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CASE UPDATE

May 2003

The vast majority of our friends and clients have chosen to receive the Case Update via email. In recognition of this fact we have converted to a vertical format without columns to maximize reader convenience.

In the near future this newsletter will be available exclusively online, through either email or access to our soon-to-be launched website. We therefore encourage our regular mail recipients with internet access to provide us with an email address. This will ensure continued delivery without interruption of the Case Update and other important bulletins.

As always, we welcome any comments, questions or suggestions you may have regarding the form or content of our quarterly Case Update. We publish this newsletter to serve your needs and we are always open to suggestions as to how we may better accomplish this goal. Feel free to contact Eric Harrison at harrison@methwerb.com or 732-650-6511.

U.S. SUPREME COURT STRIKES DOWN PUNITIVE BAD FAITH DAMAGE AWARD AGAINST INSURER

In Campbell v. State Farm the U.S. Supreme Court ruled that an award of punitive damages 145 times greater than the compensatory damages was so excessive that it violated the carrier's right to due process. The Court overturned a $145 million bad faith award against State Farm for failure to settle a bodily injury claim within policy limits.

State Farm policyholder Curtis Campbell sued State Farm in 1989 for damages arising from the insurance company's refusal to pay $50,000 to settle a claim from an accident that killed one driver and left another driver disabled. State Farm decided to go to trial over the claim, in which Campbell was the defendant, rather than accept offers to settle for the $50,000 limits of his insurance policy. A jury found Campbell to be at fault and entered judgments against him totaling $186,000.

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Campbell sued State Farm, alleging a bad-faith failure to settle. Under Utah law Campbell was entitled to seek damages beyond the excess judgment of $136,000. A jury awarded $2.6 million in compensatory damages -- later reduced to $1 million -- and $145 million in punitive damages.

The judge in the case later cut the punitive damages award to $25 million, but the Utah Supreme Court reinstated the original amount. The U.S. Supreme Court ultimately ruled that the Utah Supreme Court had erred in permitting such an award to stand.

Writing for the majority, Justice Kennedy said an award of punitive damages at or near the amount of compensatory damages would probably be justified. However, a punitive award 145 times the size of the compensatory award clearly violated due process.

The majority noted that when imposed indiscriminately, punitive damages "have a devastating potential for harm."

The quantum of compensatory damages awarded in Campbell far surpassed what would be permitted under current New Jersey law, since Rova Farms generally limits bad faith failure-to-settle claims to the amount of the excess verdict. However, the Campbell ruling applies equally to any case in which punitive damages have been plead, including first party bad faith claims. The high Court's ruling further buttresses New Jersey's own statutory and common law protections against excessive awards of punitive damages.

INSURANCE FRAUD/APPLICATION MISREPRESENTATION

The New Jersey Supreme Court has unanimously affirmed the Appellate Division's decision in Palisades Safety and Insurance Association v. Bastien, holding that a named insured's false representation that he was single and the only person of driving age in his household should be imputed to his spouse even if she was unaware of the misrepresentation. The Court created a bright line rule that the spouse of an insured who commits application fraud is not an "innocent third party" entitled to PIP benefits.

Significant in the Court's analysis was the finding that accurate information would have resulted in a higher premium – not a refusal to provide coverage. Thus the decision strengthens the underwriting defenses of a carrier which bases its premium calculation on the information provided during the application process.

INSURANCE FRAUD/RESTITUTION

Mercer County trial Judge Jack Sabatino recently ruled in a published decision, NJM v. Gonsalves, that an insurer who discovers fraud by a policyholder may seek restitution from medical providers in appropriate circumstances. The Court created guidelines to determine the equity of permitting a repayment action, including the time that elapsed from the provider's receipt of payment to the insurer's demand for repayment, the size and frequency of payments, the nature of the fraud or mistake involved and whether the provider or insurer should have known about the fraud or mistake.
In this case, NJM attempted to obtain restitution for approximately $260,000 it had paid over the years to a pharmacy that provided medication to the victim of a serious accident who allegedly listed a New Jersey address while actually residing in Pennsylvania. She also failed to list her son as a driver. NJM contended that such misrepresentations should void coverage ab initio.

Unfortunately, the accident occurred in 1987 and the payments to the pharmacy continued through 2001. Judge Sabatino refused to order restitution because the pattern of repeated payments reasonably induced the pharmacy to believe that the payments were valid. The Court also noted the absence of evidence to suggest that the pharmacy should have known about the alleged residency fraud of the policyholder.

