METHFESSEL & WERBEL

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The Leading Insurance and Claims Attorneys

CASE UPDATE

October 2003

Welcome to the beginning of another busy fiscal year in claims handling. A variety of political and judicial developments promise to impact upon your work in the months to come.

Included in this edition of the Case Update are a variety of important decisions which directly affect the insurance industry. As always, Methfessel & Werbel remains committed to keeping our clients abreast of significant legal developments as they occur. With that in mind, we encourage you to visit our website at www.methwerb.com for firm news, profiles and claims information designed to aid our business partners in the pursuit of effective claims handling at all phases.

Significant growth at M&W has led to the addition of six new associates to our property, subrogation, liability and complex litigation teams. For brief biographies of our new associates please scroll to "Firm Notes."

We appreciate all the positive feedback we have received regarding the Case Update and the website. We continue to welcome your comments and suggestions, which should be directed to Eric Harrison at harrison@methwerb.com.

We begin this edition with a focus on recent developments in the controversial area of medical malpractice.

MEDICAL MALPRACTICE-AFFIDAVIT OF MERIT

In Risko v. Ciocca the Appellate Division held that a medical malpractice plaintiff must file an Affidavit of Merit in a case of *res ipsa loquitur* or intentional tort unless the "common knowledge doctrine" applies.

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A few days later Ms. Risko experienced significant swelling in her neck which culminated in hospitalization and emergency surgery to remove an expanding hematoma. While recuperating in the surgical intensive care unit she suffered a right hemispheric stroke. She died within a year.

Mrs. Risko's husband filed suit, which the trial court dismissed for failure to file an Affidavit of Merit under N.J.S.A. 2A:53A-29.

Mr. Risko appealed, arguing that an Affidavit of Merit should not be required because Mrs. Risko's injuries and demise could not have occurred but for negligence by Dr. Ciocca. The appellate panel noted that the case did appear to be a *res ipsa loquitur* case in that the "occurrence itself ordinarily bespeaks negligence." Nevertheless, concluded the court, under the Affidavit of Merit statute the plaintiff would be required to present expert testimony establishing that the medical community would recognize Mrs. Risko's injuries and death as indicative of negligence. Because this was not "a common knowledge" case – one in which, for example, a doctor performs surgery on the wrong side of the plaintiff's body or fails to remove a surgical tool before suturing the patient – an Affidavit of Merit was required.

The U.S. Court of Appeals for the Third Circuit found the "common knowledge" doctrine satisfied in Natale v. Camden County Correctional Facility, a federal civil rights case involving the alleged denial of insulin to a known diabetic for the duration of a 21 hour incarceration. Two days after his release Mr. Natale suffered a stroke. The Third Circuit reversed District Judge Pisano's dismissal, ruling that Mr. Natale's malpractice claim fell within the "common knowledge" exception to the Affidavit of Merit statute. Additionally, the plaintiff had presented sufficient evidence of a policy or custom depriving him of his right to adequate medical care, thereby requiring reinstatement of his Section 1983 civil rights claim.

In Guzman v. Jersey City Medical Center the plaintiff presented to the emergency room but left when he "felt ignored for too long a period of time." His wife took him to his doctor's office, from which he was transported to another hospital. Mr. Guzman claimed that the delay in treatment caused him bodily injury.

In an effort to circumvent the requirements of the Affidavit Of Merit Statute – presumably because he could not find an expert to certify that the emergency room staff deviated from applicable standards of care – Mr. Guzman's attorney forwarded a written request for medical records from the medical center almost two years before filing suit. The medical center advised the attorney prior to the filing of suit that there existed no record but that the EMTs might have records documenting Mr. Guzman's transportation to the emergency room.

A different attorney filed a malpractice action on behalf of Guzman and served a notice to produce documents. The medical center responded with a redacted emergency room log which did not contain Mr. Guzman's name.

Attempting to invoke an exception to the Affidavit of Merit requirement, Guzman's attorney filed a sworn statement that he requested discovery that had "a substantial bearing on the preparation of an Affidavit of Merit" and that the Medical Center failed to respond. The Appellate Division affirmed dismissal of Guzman's case on the basis that neither Guzman nor his attorney had any objectively reasonable basis to believe that the Medical Center possessed any further records.

MEDICAL MALPRACTICE-WRONGFUL BIRTH

In Geller v. Akawie a three-judge appellate panel ruled that the doctrine of avoidable consequences does not apply to a wrongful birth claim based on inadequate genetic counseling. The case involved a claim that the defendant doctor failed to conduct appropriate follow up after determining that initial genetic testing for Tay-Sachs disease had not been conducted. The Appellate Division ruled that the trial court had erred in applying an elevated standard of proof which would otherwise apply to parental claims of emotional distress arising out

of neonatal malpractice. This case is different, held the court, because the parents of the genetically impaired child did not claim that the physician's negligence caused the impairment and the parents' claim of injury is independent of any claim asserted on the child's behalf.

MEDICAL MALPRACTICE-HIV

The anonymous plaintiff in Doe v. Arts lived a nightmare for three years after the defendant doctor incorrectly interpreted the results of a blood test and told him that he was HIV positive. Thereafter the doctor failed to re-test him and referred to him a hospital that also failed to re-test him, subsequently referring him to a second hospital that administered treatment but failed to re-test him as well. A jury found that the defendant doctor had deviated from generally accepted standards of practice in failing to give the plaintiff pre and post–test counseling, misinterpreting the test results and providing the results over the phone rather than in person.

