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The Leading Insurance and Claims Attorneys

CASE UPDATE

November 2007

Insurance Fraud: The Battle Continues

Only two days after our last Case Update went to press, attorney Irwin Seligsohn and his Essex County law firm pleaded guilty in an ongoing insurance fraud investigation targeting the illegal use of "runners" and fake accidents to generate auto insurance claims. The guilty plea represented the culmination of a thorough investigation by the Office of Insurance Fraud Prosecutor. The investigation began with referrals by the Special Investigation Units of Prudential and Allstate, which assisted the OIFP.

Experienced adjusters know that fraud lurks in a high percentage of claims. The line between embellishment of a claim and criminal fraud can be obscured by events in the adjustment process that elude detection, whether due to sophistication in the claimant or lack of sufficient time to investigate. Standing alone without investigation, a claim rarely appears fraudulent on its face. Similarly, the pattern of fraud to which Seligsohn pled guilty could not have been detected without attention to shared characteristics of claims submitted to the referring insurers.

This is an area in which adjusters and attorneys must work together. When your review of a claim has raised a red flag based on your experience as an adjuster, you need not have the level of proof necessary for an OIFP referral to take action. Once in the hands of an attorney the claim may be investigated through a sworn examination under oath and responses to document demands. In the first party context, an insured's failure to cooperate in the investigation can void coverage under the policy. In the case of a third party claim, the rules of the applicable forum – e.g. contractual arbitration, statutory arbitration, Superior Court – provide the tools necessary to ferret out fraud.

While events like the guilty plea of Seligsohn and the prosecution of his runners are to be celebrated, the war against insurance fraud is won in small increments which often do not garner attention in the press. Early detection, prompt and timely referrals to counsel and a steady exchange of information between the adjuster and the attorney are the keys to fraud prevention, detection, and in the appropriate case, prosecution. The Office of Insurance Fraud recently recognized Stephan Katzman, Matt Werbel and Eric Harrison of M&W for their efforts in the industry's ongoing battle against fraud. We in turn recognize the OIFP as a valuable resource and a powerful tool in the investigation and defense of questionable claims.

The first step, of course, is detection. The second step is investigation. While not every claim will require a referral to counsel, you need not make a formal referral to call us for advice in your investigation of a questionable claim. Our commitment to our clients means that an attorney will be available to guide your efforts.

As always, we encourage you to contact us with any questions about the decisions digested here or suggestions of how to better serve your needs with this newsletter. Thank you for your continued support!

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-- NEW JERSEY LAW --

LIABILITY INSURANCE – COOPERATION - UNILATERAL SETTLEMENTS BY INSUREDS

New Jersey Eye Center v. Princeton Insurance Company, was a declaratory judgment action arising out of a large medical malpractice settlement between bodily injury plaintiffs and an insured without participation or permission from the medical malpractice insurer. Citing a reservation of rights by the carrier, the bodily injury plaintiffs and the insured invoked Griggs v. Bertram to argue that they had the right to effectuate the settlement and an assignment of the insured's rights under the policy to the plaintiffs. The Appellate Division disagreed, noting that Griggs v. Bertram arose out of a complete declination of coverage, while in this case Princeton Insurance Company defended its insured under a reservation of rights. Accordingly, in settling with the plaintiff the insured medical provider assumed an obligation without the carrier's consent in violation of the policy. The settlement was vacated and the matter remanded for trial.

TORTS – JURISDICTION - INTERNET

As technology progresses, so must federal and state law governing jurisdiction over out-of-state defendants. In Goldhaber v. Cohlenberg the Appellate Division held that New Jersey courts had jurisdiction over a California resident with no ties to New Jersey who posted allegedly libelous messages about New Jersey residents on the internet. The Court hastened to note that not all internet postings will subject the declarant to jurisdiction; rather the person who posts the offending message must reasonably believe that the postings would affect someone within the State of New Jersey. In this case because the defendant targeted his messages to the plaintiffs in New Jersey with knowledge that they live here, he reasonably should have anticipated being "hailed into court here."

AUTO ACCIDENTS - CHOICE OF LAW - VICARIOUS LIABILITY

In **Arias v. Figueroa** the Appellate Division reversed a trial court's application of New York vicarious liability law to hold Avis responsible for injuries sustained in a New Jersey accident by a motorist struck by a van rented by a New York resident. Because the New York vicarious liability law then in effect limited its own application to accidents occurring in the State of New York, the "governmental interests" analysis swung in favor of New Jersey law to shield Avis from vicarious liability.