Despite this result, the cause of action recognized by Judge Sabatino should be taken to heart by claim and subrogation adjusters throughout New Jersey. Under the standards articulated in Gonsalves, your claim for reimbursement will be strongest when asserted closest in time to the discovery of its factual basis.

INSURANCE COVERAGE/CLAIMS MADE POLICIES/BROKER MALPRACTICE

In President v. Jenkins, a case handled by Eric Harrison of our office, a divided appellate panel upheld the plain language of a "claims made" policy exclusion barring claims that accrue before the policy begins. The Court also upheld dismissal of the broker malpractice claims against our client, C&R Insurance Agency, based on the failure of the uninsured doctor to demonstrate a deviation from professional standards of care.

Dr. Reginald Jenkins, an OB/GYN, met with a representative of C&R Insurance Agency on January 8, 1998 to arrange for malpractice coverage with Zurich American beginning February 1, 1998, the date on which his coverage with Princeton Insurance Company would expire. At the conclusion of the meeting, Dr. Jenkins told the C&R representative that he was "behind one payment" to Princeton and asked what he should do. The C&R employee told him that he should make the payment.

Unbeknownst to C&R, Princeton had actually issued a notice of intent to cancel for nonpayment of premium. Additionally, after their January 8, 1998 meeting, Dr. Jenkins failed to follow C&R's advice to make the remaining Princeton payment. Thus the doctor was ultimately uninsured from October 1997 through February 1, 1998, when his coverage with Zurich began.

Also unbeknownst to C&R, Dr. Jenkins allegedly had committed malpractice only days before meeting with C&R by failing to diagnose preeclampsia in Debra President, who suffered a stroke prior to giving birth and sustained permanent neurological and cognitive injuries. She filed suit against Dr. Jenkins in 1999.

Zurich denied coverage, citing policy language which excluded coverage for claims arising out of losses occurring prior to the first date of coverage. Dr. Jenkins and Ms. President in turn filed separate claims against both Zurich and C&R, alleging that Zurich's policy contained ambiguities requiring coverage and that in the alternative, C&R committed professional malpractice by failing to investigate Dr. Jenkins' insurance status and obtain coverage to bridge the gap between the policy's risk purchasing group "effective date" of January 1, 1998 and the "retroactive date" applicable to Dr. Jenkins.

The trial court granted summary judgment to Zurich and C&R. Shortly thereafter, Ms. President and Dr. Jenkins entered into a consent judgment for $1,000,000 with execution to be stayed pending appeal.

A divided appellate panel affirmed, ruling that Dr. Jenkins' coverage lapse was attributable solely to his own actions, that the plain language of the Zurich exclusion for claims arising out of events predating coverage was clear and unambiguous and that C&R did not deviate from any applicable standard of care. Rather, both C&R and Zurich provided Dr. Jenkins with precisely what he requested – malpractice coverage beginning on February 1, 1998.

Judge Landau dissented, opining that a jury should be permitted to interpret the Zurich policy and consider C&R's failure to investigate Dr. Jenkins' coverage status following the January 1998 meeting. The doctor and plaintiff have filed an appeal to the New Jersey Supreme Court, setting the stage for a decision in late 2003 or early 2004. We will keep you posted.

INSURANCE COVERAGE/CANCELLATION

Calderon v. Jiminez, an appellate decision addressing the cancellation of a workers' compensation policy, extended the rule of Miney v. Baum, an auto assigned-risk case, to the cancellation of workers' compensation policies. Like New Jersey's assigned-risk plan for auto insurance, the New Jersey Workers' Compensation Plan requires carriers to mail cancellation notices by certified mail pursuant to N.J.S.A. 34:15-81. Failure to send the

cancellation by certified mail will effectively nullify the cancellation and extend the policy terms to cover a subsequent loss.

INSURANCE COVERAGE/DUTY TO READ POLICY

Edwards v. Prudential, a class action suit, alleged that Prudential and Allstate breached a contractual duty to their policyholders by failing to alert them that their policies provided up to $50.00 a day towards lost earnings if litigation over a covered claim required attendance at court proceedings. Writing for a unanimous appellate panel, Judge Havey rejected the policyholders' argument that an implied covenant of good faith required the carriers to alert policy holders to this potential entitlement and provide them with forms for the filing of such claim. The Court adhered to the general rule that an insured is chargeable with knowledge of the contents of an insurance policy in the absence of fraud or inequitable conduct on the part of carrier.

