METHFESSEL & WERBEL

----------A Professional Corporation----------

The Leading Insurance and Claims Attorneys

CASE UPDATE

October 2004

SUPREME COURT UPHOLDS DISMISSAL OF BROKER MALPRACTICE ACTION DEFENDED BY M&W'S ERIC HARRISON

In August the New Jersey Supreme Court decided President v. Jenkins, a combined insurance coverage and broker malpractice action in which Eric Harrison of our office originally obtained summary judgment on behalf of C&R Insurance Agency, which sold a Zurich-American malpractice policy to the defendant, Dr. Reginald Jenkins. In August 1997 Dr. Jenkins requested coverage with Zurich effective February 1, 1998 to succeed his coverage with Princeton, which was scheduled to lapse on that date. Because of financial difficulties Dr. Jenkins elected not to make his final premium payment to Princeton, causing coverage to lapse in October 1997. He committed alleged acts of malpractice in January 1998 and the coverage with Zurich did not begin until February 1998, leading to disclaimers by Princeton and Zurich and a declaratory judgment action filed by Dr. Jenkins and Ms. President, his injured patient.

The trial court entered summary judgment for both carriers as well as the C&R Agency, ruling that the policy terms were clear and well known to Dr. Jenkins, who by his own admission got what he paid for. A divided appellate panel affirmed.

The New Jersey Supreme Court unanimously affirmed dismissal of the claims against the broker, ruling as a matter of law that C&R had no affirmative duty to investigate the accuracy of Dr.

TABLE OF CONTENTS

SUPREME COURT UPHOLDS DISMISSAL OF BROKER MALPRACTICE ACTION DEFENDED BY M&W'S ERIC HARRISON 1
COMPARATIVE NEGLIGENCE - "ULTIMATE OUTCOME" CHARGE 2
PROTECTIVE ORDERS - ACCESS TO UNFILED DISCOVERY 3
WORKERS COMPENSATION - MEDICAL PROVIDERS 3
PRODUCT LIABILITY - OSHA PREEMPTION 4
TORTS - DEFAMATION 4
TORTS - PREMISES LIABILITY 4
TORTS - PARENTAL IMMUNITY 5
TORTS - SPORTING EVENTS 5
TORTS CLAIMS ACT - INTENTIONAL ACTS 5
TORTS CLAIMS ACT - INJURY OFF PUBLIC LAND 5
TORTS CLAIMS ACT - UNIMPROVED LAND AND DISCRETIONARY IMMUNITIES 6
LIABILITY INSURANCE - INTENTIONAL ACTS EXCLUSION 6
NEW YORK UPDATE - COURT OF APPEALS RULES IN FAVOR OF LIABILITY COVERAGE FOR EMPLOYER IN SUIT FOR INTENTIONAL SEXUAL ASSAULT BY EMPLOYEE 6
CIVIL RIGHTS - CONSTRUCTIVE DISCHARGE - SEXUAL HARASSMENT 7
CIVIL RIGHTS - LAW AGAINST DISCRIMINATION 7
EMPLOYMENT LAW - RESTRICTIVE COVENANTS 8
AUTO INSURANCE - UNINSURED MOTORIST BENEFITS 8
AUTO INSURANCE - UNINSURED MOTORIST BENEFITS - ANTI - STACKING 8
AUTO INSURANCE - PIP BENEFITS - STOLEN CARS 9
AUTO INSURANCE - PERMISSIVE USE 9
AUTO INSURANCE - RENTAL COMPANIES 9
MEDICAL MALPRACTICE - INFORMED CONSENT 9
MEDICAL MALPRACTICE - PEER REVIEW REPORTS 10
ENVIRONMENTAL LAW 10
WORKERS COMPENSATION - RECREATIONAL AND SOCIAL ACTIVITIES 10
FIRM NOTES 10
TRIAL NOTES 11

3 ETHEL ROAD, SUITE 300 ! P.O. BOX 3012 ! EDISON, NEW JERSEY 08818 ! (732)248-4200 ! FAX (732)248-2355
450 SEVENTH AVENUE ! SUITE 1400 ! NEW YORK, NEW YORK 10123 ! (212) 947-1999 ! FAX (212) 947-3332

Jenkins' statements regarding his coverage status and coverage needs. In the absence of a prior course of dealing or a specific request for assistance in ascertaining his insurance status, the Court ruled, Dr. Jenkins did not trigger any duty on the part of C&R to ensure that he paid his premium to the prior carrier, to monitor the status of the prior policy or to seek gap-filling coverage upon Dr. Jenkins' decision to skip a premium payment.

With respect to the coverage claim against Zurich American, a divided Supreme Court held that an ambiguity in the declaration sheets which Dr. Jenkins received three months after his acts of malpractice required a trial to determine his reasonable expectations. Thus the Court remanded the case for a trial.

