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CASE UPDATE

June 2005

NEW JERSEY SUPER LAWYER: ED THORNTON

New Jersey Monthly Magazine's"Super Lawyers 2005" survey results are now in! Based on responses to more than 35,000 ballots issued statewide, M&W's Ed Thornton was voted a "Super Lawyer" in the field of personal injury defense. This designation places Ed where he belongs, among the elite of New Jersey defense lawyers. Please join us in congratulating Ed for his excellent work and contributions to the practice of law on behalf of the claims industry. This award only affirms what we and our clients have known for years.

NEW JERSEY LEGISLATURE AMENDS SPILL ACT, ADDS STATUTE OF LIMITATIONS

The Legislature recently amended the New Jersey Spill Act to impose a four year statute of limitations for private party actions and a three year statute of limitations for the State. To avoid preclusion of older cases where the statute would otherwise bar suit, the Act now sets a cause of action accrual date of January 1, 2002. As a result, the new statute of limitations will bar private party actions under the Spill Act on older cases after January 1, 2006.

We recommend that you review all older potential Spill Act claims that are not yet in suit. The Spill Act gives a measure of protection to purchasers of polluted commercial property to encourage the purchase and remediation of old industrial sites. It allows these purchasers to bring a private cause of action against another party, such as a prior property owner, an oil company, or other tortfeasor, to recover for damages sustained by the property.f you have a viable recovery action against another party it must be filed before

TABLE OF CONTENTS

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January 1, 2006. Feel free to contact Ric Gallin of our environmental coverage team with any questions. (gallin@methwerb.com)

SUPREME COURT CONFINES ABSOLUTE POLLUTION EXCLUSION TO "TRADITIONAL ENVIRONMENTAL CLAIMS"

The Supreme Court ruled that the absolute pollution exclusion is to be narrowly construed and applied only to those claims traditionally thought of as environmental hazards. In *Nav-Its v. Selective*, the Court ruled that the exclusion does not apply to injuries arising out of non-environmental exposures, regardless of whether the pollutant is the actual and direct cause of those injuries or damages. It found coverage under the policy for personal injuries sustained by a third party because of toxic fumes released from a floor sealant applied by the insured's subcontractor.

In one bold move, the Supreme Court has taken an aggressive approach in the application of the "reasonable expectations" doctrine to defeat enforcement of a clearly drafted and approved specific exclusion.

The Court based its decision heavily on the regulatory history of the pollution exclusion clause, finding that its purpose was to have a broad exclusionary effect only for "traditional environmentally-related damages."

In rendering its opinion, the Court presented the insurance industry with the following challenge that promises to bring about future litigation on the regulatory history of each policy exclusion on which the insurance industry may rely in denying coverage:

"As a final observation, the insurance industry has revised its policies in the past to provide for the exclusion of certain coverages. We will review each change on the record presented. We emphasize that industry-wide determinations to restrict coverage of risks, particularly those that affect the public interest, such as the risk of damage from pollution, environmental or otherwise, must be fully and unambiguously disclosed to regulators and the public."

The practical effect of this challenge is that the Court may now ultimately serve as the appellate board to the state's Department of Insurance and Banking. The courts may scrutinize submissions made to regulators regarding the effects of an exclusion. Litigants may demand discovery as to the regulatory basis for any exclusion and make arguments as to the policyholders' expectations – even when the exclusion is clear on its face and there is no ambiguity in the policy itself. Ultimately, litigants may raise arguments based on the reasonable expectations doctrine as the result of comments made by unknown persons in the insurance industry to unknown regulators in an unknown context.

Thus, while the decision to narrowly construe and limit the application of the exclusion to "true environmental problems" is consistent with the case law from many jurisdictions. New Jersey's *Nav-Its* decision suggests that the litigation of coverage disputes involving an exclusion is likely to become even more expensive and time consuming due to the new relevance placed on regulatory findings as a means to undercut the significance, meaning, and effect of even a clearly written policy exclusion.

ARBITRATION

In *Elizabethtown Water Co. v. Watchung Square Assocs., LLC*, the Appellate Division ruled that when some parties in a Law Division action are contemporaneously involved in an arbitration involving some but not all parties to the

Law Division action and there is a significant overlap between the parties and the issues in both proceedings, then the Law Division action should be stayed pending outcome of the arbitration.

AUTO INSURANCE / AICRA / ECONOMIC AND NONECONOMIC LOSSES

In *D'Aloia v. George*, the Appellate Division affirmed the trial court's dismissal of the plaintiff's claim for reimbursement of her PIP co-payments and deductibles as unreimbursed economic losses under AICRA.

The trial court based its dismissal on *Roig v. Kelsey*, 135 N.J. 500 (1994), which construed statutory language rendering inadmissible evidence regarding PIP deductibles and co-payments made in personal injury suits arising out of an automobile accident under this state's former No-Fault Act, as the basis upon which recovery of PIP deductibles and co-payments is prohibited.

In *Roig*, the Supreme Court did not interpret the No-Fault Act's general language permitting actions for uncompensated economic losses as a basis for creating any right to sue for PIP co-payments and deductibles.

In *D'Aloia*, the plaintiff argued that the Legislature overruled *Roig* by enacting AICRA and leaving intact the same general language that recognizes a right to sue for uncompensated economic losses. The Appellate Division disagreed with the plaintiff and affirmed the trial court's dismissal, claiming that the Legislature would have changed the provisions underlying the *Roig* decision if it intended to overrule *Roig*.

