Law Offices
METHFESSEL & WERBEL
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The Leading Insurance and Claims Attorneys

CASE UPDATE

January 2009

To Our Friends and Clients –

Happy New Year! It has been an eventful year, both at Methfessel & Werbel and in the New Jersey and New York legal communities at large. In this issue we will highlight important legal developments since late 2007 in both states, as well as some accomplishments of note within the firm. As always, we welcome your questions and comments. Best wishes for a happy and healthy 2009!

DON CROWLEY, ED THORNTON, BILL BLOOM AND ERIC HARRISON: SUPER LAWYERS

Key Media, the creators of the "Super Lawyers" rosters which in New Jersey are published in partnership with New Jersey Monthly Magazine, has named an unprecedented four M&W attorneys as "Super Lawyers". In related news, the Supreme Court recently rejected a challenge to the methodology employed in the survey, accepting the report of a Special Master that the process is "a comprehensive, good-faith and detailed attempt to produce a list of lawyers that have attained high peer recognition."

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. Congratulations to Don, Ed, Bill and Eric, whose peers have recognized them for the skills and dedication that M&W and its clients have valued for years.

STEPHEN KATZMAN: TOP INSURANCE FRAUD PROSECUTOR

2008 was a banner year for Stephen Katzman. At the annual conference of the New Jersey Special Investigators Association, Stephen received a Special Recognition Award for his achievements in fighting insurance fraud in New Jersey since 1985, including most recently his part in the elimination of an insurance fraud ring involving 80 participants. Stephen's work in conjunction with law enforcement resulted in enormous savings to the insurance industry.

Additionally, Stephen's investigation of fraudulent insurance claims resulted in two criminal indictments against insurance fraud perpetrators during 2008, including a medical provider and an insured who drove his $160,000 Bentley into the Hudson River.

-- NEW JERSEY --

Reyes v. Egner
In a case handled by Bill Bloom, the Appellate Division cited changes in the Restatement to adjust the rules of premises liability applicable to landlords under a short-term lease. Departing from the bright-line Patton rule that a landlord who leases the entire premises will be held liable only for damage arising out of a hazard which was fraudulently concealed, the Appellate Division held that a jury should determine whether it was unreasonable for the insured landlord not to warn his tenant regarding the absence of a clear marking on a single step between an exterior door and a rear deck.

Potenzone v. Annin Flag Company
Loading and unloading exclusion held void as against public policy. Court upholds "strong legislative policy in favor of protecting innocent victims." Since loading and unloading coverage is mandatory by statute, it cannot be limited by contract.

Progressive v. Hurtado
An insurance carrier could not decline coverage to insured and transferee of motor vehicle who took certificate of title and possession and control of vehicle because certificate of title failed to provide "odometer reading" and was ineffective as a matter of law. Equitable transfer of title held insufficient to void insurable interests.

Pyun v. Chesnowitz
No ambiguity exited with regard to name of insured. Insured had obligation to advise insurance carrier of change of circumstances---namely corporation had dissolved prior to date of accident and insured not operating as a corporation, but as an individual at time of accident.

Iliadis v. Wal-Mart
Good faith entails adherence to "community standards of decency, fairness or reasonableness…" and requires a party to refrain from "destroying or injuring the right of the other party to receive its contractual benefits….a plaintiff must also prove the defendant's bad motive or intention."

Pizzullo v. NJM
Absent "willful, wanton or grossly negligent" actions by insurance carrier, the carrier is immune from suit by reason of coverage choices of the insured. Customer service representative's advice could be repudiated by carrier. Please note that gross negligence is defined as "more than ordinary negligence, but less than willful or intentional conduct."

New Jersey Manufacturers v. National Casualty Company
Primary carrier could be liable for prejudgment interest in excess of its policy limits if it was guilty of bad faith in settlement of a plaintiff's claim. Court considers (1) whether carrier made timely offers reflective of strength of claimant's case (2) whether the carrier strategy had reasonable prospect of success (3) whether carrier offered its policy limit in timely fashion after being made aware it could settle the case.

