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Legal Insights
Issue Management Group

Claims Law Department

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Arbitration

Ninth Circuit Holds Federal Arbitration Act Preempts California Rule That Claims For Public Injunctive Relief Cannot Be Arbitrated

Ferguson v. Corinthian Colleges, Inc.

In *Broughton v. Cigna Healthplans of California*, 21 Cal.4th 1066 (1999), and *Cruz v. Pacificare Health Systems, Inc.*, 30 Cal.4th 303 (2003), the California Supreme Court held that California public policy prohibits arbitration of claims for public injunctive relief brought under the Unfair Competition Law or the Consumers Legal Remedies Act, and that the Federal Arbitration Act (FAA) does not preempt this state public policy. These decisions were called into question by *AT&T Mobility, LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740 (2011), where the United States Supreme Court held that the FAA does preempt state laws (such as bans on class arbitration waivers) that prohibit outright the arbitration of a particular type of claim or that otherwise stand as an obstacle to the FAA's objective to ensure that arbitration agreements are enforced according to their terms.

In *Ferguson v. Corinthian Colleges, Inc.*, __ F.3d __ (No. 11-56965, October 28, 2013), the Ninth Circuit held that the California anti-arbitration rule announced in *Broughton* and *Cruz* does not survive *Concepcion*, and that the state public policy of prohibiting arbitration of public injunctive relief claims is preempted by the FAA.

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Artibtration

California Employment Arbitration Agreements Remain Subject to Unconscionability Analysis

Leos v. Darden Restaurants, Inc.

A 2010 landmark California Supreme Court decision upheld the right of California employers to require employees to sign mandatory arbitration agreements as a condition of employment, as long as the agreements meet certain requirements. In *Armendariz v. Foundation Health Psychcare Services, Inc*., the court set forth the unconscionability standards for assessing whether employment arbitration agreements are unconscionable. That is, to be conscionable, arbitration agreements must be mutual, they must not limit damages, they must be fair, they must provide both sides the ability to conduct adequate discovery, and they must not require employees to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.

Since *Armendariz*, California courts have applied these standards to various arbitration agreements. Some courts have enforced mandatory arbitration agreements, while others have refused, holding such agreements unconscionable. When it comes to arbitration, federal law reflects a policy of favoring arbitration. The United States Supreme Court has stated that courts must place arbitration agreements on an equal footing with other contracts, and must enforce them according to their terms. Given the favorable federal policy towards arbitration agreements, questions arose regarding whether California law under "Armendariz", the Court conflicted with the federal requirement that arbitration agreements be enforced according to their terms.

Following the United States Supreme Court decision in *AT&T Mobility v. Concepcion* in 2011, there was some question as to whether California employment arbitration agreements remained subject to the unconscionability analysis of *Armendariz*.

In *Concepcion*, the U.S. Supreme Court appeared to be critical of California law when it stated that California frequently applies the unconscionability rules to find arbitration agreements unconscionable. Further, the U.S. Supreme Court stated that the Federal Arbitration Act's preemptive effect might extend even to grounds traditionally thought to exist at law or in equity for the revocation of any contract. However, California courts have reasoned that *Concepcion* should be applied narrowly, and have continued to apply *Armendariz*. For instance, in *Samaniego v. Empire Today, LLC*, a 2012 California appellate court decision held that the holding in *Concepcion* does alter the fact that California employment arbitration agreements are still subject to the unconscionability analysis of Armendariz.

California courts continue to construe and explain the *Armendariz* factors such as in the recent June 2013 case of *Leos v. Darden Restaurants, Inc*., where the plaintiff claimed that the arbitration agreement failed to satisfy several of the *Armendariz* factors. The Court of Appeal explained the Armendariz factors and held that although the agreement at issue in the case was procedurally unconscionable, it was not substantively unconscionable, and was therefore enforceable. As Armendariz is still the law, employers should review their arbitration agreements to ensure that they comply with the current state of the law.

Because of the uncertainty and limitations of arbitration provisions in the employment context, some employers are looking at the possibility of using general reference provisions instead. Under a general reference, the matter proceeds much like a bench (non-jury) trial, before a neutral hearing officer (usually a retired judge). There is no right to a jury, but the rules of evidence apply and the judgment is appealable. To date, there is a dearth of case law in California on the enforceability of such provisions, but some attorneys feel that, since they

have some of the protections lacking in arbitration proceedings, the prospects for enforcing them are good.

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Bankruptcy

Second Circuit Imposes Additional Restrictions On Foreign Entities Filing Chapter 15 (International) Bankruptcy Cases

In re Barnet

Chapter 15 of the Bankruptcy Code was enacted to deal with international bankruptcies. It permits "Foreign Representatives" of companies that are in bankruptcy or liquidation proceedings outside of the United States to seek "recognition" of those proceedings in a U.S. bankruptcy court. In the Second Circuit's recent *Barnet* decision, the Court found that certain restrictions contained in Chapter 1 of the Bankruptcy Code apply to foreign entities that seek protection under Chapter 15. Prior to this decision, it was not clear that Bankruptcy Code requirements outside of Chapter 15 were applicable to Chapter 15 cases.

Background on Chapter 15

Chapter 15 was enacted in 2005 to help facilitate the orderly administration of multinational bankruptcy and insolvency cases. It is not solely an American creation. Rather, Chapter 15 implements the United Nations Commission on International Trade Law's *UNCITRAL Model Law on Cross–Border Insolvency*. Nineteen countries have adopted the UNCITRAL Model Law, which has dramatically increased the predictability of the treatment of commercial relationships for multinational companies.

When a foreign company files a Chapter 15 case, it is seeking "recognition" of a foreign insolvency proceeding. Recognition provides valuable protections to the foreign company. If a U.S. Bankruptcy Court recognizes a foreign insolvency case as a "foreign main proceeding," then all U.S.-based litigation and collection activity is stayed by the automatic stay that is generally applicable in bankruptcy cases. 11 U.S.C. § 1520; 11 U.S.C. § 362(a). So, for example, if a U.S. entity were suing a foreign company in a U.S. court, and the foreign company's insolvency proceeding was granted recognition in a Chapter 15 case, the automatic stay would be applicable to the U.S. litigation.

Factual Circumstances of ***Barnet***

Barnet is the "Foreign Representative" that has been charged with liquidating Octaviar Administration Pty Ltd. ("OA"), a company incorporated in Queensland, Australia. During 2008, OA was placed into a type of insolvency proceeding under Australian law that is referred to as "external administration."

In connection with the investigation of OA's affairs, a lawsuit was commenced in Australia by OA liquidators against certain affiliates of Drawbridge Special Opportunities Fund LP, a U.S. entity. The Australian lawsuit seeks AUD$210 million from Drawbridge's affiliates.

On August 13, 2012, the Foreign Representative filed a Chapter 15 case for OA in the United States Bankruptcy Court for the Southern District of New York. In connection with this filing, OA's Foreign Representative indicated that she intended to seek discovery from Drawbridge in the U.S., in furtherance of the Australian suit against Drawbridge's affiliates. Drawbridge opposed the Foreign Representative's Chapter 15 filing, arguing that the Bankruptcy Court should not grant recognition to the OA liquidation in Australia. Among other things, Drawbridge argued that OA was not eligible to file a Chapter 15 case because it lacked any U.S. assets, and it otherwise failed to satisfy the eligibility requirements set out in Chapter 1 of the Bankruptcy Code.

The Bankruptcy Court disagreed and granted recognition to the Australian insolvency proceeding for OA. Drawbridge appealed, principally due to a concern with having to respond to discovery which relates to a wholly foreign litigation matter that was pending in a country where Drawbridge did not directly do any business.

Analysis

Chapter 1 of the Bankruptcy Code, in Section 109(a), provides that “only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor under [the Bankruptcy Code].” For domestic bankruptcy cases without any international element, Chapter 1 of the Bankruptcy Code provides the eligibility requirements for filing bankruptcy. Debtors filing cases under Chapter 7 (liquidation) or Chapter 11 (reorganization) of the Bankruptcy Code must simply comply with the eligibility requirements set out in Chapter 1; there are not separate eligibility requirements in Chapters 7 and 11.

Chapter 15 is somewhat different than the other chapters of the Bankruptcy Code because it has its own set of eligibility requirements. Foreign representatives that are seeking recognition of a foreign insolvency proceeding must meet the requirements of Section 1517 of the Bankruptcy Code. That provision requires that: (1) the foreign proceeding is a “foreign main proceeding or foreign nonmain proceeding,” as defined in Section 1502 of the Code; (2) “the foreign representative applying for recognition is a person or body”; and (3) “the petition meets the requirements of section 1515.” In *Barnet* , the Foreign Representative took the position that these specific Chapter 15 eligibility requirements displaced the Chapter 1, Section 109 requirements.

The Second Circuit rejected the Foreign Representative’s arguments, and found that OA was not eligible to file a Chapter 15 case because it did not meet the eligibility requirements of Chapter 1. Specifically, OA did not have a domicile, a place of business, or property in the United States. The Court disposed with several arguments that called for the Court to examine the context and purpose of Chapter 15. Instead, the Court focused on the plain meaning of the statutory text, and found that the requirements of Chapter 1, Section 109 clearly apply to all cases under the Bankruptcy Code, including cases under Chapter 15. Whether OA met the requirements of Chapter 15 was secondary; the primary issue was that OA simply was not eligible to be a Debtor because it had no domicile, place of business, or property in the United States, as required by Chapter 1 of the Bankruptcy Code. The Court therefore vacated the bankruptcy court’s recognition order, with the anticipated outcome being the dismissal of the Chapter 15 case.

Conclusion

Chapter 15 remains fairly new, with only about 560 distinct Chapter 15 cases having been commenced in the United States during the nine years since Chapter 15 was enacted. Although Chapter 15 was imposed to further normalize international commercial relationships and harmonize treatment of international insolvency situations, those principles will not lead courts to ignore the generally applicable statutory requirements of the Bankruptcy Code, as the *Barnet* case demonstrates. *Barnet* recognizes an important limitation on the ability of foreign liquidators and entities in foreign insolvency proceedings to come to the U.S. and use the Chapter 15 process against U.S.-based entities, and the case serves as an important reminder that there are many issues that remain unresolved in this comparatively new chapter of the Bankruptcy Code.

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Causes of Action

A Brief Overview of Case Law on "Failure to Train" Claims and its Implications for Medical Device Manufacturers

In recent years, causes of action for "failure to train," or allegations predicated on a duty to train, have been on the rise in cases against medical device manufacturers. Historically, however, such claims and allegations have made relatively few appearances in the case law — even fewer in the context of prescription products.

Where claims and allegations have arisen, the case law seems to have congealed into three approaches. The first approach involves cases in which there is a refusal to recognize a duty to train or, conversely, in which a failure-to-train claim is allowed as a mere derivative of a "failure to warn" claim. The second approach involves cases that either allow or disallow such claims as a form of an educational malpractice cause of action.In the third approach, cases specifically involve a medical device that has received premarket approval, or PMA, and there is either recognition or denial that such claims are preempted by the Food, Drug and Cosmetic Act. Each approach is outlined briefly below.

Failure To Train Vs. Failure To Warn

Some courts consider any alleged duty to train as a novel allegation with no basis in law. Probably the most prominent example comes from the Minnesota Supreme Court, and it involves an aircraft, rather than a medical device.

In *Glorvigen v. Cirrus Design Corp*., the plaintiffs brought suit against the manufacturer of a private plane on behalf of the owner/pilot and his passenger, who had died when the plane crashed.[1] The plaintiffs alleged that the plane manufacturer's two-day "transition training" (in which an experienced pilot's previous training and experience are built upon to familiarize him or her with the new plane) failed to train the pilot on precisely the maneuver he would have needed to avoid the crash.

The Minnesota Supreme Court rejected this theory, holding that "[t]he duty to warn has never before required the supplier or manufacturer to provide training, only to provide accurate and thorough instructions on the safe use of the product."[2] "[T]o hold now that [the defendant] must provide training would either create a new common law duty to train or expand the duty to warn to include training … [which] would require an unprecedented expansion of the law."[3]

The alleged duty to train has been rejected in the medical device context as well.[4] In doing so, courts often point out that such a duty is novel and it would impermissibly interfere with the physician–patient relationship:"It is well established that a medical device manufacturer is not responsible for the practice of medicine."[5]

In such cases, the alleged failure to train is often characterized as an inept attempt to expand the duty to warn.[6] Moreover, as the 5th U.S. Circuit Court of Appeals observed, "[i]t is both impractical and unrealistic to expect drug manufacturers to police individual operating rooms to determine which doctors adequately supervise their surgical teams."[7]

Some cases reject liability for failure to train even when that duty to train has been voluntarily assumed. In *Chamian v. Sharplan Lasers Inc.,* the Massachusetts Superior Court provided a good example of the underlying rationale: "The fact that individuals who have received training on medical equipment subsequently misuse the equipment to the detriment of a patient, standing alone, is insufficient to establish a breach of a duty to the injured patient on the part of the entity that provided the training. By providing training, [the defendant] did not become a guarantor of the competence of [those it trained.]"[8]

Other cases allow for the assumption of the duty to train: “A medical device manufacturer does not automatically have a duty to properly train, instruct or assist a physician on the surgical implantation and use of the device. However, the manufacturer can affirmatively undertake that duty,” the U.S. District Court for the Southern District of Indiana has said.[9]

Finally, some courts have allowed failure-to-train claims to proceed as an unremarkable subspecies of a failure-to-warn claim. For example, in another Southern District of Indiana case involving an implantable medical device called the “Virtue” urethral sling, the court held that “defendants’ alleged marketing of the Virtue device for non–FDA [Food and Drug Administration]-approved purposes, combined with failing to warn customers or train and educate physicians about the device, once they knew about potentially adverse side effect, qualified under failure to provide adequate warnings or instructions.”[10]

Failure To Train As Tantamount To An ‘Educational Malpractice’ Claim

Some courts have analyzed failure-to-train claims under the rubric of “educational malpractice,” a largely discredited theory that attempted to hold educational institutions liable — either by their students or third parties allegedly harmed by their students — for doing their jobs poorly. This has arisen primarily in the aviation context. Thus, in *Sheesley v. Cessna Aircraft Co.,* the plaintiffs were representatives of airplane passengers killed in a crash that was allegedly caused by the pilot’s poor training.[11]

In that case, the U.S. District Court for the District of South Dakota held that “[t]he gravamen of plaintiffs’ claims are that [the defendant] negligently trained [the pilot] by failing to provide him the skills and training necessary. … Further, plaintiffs contend that [the defendant] used negligent teaching techniques. … In other words, plaintiffs are contesting the substance and manner of [the defendant’s] training. Plaintiffs’ claims encompass the traditional aspects of education, and thus sound in educational malpractice.”[12] Such claims, the court found, were not cognizable.[13]

Other courts have found that the public policy rationales behind the refusal to recognize an educational malpractice claim — such as the lack of a satisfactory standard of care, the vagaries of external causes affecting a student’s failure to learn and the potential of court involvement in day-to-day school operations — do not extend beyond traditional educational institutions.

In *Newman v. Socata SAS*, the U.S. District Court for the Middle District of Florida held that a failure-to-train claim brought against a flight training school was not an educational malpractice claim, and it could thus proceed.[14] “Allowing the claims at issue (that a for-profit commercial entity, teaching a narrowly structured course on the operation of a specific type of aircraft, owed and breached a duty to warn and train regarding a known lethal propensity of the aircraft to torque roll) to proceed does not implicate the public policy concerns [barring educational malpractice claims],” the court said.[15]

Such a result is probably distinguishable in the medical device context, however, because it does not involve a “learned intermediary” physician, who is already an expert in the field and is under an independent professional duty to use any such device pursuant to the standard of care.

Preemption of Failure to Train

When failure-to-train claims involve devices approved pursuant to the FDA’s rigorous PMA process, some courts have held that such claims are preempted by the FDCA because they would constitute a state requirement different from or additional to the federal requirements, the 5th Circuit has ruled.[16] This analysis does not apply in cases in which the defendant fails to provide training mandated by the FDA’s PMA.[17] Other courts, including the Indiana Court of Appeals, have held that interaction between sales representatives and physicians is outside the ambit of FDA regulation, and thus failure-to-train claims escape federal preemption.[18]

Conclusion

If a rational conclusion can be discerned from this discussion, it is perhaps that the most thoughtful opinions in the medical device context recognize that failure-to-train claims interfere with the practice of medicine and would impose an impractical duty on medical device manufacturers to “oversee” doctors in their operating rooms and offices. The unique aspects of the doctor–patient relationship thus help to distinguish cases — such as aviation cases analyzed under educational malpractice theory — that find against the defendant. That analysis, however, is complicated when a manufacturer voluntarily trains the physician and thus potentially undertakes a duty to do so reasonably.

Arguably, the “learned intermediary” doctrine should prevail over the voluntary assumption of a duty, but that remains to be hashed out in case law. Considering that courts have come out on both sides of what should be a straightforward application of the preemption doctrine, the courts’ ongoing treatment of the voluntary assumption question is likely to remain mixed as well.

