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CASE UPDATE

Methfessel & Werbel is pleased to present the Winter 2013 edition of Case Update. This issue covers several significant recent developments in relevant law and within the insurance community – most notably, the recent enactment of the "SMART" Act governing the mechanics of Medicare lien reimbursement. As always, we welcome your comments, questions and feedback.

PRESIDENT SIGNS "SMART" ACT INTO LAW

On January 10th, President Obama signed into law HR 1845, which includes the Strengthening Medicare and Repaying Taxpayers ("SMART") Act. The SMART Act, which applies to Non-Group Health Plans (i.e. workers' compensation, no-fault and liability insurance -- including self-insuranceplans), contains several beneficial provisions that should streamline liability settlement negotiations and provide settling parties with greater certainty regarding the finality of their settlements. Although many of the regulatory details remain to be promulgated by the Secretary of Health and Human Services through administrative action, the highlights of the SMART Act are:

LEARNING THE AMOUNT

The SMART Act permits litigants to learn the amount that Medicare claims it should be reimbursed before the parties settle or proceed to judgment. Under the Act, and subject to certain timing provisions and exceptions, most parties in tort actions will be able to use CMS' new conditional payment portal to obtain from CMS a specific statement of the amount to which CMS contends it is entitled. CMS is now required to update the information available through that portal within specified timeframes after it pays what are often ongoing medical expenses. The information posted through the portal must also meet requirements for specificity and reliability.

APPEALS

The SMART Act authorizes CMS to create a mechanism for challenging Medicare's determination of the reimbursement amount. CMS must create regulations defining an appeal process for those from whom CMS can seek recovery. Personal injury advocates and representatives of the liability insurance industry hope that the forthcoming regulations include recognition of the issues of relative fault and causation that are intrinsic to almost all tort cases. Although the process of drafting, vetting, publishing, and eventually adopting valid, enforceable regulations takes considerable time, the SMART Act lets litigants know that in this regard, help is on the way.

FINES FOR NONCOMPLIANCE

The SMART Act also remediates one of the more onerous aspects of the Medicare Secondary Payer Act for insurers. The Act injects a previously non-existent measure of reasonableness and discretion into the determination of whether a liability insurer will be fined $1,000 per day per claimant for noncompliance with the law's complex reporting scheme. The Act also requires the government to solicit proposals for regulations that would exempt insurers from punishment where they had made good faith efforts to identify a beneficiary.

OTHER IMPROVEMENTS

The SMART Act requires that beginning November 15, 2014, the government must annually publish a minimum settlement or judgment dollar threshold below which it will not seek reimbursement. Also, clarifying a prior omission that had troubled courts around the country, the SMART Act sets three years as the time during which the government may file an action for reimbursement.

The SMART Act had been closely followed by insurers and claims practitioners since its introduction in the House in March 2011. Supporters argue that the proposed reforms are necessary to make MSP compliance more practical and equitable, while still protecting Medicare's interests under the MSP statute.

The enactment of the bill will impose critical timelines for CMS. First, 60 days after the law's enactment CMS must solicit comments regarding regulations for Section 111 civil money penalties. No later than September 2013, final regulations will have to be published regarding the new conditional payment process. The next major deadline would be that by November 15, 2013, the Secretary must establish substantive thresholds for both conditional payments and Section 111 reporting. Over time, a plan for an SSN and HICN-free Section 111 reporting process will have to be announced.

The SMART Act will require Medicare to make substantive changes that will materially and substantially affect the exchange of MSP information for years to come. At this point, it remains to be seen how CMS will implement the law through the regulatory process.

UPDATES IN NEW JERSEY CASE LAW

CHARITABLE IMMUNITY/STANDARDS OF REVIEW

The Charitable Immunity Act is clear that organizations or associations organized solely for charitable, religious, educational, or hospital purposes are immune from actions alleging simple negligence (except for hospitals up to $250,000). The Courts have in the past wrangled with the definition of "charitable" organizations. While applying the common meanings to the religious and educational labels, organizations claiming charitable status must be reviewed to determine, for example, funding, charter, daily operations, relationship to other entities, the extent to which operations lessen any burden on the government, and similar questions in support of the burden of persuasion of the affirmative defense of charitable immunity. In deciding the unreported case of Henley v. Collingswood Manor, the Appellate Division sent back to the trial court its decision for summary judgment, requesting further fact finding. The Court noted that the test is whether or not an organization is "essentially supported" through charitable contribution, and the fact that a non-profit corporation receives some government support does not alter its nature as a charity for immunity purposes. Fraternal organizations such as the VFW or Lions Club are not immune because they are not charitable organizations.

