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Introduction

Welcome to the Fall 2013 edition of *Legal Insights*, a quarterly publication produced by the Claims Law Department's Issue Management Group. *Legal Insights* is a compendium of updates and analysis of recent court decisions of interest to our claims personnel, corporate risk managers and brokers. The articles are prepared by attorneys in approved panel law firms and AIG's own staff counsel.

This edition includes decisions concerning class actions, damages, jurisdiction, premises liability and procedure as well as recent cases involving New York Labor Law § 240. It also includes two new topics of interest – cyber risk and third party litigation financing.

We hope our readers will find these reports informative and useful. Should recipients become aware of new decisions they believe will be of interest to others in the claims, risk management and brokerage communities, feel free to send cases to issue.management@aig.com for possible inclusion in future editions.

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Arbitration

The "Effective Vindication" Doctrine is a Virtual Dead Letter After ***American Express Co. v. Italian Colors Restaurant***

American Express Co. v. Italian Colors Restaurant

The U.S. Supreme Court has ruled that the Federal Arbitration Act requires courts to enforce a contractual waiver of class action procedures in an arbitration clause, even where the practical effect of such a waiver is to bar claimants from asserting claims under federal law because they have no economic incentive to arbitrate them on an individual basis. The Court's ruling rejects the doctrine that such waivers prevent the "effective vindication" of a federal statutory right.

On June 20, 2013, the U.S. Supreme Court, in *American Express Co. v. Italian Colors Restaurant*, No. 12-133, heldthat the Federal Arbitration Act (FAA) requires courts toenforce a contractual waiver of class action procedures in an arbitration clause, even where the practical effect of such a waiver is to bar claimants from asserting claims under federal law because they have no economic incentive to arbitrate them on an individual basis. Some courts, including the U.S. Court of Appeals for the Second Circuit in *Italian Colors*, had refused to enforce such class action waivers on the ground that they prevent the "effective vindication" of a federal statutory right. The Court rejected that argument, declaring that "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."

The groundwork for the *Italian Colors* decision was laid two years ago, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In that case, the Court held that the FAA preempted a California state court rule invalidating class arbitration waivers where the plaintiff alleged that the defendant had "carried out a scheme to deliberately cheat large numbers of consumers out of small amounts of money." Some commentators speculated that the impact of that holding might be limited by two factors. First, *Concepcion* involved claims under state, not federal, law, and there was speculation that the Supreme Court might be more willing to strike down a class action waiver if it barred enforcement of a federal claim. Second, the arbitration clause in *Concepcion* included several consumer-friendly provisions, including provisions that required AT&T to pay a minimum amount of $7,500 plus twice the amount of the claimant's attorney's fees in the event that the claimant were to win an award larger than AT&T's final written settlement offer. Some commentators wondered whether the Court would refuse to enforce a class action waiver that did not contain these or other features that preserved a financial incentive to arbitrate individual claims.

Italian Colors removed any doubt on these issues: class action waivers are enforceable under the FAA, even when they effectively bar the prosecution of federal claims because individual claimants have no incentive to bring them in arbitration. The plaintiffs in *Italian Colors* submitted compelling evidence that they had no such incentive. They asserted complex antitrust claims. They offered a declaration from an economist estimating that the expert analysis necessary to prove these claims would cost up to $1 million, while each individual plaintiff's maximum potential recovery would be $12,850, or $38,549 when trebled. The arbitration agreement between the plaintiffs and American Express prohibited class arbitration, and did not contain any of the consumer-friendly provisions contained in the arbitration clause in *Concepcion*. Based on these facts, the Second Circuit held that the arbitration clause was unenforceable because the plaintiffs could not "effectively vindicate" their federal antitrust claims in arbitration. The Supreme Court disagreed.

The Court noted that the "effective vindication" doctrine originated in dicta, and had never been applied to invalidate an arbitration agreement. The Court explained that while the doctrine would "cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights," and might "cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable," the arbitration clause here contained no such provisions. Instead, it merely "limit[ed] arbitration to the two contracting parties." The "fact that it was not worth the expense involved in *proving* a statutory remedy [did] not constitute the elimination of the *right to pursue* that remedy."