Weiss v. First Union Life Insurance Company
In proper circumstances an insured may maintain actions for civil RICO and/or Consumer Fraud Act against insurance carrier. McCarran-Ferguson Act, 15 U.S.C.A. Section 1011, et seq., does not preclude civil RICO action against insurer pursuant to 18 U.S.C.A. Section 1961.

Connecticut Indemnity Company v. Podeszwa
Exclusion of coverage in a "bob-tailing" policy for use of truck to carry property for business did not violate public policy or statutory mandate of liability coverage.

Baldassano v. High Point Ins. Co.
Alleged negligence of insurance carrier's agent in not advising insureds of availability of higher limits of UIM coverage would not support a claim of vicarious liability against insurance carrier. Carrier was not liable for coverage choices made by insured who signed Coverage Selection Form pursuant to N.J.S.A. 17:28-1.9 and Strube v.Travelers Ins., 277 N.J. Super. 236 (App. Div. 1994), aff'd o.b. 142 N.J. 570 (1995).

Srocynski v. Milek
Failure of Workers Compensation carrier to file certified statement with DOBI made notice of cancellation for failure to pay premiums ineffective even though employer (insured) and DOBI received "like notice" by using electronic file transfer protocol. Court held "substantial compliance" doctrine inapplicable.

Piermount Iron Works, Inc. v. Travelers
Failure of Surplus Lines carrier to give 30 days notice of intention to non-renew policy of insurance as required by policy language results in a continuation of coverage. This case strictly construed policy language against carrier that wrote the policy because Surplus Lines carriers are not required by Statute or regulation to give 30 days notice of Non-renewal.

Totaro v. Lane
When compensatory damages result from breach of contract the exact amount of the loss need not be certain. Where it is certain that damages have resulted, courts will fashion a remedy even though proof of damages is inexact.

Pratts v. Holme
Deemer statute inapplicable to Florida resident who was a passenger in a New Jersey vehicle. Florida policy only provided PIP benefits when insured was in out of state accident while in an insured vehicle.

New Jersey Manufacturers v. National Casualty Company
Primary carrier could be liable to excess carrier for prejudgment interest in excess of policy limits if it was guilty of bad faith. Primary carrier owes fiduciary duty to excess carrier.

Burns v. Chubb Ins. Co.
Claimant had no insurable interest in property lost by reason of foreclosure sale and no claim against homeowner's policy. Court rejected attempt to "obtain insurance coverage for losses exhausted by [plaintiff's] own defaults on legal obligations resulting from foreclosure and repossession."

State v. Fleischman
Each document or narrative statement is a separate act of insurance fraud under N.J.S.A. 2C:21-4.6

Nationwide v. Fiouris
Action to void policy for material misrepresentation in application is not subject to PIP arbitration.

Morel v. State Farm
Law Division judge improperly refused to hear appellant's claim that arbitrator had failed to consider statutory defenses to PIP claim. Trial court should have considered all issues.

Janicky v. Point Bay Fuel
The Court will not permit an appeal to be made to Appellate Division on interlocutory coverage decision without a motion being made to the Appellate Division itself. Court does not want litigants or trial Court deciding what issues should be basis of an interlocutory appeal. On issues of coverage decided by Trial Court

prior to issues of indemnity and damages, it appears very unlikely Appellate Court will consider issues of coverage prior to resolution of all issues at trial level.

Shelby Casualty Insurance Company v. H.J.
"Inferred intent rule" making intentional injury exclusion of liability coverage applicable as a matter of law when adult commits sexual assault does not apply when sexual assault is committed by minor under age of 14. Factual determination must be made in case of minor.

NJM v. Varjabedian
When a policy is voided for misrepresentation, carrier owes to innocent victim of accident $15,000.00/$30,000.00 limits mandated by AICRA, N.J.S.A. 39:6A-2-13 N.B. Overruling Mannion v. Bell, 380 N.J. Super. 259 (Law Div. 2005)

Britten v. Liberty Mutual
Plaintiff was not entitled to PIP benefits from mother's policy even though she was a resident member of household. Plaintiff was a named insured under her own policy and chose her own PIP benefit level. N.J.S.A. 39:6A-4.2 and 39:6A-7(b) (4) which permits carriers to deny benefits to resident relatives who were named insureds on their own policies.