MORTGAGEE IN POSSESSION/NEGLIGENCE

The Appellate Division, in an unpublished decision, Rojas v. Rubenstein, has reiterated that a court-ordered rent receiver may be found liable for decisions made in prioritizing repairs, although it takes an expert witness to establish liability. The Court also repeated that a bank which is not a mortgagee in possession does not have the obligations of maintenance or repair of an owner.

Plaintiff Rojas, a tenant in a rundown building in Passaic, fell when a banister broke, severely breaking his leg, resulting in seven surgeries. The Court had previously appointed Peterson as a rent receiver whose duties extended to immediate repairs, but Peterson found that the building needed so many repairs and rent received was so small, that he did not even realize that banister was broken. Although the trial court dismissed the case against Peterson, finding plaintiff's expert to be not qualified, the Appellate Division noted that courts should be liberal in their admission of expert reports, leaving the benefit of cross examination to attack the expert, but did not disturb the trial court's ruling that the bank specifically requested a receiver and did not become a mortgagee in possession,

therefore not assuming any of the obligations of an owner. Further, the rent receiver acted only in his official capacity, consistent with a Court Order, and therefore could not be found personally liable. One of the things that the receiver did, in his official capacity, was procure appropriate forced-placed insurance. The key to liability against Peterson will be the extent to which a jury accepts the expert's testimony regarding Peterson's duties in the face of competing financial demands. Whether Peterson's actions would be considered in the nature of a "real estate manager" was not before the court. Also noteworthy is that the bank carefully crafted an order leading to the bank not being in possession, therefore not having the responsibilities of an owner.

COMMERCIAL TENANTS/COMMON AREAS

In a published opinion, the Appellate Division has provided guidance on the question of whether or not a store in a shopping center or mall has an obligation to repair a common parking area, absent any lease provisions otherwise allocating such duty to the tenant. In deciding Kandrac v. Marrazzo, the Appellate Division held that the store has no such independent duty of care. The opinion implies a continuing duty for the tenant for sidewalks immediately outside the store and other areas under the tenant's immediate control, but for areas not under control or not under a lease obligation to maintain, there is no duty to maintain.

Whether or not there would be a duty to report or warn of any known or reasonably discoverable parking lot defect was not addressed in the case. The opinion makes it plain that with respect to immediate ingress and egress to a store, the store has a duty to a customer, and presumably to a passerby, but does not have a duty with respect to other common areas. Further, the fact that the store may be a mall anchor store did not sway the appellate panel; the size and relative prominence of a commercial tenant in a multi-tenant commercial center has no bearing on its liability for common areas. Significantly, the Court found critical the location of the plaintiff's fall, noting that each case should be decided in a fact-sensitive manner with attention to the precise location of the accident.

APPELLATE RULING REGARDING LANDLORD OBLIGATIONS

The Appellate Division, in an unpublished case, Garber v. Haddon Hills Associates, has followed the suggestion of the Appellate Division panel which in 2011 decided Meier v. D'Ambrose. Meier, a case handled by Methfessel & Werbel, was a case in which we were granted summary judgment at the trial level but reversed by the Appellate Division, the appellate panel stating that traditional common law precepts of non-liability of a landlord in some situations may be anachronistic. Although Meier on its face was limited to a landlord inspecting a furnace, in Garber, the Appellate Division has taken opportunity to extend that issue to the structure of the building itself.

In both cases, the tenant was obligated to give notice to the landlord of any defect. Garber complained that the floor was sagging, and inspection showed termite damage. Nonetheless, since it was a one-family residence, the trial court relied on Patton v. Texas Company and granted summary judgment. The Appellate Division reversed, stating that a more modern view, even when the defect was not concealed, would allow plaintiff to potentially recover. The factors given were the landlord's right of reentry for purposes of making repairs, the nature and potential extent of harm of the risk, that the landlord is in the best position to correct structural defects, and that the defendant would benefit in the long run from proper maintenance of the property. Thus, the lesson to be learned from this holding is that common law protections afforded to landlords are eroding on a case by case basis.