NEW YORK UPDATE

DEFAMATION/INTENTIONAL ACTS/DUTY TO DEFEND

The Court of Appeals recently held that an insurance company must defend a hospital in a defamation action, despite the fact that the claim alleged malicious slander and the policy excluded coverage for intentional wrongdoing. In Town of Massena v. Healthcare Underwriters Mutual Ins. Co., the Court concluded that malice and intentional wrongdoing were not necessarily the same thing in the context of a defamation case.

The underlying action involved a doctor who advocated the use of midwives in hospitals. In 1997, the doctor brought a federal lawsuit claiming that Massena Memorial Hospital, among others, was engaged in a conspiracy to ruin the doctor's reputation and medical practice because he had publicly urged the medical facility to establish a midwifery program. The hospital's liability carrier, relying on its exclusion for defamatory statements made within a business enterprise with knowledge of their falsity, refused to provide the hospital with a defense.

The town of Massena, which owns the hospital, filed a declaratory action against its insurers seeking to compel a defense and indemnification. While the Supreme Court ordered the carriers to defend the hospital and its staff, the Third Department Appellate Division reversed, finding that a plaintiff's allegation of malicious defamation was the same as a claim of intentional misconduct, which was excluded under the policies.

An unanimous Court of Appeals reversed, holding that "even if the alleged defamatory statements . . . were intentionally and maliciously made, there was no allegation that the statements were made with knowledge of their falsity." The Court stated that actual malice "requires only recklessness as to the truth of the statement, and not knowledge of the falsity."

Thus the Court held that defamatory statements made with reckless disregard for the truth would be covered under the policy and that such coverage would not violate the public policy precluding coverage for conduct intended to cause injury.

AUTOMOBILE INSURANCE/VERBAL THRESHOLD

In Tierra v. Salazar, a three judge appellate panel further relaxed the certification requirement under the Automobile Insurance Cost Reduction Act of 1998 (AICRA), holding that in response to a summary judgment motion the plaintiff should be given a "reasonable time" to cure a defect in the original certification with the provision of a supplemental certification.

Similarly, an appellate panel led by Judge Fall relaxed the physician certification requirement in Casinelli v. Manglapus. Casinelli, which expressly answers the question posed in our last Case Update regarding the lapse of a limitations period between the filing of the Complaint and the filing of an appropriate certification, applies the "substantial compliance" doctrine to resuscitate otherwise time-barred claims when the medical evidence provided by the plaintiff through discovery essentially makes the same showing of permanent injury required by AICRA.

The Manglapus Court acknowledged its disagreement with last year's published decision in Konopka v. Foster that a plaintiff may not argue substantial compliance to avoid dismissal based on the failure to submit a timely certification. We anticipate that the split between appellate panels on this issue will culminate in a Supreme Court opinion in the near future.

In Thomasson v. McQuown Judge Perskie of Atlantic County ruled that AICRA requires a physician' s certification even for a claim of "significant disfigurement or scarring" because such injuries are not always sufficiently visible or "objective" to be evaluated by a jury without expert testimony. While this trial court decision is not binding on other trial courts, we would certainly recommend that auto carriers pursue this defense in verbal threshold cases involving scarring.

AUTOMOBILE INSURANCE/LIABILITY COVERAGE/INITIAL PERMISSION RULE

Jaquez v. National Continental Insurance Company involved the request by a defendant-tortfeasor for a cigarette from the defendant-auto owner. The owner gave him the car keys and told him that the cigarettes were in the car. The defendant tortfeasor then took the car and caused an accident, seriously injuring a third party. Applying a liberal interpretation of New Jersey's initial permission rule, the Appellate Division reversed the trial court and held that the owner effectively gave the driver permission to "use" the car by handing him the keys.

Shifting the burden of proof to the disclaiming liability carrier, the panel noted that the driver clearly operated the car without the owner's permission but that the disclaiming liability carrier had failed to show that the owner had "intended to even temporarily withhold the car" from th driver. Because the driver's conduct did not rise to the level of criminal theft, concluded the Court, the initial permission rule required that the liability carrier provide coverage to the driver as a permissive user.

AUTOMOBILE INSURANCE/AGENCY

Judges, adjusters and attorneys often confuse the concepts of permissive use and agency. Permissive use analysis determines whether the operator of a vehicle is entitled to coverage with the carrier that insures the vehicle, while agency analysis determines whether a non-operator defendant (usually but not always an owner) may be held liable for the negligence of the operator.

Shortly after the Appellate Division arguably expanded the reach of the initial permission rule in the Jaquez case (discussed above), the New Jersey Supreme Court further refined the scope of agency liability in a pair of cases involving defendant-employers with considerably deeper pockets than the employee-operators who caused accidents.