In sum, the Supreme Court's decision in *Italian Colors* demonstrates that class arbitration waivers are enforceable,even when the underlying claims are based on federal statutes and the arbitration provision does not contain consumer-friendly provisions. Some vestige of the "effective vindication"doctrine may survive the decision. As the Courtnoted, prohibitive arbitration fees, or a provision barring the assertion of a federal claim altogether, might still be unenforceable. But such provisions are presumably rare.For practical purposes the “effective vindication” doctrine is a dead letter.

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Case Hyperlink: http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf

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Artibtration

Supreme Court Resolves Circuit Split Over Interpretation of Federal Arbitration Act

Oxford Health Plans, LLC v. Sutter

The United States Supreme Court unanimously held on Monday that an arbitrator did not exceed the scope of his authority by authorizing class-wide arbitration based on his interpretation of the arbitration agreement. The decision resolves a circuit split over whether Section 10(a)(4) of the Federal Arbitration Act (FAA) prohibits a court from vacating an arbitrator's interpretation of an arbitration agreement. The Court answered in the negative -- as long as the arbitrator is "arguably construing" the arbitration agreement, a court cannot evaluate the merits of the arbitrator's decision. By emphasizing the broad discretion that arbitrators have in interpreting agreements, the Court's decision reinforces the benefits of including clear and precise language in an arbitration agreement.

In *Oxford Health Plans, LLC v. Sutter,* No. 12-135 (U.S. Jun. 10, 2013), the appellant health insurance company relied on the Court's recent holding in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 559 U.S. 662, 684 (2010), to argue that the arbitrator exceeded his powers under the FAA by authorizing class-wide arbitration. In *Stolt-Nielsen*, the Court overturned an arbitral decision authorizing class-wide arbitration because the arbitrator based its decision on public policy, and not the terms of the underlying arbitration agreement. In *Oxford*, unlike in *Stolt-Nielsen*, the arbitrator analyzed the contract's arbitration provisions in determining that the parties agreed to class-wide arbitration. The arbitrator did not, therefore, exceed his powers under the FAA, regardless of whether the arbitrator's substantive interpretation of the contract was correct. Because the appellant in *Oxford* specifically requested that the arbitrator make a determination on whether the contract allowed class-wide arbitration, it was effectively precluded under the FAA from arguing that the arbitrator overstepped its bounds in interpreting the terms of the contract itself.

The Court emphasized that the case did not present the issue of whether the availability of class-wide arbitration constituted a threshold "question of arbitrability," such as whether the arbitration agreement was valid or applied to a certain type of controversy, issues which are for the courts to decide. It would not be surprising if the Court accepts an opportunity to resolve this issue in the near future.

While not as far-reaching as other class action opinions issued in the 2013-2014 term, this decision is yet another example of the Supreme Court's recent focus on class action jurisprudence. The opinion also demonstrates the wide latitude arbitrators are given under the provisions of the FAA.

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Class Action

The Enhanced Scrutiny of Class Definitions Under the Ascertainability Requirement: An Additional Hurdle for Plaintiffs or and Increased Burden for Defendants?

Hayes v. Wal-Mart Stores, Inc.

When a plaintiff seeks certification of a class, the issue of whether the class is “ascertainable” has become an increasingly significant battleground issue in class certification proceedings. While not explicitly set out in Rule 23 of the Federal Rules of Civil Procedure, ascertainability is now widely recognized as an implied prerequisite for class certification. Ascertainability refers to the requirement that the class definition be sufficiently definite so that it is administratively feasible to determine whether a particular person is a member of the proposed class by reference to objective and definite criteria. Recent appellate authority suggest that both plaintiffs and defendants must consider issues relating to the feasibility of identifying class members when addressing a motion for class certification.