Rutgers Casualty Insurance Company v. LaCroix
The named insured's innocent child is entitled to PIP where child is unaware of parents misrepresentation on PIP application and was using vehicle with permission.

Endo Surgi Center v. Liberty Mutual,
Assignee of insured's claims for PIP could not maintain bad faith action against a carrier. A recovery is limited to the denied benefits interests and attorney's fees.

Portnoff v. New Jersey Manufacturers
Insurance carrier entitled to a set off from income continuation benefits for amounts received for total disability compensation benefits. Collateral source rule places the primary obligation to pay benefits covered by both worker's compensation and PIP on the employer rather than on the PIP insurer. See N.J.S.A. 39:6A-6.

Bedford v. Riello
Under N.J.A.C. 13:44E-1.1, the practice of chiropractic medicine is not limited to spinal manipulation so long as there is a causal nexus between a condition of the manipulated structure and a condition of the spine. In this case, for example, the Supreme Court held that manipulation of the patient's knee was potentially acceptable.

Jablonowska v. Suther
A claim of negligent infliction of emotional distress under Portee v. Jaffee is independent of the injury requirements of the verbal threshold in auto accident cases.

Villa v. Short
Language in a homeowner's policy that excludes coverage for intentional acts of "an insured" operates to bar coverage for all insureds under the policy, not solely for the insured who committed the intentional act.

Rutgers Casualty v. LaCroix
Distinguishing Bastien v. Palisades, the Supreme Court held that an innocent child of an insured whose auto coverage excluded the child from PIP benefits would be entitled to minimal PIP benefits following an accident in the vehicle provided by her parents. The definition of minimal PIP benefits was deferred to the trial court, leaving open the argument in favor of only catastrophic injury coverage in view of the availability of such limited coverage.

-- NEW YORK --

Change of Law – *Late Notice*

Effective January 17, 2009, the law regarding disclaimer based on late notice has changed. Previously, New York was a "no prejudice" state. However, policies issued after January 17, 2009 are to include a provision which indicates that in the case of late notice, a carrier can avoid coverage only if it can establish prejudice as a result of the late notice. In order to prove the existence of such prejudice, the carrier must demonstrate that the late notice "materially impairs" its ability to investigate or defend the claim.

The amendment to Insurance Law Sec. 3120 is coupled with an amendment to CPLR 3001, which allows a direct action against the carrier in order to test the validity of the disclaimer, despite the absence of a judgment against the insured. Previously, in the Lang case, the Court of Appeals barred any direct actions for the purpose of determining coverage.

Over the next few years, it is likely that this change will be a source of confusion, as old polices continue to play by the old set of rules. Additionally, in the case of polices renewed between 2009 and the early part of January 2010, the change will be based on the renewal date, not the date on which the statute takes effect. Since the parameters of "material prejudice" are unclear, it is expected to be an area that is heavily litigated over the next few years.

Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of NY and **Panasia Estates, Inc. v. Hudson Ins. Co.**

The Court of Appeals has significantly changed New York law regarding first-party bad faith. Previously, New York was a state with no real first-party bad faith. These cases, however, represent a turning point, as the Court held that an insured could recover consequential damages as a result of a wrongful failure to provide coverage based on breach of contract principles. Although the Court has decided to recognize first-party bad faith, it did not articulate the standards by which bad faith is established. Read literally, any dispute in which an insured prevails over its insurer could be considered a breach of contract, thereby subjecting the carrier to consequential damages. For example, in Bi-Economy, the carrier did not pay the full amount of business interruption coverage after a fire and is therefore subject to a claim that it caused the insured to go out of business. It is therefore possible that carriers may be exposed to loss of business claims, or in personal lines, the value of lost real estate in the case of a mortgage company foreclosure. At this time, it is unclear how the law will develop and whether any standards, such as New Jersey's "fairly debatable" standard, will be employed.

Vucetovic v. Epsom Downs, Inc.

The Court of Appeals interpreted New York City's sidewalk law which, since 2003, imposes tort liability on abutting commercial landowners for sidewalk defects. This local ordinance, which only applies to the City of New York, is in derogation of the previous law which absolved abutting landowners of tort liability. In this case, the plaintiff fell in a tree well owned by the City. The Court held that the law would be narrowly construed and since the Parks Department maintained exclusive jurisdiction over the tree wells, liability would not be extended to the abutting landowner.