In O'Toole v. Carr a municipal judge caused an accident while en route to the municipal court. The plaintiff sued not only the municipal judge, but also his private law firm based on the doctrine of *respondeat superior*. Following a trial court ruling of vicarious liability and a reversal by the Appellate Division, the Supreme Court ruled that the firm could not be held liable for the municipal judge's negligence because he was not serving any purpose of the law firm while commuting to his municipal judgeship position. Moreover, the municipal judge was not on a law firm "special errand or mission" for the firm and the firm's practice did not require him to have a vehicle for off-site firm business. Nor was he acting in an "on-call" capacity.

Carter v. Reynolds provided further opportunity for the Court to articulate the boundaries of employer liability for the negligence of an employee. The Court reiterated that vicarious liability should be imposed on an employer for an employee's negligence under the doctrine of *respondeat superior* when: (1) the employee is engaged in a special errand or mission on the employer's behalf; (2) the employer requires the employee to drive his or her personal vehicle to work so that the vehicle may be used for work-related tasks; or (3) the employee is "on-call." Courts may also impose liability when the employee is serving a "dual purpose" during a commute by serving an interest of the employer along with a personal interest. In this case the operator-defendant was an employee of an accounting firm who caused an accident while returning to her home from the home of a client. Discovery revealed that her employer required her to use her own vehicle to visit clients on a regular basis. Because this arrangement demonstrated sufficient control over the employee to invoke the doctrine of *respondeat superior*, ruled the Court, the defendant accounting firm would be held liable for its employee's negligence in the operation of her personal vehicle.

AUTOMOBILE INSURANCE/UNINSURED MOTORIST BENEFITS/INTENTIONAL TORTS

In Shaw v. Jersey City a divided New Jersey Supreme reversed an appellate panel to hold that N.J.S.A. 17:28-1.1 extends uninsured motorist coverage to injuries caused by the intentional act of a tortfeasor. In this case, the plaintiff police officer was struck by a stolen vehicle. The Supreme Court held that this event constituted an "accident" within the meaning of the UM endorsement. The Court relied in part on its decision in Allstate v. Malec, which held that for purposes of PIP benefits, the word "accident" would not exclude intentional conduct "except where the conduct of the injured person was implicated."

AUTOMOBILE INSURANCE/PIP BENEFITS/POLICE OFFICERS

A different appellate panel ruled in New Jersey Manufacturers v. Hardy that a marked police cruiser does not qualify as a "private passenger automobile" under N.J.S.A. 39:6A-2, depriving an injured police officer of recourse to PIP benefits. Rather than focusing on the plain language of the statute, the two judges in the majority reasoned that the underlying purposes of PIP coverage are "fully achieved" by the worker's compensation benefits generally available to injured officers. Distinguishing the definition of "automobile" under the PIP law from the definition of "automobile" under the law governing UM benefits, the divided appellate panel held that the injured officer was not entitled to PIP benefits.

Judge Lisa's dissent confers upon the PIP claimant an automatic right to appeal. Unless and until the Supreme Court reverses this decision, however, all auto carriers should deny PIP claims asserted by occupants of marked police cruisers on the basis that the cruisers do not qualify as "private passenger" automobiles as defined by statute.

AUTOMOBILE INSURANCE/
PIP BENEFITS/CAUSAL CONNECTION

In Negron v. Colonial Penn the plaintiff was injured after he left a vehicle in which he was a passenger to come to the aid of his brother-in-law, who had been assaulted in the parking lot of a bar. The Appellate

Division held that the assault and the plaintiff's independent decision to exit the vehicle were intervening events which effectively broke the causal link between use of a motor vehicle and the plaintiff's injuries.

AUTOMOBILE INSURANCE/PIP BENEFITS/ARBITRATION/UNLICENSED PROVIDERS

In Liberty Mutual v. Open MRI of Morris and Essex, trial judge Villanueva confronted an arbitration award of PIP payments to an unlicenced healthcare provider which had been warned by the state not to provide diagnostic testing before obtaining a license. The Court set aside the arbitration award as contrary to law and public policy.

This opinion provides a strong basis for the vacation of AAA awards which flow from clear errors of law and touch on issues of important public policy. While Judge Villanueva is a trial court judge whose opinion relates only to violations of the Healthcare Facilities Planning Act, we do encourage auto carriers to consider Superior Court actions to vacate arbitration awards based on clear errors of law.