Therefore, NJSA 39:6A-12 continues to bar suits seeking to recover PIP co-payments and deductibles. Such balances for health care continue to be the sole responsibility of the patient.

AUTO INSURANCE / AICRA / PHYSICIAN'S CERTIFICATE REQUIREMENT

In *Casinelli v. Maglapus*, the Supreme Court held that the physician certificate that is statutorily required to show that the plaintiff met the verbal threshold under NJSA 39:6A-8(a) is not a fundamental element of the AICRA cause of action.

The Court explained that the failure to file a physician certificate in support of an AICRA cause of action bears the same consequence as a failure to make discovery, which is nothing more than a procedural error. It furthermore stated that the Affidavit of Merit statute, NJSA 2A:53A-29, is not an analogue to AICRA. Thus, the principles of *Cornblatt*, which require dismissal with prejudice (except under extraordinary circumstances) of the plaintiff's Complaint for failure to file an Affidavit of Merit within 120 days of the defendant's Answer, do not apply to an AICRA case. However, prudent defense counsel will be free to pursue discovery sanctions as warranted by the extent of the error.

AUTO INSURANCE/ AICRA / RENTAL CAR INSURANCE

In *Robinson v. Coia,* the Supreme Court ruled that a rental car company must provide automobile insurance coverage with the statutory minimums to anyone using one of its cars with permission, but that such insurance need not be primary. Therefore, if a lessee has his or her own policy, a review and analysis of the other insurance clauses of both the renter's policy and the rental car company's policy is necessary to determine which policy provides primary coverage. If policies have excess clauses that are mutually repugnant, the other insurance clauses will cancel each other out and both policies will be deemed co-primary.

AUTOMOBILE INSURANCE / AICRA / VERBAL THRESHOLD

In *Martin v. Chabra*, the Appellate Division held that the plaintiff injured motorist who owned and registered the vehicle involved in the automobile accident, but was insured under a policy issued to his girlfriend, was entitled to PIP benefits under his girlfriend's policy but was also subject to the verbal threshold provisions of AICRA, under NJSA 39:6A-8.

The plaintiff was a listed driver under his girlfriend's policy, which covered the vehicle owned and registered by the plaintiff under his name. As a result of the accident, the plaintiff received PIP benefits as an injured occupant of the vehicle.

The plaintiff also filed suit for economic and noneconomic damages as a result of the injuries he sustained. The Law Division dismissed the plaintiff's Complaint under the verbal threshold in accordance with the policy under which he obtained PIP benefits.

The Appellate Division affirmed on other grounds, determining that the plaintiff was subject to the verbal threshold because he was the owner of a vehicle that was registered or principally garaged in this state and he failed to maintain automobile liability insurance coverage for that vehicle. Relying on NJSA 39:6A-4.5, the panel noted that the plaintiff would have been completely precluded from recovering any economic or noneconomic loss as a result of the accident, if not for his girlfriend's policy on the vehicle.

Significantly, the Appellate Division found that the Legislature must have intended to apply the verbal threshold to an unlawfully uninsured injured party in an accident not arising from his or her operation of an uninsured vehicle just as it applies to bar all actions by unlawfully uninsured drivers of an uninsured vehicle.

AUTO INSURANCE / PIP BENEFITS / COVERAGE

In *Stoerrle, et ux. V. Liberty Mut. Fire Ins. Co. v. Harleysville Ins. Co.*, the Appellate Division affirmed the trial court's grant of summary judgment to an insurer who denied PIP coverage to a plaintiff who was the owner or registrant of an automobile that was being operated without PIP coverage. The panel deemed it irrelevant that the plaintiff had PIP coverage under policies for other vehicles he owned.

In *Walcott v. Allstate NJ Ins. Co.*, the Appellate Division ruled that an injured insured motorist convicted of DWI could collect PIP benefits. Under NJSA 39:6A-4.5(b), an injured motorist convicted of DWI is barred from recovering any economic or non-economic loss allegedly sustained as a result of the accident. On the basis of this statutory exclusion and a corresponding policy provision approved by the Commissioner of Banking & Insurance, the insurer argued that an intoxicated, injured insured motorist convicted of DWI is precluded from obtaining a PIP recovery. The Appellate Division rejected the argument, demonstrating that the courts have come to view PIP coverage as universal healthcare for auto accident victims.

AUTO INSURANCE / PIP BENEFITS / DEEMER STATUTE

In *Baduini v. Serina*, a New Jersey resident injured in a car accident occurring in New Jersey, while operating a car that he owned and registered in New Jersey but insured under a policy issued in Pennsylvania by an insurer conducting business in New Jersey (the policy of which had a "no tort threshold" option) was deemed by the

Appellate Division to be subject to the deemer statute and verbal threshold. The panel reasoned that since the insurer would be held responsible to pay PIP benefits under the Pennsylvania policy for the accident that occurred in New Jersey, the rationale of *Whitaker v. Devilla*, 147 N.J. 341, 344 (1997), applies to subject the insured to the verbal threshold. The panel explained that the deemer statute operates to extend PIP benefits for accidents occurring in New Jersey in exchange for requiring an injured plaintiff to satisfy the verbal threshold before seeking noneconomic damages. It deemed irrelevant the fact that the plaintiff was insured under a separate, New Jersey automobile policy with minimum PIP coverage and a "no tort threshold" option. Accordingly, a New Jersey car accident victim injured in a car principally garaged in another state and insured under a policy issued by an insurer conducting business in New Jersey is subject to the deemer statute and verbal threshold, regardless of other sources of PIP coverage available.