The President Court's ruling on the coverage issue arguably changes the landscape of coverage litigation in New Jersey. Typically the finding of an ambiguity which could reasonably support an expectation of coverage will trigger a finding of coverage without regard to the actual expectations of the insured. President suggests that the existence of an ambiguity and the reasonable expectations of the insured are now separate and distinct inquiries, requiring judicial determination of whether an ambiguity exists and, if so, a subsequent trial on the reasonable expectations of the insured.

Additionally, by permitting focus on the reasonable expectations of this insured rather than the objective reasonable expectations of any policyholder the Court has arguably created a test that hinges on a more subjective "totality of the circumstances" approach than on the policy language alone. While juries are typically biased in favor of coverage, compelling facts such as those present in the President case could be sufficient to avoid coverage even in the presence of an ambiguous policy term.

Finally, the chronology of events involved in President suggests that the reasonable expectations sufficient to require coverage need not exist at the time of the occurrence; they may develop at a later date upon receipt of the policy. In this case Dr. Jenkins committed acts of alleged malpractice in January and did not receive his policy until April. It was his stated confusion over the terms of the policy that led the majority to order a trial on his reasonable expectations. Thus although Dr. Jenkins by his own admission had no expectation of coverage when he committed malpractice he will now be permitted to pursue coverage based on expectations alleged to have arisen three months later.

The President decision raises more questions than it answers. While the decision is adverse to Zurich American it could ultimately benefit the insurance industry by requiring coverage trials rather than automatic findings of coverage whenever an ambiguity is found. The decision could also benefit insureds by permitting coverage to ensue based on expectations that developed after the occurrence for which insurance is sought.

COMPARATIVE NEGLIGENCE - "ULTIMATE OUTCOME" CHARGE

Brodsky v. Grinnell Haulers, a Supreme Court decision published in August, promises to have a profound impact on the trial of cases involving comparative negligence – especially those in which one culpable defendant may have considerably deeper pockets than another.

In Brodsky an automobile passenger, individually and on behalf of the estate of her husband and children, filed suit against both a truck driver and an uninsured and insolvent driver involved in the accident that left her with substantial injuries and her husband dead. The uninsured driver filed for bankruptcy and the trial court dismissed him from the action as a non-party. At trial the judge sustained an objection to opening comments by plaintiff's counsel suggesting that the uninsured driver was "maybe a small fraction, 5 percent, 8 percent, maybe 10 percent" liable.

However, the trial court did give the jury an "ultimate outcome" charge advising that under New Jersey's Comparative Negligence Law, an allocation of 60% or more to one defendant would render that defendant 100% responsible for all damages if the other defendant were unable to pay its share. Not surprisingly, the jury returned a verdict of 60% negligence against the trucking company.

Affirming in part and reversing in part the Appellate Division's reversal, the Supreme Court agreed that the trial judge erred in educating the jury as to the "ultimate outcome" of a 60% allocation of fault. Such an instruction, the Court held, sends an obvious message which threatens to yield "result-oriented," "intellectually dishonest" results.

The Court upheld the practice of apportioning fault to a non-party who was discharged in bankruptcy and expressly permitted counsel to suggest an appropriate allocation of fault. As to the judge, however, he would be precluded on remand from advising the jury of the ultimate outcome of an assessment of 60% or more negligence against a particular defendant. On balance this case represents a significant victory for defendants.

PROTECTIVE ORDERS - ACCESS TO UNFILED DISCOVERY

In Estate of Frankl v.Goodyear the New Jersey Supreme Court confronted an effort by a public interest group, Consumers for Auto Reliability and Safety, to intervene in a wrongful death case to obtain internal Goodyear documents relating to allegations of a tread separation problem with one of its tires. The safety organization alleged that this tread problem caused a series of accidents across the county, requiring disclosure of the internal memoranda for purposes of public safety.

Although the case settled while CARS' motion was pending, the demand for access ultimately reached the Supreme Court. A unanimous Supreme Court recognized a "universal understanding" in the legal community that unfiled documents are not subject to public access. While some legal scholars have suggested that this notion be revisited, the Court held that neither the New Jersey court rules nor the common law supported the third party organization's application to compel the production of unfiled discovery. The Court referred the issue to the Civil Practice Committee to address whether, going forward, the protection of unfiled discovery should continue.

WORKERS COMPENSATION - MEDICAL PROVIDERS

In University of Massachusetts Memorial Medical Center v. Christodoulou Mario Christodoulou was injured in a catastrophic accident and died two months later. Prior to his death the University of Massachusetts Group Practice rendered medical services at a cost exceeding $700,000.

Because Mr. Christodoulou was driving a vehicle owned by his employer at the time of the accident his father filed a workers compensation petition on behalf of his son's estate. The parties entered into a "section 20" settlement based on the father's acknowledgment that he would have difficulty proving that the accident occurred while his son was acting in the course of his employment. The compensation claim settled for a $50,000 lump sum payment. On the record and in the presence of the employer's attorney, Mr. Christodoulou's attorney assured his client that the employer's insurance carrier would "protect" him in the event of a lawsuit by a doctor or hospital seeking payment of medical bills.

