Law Offices
METHFESSEL & WERBEL
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CASE UPDATE

October 2001

A MESSAGE TO OUR FRIENDS AND CLIENTS

The tragedy of September 11 has touched all of our lives. Many of our friends at home and in the insurance industry have suffered the loss of friends and loved ones. Our thoughts and prayers are with the victims and their families.

HEALTH INSURER LIENS/COLLATERAL SOURCE RULE

Rick Gallin's three year campaign to extinguish health care liens on third party claims has ended with a resounding success. By a unanimous vote, the New Jersey Supreme Court reversed the Appellate Division to hold in Perreira v. Rediger that the Collateral Source Rule, N.J.S.A. 2A:15-97, bars liens by health insurers. This decision represents a major victory for the liability insurance industry, as it places the burden of paying for an injured plaintiff's medical bills on the health insurers.

Of course, health insurance liens generally have no bearing on auto accident cases, in which Personal Injury Protection benefits usually cover medical bills and PIP carriers are barred from pursuing reimbursement unless the tortfeasor was operating a commercial vehicle. While there are rare exceptions, health care liens generally do not affect auto cases.

In the context of other bodily injury cases, workers compensation, Medicaid, Medicare and ERISA-funded liens are still valid. The Collateral Source Rule expressly protects workers compensation liens. Medicaid and Medicare liens are also valid because the federal laws establishing those liens preempt the Collateral Source Rule.

ERISA also preempts state law. An ERISA health insurance plan is funded by the patient's employer. While the employer may contract with a health insurer to administer the plan, if the employer is ultimately

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responsible for paying medical bills then a lien asserted by the administrating insurer will overcome the Collateral Source Rule. Generally speaking, only very large corporations provide self-funded plans to their employees. Most healthcare liens are asserted by traditional insurance companies – which, significantly, include those HMOs which do not provide services directly to patients but instead simply reimburse panel doctors. Under Perreira v. Rediger such liens are no longer enforceable.

If you receive a "lien letter" it is imperative that you explore the validity of the lien before negotiating the underlying claim. If the party asserting the lien contends that Perreira does not apply, of course, you should demand proof. We recommend that you contact us if you have any questions regarding the viability of a health care lien.

PRODUCTS LIABILITY/FEDERAL PREEMPTION

In Housley v. Wave Energy Systems Eric Harrison of our office represented the manufacturer and supplier of a chemical solution used widely throughout the health care industry to sterilize medical devices**.** Several HMO nurses alleged that they developed respiratory problems due to product exposure from 1990 through 1994. They sued on a "failure to warn" theory based on the alleged inadequacy of the product's label and packaging.

The labeling at issue was subject to EPA review and approval under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which precludes state actions attacking the adequacy of EPA-approved labeling. During the period of the nurses' exposure, however, the EPA and FDA entered into a Memorandum of Understanding providing for dual regulation of the sterilant as not only an insecticide under FIFRA, but also an ancillary medical device under FDA regulations. Congress subsequently passed the Food Quality Protection Act of 1996, which removed the sterilants from EPA regulation altogether.

Plaintiffs argued that the shift in regulatory authority should operate to deprive the manufacturer and supplier of recourse to FIFRA preemption. The trial court disagreed and the Appellate Division affirmed in a published opinion.

Citing Lewis v. American Cyanamid, the Court agreed with our argument that neither the exercise of dual federal jurisdiction over the product, nor the product's subsequent removal from EPA regulation, should operate to circumvent preemption under FIFRA.

TORT CLAIMS ACT/STATE INDEMNIFICATION OF COUNTY PROSECUTORS

The New Jersey Supreme Court has issued an opinion of great importance to our clients who insure public entities, particularly county prosecutors' offices. In **Wright v. State of New Jersey** the Court observed that prosecutors and their subordinates act as "agents" or "officers" of the State when investigating criminal activity and enforcing the law. Because law enforcement is a basic State function, and because county prosecutors are uniquely subject at all times to the Attorney General's statutory power to supervise and supersede them, the State must indemnify prosecutors for claims arising out of law enforcement functions.

CHARITABLE IMMUNITY

The Supreme Court has overruled the Appellate Division's ruling in Bieker v. Community House of Moorestown, simplifying the application of charitable immunity law to charitable organizations that become involved in noncharitable activities.