Tutrani v. County of Suffolk

In this case, a County police officer, who was travelling on a highway, abruptly slowed his vehicle while changing lanes. The plaintiff, able to stop without hitting the police car, was rear-ended by the following vehicle. The jury determined that the police officer was 50% liable for causing the accident. On appeal, the Second Department reversed, finding that the officer was not a proximate cause of the accident because the plaintiff was able to stop. The Court of Appeals reversed the decision of the Second Department and reinstated the verdict. In its decision, the Court of Appeals held that the officer's abrupt deceleration set the events which

led to the accident in motion, especially since the accident happened seconds after the officer slowed his vehicle.

White v. Diaz

This case involved a double-parked van in Manhattan which was rear-ended. The van moved for summary judgment, claiming its action only furnished the occasion for the accident, but was not the proximate cause. Essentially, it was the van's position that the driver of the other vehicle was 100% at fault for the happening of the accident. The Court affirmed a denial of summary judgment and indicated that the issue of whether one proximately causes an accident or furnishes the occasion for accident is a difficult question with conflicting case law and therefore should be determined by the jury.

O'Brien v. Mbugua

This case dealt with what is often a difficult question in New York, the extent to which a testifying doctor can rely on the medical records and reports of non-testifying doctors. Here, the treating doctor was allowed to testify regarding an MRI report despite not having personally reviewed the films. While the treating doctor's testimony would not have been permitted to serve as merely a conduit for the non-testifying doctor's opinion or findings, the Court noted that the testifying doctor ordered the MRI and based his opinion on several factors, one of which was the report of the non-testifying doctor.

Cohen v. Memorial Sloan-Kettering Cancer Center

In this case, a worker on a ladder was hurt by protruding pipes. The Labor Law 240 claim was dismissed and the Court held that the Labor Law is not invoked merely because work is performed at a height, as long as the loss was caused by an ordinary danger of a construction site and not specific to the elevation-related risk.

Sorbara Const. Corp. v. AIU Ins. Co.

Here, the insurance carrier had timely notice of an accident under a workers compensation policy, however, notice was not given to a specific excess policy until 5 years after the accident. The court held that even though the company (as a whole) had notice of the claim, notice under a workers compensation policy is not deemed to be notice under a liability policy, therefore the late notice defense was upheld.

Brooks v. Judlau Contracting, Inc.

In this case, the court addressed an important question related to indemnification contracts, previously left open by prior decisions. The subcontract provided that the subcontractor, plaintiff's employer, was required to indemnify the contractor to the fullest extent permitted by law. Under General Obligations Law 5-322.1, any contract under which one seeks indemnification for their own negligence is void. The court held that the contract only sought partial indemnification, to the extent of the subcontractor's own negligence and that such partial indemnification is permissible.

Sanatass v. Consolidated Investing Co., Inc.

In this case, a worker was hurt while performing an alteration on the subject building. The lease prohibited the tenant from engaging in such work without the consent of the landlord. The Court held that pursuant to the absolute liability imposed by Labor Law 240, the owner of the building is liable for the height-related accident, despite the lease provision, the fact that the owner did not have knowledge of the work, and the fact that the tenant had no right to contract for the work.

Berg v. Albany Ladder Co., Inc.

In this case, a worker was injured while unloading trusses from a trailer. During the unloading process, the trusses began to roll and the worker fell from the trailer. The court held that Labor Law 240 was inapplicable and the statute does not apply to every fall that occurs at a worksite. Here, the accident was not deemed to be related to elevation and no safety devices that could have prevented the accident were introduced.

