Law Offices
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The Leading Insurance and Claims Attorneys

CASE UPDATE

August 2007 - New Jersey Edition

To Our Friends and Clients –

It has been too long! With this issue we recommit ourselves to quarterly publication of the Case Update, as well as additional "Case Alerts" of important legal developments that merit your prompt attention.

Many of our clients with New York business have requested an increased focus on New York law. With that in mind, we are publishing two versions of this issue, one devoted exclusively to New Jersey law and the other to New York law. In the future we will continue to provide either separate New York Updates or combined New York/New Jersey Updates, depending on the volume of significant decisions from both jurisdictions in the preceding months.

As always, we intend to share not only our view of important developments affecting your work, but also important developments at our firm that could affect your bottom line. In late 2006, for example, Methfessel & Werbel was selected to present a mock insurance fraud trial to more than 400 members and guests of the New Jersey Special Investigators Association in Atlantic City. The NJSIA recognized M&W as a leader in the detection and civil prosecution of insurance fraud.

In July 2007 the New Jersey Office of the Insurance Fraud Prosecutor requested a repeat performance to educate its Assistant Prosecutors and Investigators in the evidentiary challenges encountered and strategies employed in pursuit of fraud prosecutions. While the facts and witnesses in the mock trial were fictitious, they were based on several fraud cases that M&W has litigated over the past few years – most notably, cases tried by Marc Dembling and Stephen Katzman in which the plaintiff's affirmative claims were dismissed as fraudulent and the insurers were awarded civil damages, costs and fees under the Insurance Fraud Prevention Act.

While we enjoy presenting seminars to large organizations and policy-setting bodies like the OIFP, we also regularly provide in-house seminars for our clients, always tailored to the client's individual needs. Interested parties should contact Managing Partner Matt Werbel at mwerbel@methwerb.com .

We also encourage you to contact us with any questions about the decisions digested here or suggestions of how to better serve your needs with this newsletter. Thank you for your continued support!

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LIABILITY INSURANCE — INTENTIONAL ACTS — CARRIER–ASSIGNED COUNSEL

The Appellate Division revisited the thorny issue of carrier-funded representation of insureds accused of both negligent and intentional acts in New Jersey Manufacturers v. Vizciano. In this case a trial judge effectively ignored Burd v. Sussex Mutual and required the liability carrier in this bar fight case to defend the alleged assailant on all Counts of the Complaint, not only the covered negligence Counts. Accepting the matter on interlocutory appeal, the Appellate Division reversed and remanded with the express direction that NJM was well within its rights to retain counsel to defend its insured only on the covered claims.

The insured contended that he was assaulted by the plaintiff and acted solely in self-defense. If the jury were to accept this version, the Court observed, it would likely return a verdict in the insured's favor and NJM would be obligated to reimburse him for all costs of his defense. (This result would be likely because expenses incurred to defend the assault count likely could not be separated from those incurred to defend the negligence count). On the other hand, if the jury rejects the insured's version and finds that he intentionally assaulted the plaintiff then NJM would have no obligation to reimburse him for defense of the intentional tort claim. Finally, if the jury were to return a verdict for the plaintiff solely on the claim of negligence, NJM likely would be required to reimburse its insured for both his defense costs and the amounts of the judgment.

WORKERS COMPENSATION - INSURER LIABILITY FOR "SUBSTANTIAL CERTAINTY" OF INJURY

Charles Beseler Co. v. O'Gorman & Young, Inc

The Supreme Court recently resolved conflicting appellate decisions regarding the application of the "C.5" exclusion in a standard Workers' Compensation policy to an employer's claim for coverage of an employee's intentional tort lawsuit .

The Supreme Court previously defined an "intentional wrong" in Millison (1985) as an action committed with deliberate intent that had a "substantial certainty" of causing injury. This definition was expanded by the Supreme Court in Laidlow (2002) to encompass not only "actions taken with a subjective desire to harm," but also "instances where an employer knows that the consequences of those acts are substantially certain to result in such harm."

In Beseler, the workers' compensation carrier denied coverage, arguing that the phrases "intentionally caused" in the C.5 exclusion and "intentional wrong" in N.J.S.A. 34:15-8 were coterminous; thus the C.5 exclusion should bar coverage for all employer/employee tort lawsuits that avoid the workers compensation bar.

As a matter of statutory and contract construction, we believe that the insurer's argument was compelling. However, the Supreme Court engaged in its common practice of strictly construing exclusions to maximize recovery to injured plaintiffs. The Court held that the exclusion for coverage of injury "intentionally caused or aggravated by" the employer is narrower than the statutory "intentional wrong" exception under the workers' compensation scheme. Therefore, the C.5 exclusion will preclude coverage only for bodily injury resulting from a subjective intent to injure. Injuries that are "substantially certain" but not intentionally caused will trigger coverage.