In Bieker an infant plaintiff was injured while his father played in an informal adult men's basketball group which paid fees for use of the Community House facilities. The trial court dismissed the case under the Charitable Immunity Act. The Appellate Division reversed, holding that the Community House was not "organized exclusively" for religious, charitable or educational purposes.

The Supreme Court granted certification and reversed, applying the Act broadly to hold that in general, noncharitable activities are "an adjunct to the organization's core purpose if only because they provide a source of income, in addition to charitable

donations and trust funds, that enables the organization to carry out" its core purpose.

In this case, however, the Court acknowledged that rentals to for-profit entities could raise a question whether a charitable organization's "dominant motive" is truly charity. While the Community House evidently used the higher fees charged to for-profit entities to offset its losses, the record was insufficient to permit a determination of the organization's dominant motive. Accordingly, the Court remanded for further findings, cautioning that Community House should be denied immunity only if rentals to for-profit entities are found to be a "dominant use."

Citing Bieker, the Appellate Division ruled in Lax v. Princeton University that charitable immunity barred a personal injury action by a patron of a Princeton Chamber Symphony concert at an auditorium that the Symphony had rented from the university for the concert.

DISCOVERY/DRAFT EXPERT REPORTS

Judge Walsh of Bergen County has issued a published opinion regarding the discoverability of an expert's draft report and notes. In Adler v. Shelton, a damages action arising from the design and construction of the plaintiffs' home, the court held that the defendants could discover a draft report by the plaintiffs' expert, a fax cover sheet and invoices.

AUTOMOBILE INSURANCE/ UNINSURED MOTORIST BENEFITS

In Martellio v. Burbank an appellate panel held that an arbitration panel may award prejudgment interest to a UM claimant, even if the claimant did not request an award of interest. The Court held that the insolvency of Home State, the tortfeasor's liability carrier, constituted an equitable factor sufficient to support an award of interest from the date of the arbitration demand through the date of the award.

BROKER LIABILITY/COMPARATIVE FAULT

In Aden v. Fortsh, a case handled by Jared Stolz of our office, a divided Supreme Court recently held that a jury hearing a broker malpractice case may not allocate comparative fault to an uninsured client who failed to read his policy. We represented a broker who obtained a condominium policy that provided only $1,000 worth of coverage for repair of interior damage caused by a fire. A fire caused nearly $20,000 worth of interior damage which the condominium association's insurer would not cover. The insured sued the broker, arguing that he had relied on the broker's expertise to obtain coverage for "any losses I might have in my condo."

The plaintiff did not read his policy until after the fire. At trial the court refused to permit an allocation of comparative fault to the plaintiff. The Appellate Division reversed a judgment for the plaintiff but the Supreme Court held 4-3 that "the comparative negligence defense is unavailable to a professional insurance broker who asserts that the client failed to read the policy and failed to detect the broker's own negligence." However, the Court accepted our alternative jury argument and emphasized the right of a broker to argue that a failure to read the policy is the "sole proximate cause"of the insured's loss.

Significantly, the Court also held that a client who withholds important information or otherwise impedes his broker may be considered comparatively negligent, permitting a jury to apportion comparative fault. A similar allocation will be permitted when the client is a sophisticated purchaser of insurance who could reasonably be charged with knowledge of the insurance product purchased through the broker. Additionally, the four-justice majority concluded by noting that in a first-party action against an insurer, an insured may still be charged with a responsibility to read his policy upon receipt.

AUTOMOBILE INSURANCE/ UM BENEFITS/FAMILY MEMBERS

In our August 2000 Case Update we reported the Appellate Division's decision in Progressive v. Hurley, which held that NBA player Robert Hurley was not entitled to UM coverage with Progressive for injuries he sustained while driving a loaned vehicle. The Supreme Court has reversed, finding an ambiguity in the policy language which required coverage for Mr. Hurley.

Progressive insured "Devil Eleven," a closely held corporation which Hurley formed at the recommendation of a financial advisor. The Appellate Division affirmed the trial court's conclusion that Progressive did not owe UM coverage, since the declaration sheet clearly indicated that the policy did not provide UM coverage under the "drive other car" endorsement.

The Supreme Court reversed, adopting the minority view that "family oriented language in an auto insurance policy issued to a corporation renders the policy language ambiguous." Under New Jersey law, of course, ambiguities are resolved in favor of the purported insured. In order to avoid ambiguity in the future, noted the Supreme Court, UM endorsements containing family member language should not be appended to business automobile policies because "policyholders are left to speculate about their meaning and purpose."