Preserver Ins. Co. v. Ryba

In this case, the underlying plaintiff suffered a grave injury. In New York, an employer can be impleaded in a case for common law contribution if there is a grave injury. The defense of such a claim rests with the workers compensation policy. Here, Preserver issued a New Jersey workers compensation policy to a New Jersey employer. The policy did not indicate that the insured performed work in New York. Under New York Insurance Law Sec. 3420, disclaimers must be provided in a timely manner. While there is a large amount of litigation regarding the timeliness of disclaimers, this law only applies to policies issued in New York. Since the subject policy was issued in New Jersey, Sec. 3420 did not apply. (Under NJ law, an insured has to show it is prejudiced by an untimely disclaimer, NY is a "no-prejudice" state if 3420 applies). Additionally, under New York law, an employer's liability coverage under a workers compensation policy is unlimited. Conversely, under New Jersey law, a limitation on an employer's liability coverage is permitted, which in this case was $100,000. The Court held that since the policy at issue was a New Jersey policy, its limitation of coverage was permissible, despite the fact that the work was performed in New York. In essence, the policy did not have to comply with New York's unlimited coverage. Finally, the court noted that effective September 2007, an employer performing work in New York is required to obtain a workers compensation policy issued in New York.

Fair Price Medical Supply Corp. v. Travelers Indem. Co.

This is a case that truly highlights New York's "procedure over substance" position regarding the payment of no-fault claims by carriers. Here, the defendant, through its insured, established that he did not actually receive supplies from the plaintiff. However, Travelers did not receive this information in a timely manner after the claim was submitted, and as a result, did not timely disclaim under the strict no-fault regulations. In rendering its decision to allow the claim, the court in essence held that it is more important for carriers to comply with the no-fault regulations than it is to punish a provider who may engage in fraudulent billing practices. While there is a narrow exception to the timely disclaimer rule if there is no coverage, billing for services which are not provided is not a coverage issue. Two dissenting justices questioned the wisdom of the court's permitting fraudulent claims based on technicalities which were previously unnoticed by the carrier.

Bernstein ex rel. Bernstein v. Penny Whistle Toys, Inc.

The court reiterated the longstanding New York law which provides no recovery for a dog bite unless the dog's owner knew of the animal's vicious propensities.

AT THE FIRM

Methfessel & Werbel welcomes three new associates – Michelle Schott, Adam Weiss and Jeffrey Noonan.

Michelle Schott joins M&W with more than a decade of experience in civil rights, environmental and general liability law. Michelle works with Eric Harrison in the litigation of civil rights and employment claims.

Adam Weiss completed a clerkship in Middlesex County for the Hon. Edward Ryan, J.S.C. Adam has also joined Eric Harrison's team and will focus on the defense of civil rights and employment matters.

Jeffrey Noonan, a former law clerk with the State Division of Criminal Justice, joins Stephen Katzman's coverage team. Jeff will focus on the investigation and civil prosecution of suspected insurance fraud.

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 and **Ric Gallin** recently hosted a conference sponsored by the Institute of Continuing Legal Education. Marc moderated the discussion and Ric provided insight on the litigation of bad faith claims under New Jersey law.

Eric Harrison and **Michael Eatroff** participated in a PIP Symposium of the Insurance Council of New Jersey, discussing current issues in the litigation of Manipulation Under Anesthesia. A few months later, **Eric Harrison** and **Adam Weiss** conducted a break-out session at ICNJ's fall meeting where they addressed the litigation of Post-Traumatic Stress Disorder claims.

In October **Eric Harrison** gave a presentation to the Mutual Services Office, Inc. on third party exposures to internet-related liability claims. Later that month Eric participated in an ICLE seminar on "Hot Topics in Special Education".

IN THE COURTS

Don Crowley tried a pedestrian knockdown case twice - and won both trials.

Plaintiff attempted to cross a roadway on a dark, rainy night carrying a large yellow umbrella and wearing a white sweater. The insured driver, age 75, did not see plaintiff in time and struck her with the front of his vehicle. Plaintiff sustained bilateral tibia and fibula fractures, both requiring open reduction and internal fixation including rodding; left superior and inferior pubic ramus fractures and right clavicle fractures. She was hospitalized for 22 days and then discharged to home with a hospital bed and home care services. The first jury determined that the insured was negligent, but that his negligence was not a proximate cause of the accident.

Plaintiff appealed the verdict on the basis that the Court improperly sustained Don's objection to plaintiff's inquiry of defendant's accident reconstruction expert on the issue of proximate cause. The Appellate Division agreed and the matter was remanded for a new trial, but with the new jury being instructed that the insured had already been determined to be negligent – the only issue was proximate cause.

The second time around, the jury found that both parties were negligent, but plaintiff's negligence was 85%, with the insured only 15% negligent, resulting in another "No Cause".

