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CASE UPDATE

August 2002

The rapid expansion of our New York office has prompted many of our friends and clients to request updates on New York law. Beginning with this issue, then, the Case Update will summarize New York decisions which promise to impact the insurance industry.

As always, we welcome your comments and suggestions as to how we may better address the needs of our clients. Inquiries regarding our quarterly Case Update should be addressed to Eric Harrison, by phone or by email at harrison@methwerb.com.

ENVIRONMENTAL LITIGATION/"CONTINUOUS TRIGGER"

Ric Gallin has had a busy Spring and Summer. In addition to managing M&W's New York office, Ric has followed last year's success in Perreira v. Rediger by arguing several prominent cases before the New Jersey Supreme Court and Appellate Division.

In Quincy Mutual v. Borough of Bellmawr the New Jersey Supreme Court refined the "continous trigger" theory first enunciated in the landmark Owens-Illinois decision.

Like many municipalities in South Jersey, Bellmawr utilized the now-infamous Helen Kramer landfill. The borough began dumping in May 1978 and continued to dump through January 1981. On June 15, 1978, they switched liability carriers from Cigna to Quincy Mutual. In this Declaratory Judgment action, both the trial court and the Appellate Division held that the dumping that occurred while Cigna was on the risk did not trigger coverage since the waste had not yet contaminated off-site groundwater.

On certification, Ric convinced a unanimous Supreme Court that the lower court holdings confused concepts

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of "owned property" with third party liability for off-site dumping. The Court ruled as a matter of law that in a case involving off-site contamination, the first act of dumping will trigger coverage.

The Court provided much-needed guidance to the insurance industry by adopting a "days on the risk" approach to policies triggered after inception. Under this approach, the limits of policies only partially triggered will be exposed in proportion to the number of days per policy period triggered. Cigna, for example, was held responsible for only 45/365ths of its liability limits since the dumping triggered its policy with only 45 days left.

ENVIRONMENTAL LITIGATION/LIABILITY EXCLUSIONS

In Leo Haus, Inc. v. Selective the Appellate Division enforced the pollution exclusion in a home builder's commercial liability policy to preclude coverage for personal injuries suffered by the homeowners due to their heater's discharge of carbon monoxide over the course of a year. The policy at issue, like most standard liability policies, excluded coverage for injuries arising out of "discharge, dispersal, seepage, migration, release or escape" of pollutants. The Court refused to limit application of the exclusion to industrial settings, finding the language neither ambiguous nor contrary to public policy.

INSURANCE COVERAGE TRIALS/DISCLOSURE OF LIABILITY INSURANCE

Ric Gallin and Jared Stolz of our office participated in multiple trials and appeals in the matter of Humenik v. Gray, which recently culminated in a published decision on the propriety of a trial court's reference to the availability of insurance.

High school student Taft Gray shoved classmate Jacqueline Humenik into the lockers at school. Ms. Humenik sustained a wrist fracture that developed into reflex sympathetic dystrophy, a rare complication of uncertain origin. She sued Gray for damages.

Gray's father was insured by Allstate, which refused to defend him based on the exclusion for losses "which may reasonably be expected to result from the intentional or criminal acts of an insured person." Gray filed a third-party declaratory judgment action against Allstate.

Following a bench trial by Jared, Judge Pisansky of Union County concluded that Gray's actions amounted to no more than negligence and that he was therefore entitled to coverage. The Appellate Division reversed in an unpublished opinion, holding that fact issues required a jury trial on the issues of intent and foreseeability of the plaintiff's injuries. In the interim Humenik obtained a judgment against Gray for $150,000.

Ric Gallin handled the second coverage trial, in which Judge Weiss overruled Ric's objections and disclosed both the amount of the bodily injury verdict and the fact that Gray would be personally responsible for payment if the jury were to find in favor of Allstate. The jury found for the insured. The Appellate Division held that although the errors were harmless, the trial court did err in disclosing the amount of the bodily injury verdict and the potential of a personal judgment against the insured.

The publication of Humenik v. Gray provides additional ammunition to carriers who seek to preempt inappropriate references to the availability of liability insurance.

HOMEOWNERS INSURANCE/CDS EXCLUSION

In Prudential v. Brenner the insured's son pleaded guilty to conspiracy to commit armed robbery, admitting that he and his friends visited the home of a known drug dealer intending to "steal a pound of marijuana." A struggle ensued and the drug dealer was shot and killed by one of Brenner's friends.

