Law Offices
METHFESSEL & WERBEL
----------A Professional Corporation----------

The Leading Insurance and Claims Attorneys

CASE UPDATE

August 2007 - New York 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!

LIABILITY INSURANCE – DENIAL OF COVERAGE – DECLARATORY JUDGMENT

In **Lang v. Hanover**, 3 N.Y.3d 350, 787 N.Y.S.2d 211 (2004) the Court of Appeals held that no interested party can bring an action against a carrier unless the claim against the insured has been brought to judgment. There had been authority in the past that although no direct action to enforce a claim could be brought against a carrier without a judgment, interested parties such as plaintiffs and codefendants could initiate coverage declaratory judgment action to test the validity of a disclaimer. This is no longer permitted. However, the Court warned: "Finally we note that an insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment pursuant to Insurance Law Sec. 3420. Under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment."

The lesson of the case is that carriers are being prodded into starting the declaratory judgment action. An important twist is that if the insured sues the insurer, legal fees are not allowed. If the action is intitiated by the carrier, the insured can seek legal fees if successful.

ENVIRONMENTAL COVERAGE – OCCURRENCE-BASED POLICIES

Olin Corp. v. Certain Underwriters at Lloyd's London (2nd Circuit)

The triggering of excess insurance coverage under occurrence-based polices for environmental cleanup was addressed by the Second Circuit in November of 2006. Under New York law, liability for continuous property damage that takes place over a number of policy periods is allocated over the time during which property damage occurred. The insured who had already settled with its primary carriers advocated the position that property damage did not continue after the contamination reached a point at which the full remediation became necessary. This interpretation would have reduce number of primary polices over which liability would be spread, thereby reaching excess coverage. The excess insurance carriers argued that property damage occurs as long as contamination continues to increase or spread, whether or not the contamination is based on active pollution or the passive migration of contamination into the soil and groundwater. On appeal, the Second Circuit adopted the position advocated by the excess carriers holding that the costs of remediation should be allocated over the period in which property damage occurred, as nearly as possible according to the amount of property damage that occurred in each policy period, and property damage includes the passive migration or spread of contaminants. The Second Circuit also rejected the proposition that the insurers faced joint and several liability that would allow the insured to select any triggered policy for compensation of the entire amount and leave it to the insurer to seek contribution.

DAMAGES – ILLEGAL ALIENS

In **Balbuena v. IDR Realty**, the Court of Appeals of New York ruled that an illegal alien may pursue a claim for future lost wages. This decision was issued despite Federal immigration laws and US Supreme Court precedent about illegal aliens. The New York Court felt that to disallow such claims would give employers the wrong incentives as to safety and encourage them to allow illegal aliens to suffer on the job injuries. The decision does allow the defense to argue the plaintiff's immigration status as a factual issue against a lost wage claim. The dissent points out that the majority decision is allowing the enforcement of an illegal contract and allows the plaintiff to seek benefits contrary to Federal law.

SEXUAL HARASSMENT – DUTY TO DEFEND

NWL Holdings, Inc. v. Discover Property & Cas. Inc. Co.

The question of whether or not counsel fees were recoverable for the defense of a company in an employee on employee sexual harassment complaint under New York law was recently addressed by the Federal Eastern District Court of New York. In the underlying action, there were two separate complaints filed. In the first complaint, there was no allegation of negligent supervision and the carrier denied coverage and did not provide a defense based on the facts alleged in the complaint. In the second complaint, there was an allegation of negligent supervision, and the carrier accepted limited coverage and provided a defense for those counts alleging negligent supervision. The second complaint was subsequently abandoned and the first complaint was settled for $299,000.00. The employer then sought to recover only defense costs from the first complaint and costs from the coverage action.

