LEGAL NEWS IN BRIEF

News in a Flash for Subrogation and Insurance Professionals

VOLUME 14, ISSUE 3

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LEGAL NEWS IN BRIEF IS PREPARED AND PUBLISHED BY
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NJ SUPREME COURT CITES LOJM CASE IN RECENT DECISION

Davis v. Brickman Landscaping
New Jersey Supreme Court
Docket No. A-22/23/24-12
(September 15, 2014)

The New Jersey Supreme Court cited Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344 (2011), litigated and successfully argued by our office, in its recent decision regarding net opinions, i.e. assertions by proffered expert witnesses which are unsupported by sufficient objective authority. Plaintiffs sued for injuries arising out of a fire in a hotel closet which did not have a sprinkler installed. Their expert countered Defendants' claim that a standard adopted into the NJ Uniform Fire Code constituted the full extent of private sprinkler maintenance inspectors' responsibilities. Although that standard did not require evaluation of a need for an additional sprinkler or notification to a hotel owner as to such need, Plaintiffs' expert alleged an expectation of reasonable care that requires inspectors to take additional precautions. Citing Pomerantz, the Court found Plaintiffs' expert opinion was a "mere conclusion" that "lack[ed] an appropriate factual foundation." As Plaintiffs were unable to otherwise satisfy their burden of establishing the applicable standard of care and a breach of that standard, summary judgment in Defendants' favor was appropriate. ■

RETROACTIVITY

Johnson v. Roselle EZ Quick
New Jersey Appellate Division
Docket No. A-4244-12T2
(August 25, 2014)

Geico's insured settled with tortfeasor for the tortfeasor's policy limits and assumed responsibility for PIP reimbursement claims held by Geico. The Appellate Division affirmed the trial court's summary judgment in favor of Geico, which allowed Geico to be reimbursed for PIP benefits from the settlement proceeds. Prior to the 2011 amendment of N.J.S.A. 39:6A-9.1, New Jersey courts construed the statute to allow for the PIP carrier's reimbursement even if the tortfeasor's insurance policy limits were insufficient to make the insured whole. The amendment requires that the insured be made whole first. None of the factors which warrant retroactive application of the amendment – legislative intent; whether the amendment is merely "curative"; and/or the parties' reasonable expectations – appear in this instance.

Significantly, the court did not address the fact that, prior to the amendment, an injured party was permitted to exhaust the tortfeasor's policy limits and thus deprive the PIP carrier of any recovery. ■

LATE NOTICE OF CLAIM

Ramirez v. Matawan Borough
New Jersey Appellate Division
Docket No. A-2861-12T3
(July 28, 2014)

Plaintiff successfully appealed the lower court's denial of her motion for leave to file a late notice of claim pursuant to the NJ Tort Claims Act. The disabled claimant fell out of her wheelchair in September, 2011 when

it hit a crack in the pavement in a parking lot owned by the Borough. Her mother and caretaker suffers from seizures and was unable to secure legal representation since learning the extent of Plaintiff's injuries. Although the caretaker, suing pro se as Plaintiff's guardian, did not file a notice of claim within 90 days as statutorily required, the Appellate Division found extraordinary circumstances to exist in the case at bar, noting that as long as the claimant's disability persisted, the time to file her claim was tolled, regardless of whether her guardian was sufficiently capacitated to file suit. ■

ARBITRATION AWARD

Allstate Ins. Co. v. Fiduciary Ins. Co. of America
New York Supreme Court
(Suffolk County)
2014 NY Slip Op 30973(U)
(April 11, 2014)

Allstate sought to confirm an arbitration award against Fiduciary for additional no-fault benefits paid for an automobile accident between the parties' insureds. Arbitration Forums had previously rendered a 50% award in Allstate's favor for initial payments made. Fiduciary as respondent cross-petitioned to vacate the award on the grounds that the arbitrator failed to consider new evidence, namely, the report made to ISO, a database in which insurers provide claim information and fraud investigation results. Respondent claimed it was unable to obtain the ISO report until after the prior award was rendered. Additionally, Fiduciary claimed that it never received proof of payment from Allstate to substantiate the amounts claimed, and that the arbitrator improperly denied Fiduciary's request for a court reporter at the hearing. The Court held there to be a sufficiently rational basis for the arbitrator to follow the prior decision, based on the police report, regardless of the ISO report's existence. Moreover, whether to allow a court report at the arbitration is within the arbitrator's discretion. The court did find that Allstate's failure to provide full documentation to Fiduciary regarding its damages, or to at least allow an adjournment of the hearing on that basis, required that the matter be remanded to arbitration on the limited issue of damages. ■

ENTIRE CONTROVERSY DOCTRINE

Brake v. Martin
New Jersey Appellate Division
Docket No. A-5509-12T3
(July 17, 2014)

Homeowners who discovered mold developing in their house made a claim to State Farm, which paid the claim and then sought subrogation from the sellers and parties who had constructed the house. Shortly before State Farm settled the action on its own behalf and in the name of its insureds, the homeowners filed a pro se complaint against the same defendants for various causes of action, including personal injury due to exposure to the mold. Defendants successfully moved to dismiss on the basis of the entire controversy doctrine. The Appellate Division remanded the case for the limited purpose of ascertaining whether the homeowners "had, or reasonably should have had, *sufficient knowledge and time* to take the steps necessary to add a claim based on… [the] personal injuries to the then pending property-damage subrogation action, which was brought and controlled by counsel for its insurance carrier rather than themselves." ■

PRIMARY COVERAGE

Travelers Property Casualty Co. of America v. Continental Ins. Co. of N.J.
U.S. Dist. Ct., D.N.J.
Civil Action No. 10-6320 (FLW)
(August 19, 2014)

Travelers disputed that it was an excess insurer for a loss in which a Weichert real estate agent, operating his personal vehicle, injured claimant in the course of showing claimant houses for sale. The agent's wife's insurance policy with Encompass provided for proportional payment on the loss where there is other insurance. Travelers, insurer for Weichert, invoked its clause providing only excess coverage for any covered auto not owned by Weichert. The District Court ruled that for a true primary-excess relationship to exist, the same insured must purchase underlying coverage for the same risk; here, Weichert did not do so. Thus, both policies applied from dollar one and shared equal obligation to defend. ■

OFFICE UPDATE

We hope to see you at the next NASP conference, being held in Orlando, Florida on November 9-12, 2014. Jan Meyer, Stacy Maza, and Noah Gradofsky will be attending. Please stop by a session paneled by Mr. Meyer and Mr. Gradofsky entitled: "Subrogation Strategies When the Tortfeasor's Insurer Denies Coverage." The session will take place at 4:00 p.m. on November 10. ■