N E W S

Legal News in Brief

News in a flash for Subrogation and Defense adjusters

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IT'S NOT RUDE, JUST PRUDENT: MAIL "NOTICE OF CLAIM" TOGETHER WITH YOUR FINAL BILL TO N.Y. STATE AUTHORITY

NEW YORK
✓ NOTICE OF CLAIM

NEW JERSEY
✓ *RES ISPA LOQUITUR:*
"THE THING SPEAKS FOR ITSELF"
✓ VERBAL THRESHOLD
✓ ENTIRE CONTROVERSY DOCTRINE
✓ MANDATORY, NON-BINDING ARB.
✓ VENUE

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NEW YORK

"NOTICE OF CLAIM" IN CONTRACTS WITH STATE AUTHORITY

C.S.A. Contracting Corp. v. NYC School Const. Authority
NY Court of Appeals
5 N.Y.3d 189, 800 N.Y.S.2d 123
July 6, 2005

This case will confirm your suspicions that the Notice of Claim requirement exists only to bar meritorious suits against government entities.

Tort cases are subject to a 90 day notice requirement, but at least torts have a clear date of incident. By contrast, a party that contracts with a state authority must file its notice of claim promptly upon completing performance, even if the bill is yet to be disputed.

Public Authorities Law §1744(2) requires notice of claim "within three months of the accrual." Accrual, paradoxically, is the date of completion. Note the distinction between accrual of a claim and a cause of action.

While upholding the precedential case, Wager, the Court complains that: "Wager was based on questionable logic, and has led to unfortunate results." In fact, the legislature has already changed the law regarding educational contracts, and the Court practically begs the legislature to fix this the law regarding authorities too.

The *NY Law Digest* advises government contractors to immediately file a notice of claim upon completion of their work. It suggests, for politeness, to include a cover letter explaining that the notice of claim does not reflect any suspicion that the Authority won't pay, but is merely a *pro forma* effort to comply with the CSA/Wager rule.

NEW JERSEY

RES ISPA LOQUITUR: "THE THING SPEAKS FOR ITSELF"

Jerista v. Murray
N.J. Appellate Division
185 N.J. 175, 883 A.2d 350
October 12, 2005

"An open-and-shut case." This could describe the Court's take on a supermarket automatic door that closed on a shopper. Under the doctrine of *res ipsa loquitur,* Latin for "the thing speaks for itself" a jury can infer that such a door doesn't close on someone without negligent maintenance. The door is not a "complex instrumentality" that would require an expert witness. Neither must the plaintiff disprove other reasons for the accident. Nor must the plaintiff prove what caused the door to fail in this particular incident. Rather, the jury may accept the inference of negligence unless the defendant can prove otherwise.

VERBAL THRESHOLD

Kennelly-Murray v. Megill
N.J. Appellate Division
381 N.J.Super. 303, 885 A.2d 955
November 17, 2005

The Court clarified confusion arising from the legislature's changes to Automobile Insurance Cost Reduction Act (AICRA). The previous nine categories for surmounting the Verbal Threshold included "fractures." The six new

categories include "displaced fractures." This does not mean, however that a "permanent injury" is barred by the threshold just because it stems from a non-displaced fracture.

ENTIRE CONTROVERSY DOCTRINE

Potter v. State Farm Indem. Co.
N.J. Appellate Division
Not Rep. A.2d, 2005 WL 3429334
December 15, 2005

Massi v. Rutgers Cas. Ins. Co.
N.J. Appellate Division
Not Rep. A.2d, 2005 WL 3478176
December 21, 2005

In these two cases, the Appellate Division rejected an Insurer's entire controversy defense, thus preserving the essential "fairness" that the rule demands. "[T]he twin pillars of the entire controversy doctrine are fairness to the parties and fairness to the system of judicial administration." With these words the Appellate Court reversed findings below.

Potter sued State Farm for breach of a settlement agreement. State Farm replied that this suit was barred under entire controversy, because it should have been litigated together with State Farm's action to compel the selection of an appraiser.

The Court sided with Potter, because he did not have "a fair and reasonable opportunity to have fully litigated the claim in the original action."

Massi sought Personal Injury Protection (PIP) payments for medical expenses necessitated by an auto accident. Due to an error by the doctor's billing department, Massi's lawyer only submitted the medical bills, $3,000 worth, and not the physical therapy for $12,000.

When the error was revealed, the plaintiff submitted these other bills as well, but Rutgers Insurance denied this larger payment.

The Court found for the insured, holding that Rutgers had merely included the entire controversy affirmative defense in its pleading but not bothered to raise the issue until the trial date. More pointedly, Rutgers did not try to show prejudice to its interests. Finally, the error was not the attorney's but rather the medical provider's. The Court granted coverage; to rule otherwise, it said, would violate "judicial fairness," the "polestar" of the entire controversy doctrine.

REJECTING AWARD OF MANDATORY, NON-BINDING ARBITRATION

Nascimento v. King
N.J. Appellate Division
381 N.J.Super. 593, 887 A.2d 203
December 15, 2005

New Jersey Courts send many cases to mandatory, but non-binding arbitration. Counsel dutifully attend these informal sessions, knowing that they are usually meaningless. The dissatisfied party has 30 days to reject the result by filing a demand for a trial *de novo*. NJSA 2A:23A-26. A copy of this demand is served by regular mail upon the adversary. Rule 4:31A-6(b)(1).

However, the filer should be in the habit of filing and serving promptly. If he exceeds the 30 days, the arbitration award will stand. This deadline is firm but not absolutely rigid.

A personal injury defendant rejected the $300,000 arbitration award and duly filed for a new trial. However, the firm's secretary accidently mailed a deposition notice to the adversary in place of a copy of the demand.

The plaintiff received the deposition notice, waited until the 30 days expired, and moved to confirm the award. The defendant opposed, but lost at trial. The judge concluded that the secretary's error was not the "exceptional circumstances" required by the statute for an exemption.

The Appellate Court reversed, observing that, while filing is a statutory requirement, serving on the adversary is merely a court rule. The very first rule in the book, 1:1-2, allows any other rule to be relaxed for the sake of "justice." Defendant's had "substantially complied" by their attempted service, and even the plaintiff's counsel admitted that the error did not caused any real delay or prejudice.

The moral of the story: A little attention beforehand will save needless litigation afterwards.

All case summaries are solely the product of this office. Material gathered from public sources, published and unpublished cases, NJ Law Journal, NY Law Journal, and NY State Law Digest. The reviews herein do not constitute legal advice. For legal advice kindly contact our office.

VENUE

Metropolitan Ins. v. Perez
Unpublished opinion
Law Div., Bergen County, 23-3-1274
August 15, 2005

Plaintiff "does business" in all NJ counties, and chose Bergen as the venue for this case. While this choice is valid, it could not overcome other venue factors: the accident, insured, and defendants were all in Gloucester County. (Rule 4:3-2(a), 6:1-3) Venue was transferred there accordingly.

OUR NEWEST ATTORNEY

Congratulations to our newest admitted attorney, **Gregory Guido, Esq.** He passed the New York and New Jersey bars on his first attempt, having graduated in July from St. John's Law School in New York City.

ADDING NEW SPACE AND NEW STAFF

A break-through! Of the office walls, that is. We will take over neighboring offices at the end of the month for a significant increase in space. This will provide extra room for handling your files.

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