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NOTES

1 Glorvigen v. Cirrus Design Corp., --- N.W.2d ---, 2012 WL 2913203 (Minn. 2012).
2 Id. at *10.
3 Id.
4 See, e.g., Woodhouse v. Sanofi-Aventis U.S. LLC, 2011 WL 3666595 at *3 (W.D. Tex. June 23, 2011) (allegation that defendant “failed to train, warn or educate” physicians failed to state a plausible claim because no such duty exists).
5 Sons v. Medtronic Inc., 915 F. Supp. 2d 776, 783 (W.D. La. 2013); see also Wolicki-Gables v. Arrow Int’l, 641 F. Supp. 2d 1270 (M.D. Fla. 2009), aff’d, 634 F.3d 1296 (11th Cir. 2011) (no affirmative duty to advise physician on how to use the product; the physician must use the product according to his or her medical judgment).
6 See, e.g., Rounds v. Genzyme Corp., 2011 WL 3925353 at *3 (11th Cir. Sept. 8, 2011) (“[The plaintiff’s] attempt to circumvent the learned intermediary doctrine by characterizing the issue as one of training rather than of warning. … This is a distinction without a difference. … [The defendant] satisfied its duty … by providing clear, unambiguous information concerning the contraindications for [the product], as well as the risks associated with it. Whether [the defendant] was ‘training’ or ‘warning’ [the treater] of these risks when it provided him the package insert is … an issue of semantics only.”).
7 Swayze v. McNeil Labs., 807 F.2d 464, 468 (5th Cir. 1987).
8 Chamian v. Sharplan Lasers Inc., 2004 WL 2341569 at *7 (Mass. Super. Ct. Sept. 24, 2004).
9 Lemon v. Anonymous Physician, 2005 WL 2218359 at *2 (S.D. Ind. 2005); see also Restatement (2d) Torts, §+324A, Liability to Third Person for Negligent Performance of Undertaking.
10 Lautzenhiser v. Coloplast A/S, 2012 WL 4530804 at *4 (S.D. Ind. Sept. 29, 2012).
11 Sheesley v. Cessna Aircraft Co., 2006 WL 1084103 (D.S.D. April 20, 2006).
12 Id. at *16-*17.
13 Id.
14 Newman v. Socata SAS, 924 F. Supp. 2d 1322, 1329-30 (M.D. Fla. 2013).
15 Id. at 1329.
16 See, e.g., Rollins v. St. Jude Med. Diagnostic Div., 442 F.3d 919, 929-33 (5th Cir. 2006) (state law duty to train medical personnel in the use of a PMA device preempted as a state requirement additional to an FDA regulatory scheme).
17 See, e.g., Chao et al. v. Smith & Nephew, 2013 WL 6157587 at *3-*4 (S.D. Cal. Oct. 22, 2013).
18 See, e.g., Medtronic Inc. v. Malander, 996 N.E.2d 412, 419 (Ind. Ct. App. 2013).

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Causes of Action

The New York Court of Appeals Determines That A Common-Law Cause Of Action For A Breach Of The Fiduciary Duty Of Confidentiality Does Not Lie Against A Medical Corporation For An Unauthorized Disclosure Of Medical Information By An Employee Who Is Not A Physician And Who Is Acting Outside The Scope Of Her Employment

Doe v. Guthrie Clinic, Ltd.

The Case before the Court:

The plaintiff in this action was being treated for a sexually transmitted disease at the defendant's private medical facility when a nurse at the clinic recognized him as her sister-in-law's boyfriend. The nurse accessed the plaintiff's medical records and learned of the reason for his treatment and informed her sister-in-law of the plaintiff's condition. The sister-in-law then forwarded those messages to the plaintiff, suggesting that staff members at the clinic were ridiculing him and/or his medical condition. Five days later, the plaintiff called the clinic to complain of the nurse's behavior and, after meeting with an administrator, learned that the nurse was fired. The president and CEO of the defendant's corporation wrote to plaintiff confirming that there was an unauthorized disclosure of his medical information, and that appropriate disciplinary action had been taken. The plaintiff then filed suit in federal court, alleging causes of action for breach of duty, breach of contract, negligent hiring, and negligent and intentional infliction of emotional distress. The United States District Court for the Western District of New York granted the defendant's motion to dismiss those claims and the plaintiff appealed with respect to a number of the dismissed causes of action. After affirming the dismissal of all but one cause of action in the complaint, the United States Court of Appeals for the Second Circuit reserved decision on the plaintiff's claim for breach of the fiduciary duty and certified a question to the New York Court of Appeals as to whether such a common-law right exists against the medical corporation for its employees unauthorized disclosure of medical information.

The Court's Decision:

In a 6-1 decision, the Court rejected such a common-law cause of action, noting that hospitals and medical corporations generally may be held vicariously liable for their employees' wrongful acts, but only where those acts are committed in furtherance of the employer's business, and within the scope of employment. Further, the Court has consistently refused to hold medical corporations to a "heightened duty" for an employee's misconduct, imposing a duty on the hospital only where the risks are reasonably foreseeable. With respect to the case before it, the Court refused to extend the medical corporation's duty as the plaintiff argued, holding instead that "a medical corporation's duty of safekeeping a patient's confidential medical information is limited to those risks that are reasonably foreseeable, and to actions within the scope of employment." The majority took issue with the lone dissenter's argument that its holding was too narrow, believing that an affirmative answer to the certified question would result in essentially strict liability on medical corporations for any disclosure by an employee.

The dissent suggested that "a strong legal regime" was necessary given the ease with which information now spreads across social networks. Instead of restricting the hospital or medical corporation's liability, the dissent would have approved an independent cause of action to "provide a powerful incentive to medical corporations to implement protections against disclosures." Specifically, the dissent asserted that protection on the order of absolute liability is necessary to protect plaintiff's privacy:

> [g]iven the highly personal nature of medical data at risk of disclosure, the harm associated with dissemination of such sensitive private information, the ease with

which employees of a medical corporation may access confidential data, disseminated through the use of a commonly held, and inexpensive device, a cellular telephone, and the inability of patients to protect themselves from employee misconduct.

The Impact of this Decision

The Court has reaffirmed the principle that actions taken for purely personal reasons by an employee which clearly do not further the employer's business and which cannot be considered to fall within the scope of employment will not give rise to liability on the hospital or medical corporation.

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Case Hyperlink: http://www.nycourts.gov/reporter/3dseries/2014/2014_00138.htm

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Causes of Action

The Supreme Court of Pennsylvania Eliminates Workers' Compensation Exclusivity in Latent Disease Cases

Kathleen Tooey, Executrix of The Estate of John F. Tooey, Deceased, and Kathleen Tooey in her own right v. AK Steel Corporation

On November 22, 2013, the Pennsylvania Supreme Court issued an opinion in *Tooey v. AK Steel Corp.*, 81 A.3d 851 (Pa., 2013), holding that the exclusivity provision of the Workers' Compensation Act, 77 P.S. § 411(2), does not apply to common law claims made by employees for occupational diseases which manifest outside of the 300-week period prescribed by Section 301(c)(2) of the Act. This ruling overturns recent decisions of the Superior Court of Pennsylvania upholding the exclusivity provision of Section 303(a) of the Act, 77 P.S. § 481, and exposes employers in Pennsylvania to common law claims by former employees for asbestos-related and other latent occupational diseases.

- Development of the Law

The Workers' Compensation Act ("the Act") involves a basic exchange between workers and employers, such that claims involving workplace injuries sidestep the civil judiciary system, and are guided through a no-fault administrative scheme. Employees receive prompt payment for work-related injuries, and in return, employers obtain immunity from most common law claims and pay benefits at an established rate into the Pennsylvania Workers' Compensation Fund.

Section 303(a) of the Act, in pertinent part, provides:
The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employee, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.
Tooey, 81 A.3d at 856, *quoting* 77 P.S. § 481(a).

Tooey focused on Section 301(c)(2) of the Act, which provides:
The terms "injury," "personal injury," and "injury arising in the course of his employment," as used in this act, shall include . . . occupational disease as defined in Section 108 of this act [i.e., 77 P.S. § 27.1]: *Provided, That whenever occupational disease is the basis for compensation, for disability or death under this act, it shall apply only to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment* in an occupation or industry to which he was exposed to hazards of such disease: And provided further, That if the employee's compensable disability has occurred within such period, his subsequent death as a result of the disease shall likewise be compensable.
Tooey, 81 A.3d at 357, *quoting* 77 P.S. § 411(2) (emphasis added by the Supreme Court).

Prior to the Supreme Court's decision in *Tooey*, workers who developed a latent disease more than 300 weeks after the last date of employment were precluded from receiving workers' compensation benefits from their employers or filing a common law claim against their employers. In *Ranalli v. Rohm & Haas Co.*, 983 A.2d 732 (Pa.Super., 2009), a three-member panel of the Superior Court held that a former employee who was last employed by the defendant more than 300 weeks before manifestation of the injury could not recover from the former employer on pursuant to the Act's exclusivity provision, Section 303(a), and 300-week statute of repose, Section 301(c)(2). *Ranalli*, 983 A.2d at 735. The Superior Court reasoned that application of Section 303(a) "does not deny access to the courts, rather it limits recovery as contemplated by the legislative scheme." *Id.*

Relying on *Ranalli*, the Superior Court in *Sedlacek v. A.O. Smith Corp.*, 990 A.2d 801 (Pa.Super., 2010),

observed that both the Act and the Occupational Disease Act, 77 P.S. §§ 1201 *et seq.,* contained provisions limiting compensation for disability or death resulting from occupational disease to injuries that occurred within a defined period from the date of last employment. *Sedlacek*, 990 A.2d at 810. Moreover, the court determined that such provisions did not violate the federal Due Process or Equal Protection Clause, or the Remedies Clause of the Pennsylvania Constitution. *Id.* at 811. Under these cases, workers had no remedy against their employers if they developed a latent disease more than 300 weeks after the conclusion of their employment, but instead, could pursue common law actions against third-party manufacturers, distributors and suppliers to recover damages for their injuries.

- ***Kathleen Tooey, Executrix of The Estate of John F. Tooey, Deceased, and Kathleen Tooey in her own right v. AK Steel Corporation***, 81 A.3d 851 (Pa., 2013)

John Tooey was an industrial salesman of asbestos products for Ferro Engineering from 1964 until 1982, and developed mesothelioma in December 2007. *Tooey*, insert volume A.3d at 856. Spurgeon Landis was exposed to asbestos during his employment for Alloy Rods, Inc. from 1946 until 1992, and was diagnosed with mesothelioma in 2007. *Tooey and Landis* ("Appellants") filed separate lawsuits against multiple defendants, including their employers, and in both cases, the employers filed motions for summary judgment asserting the exclusivity provisions of Section 303(a) of the Act. *Id.* The appellants argued that the Act, State and Federal Constitutions, and precedent from the Pennsylvania Supreme Court allowed a tort action against an employer where the disease falls outside "the jurisdiction, scope and coverage of the Act." *Id.* The trial courts agreed, and denied the employers' motions for summary judgment. *Id.* On interlocutory appeal, the Superior Court reversed, concluding that it was bound by its decisions in *Ranalli*, *supra* and *Sedlacek*, *supra*.

In a 5-1 decision, the Supreme Court ruled that the Act does not bar the appellants, who developed mesothelioma more than 300 weeks after their employment ended, from suing to recover damages from their former employers. *Tooey*, 81 A.3d at 855. Reversing the Superior Court's decision, the Court adopted the appellants' argument that "under the plain language of Section 301(c)(2), an occupational disease which first manifests more than 300 weeks after the last occupational exposure to the hazards of the disease does not fall within the definition of injury set forth in Section 301(c)(2). *Tooey*, 81 A.3d at 859. Therefore, the Act does not apply to employees seeking compensation for such diseases, and the exclusivity provision of Section 303(a) does not preclude an employee from seeking recovery for such disease through a common law action against an employer." *Id.* at 861-862. The Court also found that the Act's remedial goals supported the appellants' grammatical interpretation, concluding that to read the Act otherwise would be tantamount to denying an employee any remedy against his or her employer. Writing for the majority, Justice Debra M. Todd stated, "It is inconceivable that the legislature, in enacting a statute specifically designed to benefit employees, intended to leave a certain class of employees who have suffered the most serious of work-related injuries without any redress under the act or common law." *Id.* at 863.

Justice Thomas G. Saylor dissented, concluding that such diseases were covered by the Act, but that compensation was not available to the plaintiffs because the 300-week period for filing claims had expired. *Id.* at 865. Justice Saylor also disagreed with the majority's interpretation of the Act's purpose, noting that the majority's interpretation undermined the compromise of interests embodied by the Act. *Id.* at 871.

- Conclusion

This Supreme Court's decision in *Tooey* constitutes a major shift in Pennsylvania law. It significantly increases potential exposure of plant owners and operators, and companies engaged in the building trades, to liability for latent disease claims made by their former employees, including claims for asbestos-related diseases and latent diseases resulting from workplace exposure to chemicals and other substances. *Tooey* also raises coverage issues under general liability and Workers' Compensation insurance policies. As a result of the *Tooey* decision, previously immune employers within Pennsylvania are being sued in occupational disease cases where the condition manifests itself more than 300 weeks after the last date of employment.

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Causes of Action

"Cause in Fact" Analysis Adds Protection for Builders, Developers and Architects

Aegis Insurance Services, Inc. v. 7 World Trade Co., L.P.

The terrorist attacks of September 11th produced a multitude of litigation. Although we are now more than twelve years removed from those tragic events, litigation continues.

On December 4, 2013, the United States Court of Appeals for the Second Circuit issued a significant decision in a case in which recovery was sought for considerable property damage in the wake of the attacks. As the decision acknowledged, "[t]he horrific events of September 11, 2001 are well known and need not be repeated here in great detail." *Aegis Insurance Services, Inc. v. 7 World Trade Co., L.P.* ("*Aegis Insurance*"), Docket No. 11-4403-cv (Dec. 4, 2013). Sometimes overlooked, however, is the fact that the Twin Towers were not the only structures that collapsed that day. In fact, all seven buildings comprising the World Trade Center Complex either collapsed on their own or were demolished later, including 7 World Trade Center ("7WTC"), a 47-story building constructed at the northern edge of the site.

7WTC was built above an electrical substation Con Ed had constructed at the World Trade Center Complex to provide electricity to the site. When the North Tower collapsed on September 11th, it caused a raging fire throughout 7WTC. "With no water, and no civilian lives at risk, and with their comrades buried in the Towers' debris, the fire department decided to create a collapse zone around 7WTC and allow the fire to burn, unchecked." *Id.* That evening, the building collapsed and crushed the substation.

Con Ed sued 7WTCo. (the builder), its agent, the general contractor and the structural engineer. Con Ed asserted that the building was designed and constructed in such a manner that it lacked structural integrity, and had it been properly constructed, it would have remained standing at the end of the day. 7WTCo. moved for summary judgment, arguing that no duty was owed to Con Ed insofar as the terrorist attack and its consequences were unforeseeable and that the building was properly designed and constructed but simply could not withstand these catastrophic events.

The district court granted summary judgment to 7WTCo., finding that no duty was owed to Con Ed to protect its substation; and even if a duty was owed, the risk of harm certainly did not "encompass the long chain of events on September 11, 2001." *In re September 11 Litigation Aegis Ins. Servs*., 865 F. Supp. 2d 370, 383 (S.D.N.Y. 2011). Con Ed appealed.

On appeal the Second Circuit affirmed, but on an alternative theory, namely, foreseeability. The Second Circuit's decision represents a more practical approach, and one best articulated by Judge Pooler in the following statement: "While the concepts underlying tort law must, by their nature, be fluid, at the end of the day they must engage reality." *Aegis Insurance*. The Second Circuit accepted that Con Ed, contrary to the lower court's ruling, was owed a duty of care. Whereas the attack itself was clearly unexpected, "[t]he risk of massive fire at a high-rise building is a foreseeable risk." *Id.*

Nevertheless, the Court agreed with 7WTCo. that the events of September 11th were "unprecedented" and of such a "magnitude" that any alleged negligence on the part of defendants could not have been "the cause-in-fact of the collapse." *Id.* The Court favored a cause-in-fact approach over a proximate cause analysis, conceding that it was "especially difficult to shoehorn this extraordinary sequence of events into the 'welter confusion' that is proximate cause." *Id.* Accordingly, the threshold inquiry was whether "the injury or loss would have occurred regardless of the conduct." *Id.*

As applied here, Con Ed and its experts failed "to relate the constellation of events surrounding the collapse of

7WTC or link the unprecedented nature of those events with the negligence at issue." *Id.* Because of this, the Court had "little trouble concluding" that "7WTC would have collapsed regardless of any negligence ascribed by plaintiffs' experts" to the design and construction professionals. *Id.*

This decision is significant for several reasons. It affords developers, builders and architects added protection from lawsuits linked to catastrophic events. As the Court explained, "[i]t is simply incompatible with common sense and experience to hold that defendants were required to design and construct a building that would survive the events of September 11, 2001." *Id.* Moreover, it may prompt a shift by the courts from an analysis that focuses almost exclusively on proximate cause, to one that considers, at least in part, the practicalities associated with the claimed injury or loss. If so, this decision will have broader application to all negligence cases.

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Causes of Action

Door Opening to Allow Common Negligence Claims Against Construction Professionals

Donatelli v. D.R. Strong Consulting Engineers, Inc.

For several years, design and construction professionals have been awaiting word from the Washington Supreme Court regarding whether aggrieved parties are limited to remedies set forth in their written contracts or whether they can pursue common law negligence claims. On November 14, the court decided *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, by suggesting that negligence claims could be pursued in certain circumstances unless the parties' clearly and specifically preclude them. The result demonstrates the importance of including specific terms in the contract which delineates claims that the parties intend to either limit or preclude.