The ascertainability requirement serves several important objectives. First, it eliminates serious administrative burdens that are not consistent with the efficiencies expected in a class action. Second, it protects absent class members by ensuring the best notice possible, consistent with both requirements of due process and Rule 23. Third, it protects defendants by ensuring that the defendant can clearly identify the class members bound by any final judgment. Similarly, a class definition tied to objective and definite criteria ensures it will be feasible for both a defendant and potential class members to identify who may ultimately be entitled to damages or other relief. Defining class membership by reference solely to objective factors also avoids fail-safe classes, in which a class is defined in terms of the merits of a plaintiff’s claims.

In a recent decision, the Court of Appeals for the Third Circuit again emphasized that the plaintiff must show by a preponderance of the evidence that there is a reliable and administratively feasible method of ascertaining the class:

> This petition for class certification will founder if the only proof of class membership is the say-so of putative class members or if ascertaining the class requires extensive and individualized fact-finding.

Hayes v. Wal-Mart Stores, Inc., No. 12-2522, slip op. at 13 (3d Cir. Aug. 2 2013). In *Hayes*, the plaintiff purchased two “as-is” products and was offered and Hayes agreed to purchase a Sam’s Club service plan for each product. Sam’s Club had contracted with a vendor to offer an extended warranty product service plan on merchandise it sold. It routinely offered the service plan on “as-is” products. “As-is” products are certain clearance items that may have been returns, display items, damaged items, or items Sam’s Club wanted to clear out from inventory. The extended warranty product Sam’s Club was selling, however, did not cover most products sold “as-is” including but not limited to floor models and demonstration models. But it did cover “as-is” products that were covered by a full manufacturer’s warranty, and products that were being sold “as-is” simply to clear out inventory. Alleging that Sam’s Club was selling warranties to “as-is” purchasers who could not benefit from the warranties, Hayes sued under the New Jersey Consumer Fraud Act, and asserted as well breach of contract and unjust enrichment claims.

In opposing class certification, Sam’s Club argued that the proposed class was not ascertainable because there was no feasible way to identify class members from available records. Sam’s Club kept an inventory of products placed for sale “as-is.” But Sam’s Club did not keep records of which “as-is” sales involved the concomitant sale of a service plan. Instead, Sam’s Club kept records of all price overrides, and all “as-is” products were rung up with a price override, but so were many other products for various other reasons.

The district court certified the following Rule 23(b)(3) class:

> All consumers who …. Purchased from Sam’s Clubs in the State of New Jersey, a Sam’s Club Service Plan to cover as-is products. Excluded from the Class are consumers whose as-is product was covered by a full manufacturer’s warranty, was a last-one item, consumers who

> obtained service on their product, and consumers who have previously been reimbursed for the cost of the Service Plan.

Slip op. at 4-5. The district court found the defined class was ascertainable because the definition specified "a particular group that was harmed during a particular time frame, in a particular location, in a particular way" and used objective criteria. *Id.* at 8-9. The district court further found that Sam's Club had records of 3,500 member transactions during the class period that included both a price override — potentially but not definitely signaling that the purchase may have been an "as-is" product — and a Service Plan. The district court noted however that Sam's Club had no method for determining how many of the 3,500 price override transactions were actually for "as-is" items, but did not see that as a barrier to class certification, reasoning that the plaintiff should not be hindered from bringing a class action because the defendant lacked records. *Id.* at 11-12.

The Third Circuit granted interlocutory appeal, vacated the certification order and remanded in light of its decision in *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012). In *Marcus*, a putative class action alleging that run-flat tires manufactured by Bridgestone and included as original equipment on certain BMW vehicles were purportedly defective. The district court certified a class, and the Third Circuit vacated and remanded, finding a number of defects in the class certification decision. The Third Circuit in *Marcus* addressed ascertainability and expressly adopted a requirement that the members of a proposed class must be readily ascertainable by objective criteria:

> [The district court] must resolve the critical issue of whether the defendants' records can ascertain class members and, if not, whether there is a reliable, administratively feasible alternative. We caution, however, against approving a method that would amount to no more than ascertaining by potential class' members say so. For example, simply having potential class members submit affidavits that their Bridgestone RFTs have gone flat and been replaced may not be "proper or just." BMW and Bridgestone will be able to cross-examine [the named plaintiff] at trial about whether and why his tires "have gone flat and been replaced." Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.