Thereafter, however, AIG, the employer's insurer, refused to honor the hospital's large bill, claiming that it had agreed to hold the father harmless but not the son's estate. The Supreme Court reversed dismissal of the hospital's collection action against the decedent's estate, ruling that the medical provider could not be bound by the terms of a settlement agreement to which it was not a party.

PRODUCT LIABILITY - OSHA PREEMPTION

In Gonzales v. Ideal Tile Importing Company the Appellate Division upheld dismissal of a product liability claim relating to components used in the manufacture of a forklift that injured the plaintiff. Because the safety standard suggested by the plaintiff conflicted directly with federal regulations adopted by OSHA, ruled the Appellate Division, and because the OSHA regulations do not merely set a mandatory minimum for forklift safety devices but "pre-empt the field" of safety regulation, the plaintiff's product liability claim against the components manufacture was properly dismissed.

TORTS - DEFAMATION

In DeAngelias v. Hill the Supreme Court confronted a defamation case filed by a police officer against a disgruntled citizen who accused the officer of perjuring himself in municipal court when testifying regarding a summons issued for unlawful overnight parking. Because the disgruntled citizen actually possessed a recording of the officer making statements he later denied having made, the Supreme Court ruled that the officer failed as a matter of law to demonstrate the actual malice necessary to sustain a defamation claim prosecuted by a public figure.

TORTS - PREMISES LIABILITY

In Scully v. Fitzgerald the defendant, a commercial landlord, stored construction materials in an area adjacent to a storefront it rented to the plaintiff, who operated a travel agency. Attached to the back of the structure was a two story building that housed two apartments. The second floor apartment had an adjacent deck where guests of one of the tenants frequently discarded cigarettes that threatened to ignite flammable materials. On one of these occasions a discarded cigarette did in fact ignite a fire that destroyed the building, and with it, plaintiff's business property. The New Jersey Supreme Court upheld the Appellate Division in reinstating a verdict for the plaintiff, finding that in these circumstances the commercial landlord owed his commercial tenant a common law duty to maintain the storage area in a condition safe from the dangers created by the landlord's residential tenants.

Addressing commercial sidewalk liability - - and arguably extending its scope - - the Appellate Division in Bedell v. St. Joseph's Carpenter's Society held that where a grassy strip between the curb and sidewalk is uninterrupted, runs the length of the street parallel to the sidewalk and must be crossed by a pedestrian crossing the street in order to reach the sidewalk, the grassy strip will be considered an extension of the sidewalk for purposes of commercial sidewalk liability. Accordingly, the plaintiff may pursue negligence relating to an alleged defect in the grassy strip.

TORTS - PARENTAL IMMUNITY

A divided New Jersey Supreme Court upheld the Appellate Division's ruling in Buono v. Scalia, ruling that where defendant's five year-old son accidentally rode his bicycle into the plaintiff's sixteen month-old daughter the parents were immune from suit due to the absence of evidence to suggest that they acted willfully, wantonly or recklessly.

TORTS - SPORTING EVENTS

Baseball fans are well aware of the potential dangers of a foul ball. In Maisonade v. The Newark Bears a unanimous panel of the Appellate Division rendered foul balls potentially actionable. In this case the plaintiff was struck by a foul ball while waiting at a concession stand. The appellate panel ruled that in these circumstances imposition of a duty to protect spectators was reasonable, particularly because the conditions in question were the result of a temporary arrangement while the permanent concession stands were built. The case was remanded to the trial court for a determination of whether either or both of the defendants breached this duty.

TORT CLAIMS ACT - INTENTIONAL ACTS

Resolving a split among appellate panels, the Supreme Court in Velez v. City of Jersey City ruled that a plaintiff must give a public entity written notice prior to filing a common law intentional tort action against a public employee. However, because the law was previously unclear on the necessity of a tort notice in the context of an intentional tort claim, the Supreme Court held, the ruling would be given prospective effect, permitting this plaintiff to proceed with her claim.

TORT CLAIMS ACT - INJURY OFF PUBLIC LAND

In Smith v. Fireworks by Girone a divided New Jersey Supreme Court upheld a seven figure verdict in favor of a plaintiff injured by fireworks debris a month after the plaintiff removed it from public property following a fire works display. On the evening of the display the fireworks vendor's employees and the township fire marshal conducted a search which resulted in the recovery of at least six potentially live fireworks. The fire marshal searched the following day and found no unexploded shells. The fireworks discovered by the infant plaintiff apparently escaped their search.

About a month later the plaintiff and a friend took the fireworks to a wooded area, treated it with gasoline and cut away at the cardboard which encased the actual charge. The firework exploded in the child's left hand.