AUTO INSURANCE /
PIP BENEFITS / DISGORGEMENT

In *Allstate Ins. Co. v. Greenberg*, Judge Villaneuva of the Law Division ruled that the defendant chiropractor who violated regulations, engaged in unlawful self-referral, and employed a plenary licensed physician in violation of the Code must disgorge all PIP payments made by the plaintiff/health insurers and pay compensatory and treble damages for violations of the NJ Insurance Fraud Prevention Act.

AUTO INSURANCE /
PIP BENEFITS / PASSENGER BUS INSURERS

In *Schaefer v. Allstate N.J. Ins. Co.*, the Appellate Division held that medical expenses benefits required to be paid to a person injured while a passenger on a bus are the sole responsibility of the bus company's insurer – regardless of whether the injured passenger is insured under an automobile policy that provides PIP benefits.

AUTO INSURANCE/
UIM BENEFITS / SUBROGATION

In *McShane v. New Jersey Manufacturers Ins. Co.*, the Appellate Division ruled that NJSA 17:28-1.1(e), which reduces a policy's UIM coverage limits by amounts recovered by an injured insured under all bodily injury liability insurance available to the insured, operates to reduce the policy's UIM coverage limits only by those

amounts recovered strictly in the settlement of insured's bodily injury claims when available coverage has been exhausted.

Accordingly, the insured's UIM carrier bears the risk that the insured's bodily injury recovery may deplete a defendant/tortfeasor's liability limits before it can obtain the benefit of a recovery through subrogation. Simply stated, the Appellate Division concluded that a UIM insurer should not be made whole at the expense of the insured when no statute or contract dictates that result.

AUTO INSURANCE /UIM BENEFITS / TRIAL DEMAND

In *Marsden v. Encompass Ins. Co.*, the Appellate Division held that an insurer may be equitably estopped from asserting its contractual right to a jury trial if it fails to demand a trial in its response to its insured's *Longworth* letter.

In that case, the panel found that the insured had been prejudiced by its insurer's failure to reserve its trial

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In *Morag v. Continental Ins. Co. of New Jersey*, the Appellate Division addressed the language of a letter rejecting a UM award.

The policy provided that either party may demand a right to a trial within 60 days of an arbitrator's decision if the arbitration award exceeds the statutory minimum limit of liability and failure to do so would render the arbitration award binding.

Citing *Verbiest* for the proposition that an insurer need not reject an arbitration award and demand trial within 60-days of that decision by filing suit within that time, the panel held that the fair implication of (1) the insurer's specific reference to *Verbiest* in its rejection of the arbitration award, (2) the insurer's request that plaintiff's counsel advise insurer's counsel when the complaint is filed, and (3) the insurer's notice to the plaintiff's counsel that it waives formal service of process, was that the insurer was rejecting the arbitration award and demanding a jury trial in that case.

At the same time, the Appellate Division warned that different factual circumstances may invite ambiguities which may lead to a different result. Therefore, insurers should expressly demand a trial in rejecting a UIM arbitration award.

AUTO INSURANCE / UM BENEFITS / STATUTE OF LIMITATIONS

In *Price v. New Jersey Manufacturers Ins. Co.*, the Supreme Court held that the insurer was equitably estopped from raising a statute of limitations defense against its insured's UM claim because the insurer's conduct in requesting and receiving information from the insured on the claim for over 3½ years lulled the insured into reasonably believing that his UM claim had been properly filed.

The Supreme Court held that the insurer's duty of good faith and fair dealing includes a duty to act fairly and notify the plaintiff of any deficiencies in his claim or of the need to file a request for arbitration by a certain date. Unlike the case of *Mortara v. Cigna Property & Casualty Ins. Co.*, 356 N.J. Super. 1 (App. Div. 2001), *aff'd*, 174 N.J. 566 (2002), the insurer here did not disclaim or question coverage until after the statute of limitations had expired. Therefore, the insured reasonably relied on its insurer's conduct in failing to file a complaint or request arbitration within the statute of limitations.

Since there is no prejudice to the insurer and the result is not repugnant to the policies served by the statute of limitations, the Supreme Court held that the trial court correctly rejected the insurer's statute of limitations defense.

EVIDENCE / CHARACTER EVIDENCE

In *Ostrowski v. Cape Transit Corp.*, the Appellate Division held that defense counsel's presentation of expert medical testimony to show that the personal injury plaintiff was faking symptoms of serious brain injury constituted an attack on the plaintiffs' character for truthfulness that entitled the plaintiff to rebuttal character evidence for truthfulness under NJRE 608.
Based on its review of persuasive federal and sister state decisions, the Appellate Division determined that courts have generally distinguished the introduction of evidence that merely denies facts presented by the plaintiffs from the introduction of evidence that seeks to impeach the plaintiff, and permitted the introduction of rebuttal character evidence for truthfulness in latter scenario.

HEALTH INSURERS /COLLATERAL SOURCE RULE

In *Levine v. United Healthcare Corp.*, the Third Circuit ruled that New Jersey's anti-subrogation statute or collateral source rule conflicts with ERISA and does not fall within the ERISA savings clause. Under the Third Circuit's interpretation, health care insurers may seek reimbursement of medical expenses from insured who later win or settle a personal injury suit against a third party.

This decision undercuts the New Jersey Supreme Court's decision in *Perreira v. Rediger*. In *Perreira*, the Supreme Court held that New Jersey's collateral source rule prohibits health insurers from imposing health insurance liens on amounts recovered by personal injury plaintiffs. In doing so, the Court held that New Jersey's collateral source rule is protected from ERISA preemption because it affects insurance.