COMPREHENSIVE GENERAL LIABILITY INSURANCE - AUTO EXCLUSION - UM COVERAGE

In **Bogey's Trucking & Paving v. Indian Harbor Insurance Company**, Frank Gaidosh, a laborer working at a construction site where Bogey's delivered stone, rode in a Bogey's truck with the stone to direct the Bogey's driver where to leave the stone. Gaidosh exited the truck to direct the driver and was struck by another vehicle. He sued both drivers, pursuing Bogey's on the theory that its driver failed to equip him with a flashlight and a protective vest.

Bogey's was insured by ARI for automobile insurance and Indian Harbor Insurance Company for comprehensive general liability. Both carriers disclaimed.

The Court held that Indian Harbor did not owe coverage because its policy contained an exclusion for claims arising out of use of an insured's auto, including loading and unloading. Accordingly, ARI must defend Bogey's and its driver against Gaidosh's bodily injury claim. Further, because there was a "substantial nexus" between the accident and Gaidosh's brief occupancy of the Bogey's truck, Gaidosh was entitled to UM coverage with ARI based on his occupation of the insured vehicle.

AUTO INSURANCE – UM COVERAGE – DRIVE-BY SHOOTINGS

Livsey v. Mercury Insurance Group involved severe injuries sustained by an insured in a random, drive-by shooting while she was entering her parked car. The Appellate Division held that from the insured's perspective, this constituted an "accident" which arose out of the use of an uninsured vehicle. The Court relied on Lindstrom v. Hanover Insurance Company, a 1994 Supreme Court ruling that PIP benefits should be available to victims of drive by shootings. While the PIP statute expressly provided coverage for injuries "caused by . . . an object propelled by or from an automobile" and the UM statute does not, the appellate panel nevertheless found a sufficient nexus between use of the assailant's vehicle and the insured's injuries to trigger UM coverage.

It should be noted that the court expressly disagreed with Sciascia v. American Insurance Company, a 1982 trial court decision which was affirmed by the Appellate Division in 1983. Thus there exists a split in the Appellate Division on this issue, providing support to both sides of the argument. We will advise if and when the Supreme Court agrees to review the Appellate Division's decision in Livsey.

AUTO INSURANCE-VERBAL THRESHOLD

In **Johnson v. Scaccetti**, a unanimous New Jersey Supreme Court held that when a single bodily injury approximately caused by an accident vaults the verbal threshold, the jury may consider all other injuries—even those which do not satisfy the verbal threshold—in calculating non-economic damages. This holding, which affirmed determinations of the trial and appellate courts, was not surprising in view of the practical difficulties posed by presentation of all injury proofs during plaintiff's case in chief at trial.

In a related ruling which actually overruled the lower courts, the Supreme Court held that a chipped tooth does not constitute a "displaced fracture" within the meaning of AICRA. In this case, however, the plaintiff also sustained spinal injuries which did satisfy the verbal threshold, thus permitting the jury to consider plaintiff's chipped teeth as a component of her damages.

AUTO INSURANCE - PIP BENEFITS - ARBITRABILITY

In **Nationwide Mutual v. Fiouris** the Appellate Division defined N.J.S.A.39: 6A-5.1 as precluding mandatory arbitration of alleged fraud in the procurement of a policy. While the parties were free to arbitrate the claim of procurement fraud voluntarily, the Insurance Fraud Prevention Act guarantees the allegedly defrauded insurer the right to sue in Superior Court. The Fiouris Court drew a distinction between application fraud and fraud in the presentation of a claim, which is subject to mandatory arbitration if demanded by either party. State Farm v. Sabato and State Farm v. Molino, cases in which arbitration was compelled, involved, respectively, fraud in the advancement of a claim and a purely legal dispute over the entitlement of an estate to income continuation and essential service benefits following death of the injured party.

PRODUCT LIABILITY – INHERENT CHARACTERISTICS OF THE PRODUCT

In **Mercer Mutual Insurance Company v. Proudman**, the victim of a fire caused by a lit cigarette filed suit against R.J. Reynolds, the cigarette manufacturer, on the basis that the cigarette was not a "fire safe" self-extinguishing cigarette. Plaintiffs conceded that the self-extinguishing cigarette contemplated in the Complaint would reduce but not eliminate the risk of fire. The trial court dismissed the Complaint for failure to state a claim and the Appellate Division affirmed, applying the Product Liability Act's absolute defense against damages caused by an "unsafe aspect of the product that is an inherent characteristic and . . . would be recognized by the ordinary person who uses or consumes the product."