SIDEWALK MAINTENANCE

In an unpublished opinion, Stickel v. Hurd, the Appellate Division has affirmed the common law of sidewalk liability after a snowstorm. Defendant Hurd cleared his driveway after a storm but not his public sidewalk. Plaintiff, a neighbor, was walking her dog and rather than walk on the unshoveled sidewalk, she walked across the front lawn and then on the driveway. She encountered black ice on the cleared driveway, slipped, and was injured.

The Court first noted that the plaintiff was a trespasser on the driveway. As a trespasser she would be owed only a duty to not be willfully injured. Further, black ice, at least as far as sidewalks are concerned, has been defined as a natural condition, not artificial. The New Jersey Supreme Court, in Luchejko v. Hoboken, declared that clearing, melting, and refreezing is a natural condition, not an artificial condition, and thus since there was no duty to warn of natural conditions, the Court held that plaintiff Stickel was not entitled to any warning from the defendants.

INSURANCE/ MADOFF FRAUD

Plaintiffs filed suit in Chaitman v. Chubb Insurance, claiming they were entitled to be made whole for losses arising from Bernard Madoff's investment scam under their homeowner's policy. The trial court granted summary judgment and the Appellate Division affirmed in an unreported opinion. The Appellate Division agreed that the funds provided to Madoff were never converted to securities or accounts and despite plaintiff's contention that the loss was a theft of something other than money (accounts, contents of a bank vault or safety deposit box), the policy terms were not ambiguous and denied the claim.

STATUTE OF LIMITATIONS/AUTOMOBILE/PERSONAL INJURY

Judge Vena, a Superior Court judge sitting in Essex County, ruled in Freundlich v Chowdhury, that in the case of an accident in New York between a defendant living in New York and a plaintiff living in New Jersey and filing suit in New Jersey, the New York statute of limitations of three years would control because the New York-based defendant had a reasonable expectation of the three year limitations period and therefore would not be prejudiced by the New Jersey-based plaintiff getting the benefit of the longer limitations period.

UNINSURED MOTORIST COVERAGE/ARBITRATION/ATTORNEY FEES

In a published opinion, Badiali v. NJM, the Appellate Division held that although NJM's policy entitled it to reject an award over $15,000.00, it was not entitled to reject a UM award of $29,000.00 when it was liable to pay only half. Badiali's attorney further sought counsel fees, alleging bad faith. The Appellate Division held that it was fairly debatable, under the policy, whether NJM was entitled to reject the award or not (previously the Appellate Division, in D'Antonio v. State Farm, held in a similar UIM setting that the carrier was not entitled to appeal), and denied plaintiff's fee application or any other consequential damages. The appellate panel agreed with the panel that decided D'Antonio, and focused on the amount and finality of the arbitration award, not the extent of the carrier's potential liability or the tortfeasor's liability.

MEDICARE REIMBURSEMENT

As you know, Medicare does not issue a "final" conditional payment figure (subject to reimbursement) until requested to do so after a settlement offer has been tentatively accepted by a claimant or after a judgment is entered. This then necessitates, because of potential penalties, that monies be set aside from the settlement in order to satisfy the lien. Since the New Jersey Administrative Code requires settlement monies to be paid within 10 days, there is currently no statutory mechanism for defendants or carriers to safely hold the money aside pending final lien figures from Medicare.

Congress has passed legislation which requires CMS to offer final conditional payment information through a web portal and places time limits for Medicare to provide such information. The Secretary of Health and Human Services is ordered to establish a process to allow citizens to obtain final conditional payment figures prior to a settlement or judgment, but this will only have to be done nine months after the bill is signed. The legislation also allows for discretion of the Secretary of HHS to waive or reduce the $1,000.00 per day per claimant penalty where good faith efforts have not been successful in identifying Medicare beneficiaries.

