intent to indemnify each other for attorney's fees in action between them on contract.

CONNECTICUT UNFAIR TRADE PRACTICES ACT

GOVERNMENTAL EXEMPTION EXEMPTS FROM CUTPA LIABILITY

Tremont Public Advisors, LLC v. Materials Innov. & Recycling Auth., AC 45078 (Conn. App.)

Plaintiff submitted proposal to defendant for provision of municipal government liaison services. Defendant awarded the liaison services contract to a law firm, whose proposal was noncompliant. Plaintiff alleged the award of the contract to the law firm without a legitimate public bidding process violated the Connecticut Unfair Trade Practices Act (CUTPA). Defendant successfully moved to strike, arguing it was exempt from CUTPA. ***Held:*** Affirmed. Defendants' bidding process was authorized and regulated by statute and its conduct was subject to pervasive state regulation, exempting it from CUTPA liability pursuant to the governmental exemption.

DAMAGES

ADDITUR DENIED WHERE NO EVIDENCE SUPPORTED AMOUNT ACTUALLY PAID

Erin C. Hassett v. Secor's Auto Center, Inc., AC 44804 (Conn. App.)

Plaintiff sought to revoke acceptance of used vehicle she had purchased from defendant through loan. After experiencing issues with the vehicle, plaintiff stopped using it but continued to make monthly payments. Jury returned verdict in plaintiff's favor on her revocation of acceptance claim and awarded damages in an amount less than the vehicle's full purchase price. Plaintiff unsuccessfully filed motion for additur seeking full purchase price. ***Held:*** Affirmed. Revocation of acceptance did not require refund of total purchase price where no evidence showed such amount had been paid.

DEFAMATION

FAIR REPORT PRIVILEGE APPLIES TO DISCIPLINARY HEARINGS

Ammar Idlibi v. Hartford Courant Co., AC 44977 (Conn. App.)

Plaintiff, a pediatric dentist, sued for defamation and intentional misrepresentation in connection with articles published by defendant about plaintiff's disciplinary hearings before the dental commission regarding his treatment of a child. A reporter employed by defendant had contacted plaintiff regarding a similar complaint against another dentist at plaintiff's dental practice. The parties disputed whether the reporter informed plaintiff he would be the subject of the articles. Defendant obtained summary judgment. ***Held:*** Fair report privilege protects publication of report of official action or proceeding that deals with a matter of public concern if report is accurate and complete or fair abridgement of proceeding. Reporter's statement that he was working on article about another dentist was apparently true, defeating misrepresentation claim.

EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA)

EDTPA APPLIES TO CLAIMS FOR HARM IF ACT AT ISSUE OCCURRED ON OR AFTER EFFECTIVE DATE OF AMENDMENT

Ruth v. Elderwood at Amherst, 2022 N.Y. LEXIS 5506 (N.Y.)

Court dismissed lawsuit alleging decedent's death was caused by treatment rendered in nursing homes in March and April of 2020. ***Held:*** Affirmed. Nursing home defendants were immune from liability for negligence under EDTPA because amendment was enacted by New York State legislature during COVID-19 pandemic.

EMPLOYMENT LAW

REALTOR NOT ENTITLED TO WAGE AND HOUR CLAIM

Whitlach v. Premier Valley, Inc., 2022 Cal. App. LEXIS 1031 (Cal. App.)

Licensed real estate agent filed class-action complaint under California Labor Code Private Attorney General Act of 2004 ("PAGA"), which allows an "'aggrieved employee'" to recover civil penalties for Labor Code violations committed by an employer. Realtor agent claimed employer failed to pay all wages due and misclassified realtor agents as independent contractors. Employer demurred. ***Held:*** Proper test for independent contractor status turns on written contract, which was not unconscionable here. The lead class plaintiff's separate contract as sales manager was irrelevant for purposes of his representative class claims.

EMPLOYER MUST DEMONSTRATE LEGITIMATE NONDISCRIMINATORY REASONS FOR DISCHARGE

Fiveash v. Conn. Conference on Municipalities, AC 44824 (Conn. App.)

Plaintiff sought damages from various defendants for alleged gender discrimination and retaliation. Several employees expressed displeasure with working for plaintiff and voiced complaints. Defendants investigated the allegations, which resulted in plaintiff's termination. Defendants were granted summary judgment. ***Held:*** Affirmed. Repeated charges of mismanagement of employees and failure to respect authority were not a pretext for unlawful discrimination. Plaintiff was not engaged in a protected activity giving rise to a claim of retaliation.

FORGERY INSURANCE

INSURER REQUIRED TO COVER BANK'S LOSS FROM FORGERY SCAM DUE TO AMBIGUITY WITH CONDITION PRECEDENT

Banc of California Nat'l Assoc. v. Fed. Ins. Co., 2022 U.S. App. LEXIS 34179 (9th Cir.)