EMPLOYMENT – DISMISSAL OF NON-TENURED EMPLOYEES – ARBITRABILITY

The New Jersey Supreme Court issued a pair of decisions affecting the rights of non-tenured school employees to arbitrate their dismissals. In **Pascack Valley Regional High School Board of Education v. Pascack Valley Regional Support Staff Association**, a non-tenured custodian was permitted to arbitrate his dismissal for racially offensive comments on the job. While his individual contract permitted termination on 15 days' notice, the collective bargaining agreement between his local union and the Board required just cause for termination, defined termination as a form of discipline and permitted arbitration over disciplinary decisions.

In **Northvale Board of Education v. Northvale Education Association**, however, an equally-divided Supreme Court upheld an appellate ruling which barred a non-tenured part time teacher from challenging her mid-year dismissal. While the collective bargaining agreement permitted arbitration of discipline, the employee's individual contract permitted termination without cause on proper notice. Although the employee was terminated midterm following an observation of poor performance, the Board did not attempt to terminate her immediately for cause as required by the collective bargaining agreement. Rather, it exercised its absolute contractual right to terminate her on 60 days notice, which did not require cause and was therefore not arbitrable.

It is difficult to reconcile these to decisions, released on the same day by the Supreme Court. The distinction appears to be that the Northvale collective bargaining agreement, unlike the Pascack agreement, did not expressly define termination as a form of discipline subject to arbitration. The lesson to be learned by employers in both the public and private sectors is that to preserve true "at will" employment, employers should require signed acknowledgments from employees, as a condition of f employment, that they may be discharged for any reason whatsoever. Execution of such an acknowledgment should protect the employer from liability for subsequent discharge for any reason, so long as that reason is not prohibited by a separate rule of law.

EMPLOYMENT – DISCRIMINATION - CONSIDERATION OF RACE

In **Klawitter v. City of Trenton** the Appellate Division confronted a controversial claim on the part of two white police officers. The proofs at trial included evidence that the mayor intended to promote black officers regardless of merit. The jury returned a verdict for plaintiffs. While at trial the city did not cite race as a positive factor in support of its decision not to hire the plaintiffs, on appeal it contended that consideration of race was permissible as a "plus factor" in pursuit of a diverse police force. The Appellate Division responded that race may be considered in an employment decision only pursuant to and in accordance with an established affirmative action plan.

EMPLOYMENT – CEPA - INDEPENDENT CONTRACTORS

The New Jersey Supreme Court has ruled that licensed professionals working as independent contractors are eligible for protection under the Conscientious Employee Protection Act. In **D'Annunzio v. Prudential Insurance Company** and **Stomel v. Camden**, the Court ruled that the CEPA definition of "employee" should be construed more broadly than the traditional definition of the term in other areas of law such as worker's compensation and vicarious liability.

-- NEW YORK LAW --

COMPREHENSIVE GENERAL LIABILITY COVERAGE – ADDITIONAL INSUREDS – CONSTRUCTION

In **BP Air Conditioning Corp. v. One Beacon Insurance Group**, the Court of Appeals addressed the duties owed to an additional insured under an additional insured endorsement in the construction context. As is typical in construction, the sub-contractor entered into a contract requiring it to indemnify and insure a general contractor. One Beacon's policy defined the term "insured" to include anyone whom the named insured was required by contract or agreement to name as an additional insured – but only with respect to liability arising out of the named insured's ongoing operations. The trial court had directed that One Beacon defend the general contractor but it refused to address questions of primacy between One Beacon and any other carriers covering the general contractor. The Appellate Division went one step further and held that the sub-contractor's policy was primary, essentially relying simply on the contractual expectations of the parties and ignoring the "other insurances" clauses in the policies.

The Court of Appeals emphasized that the duty to defend is broader than the duty to indemnify In fact in New York we have often felt that duty to defend can almost be treated as a separate form of litigation insurance. Since the Complaint included facts which indicate that the incident may have arisen out of the insured's work, regardless of whether they were actually true, the duty to defend was triggered. The Court expressly rejected One Beacon's position that liability had to be determined before the additional insured endorsement could be triggered.