The plaintiffs in *Donatelli* entered into a written contract with an engineering firm, D.R. Strong Consulting, to develop two short plats. King County issued a preliminary approval for the short plats that was good for five years, but the project was not completed during this period and the approvals expired. Subsequently, the engineering firm assisted the Donatelli's in obtaining new preliminary approvals, but the real estate market collapsed before they could obtain final approval. The Donatelli's ran out of money and lost the property to foreclosure. They sued the engineer for breach of contract, negligence, negligent misrepresentation and violation of the Washington Consumer Protection Act ("CPA"). The engineer moved for summary judgment on all of the negligence claims, asserting as its sole basis for the motion that the claims were barred by the economic loss rule and on the CPA claim. The trial court granted summary judgment on the CPA claim but denied summary judgment on the negligence claims.

The contract between the Donatelli's and the engineering company contained a limitation of liability provision that limited the engineer's liability to $2,500 or the fee charged, whichever was greater. The limitation could be waived if the client agreed to pay an additional 5 percent of the fee or $500, whichever was greater. The Donatelli's had chosen not to waive the liability limitation by paying the additional fee.

The Supreme Court upheld the trial court and Court of Appeal decisions denying summary judgment on the tort claims. On the plaintiffs' negligence claim, the court decided that it was unclear which duties the engineer assumed under the written contract. Because the record didn't adequately establish the scope of the professional obligations incorporated into the contract, the court refused to determine if any of the engineer's duties to the plaintiffs arose independently of the contract and sent the case back to the trial court.

The *Donatelli* case emphasizes the importance of clearly delineating in a contract the duties assumed in construction contracts, whether arising specifically from the contract or created by law.

This case should also serve as a reminder to include integration and limitation of liability clauses in all contracts. An integration clause is intended to preclude any claims that the parties orally modified the contract to include (or exclude) specific terms. Likewise, detailed limitation of liability clauses that incorporate potential negligence or professional liability damages are necessary to limit the potential exposure of design professionals to extra-contractual claims.

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Causes of Action

New California Case Means Changes for Wrongful Death Claims

Ceja v. Rudolph & Sletten, Inc.

California Code of Civil Procedure Section 377.60 provides that a decedent's putative spouse may bring a wrongful death action if he or she was dependent on the decedent. The statute defines a putative spouse as "the surviving spouse of a void or voidable marriage who is found by the court to have *belief in good* faith that the marriage to the decedent was valid".

The recent California Supreme Court case, *Ceja v. Rudolph & Sletten, Inc.* (2013) 56 Cal. 4th 1113, overturned long established case law requiring a putative spouse to have an objective, good faith belief that his or her marriage is valid to have standing to bring an action for wrongful death. The Court, in an unanimous opinion written by Judge Baxter, held that if a putative spouse has a *subjective* good faith belief of marriage, then he/she has standing to bring a wrongful death action. This is true even if the marriage was invalid and the putative spouse knew that the marriage was invalid. The *Ceja* court concluded that wrongful death statute, *Code of Civil Procedure* § 377.60, contemplates a subjective standard that focuses on the alleged putative spouse's state of mind to determine whether he or she maintained a genuine and honest belief in the validity of the marriage.

On September 19, 2007, decedent, Robert Ceja, was killed in an accident at a construction site. Plaintiff Nancy Ceja filed a wrongful death action against defendant Rudolph & Sletten, Inc. claiming she was the putative spouse of decedent pursuant to § 377.60.

The following evidence was produced in discovery: the decedent and his previous wife, Christina Ceja, were wed in 1995. When decedent met plaintiff in 1999, he told plaintiff that he was married but separated. In 2001, decedent filed a petition for dissolution of his marriage to Christina and he started living with plaintiff.

In September 2003, plaintiff and decedent filled out a license and certificate of marriage. The document was marked "0" in the space asking for decedent's number of previous marriages and was left blank in the other two spaces asking how and when any previous marriages had been terminated. Although, plaintiff knew of decedent's marriage of Christina, plaintiff signed the "Affidavit" box indicating that the contents of the completed document were "correct and true to the best of their knowledge and belief". On September 24, 2003, a marriage license was issued to plaintiff and decedent.

It was undisputed that decedent was still married to Christina when he and plaintiff held their wedding ceremony three days later. On December 21, 2003, the Santa Clara County Superior Court filed a "Notice of Entry of Judgment", stating that a judgment for dissolution of the marriage between decedent and Christina had been entered on December 26, 2003 and that the judgment was effective as of the date the judgment was filed. The notice also contained a warning, in a separate box and in bold, which read "[n]either party may remarry until the effective date of the termination of marital status." The notice was mailed to plaintiff and decedent's home and in January 2004, plaintiff faxed a copy to decedent's ironworkers union so she could be added to decedent's medical insurance.

Defendant moved for summary judgment, contending plaintiff lacked standing to bring a wrongful death action as a putative spouse because she did not have the necessary "good faith belief" that her marriage to decedent was valid. Defendant's motion was based on the fact that plaintiff and decedent were married before the dissolution of his marriage with Christina became final, rendering decedent's marriage to plaintiff void; plaintiff falsely signed a marriage license in which decedent falsely represented that he had not been married before; and finally, the court document clearly indicated that decedent's marriage to Christina was not dissolved until *after* his wedding with plaintiff.

In opposing the motion, plaintiff argued that she understood decedent had filed for "divorce in 2003 but did not know what happened after that because decedent would never discuss the subject." Plaintiff claimed that she did not read the marriage certificate in detail and signed the document. While plaintiff recalled faxing the court document to decedent's union, she did not recall specifically reviewing the papers before she sent them. However, she "absolutely knew" that he was divorced from Christina when she faxed the court document and at the time of his accident.

Plaintiff further argued that following their well-attended marriage ceremony, she held herself out to the public as decedent's wife, she changed her last name to Ceja and they both wore wedding rings, shared a joint checking account, lived together in the same house, and handled their taxes as married, although filed separately. Plaintiff claimed that she would not have had her wedding if she did not believe their marriage would be legal and valid, and that had she realized at any point that their marriage was invalid, she "would have simply redone the ceremony."

The trial court granted defendant's motion for summary judgment. The trial court, consistent with *In re Marriage of Vryonis* (1998) 202 Cal.App.3d 712, applied an objective test for putative spouse status and found that plaintiff did not have an objectively good faith belief in the validity of her marriage to decedent.

The Court of Appeal reversed, disagreeing with the *Vryonis* objective approach; the court held 337.60's requirement of a good faith belief refers to the alleged putative spouse's *subjective* state of mind. In the court's view, plaintiff's claim that she believed and acted as if her marriage was valid and that she had not read the marriage license or the final divorce papers, if found credible by the trial court, could support a finding of a good faith belief and establish a putative spouse status.

The Supreme Court, in reviewing the issue, focused on the meaning of the statutory phrase, "believed in good faith." The Court concluded that the good faith inquiry is purely subjective and evaluates the state of mind of the alleged putative spouse, and that the reasonableness of the claimed belief is properly considered as part of the totality of the circumstances in determining whether the belief was genuinely and honestly held.

The Court first looked to the ordinary usage and meaning of the phrase "good faith" and discussed its equation with "sincerity", "honesty" and "a state of mind indicating honesty and lawfulness of purpose" or "absence of fraud, deceit, collusion, or gross negligence." The Court next noted that before any California statute made a reference to putative spouses, the courts began developing the putative spouse concept as a means for enabling a party to an invalid marriage to enjoy the civil benefits of marriage if he or she believed in good faith that the marriage was valid. The courts made it clear from the beginning that the fundamental purpose of the putative spouse doctrine was to protect the expectations of innocent parties and to achieve results that are equitable fair, and just.

The Supreme Court next looked at the relevance of reasonableness. Since *Vyronis* was decided, the Courts of Appeal have been unanimous in holding the good faith inquiry is objective in nature. However the Court, disagreeing with *Vryonis* to the extent that "good faith" is tested by an objective standard, concluded:

…[T]he reasonableness of a party's belief is a factor properly considered…Thus, a finding of whether a party's belief was genuinely held in good faith will be informed, in part, by whether that party was aware of the facts that were inconsistent with a rational belief in the validity or lawfulness of a marriage.

The Supreme Court, affirming the holding of the appellate court, held:

In determining good faith, the trial court must consider the totality of the circumstances, including the efforts made to create a valid marriage, the alleged putative spouses' personal background and experience, and all the circumstances surrounding the marriage. Although the claimed belief need not pass a reasonable person test, the reasonableness or unreasonableness of one's belief in the face of objective circumstances pointing to a marriage's invalidity is a factor properly considered as part of the totality of the circumstances in determining whether the belief was genuinely and honestly held.

The impact of *Ceja* is that it is much more difficult to prevail on summary judgment against a putative spouse based on lack of standing. The putative spouse need only have a subjective good faith belief of marriage to the decedent to create a triable issue of material fact. The *Ceja* ruling may also make it more difficult to obtain a directed verdict or jury verdict on the issue of standing. In order to combat this situation, discovery and strategy should be tailored to determine the putative spouse's state of mind regarding his/her good faith belief of his/her marriage with an examination of the "totality of the circumstances" including factors such as whether the couple held a wedding ceremony and conducted their financial affairs as a married couple and whether the putative

spouse held himself/herself out to the public as the decedent's spouse. It should also be borne in mind that the subjective test regarding the putative spouse's good faith belief that he/she was legally married is subject to the reasonableness of the belief. Thus, the defendant should attempt to disprove the putative spouse's alleged genuine and honest belief of his/her marriage.

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Class Action

Supreme Court Jettisons Removability of Parens Patriae Actions Under CAFA Mass Action Provisions

Mississippi Ex Rel. Hood v. Au Optronics Corp

The United States Supreme Court, in *Mississippi ex rel. Hood v. AU Optronics Corp.*, unanimously held that a suit filed by a state as the sole plaintiff does not constitute a "mass action" under the Class Action Fairness Act (CAFA). This decision, issued January 14, resolves a circuit split over whether *parens patriae* actions – actions brought by a state on behalf of its citizens – are removable as mass actions under CAFA.

A mass action is a civil action in which monetary relief claims of "100 or more persons" are proposed to be tried jointly and the amount in controversy for each claim exceeds $75,000. Whether a *parens patriae* action qualifies as a mass action depends on whether the citizens on whose behalf the state is suing are considered "persons" under CAFA. Prior to *AU Optronics*, the Fourth, Seventh and Ninth Circuits concluded that *parens patriae* actions are not mass actions because the state, not its citizens, is the real plaintiff or "party in interest." The Fifth Circuit, however, employed a "claim-by-claim" analysis to determine whether the state or the individual citizens were the real parties in interest, thereby allowing each citizen to count toward the 100-plaintiff mass action CAFA jurisdictional threshold.

In *AU Optronics*, the Supreme Court rejected the Fifth Circuit's claim-by-claim methodology and endorsed the other circuits' approach. The Court began its analysis with the statutory text of CAFA, noting that for the claim-by-claim analysis to work, the phrase "100 or more persons" would have to be construed as "100 or more named or unnamed real parties in interest." The Court also reasoned that in order for the claim-by-claim approach to work, each unnamed party in interest would have to meet the $75,000 amount in controversy requirement. This requirement would create an unwieldy "administrative nightmare" where courts would not only have to identify each unnamed party, but ascertain the amount in controversy for each unnamed party. The Court therefore held that the proper approach is for courts to determine who the "proposed plaintiffs" are, but not to include unnamed parties. This was the same approach employed by the Fourth, Seventh and Ninth Circuits.

The Supreme Court's decision in *AU Optronics* further clarifies CAFA's jurisdictional reach and confirms that *parens patriae* actions are not removable as mass actions under CAFA. The decision may result in increased *parens patriae* litigation and allow state attorneys general to easily avoid litigating such cases in federal court.

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Damages

Appellate Division First Department Sustains a $16 Million Pain and Suffering Award in Burn Injury Case

Peat v. Fordham Hill Owners Corp.

The Case Before The Court

The plaintiff was injured while refinishing a floor in defendant's apartment complex. He was engulfed in flames when the lacquer he was using was ignited by the pilot light on the stove. Consequently, the plaintiff sustained second and third-degree burns over 50% of his body.

The jury awarded plaintiff a total verdict of over $18 million. While the decision does not give a breakdown of the verdict, inquiry with defense counsel reveals that the verdict included an award of $16 million for pain and suffering.

The defendant appealed on the ground of excessiveness.

The Court's Decision

The Appellate Division First Department affirmed: "The damages awarded do not materially deviate from what would be reasonable compensation under the circumstances. The record shows that plaintiff has undergone 15 surgeries, engaged in extensive physical and occupational therapies in an effort to be able to perform the most basic of life functions again, and still experiences significant depression and post-traumatic stress disorder."

The Impact Of This Decision

This opinion vividly illustrates the particular sympathy that courts have for burn victims. It is also noteworthy that our research reveals that this award is twice the amount of the highest verdict that the First Department previously sustained for a burn injury. In addition, this decision may be a signal that the First Department is ready to sustain higher awards in other catastrophic injury cases such as quadriplegia and paraplegia.

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Damages

Affordable Care Act has Potential to Limit a Defendant's Exposure for Future Medical Costs in NY Personal Injury Litigation

Generally overlooked in the national debate surrounding the Patient Protection and Affordable Care Act (ACA) is the effect the new law will have on personal injury litigation. If standard loss-allocation and mitigation rules are followed, the new law should have a significant impact on a personal injury plaintiff's ability to recover the cost of future medical care, thus limiting a defendant's exposure for such damages. Though no definitive judicial rulings have been issued on this topic, the new law has the potential to substantially lower the risk of exposure to defendants and their insurers.

The cost of future medical care can be a significant component of a plaintiff's economic damages, often running into the millions of dollars. In states that do not enforce the common law collateral source rule, which precludes the reduction of a personal injury award by the amount of compensation a plaintiff receives from a source other than the tortfeasor, such awards should be reduced to the cost of obtaining necessary insurance to pay for the care, *so long as the insurer does not maintain a legal right of subrogation.* Some jurisdictions, such as New York, have limited an insurer's right of subrogation while other subrogation rights are guaranteed by statute.

Judicial Consideration of the Affordable Care Act

Once the ACA was upheld by the United States Supreme Court and the key provisions of the law took effect, courts began to consider limiting a plaintiff's economic damages by admitting evidence at the time of trial pertaining to insurance available under the new law.

For example, in *Caronia v. Philip Morris USA, Inc.,* 2013 N.Y. Slip Op. 8372 (December 17, 2013), the New York State Court of Appeals considered whether the plaintiffs (who were smokers for 20 years or more, but who had not yet been diagnosed with a smoking-related disease) could pursue an independent cause of action and recover the cost of monitoring for future diseases. The court ruled that they could not because the plaintiffs had not yet sustained an injury. In a dissenting opinion, Chief Judge Lippman found unpersuasive the defendants' argument that under the terms of the ACA, the plaintiffs would soon be able to obtain free access to such monitoring. However, he acknowledged that there was a potential for an offset under the law for a reduction of the plaintiffs' damages. *See also, Cowden v. BNSF Railway Company,* 2013 U.S. Dist. LEXIS 155486 (E.D.Mo., October 2013).

Duty to Mitigate Damages and Collateral Offset Rules in New York

New York is one of several states to abandon the common law collateral source rule. To prevent double recoveries and to help allocate the costs of compensating plaintiffs for injuries, the New York State Legislature enacted section 4545(a) of the Civil Practice Law and Rules. Pursuant to this rule, a judgment in a personal injury or wrongful death action must be reduced by the amount of collateral source payments. Such payments include amounts that a plaintiff has received or will, "with reasonable certainty," receive from collateral sources such as insurance.

Section 4545(a) provides that a collateral source should be "pursuant to a contract or otherwise enforceable agreement." Although the ACA is not, in and of itself, a contract or an agreement, the mandatory insurance policies one must purchase pursuant to it are contracts. Even if a plaintiff has not yet purchased health insurance coverage under the Act, it should be assumed that he or she will do so since it makes little economic sense to pay the higher costs of the medical care than the lower costs of the insurance. This issue has not yet been resolved by the courts. Nevertheless, because a plaintiff has a duty to mitigate his or her damages, the courts should be encouraged to apply the law so as to avoid the inequitable result of a plaintiff receiving a

double recovery.

Duty to Mitigate Damages

There is a long-standing common law rule that limits an injured party's recovery if he or she has failed to reasonably mitigate his or her damages (sometimes referred to a "duty to mitigate"). The Restatement Second of Torts describes the rule as follows: "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."

Williams v. Bright, 230 A.D.2d 548, 550 (1st Dept. 1997), citing *Blate v. Third Ave. RR Co.,* held that "a party who claims to have suffered damage by the tort of another is bound 'to use reasonable and proper efforts to make the damage as small as practicable,'" and citing *Hamilton v. McPherson,* "If an injured party allows the damages to be unnecessarily enhanced, the incurred loss justly falls upon him." Applying this rule of law to the ACA, it becomes clear that because insurance is now available to everyone, regardless of any preexisting medical conditions, sound public policy would require an injured plaintiff to purchase insurance to pay for his future medical care.

The proper time to apply the new law would be immediately after a verdict is reached. Before a court may enter judgment on a verdict in an action to recover damages for personal injury, injury to property or wrongful death, it must first apply to the findings of past and future damages any applicable rule of law, including setoffs, credits and any reductions for comparative negligence. *See,* CPLR § 5041(a) (Consol. 2013). Following a verdict, a defendant cast in damages should immediately move for a collateral source offset hearing. Failure to grant such a hearing in cases involving a structured verdict is in error and requires a judgment be set aside (*Garrison v. Lapine,* 22 Misc. 3d 1128(A) (Sup. Ct., Ulster Cty. 2009) aff'd 72 A.D.3d 1441 (3d Dept. 2010).