The trial judge instructed the jurors that a finding of negligence could permissibly render the doctor responsible for all of the plaintiff's emotional distress, including alleged distress that occurred even after he learned that he was HIV negative. The Appellant Division affirmed, holding that Williamson v. Waldman, which limits the emotional distress damages in "fear of AIDS," cases does not apply to a case of actual misdiagnosis.

TORTS-PREMISES LIABILITY

In Park v. Rogers a divided New Jersey Supreme Court addressed a personal injury suit arising out of the plaintiff guest's fall down stairs because of a short handrail in the home of a friend. Specifically, Ms. Park descended in darkness a deck stairway with a "prematurely short banister" which she claimed caused her to stumble and fall. The trial court dismissed her Complaint and the Appellate Division affirmed, agreeing with the trial court that discovery showed that the plaintiff was on notice of the condition of the handrail and therefore aware of the risk.

The Supreme Court reversed, holding that the Appellate Division applied the correct legal standards with respect to the landowner's duty to his guest but failed to give the plaintiff the benefit of the most favorable view of the evidence in response to defendant's summary judgment motion. While the plaintiff had conceded at her deposition that she had called out to her friend while walking down the stairway that "it was really dark," the very absence of lighting was what compelled the plaintiff to depend so completely on the handrail. She did not become aware of the insufficiency of the handrail until it caused her to fall.

Viewing the evidence in the light most favorable to the plaintiff, the Supreme Court concluded, the trial court and the Appellate Division erred in dismissing her case because a reasonable jury could conclude that the plaintiff was not on notice of the short banister prior to her fall.

Justices Verniero and Coleman dissented, noting that the plaintiff obviously knew it was dark and presumably became acquainted with the banister when she ascended the stairs prior to her fall, which occurred later in the evening.

A division in the Supreme Court over a relatively straightforward premises liability case demonstrates the fact-sensitive nature of these cases, the importance of an effective deposition and motion practice. Carriers should always test a questionable liability case with a summary judgment motion, lest the matter proceed to trial and the creation of a record more supportive of the plaintiff's claims.

PRODUCTS LIABILITY-MANUFACTURER AND SELLER STATUS

In Becker v. Tessitore the Appellate Division addressed a claim that a defective retread tire on the defendant's tractor trailer caused a motor vehicle accident. At trial the court denied the plaintiff's request to assert a product liability claim because the defendant trucker was neither the manufacturer nor seller of the tire. Following a no cause verdict the Appellate Division affirmed for the reasons articulated by the trial judge.

PRODUCTS LIABILITY-DEMONSTRATIONS

In Levey v. Yamaha Motor Corporation a boat distributor's sales representative demonstrated use of the boat to the retailer's salesman in a manner violative of the safety warnings contained in the manual. The warnings consisted of fairly common admonitions to avoid rough water and jumping. The distributor's representative drove the boat in rough off-ocean waters and intentionally jumped waves.

Subsequently the retail salesman to whom the distributor had provided the demonstration gave a similar demonstration to prospective purchaser Kelly Levey. Ms. Levey contended that the salesman "made a conscious effort to cause the boat to go airborne" when she was thrown from her seat and suffered injuries.

Ms. Levey sued not only the boat dealership, but also Yamaha, the manufacturer. The trial court granted summary judgment for Yamaha and the Appellate Division reversed, holding that determining the adequacy of a seller's instructions and warnings requires consideration of all the seller's communications to intended users - - including demonstrations of the product. The Court held that the distributor representative's reckless demonstration to the local sales representative could have encouraged the local sales representative to demonstrate the boat in a manner inconsistent with the accompanying warnings. Were a jury to agree, the Court held, then Yamaha could be found liable under the Product Liability Act for failure to provide adequate warnings.

WORKERS COMPENSATION-COMPENSABLE DISEASE-EMPHYSEMA

In Lindquist v. Jersey City Fire Department and Colbert v. Jersey City the New Jersey Supreme Court applied the liberal medical causation standard of Rubanick v. Whitco Chemical Company, a toxic tort case, to workers compensation claims of emphysema precipitated by industrial pollutants. The Court expressly distinguished the stringent standard of Fiore v. Consolidated Freightways, which applies only to cardiovascular injury. The Court further held that the statutory presumption of occupational medical causation applies equally to volunteer firefighters and paid firefighters.

WORKERS COMPENSATION-SECTION 40 LIENS AGAINST EMPLOYERS

In Calalpa v. Dae Ryung Company the plaintiff received workers compensation benefits after severing three fingers on the job. He subsequently settled an intentional tort case against his employer and joint employer. The workers compensation insurer obtained an order granting a workers compensation lien under N.J.S.A. 35:15-40, requiring the injured plaintiff to reimburse the insurer approximately $40,000 from his settlement proceeds. The Appellate Division affirmed on the basis of Millison v. E.I. duPont de Nemours.

WORKERS COMPENSATION BAR-CIVIL SUITS AGAINST EMPLOYERS

In a trilogy of employment injury cases, the New Jersey Supreme Court has arguably altered the Millison standard to expand the right of plaintiffs to sue their employers for injuries sustained on the job.

Tomeo v. Thomas Whitesell Construction Company involved the installation of sprinkler devices in commercial buildings. During the course of a job the plaintiff's employer instructed him to remove snow from the premises with a snow blower on which the safety lever had been deactivated with electrical tape, attaching it to the

handlebar in the operational position. Plaintiff placed his hand into the blower chute to unclog snow while the propeller was turning and injured several fingers. He sued his employer, arguing that the act of taping the safety lever was sufficiently egregious to surmount the workers compensation bar against civil liability.