Under New York law, an insurance company's duty to defend is very broad, arising whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer has actual knowledge of facts establishing a reasonable possibility of coverage. The plaintiff argued that a duty to defend arose under existing case law absent a specific allegation of negligent supervision in the complaint because under New York law a sexual assault committed by an employee is an "accident" and therefore an "occurrence" within the meaning of the policy because (1) the employer did not intend or expect the sexual assault; and (2) the employee's intention in committing the act could not be attributed to his employer under the doctrine of respondeat superior because the employee was not acting within the scope of his employment. The Court agreed, citing RJC Realty Holding Corp. v. Republic Franklin Ins. Co., 2 N.Y.3d 158 (2004). Furthermore, the employer's liability exclusion does not apply because while the sexual assault may have happened at work, it did not arise out of plaintiff's employment.

AUTOMOBILE INSURANCE – VERBAL THRESHOLD

In **Pommels v. Perez**, the Court of Appeals strengthened the verbal threshold. The Court emphasized that the purpose of the No Fault law of 1973 was to effect a compromise, prompt payment of PIP in exchange for a limitation on bodily injury claims to those involving serious injury. The Court concluded that even when there is objective medical proof of a serious injury, when additional factors interrupt the chain of causation, such as a pre-existing condition, an intervening medical problem or a gap in treatment, summary judgment may be appropriate.
Proof of a herniated disc without additional objective medical evidence of significant physical limitations, is not enough by itself to establish a serious injury.

In one of the three cases before the Court, the plaintiff failed to explain why he stopped treatment after six months and did not resume until sometime later. He also failed to address the effects of a subsequent kidney ailment on his overall condition.

In the second case plaintiff submitted an affidavit from a doctor as to a causally connected herniated disc, the treatment and from plaintiff as to his pain and limitations. Here the gap was explained by the doctor, who said that further treatment would be only palliative. Limitation of motion measurements were given. This was deemed sufficient to overcome the summary judgment motion.

In the third case the radiological evidence showed pre-existing degeneration. Plaintiff claimed a traumatic herniation. Once defendant produced evidence that the plaintiff's problems were related to a pre-exisiting condition, the burden shifted to plaintiff to show new problems caused by the accident. The proof was deemed

lacking because plaintiff's original doctor related the pain to a pre-existing herniation and the subsequent treating doctor concurred.

As is often the case in New York summary judgment practice, the result can be determined by the procedural quality of the proofs presented. We can also expect continued tailoring of affidavits to meet standards set by the Court. However, the Pommels trilogy of cases does send a clear message that the verbal threshold is to be taken seriously by the trial courts and the quality of the proofs is to be scrutinized. The mere existence of conflicting medical opinions will not suffice to preclude summary judgment and the plaintiff must show a serious limitation along with proof of objective injury.

PIP BENEFITS – VALIDITY OF EXTENSION

Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.

The question of sufficient evidence to establish the mailing of an extension request for verification of a claim from a PIP carrier to a provider was addressed by the Kings County Court in December of 2006. Under New York PIP law, an insurer shall either pay or deny the claim in whole or in part within thirty days of receiving a claim. The 30-day period may be extended by a timely demand by the insurance company for further verification of a claim; however, this demand must include the information called for in the prescribed denial of claim form.

The claimant denied receipt of the verification letter extending the 30 period. The claims adjuster testified to the general mailing procedures to establish both mailing of the verification letter and the sufficiency of the denial letter. Under cross examination, the claims adjuster did not have adequate information about the routine mailing procedures resulting in conflicting testimony between the general mailing procedures and what was actually performed. Likewise, under cross-examination, conflicting testimony was elicited regarding the claims adjuster's routine handling of the denial form and what actually occurred in this case.

The trial court ruled that the carrier did not meet its burden to prove that the verification letter was actually sent, and the sufficiency of the denial letter. The import of this decision is that carriers will have to maintain better records regarding proof of mailing of a verification, denial or EUO request. Failure to do so will result in adverse decisions against the carrier based on hyper-technical compliance without regard to the substantive issues presented.