In *Levine*, the plaintiffs' bar filed in federal court and sought to recover amounts previously paid to satisfy health insurance liens in settled cases. The District Court ruled that *Perreira* does not apply retroactively. On appeal, the Third Circuit went further and held that the Supreme Court of New Jersey incorrectly interpreted the New Jersey collateral source rule to be a state law "affecting insurance." It found the collateral source rule as one that does not regulate solely the insurance industry, which disqualifies the state law from ERISA's savings clause. Only when a state law qualifies under *Kentucky Ass'n of Health Plans Inc. v. Miller*, 538 U.S. 329 (2003) as "state regulation of insurance," will the law fall within ERISA's savings clause.

Consequently, some health insurers may try to assert liens in cases in which the *Perreira* decision once prohibited the imposition of health insurance liens.

It remains to be seen how the conflict between state and federal courts on this issue will be played out. The Third Circuit decision conflicts not only with the New Jersey Supreme Court's decision, but also with decisions in other federal circuits.

Previously extinguished liens may now reappear, requiring further action in court to ensure final settlement of bodily injury claims.

LAW AGAINST DISCRIMINATION / PUBLIC ACCOMMODATIONS / HOSTILE ENVIRONMENT

The Director of the New Jersey Division of Civil Rigths ruled that bias-based student-on-student harassment violates LAD.

In *L.W. v. Toms River Reg. Schools Board of Educ.*, Director J. Frank Vespa-Papales overturned the ALJ's ruling that there was no cause of action for claims of hostile environment in a public school setting. He held that the scope of liability under LAD is significantly broader than under Title IX because LAD "specifically prohibit[s] direct

or indirect acts of discrimination of any owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation."

In this case, the complainant alleged that he was taunted, punched, and compelled to transfer to another school as a result of the name-calling and hostility he faced in and out of school. He said he was frequently called names like "faggot" and "homo" when he was 6th and 7th grade, with taunts sometimes escalating to physical altercations. He alleged that in 9th grade, he was taunted twice with epithets and punched by other students off school grounds while on his lunch break on his way home. He allegedly missed class for a month while his mother looked for a transfer school because they found the harassment to be so significant.

While the school did take action against the perpetrators, from lectures to school suspensions, and employed a progressive disciplinary policy, the Director ruled that the school failed to address a broader pattern of abuse. The Director focused on the school's failure to provide the complainant with an education not permeated by bias-based hostility.
As a result, the school was ordered to pay $50,000 to the complainant, $10,000 to the complainant's mother, and $10,000 to the state as a statutory fine.

LAW AGAINST DISCRIMINATION / EMPLOYMENT LAW / WRONGFUL TERMINATION ACTIONS / PRIMA FACIE CASE

In *Zive v. Stanley Roberts, Inc.*, the Supreme Court held that a plaintiff employee seeking to prove a prima facie case of wrongful termination under LAD need only to show that he was "objectively qualified" for the position. Therefore, the plaintiff who had eight years of performance experience for the job from which he was denied employment upon his return from medical leave was deemed "objectively qualified" for that job and, by virtue of that experience alone, established a prima facie case of wrongful termination under LAD.

LITIGATION / AFFIDAVIT OF MERIT

In *The Diocese of Metuchen v. Prisco & Edwards*, the Appellate Division ruled that a third party plaintiff is not subject to the Affidavit of Merit statute when its third party claim is in the nature of contribution or joint tortfeasor liability against another professional.
Based on an analysis of the meaning of the statute, the true nature of the particular claims being asserted, and more practical reasons, the Appellate Division held that an Affidavit of Merit need not be filed in a third party claim in the nature of contribution or joint tortfeasor liability because such a requirement would not serve the purpose of the Affidavit of Merit statute.
The decision encourages third party claims by aggrieved professionals against contributing tortfeasors.

LITIGATION / ATTORNEYS FEES

In *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*, the Supreme Court clearly reiterated that Rule 4:42-9(a)(6), which permits the recovery of attorneys' fees "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant," does not apply when the insured brings direct suit against his insurer to enforce casualty or other direct coverage. The Court quoted *Eagle Fire Prot. Corp. v. First Indemn. Of Am. Ins. Co.*, 145 N.J. 345, 363 (1996), and refused to permit the recovery of attorneys' fees in this matter because the policy under which the insured sought coverage did not concern liability to third parties.

NEGLIGENCE /PREMISES LIABILITY / SIDEWALKS / SLIP AND FALL

In the unpublished decision, *Ware v. Commerce Bancorp.*, the Appellate Division upheld the trial court's dismissal of the plaintiff business invitee's Complaint against the defendant commercial property owner for injuries allegedly sustained when she slipped and fell on an uneven sidewalk on the defendant's property. The plaintiff admitted that she did not know exactly where she fell and on what she fell. She could only guess that the unevenness by way of a one-half inch height differential between slabs in a part of the sidewalk was the cause (the unevenness of which she noticed two days after her fall). The Appellate Division ruled that the plaintiff did not provide sufficient evidence to establish the existence of a dangerous condition or causation.

NEGLIGENCE/PREMISES LIABILITY/ WORKPLACE ACCIDENTS

In *Raimo v. Fischer et al.*, the Appellate Division held that general negligence principles and not the common law doctrine of premises liability govern a contractor's duty of care to persons coming onto the site. It also noted that the Supreme Court has continued to apply common-law principles of premises liability only to tort cases involving claims against the owners of property used for noncommercial purposes. It cited to *Hopkins*, *Carvalho*, and *Alloway* in support of its conclusion that general negligence principles govern cases involving claims against operators of commercial enterprises.