A divided Supreme Court upheld dismissal of the plaintiff's claim, citing the lack of evidence to suggest that the employer acted with knowledge that an injury was substantially certain. Additionally, the Court noted, the snow blower was not a piece of industrial machinery but was instead a consumer product which bore clear warning labels, rendering the plaintiff's insertion of his hand an intervening cause of injury. The Court held that the same objective standard for measuring whether a user of consumer goods has engaged in proper self-protective measures under the Products Liability Act should be applied to intentional tort claims against employers under the Workers Compensation Act.

In contrast, the Supreme Court held in Mull v. Zeta Consumer Products that a plaintiff injured when her hand was drawn into an unprotected industrial winding machine could proceed with a claim against the employer because discovery demonstrated a history of previous accidents, employee complaints and OSHA citations. Comparing this case to Laidlow v. Hariton Machinery Company, the Court upheld plaintiff's right to pursue an "intentional wrong" suit against his employer.

Finally, in Crippen v. Central Jersey Concrete Pipe Company discovery revealed a lengthy course of OSHA citations and deception by the employer. Eighteen months before the workplace accident that culminated in the plaintiff employee's death OSHA had issued a citation and Notification of Penalty to the employer for numerous unsafe working conditions. The plaintiff "materialman," who was responsible for controlling the movement of sand and gravel into loading hoppers in an elevated shed, fell from a wooden plank and unsecured ladder, landed in the sand hopper and suffocated. The Supreme Court held that the prior OSHA citations and the employer's history of deceiving OSHA could support an intentional wrong claim action against the employer.

NEW YORK UPDATE

NEW YORK-TORTS-ILLEGAL IMMIGRANTS

In several recent decisions New York trial judges have upheld the right of illegal immigrants to bring negligence claims and recover damages. In Balbuena v. IDR Realty, LLC, a third-party defendant sought partial summary judgment in a construction accident case, asserting in part that the plaintiff could not maintain common law negligence claims or Labor Law violations because he was an illegal immigrant. In addition, the third-party plaintiff asserted that the United States Supreme Court decision in Hoffman Plastics Compound v. N.L.R.B., 535 U.S. 137 (2002) stood for the proposition that illegal immigrants are barred from using state courts to seek civil damages for alleged tortious conduct.

The trial court held that it was not bound by the decision in Hoffman on several grounds. One, the trial court found that nothing in the Hoffman decision stated or implied that its holding would be applicable to tort actions brought under state common law. In addition, the trial court noted that several other courts concluded that the Hoffman decision did not stand for the proposition that an illegal immigrant is barred from recovering damages. The trial court ultimately denied the third-party plaintiff's motion for summary judgment given that discovery was not yet complete.

Until there has been a definitive ruling by the Appellate Division or Court of Appeals on this issue, the mere fact that a claimant or plaintiff is an illegal immigrant is insufficient to deny the claimant-plaintiff recovery of damages or benefits. As always, we will keep you apprised of further developments in this area of the law.

NEW YORK-INSURANCE-FIRE-COVERED LOSS

In Klein's Moving & Storage Inc. v. Westport Ins. Co, a case venued in Kings County Supreme Court, Second Department, the contents of the plaintiff's warehouse were insured under a commercial inland marine insurance policy that required that the plaintiff, in the event of a loss, take all reasonable steps to protect covered property from damage. The plaintiff brought suit against its carrier, seeking to recover the costs incurred as a result of moving the warehouse contents in order to repair, clean, and paint the warehouse after a fire.

The carrier sought dismissal, asserting that movement costs were not covered under the policy of insurance because the movement costs did not involve a direct, physical loss to covered property. The court agreed with the carrier, finding that the policy did not cover plaintiff's costs in moving the contents of the warehouse after the fire. Applying the plain and ordinary meaning of the clear and unambiguous terms of the policy, the court found that actual loss or damage to "Covered Property" from a "Covered Cause" did not include the costs for moving property within the warehouse so as to allow cleaning, painting, and restoration of the premises following a fire.

NEW YORK-NO FAULT-ASSIGNMENT OF BENEFITS

Recently, in A.B. Medical Services, PLLC v. Highlands Insurance Co., a New York court set forth standards for valid Assignment of Benefit forms from patients to health care providers.

In this matter, plaintiff sought summary judgment on medical expense payment claims. In support of its motion, plaintiffs attached various Assignment of Benefit forms. In determining whether plaintiff had a prima facie claim, the Court examined the standards for a valid Assignment of Benefits.

First, the Court held that the Assignment of Benefits form must name the assignee medical provider. The form must also identify the insurer from whom no-fault benefits are requested. Third, the assignor must execute the form. Finally, the medical provider must authenticate the signature of the assignor.

In this matter, the court denied plaintiff's motion given that the assignment of benefits forms annexed to its motion lacked the four criteria, and therefore, lacked an effective assignment. Without a proper assignment, the court held, the medical provider failed to make a prima facie showing of entitlement to payment of the disputed medical bills.

TORT CLAIMS ACT-INDEPENDENT CONTRACTORS

In Muhammad v. New Jersey Transit the defendant public entity hired an independent contractor to remove asbestos from the roof of one of its garages. New Jersey Transit warned the contractor that the roof was unsafe, expecting the contractor to advise the employees. When the contractor failed to warn its employees of the unsafe condition of the roof and one of its employees sustained an injury, the employee sued New Jersey Transit directly. A unanimous New Jersey Supreme Court held that New Jersey Transit did not act in a palpably unreasonable manner when it advised the employer of the hazard, expecting the employer to inform its employees of the dangers inherent to the project.