The Court of Appeals did find that the Appellate Division erred in determining One Beacon primary. Since none of the carriers were parties to the declaratory judgment action and no other relevant policies were submitted, priority of coverage could not be determined.

LIABILITY INSURANCE – APPLICATION FRAUD

In **Schirmer v. Penkert** the Second Department confronted an underwriting survey taken after issuance of the policy. The insured had represented that he was a cabinet maker and there was no watercraft exposure. The plaintiff was injured when he fell while boarding a boat at a dock rented from the insured on the insured premises. The trial court had found a misrepresentation and upheld a disclaimer. The Appellate Division ruled the carrier could not get summary judgment because it only relied on an affidavit of an underwriter. New York courts will not allow summary judgment based solely on an underwriter's word that the misrepresentation was material; it must be supported by written guidelines. Furthermore, the Court granted summary judgment to the insured, effectively ruling that the post-issuance survey was irrelevant and could not be a material misrepresentation because under Insurance Law Sec. 3105 a material misrepresentation must take place before the policy is issued.

This decision obviously undercuts the ability of carriers to use surveys or underwriting inspections to form the basis for a rescission based on material misrepresentation. However, denials based on contractual fraud language should still be pursued in appropriate circumstances.

SETTLEMENT - CONFIRMATION

New York Courts continue to adhere to very strict procedural requirements. In **DeVita v. Macy's East, Inc**. the Second Department refused to enforce a settlement which had been confirmed by emails between plaintiff's counsel and defense counsel. CPLR 2104 requires an agreement in writing signed by the parties or their attorneys or a stipulation made in open court. An exchange of emails was deemed not to satisfy this requirement. Under this case email exchanges with an adversary will not result in an enforceable binding settlement.

EXPERT DISCLOSURE – TREATING DOCTORS

In **Butler v. Grimes**, the Second Department indicated that the expert disclosure rules do not apply to treating physicians. Thus the plaintiff's treating physician can provide testimony about conditions or future surgery without prior disclosure. It remains an anomaly of New York practice that defendants are required to conduct IMEs prior to the case being put on the trial calendar and to exchange the report; whereas a plaintiff can hold back on the exchange of medical information and, when it comes to a treating physician, simply provide an authorization and present testimony from a treating doctor who is not considered to be an expert within the meaning of CPLR 3101.

AUTO INSURANCE – UM COVERAGE - NOTICE

In **New York Central Mutual v. Davalos**, the insured gave timely notice of the accident and made a claim for no fault benefits. However, he did not give notice of his uninsured motorist claim as soon as practical. The Court held that under these circumstances the carrier has to show prejudice. The holding was based on **Rekemeyer v. State Farm Mutual**, in which the Court of Appeals established a prejudice standard applicable to uninsured motorist claims. This is because the carrier was already on notice of the claim because of the PIP claim and thus the fraud risk of late notice is not as pronounced. While New York has traditionally been a "no prejudice" state when it comes to late notice, this rule is subject to attack. In fact there have been efforts to push through legislation to impose a prejudice requirement on a late notice disclaimer although the legislation has not yet been enacted.

AUTO INSURANCE – NO FAULT – MEDICAL NECESSITY - RADIOLOGY

In **Long Island Radiology v. Allstate Insurance Co.,** the Second Department resolved a split among lower courts with respect to bills of radiologists for procedures performed by prescription. The radiology center argued that its work pursuant to a prescription from another provide was per se medically necessary and that the carrier should not be permitted to argue lack of medical necessity in challenging a radiologist's submission of no fault bills. The Second Department disagreed, ruling that the radiologist could take on no greater rights than the person who assigned the benefits and since the lack of medical necessity could be raised as to the insured it could be raised as to the radiologist as well.

-- PENNSYLVANIA LAW --

Many of our clients are writing business, and therefore defending claims, in Pennsylvania. Recent trends in bad faith litigation merit your attention, as Pennsylvania courts have been notoriously hostile towards third party disclaimers.

Bombar v. West American Insurance Company, is an Appellate Level case from July 2007.