TRIAL – EVIDENCE –PHOTOGRAPHS

Brenman v. Dimello

The New Jersey Supreme Court overruled the Appellate Division's per se rule against the admission of vehicle photographs without expert testimony in motor vehicle bodily injury cases. The admissibility of any relevant photograph rests on whether the photograph fairly and accurately depicts what it purports to represent, an evidentiary decision that properly lies in the trial court's discretion. The Court rejected a per se rule that requires expert testimony as a foundation for the admissibility of a photograph of vehicle damage when the photograph is used to show a correlation between the damage to the vehicle and the cause or extent of injuries claimed by an occupant of the struck vehicle.

BAD FAITH – RICO AND CONSUMER FRAUD ACT LIABILITY

Weiss v. First Unum Life Ins. Co.

The Court of Appeals for the Third Circuit recently analyzed New Jersey and federal law to determine that in the proper circumstances, an insured may maintain an action for civil RICO and Consumer Fraud Act damages against a carrier. Mr. Weiss was an investment banker for a firm that maintained group short term and group long term disability insurance. He suffered an acute heart attack in January of 2001, and was shortly thereafter diagnosed with severe left ventricular dysfunction and extremely low blood pressure which left him unable to work. Mr. Weiss applied in May of 2001 and received full short term disability benefits retroactively from the date of the heart attack until July 2001, at which time long term disability benefits began. The long term benefits were terminated in October of 2001 without reason. After exhausting his administrative remedies, Mr. Weiss filed suit in November of 2002. Shortly after the lawsuit was initiated, First Unum reinstated coverage retroactively to the date of termination, paid all overdue monies with interest, and continued to make payments.

Mr. Weiss' lawsuit alleged a systemic scheme to defraud claimants by wrongfully terminating high value long term disability claims. Third Circuit held that under the legal standard articulated in Picketts v. Lloyd, (recognizing a common law right of private recovery for bad faith failure to pay first party claims upon the lack of a fairly debatable reason for denial of benefits), a racketeering scheme would constitute a distinct and egregious tort permitting the recovery of punitive damages. The Third Circuit also touched on the Consumer Fraud Act (CFA), as an existing statutory scheme which would provide treble damages as a remedy for a failure to pay first party benefits as part of a larger scheme to defraud.

This is a controversial decision which predicts but does not control the development of New Jersey's Consumer Fraud Act jurisprudence. It is instructive but not binding on New Jersey state courts. Only time will tell whether the Appellate Division and/or the Supreme Court adopts a similarly expansive view of the Consumer Fraud Act.

PIP BENEFITS – BAD FAITH

Endo Surgi Center, P.C. v. Liberty Mut. Ins. Co.

In this case the Appellate Division held that a medical provider assignee has no right to assert a bad faith claim for non-payment of PIP benefits.

The Appellate Division cited to its prior cases of Milcarek, Kubiak, and Pierzga which held that an insured could not maintain a claim for bad faith denial of PIP benefits; however, noted these did not specifically address the assignment of PIP benefits to a medical facility. The Appellate Division extended the reasoning from those opinions to include the compensatory claims of medical providers. The Appellate Division held that since PIP benefits are statutory in origin, an assignee of an insured who is wrongfully denied such benefits is entitled to only the statutory remedy of interest on the benefits and attorney's fees.

PIP BENEFITS – LIMITATIONS ON ASSIGNMENT

Health First Chiropractic Center v. USAA Ins. Co.
The Appellate Division has recently issued an unpublished opinion which should prove a valuable tool in evening the procedural playing field in PIP arbitration. In this case the insurer exercised its option, under the policy of insurance, to refuse to accept the assignment of rights and benefits from the patient to the provider. This position was apparently taken by the insurer only upon the assignee's action being filed, notwithstanding the fact that partial payment had already been made directly to the provider. The Appellate Division ruled that the provider had no standing to pursue its claim.

This is not the first decision upholding a limitation on assignment clause. Indeed, the Coalition v. DOBI case first endorsed such clauses, and a number of Law Division decisions have reinforced the insurers' position. However, in the PIP arbitration venue, arbitrators have been creative in protecting providers' positions in the face of legitimate assignment/standing defenses. They have rebuffed insurers' attempts to enforce limitation on assignment clauses by finding that partial payment of a bill, directly to a provider, constitutes a "waiver" of the clause. Even though these decisions were a result of various arbitrators misunderstanding the elements of the doctrine of waiver, they did present a problem. However, in First Health Chiropractic Center v. USAA, the Court specifically ruled that partial payment of medical bills would not constitute a waiver of the no assignment clause. Such payment was found not to evince a "voluntary and intentional relinquishment of a known right."