TORT CLAIMS ACT-TORT THRESHOLD

Since Brooks v. Odom the trial bar has long recognized the significant differences between the No Fault Act's verbal threshold and the injury threshold under the Tort Claims Act. Simply put, the Title 59 TCA threshold has always been considered much harder to satisfy, even in the wake of AICRA's "tightening up" of the auto threshold.

The Supreme Court arguably eliminated that disparity in Knowles v. Mantua Township Soccer Association, a decision sustaining a claim against a public entity where the evidence of "serious impact" on the claimant probably would have been insufficient to sustain a cause of action under the auto verbal threshold.

Plaintiff Joseph Knowles visited Chestnut Branch Park in the township of Mantua to watch a soccer game. As his car exited the park a barricade swung from its open position and crashed through the windshield, striking his upper body. The barricade struck his left shoulder, knocked him over the seat and left him dazed.

Mr. Knowles underwent physical therapy and chiropractic adjustments and took prescription and pain medication. An EMG test performed three months later demonstrated lumbar radiculopathy. The neurologist recommended continued chiropractic care and physical therapy. A subsequent MRI demonstrated a central disc herniation at L4-5.

While the objective soft tissue injuries were verified by testing, Mr. Knowles complained only that he missed one week of work and experienced insomnia, inability to referee soccer games and inability to take part in recreational sports.

Under the old Brooks v. Odom standard, which rigidly applied N.J.S.A. 59:9-2d to require not only objective permanent injury but also "a permanent loss of bodily function that is substantial," the plaintiff's claims clearly should not have survived summary judgment. Nevertheless, the Court compared the facts to those in Brooks and other Tort Claims Act cases to determine that Mr. Knowles had sustained a permanent, substantial loss of a bodily function as defined by the Act.

Knowles arguably opens the door to a host of claims against public entities which previously would have been dismissed. The decision brings to mind the adage that "bad facts make bad law" – we suspect that the violent and unexpected nature of the accident informed the court's analysis of the severity of the injuries.

AUTOMOBILE INSURANCE-UM BENEFITS-STEP-DOWN CLAUSES

Two panels of the Appellate Division have handed down important decisions upholding "step-down" clauses in UM-UIM endorsements. A step-down clause is a policy provision applying lower UM-UIM limits to injured vehicle occupants other than the named insured who purchased the policy.

Botti v. CNA involved a commercial policy issued to the plaintiff's employer as a named insured. The UM endorsement limited the coverage available to an employee who is a "named insured" on another policy with lower UM limits. In this case the injured employee held a policy covering his family car with lower UM limits. The Appellate Division found no objectively reasonable expectation of entitlement to the higher limits of the host vehicle and enforced the step-down clause to apply the plaintiff-employee's own policy limits.

The Botti court parted ways with other panels of the Appellate Division, who previously ruled in Macchi v. Connecticut General Ins. Co. and Araya v. Farm Family Casualty Insurance Co. that designation of a corporate employer as a "named insured" would provide illusory UM benefits to injured employees, thereby requiring reformation of the policy to discard the step-down clause. The Botti court reasoned that UM coverage to any vehicle occupants would be available for the full policy limits unless such a vehicle occupant was a named insured under his own policy, in which case the step-down clause would apply.

Of course, this result does beg the question of inequity between uninsured fortuitous occupants and those who have their own coverage. Had Mr. Botti been uninsured, the CNA endorsement would not have stepped him down and he would have been eligible to receive up to $1,000,000 in UM coverage.

Many auto carriers have answered this disparity with an additional step-down clause providing that strangers to the policy with their own coverage would be stepped down to their own lower limits, or, if they have no coverage, to the minimum liability limits required by law ($15,000 per person-$30,000 per accident). Our office has drafted UM endorsements containing this language, which the Department of Banking and Insurance has approved.

In Christafano v. New Jersey Manufacturers Insurance Company a different appellate panel confronted a step-down provision limiting the amount of UM coverage available to a family member who is the named insured under another policy covering his personal vehicle. The court enforced the step down clause, limiting NJM's exposure to the limits chosen by the family member on his own policy.

UNINSURED MOTORIST BENEFITS-SETTLEMENT OF UNDERLYING CLAIM

In Ohio Casualty v. Bornstein the plaintiff, a passenger in a New York City taxicab, sustained injuries when the cab was rear-ended by another car. He filed suit in New York against the taxicab company, which offered $60,000 of its $100,000 liability limit. Plaintiff's counsel notified his UM carrier, Ohio Casualty, of the proposed settlement, invited Ohio Casualty to intervene in the New York action and requested approval of the settlement.

In response, Ohio Casualty filed a declaratory judgment action asserting that it should not be required to pay any UIM benefits because plaintiff's settlement was substantially below the tortfeasor's policy limit. The trial court granted summary judgment to Mr. Bornstein and the Appellate Division affirmed, ruling that while "an insured does not have an unfettered right to settle a suit for a modest or insignificant sum" and then pursue a UIM claim, the settlement amount in this case was substantial when compared to the tortfeasor's policy limits and Bornstein's stated reason for accepting the settlement – avoidance of protracted litigation in New York – was reasonable. Thus the Court permitted him to pursue his UIM claim, subject of course to a $100,000 credit equal to the tortfeasor's liability policy.

AUTO INSURANCE-PENALTIES FOR LACK OF INSURANCE

Plaintiff Gisele Lightner was sitting in the passenger seat of a parked car which was owned and registered by herself and another. She got into the car to apply her makeup in the sun-visor mirror and to wait for the co-owner of the vehicle, with whom she planned to walk to the store. While she was seated in the car, it was rear-ended by a car driven by defendant Tomas Solis.

