N E W S

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News in a flash for Subrogation and Defense adjusters

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AN APPELLATE VICTORY FOR JOSHUA ANNENBERG, ESQ.

N.J. SUPREME COURT: WITHOUT "APPRECIABLE PREJUDICE," LATE NOTICE TO INSURER IS DEEMED WAIVED

Legal News in Brief
Law Offices of Jan Meyer

New Jersey Office:
1029 Teaneck Road
Second Floor
Teaneck, NJ 07666
☎ (201) 862 9500
Fax (201) 862 9400
jmeyer@janmeyerlaw.com

New York Office:
50 East 42nd Street
Suite 1809
New York, NY 10017

Jan Meyer

Richard A. Hazzard
Noah Gradofsky
M. Ari Jacobson
Stacy P. Maza
Terri DeVito
Gregory J. Guido

Of Counsel:
Joshua Annenberg

Legal News in Brief prepared by Jan Meyer, Esq.

Please call me to discuss any legal issues or for a clarification of current law.

NEW YORK

Laduca v.
Levidow, Levidow & Oberman
N.Y. Appellate Division
--- N.Y.S.2d ----, 2006 WL 1174085.
May 2, 2006

Our own Joshua Annenberg, Esq., noted appellate counsel, again achieved a victory in New York's Appellate Division, Second Department, in the case of Laduca v. Lavidow, a professional malpractice action. Mr. Annenberg successfully opposed the defendants' appeals of the lower court's order restoring the action to active litigation status. The Appellate Division ruled in favor of plaintiff Laduca, affirming the lower court's restoration of the action.

Mr. Annenberg also serves as Adjunct Professor of Law at New York Law School where he teaches legal writing and appellate practice.

NEW JERSEY

"APPRECIABLE PREJUDICE" BURDEN FOR INSURERS

Gazis v. Miller
N.J. Supreme Court
186 N.J. 224, 892 A.2d 1277
March 20, 2006

An insurer can be obliged to pay despite late notice, unless the lateness caused "appreciable prejudice" such as impairing its defense or causing it to lose reinsurance. The N.J. Supreme Court ruled that this must be the result for an occurrence-based excess liability policy, where a strict ruling would deny compensation to an injured party.

The defendant driver herein gave immediate notice to his insurer, Kemper. Kemper, without excuse, forgot to inform National, the supplemental insurer. The trial and appellate courts held that, between Kemper and National, two sophisticated parties, the unambiguous 120-day notice requirement should be given its full preclusive effect.

However, the Supreme Court overturned, ruling that this protection for insureds is necessary to give effect to the public policy behind insurance, paying injured persons. The High Court observed that National was not prejudiced by the delay because it already knew about the suit through other channels and, in any event, had no obligation to defend the suit so it did not need advanced warning.

The ruling would be different, the opinion stated, if the policy was claims-made. In claims-made policies, extending the notice deadline would give an un-bargained-for benefit, effectively expanding the policy.

CHALLENGING ARBITRATION

Le v. Motor Club of America Ins. Co.
N.J. Appellate Division
Not Rep. A.2d, 2006 WL 1028838
April 20, 2006

Prejudice may be a factor in excusing late notice, but not in excusing expiration of the statute of limitations. The Court refused to overturn an arbitrator's decision denying any award on the grounds that the arbitration was filed after the statute had run.

Plaintiff had timely filed suit against its insurer, but had failed to serve the insurer and then allowed the suit to be dismissed for lack of prosecution. Plaintiff argued that its arbitration related back to the filing date of the law suit. The court replied that restoration of this suit would have related back, but an arbitration is an entirely new action.

The plaintiff would have fared better if the parties had agreed to drop the suit and move to arbitration.

PREMISES LIABILITY: TRAMPOLINE

Bagnana v. Wolfinger
N.J. Appellate Division
--- A.2d ----, 2005 WL 3969171
April 21, 2006

A social guest was injured while jumping with her husband on the host's trampoline. The plaintiff was "bounced out" of court on summary judgment. The trial court considered the danger self-evident to guests, like that of diving into the shallow end of a swimming.

However, plaintiff bounced back in the appellate court. The appeals court ruled that the special danger created by two people jumping together was not obvious to guests. The owner's manual warned that "double-jumping" could cause intense bounce-back, leading to injury. The host failed to post the warning sign that came with the trampoline and alerted users. The appellate court had similarly rescued a plaintiff from summary judgment where a host obscured the "NO DIVING" sign swimming pool. In either case, a reasonable jury could find the host breached its duty to guests and was at least partly liable.

UNINSURED MOTORIST COVERAGE

Collins v. U.S. Fidelity and Guar. Co.
N.J. Appellate Division
384 N.J.Super. 439, 894 A.2d 1234
April 13, 2006

When a truck drives through a tollbooth, it can't straddle two lanes. If the driver doesn't choose a lane, someone is going to get hurt. Figuratively, that's what happened when a truck injured a toll collector.

A truck went through the plaintiff's lane, injuring his outstretched arm. A partial identification of the licence plate led him to New Penn trucking. Just in case the ID was wrong, the collector also made a claim against his Uninsured Motorist (UM) insurer, USF&G.

UM pays where the offending vehicle is either (a) uninsured, or (b) unidentified, and then pursues the tortfeasor to recovery the payout under subrogation.

Here, once the toll collector settled with New Penn, USF&G declared that its subrogation rights had been destroyed, so it was freed of it liability.

But here's the twist: it appears that the licence plate ID was wrong, and that New Penn wasn't the tortfeasor. It simply paid the nuisance value to avoid litigation.

The Court ruled that New Penn fit into neither of the two "lanes" of recovery under UM.

Either New Penn was the tortfeasor, in which case it was identified and insured, so the UM coverage didn't apply. Or else New Penn wasn't the tortfeasor, and the real tortfeasor was still unidentified, in which case the release didn't hurt USF&G. Therefore the toll collector could reach out and collect against his insurer.

Macias v.
Prospect Terrace Apartments
N.J. Appellate Division
Unpublished. 2005 WL 3478142
December 21, 2005

A UM claim can arise without anyone touching a vehicle. A woman walked to her car every morning via a set of stairs from an elevated sidewalk down to the street. On the morning of the incident, the bottom of the stairs were blocked by an illegally parked car. The woman tried to descend a grassy slope to her car instead, but fell and broke her ankle.

In overturning summary judgment against her, the Court ruled that the insured's fall was in part a result of the illegally parked car, which was never identified. The opinion likened this to Tornatore v. Selective Ins. Co. of Am., 302 N.J.Super. 244 (App.Div.1997). Tornatore stopped to assist the victims of a hit-and-run multi-car accident, but someone yelled "fire" and triggered a stampede. Injuries to rescuers were foreseeable - albeit not in that manner.

The Court distinguished the insurer's comparison to a case where an unidentified driver, in a fit of "road-rage" assaulted an insured. Intentional criminal conduct was an intervening cause not directly related to "use" of a vehicle.

A BREAK-THROUGH!

Of the office walls, that is. We are taking over neighboring offices and nearly doubling our space. That will give us the needed room for expansion.

NEW STAFF

Alfredo Ramos, a recent Rutgers Law grad has joined us. He will be taking the New York and New Jersey Bar Exams in July.

Gregory Guido, Esq. just attended his swearing-in to the NY bar.

Brief Latin:
NUNC PRO TUNC
"Now for Then"
Court remedy with retroactive effect.
- Black's Law Dictionary

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.

Law Offices of Jan Meyer
(201) 862 9500
jmeyer@janmeyerlaw.com