The family of the decedent filed a wrongful death action and Brenner sought coverage from Prudential, his parents' carrier. Prudential disclaimed coverage, citing an exclusion for coverage of loss or injury "arising out of the use, sale, manufacture, delivery, transfer or possession by any person" of a controlled dangerous substance. Finding the exclusion clear and unambiguous, the Court also found a sufficient nexus between the decedent's death and the attempted acquisition of CDS to place the claim within the CDS exclusion.

PUBLIC ENTITY LIABILITY INSURANCE/ TRIGGER OF COVERAGE

Borough of Florham Park v. Utica Mutual involved a dispute between two liability carriers over responsibility for the counsel fees and expenses

incurred by a teacher who was accused of sexual assault and ultimately acquitted. A divided Supreme Court held that because the Board of Education's statutory obligation to indemnify the teacher under N.J.S.A. 18A:16-6.1 arose at the moment of acquittal, the acquittal also operated as the trigger of coverage under the Board's liability policy. This ruling relieved from liability the Board's previous carrier, which was "on the risk" at the time of the alleged misconduct and the filing of charges.

AUTOMOBILE INSURANCE/VERBAL THRESHOLD

Law Division judges from Union and Bergen Counties have published conflicting opinions on the applicability of the Oswin "serious impact" requirement to claims subject to the new verbal threshold under AICRA.

In Compere v. Collins Judge Lyons of Union County ruled that in passing AICRA, and particularly in defining "permanent injury" under N.J.S.A. 39:6A-8, the Legislature essentially abrogated the "serious impact" requirement under Oswin and its progeny. While the plaintiff sustained significant injuries and probably would have met the "serious impact" requirement if it had been imposed, Judge Lyons' holding, if followed by other trial courts, effectively means that a herniation of disputed origin will typically suffice to defeat a summary judgment motion.

In contrast, Judge Yannotti of Bergen County held in Rogozinski v. Turs that plaintiffs who proceed under the new verbal threshold are still obligated to satisfy the objective and subjective prongs of the Oswin test, albeit within the confines of a higher injury threshold.

In view of the severity of the plaintiff's injuries, Allstate chose not to appeal Judge Lyons' decision in Collins. Judge Yannotti's holding in Rogozinski has been appealed. We will keep you posted on the development of this hot issue. In the meantime, all carriers would be well-advised to file verbal threshold motions and invoke the reasoning of Judge Yannotti to demand jury charges and interrogatories covering the "serious impact" requirement.

AUTOMOBILE INSURANCE/ PIP BENEFITS/EXAMINATIONS UNDER OATH

The Appellate Division has provided a strongly-worded decision which will aid auto carriers frustrated by their inability to investigate PIP claims with Examinations Under Oath. In State Farm v. Warrington the court held that a PIP insured must submit to an insurer's request for an EUO, even in the face of an ongoing grand jury investigation involving the insured. Additionally, the insured's Fifth Amendment privilege against self-incrimination does not give the insured a blanket right to refuse to answer all questions.

Charles Warrington was not only an alleged accident victim, but also a member of the board of directors of American Spinal, whom State Farm paid nearly $23,000 in PIP benefits for his treatment. State Farm attempted to schedule an EUO to investigate the possibility of fraud.

Warrington earlier had been served with a Grand Jury subpoena to testify regarding allegations that a retired police officer had been obtaining accident reports and recruiting patients for American Spinal. Based on the subpoena and the ongoing investigation he refused to submit to an EUO on Fifth Amendment grounds.

The court cited NJAFIUA v. Jallah, Prudential v. Nardone and Ransom v. Selective for the proposition that Warrington, as an insured claimant, had a contractual duty to submit to an examination under oath. If he were to refuse to answer material questions, held the court, he would risk being compelled to repay the PIP benefits previously paid to the care provider.

Thus Warrington arguably expands Jallah by contemplating an action to recoup previously paid PIP benefits for lack of cooperation in a post-payment investigation. This decision provides a basis not only for demanding an EUO after benefits have already been extended, but also for suit to recover such benefits upon discovery of fraud or non-cooperation.

CHARITABLE IMMUNITY

The Spring of 2002 has seen significant developments in the law of charitable immunity.

The Supreme Court resolved a split among appellate panels with its decision in O'Connell v. State of New Jersey. As reported in this publication in 2000, the appellate rulings in O'Connell and Graber v. Stockton College provided opposite views on the applicability of the Charitable Immunity Statute to claims against public entities. The Supreme Court's ruling in O'Connell resolves the dispute in favor of charitable immunity for public universities.