Section 4545(a) specifically does not apply to insurance or other collateral sources to which there is a statutory right of subrogation. Such statutory rights to subrogation exist for Workers' Compensation insurance as well as benefits paid under Title XVII of the Social Security Act (codified as 42 USC Section 1395, *et seq.*), which govern health insurance for the aged and disabled. A review of the provisions of the ACA does not indicate that there is any similar right to repayment, reimbursement or subrogation under the Act. As noted previously, New York has recently limited an insurer's right of subrogation to recover amounts paid for medical care from any settlement for personal injury, medical, dental or podiatric malpractice or wrongful death. Thus, in New York, a defendant should be entitled to a reduction for amounts awarded for future medical care, unless that medical care will be paid for by Medicare, Medicaid, Workers' Compensation insurance or, in certain circumstances, Personal Injury Protection benefits awarded under a no-fault automobile policy.

Recommended Best Practices

The issue of collateral source offsets and the implications of the ACA should be raised at the earliest possible time in defending a tort action. Mitigation of damages and the reduction of any award based on collateral source offsets should be pled as affirmative defenses in a defendant's answer. If an action is already pending and if these defenses have not been raised, counsel should move to amend the answer to assert them.

The application of the Affordable Care Act, Article 50b of the CPLR and section 5-335 of the General Obligations Law, should be pled in a defendant's bill of particulars where appropriate. Discovery demands should include authorizations for all health insurance records, Workers' Compensation records, and the Centers for Medicare and Medicaid Services.

Defense counsel may wish to consider retaining an expert insurance actuary to testify to the cost of insurance, and the expert should be disclosed as early as possible. Preparing these arguments at an early stage can have benefits if and when a case is presented for alternative dispute resolution. It should also be anticipated that a plaintiff will move to preclude any evidence of insurance from the trial. The prudent practitioner should be prepared with memoranda of law to support the relevance of the insurance provisions of the ACA. Finally, defense counsel should move for a collateral source hearing as soon as possible following any verdict. Failure to make a timely application for such relief could result in a waiver of a substantial right.

To date, no court of record has applied the provisions of the ACA to reduce or limit an award for future economic damages. By applying existing principles to the new law, however, a practitioner should be able to use the Act to prevent an excess recovery by a plaintiff and to limit the exposure of a defendant or the defendant's insurer. Because the purpose of an award for economic damages is to compensate a plaintiff for his actual damages and not to bestow a windfall, this should be seen as a matter of simple justice and equity.

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Damages

New York Court of Appeal Decision Refuses to Create a New Equitable Cause of Action for Medical Monitoring

Caronia v. Philip Morris USA, Inc.

New York's high court, the Court of Appeals, has issued a decision refusing to create a new, independent equitable cause of action for medical monitoring. *Caronia v. Philip Morris USA, Inc.*, No. 227, slip op. (N.Y. Dec. 17, 2013). In issuing its opinion, the New York high court held that policy reasons "militate against a judicially-created independent cause of action for medical monitoring" and that allowing such claims "absent any evidence of present physical injury or damage to property, would constitute a significant deviation from our tort jurisprudence." *Caronia*, slip op. at 14. "Allowing [a plaintiff] to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure." *Caronia*, slip op. at 13.

Plaintiffs, all current or former smokers, commenced a class action suit against Philip Morris in the United States District Court for the Eastern District of New York alleging claims in negligence, strict liability and breach of the implied warranty of merchantability. None of the plaintiffs had been diagnosed with lung cancer, nor had they been under investigation by a physician for suspected lung cancer; but rather alleged they were at an "increased risk" for developing lung cancer due to their smoking history. As none of the plaintiffs were actually injured, they requested equitable relief in the form of a medical monitoring program, to be funded by Philip Morris, which would provide Low Dose CT ("LDCT") chest scanning, a diagnostic testing method that assists in the early detection of lung cancer.

At the completion of discovery, the District Court granted Philip Morris's summary judgment motion as to the negligence and strict liability claims as time-barred, but requested additional briefing as to the implied warranty claim and whether New York courts would recognize an independent cause of action for medical monitoring. *Caronia v. Philip Morris USA, Inc.*, No. 06-cv-224, 2010 WL 5205583 (E.D.N.Y. Feb. 11, 2010). In the interim, plaintiffs filed an Amended Complaint adding an equitable cause of action for medical monitoring. After additional briefing, the District Court dismissed the warranty claim for lack of evidence of an actual breach, and dismissed the medical monitoring claim for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) because plaintiffs could not sufficiently plead their injuries—an increased risk of cancer from smoking Marlboro cigarettes—were proximately caused by Philip Morris's conduct. *Caronia v. Philip Morris USA, Inc.*, No. 06-cv-224, 2011 WL 338425, at *3 (E.D.N.Y. Jan. 13, 2011). Plaintiffs appealed these decisions.

On May 1, 2013, the United States Court of Appeals for the Second Circuit affirmed the dismissal of plaintiffs' negligence, strict liability, and breach of implied warranty claims. *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 417 (2d Cir. 2013). As to the medical monitoring claim, the Second Circuit certified the following questions to the New York Court of Appeals:

1. (1) Under New York law, may a current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease?
2. If New York recognizes such an independent cause of action for medical monitoring,

   (A) What are the elements of that cause of action?
   (B) What is the applicable statute of limitations, and when does that cause of action accrue?

In the majority opinion penned by Judge Eugene Pigott, in which three other judges joined, New York's high court answered the first question in the negative, and declined to answer the second question as academic.

Chief Judge Jonathan Lippman issued a dissenting opinion, joined by Judge Jenny Rivera; and Judge Robert Smith abstained.

The Court of Appeals evaluated prior holdings in which the New York Appellate Division focused on whether plaintiffs requesting medical monitoring awards could establish a "rational basis" for their fear of contracting the alleged disease that would lead to such awards. However, in each of those cases, unlike in *Caronia*, the plaintiffs alleged either personal injury, property damage, or both, and sought relief in the form of medical monitoring funding. The *Caronia* Court noted, with reference to these cases, that "[t]o the extent any of these, or other, cases can be read as recognizing an independent cause of action for medical monitoring absent allegation of physical injury or property damage, they should not be followed." *Caronia*, slip op. at n.2.

The Court of Appeals recognized that the highest courts in other states are divided on this issue. Some jurisdictions, like Michigan and Oregon, refused to recognize medical monitoring as an independent cause of action, while other states, such as Massachusetts, West Virginia, Pennsylvania and Arizona, have found a plaintiff who does not allege a present physical injury can still recover future medical monitoring costs. The *Caronia* plaintiffs requested the New York Court of Appeals follow the holding in *Donovan*, in which the Massachusetts Supreme Judicial Court, the highest court of the state, found that an independent claim for medical monitoring does exist in a similar claim filed against Philip Morris. *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215 (2009). In *Donovan*, the Supreme Judicial Court ruled that proof of physical harm is only required for damages for emotional distress, and that cases seeking future damages for medical monitoring can move forward if plaintiffs demonstrate an increase in medical expenses.

The *Caronia* Court acknowledged that it "undoubtedly has the authority to recognize a new tort cause of action, but that authority must be exercised responsibly, keeping in mind that a new cause of action will have both 'foreseeable and unforeseeable consequences, most especially the potential for vast, uncircumscribed liability'." *Caronia*, slip op. at 11 (citing *Madden v. Creative Servs.*, 84 NY2d 738, 746 (1995)). The *Caronia* Court also conceded there are "significant policy reasons that favor recognizing an independent medical monitoring cause of action" (Caronia, slip op. at 11-12), but that the "Legislature is plainly in the better position to study the impact and consequences of creating such a cause of action . . ." (*Caronia*, slip op. at 13).

Prior to this ruling, New York courts had recognized medical monitoring as an element of damages recoverable only after a physical injury has been proven. No New York appellate court had addressed the viability of an independent cause of action for medical monitoring, finding only that medical monitoring costs can be included in a damages award. Had the Court of Appeals sanctioned medical monitoring as an independent tort, New York could have become a magnet jurisdiction for such claims. The *Caronia* decision is important to numerous industries including medical device manufacturers, homebuilders and developers, pharmaceutical companies, consumer products manufacturers, the military and defense contractors, railroad companies, mining companies, oil and gas companies, coal companies, agriculture companies, liability insurers and chemical manufacturers—to name a few—in avoiding the economic consequences of class actions by potentially millions of plaintiffs with no actual injuries who seek damages because they may be at a higher risk of developing an injury later in life. Such "fear of" claims could have flooded the courts and massively expanded potential liability to the many defendants subject to jurisdiction in New York. This high court determination puts New York squarely in the camp of those jurisdictions which reject an independent equitable cause of action for medical monitoring.

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Evidence

Ninth Circuit Court of Appeals Vacates $9.3 Million Asbestos Verdict

Estate of Barabin v. AstenJohnson, Inc

Holding

The Ninth Circuit Court of Appeals vacated a $9.3 million asbestos verdict, holding that the US District Court for the Western District of Washington erred in admitting expert testimony without undergoing a *Daubert* hearing and without making the necessary findings of relevancy and reliability under Federal Rule of Evidence 702. It also held that a reviewing court can properly make findings related to expert testimony admissibility if it "decides the record is sufficient to determine whether expert testimony is relevant and reliable…"

Facts

Plaintiff Henry Barabin alleged that he was exposed to asbestos while working at a paper mill, which caused pleural mesothelioma, a rare cancer affecting the tissue surrounding the lungs. Prior to trial, Defendants moved to exclude the testimony of Plaintiffs' industrial hygienist, Kenneth Cohen, arguing that he was not qualified to testify and that his theory was not the product of scientific methodology. Defendants also moved to exclude expert Dr. James Millette arguing that his tests were unreliable due to marked differences between testing conditions and actual conditions at the paper mill. Defendants also sought to exclude any testimony regarding the theory that "every asbestos fiber is causative." The court initially excluded the testimony of Cohen but subsequently reversed its decision after Plaintiffs presented further information regarding the factual basis for the expert's testimony and related testimony in other trials. The court did not hold a *Daubert* hearing related to the testimony of any expert and all of the testimony was allowed at trial. The district court essentially passed to the jury its concerns with the reliability of the expert testimony.

Why This Case Is Important

This case highlights the trial court's function as a gatekeeper to exclude junk science that does not "logically advance a material aspect of the party's case" and has no "reliable basis in the knowledge and experience of the relevant discipline." Reliability rests upon a number of non-exhaustive factors: (1) whether the scientific theory or technique can be (and has been tested); (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the relevant scientific community. It is an abuse of discretion for the trial court to relinquish its gatekeeper role and delegate the evaluation of expert testimony to the jury.

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Jurisdiction

US Supreme Court Raises Threshold for Suing Foreign Companies in the United States

Daimler AG v. Bauman, et al.

Last year, in two decisions, the U.S. Supreme Court upheld the protection afforded to manufacturers in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

- In *J. McIntyre Machinery Ltd. v. Nicastro*, the Court held, in a 6–3 decision, that putting a product in the stream of commerce without anything more is not enough to subject a company to specific jurisdiction of a court in the state where the accident occurred.
- In *Goodyear v. Dunlop Tires Operations, S.A. v. Brown,* the U.S. Supreme Court, in a 9–0 decision, held that there is no general jurisdiction over a foreign company that does not have continuous and systematic contacts with the state attempting to exercise jurisdiction. Whether the company placed the accident product in the stream of commerce is not applicable to a general jurisdiction inquiry.

The Supreme Court recently expanded on the *Nicastro* and *Goodyear* cases in a decision that will be very interesting to the international business community, especially foreign business that have, or even contemplate having, affiliates or subsidiaries operating in the United States. In ***Daimler AG v. Bauman, et al***., No. 11-965, the Court held that a defendant will be subject to general jurisdiction in a state only if its connections with the state are so continuous and systematic as to render the defendant "essentially at home" in the forum state. The decision demonstrates that the Supreme Court is clarifying and rationalizing the circumstances under which a foreign corporation can be subject to jurisdiction in the United States.

Background

DaimlerChrysler Aktiengesellschaft (Daimler) is a German public stock company. The plaintiff in *Bauman* alleged that Mercedes-Benz Argentina (MB Argentina), an Argentinean subsidiary of Daimler, collaborated with state security forces during Argentina's 1976–1983 "Dirty War" to kidnap, detain, torture and kill certain MB Argentina employees.

The plaintiffs alleged that personal jurisdiction over Daimler was appropriate because of the California contacts of Mercedes-Benz USA, LLC (MBUSA), a different Daimler subsidiary, incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes vehicles manufactured by Daimler to independent dealerships throughout the United States, including California.

Daimler moved to dismiss the action for lack of personal jurisdiction. The District Court granted Daimler's motion to dismiss. The Ninth Circuit reversed the dismissal and held that MBUSA, which it assumed fell within the California courts' long-arm statute, was Daimler's "agent" for jurisdictional purposes, so that Daimler should also be answerable to suit in California. The U.S. Supreme Court reversed the Ninth Circuit's decision, holding that Daimler should not be subject to jurisdiction for injuries allegedly caused by conduct of MB Argentina that took place entirely outside the United States.

U.S. Supreme Court Decision

The Supreme Court held that the Ninth Circuit's agency theory could not be sustained because it rested on MBUSA's services being "important" to Daimler. The Court noted that if "importance" in this sense were sufficient to justify jurisdictional attribution, foreign corporations would be subject to suit on any or all claims wherever they have an in-state subsidiary or affiliate. This outcome would sweep beyond even the "sprawling view of general jurisdiction."

Even assuming for the purposes of this decision that MBUSA qualified as “at home” in California, the Supreme Court noted that Daimler’s affiliations with California were not sufficient to subject it to the general jurisdiction of California’s courts. The Court noted that, outside an exceptional case, a corporation is subject to general jurisdiction in the jurisdiction where it is incorporated and/or where its principal place of business is located. Conversely, the plaintiffs’ reasoning in *Bauman* would reach well beyond those exemplar bases to approve the exercise of general jurisdiction in every state in which a corporation engages in a substantial, continuous and systematic course of business. The Court noted that, as it held in *Goodyear*, the proper inquiry is whether a foreign corporation’s “affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state.”

The Supreme Court opined that neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business in California. If Daimler’s California activities sufficed to allow adjudication of an Argentinean-rooted case in California, the same global reach would presumably be available in every other state in which MBUSA’s sales are sizable. Accordingly, the Supreme Court held that even if Daimler had MBUSA’s California contacts attributed to it, Daimler was not “at home” in California and should not be subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred in California or had its principal impact in California.

The *Daimler* court also ruled that the Ninth Circuit did not give sufficient attention to the transnational context of the case and did not sufficiently consider the risks to international comity that its expansive view of general jurisdiction would present.

Analysis

This decision will be welcome news for foreign corporations that have affiliates and/or subsidiaries conducting business in the United States as they will not be subject to general jurisdiction in the United States simply because they have a subsidiary, not related to any alleged wrongdoing, conducting business in the United States. The Supreme Court made it significantly more difficult to establish general jurisdiction over a corporation for conduct not related to the forum, and that will be welcome news to international corporations. This should allow foreign corporations to better assess the potential for being sued in the United States and to manage potential liabilities.

The decision should make litigation less expensive for corporations because it should limit discovery aimed at proving that a corporation should be subject to general jurisdiction because of the nebulous quantity of contacts with the forum. The relevant inquiry is now whether the forum can be considered the corporation’s home; an inquiry that the Court held centers on whether the corporation’s principal place of business is located in that forum or if it is incorporated in that forum. This should greatly limit foreign corporations’ exposure to lawsuits in the United States.

Based on this decision, barring exceptional circumstances, a foreign corporation should not expect to be subject to general jurisdiction in a forum in which it does not have a subsidiary and/or affiliate incorporated in that forum and/or having a principal place of business in that forum. Moreover, even if a foreign corporation’s subsidiary is incorporated in the forum state or has its principal place of business in the forum state, in order to have jurisdiction over the foreign parent corporation, the plaintiff would have to demonstrate that the subsidiary is the parent corporation’s alter ego. For foreign corporations, this decision adds another layer of protection and certainty they can use to evaluate future liability risks and expenses.

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Jurisdiction

US Supreme Court Clarifies the Enforcement of Forum-Selection Clauses

Atl. Marine Constr. Co. v. United States Dist. Court

In *Atl. Marine Constr. Co. v. United States Dist. Court*, 187 L. Ed. 2d 487, 2013 U.S. LEXIS 8775, 2013 WL 6231157 (2013), the United States Supreme Court clarified the procedure for enforcing a valid forum-selection clause when a case is brought in a jurisdiction other than the one identified in the clause.

Facts

Defendant, Atlantic Marine Construction Co., is a Virginia corporation that was hired to construct a child-development center at Fort Hood in the Western District of Texas. Atlantic Marine entered into a subcontract with plaintiff, J-Crew Management, to perform construction work on the project. The subcontract contained a forum-selection clause, which stated that all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia Norfolk Division." After a payment dispute arose, plaintiff filed suit against defendant in the Western District of Texas. Defendant moved to dismiss under 28 U.S.C. § 1406(a) and Federal Rule of Civil Procedure 12(b)(3). Defendant also argued in the alternative that a transfer would be appropriate under 28 U.S.C. § 1404(a). The District Court denied both motions, and the Fifth Circuit Court of Appeals denied defendant's petition for a *writ of mandamus*.