The practical implications of this decision in the PIP arbitration arena are significant. Claimants on assignment who resist consolidation of multiple claims arising out of the same questionable accident are now subject to having their claims dismissed based on lack of standing; the insurer can simply assert that it will not agree to the assignment unless objections to consolidation are dropped. An insurer experiencing difficulty completing its investigation is often faced with an assignee who will not give consent for a reasonable adjournment of a hearing. Insurers can now resist a PIP arbitration matter going forward until reasonable investigation is completed by withholding consent to assign if consent for reasonable adjournments is not granted.

Insurers are typically faced with the dilemma of personal counsel for patients dragging their heels on production of their clients for Examinations Under Oath while providers' attorneys on assignment struggle to move the matter forward. There is now incentive for the PIP attorneys to push personal attorneys to cooperate in the insurers' investigation.

PIP – "MEDPAY" – ATTORNEY FEES

In a decision expected by the insurance industry and the plaintiffs' bar alike, the Appellate Division held in **Knight v. AAA Mid-Atlantic Insurance Company** that counsel fees and costs are available to a first-party insured who prevails in an action to obtain extended medical expense benefits, known generally as "medpay."

AUTO INSURANCE – TRANSFER OF TITLE

In **Progressive Group v. Hurtado**, Benjamin Messing of M&W obtained a ruling which enforces the plain language of the Certificate of Ownership Law to ensure insurance coverage, so long as a policy remains active, for a vehicle sold without an appropriate transfer of paperwork. In this case the seller failed to comply strictly with the Certificate of Ownership Law by failing to provide an odometer reading as required by N.J.A.C. 13:21-5.9, rendering the assignment of the title certificate incomplete and failing to transfer title. The purchaser was therefore covered under the seller's policy despite actual transfer of the vehicle.

AUTO INSURANCE - LIMITS AVAILABLE FOLLOWING VOIDANCE OF EXCLUSION

In **Potenzone v. Annin Flag Co.**, the New Jersey Supreme Court addressed a question similar to that addressed in 2005 by the Appellate Division in Proformance Insurance Company v. Jones: when an exclusion is void as conflicting with the omnibus auto statute, is an injured third party entitled to only mandatory minimum coverage, or the full coverage otherwise provided by the policy?

In Proformance, a 2005 decision, the Appellate Division invalidated a business activities exclusion as contrary to the omnibus mandatory coverage statute. However, the court held that the carrier would owe only the statutorily mandated $15,000.00 per person/$30,000.00 per accident liability limits, rather than the full policy limits. The Potenze Court, distinguishing Proformance, noted that the "loading and unloading" exclusion before it was invalidated in 1990 with its decision in Ryder/P.I.E Nationwide v. Harbor Bay Corporation. Since the carrier was on constructive notice that the exclusion was void – unlike the Proformance business activities exclusion, which was voided for the first time in that case – the injured third party should not be deprived of recourse to the full policy limits. While the Potenzone Court did not expressly overrule the Appellate Division's decision in Proformance, application of Potenzone to subsequent claims in the face of a void exclusion is likely to result in the availability of complete policy limits.

UM/UIM INSURANCE – STEP-DOWN CLAUSES

The Appellate Division ruled in favor of the carrier in **Seabridge v. Discount Auto**, upholding an amendment to a personal automobile policy which provided a step-down in coverage when the covered vehicle was driven by a person in the automobile repair business. The panel distinguished Skeete v. Dorvius on the basis that the step-down clause in this policy had actually replaced a complete exclusion for such coverage in a prior version of the policy. Thus the alleged absence of sufficient notice to the insured did not cause prejudice, since the notice advised of an increase in coverage and not decrease.

AUTO ACCIDENTS—DUTY OF PASSENGERS TO PROTECT INJURED PEDESTRIANS

Undoubtedly you have heard the expression "bad facts make bad law". Witness **Podias v. Mairs**, a case in which an 18-year-old driver struck a motorcyclist on the Garden State Parkway after a night of drinking. The motorist and his two passengers observed the motorcyclist lying at the road after the impact and fled the scene. None of them made any effort to assist the injured motorcyclist or to contact the authorities despite the fact that all three had cellphones. As he lay in the roadway, the motorcyclist was struck by another car and killed.

In the combined wrongful death/survivorship action on behalf of the deceased motorcyclist, the Appellate Division acknowledged that under traditional tort theory mere presence at the commission of a wrong, or failure object to it, is not enough to state a cause of action. Over the years, however, liability for inaction has been extended. Based on these horrendous facts the Court used this opportunity to conclude that a reasonable jury could find that the passenger defendants breached a duty of care which approximately caused the decedent's death.