PIP BENEFITS – BLANKET DENIALS

In **Willis Accupuncture v. GEICO**, Judge Thomas of the Civil Court, Kings County, ruled that carriers cannot rely on blanket denials as against further treatment. Each claim must be individually responded to, even those that are submitted after a "cut off". This case relied on a decision which was subsequently affirmed by the First Department, A & S Medical v. Allstate, 15 A.D.2d 2d 170, 789 N.Y.S.2d 27 (1st Dept 2005). The First Department case held that a cut off sent to the insured is not binding on the assignee, the assignee provider is entitled to their own notice of denial. In effect, normal assignment principals which hold that an assignee can obtain no greater rights than the assignor do not necessarily apply in the no-fault situation.

In **Metropolitan Radiological Imaging v. State Farm**, 790 N.Y.S. 2d 373 (Civil Court, Queens Cty 2005) Judge Markey held that in order for a carrier to make a discovery motion or even seek discovery in a PIP case, the carrier must submit proof of timely denials or request for verification. In the usual case, one can make discovery demands and substantive issues are set aside for trial. The PIP arena continues to develop its own jurisprudence outside of the CPLR. Here a carrier must establish the substantive basis for its position before it will be allowed to assert any procedural rights, including the right to take discovery.

WORKERS COMPENSATION

In **Cruz v. New Mellenium Construction & Restoration**, 17 A.D.3d 19, 793 N.Y.S.2d 548 (3rd Dept. 2005) the Court held that a workers comp policy, like an auto policy, cannot be cancelled "ab initio" (from its inception). In this case the carrier's investigation revealed material misrepresentations in the application for insurance. New York does not permit ab initio cancellation of an auto policy. Because of the mandatory nature of workers comp, it was treated in the same realm as auto in terms of cancellation rights. This decision is consistent with prior pronouncements that auto and comp are unique lines of statutorily mandated coverage.

ENVIRONMENTAL TORTS – "OCCURRENCE"

Appalachian Ins. Co. v. General Elec. Co.

The question of whether a primary carrier can group together as a single occurrence numerous personal injury claims arising from the exposure of individuals to asbestos to access excess coverage was addressed by the New York Appellate Division in February of 2007. Defendant GE designed and installed over 22,000 steam turbines containing asbestos between 1966 and 1986. During this time period, GE was insured through Electric Mutual Liability Insurance Company, where the premium structure functioned much like a self-insurance retention or a deductible, with GE reimbursing EMLICO for claims EMLICO paid on GE's behalf. Unfortunately for GE, the policies had a $5M per occurrence limit with no annual aggregate limit. On 400,000 asbestos claims paid by EMLICO /GE through the year 2002, the average payout per claim was only $1,500 per claim, but aggregated together totaled $600M. Unless a single claim exceed $5M, excess coverage would never be reached. When asbestos claims spiked in the early 1990's GE and EMLICO cut a deal to treat all the asbestos claims as a single occurrence rather than a single claim as it had done previously so that excess policies could be accessed. No excess carriers were consulted regarding this change in handling of the claims and sued GE and EMLICO.

The Court held that as the claims involved numerous individual claims separated by time and space, each would be treated as an individual claim and could not be treated as a single aggregate. Thus, the excess policies would not be reached unless an individual claim exceeded $5 million. However, the Court did indicate that in certain instances, such as a chemical leak, a mass tort could be a single occurrence.

FIRST PARTY BUILDING COVERAGE – "SETTLEMENT" EXCLUSION

In **242-44 E. 77 Street v. Greater New York Mutual** the First Department ruled that settling or cracking in a building due to construction work on an adjoining property is covered under a first party policy. The settlement exclusion was limited to natural settlement and not related to construction activities which affect underpinning or lateral support. In addition, the negligent work exclusion is limited to work performed by or on behalf of the insured and not by third parties on adjoining property. The collapse coverage was not discussed. There is an issue in New York as to whether there must be a total collapse or if imminent risk is sufficient to trigger collapse coverage. However, in the construction context this issue becomes irrelevant because mere settlement which does not reach a collapse is sufficient to trigger coverage.

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 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.