Insurer's policy covered forgery loss to bank if six conditions were met, including that the forgery appeared on one of eight listed types of collateral, including, a "Security Agreement" or an "Evidence of Debt." Insured bank made $15 million loan to third-party in reliance on forged "Control Agreement," which insurer found did not meet definition of "Security Agreement" or "Evidence of Debt." Trial court agreed. ***Held:*** Reversed. Forged Control Agreement met definition of "Security Agreement" or "Evidence of Debt." Also, trial court failed to consider forged document as direct cause of bank's loss.

LEGAL MALPRACTICE

PROXIMATE CAUSE NOT RESOLVABLE ON MOTION TO DISMISS

Fed. Ins. Co. v. Lester Schwab Katz & Dwyer, LLP, 2022 N.Y. App. Div. LEXIS 6997 (N.Y. App. Div. 1st Dep't)

Court denied law firm's motion to dismiss legal malpractice claim, ruling complaint sufficiently alleged specific facts supporting that, but for law firm's alleged negligence, plaintiff would have achieved better result. ***Held:*** Affirmed. Claim adequately asserts cause of action for legal malpractice.

PARTIES' ACTIONS DEMONSTRATE EXISTENCE OF ATTORNEY-CLIENT RELATIONSHIP

Shan Yun Lin v. Lau, 2022 N.Y. App. Div. LEXIS 6162 (N.Y. App. Div. 2d Dep't)

Court denied defendant law firm's motion, which argued attorney-client relationship did not exist. ***Held:*** Affirmed. Plaintiffs submitted affidavits stating that they met with attorney who advised them he would represent them and instructed them to wire funds to his escrow account.

LIFE INSURANCE

NOTICE TO INSURER OF CHANGES OF BENEFICIARY INTEREST IS CONTROLLED BY DIVORCE DECREE

Randle v. Farmers New World Life Ins. Co., 85 Cal. App. 5th 53 (Cal. App.)

Trial court granted summary judgment to insurer on breach of contract and related claims arising from insurer's payment to plaintiff who was beneficiary of ex-husband's life insurance policy. Plaintiff was paid reduced interest contrary to terms of divorce decree. ***Held:*** Reversed. Evidence of failure to comply with policy terms regarding changes in ownership did not defeat plaintiff's claims because policy's requirements for updating ownership did not control over divorce decree, of which insurer had imputed knowledge or notice.

LIMITATION OF ACTIONS

RAILROAD WORKER'S CLAIM BARRED AS TARDY

Metz v. CSX Transp. Corp., 2022-Ohio-3503 (Ohio App.)

Employee brought FELA action claiming work exposure to diesel exhaust caused COPD. ***Held:*** Action was barred by three-year statute of limitations. Action accrues upon discovery of possible connection, rather than likely connection, of injury due to exposure. Medical records showed that ten years before suit a suspicion existed about work-related cause.

LITIGATION

WRITTEN AND FILED ACCEPTANCE OF SETTLEMENT OFFER VALID DESPITE INCLUSION OF ADDITIONAL PAYEE ON CHECK

Suarez Trucking FL Corp. v. Souders, 2022 Fla. LEXIS 1585 (Fla.)

Defendant added payee not acceptable to plaintiff on its timely written acceptance of plaintiff's demand for judgment. ***Held in a split decision:*** Timely acceptance of terms of plaintiff's written offer created a valid contract under statute. Acceptance need not repeat terms of offer, just manifest unqualified assent to them. Negotiations during pendency of written offer did not change terms of offer or constitute counteroffer. Whether defendant breached contract by including additional payee was different issue. Dissent argued that disagreement over payee showed there was no meeting of minds.

MARINE INSURANCE

INSURER'S DENIAL UPHELD DUE TO INSURED'S FAILURE TO PROVIDE FINANCIAL RECORDS

United States Fire Ins. Co. v. Icicle Seafoods, 2022 U.S. App. LEXIS 33541 (9th Cir.)

Insurer filed declaratory action against insured seafood wholesaler for breach of implied duty after denying claim due to insured's failure to cooperate under marine policy by withholding historical financial information. Trial court found insurer's requests were material because information was "relevant and germane" to insurer's investigation into loss arising from damaged fish-processing ship. ***Held:*** Despite no evidence of insured fraud in refusing to turn over certain documents, affirmed because insured breached implied duty to cooperate and insurer showed prejudice.

MEDICAL MALPRACTICE

PHYSICIAN'S AFFIDAVIT INSUFFICIENT TO SUPPORT MALPRACTICE CLAIM

Korakis v. Mem'l Hosp. of S. Bend, 2022 Ind. App. LEXIS 359 (Ind. App.)