AUTOMOBILE INSURANCE/ UNINSURED MOTORIST BENEFITS/ SCOPE OF ARBITRATION

In Berger v. First Trenton the Appellate Division asserted jurisdiction over a coverage dispute, noting that the "standard" New Jersey UM arbitration clause contemplates that the arbitrators decide only the extent of the tortfeasor's liability and the total amount of damages. The Court expressly distinguished the clauses at issue in USAA v. Turck and Bocelli v. Hanover Metro Ins. Co., which provided for arbitration of whether the insured was "legally entitled to recover damages under this endorsement."

While in Turck and Bocelli the expansive phrase "disputes . . . under this endorsement" required submission of coverage disputes to the arbitrators, the standard UM endorsement in New Jersey limits the arbitrators' review to the insured's right to recover damages from the uninsured vehicle and the amount of damages.

Turning to the coverage issue at hand, the Court voided First Trenton's UM exclusion which purported to bar recovery by an insured who is injured while a passenger in a livery vehicle – the so-called "for fee" exclusion. Note, however, that under Campbell v. Lion Ins. Co. the exclusion is still valid when applied to **underinsured** motorist claims. The pivotal difference, of course, is that N.J.S.A. 17:28-1.1 mandates a prescribed baseline level of UM benefits, while UIM benefits are strictly a creature of contract with no minimum statutory requirements.

Significantly, in Hansen v. Hansen a different panel arguably expanded the scope of judicial review of UM coverage issues. Construing the same standard UM endorsement, the Appellate Division held that the trial court should have the power to decide whether the claimants satisfied the conditions precedent to coverage of (i) timely notice of the UM claim and (ii) reasonable efforts to identify the alleged phantom vehicle.

While lack of timely notice defenses will usually fail under the stringent "appreciable prejudice" standard, the defense of failure to attempt identification of an alleged phantom vehicle will often be stronger in cases of suspected fraud. We encourage auto insurers to seek a judicial determination of coverage when the circumstances demonstrate a delayed or minimal effort to identify a phantom vehicle.

AUTOMOBILE INSURANCE/ UNINSURED MOTORIST BENEFITS/ LONGWORTH NOTICE

When a non-resident passenger is entitled to underinsured motorist benefits from his own auto carrier, operation of the "excess escape" clause common to most UM endorsements will frequently render the host vehicle's policy primary. When the claimant wishes to settle with the tortfeasor he must provide Longworth notice to the UIM carriers against whom he wishes to assert a claim.

In Hallion v. Liberty Mutual the Appellate Division confronted a case in which the claimant notified only her personal carrier, Liberty Mutual, of her intent to settle with the tortfeasor. Liberty Mutual then belatedly sought an order declaring that the vehicle's insurer, CNA, was primarily liable and required to arbitrate the UIM claim. The Appellate Division held that while the "better practice" is for the insured to notify all UIM carriers on the risk, the first carrier to whom Longworth notice is given has the duty to provide similar Longworth notices to all other carriers from whom it wishes to seek contribution.

In this case, held the Court, CNA was clearly primary but Liberty's failure to provide notice of the claim until nearly four years after the accident supported the trial

court's finding that CNA had been prejudiced by the late notice. Thus CNA was released and Liberty Mutual was required to provide UIM benefits on a primary basis.

AUTOMOBILE INSURANCE/ VERBAL THRESHOLD

Judge Sweeney of Burlington County has issued the first published opinion addressing the "new" verbal threshold created by the Automobile Insurance Cost Reduction Act. Under N.J.S.A. 39:6A-8 as amended by the Act, a plaintiff subject to the verbal threshold must provide the defendant with a certification of permanency from a either his treating physician or a board-certified licensed physician to whom he was referred by the treating physician. The plaintiff in Pensabene v. Straus provided a certification from his treating chiropractor, which the defendant challenged on the basis that a chiropractor does not qualify as a "licensed physician."

Citing the statutory definition of the term "physician" at N.J.S.A. 45:9-5.1, the trial court conceded that the legislature did not expressly list chiropractors as physicians. Nevertheless, the "confusing and ambiguous" definition was sufficiently broad to encompass chiropractors as "practitioners in any . . . method of treatment of human ailment." Accordingly, Judge Sweeney held that a certification from a treating chiropractor satisfied the requirements of the verbal threshold law under N.J.S.A. 39:6A-8.