In addition, the panel held that a general contractor cannot be held vicariously liable for the negligence of one of its subcontractors without a contractual obligation to supervise all construction work and without having been on the site.

Finally, the Court held that the owners of the residential property could not be held liable under either the common-law doctrine of premises liability or a theory of vicarious liability for the subcontractor's negligence. The homeowners had no control over the manner in which the house was being constructed and were not present at the construction site except on weekends. In such circumstances, the Court held, the homeowner could not be held responsible for injuries arising out of the negligence of the subcontractor's performance of its work.

NEW JERSEY PROPERTY-LIABILITY INSURANCE GUARANTY ASSOCIATION

In *Johnson v. Braddy*, the Appellate Division held that the insured is now liable for the balance of any hiatus between the $300,000 policy limit available under the New Jersey Property-Liability Insurance Guaranty Association (PLIGA) Act and the limits of the policy issued by the insured's insolvent insurer. This decision overrules the Law Division's ruling in *Flaherty v. Safran*, which held that the adverse consequences of the insurer's insolvency should be borne by the tortfeasor.

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In *Thomsen v. Mercer-Charles, et al.*, the Appellate Division interpreted the exhaustion and setoff provision under the New Jersey Property-Liability Insurance Guaranty Association (PLIGA) Act to hold that the Association is entitled to a setoff of the full amount paid by a solvent insurer and therefore is relieved from its statutory obligations if the setoff equals or exceeds the $300,000 statutory cap for covered claims. This will be true regardless of whether the claim far exceeds the coverage limits of the solvent insurer's policy.

It rendered its decision in *Thomsen v. Mercer-Charles, et al.*, and four related cases.

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In *Arcnet Architects, Inc. v. NJ Property-Liability Ins. Guaranty Assn.*, the Appellate Division held that counsel fees and other claim expenses incurred prior to the insurer's insolvency are not "covered claims" payable by the NJ Property-Liability Ins. Guaranty Assn.

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In *Hudson Environmental services v. New Jersey Property-Liability Insurance Guaranty Ass'n*, Judge Ostrer of the Law Division in Mercer County held that NJSA 17:30A-17 insulates the Association from claims for consequential damages or reformation based on the Association's alleged bad faith or breach of duty to timely pay claims. It also determined that there is no right of action against PLIGA for violation of the Unfair Claims Settlement Practices Act.

NEW JERSEY TORT CLAIMS ACT

In *Coyne v. State of New Jersey, Dept. of Transportation*, the Supreme Court reversed the Appellate Division and trial court's opinion and held that the discretionary act immunity provisions of the Tort Claims Act, NJSA 59:2-3a, do not afford policymaker discretionary protection to road crew members to which ultimate authority has been delegated to establish safety procedures during their clean-up operations. The DOT's safety manual's disclaimer, which gave DOT road crew members discretion in the methods and means by which they were to ensure the safe and expeditious movement of traffic and the safety of the work force, did not confer "policymaking" discretion as defined by the Tort Claims Act.

POLICY INTERPRETATION / CANCELLATION

In *Nece v. Rutgers Cas. Ins. Co.*, the Appellate Division reversed the trial court's entry of summary judgment in favor of plaintiff insured in a coverage dispute because a reinstatement notice was mailed after the insurance cancellation notice. It remanded the matter to the trial court, noting that the reinstatement notice pre-dated the cancellation notice, regardless of when the two notices were mailed, and ruled that the insurer had complied with statutory requirements entitling it to a presumption of mailing and cancellation. At the same time, the Court ruled that entry of judgment against the insurer under these circumstances could not be made as a matter of law. The Court ruled that there was a fact issue regarding the plaintiff's state of mind for purposes of determining whether the insurer should be estopped from denying coverage as a result of the sequence of mailing of the two notices.

POLICY INTERPRETATION / COOPERATION CLAUSE

In *Pacheco, etc. v. Proformance Ins. Co.*, Judge Villaneuava, of the Law Division dismissed the plaintiff insured's complaint to vacate an arbitration award that denied him PIP benefits for "egregious" lack of cooperation in refusing to ensure the production of medical information from the plaintiff's doctor and refusing to provide a statement to the insurer without conditions unilaterally placed by the plaintiff's attorney. The judge ruled that the insured's refusal to give the statement was egregious in light of the clear policy requirements for it.

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In *Klotsman v. Great Northern Ins. Co.*, Judge Walsh of the Law Division granted summary judgment against a plaintiff insured for failure to cooperate under the policy's cooperation clause and unfair delay. The plaintiff asserted a first-party claim against her carrier for a stolen $85,000 platinum diamond ring. The plaintiff failed to produce certain information and documentation requested at an examination under oath on the grounds of irrelevancy, but did produce a sworn proof of loss and appear for an examination under oath.

The plaintiff filed a verified complaint seeking declaratory judgment nearly 14 months after the EUO and 15 months after the plaintiff was first alerted to the document request. The court indicated that although it did not find that the plaintiff insured's level of non-cooperation and suspicion to be as extreme as in *DiFrancisco v. Chubb Ins. Co.*, it did find that the plaintiff's delay prevented the defendant insurer from fully investigating the claim. Since the court could not find a legal or equitable basis to allow the plaintiff another chance to produce the documents, it granted the insurer's request for summary judgment and dismissed the plaintiff's complaint.