Analysis

The United States Supreme Court overruled the District Court and the Fifth Circuit by holding that the proper procedure for enforcing a valid forum-selection clause is a motion to transfer under 28 U.S.C. § 1404(a), not a motion to dismiss for improper venue. The Court found that venue transfers under 28 U.S.C. § 1406(a) or FRCP 12(b)(3) are conditioned upon venue being "wrong" or "improper." Unlike 28 U.S.C. § 1406(a) or FRCP 12(b)(3), a 28 U.S.C. § 1404(a) motion to transfer does not require a forum to be wrong or improper, making it the appropriate mechanism for enforcing a forum-selection clause.

The Court also found the doctrine of *forum non conveniens* is the proper method for enforcing a forum-selection clause that directs a conflict to a state or foreign forum. The Court explained that Section 1404(a) is a codification of the doctrine of *forum non conveniens* and that the doctrine "has continuing application in federal courts" for all cases directing a conflict to a nonfederal forum. Furthermore, since the motion to transfer derives from the *forum non conveniens* doctrine, courts should use the same balancing test for evaluating forum-selection clauses pointing to federal and nonfederal forums.

The Court then stated the Section 1404(a) balancing test for cases involving a valid forum-selection clause. When a contract contains a valid forum-selection clause, the balancing test changes in three ways:

1. The plaintiff's choice of forum receives no weight, and the plaintiff has the burden of establishing why the case should not be transferred to the forum specified in the forum-selection clause. The Court reasoned that parties usually bargain for this provision in a contract and provide consideration in exchange for the forum.
2. District courts cannot consider the parties' private interests because any inconvenience the parties may suffer by litigating in the forum specified in a forum-selection clause was foreseeable at the time the contract was formed. Consequently, public interest factors may only be considered.
3. When a party files suit in a forum different than the one specified in the forum-selection clause, the Section 1404(a) venue transfer will not allow a plaintiff to adopt the substantive law of the state in which

the transferring court sits. The Court found that doing so would encourage gamesmanship and allow a plaintiff to forum shop for state-law advantages, which would "disrupt the parties' settled expectations."

Therefore, the Supreme Court overruled the lower courts and remanded the motion to transfer decision to be decided in accordance with its opinion.

Learning Points

It is important to note that this entire analysis is premised on the forum-selection clause at issue being valid. If the forum-selection clause is invalid, the Supreme Court's new balancing test does not apply. With that caveat in mind, this decision makes it significantly easier and more cost-effective to enforce valid forum-selection clauses. The Court's ruling provides parties with a clear procedure for transferring cases to the forum specified in a forum-selection clause and resolves the conflict among lower federal courts. The decision should provide parties with the legal authority they need to draft strong motions to transfer and enforce valid forum-selection clauses. The decision also curbs a plaintiff's ability to forum shop for state-law advantages, which allows the parties to better predict the governing law and litigation risks they may face by agreeing to a forum-selection clause.

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Jurisdiction

Joinder And Effects Of Necessary And Indispensable Parties In Assault And Battery Cases In Nevada

In negligent security cases, where the plaintiff alleges that he or she was assaulted, the active tortfeasor who commits the battery may be brought in under Nevada *Rule of Civil Procedure* ("NRCP) 19(a) as an indispensable party to the lawsuit, even if the plaintiff did not name that party as a direct defendant.

NRCP 19 governs the joinder of parties to an action who are necessary and indispensable. NRCP 19(a) provides, in pertinent part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may...(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest...[.] (emphasis added).

The failure to join a necessary party does not serve the interest of justice or comply with NRCP 19(a). *Crowley v. Duffrin*, 109 Nev. 597, 602, 855 P.2d 536, 539-40 (Nev. 1993). Joinder of necessary parties is required:

> if the defendants actually before the court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability, under the decree, more extensive and direct, than if the absent parties were before the court, that of itself will, in many cases, furnish a sufficient ground to enforce the rule of making the absent persons parties.

Robinson v. Kind, 23 Nev. 330, 335-36 (Nev. 1896) (overruled on other grounds) (emphasis added).
All persons materially interested, either legally or beneficially in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind them all.
Id. at 335.

"If the interest of absent parties may be affected or bound by the decree, they must be brought before the court or it will not proceed to decree." *Id*., at 335-36.

Under Nevada's comparative negligence statute, both the active tortfeasor (assailant) and the passive tortfeasor (property owner) can be held liable. However, only the active tortfeasor (assailant) can be jointly and severally liable. A passive tortfeasor, such as an owner of the property where the assault took place, would only be severally liable for its own negligence. NRS 41.141 is Nevada's comparative fault statute. NRS 41.141 provides, in pertinent part:

4. Where recovery is allowed against more than one defendant in such an action, except as otherwise provided in subsection 5, each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant.

5. This section does not affect the joint and several liability, if any, of the defendants in an action based upon:

. . .

(b) an intentional tort.

See, NRS 41.141 (emphasis added).

In *Café Moda, LLC v. Palma*, 272 P.3d 137, 138 (Nev. 2012), the Nevada Supreme Court determined whether NRS 41.141 allows liability to be apportioned between a negligent tortfeasor and an intentional tortfeasor. In *Café Moda*, Richards and Palma were patrons of Café Moda. *Id*. They had an altercation at the restaurant which resulted in Richards repeatedly stabbing Palma. *Id*. Palma brought suit against Café Moda under a theory of negligence. *Id*. Palma sued Richards under an intentional tort theory of liability. *Id*. The jury rendered a verdict in favor of Palma and apportioned 80% of the fault to Richards and the remaining 20% to Café Moda. Id. The District Court determined that under NRS 41.141, Richards and Café Moda were jointly and severally liable for 100% of Palma's damages. *Id*. Café Moda appealed. *Id*.

The Nevada Supreme Court overturned the District Court and concluded that the several liability provision contained in subsection 4 of NRS 41.141 applied to an action involving a negligence cause of action and intentional tort cause of action against multiple defendants. *Café Moda,* 272 P.3d at 141. The Court found that the Legislature placed the several liability provision for multiple defendants into the statute to prevent the deep pocket doctrine. *Id*., at 140 citing Hearing on A.B. 249 Before the Senate Judiciary Comm., 65th Leg (Nev., March 8, 1999). In light of this rationale, the Nevada Supreme Court found that several liability should be apportioned amongst all defendants even though subsection 4 of NRS 41.141 refers to percentage of negligence only. *Id*. Thus, the Court construed subsection 4's use of the word "negligence" to actually mean "fault" *Id*. The Court reasoned that a defendant should not receive the benefits of several liability only if his codefendant is also being sued on a negligence theory:

[This application not only] runs counter to the Legislature's design of NRS 41.141, but it produces the unreasonable result of hinging the extent of a negligent defendant's liability on another party's mindset.

Id., at 141.

The Court concluded that the District Court should have determined that Café Moda was severally liable for 20% of Palma's damages and that Richards remained jointly and severally liable for 100% of Palma's damages. *Café Moda, LLC v. Palma*, 272 P.3d 137, 141 (Nev. 2012).

That decision left defendants filing motions to name assailants as indispensable parties under NRCP 19(a) in hopes that they would only be severally liable for their respective negligence. However, the plaintiffs' bar argued that a plaintiff has the right to sue whomever he wants under whatever theory of liability he wishes to use (i.e., a plaintiff can sue just the property owner for negligent security and does not have to sue the assailant for assault and battery, if he does not want to). This prompted a further interpretation of the *Café Moda* case, which the Nevada Supreme Court took up in 2013.

The Nevada Supreme Court recently clarified its stance regarding a plaintiff's joinder of a tortfeasor as a necessary party under NRCP 19(a). *Humphries v. Eighth Judicial Dist. Ct.,* 129 Nev. Adv. Op. 85 (2013).

The *Humphries* case involved an altercation that occurred between Plaintiffs Humphries and Rocha II and Defendant Ferrell at the New York-New York Hotel and Casino in Las Vegas, Nevada. security officers and police stopped the altercation and detained Ferrell. Ferrell was arrested and subsequently convicted of one count of attempted battery with substantial bodily harm.

In May 2011, Plaintiffs filed a complaint against Defendant New York-New York Hotel and Casino, alleging various negligence causes of action. Plaintiffs did not make any allegations or claims against Ferrell. New York-New York subsequently moved the Court to compel Plaintiffs to join Ferrell as a necessary party under NRCP 19(a). The Court granted New York-New York's motion pursuant to the Nevada Supreme Court's decision in *Café Moda, L.L.C. v. Palma*, 272 P.3d 137 (Nev. 2012). In *Café Moda*, the Court held that in a case alleging comparative negligence, an intentional tortfeasor's liability is joint and several, but a merely negligent co-tortfeasor's liability is several, even if the injured party is not comparatively negligent. Plaintiffs petitioned the Nevada Supreme Court for a writ of mandamus, challenging the Court's order.

The Nevada Supreme Court clarified its holding in *Café Moda* and determined that the District Court erred in compelling Plaintiffs to join Ferrell as a necessary party. The Court reasoned that a plaintiff may still be afforded complete relief under NRCP 19(a) against the liable defendant(s) he sues, regardless of the existence of other co-tortfeasors. The Court reasoned that the named defendant may have a cause of action for contribution against a co-tortfeasor, which does not preclude complete relief between the plaintiff and defendant. The Court further concluded that under NRCP 19(a)(2), a co-tortfeasor's ability to dispute his liability to the plaintiffs will not

be impacted by an action to which the co-tortfeasor is not a party, and the defendant will not be subject to inconsistent obligations.

The Nevada Supreme Court also determined that public policy considerations weigh against a *per se* rule requiring a plaintiff to join co-tortfeasors in a lawsuit as necessary and indispensable parties. A plaintiff who is unable to join a tortfeasor because the tortfeasor is unknown, immune from liability or outside of the court's jurisdiction would face the harsh sanction of dismissal under a *per se* rule. As a result, a plaintiff would bear the entire burden of damages, regardless of the original defendant's availability of fault. The Court stated that placing the risk of an unknown, immune or unavailable tortfeasor on an available and at-fault tortfeasor is more equitable than dismissal for failure to join a necessary party.

The Nevada Supreme Court also noted that a defendant tortfeasor has the ability to implead a co-tortfeasor on a theory of contribution under NRCP 14(a). The ability to seek contribution from a co-tortfeasor affords the named defendant some relief without requiring joinder of a co-tortfeasor under NRCP 19(a). Specifically, impleading the co-tortfeasor provides the named defendant with an avenue to apportion fault when the plaintiff chooses not to pursue a claim against a potential tortfeasor. The Court concluded that permitting the defendant to implead the other tortfeasor properly places the burden of joining a nonparty on the party that stands to benefit the most from joining the nonparty.

The *Humphries* Court concluded that complete relief could be afforded between Plaintiffs and Defendant New York-New York without requiring that Plaintiffs join Ferrell as a necessary and indispensable party under NRCP 19(a). The Court further determined that Defendant New York-New York could pursue apportionment of fault without Ferrell's joinder through impleader under NRS 17.225(1) and NRCP 14(a).1 In the event that Defendant New York-New York joined Ferrell, the Supreme Court instructed that the jury should render a special verdict indicating the percentage of negligence attributable to each party including Ferrell as the third-party defendant. Thus, the ruling prevented Defendant New York-New York from obtaining the benefits of several liability apportioned amongst multiple defendants pursuant to NRS 41.141(4).

Analysis of the current state of law in Nevada If a plaintiff alleges both assault and battery and negligent security and sues both the active tortfeasor (assailant(s)) and the passive tortfeasor (property owner/security company), the active tortfeasor is both jointly and severally liable, whereas the passive tortfeasor is only severally liable for its proportionate liability.

Where a plaintiff chooses to sue only the passive "deep pockets" defendant, that defendant can file a third party complaint against the active tortfeasor. While the passive defendant will be held liable for the entire judgment if the plaintiff proves his case, the passive defendant may seek proportionate contribution from the active tortfeasor whom it has named as a third party defendant.

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1 NRS 17.225(1) states: "Except as otherwise provided in this section and NRS 17.235 to 17.305, inclusive, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them."

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Premises Liability

West Virginia Premises Liability Risks....Not Open and Obvious Anymore

Hersh v. E-T Enterprises, Ltd.

West Virginia courts have historically held that an injured individual is not allowed to recover damages from injuries that occur due to hazards that are open and obvious thus providing a defense to property owners. That all changed on November 12, 2013 when the state's highest court, the West Virginia Supreme Court of Appeals, released a landmark decision in *Hersh v. E-T Enterprises, Ltd.,* et al., No. 12-0106. This decision overturns more than 100 years of West Virginia case law by holding that the "open and obvious doctrine in premises liability negligence actions is abolished."

The Court replaced the open and obvious doctrine with a new standard of care stating that "if it is foreseeable that an open and obvious hazard may cause harm to others despite the fact it is open and obvious, then there is a duty of care upon the owner or possessor to remedy the risk posed by the hazard." Therefore, instead of precluding liability, the Court held that the question of comparative negligence when a hazard is open and obvious should be determined by a jury.

The Hersh matter arose out of a personal injury suffered by plaintiff Walter E. Hersh while shopping at a Martinsburg, West Virginia shopping plaza. While in the shopping plaza parking lot, Mr. Hersh traversed a set of stairs that did not have a handrail in violation of a Martinsburg city ordinance. The handrail was reportedly removed by the property owner, to prevent skateboarders from using it to perform stunts, which could result in serious injury. Mr. Hersh fell down the stairs and suffered a severe head injury. There was no dispute between the parties as to whether (1) the missing handrail constituted a violation of Martinsburg city ordinance, or (2) that Mr. Hersh was aware of the missing handrail before he attempted to traverse the stairs.

In reversing the circuit court, the West Virginia Supreme Court of Appeals relied on the fact that violation of the city ordinance imposed a duty of care upon the property owner and that the "obviousness of a danger does not relieve an owner or possessor's duty of care towards others . . . [w]hether a plaintiff's conduct under the circumstances was reasonable will be determined under the principles of comparative negligence. A plaintiff's knowledge of a hazard bears upon the plaintiff's negligence; it does not affect the defendant's duty."

In an effort to preserve the logic behind the open and obvious doctrine, the Court also stated: "the finder of fact must assess whether a non-trespassing entrant failed to exercise reasonable self-protection in encountering a hazard . . . [b]ut an entrant's decision to encounter an open and obvious danger does not necessarily mean that the land possessor was not also negligent for failing to fix an unreasonable danger in the first place."

The Court also emphasized that it continues "to hold that possessors of property - particularly private homeowners - are not insurers of safety . . . they only have a duty to take reasonable steps to ameliorate the risk." The Court then proceeded to apply its new test to the facts of this case, finding that the circuit court "should have found that the defendants had a duty of care to install handrails on the staircase."

All property owners and business owners in particular need to evaluate their operations and property to eliminate and protect against risks associated with even the most open and obvious risks, and train their supervisors and managers on this potential heightened risk area as well.

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Premises Liability

Supreme Court of Kentucky Effectively Abrogates the Open and Obvious Danger Doctrine

Shelton v. Kentucky Easter Seals Society, Inc.

Two seminal opinions on premises liability law issued by the Supreme Court of Kentucky have substantially redefined the open-and-obvious-danger doctrine, with significant implications for premises liability claims. Generally, land possessors owe invitees a duty to discover unreasonably dangerous conditions on the property and to either correct the conditions or, at a minimum, warn invitees of their existence. *See, e.g., Kentucky River Medical Center v. McIntosh,* 319 S.W.3d 385 (Ky. 2010) (citing *Perry v. Williamson,* 824 S.W.2d 869, 875 (Ky. 1992)). Traditionally, the open-and-obvious-danger doctrine operated as an exception to this general duty, providing that land possessors were not liable to invitees who are injured by open and obvious dangers. The Court's opinions in *McIntosh* and more recently in *Shelton v. Kentucky Easter Seals Society, Inc.,* 2011-SC-000554-DG (Ky. 2013), issued in November 2013, combine to effectively abrogate the open-and-obvious-danger doctrine in Kentucky.

McIntosh: The First Step Toward Abrogating the Doctrine

In *McIntosh,* the parties and the Court framed the issue as whether the existence of an open and obvious danger presents a question of law as to a defendant's duty, or a question of fact as to the relative fault of the parties. In its opinion, the Court explored the history of the doctrine, which arose during the era of contributory negligence. Under contributory negligence, any negligence on the part of the plaintiff barred recovery. When contributory negligence was the prevailing rule, the Court noted, courts sometimes applied the doctrine in terms of duty while others did so in terms of fault. But the distinction was irrelevant because under either approach the plaintiff could not recover by virtue of his or her own contributory negligence. Now that Kentucky and most other states have adopted a comparative fault regime, the distinction is critical. If the doctrine is applied to excuse a land possessor's duty, there is no recovery because the existence of a legal duty is a prerequisite to a finding of negligence. By contrast, if the doctrine is applied only to assess the relative fault of the parties, an injured party may recover, with the amount of recovery offset by his share of the fault.

The *McIntosh* Court noted that the "manifest trend of the courts [nationally] is away from the traditional rule absolving … owners and occupiers of land from liability for injuries resulting from known or obvious conditions" and toward tasking the jury with evaluating the relative fault of the parties. Courts are increasingly adopting the position of the Restatement Second of Torts, which provides: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." The Restatement approach thus frames the issue in terms of foreseeability: a land possessor may, under this approach, be liable for injury caused by a condition, despite its open and obvious nature, if the harm was foreseeable.

The Restatement enumerates specific instances in which harm may be foreseeable, and the land possessor may be liable: "where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it … [and] where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk."