Don also tried a case in which the insured owned a building which housed his own insurance agency as well as plaintiff's electronics store. He hired a plumbing contractor to install hot water heaters. A fire occurred due to improper use of a plumber's torch to sweat a copper pipe, destroying the entire building. The insured was sued for negligently hiring the plumbing contractor. The demand was $300,000 for the uninsured loss.

At the close of plaintiff's case, Don moved for involuntary dismissal on the basis of non-liability of a landowner who engages an independent contractor unless (a) the landowner controls the manner and means of the contractor's work, (b) engages an incompetent contractor, or (c) the activity contracted for constituted a nuisance per se. The Court found that plaintiff had not satisfied any of these requirements and dismissed the case with prejudice.

Don settled a failure to warn product liability case for $3.2 million on the date of trial. The case involved two workers on a pump jack scaffold system which collapsed. Don represented the manufacturer of the pump jacks which held the system together. Plaintiffs had serious proof problems in plaintiff-oriented Hudson County on the issues of both identity of the product and proximate cause of the allegedly inadequate warning to the accident. However, one plaintiff was rendered a paraplegic and the other was a 55 year old who sustained moderate brain damage . Neither could ever work again. Their economic losses alone were more than $1 million each. Also, each had to pay back $800,000 towards a workers compensation lien. Ultimately the plaintiffs obtained a net recovery of $650,000 each, which was a small fraction of what a jury could have awarded.

Ed Thornton received a reversal of a trial judge in the Appellate Division, the Appellate Division agreeing that the trial judge had no authority to force a carrier to participate in a structured settlement against its will. The Court agreed with Ed that the carrier’s negotiating position would be damaged if a court were to allow, after resolution had been reached, an additional condition to be foisted upon the carrier by the court.

Ed settled a death action food poisoning claim brought against the insured, a supplier of raw fish, and a restaurant. The restaurant paid $150,000.00, Ed’s client paid $7,000.00.

Ed also received summary judgment in the case of a police officer who was shot while on-duty. The officer had responded to the scene because of reports of gunfire. It seems the driver and the insured were shooting a

handgun and a machine gun out of a moving vehicle, and when pulled over, a gun fight ensued. The driver of the car was killed by police, and Ed received summary judgment on behalf of the passenger.

Ed settled the case of a man who fell down an interior staircase of the insured's building, broke his neck and lingered in a coma for four months until dying. The case settled for $25,000.

Ed also obtained reversal of a trial judge, who had refused to grant summary judgment to a church on a claim brought by a woman who fell on church property. She claimed that since she was just picking up a relative from an event, she was not a beneficiary of the church. The trial judge agreed and denied summary judgment. Ed filed a motion for interlocutory appeal and the Appellate Division reversed, finding that charitable immunity barred the lawsuit.

Ric Gallin tried a high exposure auto accident case in New York Supreme Court (Westchester County). The insured left turned the 30 year-old female plaintiff resulting in a high speed crash. The plaintiff was trapped in her car for over one hour and her leg was shattered to the point that her foot was facing backwards. She had multiple plates installed, will need at least two future surgeries and has the real possibility of needing a foot fusion. Against a demand for the policy limits of $1.25 million, Ric obtained a net verdict of $975,000.

Ric also obtained important decisions from two trial judges regarding the inapplicability of Owens Illinois allocation methods to underground storage tank ("UST") claims. Many carriers have been taking the position in environmental cost recovery actions, especially UST claims, that regardless of who is insured, all that need be performed is an Owens Illinois allocation based on applicable policy limits. We have never agreed with this position. It is our position that liability between different insured needs to be determined based on Spill Act liability and that policy limits do not matter. The contiguous trigger allocation of Owens Illinois should apply only when the carriers insure the same party. Rick convinced two different trial judges – Judge Goldman in Essex and Judge Perri in Monmouth – agreed with our position. Judge Perri issued an extensive, well-reasoned written opinion. Judge Goldman's decision is currently on appeal.