POLICY INTERPRETATION / DUTY TO DEFEND / DEFENSE COSTS

In *L.C.S., Inc. t/a D'Jais Bar, Inc. v. Lexington Ins. Co.*, the Appellate Division held that the policy exclusion for liability claims "arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation of a director of the Insured, his employees, patrons or other persons" did not clearly exclude from coverage any alleged negligent activity independent of assault.

Therefore, it found the insurer liable for defense costs on the covered counts of the underlying negligence complaint for which the insurer failed to reimburse or enter a defense on behalf of the insured.

In allocating defense costs, the Appellate Division held that the trial judge has discretion to make a "fair allocation" of defense costs between covered and uncovered claims.

Significantly, it held that an insurer cannot relitigate the issue of whether the claimant's injuries were in fact caused by an excluded cause of loss once it is found to have wrongfully left the insured to fend for itself in the litigation of the underlying negligence suit.

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In *Hebela v. Healthcare Ins. Co.*, the Appellate Division finally provided guidance regarding the proper procedure to follow in arriving at an allocation of defense costs. In reversing the trial court's allocation of defense costs without conducting either a plenary hearing or an analysis, the Appellate Division remanded the issue of defense costs allocation to the Law Division for further proceedings on the damages issue.

POLICY INTERPRETATION / MANIFEST INTENT

In *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*, the Supreme Court held that an insured auto dealer sustained a direct loss under the employee-dishonesty clause of its insurance policy when its employee induced it to hand over 27 autos in exchange for 27 installment sales contracts signed by non-creditworthy customers and each auto exchanged constituted a separate occurrence.

In that case, the insured's employee approved 27 credit applications containing false information to secure loans for non-creditworthy customers. After an investigation on defaulting loans, a number of lenders filed suit against the insured for fraud and breach of contract. The insured filed a third party suit against the employee and its commercial liability carrier, among others. Although the main property coverage form did not include automobiles held for sale, accounts, bills, other evidences of debt money, notes, and securities, an endorsement to the policy contained an "Employee Dishonesty" provision that extended coverage to "direct loss of or damage to Business Personal Property and "money" and "securities" resulting from the dishonest acts of the insured's employee acting "with the manifest intent to cause" the insured loss or damage and any employee or other person or organization to obtain a financial benefit. The insured settled all of the lenders' claims for $215,000.

The Law Division granted the insured's Motion for Summary Judgment and held that the insured's employee's conduct constituted "dishonest acts" under the policy that caused the insured to sustain a "direct loss." Because the insured's employee defrauded auto lenders on 27 occasions, the Court held that there were 27 separate occurrences. It awarded the insured prejudgment interest and attorneys' fees for defending the Auto Lenders' action and enforcing its rights against its insurer.

The Appellate Division reversed and remanded the matter for entry of judgment in favor of the insurer. The majority found that the employee's "manifest intent" was not to cause loss or damage to the insured, but rather was to defraud Auto Lenders. In addition, the majority held that the insured had not suffered a "direct loss" under the policy

because the fraudulent conduct was directed against the third party lenders, not the insured. It also vacated the award of attorneys' fees.

The Supreme Court reversed and remanded the matter to the trial court, finding that material fact issues precluded entry of summary judgment. In analyzing the terms "manifest intent," the Court construed the terms to refer to the employee's state of mind in engaging in the allegedly dishonest or fraudulent acts that caused the insured's loss, which it evaluated under a "substantial-certainty" test. The "substantial-certainty" test requires proof of the employee's purpose or desire to cause the insured to sustain a loss and to obtain a financial benefit at the insured's expense or proof that the employee knew that the aforementioned loss and benefit were substantially certain to result.

Based on the substantial-certainty test, the Court found there were fact questions regarding the employee's intent to harm the insured and to obtain a financial benefit at the insured's expense. It determined that there was a fact issue as to whether the employee intended the insured to suffer a loss because the employee's behavior lay in the middle of a spectrum of behavior ranging from an act of embezzlement to an exercise of poor business judgment. It also determined that there was a fact issue regarding whether the employee intended to financially benefit anyone other than the insured, despite the fact that the policy excluded increased commissions from the scope of covered losses.

POLICY INTERPRETATION / NEGLIGENT MISREPRESENTATION

In *McClellan v. Feit, Jr.*, the Appellate Division held that a 1986 Prudential homeowners policy covered the homeowner's alleged negligent misrepresentation of the absence of an underground oil tank on the residential property that it sold. In doing so, however, the panel remanded the case to the trial court to determine whether the insureds received a 1994 policy change, which specifically excluded negligent misrepresentation from coverage.

POLICY INTERPRETATION / PARTIAL FIRE LOSS

In *Medicia Corp. v. Great Northern Ins. Co.*, the Appellate Division upheld the motion judge's entry of summary judgment in favor of the defendant insurer to limit recovery on the plaintiff insured's fire loss claims to those claims directly related to the need to repair the fire-damaged room in the plaintiff's plant. The panel held that the insurer was not obligated to cover anything other than the damage resulting from the original fire. It was not obligated to cover the costs of a new sprinkler system for the entire plant or the plaintiff's claimed "business income" or "extra expense" loss.

POLICY INTERPRETATION / WAREHOUSEMAN LIABILITY POLICY / DIRECT PHYSICAL LOSS

In *Customized Distribution Services v. Zurich Insurance Co.*, the Appellate Division found coverage under a warehouseman's liability form for damages allegedly caused by the insured warehouseman's failure to properly rotate and ship its customer's beverage product. At issue was whether the above failure rendering a product to become outdated could qualify as a "direct physical loss" and whether the exclusion for any loss resulting from "[d]elay, loss of use, loss of market, or any other consequential loss" applied.