The *McIntosh* Court explicitly embraced the Restatement approach, viewing it as "consistent with Kentucky's focus on foreseeability in its analysis of whether or not a defendant has a duty." Moreover, the Court

characterized the approach as consistent with a rule of comparative fault because it would hold both plaintiff and defendant responsible for their negligence. The Court reasoned that allowing "known or obvious conditions to always absolve land possessors from any liability 'would be to resurrect contributory negligence' in such cases," and concluded that the open-and-obvious-danger doctrine has little place outside a contributory negligence regime. The Court couched its reasoning in policy terms, viewing its role as " [discouraging] unreasonably dangerous conditions rather than fostering them in their obvious forms." "The party in the best position to eliminate a dangerous condition," the Court wrote, "should be burdened with that responsibility."

The Court established the following approach, effectively gutting the doctrine: "The lower courts should not merely label a danger as 'obvious' and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger." The Court further noted that this approach "places a higher duty on the plaintiff to look out for his own safety," noting that the jury could still apply comparative fault principles to apportion some degree of fault to the plaintiff.

In *McIntosh,* the Court clearly set out to abrogate, or at least severely limit, the open-and-obvious-danger doctrine by shifting its application from a question of law, to be decided by the trial judge, to a question of fact, to be resolved by the jury. While the Court embraced the Restatement approach and emphasized foreseeability as the central inquiry, it retained the basic principle underlying the open-and-obvious-danger doctrine: that there is no duty to warn of or correct open and obvious dangers, *except* where the harm, despite the open and obvious nature of the danger, was foreseeable.

Shelton: The Death Knell

In *Shelton v. Kentucky Easter Seals Society, Inc.,* 2011-SC-000554-DG (Ky. 2013), the Court went further, noting that a "close reading of *McIntosh* indicates that [the Court] decided the existence of an open and obvious danger went to the issue of duty." The *Shelton* Court embraced the opportunity to clarify *McIntosh* and "emphasize that the existence of an open and obvious danger does not pertain to the existence of duty. Instead, [it] involves a factual determination relating to causation, fault or breach."

Shelton explicitly flips the basic foundation of the open-and-obvious-danger doctrine and its own reasoning in *McIntosh,* holding that an "open-and-obvious condition does not eliminate a landowner's duty. Rather, in the event that the defendant is shielded from liability, it is because the defendant fulfilled its duty of care and nothing further is required. … No liability is imposed when the defendant is deemed to have acted reasonably under the given circumstances." In other words, there is *always* a duty owed to invitees, regardless of the obvious and open nature of the danger. The relevant inquiry, to be conducted by the jury, is the extent of the foreseeable risk, and this speaks to the existence of a breach and apportionment of fault, not duty.

Where We Stand

Post-*Shelton*, the open-and-obvious-danger doctrine survives in theory, but likely not in practice. By characterizing the issue of whether a danger was open and obvious as a question of fact relating to breach and fault, rather than a question of law relating to duty, the Court has removed the bar to recovery that previously existed for plaintiffs claiming injuries resulting from openly and obviously dangerous conditions on the land of another. Now, the nature of the condition is relevant only to the issues of whether the defendant breached a duty to the plaintiff and the relative fault of the parties to an action.

The effect of *Shelton* is that far more premises liability claims involving injuries previously barred under the doctrine will survive motions for summary judgment and proceed to trial. While the Court predicted that summary judgment would remain a viable option under the new approach, it is difficult to envision such viability in practice. The Court held that "[i]f reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation, summary judgment is still available to the [land possessor]," theoretically retaining the option of summary judgment. However, motions for summary judgment are analyzed in a light most favorable to the non-moving party (the plaintiff), and in light of the Court's emphasis on comparative fault principles, it seems likely that claims will survive simply by plaintiff asserting *some* fault on the part of defendant. It would then fall to the jury to assess the relative fault of each party.

The open-and-obvious-danger doctrine is effectively dead in Kentucky, its application now confined to the factual issues of breach and comparative fault – determinations made during the trial phase, after significant investments of time and money that the doctrine had previously enabled land possessors to avoid.

A case in the U.S. District Court for the Western District of New York provides a good example of a fracking case that used a Lone Pine order to force plaintiffs to pick a story early in litigation.[10] Unlike the cases in Pennsylvania and West Virginia, this case was brought by 15 different plaintiffs, as opposed to four or fewer.

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Case Hyperlink: http://opinions.kycourts.net/sc/2011-SC-000554-DG.pdf

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Premises Liability

Ohio Supreme Court Rules that the Recreational User Statute Provides Immunity for Property Owners, Even for Manmade Hazards

Pauley v. City of Circleville

The Ohio Supreme Court recently issued a decision extending recreational user statute immunity to real property owners who have man-made hazards on their property. This is an important decision for property owners who open their land for recreational purposes because it limits their liability and further clarifies the application of the recreational user statute for man-made hazardous conditions on property.

In the recent Ohio Supreme Court case of *Pauley v. City of Circleville*, 137 Ohio St.3d 212 (2013), Plaintiff was catastrophically injured while sledding at a park owned by the City of Circleville. Entry to the park was free. In the summer of 2006, the City offered free topsoil excavated from a nearby construction site. The remaining topsoil was left at the park and emptied onto the ground, where it formed two mounds approximately 15 feet high. One afternoon the 18-year old Plaintiff and his friends decided to go sledding at the park. The Plaintiff claimed that as he was sledding down one of the mounds, he "hit an immoveable object," "instantly went numb" and could not move his body. The Plaintiff suffered a broken neck, which caused him to become a quadriplegic. The day after, his friends went back and observed what looked like a railroad tie where Plaintiff was injured. Plaintiff and his mother filed a complaint alleging that the city acted negligently, recklessly, and wantonly in dumping debris in the park, which resulted in a physical defect that caused Plaintiff's injuries.

The central issue in Pauley was the recreational user statutes, O.R.C. §1533.18 and 1533.181, which generally hold that property owners who open their premises to recreational users free of charge are immune from liability for injuries suffered by recreational users engaged in recreational activities. The Plaintiffs urged the Court to hold that if a property owner modifies his or her property in a manner that creates a hazard without promoting or preserving the recreational character of the property, then immunity does not apply.

The recreational user statute states that "no owner owes any duty" to any recreational user. The Court thus determined that an owner of recreational property cannot be liable for injuries sustained during recreational use "even if the property owner affirmatively created a dangerous condition." Applying this principle, the Court held that the City owed the Plaintiff no duty to keep the premises safe and that the City's alleged creation of a hazard on the premises did not affect this immunity.

This decision is an important clarification of the recreational user statute, which will provide additional protection to owners of recreational land including government entities that often open their land to the public. If the property owner takes actions which are later determined to have created a hazard, the property owner cannot be liable as long as the property qualifies as recreational property and the user qualifies as a recreational user engaged in a recreational activity.

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Premises Liability

Statutory Immunity For A Landowner When An Injured Claimant Is Engaged In A Recreational Activity

Landowners in California are often sued by members of the public who sustain injuries while engaging in recreational activities on the private landowner's property, such as skateboarding, watching fireworks, hiking, camping, fishing, et cetera. In defending against lawsuits initiated by such injured members of the public, defense counsel should always plead the affirmative defense of statutory immunity for landowners provided by Civil Code section 846. What follows is an analysis of that defense and its application as illustrated in a recent case wherein our client, a private landowner, prevailed on a motion for summary judgment against plaintiffs who were injured while allegedly on our client landowner's private property for the purpose of watching a 4th of July fireworks display.

In California, public policy favors private landowners allowing their property to remain open for members of the public to use that land for recreational purposes. To effectuate that policy, the California Legislature enacted *Civil Code* section 846, granting statutory immunity to landowners in cases where members of the public sustain injury while engaged in recreational activities, so long as certain conditions are met, as described herein below.

A. Statutory Language of ***Civil Code*** § 846

Civil Code § 846 provides:

An owner of any estate or any other interest in real property, whether possessory or non-possessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or non-possessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to entre for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

B. The Requisite Elements to Perfect the Statutory Immunity Defense

1. "*Recreational Purpose*"

As stated above, the statute defines "recreational purpose" to ***include*** such activities such as "fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites."

"The determination as to whether the land is 'suitable' for recreation is placed on the user, not the courts….The statute encompasses any land that is ***used*** for recreation, rather than what some court may determine is recreational land." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1106.) "By stating that a recreational purpose 'includes such activities as' those listed therein, the statute clearly indicates that the list is merely illustrative….A recreational purpose is one intended to refresh the body or mind by diversion, amusement, or play." (*Valladares v. Stone* (1990) 218 Cal.App.3d 362, 369.)

For illustrative purposes, we recently won a motion for summary judgment in a case where an out of control vehicle jumped a curb and plowed into a crowd of spectators watching a Fourth of July fireworks display from, and bordering, a privately owned shopping center. The court agreed with our argument that the plaintiff spectators were engaged in a recreational activity (e.g., sightseeing, picnicking…viewing or enjoying historical, scenic…sites), over plaintiffs' argument that because one of the plaintiffs had made a purchase at one of stores within the defendant shopping center prior to sitting down to watch the fireworks display, plaintiffs were not engaged in a recreational activity, but rather, the activity for which the shopping center was open (i.e., retail sales).

2. *Willful or Malicious Failure to Guard Against a Dangerous Condition*

In the context of *Civil Code* § 846, 'willful or malicious' failure to guard or warn against a dangerous condition, use, structure or activity on private property, involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. (See *Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927, 947-948.) The intention must relate to the misconduct and not merely to the fact that some act was intentionally done. "Willfulness generally is marked by three characteristics: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury is a probable, as opposed to possible, result of the danger; ***and*** (3) conscious failure to act to avoid the peril." (*Manuel, supra,* at pg. 940; ***emphasis*** added.)

Going back to the aforementioned exemplar, we presented undisputed evidence that established the owner of the shopping center: (1) was not involved in any way in the preparation, or execution, of the fireworks display; (2) had no knowledge prior to the incident that members of the public used its private property as a viewing area for the fireworks display; (3) did not know, or have reason to know, that a vehicle would or would likely strike another vehicle in the intersection and subsequently strike spectators on the corner of that intersection, because to their knowledge, that had never happened before; (4) never intended to harm anyone by not placing barricades or some other type of protective devices (a) on the private property, (b) on the public sidewalk bordering the private property, or (c) beyond the public sidewalk in the public street, to attempt to prevent the incident from happening, because it had no authority to do so; and (5) did not consciously fail to act to prevent the incident from occurring based on the aforementioned undisputed facts.

Plaintiffs' argument in opposition was that an employee of the shopping center assumed people would be watching the fireworks display near the property, and perhaps tailgating, and thus, the private landowner's

decision to basically 'do nothing' was 'willful and malicious.' The court found plaintiffs' argument unpersuasive.

3. *Consideration*

"Consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72.)

Again using the aforementioned exemplar, we presented undisputed evidence that plaintiffs paid no consideration to the landowner to use the shopping center, and/or the sidewalk bordering the shopping center, as a viewing area for the fireworks display.

Plaintiffs argued that stores and restaurants within the shopping center were open for business and that the landowner's assumed knowledge and permitting of members of the public to watch the fireworks display from its property, and to tailgate therefrom, established goodwill in the community which amounts to consideration. Plaintiffs concurrently argued that one of the plaintiffs shopped at one of the stores in the shopping center prior to sitting down to watch the fireworks display, and that since that store made a profit from that sale, and the shopping center thereby obtained a percentage of the profit from that sale pursuant to the lease, the shopping center obtained the requisite consideration. The court again found plaintiffs' arguments unpersuasive.

4. "*Express Invitation*"

"In ordinary parlance, an advertisement to the general public is not considered an 'express invitation' to each member of the public to whom the message is beamed. Nothing in the sparse legislative history of *Civil Code* § 846 suggests that a more encompassing reading of the term 'expressly invited' was intended. To the contrary, the little history available indicates that the Legislature intended the term 'expressly invited' to include only those persons who were personally selected by the landowner." (*Phillips v. U.S.* (1979) 590 F.2d 297, 299.) Furthermore, *Ravell v. U.S.* (1994) 22 F.3d 960 held that *Johnson v. Unocal Corp.* (1993) 21 Cal.App.4th 310, correctly set forth the law of the State of California, and that plaintiff, a member of the public, came onto the property without "a direct personal invitation" and thus, the defendant did not owe a duty of care to make the property safe for her use, which was a recreational air show (citing *Johnson, supra*).

Again citing the exemplar, we presented undisputed evidence that the shopping center played no part in the promotion, or execution of the fireworks display. It did not advertise or market to members of the public that they could watch the fireworks display from the shopping center. The landowner did not send out any direct, personal invitations to any members of the public, much less plaintiffs, to come watch the fireworks display from its property. Plaintiffs even admitted in written discovery and depositions that they received no invitations from anyone to watch the fireworks display from where the incident occurred.

C. Handling the Landowner's Statutory Immunity Defense

Counsel for the landowner should ascertain as soon as possible what the injured plaintiffs were doing on the property when the injury occurred. If such was a recreational activity, whether expressly enumerated by the statute, or simply something that "refresh[es] the body or mind by diversion, amusement, or play," then counsel should then attempt to develop evidence that establishes that the exceptions enumerated above do not apply, and that the landowner is entitled to statutory immunity. Evidence establishing the elements of 'recreational purpose,' 'consideration', and 'express invitation' can be obtained from the plaintiff(s), most commonly through written discovery and/or deposition testimony. The landowner can also provide the evidence establishing the elements of 'consideration,' 'express invitation,' and 'willful or malicious,' most commonly through a declaration based on personal knowledge.

As a procedural matter, the landowner must plead as an affirmative defense statutory immunity pursuant to *Civil Code* § 846.

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Product Liability

Lance v. Wyeth: A New Cause of Action in Pennsylvania?

Issuing an opinion over two years after oral argument, the Pennsylvania Supreme Court ruled last week in *Lance v. Wyeth* that pharmaceutical companies can be held liable for negligence in the design and marketing of drugs. While the 4-2 majority opinion stated that Wyeth was asking for the court to impose "a new [restricted] duty regime" by ruling against such negligence claims, this decision actually expands the duty regime by allowing them.

Background

In April 1996, the Food and Drug Administration ("FDA") approved Redux as a prescription weight-loss drug. The Redux packaging warned of an increased risk of pulmonary hypertension ("PPH"). By September 1997, Wyeth and the FDA announced that the drug would no longer be available in the United States following reports of an association between the medication and serious heart problems.

In the fall of 2006, Patsy Lance brought this case on behalf of her daughter, Catherine Lance, alleging that Catherine ingested Redux for several months in 1997. The complaint alleged that the drug caused Catherine to develop PPH, from which she died within a month after her diagnosis in 2004. Lance framed her claims as "Negligence—Unreasonable Marketing of a Dangerous Drug and Unreasonable Failure to Remove the Drug from the Market before January 1997." Lance disavowed any claim based upon inadequate labeling.

At the lower court level, Wyeth filed and won a motion for summary judgment, arguing that Lance failed to assert a cognizable cause of action. On appeal, the intermediate appellate court found that Lance should have been permitted to proceed with a claim of negligent design only. Wyeth and Lance cross-appealed to the Pennsylvania Supreme Court, "challenging, respectively…that pharmaceutical companies are not immune (under Pennsylvania law) from claims of negligent drug design, and that claims of negligent marketing, testing, and failure to withdraw are unviable."

The Supreme Court's Decision

The majority of the Pennsylvania Supreme Court affirmed the intermediate court's ruling reinstating Lance's negligent design defect claim but reversed the part of the decision that disallowed other negligence-based theories, such as negligent marketing.

On appeal, Wyeth maintained that, under Pennsylvania precedent, claims against pharmaceutical companies were limited to manufacturing defects and inadequate warnings. But the Pennsylvania Supreme Court held that the case was a matter of first impression. The court noted that "products which a manufacturer or supplier knows or should know are too dangerous for any class of users are simply outside the purview" of previous decisions. Because the underlying decision was made at the summary judgment level, the court was required to accept as true that there was "a lack of due care resulting in an untenably dangerous product being put into the marketplace."

The Pennsylvania Supreme Court recognized in Lance that previous decisions took "a blanket approach applying comment k of the Restatement (Second) of Torts § 402A to preclude strict-liability design defect claims for all prescription drugs."1 The court held, however, that the adoption of comment k in the strict liability realm did not preclude a claim based on the negligent "design" of a prescription drug. According to the court, it is "plain enough that the comment [k] is premised on the assumption that all products within its scope carry some net benefit (relative to risks) for some class of consumers."

The court also disagreed "that comment k, a facet of the law of strict liability under the Restatement Second, readily translates into the negligence arena, particularly given the very distinct treatment of strict-liability versus negligence theory required under" Pennsylvania law. The court noted one of "the primary distinctions which has been vigorously maintained is that strict products liability is said to be concerned solely with the product itself. There is greater flexibility, however, with regard to traditional, fault-based liability – i.e., negligence – where the conduct of manufacturers and/or suppliers is squarely in issue."

Ultimately, the court saw Wyeth as "asking, in substance, that we should invoke policy justifications to scale back the existing duty of pharmaceutical companies to independently and vigilantly protect against unreasonable health risks which may be posed by products made for human consumption." The court suggested:

> A subtext of Wyeth's position…is that the likelihood that a pharmaceutical company would actually tender an essentially worthless and dangerous drug into commerce is so minimal, and the burden of responding to meritless claims so great, that it is not sound to preserve an avenue for redress even for legitimate claims. We do not discount the impact of litigation on the pharmaceutical industry, but we simply do not know enough about it to undertake any kind of reasoned comparison of the social policy effects of curtailing fault-based liability in Pennsylvania.