On March 15, 1995 the plaintiff Bombar was severely injured by a forklift while at work. The forklift was manufactured by a German company which shipped it to an American subsidiary who in turn sold it to Upright, which is in the business of selling and servicing industrial equipment. As shipped and sold the forklift did not have a back up alarm or strobe light when the vehicle is driven in reverse. It was later equipped with an after-market back up alarm by an employee of Upright. Because the alarm was annoying it was apparently disconnected by plaintiff's fellow employees. There are allegations that the alarm was improperly installed and that Upright had been called several times to reinstall the alarm before the accident.

Upright was insured through West American for general liability. The policy had an exclusion for products liability/completed operations and did not provide coverage for bodily injury which occurs away from the insured premises or arising out of the insured's own work. Upright met with its insurance agent who advised that it did not have coverage and therefore the carrier was not notified. Subsequently Upright purchased products completed hazard coverage. A lawsuit was filed on May 24, 1996 against Upright which included claims of strict liability and negligence. In April of 1999 Upright was required to produce its insurance policy and Upright advised its agent who denied coverage due to the products and completed operations exclusion. In June of 1999 Bombar sent a copy of the Complaint to West American who notified her that there was no coverage due to the exclusion. That letter was never sent to Upright. Deposition testimony indicated that West American, although aware of the allegations, only made a cursory attempt at investigation. West American never issued a reservation of rights letter or directly notified Upright that coverage was being denied. On the flipside Upright never made any written demand for a defense on West American.

Bombar received a verdict against Upright that was ultimately for $2,393,000.00. Upright then filed a Declaratory Judgment action against West American for indemnification and also for bad faith handling of the claim. Bombar received an assignment of all rights Upright may have had against the West American policy. The trial court concluded that there was coverage for the underlying accident, that West American was liable for the entire amount of the jury verdict, that West American was subject to punitive damages and attorneys fees as well as compensatory damages to its insured. The trial court entered judgment against West American in the amount of slightly over $12,000,000.00, which included a punitive damage award of four times the compensatory damage award for $7,200,000.00.

The claim was that the injuries were outside the product/completed operations coverage because the injuries arose from Upright's negligent work on the forklift's back up alarm. Furthermore negligent failure to warn or provide instructions is covered by the insurance policy. The Appellate Court agreed with the trial court that the products/completed operations exclusion does not apply when the claims include negligent failure to warn or negligent installation, service or maintenance of the alarm. These are not considered products liability claims. The installation of the back up alarm by Upright was a service. It had not been completed because the installation was both faulty and negligent. Coverage existed.

West American's exclusion had specific language that referred to failure to warn. The Court disregarded it because, it reasoned, the warning still must be "complete" in order for the exclusion to apply. Because there was a negligent failure to warn, the operation was not complete and therefore the operation was not complete.

The dissent noted that the trial court's reasoning was incredibly circular. Furthermore West American's policy used exactly the language that the Appellate Division had told the insurance companies they had to use to avoid covering failure to warn claims. The dissent was troubled that an insurance company, which specifically follows a court decision as to how to write a policy, should then be found to have written an ambiguous exclusion. The dissent also noted that based upon the majority's circular logic a failure to warn case can never be excluded because theoretically the product was never completed.

The Appellate Court also upheld the bad faith award. In this context, despite the fact that a bad faith claim must be proved with clear and convincing evidence, the Appellate Court upheld a grant of summary judgment against West American. The Court noted that a Pennsylvania bad faith claim can include a bad faith investigation.

In **Pennsylvania National Mutual Casualty Insurance Company v. Johnson** the Court of Common Pleas of Delaware County found that Penn National acted in bad faith in refusing to defend and indemnify its insured under a homeowners policy.

The policy was a $100,000.00 policy. Compensatory damages were awarded in the amount of $2,490,000.00 and punitive damages in the amount of $6,000,000.00 together with costs and attorneys fees.

The underlying Complaint involved a shooting by the insured. Johnson pled guilty to voluntary manslaughter. Despite this an arbitrator found that Mr. Johnson had acted negligently and not intentionally in shooting the decedent. There was an altercation in which the decedent became verbally aggressive. Apparently the aggressor had a handgun which fell into the hands of Mr. Johnson. Instead of throwing the handgun away to defuse the dangerous situation he chose to hang onto the gun. It was then claimed that the decedent continued the physical assault and Johnson accidentally shot and killed him – notwithstanding the evidence of multiple shots being fired. Mr. Johnson pled guilty as part of a plea bargain to avoid spending the rest of his life in prison because he was initially charged with first degree murder.