At trial a jury concluded that the unexploded firework created a dangerous condition in the park, the dangerous condition proximately caused the accident and posed a foreseeable risk of injury. Applying the Tort Claims Act, the jury further found that the township's action or inaction was "palpably unreasonable," justifying a gross verdict of 1.6 million dollars. The New Jersey Supreme Court ultimately upheld the verdict, ruling that when a public entity creates of suffers a dangerous condition on public property that leads "ineluctably and foreseeably" to injury it will not be insulated from liability under the requirement of N.J.S.A. 59:4-2 that liability arising from public property requires that the public property be in a "dangerous condition at the time of the injury." As noted by the two-judge dissent, the majority's decision essentially removed the TCA's requirement of a close temporal relationship between the creation of the danger and the occurrence of the injury.

TORT CLAIMS ACT - UNIMPROVED LAND AND DISCRETIONARY IMMUNITIES

The Supreme Court has affirmed the Appellate Division's controversial ruling in Aversano v. Palisades Interstate Parkway Commission. The case arose out of the death of Andrew Aversano, who fell from a cliff at Palisades Interstate Park. Assuming that he "could not have survived the fall," the police undertook a "recovery" operation rather than a rescue operation. The difference in response time arguably contributed to Mr. Aversano's death, since he was still breathing when the police found him three hours later.

The Supreme Court affirmed the Appellate Division's reversal of summary judgment, ruling that the unimproved property immunities available under the Tort Claims Act, while applicable to any claims relating to the condition of the cliff, would not apply to immunize the park police from liability for their negligence in assuming Mr. Aversano's immediate death. However, the high court remanded the case to the trial court for a determination as to whether the police might be immunized by the TCA's immunity for discretionary acts of public officials.

LIABILITY INSURANCE - INTENTIONAL ACTS EXCLUSION

In State Farm v. Vincent Connolly, a declaratory judgment action, State Farm sought to avoid defense and indemnification of a putative insured who pleaded guilty to third degree assault and battery. The policy excluded coverage for injuries intended or expected by the insured. In this case, however, the insured denied that he committed the underlying assault and further claimed that he pleaded guilty for unrelated reasons. The Appellate Division held that while the guilty plea would be admissible to impeach his credibility, under he facts presented the insured would not be barred from attempting to rebut or explain the circumstances surrounding his guilty plea.

Priest v. Roncone, also implicating an intentional acts exclusion, involved a conviction of second degree reckless manslaughter in connection with the death of the four year old daughter of the defendant Roncone's ex-girlfriend. The child died of a brain injury while left in the care of Mr. Roncone, whom a criminal jury convicted. The facts adduced at the criminal trial suggested that Roncone pushed her down a flight of stairs.

The Appellate Division reversed the trial court's ruling that Selective, Roncone's liability insurer, defend and indemnify him for the survivorship claims of the infant's estate. Because the child was left "in the care of" Roncone, the Appellate Division concluded, she qualified as an insured within the meaning of the policy, thereby disqualifying Roncone from a defense to her survivorship claims. As to the wrongful death claim filed by her mother and biological father, however, such a claim belongs not to the decedent but to the decedent's heirs, removing the claimant from the definition of "insured" and entitling Roncone to a defense.

Finally, because the criminal verdict did not provide a basis to presume that Roncone intended or expected the child's death, the Appellate Division remanded the case to the trial court for further discovery and factfinding as to the applicability of the intentional acts exclusion.

NEW YORK UPDATE – COURT OF APPEALS RULES IN FAVOR OF LIABILITY COVERAGE FOR EMPLOYER IN SUIT FOR INTENTIONAL SEXUAL ASSAULT BY EMPLOYEE

In RJC Realty Holding Corp v. Republic Franklin Insurance Co. the Court of Appeals held that it is an accident, and the employer is entitled to coverage despite the intentional acts exclusion, when an employee commits an intentional act, even if it is a sexual assault. In this case the employee was a masseuse who allegedly exceeded

his professional boundaries. The employer was sued for negligent hiring and supervision. The Appellate Division, following several other appellate precedents, ruled that because this was an intentional sexual assault it fell within the policy's "expected or intended" language.

The Court of Appeals held that the issue must be viewed from the standpoint of the insured seeking coverage. Here, from the employer's standpoint, this was an unexpected act outside the employee's scope of employment and therefore covered. The Court relied on the "vicarious liability" doctrine. Since this was not an act for which respondeat superior liability would apply there would be coverage for the employer.

On the positive side, based on the Court's analysis, while the carrier lost on the coverage issue it was placed in a stronger position on the underlying case since the employer should not be found vicariously liable and the plaintiff will have to prove actual negligent hiring and supervision by the employer. This should be difficult in the absence of proof that the employer knew or should have known of a propensity to sexually assault clients.

The holding in RJC Realty teaches that in such a case the carrier must disclaim as to the employee, disclaim as to any allegation of vicarious liability and only accept coverage for acts of independent negligence by the employer.