PREMISES LIABILITY/SWIMMING POOLS

The Supreme Court addressed a serious swimming pool accident in Tighe v. Peterson. Noting the plaintiff's testimony that he had been in defendant's swimming pool approximately 20 times before his injury, and that he knew where the deep portions were situated and not to dive into the shallow part, the Court held that the defendants did not have a duty to warn him of the configuration of the pool's depth.

PREMISES LIABILITY/SIDEWALKS

In Nielsen v. Lee an appellate panel clarified commercial sidewalk liability law by holding that a commercial abutting landowner may be held liable for a sidewalk defect caused by a tree root – even in a municipality with a local shade tree commission. In doing so, the Court held that the legislature's amendment of N.J.S.A. 59:4-10b in 1996 intentionally overruled Tierney v. Glide, an appellate case from 1989 which had absolved abutting commercial owners from liability when shade tree commissions exercised exclusive control over the maintenance of abutting sidewalks.

PREMISES LIABILITY/SUPERMARKETS

In Nisizoccia v. Glass Garden the New Jersey Supreme Court reinstated the personal injury action of a supermarket patron who slipped on a grape near the checkout isle. After falling the plaintiff noticed the presence of a few other grapes within a three foot diameter.

At the close of plaintiff's case, the trial court refused to grant the plaintiff's inference of negligence under the "mode of operations" rule and entered a directed verdict for the defendant supermarket.

Citing the 1966 case of Wollerman v. Grand Union, the Supreme Court reinstated the case and ruled that the plaintiff was entitled to an inference of negligence on the part of the supermarket. As a practical matter, the Nisizoccia holding extends the reach of Wollerman from the produce aisle to the checkout counter.

PREMISES LIABILITY/INDEMNIFICATION

As expected, the New Jersey Supreme Court has upheld the Appellate Division's ruling in Azurak v. Corporate Property Investors, in which the Court held that a janitorial contractor would not be required to indemnify the Ocean County Mall for a bodily injury claim arising out of a fall because the indemnification agreement in the service

contract did not include indemnification for claims arising out of the mall's own negligence. The Supreme Court essentially reiterated the rule of law first enunciated in Ramos v. Browning Ferris that indemnification language in a contract will not protect the indemnified party from the results of its own negligence unless the contract explicitly and unequivocally states as much.

CIVIL RIGHTS/MALICIOUS PROSECUTION

In Mantz v. Chains U.S. District Judge Brotman ruled that the issuance of a summons requiring a criminal defendant to appear in court does not, by itself, constitute a "seizure" under the Fourth Amendment. The Court granted the defendant State Trooper' s motion for summary judgment and dismissed the plaintiff's section 1983 claim for malicious prosecution.

EMPLOYMENT LAW/CONSCIENTIOUS EMPLOYEES PROTECTION ACT

Patrick Cosgrove, a substitute custodian who worked for the Cranford Board of Education, filed a grievance with his Union regarding the school district's method of distributing overtime. Shortly after filing the grievance, Cosgrove contended, he was held to a higher standard of performance than any other district employee. He was ultimately terminated for poor performance.

Cosgrove filed suit under CEPA. The trial court dismissed his claim and the Appellate Division affirmed in Cosgrove v. Cranford Board of Education, holding that Cosgrove's failure to cite any law or regulation that might have been violated by the District 's method of overtime distribution was fatal to his CEPA claim. The complaint regarding overtime distribution concerned a "personal harm" rather than the "public harm" required under Section 3 of the Act.

EMPLOYMENT LAW/WRONGFUL DISCHARGE

In Silvestri v. Optus Software the New Jersey Supreme Court confronted an employment contract which permitted termination for "failure or refusal to perform faithfully, diligently, or completely" the employee's duties "to the satisfaction of the company." After Optus President Joseph Abellino expressed dissatisfaction to Mr. Silvestri with his work for the company Mr. Silvestri was discharged. He filed suit, claiming that Optus acted unreasonably.

A surprisingly divided Supreme Court ruled that courts should not impose an objective standard of reasonableness to evaluate a discharge for employer dissatisfaction. Rather, the employer's subjective interpretation of its own satisfaction will preclude a jury trial on the reasonableness of the discharge – with the caveat that its dissatisfaction may not rest upon discriminatory animus.

EMPLOYMENT LAW/ARBITRATION AGREEMENTS

In Leodori v. Cigna the Supreme Court confronted a trial court's dismissal of plaintiff's CEPA claim on the basis of an unambiguous "waiver-of-right" provision in the employee handbook. While the waiver provision effectively required employees to resolve all employment related disputes through arbitration, in this case the plaintiff employee did not sign a form agreeing to the provision and the record contained no other evidence that he had agreed to the provision. Accordingly, the Woolley implied-contract doctrine did not apply and the plaintiff was free to pursue his CEPA claim in Superior Court.