Under the Charitable Immunity Act, an entity is entitled to immunity from suit by a beneficiary if the entity is a "nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes." The O'Connell Court held as a matter of law that despite its dependence on public funding, Montclair State College qualifies as a nonprofit association organized exclusively for educational purposes. Thus the college was immune from a student's suit for personal injuries sustained on campus.

An appellate panel decided Abdallah v. Occupational Center of Hudson County in the wake of O'Connell. Abdallah involved claims by a mentally incompetent man and his daughter that negligent supervision by OCHC, from whom both received services, exposed the daughter to sexual abuse by another resident. The trial court granted summary judgment to OCHC and the Appellate Division reversed, directing the trial judge to apply the approach of Parker v. St. Stephen's Urban Development Corp. to determine if this "non-profit, non-religious, non-educational organization" qualified for charitable immunity.

The Abdallah Court declined to apply the Supreme Court's holding in O'Connell to OCHC, holding that because the entity was neither educational nor religious, the source of its funding was still relevant under Parker. If the funding flowed primarily from private sources then charitable immunity would apply, since the immunity serves the public policy of "preservation of private charitable contributions for their designated purposes."

In a more simple but no less important case, the Appellate Division ruled in Dupree v. City of Clifton that a church whose property abutted an uneven sidewalk was entitled to sidewalk immunity because the church was used exclusively for religious purposes.

TORT CLAIMS ACT/GOOD FAITH IMMUNITY

In Dunlea v. Township of Belleville the plaintiff sustained injuries in an accident with a Belleville police officer who was allegedly responding to the report of a burglary without activating his siren or overhead lights. The Appellate Division reversed dismissal of the Complaint, holding that a plaintiff suing a public entity need not prove willful misconduct to overcome good faith immunity. Rather, a finding of reckless conduct will suffice.

MEDICAL MALPRACTICE/FRAUD

Against the backdrop of New Jersey's malpractice insurance crisis, the Supreme Court in Howard v. UMDNJ established a difficult burden of proof to be shouldered by patients claiming damages due to a doctor's misrepresentation of his credentials or his experience. Of course, a doctor whose services deviate from the applicable standard of care will generally be liable for malpractice. When a plaintiff alleges lack of informed consent because of inaccurate self-promotion by the doctor, however, he must prove that the exaggeration increased the risk of harm and that a reasonably prudent person aware of the truth would have elected not to undergo the procedure.

Observers in the medical community have commented that Howard's materiality requirement will protect competent doctors from over-litigious patients and insurance coverage problems. Permitting a fraud claim to stand without requiring materiality effectively would allow every unlucky victim of a bad surgical result to raise a dispute over who said what prior to surgery regardless of the doctor's competence. Moreover, because fraud is an intentional (and therefore uninsurable) tort, doctors unprotected by the Howard materiality requirement could be pressured into settling frivolous claims to avoid personal exposure.

MEDICAL MALPRACTICE/ CHARITABLE IMMUNITY

In Velazquez v. Jiminez a divided Supreme Court demonstrated that judicial protection of an embattled

profession has its limits. In this case, those limits were created by the plain language of an immunity statute that simply could not be stretched any further. The Court held that the Charitable Immunity Act cannot be invoked to immunize a hospital physician who assists a patient at the hospital during a medical emergency.

In ruling that the statute as written could not be extended to cover the conduct of doctors in hospitals, the Court invited the legislature to expand the Act. This could very well occur in the near future in view of the insurance dilemma facing New Jersey's medical community.

EMPLOYMENT LAW/ARBITRATION CLAUSES

A bitterly divided New Jersey Supreme Court has upheld the right of employers to condition employment on the waiver of the employee's right to a jury trial.

Maureen Martindale was hired by Sandvik, Inc. as a benefits administrator. Sandvik required her to complete and sign an application which stated that "AS A CONDITION OF MY EMPLOYMENT, I AGREE TO WAIVE MY RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING RELATED TO MY EMPLOYMENT WITH SANDVIK." The agreement further indicated that she acknowledged her right to consult an attorney before signing, waived her right to a jury trial voluntarily and agreed to arbitrate any and all disputes relating to her employment.

Distinguishing the 2001 Supreme Court decision of Garfinkel v. Morristown Obstetrics – in which the agreement at issue did not contain an express waiver of the right to a jury trial – the Supreme Court ruled 4-3 in Martindale v. Sandvik that the arbitration clause was valid and enforceable, barring plaintiff's demand for a jury trial and compelling arbitration of her claims under the Family Leave Act.