CIVIL RIGHTS - CONSTRUCTIVE DISCHARGE - SEXUAL HARASSMENT

The United States Supreme Court ruled in Pennsylvania State Police v. Suders, a title VII case, that an employer may assert the "Ellerth/Faragher" affirmative defense of no tangible employment action unless the plaintiff can prove that she quit in reasonable response to an adverse action officially changing her employment status or situation. Unlike New Jersey's liberal Law Against Discrimination, Title VII does not contemplate a hostile environment as an adverse employment action, though the Suders court held that a "humiliating demotion," "extreme cut in pay or transfer to a position in which she would face unbearable working conditions" could satisfy this requirement.

Nevertheless, the Court reiterated that a plaintiff invoking Title VII may pursue a constructive discharge claim in the absence of a tangible employment action if the defense is unable to demonstrate that the plaintiff/employee unreasonably failed to avail herself of effective grievance procedures. This is the essence of the Ellerth/Faragher defense.

Unlike an actual termination, reasoned the Court, constructive discharge may or may not involve official action. When it does not, the extent to which the agency relationship aided the supervisor's misconduct is less certain, thus permitting the employer to establish through the Ellerth/Faragher affirmative defense that it should not be held vicariously liable.

CIVIL RIGHTS - LAW AGAINST DISCRIMINATION

In Ptaszynski v. Uwaneme the Appellate Division ruled that a municipal police department - - specifically, the building and its officers - - constitute a "place of public accommodation" within the meaning of the New Jersey Law Against Discrimination. Thus in this case, where defendant alleged that the officers who responded to a domestic violence call denied him equal treatment because of his race, dismissal of his LAD claims was reversed. While some of the officers' allegedly discriminatory conduct occurred outside the police building, the appellate panel construed broadly the definition of a "place of public accommodation" to find the LAD applicable.

In another decision arguably expanding the reach of the LAD, a divided Supreme Court upheld the Appellate Division's ruling in Tarr v. Ciasulli that mere embarrassment is sufficient to sustain a cause of action under the LAD so long as all other prima facie elements are met. The trial court dismissed plaintiff's gender discrimination case because she presented no evidence of extreme emotional distress. The Appellate Division reversed and the Supreme Court agreed that under the remedial aims of the LAD a plaintiff's damages need not rise to the level of pain and suffering necessary to sustain a tort action for intentional infliction of emotional distress.

EMPLOYMENT LAW - RESTRICTIVE COVENANTS

The Supreme Court has reversed the appellate decision in Maw v. Advanced Clinical Communications, holding that the plaintiff's private dispute with her employer over the terms of a "do not compete" provision did not implicate violation of a clear mandate of public policy as contemplated by the Conscientious Employee Protection Act (CEPA). If plaintiff could not negotiate terms of employment to her satisfaction, the Court held, she would be free to dispute the reasonableness of the terms foisted upon her if and when her employer attempted to enforce the agreement. Until then, however, no claim would lie under CEPA for this private dispute. Justice Zazzali, a well known labor lawyer prior to his tenure began on the Supreme Court, dissented, expressing the view that the majority disregarded the clear mandate of public policy which disfavors restrictions on the pursuit of an employee's livelihood.

AUTO INSURANCE - UNINSURED MOTORIST BENEFITS

The New Jersey Supreme Court reversed Judge Pressler's ruling in Caviglia v. Royal Tours of America, ruling that because a motorist does not have a fundamental right to operate a car without liability insurance, the public policy of deterring the operation of uninsured vehicles establishes the constitutionality of N.J.S.A. 39:6A-4.5. Thus the statute is constitutional and culpably uninsured plaintiffs are precluded as a matter of law from suing tortfeasors for non economic damages such as pain and suffering.

AUTO INSURANCE - UNINSURED MOTORIST BENEFITS - ANTI-STACKING

The Supreme Court wrangled with a complicated coverage analysis in Selective Insurance Company v. Thomas, where the injured husband and wife were both named insureds under the same multiple policies. The Court held that because both of them paid premiums to two different carriers and the available liability coverage was exhausted by other claims, the anti-stacking statute should not limit them to collectively recovering only the highest single limit of all applicable policies. The Court ruled that nothing in the UM statute or the policy language suggests that a husband and wife be "lumped together" as a single insured for recovery determination purposes. Each is therefore entitled to the combined single limit in the Selective policy.

The Appellate Division ruled in Price v. New Jersey Manufacturers that although an insurer has a contractual right to investigate a claim for UM benefits, when that investigation turns into a "three year odyssey and shows all the signs of a duly accepted claim" the insurer must put the insured on direct and clear notice that the investigation will not toll the running of the statue of limitations. Absence of such notice, a divided appellate panel ruled, equity demands the tolling of the six year limitations period.

AUTO INSURANCE - PIP BENEFITS - STOLEN CARS

In Labas v. Equivel-Molina the plaintiff was injured in an accident while he was permissibly driving his father's car. Although he had chosen the verbal threshold on this own policy, his car had been stolen and he had transferred title to his insurer before the accident. Thus, the Appellate Division concluded, he did own a vehicle and would not be subject to his prior threshold choice. His father's designation of the verbal threshold would also be inapplicable because he did not reside with his father at the time of the accident.