EMPLOYMENT LAW/LAW AGAINST DISCRIMINATION/AGE DISCRIMINATION

New Jersey appellate courts have long been divided over the applicability of the so-called fourth prong of the McDonnell-Douglas test. In March 2003 the New Jersey Supreme Court resolved the dispute in favor of employer defendants, holding in McDevitt v. Bill Good Builders that an age discrimination plaintiff must establish that the defendant employer either retained or hired a "sufficiently younger" worker to fill the position from which the plaintiff was removed.

With respect to claims of direct discrimination, however, the Court also ruled that the nod of a supervisor's head can qualify as an affirmative expression of agreement, constituting an adoptive admission indicative of discriminatory animus. In this case a human resources employee advised that plaintiff was being discharged to make room for younger personnel and a supervisor allegedly nodded his head in response. If supported by the surrounding circumstances, ruled the Court, such direct evidence of discrimination would relieve the plaintiff of establishing indirect evidence of discrimination pursuant to the McDonnell-Douglas formula.

CHARITABLE IMMUNITY

In Ryan v. Holy Trinity Evangelical Lutheran Church the Supreme Court provided helpful guidance to lower courts in the application of the Charitable Immunity Act. The case arose from injuries sustained by the plaintiff while attending a meeting of the "Mothers' Center," a non-profit group of parents and expectant mothers that organized to prepare for childbirth and parenting. The group was meeting at Holy Trinity's parish house when a detached closet door struck the plaintiff.

At the time of the accident, the church had a policy of opening its doors to social outreach projects with community purposes and allowing them to use its facilities to conduct meetings. These groups included the Boy Scouts, Alcoholics Anonymous and several similar organizations.

In reviewing the trial court's dismissal of Ms. Ryan's claims against the church and refusal to dismiss her claims against the Mothers' Center, the Supreme Court confronted the divergent lines of case law addressing entities that organized "exclusively for educational purposes" versus those organized "exclusively for charitable purposes."

The Court held that because the church was organized exclusively for religious purposes and the Mothers' Center was organized exclusively for educational purposes, the Charitable Immunity Act was satisfied as a matter of law and both entities and their representatives were entitled to dismissal with prejudice. In contrast, the Court explained, entities that claim they are "organized exclusively for charitable purposes" will be subject to a factual analysis pursuant to Parker v. St. Stephens' Urban Development Corporation, an appellate decision from 1990, requiring a focus on the entity's true source of funding.

In Dupree v. City of Clifton the New Jersey Supreme Court affirmed the Appellate Division's 2002 opinion which granted charitable immunity to a church for claims arising out of the conditions of an abutting sidewalk. In this case, the defendant church's property was used for exclusively religious purposes, though if it had been used for commercial or business activities such as the operation of a school or rental income then the imposition of commercial sidewalk liability would have been appropriate.

Significantly, the Court held that while the Charitable Immunity Act did not preclude abutting sidewalk liability because the plaintiff was not a beneficiary of the church, the absence of charitable immunity did not preclude summary judgment because the church's insulation from liability derives not from the Charitable Immunity Act, but from the Court's determination that the church was "non-commercial" as a matter of law.

TORTS/BUS PASSENGERS

In Sanchez v. Independent Bus Company two bus passengers were injured when a confrontation erupted between two other passengers. The Appellate Division upheld dismissal of the injured passengers' action against the bus company on the basis that the passenger who fired a gun had not acted in a threatening manner when he boarded the bus. Moreover, the events precipitating the shooting occurred within a time frame of about 30 seconds, depriving the bus driver of an opportunity to prevent the confrontation or shooting. The absence of evidence of foreseeability required dismissal of the claims against the bus company.

FIRM NOTES

No fewer than four M&W attorneys were recently certified by the New Jersey Supreme Court as Civil Trial Attorneys: **Bill Bloom**, counsel to the firm on our Central Jersey litigation team; **Lori Brown Sternback**, an associate on our Bergen team; and **John Grossi** and **Kevin London**, associates on our Hudson litigation team.

Certification by the Supreme Court is an acknowledgment of expertise as a trial attorney that follows not only a stringent review of the candidate's trial experience and ethics, but also a rigorous full-day examination covering a wide range of substantive and procedural issues. M&W takes pride in the fact that our roster of trial attorneys has now climbed to eleven. We congratulate Bill, Lori, John and Kevin on this accomplishment.