EMPLOYMENT LAW/SEXUAL HARASSMENT

In Hill v. Fauver four employees of the Department of Corrections allegedly conspired to falsely accuse a facility superintendent of sexual harassment. Their allegations culminated in the filing of disciplinary charges by the Department's Equal Employment Opportunity Office. The charges were dismissed after a hearing. Shortly thereafter one of the complainants tearfully apologized to Superintendent Hill, stating that the sexual harassment claim was a lie but that the others had threatened her with loss of her job if she did not participate.

Hill sued the four individuals involved in the conspiracy and obtained verdicts totaling more than $300,000. The Appellate Division affirmed the verdicts and held that the false allegations of sexual harassment were not protected by the litigation privilege for the simple reason that the litigation in question – the disciplinary proceedings – was "improperly filed." Moreover, the court held that the conspiracy to have Hill discharged with false accusations was sufficiently malicious to sustain Hill's claim for intentional infliction of emotional distress.

EMPLOYMENT LAW/ "NO WORK, NO PAY" RULE ABOLISHED

A divided New Jersey Supreme Court has abrogated the "No Work, No Pay" rule, a nearly 150 year-old rule of law which precluded wronged public employees from receiving back-pay damages for periods when they did not work. In State of NJ Department of Corrections v. International Federation of Professional and Technical Engineers the Court rejected the doctrine as irrelevant, unsound and "unworkable in application" to contemporary labor disputes.

EMPLOYMENT LAW/ CONSCIENTIOUS EMPLOYEE PROTECTION ACT

In McLelland v. Moore the plaintiff, a captain in the Perth Amboy Police Department, objected to the issuance of gun permits to a Deputy Chief who did not reside in Perth Amboy and to a "known" drug dealer who listed a "rooming house" above a bar as his address. McLelland was subsequently suspended for 60 days and demoted to lieutenant. The Appellate Division reversed a large CEPA verdict in plaintiff's favor, ruling that he had failed to make an adequate showing of any violation of law or public policy. Rather, the issuance of the permits arguably constituted nothing more than "judgment errors" which failed to qualify as a sufficient predicate for a CEPA retaliation claim.

EMPLOYMENT LAW/AGE DISCRIMINATION

An appellate panel ruled in Petrusky v. Maxfli Dunlop Sports Corporation that an older worker alleging age discrimination need not show that he was replaced by a younger worker. Under the Sisler case, of course, a younger worker alleging discrimination because of his youth must establish that he was replaced by someone older. In holding that an older worker alleging age discrimination need not demonstrate that he was replaced by someone younger, the Appellate

Division disagreed with a New Jersey federal trial court's recent ruling in Swider v. Ha-Lo Industries.

PREMISES LIABILITY/WORKPLACE ACCIDENTS

The decedent in Crippen v. Central Jersey Concrete Pipe Company suffocated when he was buried in sand used to make concrete pipes. The accident allegedly resulted from his employer's failure to correct OSHA violations. The Appellate Division held that while the employer's minimal attempts to remedy the violations were "clearly reprehensible," they did not evidence a deliberate intent to injure. Thus the decedent's widow had recourse only to the workers compensation system.

BOATING INSURANCE/ EXCLUSIONS FOR INJURIES OF INSUREDS

In Zacarias v. Allstate a boat owner's wife was injured on the boat. He sought coverage from Allstate under a policy which defined an "insured person" as "you and, if a resident of your household . . . any relative." One of the common exclusions listed on pages 12 and 13 stated that "we do not cover bodily injury to an insured person."

By a 4-2 vote the New Jersey Supreme Court enforced the exclusion to find no coverage. Writing for the majority, Justice Verniero concluded that "an insurance contract is not *per se* ambiguous because its declarations sheet, definition section and exclusion provisions are separately presented."

TRIAL RESULTS

Don Crowley tried an employment case involving an executive secretary for a board of education. In July 1995 a new director was appointed and friction developed between the plaintiff and the director over work procedures. He began writing memos to her regarding her performance, forwarding a copy to her personnel file. Things escalated into what she considered to be a hostile work environment with meetings behind closed doors in his office where he lectured her in excruciating detail how she should perform her job. Within nine months the plaintiff was hospitalized for a panic anxiety attack, rapid heartbeat and elevated blood pressure.