Maj. Op. at 36.

Despite the court's discussion of "scaling back" an "existing duty" and "curtailing fault-based liability," the opinion did not cite to a single decision allowing design-related negligence claims without providing an alternative feasible design. The court acknowledged that "proof of a reasonable alternative design is a typical device used to establish defect." But, the majority opinion also noted the lack of decisions from "this Court making an alternative safer design an absolute prerequisite to any and all design-based claims." The court held that a "company which is responsible for tendering into the market a drug which it knows or should know is so dangerous that it should not be taken by anyone can be said to have violated its duty of care either in design or marketing…In other words, in the negligence arena at least, the substantive allegations are more important than the labels."

In addressing Lance's negligent marketing claim, the court agreed with plaintiff that "the law of negligence establishes a duty, on the part of manufacturers, which can be viewed on a continuum" ranging from "a warning of dangers, through a stronger warning if justified by the known risks, through non-marketing or discontinuance of marketing" if the product simply should not be used in light of its relative risks. Thus, the court held, to the degree Lance wished "to couch the lack of due care manifested in such circumstances as negligent marketing, this is consistent with her prerogative as master of her own claim."

Decision's Significance

It is likely that this decision will lead to an increased number of complaints brought against pharmaceutical companies in Pennsylvania—especially in Philadelphia where plaintiffs already take advantage of the mass tort program. Indeed, the Pennsylvania Supreme Court implicitly acknowledged the possibility of increased lawsuits in its decision. It is also possible that this will be the start of a larger push by plaintiffs' attorneys in jurisdictions that have not yet addressed the question.

There are good arguments to limit the holding to situations in which the drug has already been taken off the market, but, on its face, the opinion does not do so. Moreover, it is important to remember that the Lance decision simply returned the case to the trial court level for further proceedings, and the ultimate outcome is unknown. In the interim, pharmaceutical manufacturers should expect additional litigation in Pennsylvania based on what is a novel theory of liability in the pharmaceutical arena.

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Product Liability

French Pip/Tüv Decision: What It Means For Medical Devices Regulation

Summary

In November 2013, a French commercial court ordered the notified body responsible for certifying the quality management system ("QMS") and design dossier of Poly Implant Prosthèse ("PIP"), the manufacturer of defective breast implants, to pay substantial compensation to both distributors of the implants and the patients affected. As is well known, the defects resulted from the use of non-medical quality, industrial grade silicone gel in the implants. TÜV appealed this decision but this was rejected by the Court of Appeal of Aix-en-Provence by judgment dated 1 January 2014, upholding the Commercial Court of Toulon's first instance decision.

Combined with last year's European legislative developments in relation to notified bodies, the ruling has potentially far-reaching implications for notified bodies operating in the medical devices sector, and is also of interest to manufacturers as we wait to see if the Medical Devices Directive 93/42/EEC ("MDD") revision will result in an adopted text ahead of the EU Parliament elections this year.

The First Instance Decision

The French court's ruling required the notified body, TÜV Rheinland LGA Products based in Germany ("TÜV Germany"), and its French affiliate, SAS TÜV Rheinland France ("TÜV France") (together, "TÜV"), to make initial compensation payments pending expert assessments to determine further compensation. Experts have been appointed to evaluate and report back to the court on distributors' non-monetary loss in July 2014 and on the expected lifespan of prostheses for patients by the end of January 2015. Interestingly, only one of the defendants (TÜV Germany) was a notified body.

TÜV sought to defend the claims by pleading that the French court did not have jurisdiction and that the claims were inadmissible. However, TÜV's 'technical' defenses did not succeed and the court's decision, if followed, could therefore have ramifications for notified bodies and their affiliates across the EEA.

Regulatory Background

In the medical devices sector in Europe the manufacturer is currently legally responsible for ensuring that its products comply with MDD requirements. In relation to medical devices which pose greater health and safety risks to patients (Class IIa, IIb or III), the manufacturer is obliged under the MDD to engage a notified body – such as TÜV – to review the manufacturer's QMS for design, manufacture and final inspection and, in certain cases, to also review a design technical file. Once these have been audited, reviewed and approved, the notified body certifies the QMS and, if applicable, the design dossier. The manufacturer may then CE mark and market the devices in the EEA.

Reasoning behind the First Instance Decision

The court identified, by reference to the MDD and previous breast implant health concerns, the intended role and obligations of a notified body. The court considered that notified bodies effectively assume a public role and duty. In doing so, whenever they certify a product they are guaranteeing that the product has reached an EEA-recognized standard of safety. The court decided that TÜV had fallen short of its duty by failing to prevent or identify PIP's fraud and that TÜV should therefore compensate those who had incurred loss in consequence. The rationale was as follows:

- As a notified body in charge of PIP's certification, TÜV Germany had an easy job as the only gel authorized for medical use was NUSIL gel. TÜV's tests were not sufficiently probing regarding use of the authorized gel.
- TÜV erred in never carrying out an unannounced audit or inspection at any of PIP's locations. The court considered an unannounced inspection at PIP's Seyne sur Mer location would undoubtedly have uncovered the presence of non-NUSIL gel stock. If an unannounced visit had taken place the fraud would have been detected earlier, considerably reducing the extent of the affected products' distribution.
- TÜV Germany did not carry out a sufficiently rigorous review of PIP's financial accounts. Such a review would have detected the purchase of non-NUSIL gel by PIP, and identified a mismatch between the volume of NUSIL gel bought and the volume of PIP's production. TÜV apparently ignored the quantities, quality and weight of the devices' raw materials.
- TÜV Germany's breaches of its obligations to assess both design and manufacture, combined with a non-notified body's involvement (TÜV France), contributed to PIP's fraud. TÜV should therefore indemnify both distributors (for the interruption to supply as well as the destruction of their stock) and also patients.
- Even though TÜV France did not have notified body status, auditors who inspected PIP were TÜV France employees. The court considered its role should have been limited to administrative, commercial, financial and translation assistance to TÜV Germany. However, having taken part in the audits, TÜV France should also take responsibility for the negligence.

Comment

European Commission Interim Measures

Partly in response to the PIP incident but prior to the French court's ruling above, the European Commission introduced interim measures relating to the medical devices sector on 25 September 2013 (see Commission Implementing Regulation 920/2013, and non-binding Commission Recommendation 2013/473/EU).

The measures include a requirement on notified bodies to conduct unannounced inspections of manufacturers and to check samples, as well as rules on conflicts of interest. Importantly the measures require notified bodies to ensure that they are properly resourced, whether that involves the assistance of subcontractors or subsidiaries or not, and that their staff are fully qualified to carry out the assessments required. In particular there are restrictions on what may be subcontracted by notified bodies. The measures also require Member States and the Commission to take a more active role in the assessment, regular surveillance, monitoring and investigation of notified bodies.

What does this mean for industry?

If courts in other Member States adopt a similar approach, this decision signals that the potential liability exposure of notified bodies' cannot be confined to contractual risks alone. Nor can a notified body necessarily rely on the fact that a manufacturer has acted fraudulently as a defense as the court may consider the fraud to have been discoverable by an appropriately thorough inspection, as in this case.

The French court recognized a wide public duty on the part of notified bodies by reference to the MDD, which appears to be owed not only to end-user patients but also to distributors. If notified bodies fall short of this duty, then they may face significant damages claims from both distributors and patients. Given the scale of distribution of products such as the PIP breast implants, overall liability could be significant. Notified bodies will therefore likely need to review their insurance coverage. These costs will necessarily have to be passed on to industry and ultimately commissioners and consumers.

For manufacturers the increased potential liability exposure of notified bodies and the requirements imposed through the interim measures is likely to mean that applications for certification will have a longer turnaround and that reviews and audits will be more expensive as well as more challenging. Ultimately this may well mean that products will take longer to get to market and that costs will increase. If, as expected, there is a consolidation of notified bodies (i.e. fewer in total, with less capacity between them) industry may also experience a 'bottle-necking' of applications, particularly once the MDD revisions are effective requiring notified body-reviewed upgrades to existing, as well as new, product dossiers.

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Lead Paint Lawsuits Revived

California v. Atlantic Richfield Co.

On December 16, 2013, a California Superior Court judge ordered several paint companies to pay $1.1 billion to several California counties in *California v. Atlantic Richfield Co*. The award, handed down after a five (5) week bench trial, is intended to compensate for the cost of abating lead paint in millions of homes built prior to 1978. The award also is intended to develop outreach and inspection programs for lead paint and lead poisoning.

This case is significant because many prior Courts across the United States have held that lead paint claims were only actionable in the context of an individual plaintiff on a case-by-case basis. The State of California used in this case sued on the basis that the lead paint was a public nuisance in the State of California. Seven other states have brought similar lawsuits against the paint industry which were not successful.

One of the primary issues in the case was whether the Defendants continue to promote the use of lead paint, despite having actual knowledge of the hazards of the lead paint product. Plaintiffs argued that Defendants had known since the early 1900's of the dangers of lead and ignored those findings.

The judge in the case cited documents from throughout the 1900's in which the paint industry acknowledged that lead-based paint was unsafe. However, the companies continued to use the lead-based paint. Defendants argued there were many other potential sources of lead poisoning, but the judge said that these arguments "do not change the fact that lead paint is the primary source of lead poisoning in children in the jurisdictions who live in pre-1978 housing." If this ruling is upheld in California, it could provide a new basis for states, counties and cities to pursue these claims throughout the United States.

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Product Liability

Torts – Negligence – Sophisticated User Defense

Buckner v. Milwaukee Electric Tool Corporation

In Johnson v American Standard (2008) 43 Cal.4th 56, the California Supreme Court first recognized the "sophisticated user" affirmative defense in both negligence and strict liability products liability claims. Since then, the boundaries of the court's ruling have been tested with many products. This case considered the defense in the context of a handyman using a power drill that kicked back on him.

Kevin Buckner was employed by Central California Tristeza Eradication Agency (Tristeza) to do maintenance work. On October 7, 2009, while using a power drill to drill a hole in a piece of angle iron, the drill bit bound and the drill counter rotated, twisting his arm and causing serious injuries. The drill belonged to his employer, and it was a Milwaukee Magnum one-half inch pistol grip drill manufactured by Milwaukee Electric Tool Corporation 17 years earlier.

Plaintiff sued Milwaukee for negligence and strict liability, alleging that the drill could not be used safely without a side handle, also known as an anti-torque bar. He also asserted defendant failed to adequately warn of the dangers of using the drill because there was no label on the drill advising that the side handle had to be used to avoid serious injury; and the warnings in the operator's manual were insufficient to advise of the need to use the side handle and the potential for serious injury if it was not used. The drill originally came with a side handle, which could be screwed into either side of the drill, and the operator's manual advised the user to "[a]lways use a side handle for best control." A label on the drill itself read: "WARNING / HIGH ROTATING FORCE / HOLD OR BRACE SECURELY TO PREVENT PERSONAL INJURY OR DAMAGE TO TOOL / READ SAFETY INSTRUCTIONS BEFORE OPERATING." By the time of plaintiff's accident, Tristeza no longer possessed the owner's manual or the handle.

At trial, evidence was presented of plaintiff's employment history. Although he was not a licensed contractor, he had decades of work as a "handyman" and he had experience in maintenance and all kinds of construction work. He told his supervisor at Tristeza that he was a certified electrician and plumber. There was conflicting evidence regarding whether plaintiff had used the subject drill or one like it prior to the accident. There was evidence that plaintiff, like his co-employees, knew drills can bind and counter-rotate when not used properly, or when they hit obstacles. There was conflicting evidence regarding whether plaintiff knew about using a side handle in such situations. There was conflicting expert testimony on the dangers of using such a drill without a handle, and whether plaintiff should have known of this.

The jury found in favor of the defense. The jury found the drill was not negligent or defective in its design. They did not determine if there was a failure to warn, as they determined that plaintiff was a sophisticated user, and was thus on notice of the risk. Plaintiff moved for a new trial on the grounds of insufficiency of evidence on this issue. The trial court granted the motion, and defendant appealed.

The Court of Appeal affirmed the trial court's granting of a new trial, holding that there was insufficient evidence presented at trial of plaintiff being a sophisticated user. The Court looked at what the Supreme Court said in the Johnson case about the sophisticated user defense. The defense is considered an exception to the manufacturer's general duty to warn consumers, because a "sophisticated user" need not be warned about dangers of which they are already aware or should be aware. This is because the user's knowledge of the dangers is the equivalent of prior notice. This is a natural outgrowth of California's obvious danger rule – the rule that "there is no duty to warn of known risks or obvious dangers."

In order to establish the defense, a manufacturer must demonstrate that sophisticated users of the product

know what the risks are, including the degree of danger involved (i.e., the severity of the potential injury), and how to use the product to reduce or avoid the risks, to the extent that information is known to the manufacturer. Thus, in this case, defendant was required to prove sophisticated users know there is a danger the drill may bind and counter rotate, this may cause serious injury to the user, and the risk may be reduced or eliminated by proper use of a side handle.

The jury instruction used at trial stated that to succeed on the defense, Milwaukee had to show that Buckner, because of his "particular position, training, experience, knowledge, or skill knew or should have known of the [drill's] risk, harm, or danger." Unfortunately, the instructions did not define the relevant "risk, harm, or danger." The defense argued that they only had to show Buckner was aware of the risk of the drill binding and counter-rotating, but the Court of Appeal affirmed that the proper test should have been that the sophisticated user "must also know that drills like the one in issue pose a danger of serious injury that may be mitigated by the use of a side handle." With that test in mind, there was insufficient evidence to show that plaintiff was a sophisticated user. Not only was his own knowledge of whether a handle was necessary or could be used in question, but even the defense experts had testified that the drill could be operated safely without one.

The Court of Appeal affirmed the trial court's ruling, sending the case back for re-trial on the issue of failure to warn.

Comment

In order to establish the sophisticated user defense, a defendant must identify the relevant risk, show that sophisticated users are already aware of the risk, and demonstrate that the plaintiff is a member of the group of sophisticated users. Unless all three of these criteria are met, the defense will not be allowed.

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Case Hyperlink: http://www.courts.ca.gov/opinions/documents/F065140.PDF

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Product Liability

The Sophisticated User Defense Does Not Automatically Apply to an Employee of a Sophisticated Employer

Anne Pfeifer V. John Crane, Inc.

Court of Appeal, Second Appellate District, Division Four (October 29, 2013)

JCI appealed from a judgment awarding plaintiffs William and Anne Pfeifer over $21 million dollars in personal injury damages. Plaintiffs alleged that Pfeifer's mesothelioma was caused by occupational exposure to JCI asbestos-containing products from his work with JCI gaskets and packing during his tenure in the Navy from 1963 to 1970 and while he was a civilian employee repairing boilers from 1971 to 1982. Plaintiffs sued JCI for negligence, strict liability and loss of consortium.

JCI's corporate representative testified that between 1931 and 1985, JCI sold asbestos-containing gaskets and packing but did not conduct research into whether its products were hazardous. In 1981, JCI created a gasket safety data sheet for distribution to its employees which stated that over exposure to asbestos caused asbestosis and cancer. Customers only received a copy upon request. In 1983, JCI first began placing warnings on its products regarding the hazards of asbestos.

JCI attempted to submit an instruction on the "sophisticated user" defense, stating that JCI was not liable for its failure to warn Pfeifer regarding the hazards of asbestos because the Navy had greater knowledge of those hazards than JCI. The trial court rejected JCI's instructions and directed a verdict on the defense barring the application of the proposed sophisticated user defense. At the end of the trial, the jury returned a special verdict in favor of the Pfeifers on their claims for negligence, strict liability and loss of consortium for over $21 million dollars in damages. JCI appealed from the judgment on several grounds, including that the trial court erred in both rejecting JCI's proffered instructions regarding its "sophisticated user" defense, and directing a verdict on the defense.

The Court of Appeal affirmed. There are two types of "sophisticated user" defenses as noted in section 388 of the Restatement Second of Torts ("section 388"). The first defense is known as the "sophisticated user defense" and is detailed in comment k to section 388, which notes that the supplier's duty to warn arises only when the supplier has no reason to expect that the user of the product will realize the danger involved. The second defense is known as the "sophisticated intermediary defense" and is reflected in comment n to section 388 which states that when the supplier provides items to a third party who will pass them to the user, the supplier may in some cases discharge its duty to warn the user by informing the third party of the item's dangers.

It was undisputed that JCI provided no warnings to the Navy during Pfeifer's tenure from 1963 to 1970. Therefore, the Court of Appeal limited its analysis to the "sophisticated user" defense as detailed in comment k to section 388 and the California Supreme Court case, Johnson v. American Standard, Inc. (2008) 43 Cal.4th 56. In Johnson, the Supreme Court held that a manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of the risk, harm or danger. Under the sophisticated user defense, the relevant inquiry is "whether the plaintiff knew, or should have known, of the particular risk of harm from the product giving rise to the injury."

JCI's proposed jury instructions were properly rejected by the trial court because they incorrectly stated that employees of a sophisticated user are, by virtue of their employment, deemed to be sophisticated users.

However, the California Supreme Court in Johnson determined that under the “sophisticated user” defense the inquiry focuses on whether the plaintiff knew, or should have known, of the particular risk of harm from the product giving rise to the injury. The critical issue is the knowledge of the employee (or their potential knowledge) rather than the intermediary employer’s sophistication.