In a case where material meant to be recycled was instead used as fill for a clay mine quarry, turning it into a landfill, the parties sued our client, an insurance carrier, to fund a seven-figure clean-up and to reimburse the parties for an alleged seven-figure damage to the land and a seven-figures sum of accumulated legal fees. There were issues as to whether the recycled material was truly a pollutant, issues as to additional insureds and issues as to whether the duty to defend was triggered even if ultimately there was no duty to indemnify. Ric settled the case after a trial had been scheduled for pennies on the dollar, arranging settlements with the three different adversaries for less than $350,000.

In a case in Queens involving neighborhood-wide damage due to a water main break which resulted in multiple lawsuits, Ric managed to extract from the City their confidential internal investigation by seeking Mayor Bloomberg's deposition. The City had been stonewalling, claiming the water main broke due to work of a contractor who was excavating in the area. After Ric deposed the City engineer who prepared the report, the City not only settled our cases on favorable terms, but gave up their defenses and resolved all of the outstanding claims.

In another case of extensive damage caused by a gas main explosion, in Ulster County, the liable party was again stonewalling on settling the claims. Ric obtained summary judgment against the defendant and forced the defendant to pay in excess of 100% of the claim, extracting a pre-judgment interest penalty as a consequence of the unreasonable settlement position the defendant had been taking.

In a Somerset County case, the plaintiff carrier sought from a prior owner 75% of the costs of an expensive UST remediation. The current owner had owned the property for less than three years and the plaintiff claimed

through age dating that it was a ten year-old spill. Ric, defending the prior owner, settled the case for 25% based on weaknesses in the scientific proofs supporting plaintiff's claims.

In LBK v. Pawtucket Mutual, **Marc Dembling** successfully obtained an Order that a first party claim against an insurer should be sent to an appraisal pursuant to policy terms. After appraisal Marc recovered $400,000 for the Company through litigation against contractors who had caused the damage.

Marc also obtained summary judgment in favor of a liability insurer because an exposure to toxic fumes which caused leukemia and death of a plaintiff occurred after the termination date of our policy. Marc successfully argued that cases involving trigger of coverage in environmental law do not apply to an "occurrence" in a claim for personal injury.

John Knodel handled a case in which plaintiff, a mason, alleged the insureds hired him to cut down a large tree on their property although he had no experience by explaining how to do it and providing a chainsaw, ladder and safety line. When plaintiff showed up to cut the tree the insureds weren't home and failed to supply the safety line. While cutting the tree plaintiff fell out of it severely fracturing his right knee requiring surgery leaving him with a contracture preventing him from straightening his leg and a significant limp. Plaintiff's treating orthopedist opines plaintiff will need a total knee replacement. The defense doctor did not disagree. Plaintiff can no longer work as a mason and presented a substantial economic loss. The insureds hired plaintiff to install a new walkway and admitted to discussing with plaintiff installing a driveway where the tree was located but adamantly denied ever hiring plaintiff to cut down the tree. Plaintiff survived a motion for summary judgment but the trial judge granted John's motion for an involuntary dismissal at the end of all the evidence ruling the insureds owed no duty to protect plaintiff from a hazard inherent in the work he was hired to perform, assuming the insureds hired plaintiff. Plaintiff's appeal is pending.

John also recovered $215,000 in a subrogation claim in which the insured property owner suffered substantial fire damage as a result of an employee of a tenant carelessly discarding a lit cigarette. The tenant, a subprime mortgage lender, denied its employees were allowed to smoke in the building. The settlement was for nearly all of the available coverage and with defendant on the verge of filing for bankruptcy.

John obtained summary judgment on behalf of a homewner's association and its property manager against a homeowner who claimed the property manager defamed him by publishing a letter accusing him of theft and of the association violating the NJ Condominium Act by passing a resolution to the association's bylaws restricting access to the association's financial records in violation of Mulligan v. Panther Valley Homeowner's Association. The trial court granted summary judgment on all issues and the Appellate Division upheld the dismissal of the defamation claim but remanded the alleged violation of the NJ Condominium Act for a determination if the resolution was "reasonable." On remand the court ruled the resolution was reasonable, dismissing the complaint with prejudice.

John also won $181,000 in a binding PIP arbitration in which the insured was left turned by the defendant injuring her low back and eventually undergoing a lumbar fusion incurring $181,000 in medical bills. The defendant claimed the insured wasn't driving and the driver of the insured vehicle, whoever it was, had enough time to avoid the defendant's vehicle, a dump truck. The panel disagreed and awarded 100% of the amount claimed.