NEW JERSEY ENVIRONMENTAL CASES

In New Jersey Dept. of Environmental Protection v. Dimant, the New Jersey Supreme Court addressed the parameters of the Spill Act. The State had sued the current operators of a dry cleaner who had only been in business for a short while. They were accused of contributing to contamination of a public water supply. The State made a tactical decision not to initially sue prior operators and its efforts to bring them in as direct defendants at the last minute was rejected by the Courts. The issue, which was decided against the State, is whether they had to prove a nexus between the dry cleaner's actual operations and the contamination or whether it was sufficient just to establish that the drycleaner used the chemicals found in the water supply. The Court held that there had to be a connection

between the contamination caused by the dry cleaner (mere dripping in the vicinity of its property) and the contamination and the State failed to prove the necessary link. The Court also discussed that the contamination had to flow from the sued defendant's operations. However, whether that constitutes a seperate requirement or element of a Spill Act case will be the subject of debate, especially in light of two Appellate Division holdings which came out almost immediately after the Dimant decision.

In a published decision, New Jersey Schools Development Authority v. Marcantuone, the Court addressed the liability of a purchaser of contaminated property for contamination that pre-existed the purchase. The purchase took place in 1985, or before the 1993 amendments of the Spill Act. In 1993 the Spill Act was amended to include an innocent purchaser defense. In order to assert the defense, the purchaser must prove that it undertook a necessary environmental assessment of the property.

In 2001, the Spill Act was amended to include an affirmative defense to those who made appropriate inquiry on the previous ownership and uses of the property based upon generally accepted good and customary standards. In this case, a summary judgment in favor of the purchaser was reversed and the case remanded to determine whether that standard was met. In this decision the White Oak Funding case, relied upon by many to argue that mere passive migration during an ownership period would not lead to Spill Act liability, was deemed superseded by the statutory amendment. In addition, language from Supreme Court cases which held that mere ownership of contaminated land would not lead to liability seems also to have been superseded. Telling is a statement in the decision that: "Although it may seem counterintuitive to infer liability from legislation establishing an affirmative defense, logic dictates that that is the case."

A similar holding was reached in State Farm v. Shea, an unreported decision. There, an unsophisticated buyer bought a small house in a rural community in South Jersey. Following South Jersey practice, there were no lawyers involved and the buyer did not obtain a home inspection. The house had gas heat. There was a pipe sticking up in the backyard. The purchaser had no idea what the pipe was for. It turns out to have been the vent line for an abandonded UST which had leaked. The purcahser was held liable for cleaning up contamination in his neighbor's backyard, contamination which in all likelihood had pre-existed his purchase of the property. The buyer was criticized for not making inquiry about this pipe. While not requiring the purchaser to undergo a full Phase I investigation, the buyer was required to have done some investigation. Exactly what is required of someone buying a house with gas heat in terms of an environmental investigation remains unclear but it seems that not possibly having in way caused the pollution is not a defense to Spill Act liability. Whether this is consistent with the statements in Dimant that there needs to be a nexus between someone's operations and Spill Act liability also remains to be seen but we can expect the Appellate Division to be aggressive in its application of liability against people, who at first blush, would seem to be innocent of actually having caused pollution.

NEW YORK UPDATES

In Dean v. Tower Ins. Co. of New York, the Court of Appeals addressed the issue of whether residency is required in order to obtain first party coverage under a homeowners policy. The issue frequently arises when an insured obtains a homeowners policy for property at which they are not living. In Dean, the insureds had purchased a house and then determined that the house needed extensive repairs because of termite damage. The renovations took over one year and the policy in fact was renewed before the loss occurred. The loss also occurred before the Deans actually took up occupancy of the house. Using the standard homeowner form, the policy only provided coverage for the residence premises and residence was defined as the one family dwelling where the insured resided. The term resided was not otherwise defined. The Court held that there was an issue of fact as to whether this house qualified as a residence premises because of the ambiguity of the word "reside" under these circumstances. Here the insured indicated that they were at the house frequently and had the intent to eventually move in. This case thus creates issues of fact under a homeowners policy as to what is required to qualify as a residence. From the insurance company's position, however, it does retain the viability of this defense. The defense should be more

easily established in situations where the insured is clearly not living at the house, such as where an insured moves out and turns property into solely rental property.

The Court addressed the potential liability of a condominium association under the Labor Law in Guryev v. Tomchinsky. A worker was hurt while renovating a condominium apartment. The condo owner was immune from suit under the exception for the owners of one or two family homes. The plaintiff tried to proceed against the condominium on the grounds that they had some control over the work. As is typical for condos, the owner had to get the Board's approval for the work. However, the Court held that the approval only extended to a general right to make sure the renovations did not affect the builidng as a whole and a specific right to control the work. The Court drew a distinction between condos, where the unit owner has a property interest in their apartment and a co-op, where the unit owner only has shares in the Co-op and gets a lease back for their specific unit.

