Law Offices
METHFESSEL & WERBEL
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CASE UPDATE

January 2002

FIRST WE TAKE MANHATTAN . . .

METHFESSEL & WERBEL EXPANDS INTO NEW YORK

Over the years many of our clients have inquired about our ability to handle New York claims and suits. To accommodate these requests and continue in our efforts to provide the best possible services to our clients, on January 1, 2002 Methfessel & Werbel opened an office at 11 Penn Plaza in New York City. Our New York office can be reached by phone at (212) 947-1999 or by fax at (212) 947-3332.

Ric Gallin will serve as managing partner of the New York office. Prior to joining us Ric spent 11 years in New York litigating a variety of coverage, general liability, product liability, construction, labor law and aviation suits. Ric's New York experience includes defense, subrogation and declaratory judgment actions. He has tried over 50 cases in New York and has made appearances in every County Courthouse from Kingston to Riverhead. He has a total of 20 years experience as an attorney handling complex litigation, both first and third party.

Joining Ric on our New York team will be Selika Josiah, Lori Brown Sternback and Eric Harrison. Selika, who has practiced with several major New York defense firms, has more than nine years experience in the defense of liability and coverage matters in the New York courts. Lori and Eric have also litigated New York cases.

Methfessel & Werbel's commitment to technological progress will facilitate this expansion. Our New York office will be fully integrated with our main office in Edison, permitting attorneys and staff in both offices to access all relevant pleadings, communications and data regarding all of our New York files. We look forward to providing you with the same level of quality

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and professionalism in New York that you have come to expect from M & W in New Jersey**.**

INSURANCE/APPLICATION/ MISREPRESENTATION

The Appellate Division has issued a published decision with potentially far-reaching implications for the insurance industry. Palisades Safety & Insurance Assn. v. Bastien, an automobile insurance coverage action, involved the applicant's failure to name his wife as a household resident or additional driver of his car. Following an accident in which the wife was injured the carrier denied her claim for PIP benefits due to Mr. Bastien's material misrepresentation on the application.

A Palisades underwriter certified that disclosure of the wife as a household resident or additional driver would have affected the premium charged. Citing Massachusetts Mutual Life v. Manzo, the Appellate Division affirmed judgment in favor of the carrier. The Court held that the named insured's application omission qualified as "prospectively reasonably relevant," thereby entitling the carrier to disclaim coverage.

Bastien is significant because it is the first published New Jersey decision outside the realm of life insurance to hold that a misrepresentation affecting the amount of premium charged is material. Previously our courts have been reluctant to ascribe materiality to a misrepresentation in the absence of proof that full disclosure would have prompted a refusal to issue the policy. In the wake of Bastien, we strongly recommend that adjusters and SIU investigators who suspect application fraud communicate with underwriters to determine whether the misrepresentation affected the premium charged.

INSURANCE/POLICY CHANGES

In Millbrook Tax Fund v. P.L. Henry & Associates, a case arising from alleged defaults on mortgage financing, two mortgagee banks filed third party claims against real estate appraiser James Watkins for alleged negligence in valuation of the properties. Watkins' malpractice carrier disclaimed since the "claims made" policy had lapsed for nonpayment of premium more than 60 days before the carrier received notice of the claims.

Watkins' first policy contained a "limited reporting period" which extended coverage to claims accruing within the policy period but reported within one full year of expiration of the policy. That policy was amended, however, and the renewal policy which expired prior to the carrier's receipt of the mortgagee claims contained only a 60 day limited reporting period. The trial court found that Watkins had received a copy of the renewal policy and dismissed his coverage action against the carrier.

The Appellate Division reversed, citing Bauman v. Royal Indemnity Company for the proposition that a carrier that alters its policy must provide separate notification to the policyholder. As Watkins' carrier failed to do so, the Court held, it was bound to the lengthier "limited reporting period."

INSURANCE/INTENTIONAL ACT EXCLUSIONS

Harleysville v. Garrita was a Declaratory Judgment Action arising out of a fatal confrontation between David Garrita and Albert Sabatelli in Pennsylvania. Sabatelli appeared at the home of Garrita's father and assaulted Garitta over a dispute involving a romantic relationship between his mother and Garrita's father. Some friends intervened and Garrita and Sabatelli agreed to "take it outside."

Once outside, Sabatelli rushed at Garrita, who stabbed Sabatelli twice in the abdomen. The two stabbings punctured Sabatelli's stomach and heart and he died shortly thereafter.

Garitta stated that he had not intended to stab "a vital part of his body." Nevertheless, he pled guilty to third degree murder under Pennsylvania law. Sabatelli's estate subsequently filed suit against Garrita.