Don convinced the court to dismiss plaintiff's LAD claim because plaintiff presented no proof that the director's actions were based upon gender, age or membership in any other protected class. Trial proceeded on theories of constructive discharge and intentional infliction of emotional distress.

The plaintiff articulated a pretrial demand of $750,000. Following Don's cross-examination the case settled for a package of $100,000 consisting of $75,000 from the insured municipality and $25,000 from its workers compensation carrier.

Rick Gallin tried an assault case in Somerset County. The plaintiff's girlfriend was a tenant of the insured landlord. The plaintiff and his girlfriend confronted the insured landlord over the return of the girlfriend's security deposit. The discussion became heated and the insured physically ejected the plaintiff from the house. The plaintiff fell from the porch and landed on his back. Rather than coming to the plaintiff's aid or calling for help, the insured told the plaintiff's girlfriend to leave, closed the door and turned off the porch light.

The plaintiff sustained a disc herniation that required a 360 degree fusion at two levels of his lumbar spine. Although the surgery was successful in stabilizing the spine, he was left with permanent limitations.

At trial the insured was belligerent on the stand, inflaming the jury with comments such as "was I supposed to give him mouth-to-mouth?" and descriptions of the insured as "looking like a stunt man" when he was falling. Although the Court found that the insured did not intend to harm the plaintiff, the jury obviously sought to punish the insured by returning an award of eight million dollars. On post-trial motion Rick convinced the Court that the verdict was excessive and the Court reduced the award to $750,000.

Lori Brown Sternback obtained a no cause verdict against two plaintiffs in a verbal threshold case. The young women, who were 15 and 20 at the time of the accident, each alleged anterior bulging cervical discs,

low back pain and right shoulder pain. Each described a multitude of activities she could no longer perform – none of which was mentioned at their depositions. Additionally, although Lori did not dispute the insured's liability, the plaintiffs' testimony regarding the accident was inconsistent with their deposition testimony. These inconsistencies clearly affected their credibility, as the jury returned a dual no cause verdict within twenty minutes.

Kevin London obtained a no cause verdict in an auto case tried in Hudson County. The plaintiffs claimed that they entered an intersection with a green light when the insured turned left in front of them. Photos of the plaintiffs' vehicle revealed extensive damage to the entire left side of the plaintiffs' vehicle and a shattered driver's side window.

Neither plaintiff observed the insured vehicle before impact. Plaintiffs did not call the investigating officer to testify and were unsuccessful in their efforts to introduce the police report into evidence. Based on the lack of evidence regarding the operation of the insured's vehicle, the court refused to give a left-turn charge.

The jury returned a no cause verdict on liability. Lest the judge's refusal to admit the police report be raised on appeal as reversible error, the court also wisely submitted verbal threshold interrogatories to the jury. The jury found that the plaintiff had failed to satisfy the verbal threshold.

Kevin also obtained a double no cause verdict in a damages only trial. The female plaintiff's otherwise straightforward orthopedic damages case was complicated by the diagnosis of lupus about five months after the accident. However, she admitted at trial that she was unable to separate the accident symptoms from her lupus symptoms. She also admitted that she felt she would be able to work but for the disease.

Her husband, who was also injured in the accident, alleged constant neck pain but admitted that he missed only three days of work as an auto mechanic. He also denied any permanent limitations. The jury returned no cause verdicts as to both plaintiffs.

Paul Gallagher won a Special Civil Part trial in Essex County. Plaintiff was the owner of a parked car on a snow-covered street in Newark which was struck by the insured. The insured claimed that he was following a slow-moving Federal Express truck when he decided to pass it on the left on the one-way street. The insured was nearly past the Federal Express truck when the truck struck him on the right side, knocking him into plaintiff's parked vehicle.

The FedEx driver claimed, with some support from the diagram on the police report, that a recent snowfall had partially blocked the right lane and that all vehicles on the road were travelling in just one lane. He claimed that he was proceeding slowly and that the insured became impatient and attempted a dangerous pass. He claimed that the insured had misjudged the extent to which a snow bank on the left side of the road protruded into the roadway.

Judge Kirby found sole liability on the part of the Federal Express driver. Paul was able to use this finding of fact and the principle of collateral estoppel to obtain a full recovery of the insured's subrogation claim and, obviously, a complete denial of the sizable Federal Express claim against the insured.