AUTO INSURANCE - PERMISSIVE USE

In French v. Hernandez the plaintiff, an employee injured while operating his employer's vehicle during nonbusiness hours on personal business, admitted that he did not have his employer's express permission to operate the vehicle at that time. However, the parties' relationship and course of prior dealings demonstrated the existence of implied permission to use the vehicle. This holding was clearly a stretch, as the employer had previously restricted Hernandez's use of the truck to private property and under the employer's personal supervision. The employee had never been allowed to drive the truck on public roads and he was not allowed to use it for personal errands. Nevertheless, the Appellate Division held that Hernandez had implied permission to use the car and that such use therefore did not constitute "theft or the like."

The French decision arguably expands the scope of implied permission under New Jersey auto insurance law. We suspect that the insurer will petition for certification by the Supreme Court.

AUTO INSURANCE - RENTAL COMPANIES

A divided appellate panel has arguably altered New Jersey auto liability insurance law with respect to self-insured rental car companies. In Robinson v. Coia Judges Weissbard and Carchman held that as a self-insurer, Avis was required to provide primary coverage despite a provision in its contract that attempted to make its coverage secondary to that of the lessee's own insurer. The judges found a violation of public policy. Judge Wecker dissented, contending that as a self-insured car rental company Avis owes its rental customers only the minimum mandatory liability coverage required of all New Jersey auto insurance policies. Operation of the "other insurance" clause of the rental agreement would not deprive the lessee or the public of this mandatory minimum coverage, as the Avis coverage would fill the gap if coverage with the lessee's carrier were to become unavailable.

While the holding of primacy is arguably not significant in terms of indemnity dollars (the rental company coverage would likely not exceed $15,000 per accident), the longstanding rule of policy construction placing the duty to defend on primary carriers means significant defense costs previously unexpected from the perspective of rental companies. The split decision entitles Avis to appeal as of right to the Supreme Court, a right we suspect it will exercise in view of the potential exposure to auto rental companies. We will keep you posted.

MEDICAL MALPRACTICE - - INFORMED CONSENT

In Linquito v. Siegel the defendant urologist missed a diagnosis of bladder cancer and the defendant ultimately died. At trial the jury found that the doctor did not deviate from any applicable standard of care when he failed to diagnosis the recurrence of decedent's bladder cancer. However, the jury found that the doctor failed to inform the decedent of all information that a reasonable person would expect a doctor to disclose, thereby depriving him of his ability to make an informed decision about whether to pursue additional diagnostic testing or courses of treatment.

The Appellate Division reversed judgment for the plaintiff, holding that the informed consent doctrine does not apply to a situation of nondiagnosis. Rather, the doctrine applies only when a doctor diagnoses a condition and arguably fails to provide sufficient information regarding available courses of treatment.

MEDICAL MALPRACTICE - PEER REVIEW REPORTS

In Christy v. Salem, a medical malpractice action relating plaintiff's complete paralysis to negligent removal of an extubation tube, the Appellate Division balanced the plaintiff's need for information with the defendant hospital's right to maintain the confidentiality of its peer review committee opinions. The Court held that the portion of the report which was "concededly purely factual" is discoverable. However the plaintiff is not entitled to discovery of the balance of information in the report, which consists of opinions, analysis and findings of fact, as disclosure of such text might discourage peer review committees from making honest assessments in the future.

ENVIRONMENTAL LAW

In Benjamin Moore v. Aetna Causality, a divided Supreme Court held that in a "long-tail" environmental exposure case an insured must satisfy the full deductible for each triggered policy before it is entitled to indemnity from the insurer. Application of the Owens-Illinois continuous trigger theory will not abrogate the deductibles for which the insured bargained in exchange for a lower premium. The Court had previously held, in Owens-Illinois and its progeny, that in an environmental situation each policy on the risk from the time the contamination or injury commenced until it became manifest was triggered. It has now held that the deductible for each of the triggered policies must be applied and satisfied before the coverage is reached. In effect, the deductible is treated as if it is an underlying policy in a Carter-Wallace allocation. This decision may also apply to reinsurers, requiring that the retained limit for each triggered year be exhausted before the reinsurance is reached.

WORKERS COMPENSATION - RECREATIONAL AND SOCIAL ACTIVITIES

In Lozano v. Frank DeLuca Construction the plaintiff, a mason, sustained injuries while driving a go-cart while he was waiting for his employer to drive him home. The Supreme Court reversed and remanded the Appellate Division's denial of workers compensation benefits, instructing the Division of Workers Compensation to determine whether he engaged in the go-carting activity based on an objectively reasonable belief that his participation was required. The Court ruled that when an employer compels an employee's participation in a recreational or social activity the activity will be considered work-related as a matter of law. To receive workers compensation coverage under a "theory of compulsion" in the absence of direct proof the injured employee must establish an objectively reasonable belief that his participation was required.