In Farm Family Cas. Ins. Co. v. Habitat Revival, LLC, the underlying plaintiff was the sole owner of the defendant corporation. He was injured when struck by a truck driven by one of his employees. Farm Family disclaimed coverage under its business auto policy, citing the employee and workers comp exclusions. The Court held these were inapplicable. The underlying plaintiff, although owner of the company, was not deemed an employee of the company within the policy definitions. As the sole owner of the company, he was also not eligible for workers compensation.

The Court of Appeals in Mallory v. Allstate Ins. Co.affirmed that failure to comply with fair claims practices regulations does not deprive a carrier of affirmative defenses or a right to rely on policy exclusions.

Bentoria Holdings, Inc. v. Travelers Indemn. Co. addressed the consequences of settlement due to excavation on an adjoining lot, a frequent occurrence in older areas of New York City which are being redeveloped. Previously, in Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co., the Court had held that the earth movement exclusion did not apply to adjoining excavation because the exclusion in use at the time could be read in different fashions and thus was to be interpreted in favor of the insured. By the time Bentoria Holdings was decided, the exclusion had been amended to address man-made or artificial dirt removal. The Bentoria Holdings Court held that the new exclusion was clear and enforceable and therefore denied coverage.

In VBH Luxury, Inc. v. 940 Madison Associates LLC, the tenant suffered property damage due to an action of its landlord. The landord was an additional insured under the tenants policy. The Court held that the landlord was only an additional insured for injury arising out of the leased premises. Thus while the landord would be entitled to coverage for injury to a third person arising out of the leased premises, it was not entitled to coverage from the tenant's carrier for claims arising out of damage to the tenant's property

RECENT TRIAL RESULTS

Ed Thornton recently tried a case in Burlington, County wherein plaintiff, a 58-year-old homeowner, alleged that as a result of using a product blended by the insured, a chemical mix known as Shingle Care Roof Cleaner used to remove roof mold, he spilled some concentrated product on his foot where it sat for two hours, causing a third degree burn.

The product label identified the product only as an irritant, not a corrosive. The plaintiff identified the insured's product through a homemade experiment wherein, since he used two products on the day of the incident, he was able to recreate a skin burn by putting a dab of product on his forearm and suffering a reaction.

The plaintiff developed an infection at the wound site and ultimately had a skin graft. For the surgery, he had to be taken off his Coumadin, which caused him anxiety. He had no permanent injury, however, beyond the scar.

In response to the plaintiff's product identification, Ed demonstrated in the courtroom, using the same product, that the product could sit safely on human skin for up to one hour without even causing significant redness, let alone a burn. Whlie the jury found that the insured's product did caused the burn, it awarded the plaintiff only

$5,000.00 in damages, with our client being held in for 5%, the formula owner 95%, and thus the verdict being molded to $250.00. Plaintiff's demand was $150,000.00 against an offer of $10,000.00.

Ed Thornton recently was granted summary judgment in Camden County on a matter in which he represented a rescue squad whose volunteer workers allegedly did not properly care for the plaintiff. The insured's volunteer EMTs responded to a call of a distraught and mentally unbalanced man. After the police concluded the man was suicidal, the police instructed the insureds to take the plaintiff to the hospital. When they arrived at the hospital the plaintiff unclipped his restraints, jumped out of the ambulance, and jumped over a small wall. He did not know that on the other side of the small wall there was a 20 foot drop. Plaintiff was seriously hurt but the insured, as an all-volunteer organization, was granted immunity by statute. Over plaintiff's objections, the motion judge agreed with us that the insured's actions did not amount, under any interpretation, to gross negligence or reckless or willful conduct which would have denied summary judgment.

Ed Thornton resolved a matter in Gloucester County wherein plaintiff, a garbage collection man, was sprayed with sulfuric acid when throwing garbage into the truck at the insured's stop. The insured disputed that they had placed the acid, but plaintiff claimed that it was either thrown out by the insured or, since the insured had their garbage out for three days, the insured gave opportunity for any passerby to dispose into their garbage. The plaintiff presented a $1.8 million compensation lien, had undergone 37 surgical procedures, with several more on the short horizon, and when presented to the burn center, was put into a drug-induced coma for 45 days. The case settled for $2.6 million dollars.