In the personal injury suit that followed Ms. Lightner admitted that her insurance had lapsed one month earlier, rendering her uninsured in violation of NJSA 39:6A-3 and 17:20-1.9. Nevertheless, she contended that while the car was operable she had merely moved it from one side of the street to the other to avoid parking tickets and

had not driven it otherwise.

In Lightner v. Solis a three judge appellate panel sidestepped the constitutional issues addressed by Judge Pressler in the Caviglia case to focus on intent to operate in the context of NJSA 39:6A-4.5(a). That statute provides that a person "shall have no cause of action for recovery of economic or non-economic loss sustained as a result of an accident while operating an uninsured automobile." Citing the 1993 Supreme Court decision in Foxworth v. Morris, the court upheld the trial court's denial of summary judgment to the defendant, ruling that the trial court must conduct a plenary hearing to assess whether or not the plaintiff intended to operate the vehicle "in or around the time of the accident."

The panel refined the lower court's ruling on the nature of the fact finding proceeding, determining that the issue of intent to operate should be determined by the judge in a plenary hearing rather than a jury because the bar to recovery under NJSA 39:6A-4.5 calls for a statutory analysis by the court rather than simple fact finding by a jury.

INSURANCE FRAUD- FRAUD PREVENTION ACT

Ruling in a matter of first impression, Judge Villanueva held in Harleysville v. Diamond that a carrier seeking treble damages under the New Jersey Insurance Fraud Prevention Act must prove fraud by clear and convincing evidence rather than simply a preponderance of the evidence.

AUTOMOBILE INSURANCE-UNINSURED MOTORIST BENEFITS-EMPLOYEE ACCIDENTS

In Mule v. New Jersey Manufacturers Insurance Company the plaintiff sought UM benefits in connection with an accident in his employer's parking lot with an uninsured co-worker whose presence at the scene of the accident was unrelated to his employment. Although the plaintiff UM claimant was arguably working at the time of the accident, the Appellate Division reasoned that the critical question was whether both of the workers were acting in the course of their employment at the time of the accident.

In this case, the plaintiff UM claimant was returning from a meal break in the middle of his shift, rendering him eligible for workers' compensation benefits under N.J.S.A. 34:15-1. Nevertheless, because the adverse driver was not working at the time of the accident, the plaintiff was entitled to maintain an action against him and therefore was also entitled to UM benefits. The workers compensation carrier would have a statutory lien against any UM proceeds.

AUTO INSURANCE-PIP BENEFITS-FEE SCHEDULE REVISIONS

As our auto carrier clients are aware, in early 2001 the Department of Banking and Insurance adopted regulations revising the fee schedule for reimbursement of PIP benefits in a manner based on fees actually paid to physicians rather than amounts that have been billed to the patients. The new regulations also imposed a controversial daily fee cap of $90. In Coalition for Quality Health Care v. NJDOBI (approved for publication on March 7, 2003) the Appellate Division unanimously upheld the new regulations as falling within the sound discretion of the NJDOBI.

AUTOMOBILE INSURANCE-PIP BENEFITS-COLLATERAL ESTOPPEL

In Fama v. Yi a jury in a bodily injury trial determined that the auto accident in question did not proximately cause any of the plaintiff's alleged injuries. Thereafter, the plaintiff sought to compel payment of PIP benefits

and the trial court granted summary judgment to the PIP carrier, applying the doctrine of collateral estoppel to preclude PIP benefits because the jury found no causal connection. Because the plaintiff had a full opportunity to litigate this issue before a jury, the panel held, he was not entitled to a second trial on the same issue.

AUTOMOBILE INSURANCE-PIP REIMBURSEMENT

In Geico v. Allstate an appellate panel articulated an interpretation of the deemer statute generally accepted throughout the insurance industry for years. Geico, apparently misinterpreting the 1998 amendments to the deemer statute at N.J.S.A.17:28-1.4, voluntarily paid New Jersey PIP benefits to its out of state insureds injured in New Jersey. Following an accident in New Jersey between a Geico insured vehicle and an Allstate insured vehicle, Allstate sought reimbursement of PIP payments on the grounds that Geico is an out of state automobile insurer that is not authorized to transact any insurance business in New Jersey.
Acknowledging some inconsistencies within the 1998 deemer amendments, the Appellate Division interpreted the PIP reimbursement statute as written to hold that Geico owed Allstate reimbursement of PIP payments under tort-based fault principles.

In David v. Government Employees Insurance Company, a three-judge appellate panel agreed with Knox v. Linden General Insurance Company to hold that an insurer who seeks to obtain PIP reimbursement from an alleged tortfeasor's insurer has no duty to notify its insured of its actions, even if such reimbursement could deplete liability insurance funds available to satisfy the insured's personal injury claim.

TORTS-SPOLIATION OF EVIDENCE

In Swick v. The New York Times Company the manufacturer of a machine that caused plaintiff's injury on the job was out of business and had no insurance coverage. Because the plaintiff would not have been able to recover any damages from the manufacturer, he would be unable to prove that his employer's conduct in failing to preserve the machine proximately caused any injury. Applying the traditional negligence principals required by Gilleski v. Community Medical Center, the Swick Court held that plaintiff's inability to prove damages entitled the employer to summary judgment.