AUTO INSURANCE-VERBAL THRESHOLD

In **Jablonowska v. Suther** the Appellate Division held that a vehicle occupant's "Portee" claim for emotional distress arising out of witnessing the death of a family member in the car, like a bodily injury claim subject to the verbal threshold, is also subject to the verbal threshold. While the decedent's spouse and the estate were entitled to assert wrongful death and survivorship claims based on the decedent's pain and suffering and the heirs' pecuniary loss, the spouse could not assert an independent Portee claim without objective proof of permanent injury.

ABROGATION OF THE FIREMAN'S RULE

Ruiz v. Muro

In this recent decision the New Jersey Supreme Court clearly jettisoned the remains of the common law Fireman's Rule, holding that an injured police officer, like an injured firefighter, is free to sue any property owner for negligence which contributed to an injury sustained on the property. While the causal link between the negligence that necessitated the call and the plaintiff's injury may be relevant to the jury's assessment of probable cause, a direct relationship between such negligence and the fire or other condition that prompted the call will no longer bar the claim.

Plaintiff Ruiz, a Dover Police Officer, responded to a bar due to unruly patrons. One or more persons attacked Ruiz, resulting in significant injury. Ruiz, although a police officer, asserted that the property owner defendants were negligent in failing to provide adequate security. Common sense suggests that a police officer called to the scene of a barfight assumes a risk that the bar's security cannot handle the situation – indeed, were this not the case then the police would not be needed! Nevertheless, thanks to the Legislature's elimination of the Fireman's Rule in the late 1990s, property owners now face potential liability to police, firefighters, paramedics and other public servants who respond to emergency calls.

TORTS – SPORTING EVENTS – SPECTATOR SAFETY

In **Sciarrotta v. Global Spectrum** the Appellate Division continued New Jersey courts' forward march in the imposition of liability on sporting facilities for spectator injuries. In this case the plaintiff was injured by a hockey puck during warm-ups, which the Court found to pose a greater safety risk than do errant pucks during games. Based on the Supreme Court's 2005 decision in Maisonave v. Newark Bears, in which the high court adopted a "limited-duty rule" for spectator safety, the Sciarrotta Court held that issues of fact precluded summary judgment.

SCHOOLS-SAFETY

The New Jersey Supreme Court, addressing an issue of first impression, ruled in **Jerkins v. Anderson** that a school's duty to ensure the safety of its students does not end when the bell rings. In this case a nine year-old was dismissed from school on an early dismissal day, walked off school grounds without an adult and was struck by a car a few blocks from school later that afternoon. The family alleged that on typical school days the child walked home with his adult brother, another family member or a babysitter but that on the day in question the school had scheduled an early dismissal. The Supreme Court affirmed the Appellate Division's determination that schools have a duty of reasonable care to supervise students' safety at dismissal and that such duty includes suitable notice to parents of a dismissal supervision policy.

CONSTRUCTION DEFECTS – STATUTE OF LIMITATIONS

In New Jersey the statute of limitations governing contracting disputes is six years. In **Trinity Church v. Atkin Olshin Lawson-Bell**, the Appellate Division ruled that a project is completed for limitations purposes when the particular contractor's work is substantially completed—not upon the later issuance of a certificate of occupancy. We suspect that similar reasoning would be applied to an assertion of the ten-year "statute of repose" applicable to third-party claims.

CONSUMER FRAUD ACT – ATTORNEY FEES – NOMINAL DAMAGES

In **Rivera v. Salerno Duane, Inc.** plaintiff sued for consumer fraud over a used vehicle she had purchased. Although the car was sold "as is," plaintiff later had difficulties with the vehicle, and discovered through CARFAX that it had been in a prior accident, a fact not disclosed to her at the time of purchase. She aleged violations of the Consumer Fraud Act and the Truth-in-Consumer Contract, Warranty and Notice Act. She was successful on summary judgment, but was awarded only $17.90 on her consumer fraud claim, trebled to $53.70, and $400 -- $100 each for four violations of the NJTCCA – for a total judgment of $453.70. The trial judge first granted plaintiff's motion for over $20,000 in attorney's fees because she thought it unopposed. When the defendants moved for reconsideration, however, she reduced the award to nothing, concluding that the low award justified no counsel fee at all. The appellate panel disagreed and reversed, noting that each of the two statutes in question is a fee-shifting statute, the plain language of which mandates an award of attorney's fees to the injured party. The matter was remanded to the trial court to calculate an appropriate award.

A plaintiff's inappropriate billing judgment and failure to achieve the results sought for the consumer still may be presented to mitigate the fee. However, judges of the Superior Court are accorded great deference in determining the reasonableness of fees when the award of fees is permitted by statute. The availability of fees to a plaintiff who achieves limited or no recovery for himself has emboldened certain consumers' firms in recruiting seemingly questionable matters. Carriers should remain vigilant in matters where the insured dealer has offered to rescind a deal which may have involved a deceptive commercial practice, and thus mitigated or eliminated ascertainable damages.