FIRM NOTES

In the coming months **Marc Dembling** will present two seminars to members of the claims industry. In September he will speak to the National Business Institute regarding "Handling the Automobile Injury Claim in New Jersey". In January Marc will moderate a seminar at the American Bar Association mid-Winter Meeting addressing insurance coverage for construction projects.

Methfessel & Werbel is pleased to welcome four new associates who will support our property and liability groups.

Miichael Eatroff received his B.A. from Rutgers University and his J.D. from Seton Hall Law School. A former clerk to the Middlesex County Assignment Judge, Michael has over seventeen years experience in the handling first party insurance, liability defense and coverage matters as well as general/commercial litigation. He joined Methfessel & Werbel's property team in May of 2004.

Daniel T. Towell received his B.S. from Georgetown University and his J.D. from Fordham University Law School. He is a member of both the New Jersey and New York bars. After clerking for Judge Anzaldi in Union County Dan acquired seven years of experience in handling first party insurance, liability defense and coverage matters. He joined the property team in May of 2004.

Marc D. Mory, a graduate of Brandeis University and Hofstra Law School, served as Managing Editor of Hofstra's Labor and Employment Law Journal. Marc joins M & W's North Jersey liability team after three years practicing general civil litigation at a large firm.

Neil Greenstein obtained his B.A. and J.D. degrees from Hofstra University. He was admitted to the New York and New Jersey Bars in 1999.

Neil has five years experience in litigation of complex commercial matters. He is a welcome addition to M&W's New York litigation team.

TRIAL NOTES

Ed Thornton obtained a no cause verdict in a lead poisoning case in Essex County. The infant plaintiff alleged that at two years of age she was poisoned after eating paint chips in an apartment rented from the defendant. The infant's blood lead level was 31, a moderately high level, and testing by plaintiff's psychologist showed the child had a delay and deficit in language and communication. Negligence was denied.

The testimony showed that the rented apartment was painted before plaintiff's mother began her tenancy. Tests conducted by the Lead Poison Prevention Program, Newark Department of Health, showed 27 areas of violation, primarily on door jambs, window sills, and window wells. Although the mother testified she never saw the child eat paint chips, she did see the child with her mouth on the window sills, and the Newark Inspector's report showed many areas of chipping and flaking paint.

The plaintiff's claim included a request for treble damages under federal law, as the defendant acknowledged not providing an information packet concerning lead paint or lead poisoning at the time the apartment was let.

The defendant denied negligence and denied proximate cause of any alleged injury. Defendant's examining pediatric neurologist opined that the child suffered no residua from the lead burden. Following the plaintiff's rejection of a $40,000 settlement offer Ed convinced the jury that his client was not negligent.

Don Crowley obtained a no cause verdict in a premises liability case tried in federal court. In

Cox v. Deauville Inn the 75 year-old plaintiff was a patron at defendants' restaurant and exited via the front stairway. As she descended she lost her balance, allegedly reached for the handrail but missed because of its low height and extra width.

Fortunately for the defendants, a surveillance camera filmed the entire accident and demonstrated that she did have her hand on the handrail. It appeared that her husband, who was walking ahead of her and holding her hand or arm, may have inadvertently pulled her down the steps.

The defense argued that the construction of the stairway and handrail in 1986-1987 met the existing BOCA Code at the time and there had been no accidents or complaints in the intervening 16 years.

Plaintiffs' argument was that although the restaurant may have complied with the BOCA Code in existence, it was aware of the fact that the stairway did not meet the 1995-1996 Building Code which required a graspable handrail. They further argued that compliance with a standard is not necessarily conclusive on the issue of negligence and does not absolve a business from exercising reasonable care under all the circumstances notwithstanding compliance with the Code.

Plaintiff sustained a fractured pelvis and pubic rami in two places. She was out of work for more than six months. Plaintiffs' demand was $185,000.00 from the beginning of the case to the end and the company offered $5,000.00 for trial costs. After one hour of deliberation the jury returned a verdict of no negligence on the part of the Deauville Inn.

Don also successfully tried a water damage case in which the plaintiffs alleged $800,000 in damages as a result of a burst pipe. The plaintiffs' home was heated by two case fired furnaces installed by our client, the heating subcontractor. While plaintiffs were out of the country for a period of weeks in January and February, 2000, the water pipes froze and burst, inundating the home with approximately 200,000 gallons of water.

Plaintiffs' liability expert contended that the water damage was caused by the failure of the Goodman furnace located in the basement due to a faulty hot surface ignitor resulting in a no heat condition in the home and subsequent freeze-up of pipes. Plaintiffs claimed the insured and the GC selected an inappropriate furnace and negligently failed to install a valve to stem the flow of water in the event of a burst pipe. After lengthy cross-examination of plaintiff's expert the $800,000 demand dropped to $30,000, with Don's client contributing $7,500 to settle the case.