ENVIRONMENTAL LAW-CONTINUOUS TRIGGER

in Spaulding Composites Company v. Aetna the Supreme Court was called upon to further refine the so-called "continuous trigger" and "pro-rata allocation" doctrines first articulated in the landmark Owens-Illinois and Carter-Wallace cases. In a complex case involving millions of dollars in cleanup expenses and primary and excess coverage, a CGL carrier attempted to enforce a non-cumulation clause to restrict its exposure on a 9 years of coverage to a single policy limit. The Supreme Court reversed the Appellate Division's enforcement of the non-cumulation clause, holding that the continuous trigger and pro-rata allocation formulas established by Owens-Illinois and Carter-Wallace rendered the non-cumulation clause unenforceable as a matter of law.

ENVIRONMENTAL LAW-STRICT LIABILITY

In the toxic tort case of Biniek v. Exxon Mobile Corporation the plaintiffs sought recovery for damages caused by contaminants which allegedly leaked from a gasoline storage tank. Judge Williams of the Law Division in Somerset County held the sale and installation of the allegedly leaking tank into a preexisting piping did not constitute the "design, planning, supervision or construction of an improvement to real property" necessary to invoke the statute of repose codified at N.J.S.A.2A:14-1. Significantly, the court did dismiss all strict liability

claims against the defendants on the basis that gasoline transportation and storage does not qualify as an "abnormally hazardous activity."

Judge Williams' ruling on the statute of repose and strict liability issues are, in our opinion, very close calls in view of the precedents informing both areas of law. If one or both of the parties pursues an appeal after final judgment we will keep you posted of all developments. In the meantime, the trial court's ruling is informative but not binding on any other court.

TORTS-PARENTAL IMMUNITY

The seminal case of Foldi v. Jefferies established that infant children suing their parents for negligent supervision must prove more than simple negligence; they must prove "willful and wanton" failure to supervise. In Buono v. Scalia the Appellate Division applied the same standard to negligent supervision claims filed by third parties against parents. The court held that the two policy concerns underlying the Foldi rationale -- a parent's freedom to decide how much independence to give the child and the parent's unique position in determining the appropriate level of supervision necessary -- equally inform a third party claim. Thus, any party seeking damages from a parent for negligent supervision of a child who causes injury must prove a willful and wanton failure to supervise the child.

TORTS-GUN MANUFACTURER AND DISTRIBUTOR LIABILITY

In a case certain to receive national attention, the Appellate Division in Mayor Sharpe James v. Arms Technology, Inc. refused to dismiss the City of Newark's complaint against 30 gun manufacturers, distributors and retailers seeking to recover the cost of the governmental services associated with gun violence. The panel did not disturb the trial court's dismissal of plaintiffs' product liability and unjust enrichment claims but did conclude that the pleadings adequately stated a cause of action for negligence, public nuisance and punitive damages.

TORTS-AMUSEMENT PARKS

The Carnival-Amusement Rides Safety Act mandates the filing of a written accident report within 90 days with the operator of an amusement park as a pre-condition to the filing of suit for personal injuries. An aggrieved plaintiff may seek a judicial extension if he can demonstrate "sufficient reason" for the delay and lack of "substantial prejudice" to the park. In Lopez v. Gillian's Pier, the plaintiff's doctor alerted him to an alleged connection between his stroke and a roller coaster ride well within a year of his visit to the park. The plaintiff neither filed a written report nor sought a judicial extension within which that judicial extension to permit the filing of a late report. The Appellate Division upheld the trial court's dismissal of his personal injury lawsuit, affirming the continued viability of NJSA 5:3-57 et seq.

TORTS-SKI STATUTES-SNOWBOARDING

Trial Judge Graves of Sussex County applied common sense to interpretation of the New Jersey's Ski Statute to hold that the prevalence of snowboarding requires that the statute embrace snowboarding activity as well as traditional skiing on the slopes of Great George. Because the plaintiff was injured while snowboarding, a jury must now determine if the dirt area where he fell was an inherent risk of snowboarding or an obvious, manmade hazard that the defendant could have removed, eliminated or reduced. Alternatively, the plaintiff could succeed in his suit against the ski slope operator by demonstrating violation of an express or implied

statutory duty to conduct an inspection, provide information concerning trail conditions and warn of a potential danger.

TORTS--DOG BITES–VICARIOUS LIABILITY

Zukowitz v. Halperin involved a tenant's common law claim against her landlord for damages sustained when she was bitten by a dog owned by the superintendent and not by the landlord himself. The Appellate Division held that the superintendents were acting within the scope of their authority when they accepted complaints from tenants at the door of their apartment, where the plaintiff was attacked by their dog. This rendered the landlord vicariously liable for any negligence of the superintendent in allowing the dog to escape and attack the plaintiff. Reversing the trial court, the Appellate Division remanded the case for trial on the issue of the landlord's alleged negligence.

TORTS-EMERGENCY MEDICAL TECHNICIANS

The Appellant Division struck a blow for common sense and legal protection of emergency medical technicians in Shehaiber v. UMDNJ. Writing for a unanimous three-judge panel, Judge Pressler held that EMTs are not required to be trained in or to perform water rescues. Thus the law will not charge them with the duty to attempt a water rescue and failure to volunteer for a water rescue will not subject them to civil liability.

TRIAL RESULTS

Don Crowley obtained a directed verdict in a complicated sex harassment-inadequate supervision case. The plaintiff, a former client of disbarred attorney Stephen Gallo, sued two law firms which formerly employed Gallo on the theory that the firms failed to establish and enforce adequate anti-harassment policies, thus effectively permitting Gallo to engage in a pattern of sexual harassment of the plaintiff. Don represented the firm for which Gallo worked when he first met the plaintiff.