Harleysville, which insured Garrita through his father's policy, filed a Declaratory Judgment action seeking a determination that it did not owe coverage. A divided Supreme Court agreed, citing Voorhees v. Preferred Mutual, Prudential v. Karlinski and SL

Industries v. American Motorists and determining that Garrita clearly intended to cause some injury and that the actual injury that led to the Sabatelli's death was an inherently probable consequence of Garrita's actions.

INSURANCE/EXCLUSIONS/CAUSATION

The New Jersey Supreme Court has ruled that a clearly-worded exclusion, when applicable, will bar coverage even when the cause of the claim bears no relationship to the facts which trigger the exclusion. In Aviation Charters v. Avemco Insurance Company the insured's aircraft sustained damage while being operated by a pilot with insufficient experience to qualify for coverage.

The Supreme Court acknowledged that the pilot's inexperience did not contribute to the accident. Nevertheless, the Court held that "requiring a causal connection between the cause of the accident and the unambiguous exclusionary clause" would provide "an unbargained-for expansion of coverage" that would result in "the insurance company's exposure to a risk substantially broader than that expressly insured against in the policy." The Court declined adoption of a *per se* rule rendering the absence of causation irrelevant in all coverage cases. However, it did rule that a carrier generally need not prove causation when seeking to avoid coverage on grounds of a substantive and clearly-worded exclusion.

INSURANCE/LIFE INSURANCE MEDICAL EXAMINATIONS

In Nolan v. First Colony Life Insurance Company, a 35 year-old life insurance applicant underwent a preliminary physical examination which included blood sampling. The blood sample evaluation indicated elevated levels of two liver enzymes. The results were never reviewed by a doctor.

The First Colony underwriter, who had no medical training, compared the blood results to the carrier's underwriting guidelines. She noted the high enzyme levels but approved the application and issued a policy.

Two years later the insured died of liver cancer. First Colony paid the full proceeds of the policy to the insured's wife, who subsequently sued the carrier for malpractice in failing to notify Mr. Nolan of the elevated blood levels.

Distinguishing Reed v. Bojarski, in which the Supreme Court acknowledged a limited physician-patient relationship in the context of pre-employment physicals, the appellate panel observed that no physician ever examined Mr. Nolan or reviewed the laboratory findings. Additionally, the disclosure responsibilities which the New Jersey Legislature has imposed on insurance companies do not include mandatory disclosure of blood test results in the absence of a request. The Court therefore upheld the trial court's dismissal of plaintiff's case.

AUTOMOBILE INSURANCE/ AICRA/CERTIFICATIONS

Nearly four years have passed since the New Jersey Legislature enacted the Automobile Insurance Cost Reduction Act and our courts have yet to issue a published interpretation of the new verbal threshold. The willingness of the courts to construe the new threshold in accordance with the legislature's intent of cost reduction will be the ultimate determinant of the revision's efficacy.

In Watts v. Camaligan the Appellate Division confronted the physician certification requirement of N.J.S.A. 39:6A-8a, which provides that a plaintiff subject to the threshold must produce a certification from a "licensed treating physician or board-certified licensed physician to whom the plaintiff was referred by the treating physician." The statute requires provision of the certification within 60 days of the filing of the Answer, subject to a 60 day extension upon a showing of good cause.

Affirming the trial court's refusal to dismiss plaintiff's case for late production of a certification, the Appellate Division distinguished AICRA from the

Affidavit of Merit Statute and held that failure to provide a certification warrants only dismissal without prejudice. The Court concluded that it is "the revised verbal threshold, not the failure to file the certification, that is intended to limit the number of lawsuits."

AUTOMOBILE INSURANCE/ UNINSURED MOTORIST BENEFITS

In Hartman v. Allstate the Appellate Division interpreted N.J.S.A. 34:15-40(f) to permit a workers compensation carrier to pursue a UM claim against the employee's auto carrier, even in a case in which the employee abandoned his UM claim after receiving workers compensation benefits. Because Uninsured Motorist coverage is a "contractual substitute for a tort action against an uninsured motorist," held the Court, Section 34:15-40(f) allows the workers compensation carrier to assert a claim for UM benefits from the petitioner's auto insurer.

MEDICAL MALPRACTICE/AFFIDAVIT OF MERIT

The New Jersey Supreme Court has further relaxed the application of the Affidavit of Merit statute in the context of "common knowledge" cases – those cases in which a jury may infer negligence without the guidance of expert witnesses. Hubbard v. Reed involved a dentist's extraction of the wrong tooth; Palanque v. Lambert-Woolley involved a gynecologist's misreading of a pregnancy test and the performance of unnecessary D&C and laparoscopy procedures.

In both cases the Supreme Court reversed the Appellate Division's dismissal on the basis that expert testimony was not necessary to support a jury verdict in plaintiff's favor. In such a case, the Court held, a plaintiff need not provide an affidavit of merit.