Ric Gallin argued on January 3, 2013 before the New Jersey Supreme Court in the case of Farmers Mutual of Salem v. PLIGA. The issue is who ultimately bears the risk of insurer insolvency in long tail claims: the solvent insurers, the insured or PLIGA. Historically it had been PLIGA. In 2004 the Legislature inserted a new definition of the word "exhaust" into the PLIGA statute to require the insured to exhaust all solvent policy limits for all potential years of coverage, if applicable, before turning to PLIGA. PLIGA thus claims that even if a solvent carrier is on the risk for one day, its full policy limit has to be exhausted for an environmental clean up before PLIGA comes into play and the insured has no exposure. The Supreme Court, on multiple prior occasions, has said that it is the insured, not the solvent carriers, which bear the risk of insolvency. The Appellate Division had held otherwise, making the solvent carriers the guarantor of the insolvent carriers.

During oral argument the meaning of the phrase "if applicable" was debated, with Ric arguing that the under the New Jersey Owens-Illinois scheme the policies for the solvent years were not applicable to cover the insolvent years and to hold otherwise would mean an undermining of the entire Owens-Illinois structure. Based on the questioning, at least some of the justices hinted that they are not concerned with preserving Owens-Illinois in its present form and that the Legislature has a right to change the Owens-Illinois scheme. Ric countered that if the Legislature meant to change Owens-Illinois they would have said so in the legislative history but the history is silent on this point. Some justices also suggested that the insurance industry should go back to the Legislature to change the PLIGA statute back the way it was and/or simply raise premiums to account for the additional risk of another insurer's insolvency.

We suspect that the Supreme Court will not want the insured to ultimately bear the cost of insolvency despite their prior pronouncements to the contrary and may revise aspects of the Owens-Illinois approach to cost allocation. How this is resolved remains to be seen but the previously settled world of how long term occurrences are allocated among carriers may be significantly disrupted, which in turn may require an aggressive response by the industry.

Eric Harrison and his team have spent several years defending the Dumont Board of Education against a putative class action lawsuit filed by White and Case, a large New York firm with a pro bono department which has spent considerable resources seeking to reform the manner in which New Jersey school districts deliver special education and related services. The gist of the lawsuit is a claim that the District's assignment of the lead plaintiff's kindergarten autism class to an elementary school other than his "home school" was discriminatory because it occurred on account of a disability. Acceptance of this novel argument, which admittedly finds superficial support in dicta of Third Circuit opinions, which fundamentally alter how special education is delivered in New Jersey, at

potentially debilitating cost and with highly debatable benefit to the students.

Last summer the U.S. District Court dismissed plaintiffs' claims on the basis that they lacked constitutional standing because they did not experience a cognizable injury as defined by the Individuals with Disabilities in Education Act and they failed to exhaust administrative remedies through pursuit of a due process petition. Thereafter plaintiffs appealed to the Third Circuit, which entertained oral argument in January. We expect a decision at some point in mid-2013.

Meanwhile, after dismissal of the federal Complaint, plaintiffs filed a one-count Complaint in Superior Court seeking relief under the Law Against Discrimination, which the District Court did not have authority to preclude following its standing-based dismissal of the original Complaint. In late December Judge Contillo, on cross-motions for summary judgment, dismissed the Superior Court action based on plaintiffs' failure to demonstrate a cognizable injury under the LAD. The plaintiffs have appealed Judge Contillo's ruling to the Appellate Division.

Marc Dembling recently hosted and moderated "Insurance Law Update 2013," a seminar of the Institute for Continuing Legal Education at which Eric Harrison contributed to the presentation with a discussion of causes of action, defenses and coverage issues relating to claims of sexual misconduct.

Maurice Jefferson was appointed by the Supreme Court of New Jersey to serve as a member of the Ethics Committee, District VIII for a four year term. The Ethics Committee conducts investigations and hearings on ethical grievances filed by clients and other attorneys, and makes recommendations for dismissal or sanctions, up to disbarment, to the Disciplinary Review Board and the Supreme Court. Maurice joined the firm in 2010, and has specialized in first and third party insurance defense litigation and SIU.