M&W is proud to welcome **Emily Murphy** to our Property Team. Emily is a recent *cum laude* graduate of St. John's University School of Law in New York. She previously received a Bachelor of the Arts degree in Anthropology from University of California at Santa Cruz. Her work experience includes a clerkship for U.S. District Judge John E. Sprizzo in the Southern District of New York. Emily was recently sworn in as a member of the New Jersey bar by the Honorable **Jared Stolz**, managing partner of our Property Team.

Eric Harrison, a member of M&W's complex litigation and toxic tort teams, recently co-authored two articles on the controversial subject of toxic mold litigation. Risk Management Magazine published "Finding and Selecting a Mold Remediation Contractor," while Business Insurance included in their March 3, 2003 issue the article "Prevent Mold Problems Before They Start." The Business Insurance article discussed not only the science of mold, but also insurance coverage issues relating to first and third party mold claims.
Copies of the articles may be viewed at www.rmmag.com and www.businessinsurance.com. For further information feel free to contact Eric at harrison@methwerb.com or (732) 650-6511.

TRIAL NOTES

Don Crowley recently obtained a large subrogation recovery from a truck driver's liability insurer. The carrier disclaimed coverage for our client, a supermarket from which the truck driver was pulling away when the plaintiff, who had been unloading food racks, fell from the back of the truck and fractured his hip.

A jury trial in June 2002 culminated in a $300,000 verdict with liability distributed 50/50 between the driver and our client, the supermarket, for negligent supervision of the loading dock.

In a Declaratory Judgment action Don pursued the truck driver's liability carrier for reimbursement of our client's share of the judgment and all defense costs. The basis of Don's primacy of coverage argument was the close relationship of plaintiff's injuries to improper supervision during the unloading process – not merely improper upkeep of the premises. Bergen County Assignment Judge Moses ruled in Don's favor, relying on Pisaneschi v. Turner Construction Company to compel reimbursement of the insured's $150,000 share of the judgment plus all defense costs.

Don also tried a premises liability case in Bergen in which the plaintiff, a son of the insured, alleged he was carrying an 80 pound air conditioner up a set of twenty year old wooden stairs when a step flipped up and caused him to fall backward onto the concrete floor, sustaining a non-operated herniated disc and over $20,000 in medicals.
Don's expert engineer reviewed the photograph presented by the plaintiff to conclude that it did not come from this set of stairs. Furthermore, our insured's set of steps was in excellent condition. The jury returned a quick 7-1 verdict determining that the plaintiff did not fall on the insured's steps as alleged.

Ed Thornton received a no cause verdict in a falldown case of significant exposure. The insured's 54 year old sister was visiting when she stopped to examine the insured's hot tub on a sun porch. While circling the hot tub she inadvertently stepped into a trap cellar door, fracturing both shoulders and tearing a rotator cuff.

Plaintiff's injuries necessitated three surgeries and she missed four months of work as a fourth grade teacher. Against a demand of $450,000 and an offer of $90,000 the jury found the plaintiff 60% responsible for her injuries, amounting to no cause of action.

Ric Gallin obtained summary judgment in a premises liability case of significant exposure and disputed legal relationships between the parties. The plaintiff, an HVAC worker, fell through a ceiling while installing ductwork in a church. The church had divided the work through a series of contracts and did not hire one overall general contractor for all aspects of the job. The plaintiff obtained an expert report that the church effectively had turned itself into a general contractor and had a non-delegable duty under OSHA to protect the plaintiff.

Ric obtained dismissal through a two-step process. First he obtained a ruling striking the expert's opinion on the grounds that an expert may not testify to the legal interpretation of a contract or the legal duties of a property owner. With plaintiff's expert neutralized, Ric then filed a motion for summary judgment on the basis that the church did not exercise sufficient control over the plaintiff's work to warrant deviation from the rule that an owner will not be held liable for injuries to an independent contractor whose injuries flow from risks inherent in the work for which he is hired.

Ric also successfully defended a hotly contested New York PIP arbitration which included extensive live testimony from witnesses, including plaintiff's expert physician. Plaintiff was involved in a high impact car accident in which he sustained a lumbar strain. He was employed on a road crew with the Ulster County Highway Department. Although he had extensive treatment, he did not initially miss any time from work.

Eight months after the accident the claimant went out on disability for almost one year. Based on negative IMEs, medicals were cut off and the lost wage claim was denied. Plaintiff sought over $24,000 in wages and $2,000 in medicals and extra expenses. Following Ric' s cross-examination the arbitrator denied the lost wage claim in full, finding that plaintiff failed to prove that his subsequent disability related to the initial accident.

