# LEGAL NEWS IN BRIEF

## News in a Flash for Subrogation and Insurance Professionals

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### LOJM VIDEOS: INTRODUCTION TO PIP RECOVERY IN NEW YORK AND NEW JERSEY

LOJM's online guides to recovery of PIP in New York and New Jersey have long been an industry resource, providing a reference to PIP recovery rules as well as other subrogation-related laws.

Recently, each web page added a brief video introduction to PIP recovery as a handy tool for beginners or those looking for a quick refresher of the basics. You can find those videos at www.janmeyerlaw.com/nypip and www.janmeyerlaw.com/njpip.

These videos are also brief (and less interactive) examples of the seminars we provide for our clients in an effort to help our clients maximize their results. Please reach out to us if you and are interested in arranging a seminar for your team on such topics as best subrogation practices, PIP recovery, liquor liability, subrogation issues related to rideshare (Uber, Lyft) vehicles, subrogation strategies when the tortfeasor's insurance company denies coverage, and the special rules for claims against government entities. ■

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### NET OPINION

**<u>H.K.S. v. Kensey</u>**
**NJ Appellate Division**
**2020 N.J. Super. Unpub. LEXIS 936**
**(May 18, 2020)**

The Appellate Division affirmed dismissal of Plaintiff's BI suit. Plaintiff submitted an expert opinion in support of purported psychiatric injuries she sustained as a result of the underlying automobile accident. The Court found that Plaintiff's expert merely parroted Plaintiff's statements without analysis or observations of the physical manifestations of any symptoms which she subjectively claimed. Additionally, the report presented no objective medical evidence of permanent psychiatric injury, no objective comparative analysis of Plaintiff's pre- and post-accident condition, and failed to apply a clinical method of weighing and evaluating the merits of the information provided. The report was consequently nothing more than a net opinion. ■

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### VIRTUAL HEARING

**<u>Ciccone v. One W. 64th St., Inc.</u>**
**NY Supreme Court, NY Cty.**
**Index No. 651748/16**
**(September 4. 2020)**

Plaintiff (the entertainer Madonna) brought an action against her residential co-operative building over lease restrictions, pursuing claims for nearly two years after the Court had determined they were time-barred. As a result, the NY Supreme Court held that Defendant was entitled to recover its legal fees, referring the matter to a Special Referee to hear and report on an appropriate fee award. Although the hearing proceeded in February, 2020, it was not completed, and the Court adjourned it for March 12, 2020, at which time it was unable to proceed live due to the ongoing pandemic. In July, the referee proposed that the

parties proceed with a virtual hearing via videoconference. Plaintiff contested that only an in-person hearing would vindicate her due process rights and that this matter should be postponed until such time as it would be safe to resume in-person hearings.

Judiciary Law §2-b(3) authorizes the courts "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by" the court. Here, the Court referenced federal courts' (and at least one state court's) virtual approach as to expeditious bench trials in deciding that the available technology is adequate to ensure full opportunity for the parties to be heard and to assess witnesses' credibility, particularly in this case, where the issue is heavily based on documentary evidence rather than live testimony. Moreover, Plaintiff's own bad-faith actions and delays caused the trial to be scheduled during the pandemic and to necessitate alternative measures. ■

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## INJURIES IN DOG AREA OF PARK

**Freed v. Bastry**
**NJ Appellate Division**
**2020 N.J. Super. Unpub. LEXIS 1279**
**(June 29, 2020)**

Plaintiff sued for injuries sustained when Defendants' male golden retriever collided into Plaintiff while chasing Plaintiff's female golden doodle in an off-leash dog area of a park. Guidelines for the area, posted near its entrance, prohibited dogs "with a history of dangerous or aggressive behavior" and that dogs over six months old must be spayed or neutered. At the time of the incident, Defendants' dog was seven and a half months old and had not been neutered.

The Appellate Division affirmed summary judgment for Defendants. Plaintiff never asserted or demonstrated that Defendants had knowledge of any aggressive or dangerous propensity by their dog. Nor did the Court deem the guidelines to be intended to prevent a risk posed by normal canine behavior, as opposed to reducing dogs' sexual aggressiveness or biting of other dogs or humans. ■

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## MADE-WHOLE DOCTRINE

**City of Asbury Park v. Star Ins. Co.**
**NJ Supreme Court**
**242 N.J. 596**
**(June 29, 2020)**

The NJ Supreme Court addressed an issue certified by the U.S. Court of Appeals for the Third Circuit, namely, whether the made-whole doctrine applies to first-risk retention.

City had a worker's compensation policy with Star. The policy included a "self-insured limited retention for workers' compensation" losses against the City in the amount of $400,000 per occurrence. In turn, Star agreed to indemnify the City for its WC losses that exceeded the self-insured retention. City's employee sustained injuries and filed a WC claim against the City, which paid him $400,000, the full amount of its self-insured retention limit; Starr paid the remaining amount, in excess of $2 million. The employee subsequently sued a third party for the injuries, and agreed on a $2.7 million settlement, of which City and Star agreed to accept approximately $935,000 to satisfy the workers' compensation lien. City and Star then disputed whether the entire amount would go to Star, or whether the City was entitled to be reimbursed in full (i.e. "made whole") before Star could recover anything.

The NJ Supreme Court held that the made-whole doctrine does not apply to first-dollar risk, such as deductibles or as, here, self-insured retentions, which are allocated to an insured under a policy. As the retention was a provision of the agreed-upon policy, City cannot expect a better policy than it purchased. ■

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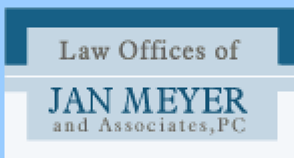
## VOIDING POLICY

**State Farm Fire and Casualty Co. v. Daley**
**NY Supreme Court, Nassau Cty.**
**Index No. 607414/18**
**(February 13, 2020)**

State Farm (SF) successfully sought to void its policy on the basis that its insured misrepresented his residence address in order to reduce his insurance premiums. Investigation by SF revealed that insured's vehicle was regularly seen in Kings County, and never in Columbia County, where insured claimed to reside. SF's specialist averred that insured's policy would have cost $4,051.22 more with a Kings County residence, and therefore, SF would not have issued the subject policy. As insured had thereby made a material misrepresentation of fact, the Court granted SF its declaratory judgment and SF had no obligation to insure him for his auto-related injuries. ■

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