Gerry Kaplan was granted a Motion for Summary Judgment in a case involving very serious injuries to plaintiff resulting in cervical disc herniations ultimately requiring surgery consisting of anterior cervical decompression with stabilization and spinal fusion. We represented the owner of commercial building, 311 79th Street Corp., whose tenant was Journey Moving & Storage. Plaintiff was employee of Journey. Plaintiff was injured while removing trash from the building through an overhead door that was propped up by a 2 x 4. Plaintiff alleged that while moving the trash the container hit the 2 x 4 causing the door to come down striking him in the back of the neck.

Gerry argued that the insured was not liable for plaintiff's injuries because under the existing lease plaintiff's employer Journey was solely responsible for all necessary repairs required in the leased premises. Tenant Journey through deposition testimony of its principal Dragin conceded that all repairs were Journey's responsibility and he further testified that the door in question was perfectly fine and never required any repair. The Court ruled that under the terms of the lease as supported by the parties mutual understanding thereof 311 79th St. was not responsible for the door's maintenance. Under the circumstances the Court found it unnecessary to reach the argument of 311 79th St. that the expert's opinion was a net opinion.

Gerry Kaplan obtained a Summary Judgment in representing Forest Realty and property manager. The property manager lived in condominium rent free on the property. There were approximately 260 units in the complex. A fire originated in the dryer in the basement of the unit due to buildup of lint in the dryer vent. The fire began at approximately 11:00 PM on 9/29/10. Plaintiff was Nadine Awad, age 55. She was a neighbor in a nearby unit and became aware of the fire. She changed into her street clothes and went outside where property manager Deborah Shafer was standing in the street.Plaintiff at some point went over to one of the firemen to advise that Deborah Shafer's cat was still in the unit.

Plaintiff then turned to run from the area and fell over the fire hose. Her theory of liability was that the insured was negligent for not properly cleaning the dryer vent and that insured's negligence was the proximate cause of her accident. Plaintiff alleged that she suffered a severe injury to her back. After extensive physical therapy and treatment by a pain management physican she consulted with three Orthopedic Surgeons who indicated that she needs sugery consisting of a lumbar fusion and decompression.

We filed a Motion for Summary Judgment on the theory that there was no forseeability or proximate cause between insured's alleged negligence and the happening of the accident. In opposing our motion plaintiff in her brief cited the case of Avedisian v. Admiral Realty Corp.,63 N.J. Super. 129 (App. Div. 1960). In Avedisian, the plaintiff was forced to evacuate her home in the middle of the night as a result of a fire which occurred in a neighboring property owned by the defendant. The Appellate Division declared that the "forseeability of such forced evacuation of occupants of a neighboring property menaced by fire [was] obvious."

On the oral argument on our motion we distinguished the Avedisian case by stating plaintiff in our case was not forcibly evacuated, nor did her injury occur while she was fleeing the building for safety. To the contrary, plaintiff's injury occurred after she voluntarily left a place of safety to approach the firefighters who were in the process of extinguishing the fire at her neighbor's home. In light of these unusual circumstances the court found in our case the facts were more akin to the case of Jensen v. Schooley's Mountain Inn, Inc., 216 N.J. Super. 79 (App. Div. 1987). In Jensen the plaintiff had been served alcohol by defendant while visably intoxicated. Ater leaving the tavern plaintiff drove to the woods where he climbed a tree and fell into a river to his death. The Court held that the intervening circumstances were so extraordinary and unforseeable that there was no proximate cause beteen the negligent service of alcohol and plaintiff's death.

Similarly in our case the Court found that insured's alleged negligence and plaintiff's resultant injury was too remote to impose liability upon our insured. There was no forseeability or proximate cause and our Motion for summary Judgment was granted.

Gerry Kaplan obtained an additional summary judgment. The building at 369 First Street in Hoboken is a condominium consisting of three residential units and one commercial unit. The condominium association is the entity responsible for maintaining the common elements of the building including the adjacent sidewalks. The association is organized as a non-profit corporation pursuant to Title 15A of the New Jersey Statutes. On March 15, 2010 plaintiff fell on the public sidewalk abutting 369 First Street, Hoboken, N.J.