One creative and underused response to fee-driven litigation is the filing of an Offer of Judgment, which documents the reasonableness of a litigant's position early in the litigation and bodes well for the defendant who must engage in years of litigation fueled primarily by opposing counsel's quest for fees.

LAW AGAINST DISCRIMINATION – PUBLIC SCHOOLS – SEXUAL ORIENTATION

In **L.W. v. Toms River Regional Schools** the Supreme Court held that the LAD recognized a cause of action against a school district for student-on-student harassment based on the perceived sexual orientation of the victim. Just as appropriate policies and swift investigation and remediation will provide a defense in the more traditional private and employment contexts, so will they constitute viable defenses to student harassment claims. At the same time, there is no doubt that the Court's decision in L.W. will encourage more fee-shifting litigation over student-on-student harassment. We wonder whether a homophobic slur in the course of typical bullying would be found sufficient to create a fact issue as to whether or not the bullying arose out of perceived sexual orientation, preserving LAD claims in the context of what otherwise would be a simple bullying case. This could be significant, as the LAD requires payment of fees and costs to a prevailing party, while a traditional tort claim does not carry such exposure.

LAW AGAINST DISCRIMINATION – RETALIATION CLAIMS

Carmona v. Resorts International

The plaintiff, a front desk agent at the defendant hotel, was fired for excessive absenteeism and theft. As his inevitable termination approached, he lodged a complaint of harassment and discrimination. Upon his termination he claimed retaliation based on the filing of the discrimination complaint.

The Court held that a plaintiff citing an underlying discrimination complaint as the basis of a retaliation claim must demonstrate a good faith basis for the original complaint. Significantly, the court also held that the trial judge erred in barring admission of the investigative report establishing the theft which the employer cited as its legitimate, non-retaliatory reason for plaintiff's discharge.

AT THE FIRM

Methfessel & Werbel welcomes four new attorneys – Counsel Jared Kingsley and Charles McCook and associates Darren Maloney and Matthew Rachmiel.

Jared Kingsley and **Charles McCook**, former partners at Bumgardner, Ellis, McCook & Kingsley, have merged their civil practice with the firm. Jared, a 1990 graduate of Duke University and a 1993 *cum laude* graduate of Cornell Law School, is certified as a Civil Trial Attorney by the Supreme Court of New Jersey. He has argued before the Appellate Division and New Jersey Supreme Court. He concentrates on matters involving personal injury, coverage, PIP benefits, workers' compensation and real estate. Jared co-authored the authoritative Compendium of New Jersey Premises Security Law, published by the American Law Firm Association in 1997. He also served as a Co-Program Advisor of Premises Security Litigation in Healthcare Institutions, New Jersey Hospital Security and Safety Directors Association Seminar.

Charles McCook, a 1985 graduate of Rutgers and a 1990 graduate of Seton Hall, was certified by the Supreme Court as a civil trial attorney in 2003. He specializes in the litigation of commercial transportation accidents, product liability, toxic torts, commercial premises liability and construction litigation. Chuck represents trucking companies in the investigation and defense of accident-related claims, as well as employment and harassment claims.

Matthew Rachmiel, an associate formerly with Jared and Chuck's prior firm, graduated from Franklin & Marshall in 1996 and from Boston University School of Law in 1999. He specializes in the defense of auto liability, PIP, premises liability, product liability, asbestos and workers compensation claims.

Darren Maloney joins M&W with more than a decade of experience in employment law, commercial litigation, personal injury, workers' compensation and environmental insurance coverage. Darren works with Eric Harrison in the litigation of civil rights and employment claims.

IN THE PRESS

Don Crowley has been selected as a "Super Lawyer" in a survey representing a wide range of practice areas, firm sizes and geographic locations throughout New Jersey. The criteria for selection are peer recognition and professional achievement. According to the press release of New Jersey Monthly in conjunction with Law and Politics, only the top five percent of attorneys are named Super Lawyers.

The nominees are grouped into practice areas. Those nominees with the highest point totals from each practice area are invited to serve on a blue ribbon panel to select nominees from their own practice area. The top 5 % of candidates from each group are selected as Super Lawyers. Lawyers from throughout the country, including N.J., are on the Web at superlawyers.com where they can be searched by name, area, practice and city.

Don joins Ed Thornton, Class of '05, on the growing list of M&W "Super Lawyers." Congratulations to Don for his recognition as an asset to M&W and to our clients.

Marc Dembling recently moderated a conference sponsored by the Institute of Continuing Legal Education regarding developments in insurance law. Marc headed a panel of experienced insurance litigators in the discussion of emerging legal issues.