The plaintiff's claim required assessment of whether the law firm knew or should have known of Gallo's predilection such that they had constructive notice and an opportunity to prevent subsequent assaults, even though none of the victims ever notified either of the law firms.

At the close of plaintiff's case Judge Donahoe directed a verdict for Don's client, agreeing that neither firm had notice or knowledge of Mr. Gallo's propensity to commit these criminal acts and that Mr. Gallo alone was responsible for violation of the Rules of Professional Conduct.

Don also obtained a no cause verdict in a trial involving a social guest's slip and fall on defendant's front brick stairway. The allegation involved missing mortar between the bricks on the step as well as a loose step which was hidden and allegedly known to the defendant. Plaintiff's injuries consisted of multiple fractured teeth which required dental implants. After reviewing photographs and listening to Don's withering cross-examination of the plaintiff, the jury agreed that the accident could not have occurred in the manner alleged by the plaintiff since the missing mortar ran in line with her direction of travel rather than across it.

Ed Thornton obtained a no cause verdict in a complex medical malpractice trial in Morris County. After two miscarriages in her early forties, plaintiff's decedent consulted the insured doctor, a hematologist. Blood analysis and bone marrow aspirations demonstrated a low white cell count suggestive of leukemia. While he could not yet render a definitive diagnosis of leukemia, he did advise her not to get pregnant.

The evidence suggested that the decedent herself told the staff of a fertility clinic that she had hematological clearance. She became pregnant with twins but lost them at 20 weeks.

Plaintiff's decedent ultimately developed leukemia and died. Her husband filed suit against the insured doctor, claiming that her emotional and physical distress in losing the twins was the result of the doctor's failure to provide proper counseling. The husband had no medical evidence to suggest that the loss of the twins flowed from a blood problem; nor did he claim that the pregnancy caused her death, since no marrow donor could be found. He simply sought pain and suffering damages on his late wife's behalf, arguing that the doctor negligently cleared her for pregnancy.

Despite the emotional nature of the case, Ed was able to point out inconsistencies and medically implausible aspects of the husband's story. Against a pretrial demand of $175,000 Ed offered nothing and the jury delivered a verdict of no cause.

Ric Gallin recently obtained a $55,000 arbitration award on a New York subrogation file. The insured was a Bennigans restaurant in Albany County. On Easter Sunday the ductwork above the grill ignited, causing $60,000 in damage. Ric proved that the fire was a result of defective duct cleaning by a maintenance contractor. The case was originally filed in Supreme Court, Albany County but was transferred to arbitration by agreement. At the arbitration hearing Ric produced both the restaurant manager and the cause and origin expert. The arbitrators made a small reduction to reflect depreciation since the Company's settlement with Bennigans had been on an RCV basis but otherwise completely accepted Ric's proofs.

Stephen Katzman obtained a directed verdict following one week of trial in a coverage case involving an alleged home collaps. Stephen successfully argued that the plaintiff did not meet the elements of collapse as defined in Fantis Foods, Inc. v. North River Ins. Co.; that the plaintiff did not prove that the loss occurred during the policy period and that the cause of the loss – subsurface water — was excluded.

Tom Zborowski obtained an order of summary judgment following a motion in limine in a falldown case. The plaintiff fell on a sidewalk outside an apartment occupied by her sister and owned by the Township of Franklin Housing Authority. She sustained a comminuted spiral fracture of the fibula and subsequently alleged re-injury during a defense examination. (Thankfully the IME doctor was not added as a defendant.)

The plaintiff's attorney failed to serve a medical report establishing permanent injury. Tom argued prior to jury selection that the plaintiff had failed to satisfy the Tort Claims Act injury threshold with objective proof of permanent loss of a bodily function. Judge Williams agreed and dismissed the case.

John Knodel tried a case in which the plaintiff fell on the insured's allegedly improperly shoveled front sidewalk. The plaintiff underwent three surgeries to her low back and incurred approximately $45,000.00 in medical bills. The plaintiff claimed the property was commercial because it was a two-family structure out of which the insured ran a small contracting business. Through the testimony of the insured, John established that although the property was a two-family house, it was owner-occupied and the predominant use by the insured was residential. The court agreed that the insured owed no duty to the plaintiff and dismissed the Complaint with prejudice. The plaintiff has filed a notice of appeal.

Bill Bloom tried a falldown case in Middlesex County. The plaintiff, a tenant of the insured, sustained a serious shoulder injury which required three surgeries after falling down 12 interior steps in the apartment he rented from the insured. The plaintiff claimed that the fall occurred due to a recurring problem with the electrical system which left him standing in pitch darkness in his kitchen, and that he fell while trying to maneuver his way to circuit box in the attic.

Bill presented evidence suggesting that the fall did not occur as the plaintiff claimed and that it had nothing to do

with any electrical problem. In short, it appeared that the plaintiff simply may have been walking to the bathroom in the middle of the night and did not see the steps. The parties stipulated damages of $90,000, and tried the case on liability only. The jury returned a verdict of no cause.

Gina Stanziale recently convinced a panel of the American Arbitration Association to vacate two awards for reimbursement of MRI services where it was determined that the DRP had erred as a matter of law. Specifically, a diagnostic imaging center filed a demand for arbitration against an insurer for services rendered to a husband and wife for MRIs of the cervical and lumbar spines. The MRIs were performed only three days after the accident occurred and after initial examination. In defense of the arbitration Gina argued that the MRIs were not medically necessary. She relied upon the care path guidelines which demonstrate that in typical soft tissue injuries an MRI is warranted only in the event of radicular complaints for several weeks, or even months, after an accident. In this case, the record was devoid of any clinical neurological deficits.