Jared Stolz obtained a carrier-friendly ruling from the Appellate Division in Slater v. Prudential, which barred an insured's first party fire damage claim for failure to appear for an examination under oath in a timely manner. The court held that the insured's post-litigation offer to give a statement was essentially "too little, too late" and that the delay "appreciably prejudiced" the carrier in its efforts to conduct a contemporaneous investigation of the fire loss.

Charles "Vike" Savoth, who manages M&W's asbestos litigation team, has taken a proactive role among defense counsel in several mass asbestos cases currently pending in Middlesex County. Vike has drafted and finalized cost-sharing agreements and forged alliances with similarly-situated defendant suppliers to undercut the claims of several lead plaintiffs. This approach has culminated in several recent summary judgments and promises further benefits as the asbestos litigation continues.

Bill Bloom recently appeared before the Appellate Division to defend the trial court's dismissal of a case involving the application of common flood and water damage exclusions to a first-party claim. The insured business, which bordered the Saddle River, sustained significant damage as a result of water infiltration which occurred during

Hurricane Floyd in September of 1999. The trial court entered summary judgment in favor of the insurer. The insured appealed, asserting that the exclusions are ambiguous and/or violative of public policy. We are awaiting the Appellate Division's ruling.

Lori Brown Sternback obtained a no cause verdict in an Ocean County case involving a business invitee's fall on a sloped walkway. The plaintiff's engineer argued that the walkway was actually a staircase and violated several State codes and regulations. Additional argument centered on the alleged need for a handrail. Lori convinced the jury that none of the codes cited by the plaintiff 's expert established evidence of negligence.

Lori also successfully defended a claim arising out of plaintiff's fall on exterior steps within a condominium complex. Following a snowfall, the insured condominium association removed snow and ice from the steps and spread rock salt. Two days later the plaintiff fell on the rock salt and claimed that it constituted a dangerous condition which the association should have removed.

Lori pointed out that although it did not snow for two days before the accident, dramatically fluctuating temperatures and nearby precipitation raised the possibility of melting and refreezing to form fresh ice. Thus the rock salt continued to serve a purpose on the date of plaintiff 's fall. The jury agreed and unanimously found no negligence on the part of the condominium association.

John Sapata recently invoked the doctrine of laches to successfully resist the reinstatement of a fifteen year-old case. The case began in 1987 with a claim for water damage. The carrier filed a declaratory judgment action seeking to deny coverage, while the insured filed a separate complaint seeking coverage for the first-party claim.

In August 1989 the insured filed for bankruptcy. Pursuant to the automatic stay, the court appropriately dismissed the carrier' s declaratory judgment action. However, the court improperly dismissed the insured's direct action against the carrier in violation of the Bankruptcy Code, which permits a debtor to prosecute affirmative claims during a period of bankruptcy.

Despite the court's error, the insured failed to file a motion to vacate the dismissal and reinstate his complaint. Instead he insured waited nearly twelve years from the date of the order to file a motion to vacate. Due to the unreasonable and lengthy delay we argued in our opposition that the equitable doctrine of laches should be applied and the insured's motion denied. The trial court agreed, holding that the automatic stay cannot operate to circumvent the doctrine of laches.

In a case of first impression litigated by **Selika Josiah**, First Trenton successfully defended a 15/30 step-down clause applicable to all UM claimants who were strangers to the policy.

The plaintiff, a passenger in our insured's vehicle, sustained injuries in an accident involving a third party. The third party had no insurance coverage; nor did the plaintiff. Plaintiff therefore sought UM benefits up to the insured's maximum, which was $50,000 under the policy with First Trenton.

First Trenton's policy contained a "step-down" clause which acted to provide the plaintiff only $15,000 in coverage because he was neither a named insured nor a family member.

The Court required proof that the Department of Banking and Insurance approved the policy language in question. Even after we provided such proof, Monmouth County Law Division Judge O'Hagan entertained argument regarding "reasonable expectations" and public policy. Ultimately the court upheld the step-down clause as consistent with public policy and the reasonable expectations of the insured, who purchased higher limits only for himself and his resident family members.

ALERT ALERT ALERT ! ! !

It is in our future plans to publish the Case Update in electronic format only. If either you or any members of your company do not currently receive our quarterly Case Update via e-mail and have the capability of doing so, please e-mail your name and e-mail address to pagano@methwerb.com.