The Appellate Division held that the term "direct physical loss" did not require a "material or chemical" change to the product's composition because the form clearly would have covered losses arising from breakage of the beverage containers. It supported its conclusion with an analogy to the "proof of imminent collapse" that has been permitted to trigger collapse coverage under a property coverage policy, even when there has been no actual collapse. It held that the product's customers' changed perception of the allegedly misrotated (and therefore outdated) product was "the functional equivalent" of a material or physical change for purposes of triggering coverage under the policy. In the alternative, it held that the policy form was "at least" ambiguous and therefore subject to construction in accordance with the insured's reasonable expectations.

In addition, the Appellate Division held that the "[d]elay, loss of use, loss of market, or any other consequential loss" exclusion clearly did not apply because that exclusion applies to losses sustained by the warehouse and not by the warehouse's customer, i.e., the product's manufacturer/distributor.

Therefore, as a matter of law, the Appellate Division held that the warehouseman's liability form provided coverage for the claims arising out of the misrotated beverages.

PRE-TORT WAIVERS & RELEASES / MINORS

In *Hojnowski v. Vans Skate Park et al.*, the Appellate Division held that a parentally executed release and waiver of the minor child's right to a trial by jury and damages for injuries sustained by the minor as a result of the defendant's negligence is enforceable only with respect to the provision for arbitration of the minor's claims. The Court reasoned that this state's strong public policy in favor of arbitration as a means of handling dispute permitted enforcement of the arbitration clause. However, as a matter of public policy, without statutory authority or judicial authorization, a parent cannot release a claim properly belonging to a child and any such agreement will be held void from inception. The Court noted that if the Legislature were interested in protecting commercial facilities such as the skateboarding rink in question here, it could act accordingly.

In his partial dissent, Judge Fisher contended that courts should defer to parental decisions regarding agreements relating to their child's activities. The dissent argued that parents should be legally permitted to execute a pre-tort release on their child's behalf. The dissent further contended that this state's public policy does not preclude enforcement of a tort remedy waiver provision that applies to risks inherent in the subject sport because those risks are not within the commercial facility's control. Under those circumstances, the imposition of tort liability on the facility would not serve one of the primary purposes of tort law, which is to deter unsafe conduct by those found liable for purposes of bringing a beneficial change in the facility's future conduct.

The partial dissent may result in Supreme Court review. We will keep you posted.

PRODUCTS LIABILITY / INTERPLAY WITH THE STATUTE OF REPOSE FOR IMPROVEMENTS TO REAL PROPERTY

In *Dziewiecki v. Bakula*, the Supreme Court examined the issue of whether manufacturers and suppliers of mass-produced products such as pool kits are subject to the 10-year statute of response found under NJSA 2A:14.1, which applies to actions arising out of alleged injuries sustained as the result of a defective or unsafe condition of an improvement to real property.

In *Bakula*, one of the defendants was not only the seller and distributor but also the installer of an in-ground pool kit purchased by the homeowners. The plaintiff was the homeowners' guest who was rendered quadriplegic after diving into the sloped wall of the homeowners' in-ground pool. Well over 10 years had passed since the installation of the pool kit when the plaintiff sustained injuries.

The Supreme Court held that only installers, not manufacturers and sellers, are members of the protected class created by the 10-year statute of repose, which protects "person[s] performing or furnishing the design, planning, surveying, supervision of construction or construction." The statute does not serve to protect manufacturers and suppliers of standardized items.

Addressing the facts before it, the Supreme Court recognized that the seller and distributor of the pool kit was also the installer of the product.

Under the circumstances, the Court ruled that liability would not attach beyond the 10-year statute of repose for installation activities. Liability for product defects would be subject to the standard rules governing claims against

manufacturers and distributors; such claims accrue at the moment of injury and will not be affected by the statute of repose.

Significantly, the Supreme Court rejected the Appellate Division's opinion that a person participating to any extent in activities covered by the statute of repose is entitled to the statute's protection. Instead, it adopted an approach that will allocate liability according to the separate causes of action that are involved. This approach will require a fact sensitive inquiry in every case for which the supplier is also the installer.

SETTLEMENT AGREEMENTS / ENFORCEMENT

In *Villanueva v. Amica Mut. Ins. Co.*, the Appellate Division held that an insurer may rescind a settlement agreement made on a mistaken understanding of the applicable policy's limits. The Court cited *Young v. State Farm Mut. Auto Ins. Co.*, 80 N.J. Super. 582 (App. Div. 1963), to support the proposition that an insurer may rescind a settlement payment if it was induced by a mistake of fact and the settling plaintiff would not be prejudiced.

At the same time, the Appellate Division recognized that restitution may not be available to an insurer which was grossly negligent or breached its duty of good faith and fair dealing in making the settlement.
Therefore, citing to *Hamel v. Allstate Ins. Co.*, 80 N.J. Super. 502 (App. Div. 1989), the Appellate Division ruled that (1) the mistake must be material and have occurred despite the mistaken party's exercise of reasonable care and (2) the mistaken party must not have caused "serious prejudice" to the other party.

Finding that the insured would be no better offer had she known that the policy limit was $10,000 rather than the $35,000, at which the insurer agreed to settle the case, the Court noted that precedent would permit recovery of funds paid to the insured in excess of the policy limits upon later discovery of the mistake. Accordingly, the Appellate Division held, enforcement of the settlement agreement would be unconscionable.

UNSATISFIED CLAIM AND JUDGMENT FUND

In *Caballero v. Martinez*, the Appellate Divison held that an undocumented alien could not form the requisite reasonable intent to establish residency in New Jersey for purposes of recovering benefits from the Unsatisfied Claim and Judgment Fund because of his illegal immigrant status.