Ric Gallin obtained summary judgment on a coverage case in Westchester County. Plaintiff was injured on a construction site. The carrier's insured was the general contractor. Initial investigation, as well as the workers compensation application, indicated that plaintiff was the insured's employee as thus coverage would be excluded under the "own employee" exclusion. The insured claimed that the plaintiff was really employed by a subcontractor. The Workers Compensation Board found plaintiff was an employee of the insured. The Court agreed with Ric that the Board finding was binding and held the exclusion was properly asserted.

Ric also recently settled a case venued in the Trial Part in Nassau County. The plaintiff, an insurance appraiser for Chubb in her thirties, was conducting an underwriting appraisal of a Gold Coast mansion which was under renovation when she slipped on a recently re-done floor covered with paper. She severely hurt her neck and ended up requiring a neck fusion. She claimed she could no longer work full time. Ric represented the floor refinisher and took the position that the insured's work was not related to the accident. The case settled for $380,000, with Ric's client contributing only $5,000. The remaining $375,000 was paid by the homeowner and the general contracting firm.

John Knodel no caused a plaintiff who claimed the insured rear ended her while she was stopped at the pick up window of a fast food restaurant.The insured claimed the host driver backed into him. Plaintiff did not sue the host driver, her boyfriend of 16 years. John impleaded him but he obtained summary judgment in a clearly erroneous ruling before trial. Plaintiff alleged an aggravation of a pre-existing cervical disc herniation and TMJ disorder and underwent extensive treatment. Ultimately the plaintiff's decision not to sue the host driver proved fateful, as the jury found the insured not negligent.

John also obtained summary judgment in commercial litigation carrying a $3 million exposure. The plaintiff, a developer, claimed their neighbors, and their neighbors' attorney tortiously interfered with his economic right to develop property he owned by contesting plaintiff's major subdivision application before the municipal planning board, instituting suit, and appealing the trial court's decision in favor of plaintiff. The proceedings took three years, at the end of which plaintiff claimed he was financially ruined and could not develop the property. He alleged $3,000,000.00 in damages. The court agreed with John that the insureds were not vicariously liable for their attorney's actions and that all the defendants were entitled to the immunity of the Noerr-Pennington doctrine, which confers immunity from retaliatory lawsuits against citizens excercising a constitutionally protected right.

Bill Bloom tried a case in Middlesex County in which the plaintiff, a home nurse, was claiming injuries as a result of a fall down the front steps of the insured's home. Specifically, plaintiff claimed that she was climbing the front steps when a decorative post which she was using for support gave way - swinging away from her like a pendulum and ultimately swinging back and striking her - causing her to fall on her back from the landing to the concrete walkway. The insured, who witnessed the incident from the front door, claimed that the plaintiff simply lost her balance and pulled the post off the foundation by hanging on it with all of her weight.

The plaintiff sustained a fractured wrist and aggravation of preexisting, non-symptomatic back condition. The wrist was treated with casting and physical therapy. The back was treated with physical therapy and epidural injections over the course of a year-and-a-half. The plaintiff claimed that as a result of the injuries she was no longer able to accept most of the nursing assignments offered her by her nursing agency; she asserted a wage loss claim in the vicinity of $200,000. She had a worker's compensation lien of $50,000.

In a key strategic move, Bill convinced the plaintiff's attorney to stipulate to a damages amount - $125,000 - and to try the liability issue only. By doing this, Bill was able to remove the issue of damages and thus the sympathy factor from the case and to permit the jury to focus on the disputed liability case. At trial, Bill argued that the insured's version was more believable than the plaintiff's, relying on blow-ups of photos which showed gouges in the limestone landing going in one direction only, which was inconsistent with the plaintiff's account and perfectly consistent with the insured's. Bill then argued that the decorative post simply was not designed nor meant to withstand the plaintiff's weight. The jury agreed and returned a verdict of no cause.

Lori Brown Sternback continued her streak of successful trial results with a Union County trial involving a head-on collision with multiple fractures, a disc herniation requiring surgery and alleged cognitive injuries. Against a pretrial demand of $470,000 and an offer of $275,000 the jury returned a verdict of $125,000.

Frank Keenan successfully vacated default, began a jury trial in Queens and settled an auto liability case during trial. The case involved a rear-end hit in which the plaintiff sustained bulging discs and a disputed wrist fracture. Against a pretrial demand of $25,000 Frank settled the case for $13,500.

Michael Eatroff obtained a rare ruling against PIP coverage from the Appellate Division. In Porter v. First Trenton the plaintiff was struck and killed by a stray bullet while driving. The bullet came from the street and not another car. The Appellate Division, reversing Judge Linares (now a federal judge), agreed with Mike that the car was only the setting of the tragedy. Because the injuries did not not arise out of the use or occupancy of a car PIP coverage was denied.

ALERT ALERT ALERT ! ! !

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.