Eric Harrison was honored by the New Jersey Law Journal on its annual list of "40 Under 40" – a list of 40 prominent New Jersey attorneys under the age of 40. The Journal recognized Eric's accomplishments in the development of insurance, employment and civil rights law in the State of New Jersey. Eric also made New

Jersey Monthly's list of "Super Lawyers Rising Stars," an honor based on peer recognition and professional achievement.

IN THE COURTS

Don Crowley successfully defended the recovery of a six-figure award of counsel fees before the Appellate Division in Marsdale v. Port Liberte Partners. The issue on appeal was the enforceability of a broad indemnification clause contained in the contract between the developer and the general contractor which provided that all subcontractors hired had to indemnify the developer regardless of negligence. The court held that the clause was enforceable against the negligent subcontractor who refused to indemnify the developer. Not only was the negligent contractor held liable for 70% of a $1.5M jury verdict, but also had to pay the developer's counsel fees for defending the action through trial. Associate Danielle Lozito assisted Mr. Crowley on the appellate brief.

Don also obtained a no cause verdict in a ladder collapse case of great exposure. The product liability design defect case resulted in a defense verdict after 20 minutes. The product was a 16 foot articulating ladder which was alleged to be capable of spontaneous collapse if the release bar was accidentally contacted by the user's shoe as he reached the middle of the ladder while climbing. There was both a failure to warn component as well as alternative safer design theory. We also had to fight off a recall of this same ladder for other reasons following the accident.

The injury was very serious - a pulverized wrist in the dominant hand of a 43 year old HVAC mechanic with four young children. He required three operations, resulting in a fused wrist and limited mobility. We were able to convince the jury with excellent expert testimony by Dr. Edwin G. Burdette, Ph.D, P.E., professor at the University of Tennessee Engineering Department, that plaintiff's theory was not physically possible while the ladder was under load. Further, plaintiff's own description of where he was at the time of the collapse contradicted his expert's understanding of the circumstances.

Ed Thornton recently won a unanimous reversal from the Appellate Division of a case tried in Hudson County by another law firm resulting in a net verdict and prejudgment interest of 1.5 million dollars. The case was sent back to the trial court for a retrial on all issues. Since the insured's carrier had a $500,000. policy limit, the sending back of this case to the trial court with the effect of wiping out the trial result means that the carrier is no longer to be considered in bad faith, and has therefore offered the policy limit in settlement.

Ed also tried a matter in Essex County where the 38 year old claimant was claiming total disability as a result of falling down the insured's basement stairs while making a liquor delivery for his employer. The insured's stairs were approximately three years old and consisted of metal, which had replaced wooden stairs. They were concededly at such an angle that they would not pass inspection under a modern code, but were "grandfathered" because they replaced pre-existing stairs. The plaintiff suffered an unquestioned herniated disc and after appropriate conservative treatment, underwent surgery. The surgery was not successful and plaintiff was left with a permanent limp and an inability to do any kind of work.

We contended that although the stairs were at a steep angle, the current building codes give a clear right to replace a pre-existing but non-conforming step as was done here. Unfortunately we had no answer for the lack of a handrail or the poor lighting, but the jury found that although the stairs were negligently constructed or maintained, the condition of the stairs did not proximately cause plaintiff's injuries. Basically, they were not convinced that the incident occurred as the plaintiff described, agreeing with Ed that the lack of dented inventory, broken packages, or the lack of anyone hearing the incident, raised sufficient suspicion to warrant a defense verdict.

Significantly, after the jury was charged, the plaintiff rejected both a "high/low" offer of $400,000/$800,000 and a $425,000 cash offer immediately before the verdict was announced: no cause of action.

Ric Gallin successfully defended an effort by a workers compensation carrier to obtain PIP reimbursement from the employer's auto carrier. An employee was hurt on a truck. The compensation carrier then sought inter-company reimbursement on the grounds that a vehicle over 6,500 lbs. was involved. Ric moved in Ulster County (the situs of the accident) to permanently stay the arbitration. The Court agreed with Ric that since the workers compensation carrier had primary responsibility for PIP under these circumstances, it would be anomalous to allow reimbursement from the auto carrier which, under the circumstances, had no obligation to pay basic economic loss. As the employer had a complete defense due to the compensation bar, its carrier also had a complete defense to this reimbursement claim. The PIP carrier had previously convinced an arbitrator under similar circumstances that its claims had merit. This case demonstrates that when significant disputes hinge on pure questions of law, it is often worthwhile to expend the extra resources necessary to force a decision from a judger rather than an arbitrator. Please remember, however, that New York has very short deadlines for seeking to stay arbitration proceedings.