Following car accident, woman sued hospital and two doctors for not timely diagnosing elbow fracture. ***Held:*** Expert physician's affidavit failed to rebut review panel's unanimous opinion that defendants did not breach standard of care. Affidavit did not state standards of care applicable to ER physician, osteopath, and hospital. It failed to state what hospital and ER doctor did wrong.

CHALLENGED CONDUCT SOUNDS IN MEDICAL TREATMENT

Rivera v. Advanced Allergy & Asthma Assess. & Diag., P.C., 2022 N.Y. App. Div. LEXIS 6806 (N.Y. App. Div. 2d Dep't)

Court dismissed as time barred lawsuit alleging plaintiff was injured when given allergy shot intended for another patient. Suit was not filed within statute of limitations for medical malpractice actions. ***Held:*** Affirmed. Distinction between ordinary negligence and malpractice turns on whether acts at issue involve matters of medical science or art requiring special skills not ordinarily possessed by lay persons or whether conduct at issue can be assessed on basis of trier of facts' common everyday experience.

EMPLOYER NOT LIABLE FOR NEGLIGENT HIRING OF EMPLOYEE ACTING WITHIN SCOPE OF EMPLOYMENT

S.W. v. Catskill Reg'l Med. Ctr., 2022 N.Y. App. Div. LEXIS 6926 (N.Y. App. Div. 2d Dep't)

Court dismissed cause of action against hospital sounding in negligent hiring, retention, supervision, or training. ***Held:*** Affirmed. Defendant demonstrated its employees were acting within scope of their employment, which negates such claim.

MUNICIPAL LAW AND CORPORATIONS

RECREATIONAL DISTRICT IMMUNE FROM LIABILITY FOR DROWNING

Nonprasit v. Ohio Teaching Family Ass'n, 2022 Ohio App. LEXIS 3500 (Ohio App.)

Teen drowned following dive off platform. ***Held:*** Recreational district immune from liability. District was a political subdivision. Plaintiff could not establish drowning involved negligence by a district employee due to a physical defect in quarry. There were sufficient lifeguard stations, and one station provided effective sight lines to diving platform and water. Unfiltered and cloudy water is common in spring-fed quarry.

NEGLIGENCE

WALKING UP STEP PROVIDES NOTICE ON DESCENT OF ITS CONDITION

Brandt v. Huggy's Coffee & Wine Bar, LLC, 2022 Ohio App. LEXIS 3681 (Ohio App.)

Invitee navigating step leading into bathroom tripped over same step while exiting. ***Held:*** One traversing step entering building is on notice of its condition. Though area was not well lit, darkness is warning of danger. Lack of color contrast between step and floor does not render step unreasonably dangerous. It was open and obvious.

GENERAL CONTRACTOR NOT LIABLE FOR INJURIES TO SUBCONTRACTOR'S EMPLOYEE

Dixon v. Shiel Sexton Co., 196 N.E.3d 717 (Ind. App.)

Brick mason employed by subcontractor fell off scaffold. ***Held:*** General contractor did not assume duty of care for employee's safety. General contractor promoted overall jobsite safety pursuant to obligations to owner. It did not assume duty of care to subcontractor employees.

GENERAL CONTRACTOR NOT LIABLE FOR INJURY TO EMPLOYEE OF INDEPENDENT CONTRACTOR

Tinsley-Williamson v. A.R. Mays Constr., Inc., 195 N.E.3d 891 (Ind. App.)

Injured employee of installer retained by owner sued general contractor for negligence. ***Held:*** General contractor owed no duty. A general contractor is not liable for an independent contractor's negligence. Exception for voluntary assumption of duty inapplicable. General contractor did not have contractual relationship with installer.

MISTAKE IN MAILING DIAGNOSIS SUBJECTS HEALTHCARE PROVIDER TO LIABILITY

Z.D. v. Cmty. Health Network, Inc., 2022 Ind. App. LEXIS 328 (Ind. App.)

Healthcare provider mistakenly mailed sensitive information to person who posted it on Facebook. ***Held:*** Provider subject to liability for invasion of privacy based on public disclosure of private facts. Lack of intentionality was irrelevant, as was mailing to only one person. ***Further held:*** Patient may not recover emotional distress damages in negligence action unless covered under modified-impact or bystander rules. She may recover for lost income and rent expenses resulting from provider's negligence. Inappropriate publication was foreseeable result of provider's negligence, and pecuniary damages resulted.

NO SPECIAL DUTY THWARTS ACTION AGAINST OFFICERS

Howell v. City of New York, 2022 N.Y. LEXIS 2385 (N.Y.)

Plaintiff sued defendants, city and police officers, alleging they failed to protect her from her ex-boyfriend's assault. Defendants were granted summary judgment. ***Held:*** Affirmed. Plaintiff failed to prove defendants owed her special duty of care as she could not have justifiably relied on any promises made or actions taken by them.