The Martindale decision joins a growing body of hotly-contested "waiver" law across the nation. Not surprisingly, labor advocates have decried the unequal bargaining power behind such agreements, while management advocates arbitration clauses as a means of controlling the skyrocketing costs of litigation and liability insurance. We expect that the United States Supreme Court will address this issue within the next few years. Until then, Martindale will govern all disputes over the validity of jury trial waivers in New Jersey.

NEW YORK CASES/CRIMINAL ACTS EXCLUSION

In Slayko v. Security Mutual the Court of Appeals upheld the criminal acts exclusion in a homeowners policy. In doing so, the appellate court overruled the Third Department's declaration that the exclusion was unenforceable as contrary to public policy.

Slayko and a friend were socializing in a cabin when the friend began playing with a shotgun. Thinking it was unloaded, he pointed it at Slayko and negligently shot him.

The friend pled guilty to felony assault. In Slayko's bodily injury suit, the intentional act exclusion did not bar coverage because the friend did not intend to injure Slayko. However, the criminal acts exclusion was directly on point, as the liability arose from the act for which the friend was convicted.

The Court pointed out that homeowners policies, unlike auto and fire insurance policies, are not subject to a host of statutory or regulatory requirements. When statutes or regulations are silent, freedom of contract will generally prevail.

Significantly, the Slayko Court expressly refused to adopt the "reasonable expectations" doctrine, which Court have used in several states – such as New Jersey – to circumvent even unambiguous exclusions.

NEW YORK CASES/PREMISES LIABILITY/ NOTICE

In Tyrell v. Wal-Mart Stores, the Court of Appeals held that a statement by an unknown employee that "I told somebody to clean up that mess" was inadmissible hearsay because there was no showing that the unidentified employee was authorized to make the statement.

In premises cases, New York plaintiffs have sought to establish notice by introducing similar testimony to show that management knew of the alleged hazard. The Tyrell decision should frustrate such tactics in the absence of otherwise admissible proof of notice.

Tyrell was recently followed by the Second Department in Goberdahn v. Waldbaums. In that case, in addition to disallowing the employee hearsay, plaintiff's affidavit that he noticed the same puddle when he first entered the store was rejected as being feigned and contrary to his deposition testimony.

On the other hand, the First Department in Navedo v. 250 Willis Ave. Supermarket allowed evidence that plaintiff's neighbor (conveniently in the store) heard the manager acknowledge that an employee had been instructed to clean the spill "a while ago". The manager was deemed to have authority to speak on behalf of the store.

NEW YORK CASES/SURVEILLANCE TAPES

The Departments have split in their interpretation of CPLR 3101(i) as it applies to surveillance tapes. In 1992, in a decision designed to balance the competing interests of plaintiff's need for discovery and defendant's desire to avoid testimony tailored to the tapes, the Court of Appeals ruled in DiMichel v. South Buffalo Railway that surveillance tapes were material prepared for litigation. While the plaintiff could review tapes intended for use at trial, defendant was entitled to depose plaintiff before producing them.

The Legislature quickly enacted CPLR 3101(i), which requires disclosure not only of tapes intended to be used, but also outtakes, memoranda and investigative reports concerning the tapes. In 1998 the Fourth Department ruled in DiNardo v. Koronowski that the statute effectively overruled DiMichel to require production of surveillance tapes before the deposition. The Third Department followed suit in Rotundi v. Mass Mutual, a decision published in 2000.

In contrast, the First Department recently ruled in Tran v. New Rochelle Hospital that DiMichel still permitted defendants to depose plaintiffs prior to production of surveillance tapes. Even if the plaintiff has already been deposed, ruled the Court, the defendant will still have the right to a second deposition if the tape raises new issues.

A Justice in Nassau County (Second Department) has chosen to follow Tran, rejecting DiNardo and Rotundi to hold that the tape at issue need not be furnished until plaintiff's deposition has been taken.

COURT NOTES/NEW JERSEY FILING FEE INCREASES

As of July 1, 2002, the fee for filing initial pleadings (Complaints and Answers) in New Jersey Superior Court increased to $200. The fee for filing motions has increased from $15 to $30. The Special Civil Part has followed suit, raising its Complaint filing fees to $50 for all claims exceeding the sum of $2000.

The Appellate Division and Supreme Court have also raised their filing fees to $200 for appeals and $30 for motions.

TRIAL RESULTS

Don Crowley tried a four day product liability case in Morris County which ended in a no cause verdict in favor of the defendant manufacturer.

Plaintiff sued the insured ladder manufacturer, claiming that a manufacturing defect in the siderail of the aluminum ladder caused it to buckle while she was standing on the fifth step and painting under a skylight at her home. She sustained a severe fracture of the left wrist, resulting in angulation and shortening, nerve damage and a "frozen" hand.