In the Complaint the decedent's estate made allegations of negligent shooting and that it was an unintended act. The Complaint was deemed to sound in negligence and not as an intentional tort. Penn National denied coverage based upon the expected and intended exclusion. Its disclaimer pointed out that the plaintiff had been shot four times. The Judge commented that Penn National's investigation was inadequate, in part because an autopsy showed that the decedent had been shot only three times rather than four.

In sum, Penn National's declination was based upon a view of the Complaint as pleading intentional acts, the plea of voluntary manslaughter and the allegation of four shots, establishing a per se intentional act. Penn National did not conduct an independent investigation; nor did it respond to plaintiff's settlement demand of $100,000.

The trial court faulted Penn National for refusing to provide a defense, noting that it walked away from the insured at its peril. The Court further noted that because the insured only received 5-10 years instead of a life term it can be presumed that there was an accidental shooting instead of an intentional infliction of the deadly shots. The bottom line: A claim that could have been settled for $100,000.00 culminated in a total judgment in excess of $8 million.

These cases are cautionary tales about the dangers of coverage decisions in Pennsylvania. This is to be contrasted with New Jersey where bad faith is only a breach of contract claim and in New York where bad faith is essentially non-existent except in cases of excess verdicts. These cases demonstrate that in a case of any significant exposure it would be prudent to incur the cost of providing a defense under a reservation of rights and retaining separate counsel to pursue a declaratory judgment action. It is only in this manner that carriers can insulate themselves against the potentially catastrophic result of quadruple damages and counsel fees.

AT THE FIRM

Methfessel & Werbel welcomes three new attorneys – experienced litigator Paul Endler as counsel and former judicial law clerks Jeanne Chestnut and Tim Fonseca as associates.

Paul J. Endler, Jr.

Since clerking for Superior Court Judges McCloud and Span in 1984, Paul has amassed more than two decades' experience as a trial lawyer on behalf of insured and self-insured clients. He is a Master of the Richard J. Hughes Inns of Court, a former President of the Union County Bar Association and a current part-time Municipal Court Judge in East Brunswick. A graduate of Montclair State College and Seton Hall Law School, Paul specializes in General Liability, defense of Title 59 claims against public entities, EPLI claims, Auto Liability, Toxic Tort, Product Liability and Civil Rights actions.

Jeanne Ketcha Chestnut

A graduate of Colorado State University and Seton Hall School of Law, Jeanne joins Marc Dembling's property team after clerking for Middlesex County Presiding Civil Judge Hurley. Jeanne previously worked as a certified paralegal and a law clerk for the Office of Administrative Law in Trenton.

Timothy Fonseca

Timothy J. Fonseca joined Methfessel & Werbel in September 2007 following a clerkship with Judge Guzman Passaic County. Tim is a graduate of Rutgers College and Albany Law School. He joins Bill Bloom's liability defense team.

IN THE PRESS

At its annual seminar in Atlantic City this October, the New Jersey Special Investigators Association honored Methfessel & Werbel for our dedication to the organization and our work in the detection and prosecution of insurance fraud throughout the State.

IN THE COURTS

Ed Thornton obtained a no cause verdict in a Warren County falldown trial. Plaintiff, 49 years old, alleged that while proceeding south on a rural road, he was suddenly met with a tractor trailer coming out of a dairy farm, giving him no choice but to skid into the rear axle of the tractor. The defendant contended that he stopped at the end of the driveway, looked to his left up the hill, saw no vehicles, and proceeded into the road. Plaintiff's reconstruction expert conceded that the truck was in the road at least five seconds before the impact occurred. Defendant's expert opined seven seconds. The defense contended that under either scenario, the plaintiff had ample time to safely brake to a hault if he was following the speed limit and making proper observations. Plaintiff contended that the truck did not stop, but came directly into the road, giving him no chance to avoid the accident.

Plaintiff had suffered extensive soft tissue injuries two years earlier in an accident in which his wife and son were seriously hurt, but claimed his injuries were generally resolved before this 2004 accident. He underwent 60 chiropractic manipulations, three lumbar epidural injections, and manipulation under anesthesia. He presented a $116,000.00 lost wage claim, stating that he could no longer work in his chosen profession as executive chef. His pretrial demand was $200,000.00. Ed offered $2,500.00. The jury held plaintiff had not proven the defendant negligent and the court entered a judgment for the insured.