Scott Heck obtained summary dismissal of a claim under the Law Against Discrimination by a minority student against his school district. The teenage plaintiff, who is black, was physically attacked by classmates who shouted racial epithets. Scott represented the Superintendent and the School Principal, both of whom were released from liability for lack of proof of aiding and abetting discrimination in violation of the LAD.

In another matter involving a claim of $10,000 arising out of alleged damage to an automobile sold by the insured, Scott obtained dismissal of negligence, breach of warranty, consumer fraud and lemon law claims.

Matthew Rachmiel recently obtained dismissal of a falldown case due to lack of jurisdiction. Plaintiff, a New Jersey resident, fell in an inn located in New Hampshire and filed suit in New Jersey. Matt moved to dismiss the case, arguing that the inn did not have sufficient contacts with New Jersey to permit the court to assert jurisdiction.

The inn was AAA-approved and maintained a website through which customers could make reservations. Plaintiff argued that those facts were sufficient to support the court's jurisdiction over the inn. Matt noted that plaintiff did not present any evidence as to the significance or import of the inn being AAA-approved and that plaintiff did not use AAA to make her reservation. Matt also cited case law to support the position that being AAA-approved, without evidence that, for example, that designation meant that the inn appeared in AAA advertisements or pamphlets in New Jersey, was insufficient to establish jurisdiction. Mr. Rachmiel also cited case law to support the position that an inn maintaining a website through which customers can make reservations, without any evidence as to the frequency with which New Jersey residents availed themselves of that service, was similarly insufficient to support the court's jurisdiction over the inn.

The court concluded that the evidence presented was insufficient to constitute the "continuous and systemic" contacts with New Jersey that is required for a New Jersey court to assert jurisdiction over an out of state defendant. The court dismissed the plaintiff's Complaint against our client for lack of jurisdiction.

Matthew Rachmiel also successfully defended a significant PIP arbitration matter. Claimant, a surgeon, sought reimbursement for back surgery upon a patient who had a motor vehicle accident several years earlier. The patient sustained injury in an unrelated fall down about one week before the surgery. Claimant asserted that the surgery was related to the motor vehicle accident and Matt asserted the absence of a causal connection between the motor vehicle accident and the surgery, given the patient's very recent fall down and pre-existing back conditions. He relied upon several independent medical evaluators who opined that there was insufficient evidence that the motor vehicle accident necessitated the surgery.

Following arbitration, the arbitrator ruled in favor of the insurer and concluded that the surgeon had not presented sufficient evidence that the surgery was causally related to the motor vehicle accident. The demand for arbitration in excess of $150,000 was denied in its entirety.

Andy Mejer obtained summary judgment in favor of a liability carrier in a case involving the shooting of a wife by her husband at the insured premises. The husband was arrested for the shooting but before the matter could be tried, he committed suicide. The executrix of the wife's estate sued the husband's estate for wrongful death and survivor benefits. A claim was made under the husband's homeowner's insurance for defense and indemnification. Merrimack denied the claim and filed a declaratory judgment for determination that no defense or indemnification was under the policy on the basis of the insured vs. insured exclusion. The court granted summary judgment.

In another coverage action handled by Andy, National Continental issued the plaintiff a commercial automobile policy for its charter bus business in the wrong rating territory because plaintiff provided inaccurate information on his application. Upon receipt of verified information, the territory was corrected, resulting in an increase premium. The additional premium was never paid, and the policy was canceled. Plaintiff filed suit, alleging the policy was wrongfully canceled and seeking loss of business income. Summary judgment was granted to National Continental, and reconsideration was denied. The Appellate Division affirmed dismissal.

Andy also obtained a judgment which voided *ab initio* an auto policy based on applications at the time of renewal. Plaintiff filed suit for personal injuries arising out of an automobile accident in New Jersey. The

defendant was insured by an out-of-state carrier, against whom he filed a third party claim for defense and indemnification. The court agreed with Andy's argument that the policy was void *ab initio* due to the insured's misrepresentations at the time of renewal and during the claims investigation.