TORT CLAIMS ACT/IMMUNITIES

In Alston v. City of Camden a police officer in pursuit of a suspect dropped his semi-automatic weapon. Because the officer had unlocked the safety catch earlier that day, the gun discharged and a bullet struck an innocent bystander. The bystander sued the officer and the Police Department.

Following a defense verdict and a reversal by the Appellate Division, the Supreme Court held that the defendants were immune from suit by operation of both police pursuit immunity and good faith immunity under the Tort Claims Act because the officer's conduct, while negligent, was not wilful.

TORTS/AGENCY

Carter v. Reynolds involved an automobile accident in which the tortfeasor, an employee of an accounting firm, was on her way home from a client's office when the accident occurred. The employee generally spent approximately one-third of her work time at clients' offices. Additionally, her employer required that she have a vehicle to travel to the clients' offices. Under these facts, concluded the Appellate Division, the employer bore responsibility for the employee's conduct under the doctrine of *respondeat superior*.

PRODUCT LIABILITY/
SUCCESSOR CORPORATIONS

In Arevalo v. Saginaw Machine Systems the Appellate Division held that an injured worker's action against the original manufacturer of a diecasting machine should not have been dismissed because the original manufacturer was still in existence and viable at the time of the injury and because, "in a products liability context," the later-formed corporation was the same entity as the original manufacturer. The fact that the later-formed corporation did not continue to sell the offending product line was deemed irrelevant, since the new corporation was a creature of corporate reorganization rather than a distinct entity.

EMPLOYMENT LAW/
CONSCIENTIOUS EMPLOYEE PROTECTION ACT

Mazza v. George Yelland, Inc. involved a company controller's claim under the Conscientious Employee Protection Act that her employer fired her after she refused to place transaction fees associated with the employer's $1.2 million personal loan on the corporation's books. Judge Orlofsky of the U.S. District Court held that plaintiff established a *prima facie* case under CEPA because a jury could find that she reasonably believed the actions requested of her to be criminal.

EMPLOYMENT LAW/
LAW AGAINST DISCRIMINATION

Oakley v. Wianecki was a hostile working environment case resting on a single "coarse, insulting and sexually explicit insult" made by a male African-American corrections officer to the plaintiff, a white female coworker. Distinguishing Taylor v. Metzger, the Appellate Division noted that the offending party was not the plaintiff's supervisor; nor was the comment similar in severity to the racial slur uttered by the Sheriff in Taylor. The Court affirmed dismissal of plaintiff's Law Against Discrimination claim.

In LaResca v. American Telephone & Telegraph, Judge Bassler of the U.S. District Court held that the Labor Management Relations Act did not preempt the epileptic plaintiff employee's claims of discriminatory discharge and failure to accommodate his disability. His claims under the Law Against Discrimination were dismissed, however, based on a holding that plaintiff's employer was not obligated to accommodate his difficulties in commuting. Citing cases construing the Americans With Disabilities Act, the Court held that commuting is not "part of the work environment that an employer is required to reasonably accommodate."

TRIAL RESULTS

Don Crowley obtained a no cause verdict in a falldown trial in Bergen County. Plaintiff sued the insured, a listing broker, as well as the showing broker and homeowner for defective conditions existing on an interior staircase leading from the kitchen to the basement. The alleged defects included the absence of a handrail and insufficient slip resistance of the metal edging placed over the front of each tread. The injuries included two disputed lumbar herniations and rotator cuff and bicep tendinitis. Unpaid medical bills approached $20,000.

The jury found that the insured met its burden of reasonable inspection under Hopkins v. Fox and Lazo.

Don also tried a contentious two-week slander case in which two doctors alleged that the Mayor and Council of Garfield, as well as our insured councilman, defamed them with comments which were published in The Bergen Record. The insured accused the doctors of receiving municipal water at their medical offices for more than 35 years without paying for it. Both doctors also held positions in Garfield; one served as Board of Education president and the other served as city physician.

The jury deliberated for two days before exonerating the Mayor and Council but returning a verdict against the insured in excess of $500,000. However, the jury also returned a verdict of wilful and wanton negligence, which should effectively relieve the homeowners carrier of liability.

Tom Zborowski defended a damages-only auto case in Passaic County. Three plaintiffs claimed injuries when their minibus was rear-ended by the insured. Despite both lay and expert testimony on behalf of one of the plaintiffs that she had undergone painful ligament reconstruction injections (an alternative medicine therapy known as prolotherapy) in an effort to relieve symptoms of herniated cervical discs, the jury declined to award any damages to any of the plaintiffs.