Bill Bloom recently won a summary judgment on an indemnification issue arising out of a construction site accident in which the plaintiff, and employee of the insured, allegedly suffered various injuries rendering him permanently disabled and unable to work as a result of a fall on ice. The plaintiff's injuring were recently judged to be worth $720,000 at a recent arbitration. The general contractor asserted a claim for contractual indemnification against the insured based upon multiple indemnification provisions in the construction contract. The general contractor filed a motion for summary judgment seeking a ruling that it was entitled to be indemnified 100%. Bill filed a cross-motion for summary judgment asserting that the general contractor was not entitled to be indemnified for its own negligence, and that the general contractor was not entitled to be indemnified at all since the general contractor had never served an expert report on the issue of liability and therefore could not make out a prima facie case of negligence against the insured. The trial court granted Bill's summary judgment motion in its entirety and dismissed the general contractor's claim with prejudice.

Lori Brown Sternback obtained summary judgment in a social host falldown case which is currently on appeal. Plaintiff was deemed to be a social guest of the insured and as such the insured did not have a duty to warn the plaintiff about a condition of which the plaintiff should have been aware. The condition was a large step down from a backyard deck with no protective handrail for the step or guardrail around the deck. Through discovery Lori demonstrated that the plaintiff had been on this deck where her accident had occurred prior to the time of the incident in circumstances demonstrating that she knew or should have known of this open and obvious condition. There was then no dispute as to any changes having been made to the deck or to the lack of the handrail from the time that the plaintiff had been on that deck until the date that her accident occurred. The court, finding no latent defect that would trigger a duty to warn on the part of the insured, dismissed the case.

Gerald Kaplan obtained a no cause verdict in an auto accident trial. The insured was operating her vehicle with plaintiff as a front seat passenger when she was struck by codefendant's vehicle at a busy intersection. Both drivers claimed they had the green light. The insured stated she started to cross Route 46 when the light turned green. She successfully crossed five lanes of Route 46 before she was struck by the codefendant. The jury returned six figure verdicts in favor of two plaintiffs but agreed with Gerry that the insured had no liability.

John Knodel obtained 50% contribution from an initially disclaiming tenant's insurer towards settlement of a falldown claim against the insured landlord. In the underlying lawsuit the lease between the insured property owner and its tenant required the property owner to keep the property free of snow and ice and the tenant to name the landlord as an additional insured under the tenant's policy. The tenant did so. The plaintiff fell on snow covered steps and alleged multiple disc herniations and underwent extensive treatment incurring over $60,000 in medical bills. The underlying lawsuit eventually settled for $68,000. During its pendency John demanded that the tenant's carrier provide coverage, defend and indemnify. It refused to do so. After John filed the declaratory judgment action the tenant's carrier agreed to pay half of the settlement based upon the "other insurance" clauses of the policies, which required an equal split in coverage.

In his first trial for Methfessel & Werbel, **Paul Endler** faced potential liquidated damages in excess of $300,000 plus counsel fees and escaped with a total verdict of less than $12,000.

Paul represented a mason contractor who constructed the building in excess of the recommended elevation above sea level and allegedly hung a door improperly, causing "honeycombing" of surrounding stucco and requiring extensive repairs. The plaintiff property owner acted as his own general contractor. When the insured brought to the owner's attention some problems with the elevation of the building, the owner responded that he would retain a surveyor but that the insured should build the walls as directed. The owner never retained a surveyor and his expert asserted that the insured had a duty to retain his own surveyor or walk off the job. Paul's expert testified that no such duty exists in the masonry industry and that plaintiff, as general contractor, was solely responsible for the result of excessive height of the building. After two weeks of trial the jury essentially agreed, delivering a 50/50 verdict and a net award of $11,232.50.

Against a $30,000 demand, **Scott Heck** obtained an award of $2,000 in the arbitration of a fall down claim by a Deacon against a church at which he was delivering turkeys for Thanksgiving. The basement steps leading to the basement were old and the rug on top of the steps had detached, causing Deacon Jones to slip and fall, allegedly injuring his left wrist. At arbitration, plaintiff alleged that his injuries to his wrist prevented him from working, taking care of his children and enjoying his life. Scott's cross-examination revealed that plaintiff had been complaining of injuries to his right wrist and that his left wrist has healed. The arbitrators, having reviewed the medical records and cross-examination, awarded plaintiff only $2,000.