The Court of Appeal further held that “…to avoid liability, there must be some basis for the supplier to believe that the ultimate user knows, or should know, of the item’s hazards. In view of this requirement, the intermediary’s sophistication is not, as a matter of law, sufficient to avert liability; there must be sufficient reason for believing that the intermediary’s sophistication is likely to operate to protect the user, or that the user is likely to discovery the hazards in some other manner.” The mere fact that the user is an employee or servant of the sophisticated intermediary is not a sufficient reason, as a matter of law, to infer that the employer will protect the employee.

Here, there was no evidence that JCI had any reason to believe the Navy would issue warnings to Pfeifer regarding JCI’s products while he served in the Navy, or that it was then “readily known and apparent” to the Navy that the amounts of dust released from JCI’s products were hazardous. The evidence did not support JCI’s inference that the Navy would warn or otherwise protect Pfeifer from the dangers of its products or that Pfeifer would realize the dangers of JCI products.

Comment

The success of the sophisticated user defense depends on whether this is sufficient evidence that an end user of a product either knew or should have known of the hazards of working with the product. This evidentiary requirement applies even if a product user is the employee of an arguably sophisticated intermediary employer.

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Product Liability

Judicial Notice of FDA Website Documents Can Be a Powerful Lever in a Medical Device Manufacturer's Motion to Dismiss

Poll v. Stryker Sustainability Solutions, Inc.

A motion to dismiss can be a powerful tool in the hands of medical device companies to eliminate cases that should be dismissed from the outset on preemption grounds, before engaging in costly discovery. Oftentimes, however, sufficient information may not be pled in a complaint to support the motion for early dismissal. Requesting that a court take judicial notice of public documents posted on the Food & Drug Administration's (FDA) website is one way to get some of that important information, such as labeling and approval letters, before the court for consideration.

The U.S. District Court for the District of Arizona's recent opinion in *Poll v. Stryker Sustainability Solutions, Inc.*, No. Civ. 13-440, demonstrates the positive impact of judicial notice of FDA website documents at the motion to dismiss stage. In Poll, the plaintiff, Jeffrey Poll, filed a complaint against Stryker Sustainability Solutions, Inc., and others, alleging that he was injured by their Cormet Cup and Cormet Head (Cormet System), a Class III medical device under the Federal Food, Drug and Cosmetic Act of 1938 (FDCA).

Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the original complaint was preempted by § 360k of the Medical Device Amendments to the FDCA, as interpreted in Riegel v. Medtronic, Inc., 552 U.S. 312 (2008). In the motion, defendants attached and referred to the Cormet System approval letter, Summary of Safety and Effectiveness, labeling and instructions for use, and supplemental PMA approvals. The plaintiff opposed the motion, arguing that the defendants converted their motion to dismiss into one for summary judgment by citing and relying on materials and facts outside of the complaint.

The court determined that it was appropriate to take judicial notice of the challenged documents because they were available on the FDA's website. In rendering its decision, the court relied on case law finding that, where the authenticity of a website or the accuracy of the information on the website is not disputed, it is appropriate to take judicial notice of information displayed publically on government websites.

Important documents such as approval letters, labeling, and supplemental approval letters for a drug or medical device are often critical to the success of a motion to dismiss based on preemption. When deciding whether to make such a motion, counsel should consider whether such documents are publically available on governmental websites such as the FDA's. If so, cases such as Poll can help assure those documents are considered by the court in the context of a dispositive motion as early in the case as possible, thereby foreclosing the need for extensive discovery.

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Statute of Limitations

Illinois Statute of Repose is Not Limited to Claims Asserted by Client

Evanston Insurance Company v. Riseborough

Brief Summary

The Illinois Supreme Court held that the statute of repose governing claims against attorneys (735 ILCS 5/13.214) is not limited to claims asserted by a client, but also applies to claims asserted by non-clients.

Complete Summary

At issue in this appeal was whether Section 13-214.3 of the Illinois Code of Civil Procedure (735 ILCS 5/13-214.3), which sets forth a six-year statute of repose for "action[s] for damages based on tort, contract, or otherwise … against an attorney arising out of an act or omission in the performance of professional services," applied to plaintiff's second amended complaint for breach of implied warranty of authority, fraudulent misrepresentation, and negligent misrepresentation. The trial court found that the statute of repose barred plaintiff's claims against the defendant attorneys and dismissed the complaint. The appellate court reversed, however, and remanded for further proceedings, finding that the statute of repose did not apply to an action brought by a non-client of the defendant for a cause of action other than legal malpractice. The Illinois Supreme Court reversed and affirmed the trial court's dismissal of plaintiff's complaint.

In 1996, Construction Corporation (the Corporation) was the general contractor for the construction of a warehouse. Two employees of a subcontractor were injured, resulting in a personal injury action filed against the Corporation by one of the workers. The Corporation was represented by the defendant law firm. At the time of the accident, the Corporation was the named insured under a number of insurance policies. In 1997, one of the insurers filed a declaratory judgment action seeking a declaration that it owed no coverage. That action was pending in 2000 when the parties reached a settlement of the personal injury case in the amount $4,887,500. On October 23, 2000, the insurers entered into an agreement, referred to by the parties as the "Fund and Fight Agreement." The defendant attorney signed the agreement as the "duly authorized agent and representative of [the Corporation]."

In summary, on December 22, 2003, the Corporation's president filed an affidavit stating that he had no knowledge of the "Fund and Fight Agreement" at the time of its creation, and that the attorney lacked authorization to sign the agreement on the Corporation's behalf. On April 29, 2009, the trial court granted the Corporation's motion for summary judgment, in part, finding that the Corporation did not give authority to the defendant attorney to sign the "Fund and Fight Agreement" on its behalf. On December 2, 2009, the trial court entered judgment in favor of the Corporation and against the insurer.

While the insurance coverage proceedings were still pending, on December 2, 2005, the insurer filed a complaint against the defendant attorneys and their firm. The insurer alleged breach of implied warranty of authority, fraudulent misrepresentation, and negligent misrepresentation, based on defendants' execution the "Fund and Fight Agreement" on the Corporation's behalf without the Corporation 's express authority. The insurer alleged that defendants' actions caused it to lose the anticipated benefits of the agreement and sustain damages. The insurer later filed an amended complaint setting forth substantially the same allegations. The trial court dismissed the insurer's complaint without prejudice as premature (because the declaratory judgment action was still pending).

On December 23, 2009, after the final judgment order had been entered in the coverage action, the insurer filed its second amended complaint reasserting its claims. The trial court granted defendants' motion to dismiss, finding the six-year statute of repose in Section 13-214.3(c) barred the insurer's claims. The appellate court reversed and remanded for further proceedings. The Illinois Supreme Court allowed defendants' petition for leave to appeal.

The statute of repose at issue is contained in Section 13-214.3 of the Code, which is titled "Attorneys." Section 13-214.3 provides, in part:

(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services … must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

(c) An action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

The Illinois Supreme Court held that the appellate court's conclusion that Section 13-214.3 applies only to a claim asserted by a client of the attorney is contrary to the plain language expressed in the statute. There is nothing in Section 13-214.3 that requires the plaintiff to be a client of the attorney who rendered the professional services. The statute does not refer to a "client," nor does it place any restrictions on who may bring an action against an attorney. The statute simply provides that an action for damages against an attorney "arising out of an act or omission in the performance of professional services" is subject to the six-year repose period. Thus, the court held that under the express language of the statute, it is the nature of the act or omission, rather than the identity of the plaintiff, that determines whether the statute of repose applies to a claim brought against an attorney. The court affirmed the dismissal of plaintiff's alleged claims on the basis that they were time-barred by the statute of repose.

Significance of Opinion

This decision is significant because the Illinois Supreme Court held that that the statute of repose governing claims against attorneys is not limited to claims asserted by a client, but also applies to claims asserted by non-clients. The court specifically rejected the conclusion of other Illinois appellate courts and federal district courts which limited the statute of repose to claims of clients for legal malpractice.

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Labor Law §240

Labor Law §240

As reported in prior issues of this publication, the opinions issued in recent years on the applicability of Labor Law §240(1) by the Court of Appeals, New York's highest Court, have been decidedly pro-plaintiff. Thus, the present issue of this publication is notable since we report on two decisions issued by the Court which are favorable to defendants. In the first decision, the Court reaffirmed its prior pro-defendant opinion in *Narducci v. Manhassett Bay Associates*, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001), which was a seminal decision on the topic of falling objects within the meaning of Labor Law §240. The second decision of the Court of Appeals which we review affirms the dismissal of the claim under Labor Law §240(1), holding that the plaintiff was not engaged in "cleaning" within the meaning of the statute. We also discuss two decisions from the Appellate Division, First Department which reaffirm that the accident need not be witnessed in order for plaintiff to obtain summary judgment on liability under Labor Law §240(1). Finally, we review a case from the Appellate Division, Fourth Department, which holds that changing the face of a billboard does not amount to "alteration" within the meaning of the statute.

More Guidance From The High Court On What Constitutes The Type Of "Falling Object" Covered By The Statute

Fabrizi v. 1095 Avenue of the Americas, L.L.C.

Anyone whose caseload includes New York claims concerning accidents in the course of the construction or repair of buildings is familiar with Labor Law § 240, the ambiguously-worded statute that imposes absolute liability for certain elevation-related accidents. Generally, the statute can be said to cover two types of elevation-related risks: "falling workers" and "falling objects." In *Fabrizi v. 1095 Avenue of the Americas, L.L.C.*, ____N.Y.3d ____, ____N.Y.S.2d ____, 2014 N.Y. Slip Op. 01206, the Court of Appeals provides further guidance on the question of what types of "falling objects" invoke the statute. Significantly, the Court reaffirmed its prior decision in *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001), where it held that in order to obtain recovery under Labor Law §240 under the "falling object" theory, "a plaintiff must show that the object fell. . . *because of* the absence or inadequacy of a *safety device* [emphasis supplied] of the kind enumerated in the statute" [emphasis in original]. The statute lists those devices as follows: "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons [and] ropes."

In *Fabrizi*, plaintiff, an electrician employed by a contractor rehabilitating the electrical system in an office building, was injured when a conduit pipe weighing between 60 and 80 pounds fell on his hand from several feet above. The conduit was part of a fairly complicated set of electrical equipment affixed to the building which had to be moved as a part of the project. Plaintiff's task required that he drill holes in the floor directly below the conduit, which dangled temporarily from a compression coupling near the ceiling. It fell about fifteen minutes after plaintiff began work. Plaintiff sought summary judgment pursuant to the statute, in response to a motion by defendants seeking to have the 240 claim dismissed. Plaintiff contended that the coupling was inadequate to secure the conduit above him. A more secure "set screw coupling" should have been used to hold the conduit in place, he contended. The trial-level court granted plaintiff's motion, but a divided Appellate Division, New York's intermediate Appellate Court, reversed and ordered a trial on the issue, holding that plaintiff failed to establish as a matter of law that the failure to provide the set screw coupling was a proximate cause of the accident. Two dissenters would have gone further and held that couplings are not the type of devices enumerated in the statute such as hoists, slings, and braces used to secure elevated loads, and that therefore defendant should have been granted summary judgment on the statutory claim. The Appellate Division granted defendants leave to bring their appeal to New York's highest Court.

The Court of Appeals' majority agreed with the dissenters at the Appellate Division that the 240 claim was subject to dismissal. The coupling was not a safety device "constructed, placed, and operated to give proper protection" from the falling conduit. Acceptance of plaintiff's argument would extend the reach of the statute beyond its intended purpose to include any component that may lend support to a structure. Couplings - of either sort – would be designed to be part of the larger assembly of electrical equipment, not as protection for workers from falling objects. As either type of coupling would have served the former purpose, the statute cannot be said to be implicated.

In his dissent, Chief Judge Lippman found it myopic to focus on whether couplings are of the types of devices enumerated in the statute. All that was needed, he argued, was to determine whether the risk posed by an elevation differential was readily apparent, and that a causal nexus between the failure to provide a safety device and plaintiff's injury had been established. In his view, plaintiff met the criteria.

Editor's Notes:

The riddle of what types of falling objects are or are not covered by the statute continues to generate decisions in a wide variety of contexts, as this one exemplifies. The majority opinion reaffirms the ruling in *Narducci v. Manhasset Bay Assoc.*, which denied "falling object" status to things that one would not expect to be secured with the types of devices described in the statute. Some commentators had concluded from recent case law that *Narducci* was losing weight as a precedent. The majority decision here halts that trend, at least temporarily.

In A Major Pronouncement, The Court Of Appeals Attempts To Clarify The Meaning Of The Term “Cleaning” In Labor Law §240(1).

Soto v. J. Crew, Inc.

Labor Law §240(1) states that it applies to the following activities: "erection, demolition, repairing, altering, painting, *cleaning* or pointing of a building or structure" [emphasis supplied]. In *Soto v. J. Crew, Inc.*, 21 N.Y.3d 562, 976 N.Y.S.2d 421 (2013), the Court of Appeals makes its most extensive attempt thus far to define the type of “cleaning” of a building or structure that is covered by the statute.

In *Soto*, plaintiff was a janitor employed by a commercial cleaning company that provided services at defendant's retail store. A store employee noticed that a 6 foot high shelf was dusty, and asked plaintiff to clean it. Equipped with a duster with a long handle, plaintiff positioned a four-foot-high A-frame ladder in front of the shelf and climbed it. As he worked, both he and the ladder fell over, allegedly causing injury.

Plaintiff sued the owners of the building and the store under Labor Law §240(1), on the facially plausible theory that "cleaning" was one of the enumerated activities for which workers were protected by the statute. After discovery, defendants obtained summary judgment on the 240 claim, successfully arguing to the lower court the plaintiff's activities constituted "routine maintenance" and therefore not the type of cleaning the protected by the statute. Defendants prevailed again at the Appellate Division with the same argument. But one judge "concurred," agreeing that the most recent precedent from the Court of Appeals mandated dismissal of the claim, despite his belief that it was inconsistent with prior high Court precedents which held that routine window cleaning was covered by 240. The Appellate Division then granted leave for plaintiff to appeal to the Court of Appeals.

Without acknowledging that there was any inconsistency among its prior precedents on the issue, or even any difficulty in interpreting the distinctions among them, the Court of Appeals took this occasion to identify the factors relevant to determination of whether any particular "cleaning" activity was covered.

> Outside the sphere of commercial window washing (which we have already determined to be covered), an activity cannot be characterized as "cleaning" under the statute, if the task: 1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; 2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; 3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and 4) in light of the core purpose of Labor Law §240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project. Whether the activity is "cleaning" is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other.

Applying these factors here, the Court found that the janitor's "cleaning" here was routine, and more like that found in a domestic setting. Therefore, plaintiff was unprotected by the statute, and would be required to demonstrate negligence in order to recover for his injuries.

Editor's Note:

The Court grudgingly refused to say so explicitly, but tacitly admitted, that its various prior opinions concerning the definition of "cleaning" were difficult to reconcile with each other. Now, however, we have decision that can be - indeed must be - consulted whenever an attempt is made to determine whether the cleaning activity is one covered by the statute.

In Apparent Reversal, First Department Permits Summary Judgment To Plaintiffs On 240 Claims For Unwitnessed Accidents

Goreczny v. 16 Court Street Owner LLC
Verdon v. Port Authority of New York and New Jersey

In the Fall 2012 Issue of this publication, we discussed *Grant v. Steve Mark, Inc.*, 96 A.D.3d 614, 947 N.Y.S.2d 97 (1st Dep't 2012), a case which gained considerable attention among those who handle cases under Labor Law §240(1). There, the Appellate Division, First Department denied the plaintiff's motion for summary judgment on liability under the statute for an unwitnessed accident even though her description of the accident was undisputed by direct evidence. In *Goreczny v. 16 Court Street Owner LLC*, 110 A.D.3d 465, 973 N.Y.S.2d 54 (1st Dep't 2013) and *Verdon v. Port Authority of New York and New Jersey*, 111 A.D.3d 580, 977 N.Y.S.2d 4 (1st Dep't 2013), the First Department appears to have retreated from its decision in *Grant*.

In *Goreczny*, the First Department affirmed summary judgment on liability to plaintiff who testified at his deposition, without contradiction, that the unsecured ladder upon which he was working, moved, causing him to fall. The Court stated that "[w]e are. . . unpersuaded by defendant's argument that plaintiff's motion should have been denied because he was the only witness to the accident. The fact that a plaintiff is the only witness to an accident does not bar summary judgment where his or her testimony concerning the manner in which the accident occurred is neither inconsistent with nor contradicted by his own account provided elsewhere or other evidence."

The plaintiff in *Verdon*, "testified that he was injured when the guardrail on the. . . platform on which he was working broke and he fell 14 feet and landed on rebar." If affirming the trial court, the Appellate Division stated that "the fact that the accident was unwitnessed presents no bar to summary judgment in his favor."

Replacement Of Advertisement On Billboard Is Not A Covered Activity Under The Statute

Saint v. Syracuse Supply Co.

Labor Law §240(1) affords protection to those who are engaged in, among other things, "altering . . . a building or structure." In *Saint v. Syracuse Supply Co.*, 110 A.D.3d 1470, 973 N.Y.S.2d 896 (4th Dep't 2013), the Appellate Division, Fourth Department held that the statute does not apply to a worker injured while changing the face of a billboard.

In *Saint*, plaintiff fell from an elevated billboard structure during the course of changing the advertisement which appeared on it. The trial court denied defendant's motion to dismiss the claim premised on Labor Law §240(1).

In reversing, the Appellate Division, Fourth Department stated that it agreed with defendant's contention that plaintiff's work did not constitute "altering" of a building or structure within the meaning of the statute. "Rather, that activity is more akin to cosmetic maintenance or decorative modifications and is thus not an activity protected under section 240."

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