Jared Stolz succeeded in a first-party fraud trial in Union over $275,000 in graphic arts computer equipment. The insureds alleged vandalism, which was highly suspicious in view of their contention that someone broke into their commercial building, stole nothing but destroyed only their graphic arts equipment – which no longer had any value to their now-defunct business.

Both an SIU investigator and a local police officer testified and opined that no break in occurred; this appeared to them to be a clear case of an insurance fraud. The jury agreed, finding that the insureds damaged their own equipment and thereby violated the Insurance Fraud Prevention Act.

Jared also handled a substantial arson fraud case in Ocean County. The case involved a set fire in a building under renovations for which the insureds had run out of money. On the eve of trial the insureds decided to withdraw their claim of approximately $150,000 in damages in the face of a counterclaim under the Insurance Fraud Prevention Act.

Lori Brown Sternback obtained a no cause verdict in a construction site accident case. The plaintiff, a mason, was cutting wire mesh that reinforces concrete when a section of mesh sprang back into his face and struck him in the right eye. He lost almost 100% of his vision in that eye.

The plaintiff claimed that the subcontractor, our insured, was negligent in failing to secure the wire. However, because he was an employee of the insured the plaintiff could only sue the general contractor for failing to ensure the safety of the workplace. The GC filed a third party claim against the insured.

The plaintiff argued the cutting process violated OSHA regulations, while the defense contended that it was the usual practice in the industry to have someone stand on the wire to secure it during a cut. The jury agreed and returned a defense verdict.

Lori also obtained a no cause verdict in a falldown case in which the plaintiff sustained significant injuries including a fractured hip and alleged exacerbation of her diabetes and heart problems. The plaintiff claimed that she fell on the last step outside the insured diner because she thought she was on the sidewalk due to the end of the handrail being situated over the last step rather than over the abutting sidewalk. She admitted that she could not see where she was standing because her obesity obscured her vision. (She weighed more than 400 lbs.)

The jury agreed with Lori that the steps were not defective and returned a no cause verdict.

Kevin London obtained a no cause verdict in a verbal threshold auto case. The plaintiff alleged that she was sitting in the front passenger seat of a parked car when the defendant's minivan backed out of a parking lot and struck the driver's side door. She alleged three cervical herniations and two lumbar herniations from this accident.

The defense radiologist testified that there were no herniations in the lumbar spine but did confirm two "old" herniations in the neck. However, the presence of significant degenerative changes throughout the entire spine undermined the allegation of a causal link and plaintiff's examination was clinically normal. After deliberating for 40 minutes the jury found that the plaintiff had failed to satisfy the verbal threshold.

Matt Werbel's first jury trial yielded a net verdict lower than the insured's final offer. Plaintiff alleged a disk bulge and radiculopathy stemming from an auto accident in which liability was stipulated. Although the plaintiff was in her mid-20s and her complaints were severe, Matt undermined her credibility on cross-examination with inconsistencies in her testimony regarding the circumstances of the accident and her absence from work thereafter.

Against a demand of $20,000 and a final offer of $10,000, the jury returned a total verdict of $7,610.

Allison Koenke obtained a no cause verdict in her first jury trial. Allison represented a PIP carrier in the context of an auto case. The defense doctors found no objective support for the plaintiff's subjective complaints and the jury agreed, awarding no damages for pain and suffering. Additionally, the plaintiff herself had submitted most of her outstanding bills to her health insurer, implicitly acknowledging that her complaints were not accident-related. The court entered a verdict in favor of Allison's client on all aspects of plaintiff's PIP claim.

FIRM NOTES

Methfessel & Werbel is pleased to announce the much-deserved promotions of four attorneys. Jared Stolz and Ric Gallin have become partners, while Bill Bloom and Eric Harrison have advanced to the position of counsel. Ric, Jared, Eric and Bill have each excelled as leaders at M&W and we value their continued efforts on behalf of the firm and our clients.

Our Subrogation Team welcomes Angelique R. Harris, a former merit scholarship winner who obtained her J.D. from New York Law School in June of 2000. Angelique's work experience includes a variety of legal internships on high profile cases. She joins Steve Kluxen, Leigh Aughenbaugh Griffith and the rest of the M&W Subrogation Team as an associate attorney.

John Grossi has been certified as an evaluator and arbitrator of personal injury claims in Hudson County Superior Court.

Jared Stolz and Matt Werbel have presented to several insurers a series of seminars addressing coverage topics such as "The Duty To Defend," "Understanding Extracontractual Damages" and "Fraud Issues in First Party Claims." Jared and Matt have conducted these seminars in-house for several carriers. We welcome any inquiries from the insurance industry about these topics and would be happy to present to your claims department an in-house seminar addressing these or any other relevant coverage issues for your claims department. Feel free to contact Jared or Matt directly with any inquiries.