Frank Keenan obtained Summary Judgment on a case in Westchester County involving a worker who sustained injuries while removing a garage door at the insured's home. Plaintiff sued the homeowner alleging both Labor Law violations and negligence.

The Court dismissed the Labor Law claims, finding that the owner of a one or two family home is exempt from the provisions of the Labor Law unless there is a showing that he directed or controlled the work. The Court noted that the homeowner had no input into the method or manner in which plaintiff performed the work so there was no basis for liability under the Labor Law.

The Court went on to dismiss plaintiff's negligence claims noting that in order for liability to be imposed, plaintiff must establish that the homeowner allowed a dangerous condition to exist at the site and failed to warn plaintiff about that condition. The Court noted that even if it were to assume that a defective condition existed, there was no duty to warn plaintiff since his own deposition testimony indicated that he was already aware of the allegedly defective condition.

Allison Koenke prevailed in a PIP arbitration of significant exposure based on a successful defense of lack of medical necessity. Although she had the benefit of several independent examinations which had cut off treatment before the dates in question, Allison attacked the petitioner's own proofs on their merits, demonstrating a probable relationship to an earlier auto accident and convincing the arbitrator to accept the treatment cut off dates of the examining defense doctors.

Danielle Lozito convinced the Appellate Division to reverse the trial court's reformation of a commercial auto insurance policy identifying the named insured as a corporation to confer UM rights upon a former shareholder because the corporation was dissolved. The trial court's determination would have subjected the carrier to the lion's share of responsibility for the compensatory damages attributable to the phantom vehicle from which the UM claim arose. The Appellate Division agreed with Danielle that under the circumstances, there would be no UM coverage owed to the former shareholder and that the dissolution of the corporation did not provide a valid basis for reformation of the policy.

Darren Maloney obtained vacation of a $113,000 default judgment against an insured whose wife had been served with process while they were separated and he was living out of state. Despite the facial legality of service, the presentation of affidavits demonstrating lack of actual notice to the insured convinced Judge Brogan to vacate the judgment and return the matter to the trial list. The plaintiff, a former tenant of the insured, must now prove her case of negligence against the insured property owner based on the presence of a tree root-related height differential on the sidewalk abutting the insured premises.

Dwight Michaelson obtained a plaintiff's verdict in a hotly-contested subrogation action. The defendant's insurer in this "red light/green light" case took a no pay position and the defendant testified that our client's insured had "apologized profusely" for causing the accident. On cross-examination Dwight demonstrated that while other statements of the motorists were recorded in the police report, neither an admission by the insured nor defendant's account of an admission by the insured appeared in the report. The court rejected defendant's testimony based on Dwight's cross-examination, awarding 100% recovery to the subrogating carrier.

Keith Murphy obtained frivolous litigation sanctions against an insured who attempted to attack an earlier summary judgment in our client's favor with the filing of new, identical litigation. Following the Court's dismissal of the insured's effort to enjoin intercompany arbitration arising out of a minor property damage claim, the plaintiff insured made two motions for reconsideration, both of which were denied. Rather than filing appeal, the disgruntled insured filed an almost identical Complaint in the Law Division under a new docket number. Keith complied with the safe harbor prerequisites of the frivolous pleadings rule, ultimately obtaining both dismissal of the new action and $4,000 in counsel fees.

Leonard Seaman obtained summary judgment on behalf of the insured tenant of an office condominium. The insured psychologist was sued by a patient who allegedly slipped and fell in the parking outside her office. Len successfully argued that the doctor was not responsible for maintenance of the parking lot. The court also agreed that the insured did not have to indemnify the condominium association for the claim. With respect to the plaintiff's unresolved feelings of anger towards her mother, however, the court declined jurisdiction.

Gina Stanziale obtained default judgment on behalf of an auto carrier against a permissive user of an insured vehicle who was fleeing the police at the time of the accident. Following the accident, the permissive user, who was severely injured, filed for PIP benefits under the policy issued by the carrier to the owner of the vehicle. An investigation revealed, and the insured's testimony confirmed, that at the time of the accident, the permissive user was fleeing the police. Defending under an exclusion in the policy for acts committed during the course of a high misdemeanor or felony, a declaratory judgment action was filed to which no Answer was ever filed by the permissive user. Ultimately default judgment was entered and the claim, which exceeded the policy's $250,000 limit, was dismissed with prejudice.