TRIAL RESULTS, MOTIONS, APPEALS, AND OTHER NEWS

Don Crowley obtained a no cause verdict in favor of a ladder manufacturer and retailer. The plaintiff alleged that he sustained significant injuries when the stabilizer bar of a ladder designed and manufactured by the defendant failed, causing the plaintiff to fall off the fourth step up the ladder after only one prior use. With the help of a witness to contradict the plaintiff's testimony regarding the circumstances surrounding the accident, Don obtained a no cause verdict after only 15 minutes of jury deliberations.

Ed Thornton successfully defended a slip and fall case asserted by a 74-year old plaintiff against the defendant commercial property owner in which the plaintiff submitted damages proofs in the amount of$770,000. As a result of his efforts, the jury determined that the plaintiff failed to prove that he fell on the commercial defendant's property when he fell on a driveway apron that was located in part on the commercial defendant's property.

Ric Gallin successfully defended a first-party insurance claim in the Superior Court, Camden County. The insured was the owner of a clothing store which suffered a fire loss. The fire occurred in a box in which the insured had placed rags with which he had been staining hangers. The cause and origin investigation indicated that this was

a "set fire." The insured claimed it was spontaneous combustion. Ric successfully demonstrated to the jury that this was not a spontaneous combustion situation and that the only plausible explanation for the fire was that the insured had set it. The carrier not only did not have to pay the insured's first party claim but was also relieved from having to defend and indemnify the insured in subrogation cases brought by adjoining stores.

Eric Harrison and *Tracy Bussel* obtained summary judgment at the close of discovery in a 12-count race discrimination/whistleblower lawsuit. Eric and Tracy also obtained partial summary judgment in *D.E.R. v. Ramsey Board of Education,* a civil rights action by a student's family alleging violations of the Individuals with Disabilities in Education Act, the ADA and the Rehabilitation Act. The plaintiffs have appealed both dismissals, the former to the Appellate Division and the latter to the Third Circuit Court of Appeals.

Marc Dembling recently moderated a seminar on insurance for construction projects and the construction industry at the American Bar Association's Mid-Year Meeting in New York City.

Lori Brown Sternback obtained a 6-1 verdict and an award of $0 in damages in an automobile accident case in which her insured client was clearly at fault. Specifically, the insured struck the plaintiff's vehicle, causing it to overturn. The property damage to the plaintiff's vehicle was over $9,000. The plaintiff, who was 73 years old at the time of loss,sustained two rib fractures (non-displaced) and neck and back strain/sprains as a result of the accident. Lori successfully persuaded 6 of the 7 member jury panel that the plaintiff's alleged limitations were not significant.

Michael Eatroff successfully employed the "Sham Affidavit Doctrine" to obtain summary judgment in favor of a carrier against an innocent third party claimant seeking benefits under an automobile policy that the carrier issued. At her deposition, the claimant described the driver of the hit and run vehicle as an individual that did not fit the description of the known permissive user of the car. Later, in opposition to the carrier's motion for summary judgment, the claimant submitted a certification recanting her previous description of the driver of the hit and run vehicle in effort to create a question of fact for submission to the fact-finder or jury. Agreeing with Michael's argument, the court disregarded the claimant's certification as a "sham affidavit."

Danielle Lozito and *Ric Gallin* convinced the Second Department of the New York Appellate Division to reverse the grant of summary judgment in a subrogation case, in the published decision of *Peerless Ins. Co. v. Allied Building*. The defendants delivered and hoisted to the insured building's roof various building supplies. On behalf of the subrogating insurer, Danielle and Ric argued that circumstantial evidence suggested that the building was damaged during delivery. Reversing the trial court, the Appellate Division agreed with Danielle and Ric that the damage presented a question of fact for a jury.

NEW ATTORNEYS

We are pleased to welcome four new attorneys to the firm: Bruce Seidman, Thomas H.E. Hallett, Douglas D'Antonio and Anthony Fazioli.

Bruce Seidman joins Methfessel & Werbel's coverage team with a wealth of knowledge and experience in the field of insurance defense. He has handled complex, high exposure cases, including medical malpractice, toxic tort, construction, products liability, liquor liability, tort claims, general negligence, and auto cases. He also has experience in handling worker's compensation and UM and UIM matters.

Tom Hallett is a 25-year veteran who has tried more than 125 cases to verdict. He has extensive experience in

the defense of medical malpractice, products liability, general liability and commercial litigation. A former partner at Reiseman and Sharp in Roseland and associate at Porzio, Bromberg & Newman,Tom started his own practice in Bernardsville in 1991, where he continued to focus on the defense of high exposure civil matters. Tom joins our North Jersey liability team.

Doug D'Antonio has over twelve years of experience handling liability defense, first party insurance, and coverage matters. He joined the North Jersey Liability team in September of 2004. Perviously Doug worked for a law firm in Westfield, New Jersey, where he handled liability defense trials, appeals, and arbitrations on behalf of insurance companies. He also acted as an arbitrator in UM/UIM disputes.

Anthony Fazioli joins M&W's South Jersey liability team after serving two years with the Somerset County Prosecutor's Office as an Assistant Prosecutor. As an Assistant Prosecutor Anthony represented the State of New Jersey in juvenile and domestic violence prosecutions as well as probation and sentencing hearings. During Anthony's two years as a prosecutor he was appointed Drug Court Prosecutor in Somerset County and certified as a Somerset County Police Academy Instructor.