In the recent case of Luchejko v. City of Hoboken, 414 N.J. Super. 302 (App. Div. 2010) our Appellate Division ruled that condominium associations were to be treated as residential property owners and not commercial property owners. The logic for this interpretation may be traced to Abraham v. Gupta, 281 N.J. Super. 81 (App. Div. 1995) in which the Appellate Division found that in a case involving an accident on the sidewalk in a commercial zone where the property was a vacant lot there could be no liability, the reasoning being that liability is imposed in situations where the enterprise is profitable and has the capacity to generate income. Condominium associations are non-profit and do not have the capacity to generate income. As a result, as a residental property owner, a condominium association has no legal duty to either maintain or make repairs to the public sidewalk.

The instant case was somewhat unusual because one of the units was a commercial cleaning establishment. The court rule that even if the commercial unit owner generated income that in no way benefited the condominium association and the association did not benefit financially in any way. As a result, in finding that the condominium was a residental property owner there could be no liability.

Paul Endler successfully resolved Sarah Hector and Urielle Charles v. City of Linden Police Department. Plaintiffs brought suit against the City and it's officer alleging a violation of their civil rights under the 4th Amendment of the United States Constitution and Sections 1983 and 1985 of the United States Code. The plaintiffs were passengers in a vehicle and a suspect being chased by the police jumped into their car. The police made that suspect get out of the car and a subsequent search of the car revealed a gun on the floor of the car and drugs in the girls purses. All 3 were charged with the gun and drug charges and in criminal court, the judge threw out the charges finding that the Linden Police officer did not have probable cause to ask the suspect to get out of the car. All criminal charges were dismissed against all of the parties.

The girls sued on the basis that since the judge in the criminal action found no probable cause, that the police could not argue that there was probable cause in the civil action. The court here found that it was a jury question as to

whether the officers' actions were reasonable in the initial search and then charging the plaintiffs with the weapons offenses even though there was a question as to who owned the gun.

We successfully had the case against the City and three of the four officers dismissed at the close of all of the evidence. The jury ruled solely on the liability of the officer who made the initial stop and issued the complaints against the plaintiffs. The jury found that the officer did not violate the civil rights of either plaintiff and dismissed the remaining claims.

Michael Poreda won summary judgment in Clark v. Geist. The plaintiff was a West Milford resident involved in the local Republican Party. Our insured was also a West Milford resident involved in the local Democratic Party. The plaintiff appropriated our insured's name to make anonymous postings on web forums that started out mocking his unsuccessful campaign for Town Council, but became increasingly vulgar and personal weeks and months after the election. Our insured complained to the police after the anonymous attacks became particularly vulgar and involved other residents, one of whom had heard the plaintiff admit to be the person using our insured's name to make these posts. The police decided to arrest the plaintiff and charge him with crimes. A municipal judge ultimately dismissed the criminal case because the prosecution could not prove that the plaintiff had actually been the person who made the offensive postings. After acquittal, the plaintiff sued our insured for defamation, false light invasion of privacy, false arrest, malicious prosecution, due process violations, and equal protection violations. Judge DeLuccia of Passaic County dismissed the entire case via summary judgment.

Michael Poreda and Eric Harrison obtained Summary Judgment in U.S. District Court in the matter of Leenstra v. Township of Andover. The plaintiff sent her therapist a suicidal text message. When the officers conducted a welfare check at her house, the plaintiff resisted the officers' efforts to take her for a mental health screening when she presented herself in a clearly agitated state and repeated suicidal ideations. The plaintiff assaulted the police officers in her home and again at the hospital. A warrant was issued for her arrest, but the charges of assault were ultimately dismissed without a stipulation of probable cause. The plaintiff claimed that the police officers had violated her Fourth and Fourteenth Amendment rights and also sought damages for common law false arrest and conspiracy. The court ruled that the officers had qualified immunity from suit and that the plaintiff had failed to show that her arrest was the product of an unlawful municipal policy, custom or practice.

Caitlin Lundquist and Eric Harrison obtained a dismissal for failure to state a claim upon which relief may be granted in U.S. District Court in the matter of Cowan v. Carteret Board of Education. After a heated meeting in the principal's office, the plaintiff, a teacher and union president, proceeded to his wife's classroom and was followed by the principal, who allegedly blocked his entry by positioning herself in front of the door. The plaintiff opened the door and made contact with the principal's person, leading her to file simple assault and disorderly conduct charges against him, which were eventually dismissed. The court ruled that the plaintiff's First and Fifth Amendment claims were time-barred by the statute of limitations, and that his failure to show any significant deprivation of liberty warranted the dismissal of his Fourth Amendment malicious prosecution claim.