Ric recently resolved a business interruption suit in the Supreme Court, New York County on the first day of a non-jury trial. The insured was a plaintiffs law firm who were displaced by September 11th. All issues were resolved except their claim for loss of income in excess of $600,000. They initially presented the claim based on the alleged value of cases they allegedly could not sign up. They later reduced the claim to $317,000 based on an alleged reduction in earnings. The Court indicated that intrinsicly it felt that some loss was incurred. The Court helped both sides come to a settlement of $150,000. The analysis was based on what would be a total loss for 4 months (the period until the insured set up semi-permanent quarters) minus credits for amounts the insured actually earned over that four month period.

Ric obtained a jury verdict on a subrogation case in the Supreme Court, Orange County. The defendant and her boyfriend moved into the insured's two family building. The boyfriend became increasingly irrational and the defendant, concerned for her safety, moved out without telling the landlord. Shortly thereafter the boyfriend started a fire causing $160,000 in damage and pled guilty to arson. Under the lease, the defendant was liable for the acts of her family and guests. Ric convinced the judge to charge the jury that because the defendant and boyfriend had been living together for an extended period of time and held themselves out as a "couple", they qualified as a non-traditional family under the terms of the lease. Armed with the charge, Ric then convinced the jury to hold the defendant responsible for the damage caused by the boyfriend. Damages were stipulated at the $100,000 policy limit of the defendant. A motion for a judgment not withstanding the verdict was denied and the defendant's carrier has pledged to appeal.

Ric recently successfully defended an environmental claim which arose out of adjoining properties at a condo complex which both had leaking USTs. The adverse carrier claimed their property was downgradient, that their leak didn't hit the groundwater and that our carrier was responsbile for all of their clean up costs. The claim was submitted to binding arbitration with testimony from both carrier's experts. The arbitrator did not believe the adverse expert and accepted Ric's position that there was cross contamination of each property by the other. The award was for each carrier to reimburse the other for 50% of the costs.

Stephen Katzman recently prevailed in the Appellate Division's disposition of an appeal from summary judgment in the matter of Kramer v. Fokis, Inc. Plaintiff, Public Service Mutual, as insurer and subrogee of a landlord, sued the insured tenant for losses arising out of a fire on the leased premises. The Appellate Division affirmed the Superior Court's judgment dismissing the action on the basis of a waiver of subrogation contained in the lease.

Against a demand of $1 million and an offer of $100,000 in a rear-end hit auto liability case, **Bill Bloom** obtained a $35,000 verdict in Middlesex County. Plaintiff, a 65 year-old lung cancer survivor, alleged that he

developed a drainage problem at the site of his lung removal surgery as a result of the accident. Plaintiff also claimed a torn rotator cuff, and neck/back injuries. The plaintiff's theory was that the trauma from striking the steering wheel with the right side of his chest, which was missing several ribs from the surgery, resulted in a rupture of the pleural lining which ultimately led to a non-healing, persistently draining open chest wound. This wound required the plaintiff to wear a drainage bag at his side at all times. Right before trial, the plaintiff demanded $1,000,000. Plaintiff was offered $100,000. After a defense-favorable question from the jury during deliberations, plaintiff reduced his demand to $300,000. The jury returned a verdict of $35,000, no doubt finding that the surgical site injury was not related to the accident.

Eric Harrison successfully defended disability discrimination claims in United States District Court in Newark. The plaintiff, Manual Castro, a handicapped individual confined to a motorized wheelchair, made an application for architectural variances to his home to build a ramp make it more accessible. The second floor of the municipal building where the hearings were held could be accessed only by stairs. To add insult to injury from plaintiff's perspective, the handicap variance was denied. He sued, claiming retaliation.

Prior to trial the settlement demand of the plaintiff was $1.5 million against a settlement offer of $500,000. The jury returned a verdict of $50,000.

Eric also obtained a no-cause verdict in an Essex County discrimination case. The plaintiff, a retired police Sergeant, claimed that he was not promoted because the Chief considered him disabled due to a recent diagnosis of post-traumatic stress disorder. The Chief denied this allegation, observing that police officers frequently take medical leave and that she did not recommend the plaintiff for promotion because he had not demonstrated the skills necessary to rank of Lieutenant. The jury agreed and returned a defense verdict.

John Knodel successfully defended an electrical contractor accused of leaving an electrical cable across basement stairs, causing the plaintiff's infant daughter to trip and fell several steps. She fractured her metatarsal. While the court found a technical violation of the Consumer Fraud Act, the jury rejected plaintiff's injury claims.

Lori Brown Sternback obtained a $600 verdict in a complex falldown case. The plaintiff claimed to have tripped over a dislodged concrete parking bumper. Plaintiff claimed neck injuries. Through discovery Lori uncovered similar neck injury claims in plaintiff's pending medical malpractice case involving an allegedly botched liposuction procedure. Cross-examination of the plaintiff at trial revealed several inconsistencies in her testimony regarding both liability and damages. Furthermore, her doctors had no knowledge of the prior liposuction; thus they could not separate the treatment they rendered from the treatment which may have been necessitated by the liposuction injury.