COURT REFUSES TO EXPAND SPECIAL DUTY DOCTRINE

Maldovan v. County of Erie, 2022 N.Y. LEXIS 2383 (N.Y.)

Plaintiff alleged various government agencies, including two providing social services, were negligent, causing grievous harm. Developmentally challenged adult victim was sexually assaulted, abused, and killed by her mother and brother, now serving lengthy prison terms for their actions. Agencies were granted summary judgment. ***Held:*** If legislature intended to create private right of action in Social Services Law § 473 (3), legislature was free to make that intent clear in future. Court, furthermore,

declined expanding prior cases where courts had found justifiable reliance satisfied as to abused minors.

PREMISES OWNER NOT LIABLE FOR DELIVERY DRIVER'S TRIPPING ON CURB EDGING DITCH

Hammond v. Lotz, 2022 Ohio App. LEXIS 3353 (Ohio App.)

Delivery driver broke wrist trying to catch herself after tripping on shallow edge ditch on lawn. ***Held:*** Ditch was open and obvious hazard negating duty of care. No attendant circumstances diverted driver's attention, significantly enhanced defect's danger, or contributed to trip. Attendant circumstances do not include driver's activities unless attention diverted by unusual circumstances created by owner.

PLEADINGS

REVISED COMPLAINT MUST BE MATERIALLY DIFFERENT FROM ORIGINAL TO CURE INSUFFICIENCIES

Sheri Speer v. U.S. Bank Trust, N.A., et al., AC 44902 (Conn. App.)

Plaintiff sought damages from defendant for slander of title. Trial court granted defendant's motion to strike, holding slander of title was insufficiently pled. Plaintiff filed revised complaint, repleading her allegations of slander of title. The trial court granted defendant's motion for judgment holding the revised complaint did not include any new facts distinguishing plaintiff's repleaded claim from the stricken one. ***Held:*** Affirmed. The allegations were nearly identical and contained no materially different allegations.

REFORMATION CLAIM FAILS TO RELATE BACK

34-06 73, LLC v. Seneca Ins. Co., 2022 N.Y. LEXIS 2094 (N.Y.)

Plaintiffs filed a complaint asserting breach of contract related to an insurance policy covering several of plaintiffs' vacant commercial properties. At trial, plaintiffs successfully attempted to amend their complaint to include an otherwise untimely reformation claim based on mutual mistake and a preexisting oral agreement. ***Held:*** The reformation claim could not relate back to plaintiffs' original pleading. Trial court, therefore, abused its discretion when it granted plaintiffs' motion to amend to include this time-barred claim.

SUBROGATION

NO SUBROGATION RECOVERY AGAINST BANK WHERE BANK HAD NO STATUTORY DUTY TO ASSURE CHECK ENDORSEMENTS WERE LEGITIMATE

Navigators Specialty Ins. Co. v. California Bank, 2022 U.S. App. LEXIS 34222 (9th Cir.)

Insurer sued bank in subrogation of benefit payment to its contractor insured for loss arising out of forged check endorsements by subcontractor. Trial court found California Commercial Code provision unambiguously stated employer was party liable when trusted employee fraudulently endorsed a check, which includes retained independent contractors. Trial court also found bank does not have affirmative duty to assure legitimacy of check endorsements. ***Held:*** Affirmed. Insurer bears first-party loss due to forged check endorsements by insured's subcontractor.

SUMMARY JUDGMENT

SUMMARY JUDGMENT NOT SANCTION FOR FAILURE TO PROVIDE DISCOVERY

10 Marietta Street, LLC v. Melnick Props., LLC, AC 44833 (Conn. App.)

Plaintiff sought damages for environmental contamination to parcel of land it owned, allegedly caused by hazardous materials from drainpipe extending onto land from defendants' adjacent property. Defendants successfully moved for summary judgment, claiming plaintiff could not meet burden of production with respect to its causes of action and that plaintiff's discovery responses failed to provide details about the alleged contamination. ***Held:*** Reversed. Plaintiff was not required to prove its causes of action to the trial court's satisfaction. Summary judgment was an improper vehicle for sanctioning plaintiff for perceived failure to comply with discovery.

TORTS

EQUITABLE REMEDIATION NOT VALID CAUSE OF ACTION FOR DEFECTIVE WOOD

DeVane v. Arch Wood Prot., Inc., 2022 Ind. App. LEXIS 335 (Ind. App.)

Homeowner sued for equitable remediation because wood deck was treated with arsenic. ***Held:*** Statute of repose covering product liability actions was inapplicable because homeowner did not allege actionable physical injury. Suit nevertheless failed because equitable remediation is not a valid cause of action.

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