The DRP disagreed with our position and found that the wife's lumbar MRI and the husband's cervical and lumber MRIs were medically necessary. In doing so she relied upon a report prepared nine months after the MRIs were conducted. Gina filed an appeal, and the appellate panel agreed with our position that the awards were incorrect as a matter of law and vacated them.

John Grossi tried a three-week defamation case in Somerville which concluded with a directed verdict in his client's favor. John represented a Baptist minister and three mental health care therapists associated with a Baptist church. The plaintiff claimed that she was defamed at a church meeting when the pastor allegedly implied that she had a borderline personality and had suffered from sexual abuse as a child. Both compensatory and punitive damages were sought. After nine witnesses testified John convinced the judge that no defamatory words were spoken and that the doctrine of presumed damages did not apply. The judge also ruled that a suggestion of sex abuse victimization – as opposed to perpetration – will not support a claim for defamation.

Matt Werbel recently testified in a criminal trial in the Superior Court. The insureds made a claim with a carrier for an alleged fire loss. The cause and origin expert found four points of origin, prompting the carrier to forward the claim to M&W for an examination under oath and further investigation. Matt conducted the insureds' examinations under oath over the course of four days. In the process he obtained documents from the insureds which disproved their respective alibis. It was also determined that the insureds demanded the value of numerous items which seemed uncharacteristic of their lifestyle. Matt found numerous material misrepresentations and the carrier denied coverage for the loss.

A large portion of the contents claim was subsequently discovered in a storage facility. Pursuant to the Arson Immunity Statute and the Insurance Fraud Prevention Act Matt shared his non-privileged file material with the Monmouth County Prosecutor's Office. Shortly thereafter the Prosecutor's Office indicted the insureds for theft by deception, arson, conspiracy to commit theft by deception and conspiracy to commit arson. Matt testified in the criminal trial and the jury convicted the insureds of all four counts.

Matt is still prosecuting the carrier's claim for reimbursement of the monies paid to the insured's mortgage company and counsel fees pursuant to the Insurance Fraud Prevention Act.

FIRM NOTES

John Sapata was recently appointed by M&W's Steering Committee to assume management of the firm's PIP Department. John will work with Eric Harrison of our complex litigation team to ensure the continuation of smooth and effective administration of PIP arbitrations.

Stephen Katzman was recently invited to speak to a class of medical students, interns and residents at the University of Medicine and Dentistry of New Jersey on the subject of "Health Care Provider Fraud." Stephen has presented many seminars on this subject in the past. Any clients interested in an in-house presentation on the growing challenge of healthcare provider fraud should contact Stephen directly.

Jared Stolz and **Matthew Werbel** of our property team have recently presented seminars covering insurance fraud, adjustment of mold claims and coverage for claims of building collapse.

Significant growth in our property, subrogation, liability and complex litigation practices has culminated in the addition of five new associates:

John Monahan graduated from Rowan University in 1989 and New York Law School in 1994. He served as a law clerk to the Hon. C. Judson Hamlin, Presiding Judge Civil Division of the Middlesex County Superior Court. John has practiced in the area of creditors rights and medical malpractice. Over the past several years he has specialized in mass torts throughout New Jersey. We welcome John to the M&W property team under the supervision of Stephen Katzman.

Matthew Venema received his B.A. with distinction from the University of Michigan. He graduated with a J.D. from Indiana University Law School in 1994. Matt practiced civil litigation in Michigan and Indiana, defending automobile, trucking and personal injury cases. After moving to the East Coast he practiced in Philadelphia for a year before joining Methfessel & Werbel in 2003. Matt joins our Hudson team under the direction of Ed Thornton, where he will handle automobile, construction and premises liability claims.

Eric Ruskin graduated in 1996 from the State University of New York at Buffalo with a B.A. in Political Science, Magna Cum Laude, Phi Beta Kappa. Following graduation from Boston University School of Law in 1999, Eric clerked with the Connecticut Superior Court. After several years engaged in medical malpractice defense Eric has joined M&W's subrogation department under the supervision of Steve Kluxen.

Sarah Newsome obtained her B.A. and J.D. degrees from Rutgers University, where she majored in Spanish and Political Science as an undergraduate and wrote for the Rutgers Law Record during law school. Sarah taught a legal research and writing class during her third year of law school. After graduating she clerked for the Hon. Thomas J.Critchley, Jr. in the Chancery Division of Morris County Superior Court. Sarah joins our complex litigation team under the supervision of Eric Harrison and Bill Bloom.

Michael Olszak also obtained his B.A. and J.D. degrees from Rutgers. After obtaining his B.A. in Political Science, Michael clerked during law school for both State Assemblyman Kevin O'Toole and the Law Division of the Attorney General's Office. Following graduation from law school Michael clerked for the Hon. Susan L. Reisner, P.J.S.C. in Passaic County. We welcome Michael to our North Jersey team, where he will handle liability cases under the direction of Ed Thornton.

Patricia Soh joins our property team under the direction of Jared Stolz. Patricia graduated from Rutgers with a B.A. in English Literature with high honors. In 2002 she obtained her J.D. from the George Washington University Law School, where she not only clerked for the EEOC and the Legal Services Corporation, but also served as a student advocate in a variety of legal clinics. Following a clerkship for the Hon. Ann Graf McCormick in Middlesex County, Patricia joins our property team under the supervision of Jared Stolz.

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.