The jury returned a 50/50 verdict on liability, $1,000 for medical expenses and nothing for pain and suffering. The Court then instructed them to return a verdict for non-economic damages based on their finding of injury. They responded with a pain and suffering verdict of $200.

Lori also recently obtained summary judgment of a claim by a social guest who visited the insured's premises and exited through a rear door to a deck that had a step which deviated from the BOCA code and did not have a handrail or guardrail which might have prevented her fall from the deck. Although plaintiff denied ever being in the rear yard or on the rear deck of the insured premises, at the time of her deposition she admitted having been on the rear deck just a month before her fall when her uncle actually died of natural causes while sitting there. Since the death of the uncle was so close in proximity to the date of accident, there was no dispute that no changes had been made to the deck. The Court noted that the insured did not have to make the premises safer for her guest than for herself and that the condition of the deck was obvious. Thus the insured could not be held liable for failing to warn of a dangerous condition.

Marc Dembling won a first party insurance coverage jury trial in Middlesex County. Encompass sued our client, Liberty Mutual, alleging that Liberty improperly denied coverage to its insured. Liberty's insured obtained a leased vehicle on September 13, 2000 and did not advise a Liberty agent to add vehicle to the policy until two days after a subsequent accident. However, the car dealer claimed that he had asked an agent of Liberty Mutual to add the vehicle to the insured's policy. Liberty its agent denied that such a request had been made. Further, if such a request had been made then it would have been denied until the insured personally signed a coverage change request form. The insured conceded on the stand that she really did not know what the car dealer did when she leased the vehicle and that she did not call the agent until after the accident. The jury did not accept the testimony of the car salesman and ruled against coverage.

Gerry Kaplan obtained a no cause verdict in an injury case by a patient against an insured ambulance squad. Plaintiff suffered from multiple sclerosis and alleged that he was dropped from a chair by ambulance attendants while being removed from his house. It was raining at the time but the attendants denied dropping plaintiff. They stated that one of them had slipped but did not let the chair fall. Plaintiff alleged aggravation and exacerbation of his condition, resulting in his now being confined to a wheelchair. The jury found no negligence and dismissed the case.

Frank Keenan obtained summary judgment on behalf of a tree company alleged to have created a hazardous condition that caused plaintiff to fall on a sidewalk bordered by trees which the insured had trimmed. The plaintiff tripped over a tree stump while walking his dog in the city owned park across the street from the insured's townhome. The Court dismissed all claims against both the insured and his tree maintenance company.

Frank also obtained summary judgment in a labor law case. We represented BMS, a contractor performing clean-up at the World Financial Center after 9/11. Plaintiff alleged injury to her ankle, leading to RSD, when she stepped in hole in a floor in the course of her clean-up work.

The Court held that Labor Law Section 240, which is designed to protect workers from elevation related hazards, did not apply to this matter because the raised computer flooring in the Dow Jones space was not the type of elevation-related hazard which the statute is designed to protect. Similarly, the Court found that Labor Law Section 241(6) did not apply because the industrial code sections relied on by the plaintiff did not apply to the type of small hole involved in this case.

Leslie Koch obtained summary judgment of constitutional claims against a rent leveling board. The owner of an apartment complex brought suit under 42 U.S.C. 1983, alleging violations of the New Jersey and United States Constitutions by the Rent Leveling Board and an individual Board Member. Plaintiff claimed that the individual Board member abused her public office, thereby violating plaintiff's due process rights by contacting a building inspector and alerting him to prematurely granted building approvals. On Leslie's motion for partial summary judgment, the court found that the Board Member was entitled to absolute immunity under Anastasio v. Planning Board Township of West Orange. Additionally, the court noted that the remedial effect of the upcoming trial on the constitutionality of the applicable town ordinance would remedy any arbitratary or capricious decisions of the Rent Leveling Board, depriving plaintiff of a Sec. 1983 claim.

Leslie also obtained summary judgment in a false arrest case involving an arrestee whose case was ultimately "no billed" because a pivotal witness could not be located. The municipal court judge's finding of probable cause, while not dispositive, was supported by the undisputed fact that the arresting officer had received a tip from a reliable source, triggering qualified immunity and a finding of objective reasonableness on the part of the arresting officers.

Mitchel Tarter obtained summary judgment for the carrier in a fire loss case on the basis that, despite insured's assertion that he had not received a cancellation notice, the carrier provided sufficient proof of mailing in the form of a date-stamped proof of mailing from the post office.

Mitchel also obtained summary judgment on an indemnification claim of a school district against the insured, a contractor whose employee was injured on school grounds. The Court agreed with Mitchel that the injury did not occur during the insured's "work" and there was no evidence that it was caused by negligence on the part of the insured, rendering the indemnification agreement inapplicable.

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