Plaintiff's liability expert concluded that the siderail as measured exceeded the tolerance set forth in the production specifications. He could not measure the thickness of the ladder in the area that collapsed for the simple reason that it was crushed in the accident. Nevertheless, he reasoned that because the toleration varied from point to point on the crushed

ladder, the area of the collapse must have been undersized.

Don defended the manufacture of the ladder based on the its uniform satisfaction of both the applicable ANSI standards and the manufacturer's own specification. The jury agreed, returning a no cause verdict within thirty minutes.

John Knodel recently tried an Essex County case in which the plaintiff alleged that while appraising the insured's property, he slipped on an object on the stairs and sustained a torn ACL. Plaintiff underwent two knee surgeries and his treating orthopedist testified that he needed a total knee replacement.

John convinced the jury that the plaintiff was more negligent than the insured, leading to an allocation of 51% comparative fault to the plaintiff and a no cause verdict.

Ric Gallin handled a Monmouth County toxic tort action involving the insured's spray-painting of file cabinets in an office building. Fumes entered the ventilation system and caused several people in the building to experience temporary illnesses. Most of the exposed workers settled their claims for nuisance figures, though one telemarketer claimed he developed a hypersensitivity to organic solvents such as nail polish fumes and cigarette smoke.

The plaintiff's own psychiatrist tendered a negative psychological profile. This did not deter the plaintiff from pressing his claim, however, in binding arbitration. Against an agreed-upon maximum exposure of $100,000, a three-judge arbitration panel returned an award of $15,000.

Ric also tried a construction accident case. The insured constructed a defective trench in a warehouse. The plaintiff warehouseman sustained knee injuries when he drove a pallet jack over the trench and it collapsed. The 59 year-old plaintiff's doctors opined that he would need knee replacement surgery in the near future. Ultimately he retired on full social security disability.

Plaintiff demanded more than $300,000 and turned down a $260,000 annuity which would have afforded full salary benefits for a number of years with survivorship to his wife. Following a lengthy trial, the jury awarded $125,000 for pain and suffering and $50,000 in per quod damages to plaintiff's wife. The jury also awarded $210,000 in lost wages, which Ric was able to eliminate through collateral source reductions. The net verdict, including pre-judgment interest, came to $206,000- significantly lower than the offer.

Eric Harrison tried a racial discrimination/hostile workplace environment case in Passaic County. The plaintiff, a custodian/bus driver employed by the insured school, refused to do custodial work during a school football game and punched out. The school was forced to dispatch an emergency driver to assume her bus runs.

The administration disciplined the plaintiff by relieving her of her bus driving duties and assigning her to custodial work. She immediately voiced complaints about every custodial assignment, ranging from dust-induced asthma to back injuries and foul language by male coworkers. She filed no fewer than five workers compensation petitions over the course of a single year. Her attendance plummeted – she was out more than 80% of the two following school years – but she did find time to sue the school for race discrimination.

To rebut the claim of race discrimination Eric showed that more than 50% of the school's custodian/bus drivers were African-American, including the present transportation coordinator. Discovery also revealed that the plaintiff had a history of welfare fraud and drug abuse. While she attributed her drug problems to the stress of removal from the bus, medical records demonstrated that she was abusing drugs during the same period of time that she was demanding reinstatement to her bus driving position.

At the close of plaintiff's case Eric obtained several favorable rulings involving her burden of establishing a prima facie case under the Law Against Discrimination. The case ultimately settled for a confidential buy-out in exchange for plaintiff's resignation.

Kevin London tried a verbal threshold damages only trial in Bergen County. The plaintiff alleged a fractured rib, cervical and lumbar herniations and tears of the rotator cuff and medial meniscus. Plaintiff had also sustained a lumbar herniation in a prior fall down accident and underwent low back surgery a year before the auto accident.

Kevin's independent examining orthopedist credited the existence of a partial rotator cuff tear. While the doctor did opine that this injury was permanent, his conclusions of permanency were based in part on inaccurate information from the plaintiff. Against a final demand of $60,000 and a final offer of $25,000, the jury returned a verdict of $18,200.

In another auto liability case, Kevin defended against the injury claims of a passenger in the insured vehicle. She alleged soft tissue injuries following only three months of chiropractic treatment. The insured testified that he was driving straight down the road when the codefendant pulled out from an adjacent parking lot without warning. The Passaic County jury entered a 50/50 liability verdict and awarded gross damages of $1,500.

ALERT ALERT ALERT ! ! !

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