Id. at 594.

In reaching its decision to vacate in *Hayes*, the Third Circuit reviewed its decision in *Marcus*, and explicitly noted that the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23 requirements: "Rule 23's requirements that the class be administratively feasible to ascertain and sufficiently numerous to warrant class action treatment cannot be relaxed or adjusted on the basis of Hayes' assertion that Wal-Mart's records are of no help to him." Slip op. at 12.

As a result of the heightened focus on the feasibility of identifying class members, and the role that a defendant's records may play in establishing ascertainability, courts are becoming less sympathetic to claims by defendants that different sets of records might need to be examined to ascertain whether potential class members meet a number of different objective criteria, even where the case involves a potentially large class with millions of records. *See e.g., Young v. Nationwide Mutual Ins. Co.*, 693 F.3d 532 (6th Cir. 2012) (rejecting defendants' arguments that the large number of defendants' records that would have to be examined to determine class membership made ascertaining class membership administratively infeasible and citing with approval cases where courts found that the size of the potential class and the need to review defendant's records, even where the review required substantial efforts, were not reasons to deny certification).

In situations where the defendant's records are inadequate for the purpose of objectively identifying class members, plaintiffs seeking to represent a class will have to successfully devise an administratively feasible means of objectively identifying class members. For example, the plaintiffs might be able to meet their burden where they are able to compile objective data from third parties and match it up with defendant's records to identify potential class members. In securities class actions, for instance, records in the hands of third party brokerage firms and transfer agents routinely are used to compile a list of potential class members.

At first blush, the increased focus on ascertainability — and the reluctance of courts to relax the requirement where the defendant does not have adequate records to ascertain who appropriately is within the scope of the class definition — appears to be a victory for the defense bar and to create an additional hurdle for plaintiffs. But as a practical matter, it likely will impose a significant business and cost burden on defendants as well. Typically, in class action cases, the plaintiff serves discovery early in the case asking for identification of every class member. In response, the defense typically objects, claiming that the discovery request is premature, and says it will answer the discovery after class certification. But now, where there is any dispute with regard to whether the defendant's records are sufficient to identify class members, the plaintiff's lawyer cannot wait until after class certification to seek discovery from the defendant about its record-keeping. Consequently, discovery involving potentially massive numbers of documents and databases which once was routinely postponed until post-certification now will need to be addressed — and the plaintiff's counsel will insist that it be addressed — before the certification hearing.

Because more recent cases have focused both on whether a proposed class definition is based on objective criteria *and* whether records exist to feasibly identify who matches those criteria, parties have to take both of those ascertainability elements into consideration when addressing a motion for class certification. Each side will need to consider what additional discovery is necessary, including discovery concerning a defendant's record keeping and the availability of third party information sources. A plaintiff will need to be prepared to adjust a proposed class definition in order to conform it to the available information. A defendant faced with a motion for class certification will likewise want to consider how its own records or use of outside data sources tie into the class definition that a plaintiff is proposing. As both sides examine the available information, class definitions may narrow, which will also narrow issues in dispute, potentially, at least in some cases, reducing the cost of litigation for both sides.

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Class Action

Third Circuit Provides Guidance on Class Action Fairness Act Exceptions

Vodenichar v. Halcon Energy Properties, Inc.

The U.S. Court of Appeals for the Third Circuit recently provided guidance on the "home state" and "local controversy" exceptions to federal jurisdiction under the Class Action Fairness Act of 2005 (CAFA). Although the Third Circuit in *Vodenichar v. Halcon Energy Properties, Inc.,* affirmed the District Court's remand of the action to state court, it declined jurisdiction based on CAFA's "local controversy" exception, rather than CAFA's "home state" exception. Significantly, in analyzing CAFA's exceptions, the Third Circuit provided guidance on two key undefined terms, "primary defendant" and "other class action." This guidance should be considered by insurers contemplating removal of class actions filed in their home state's court when the class primarily consists of citizens of that state.

CAFA provides federal courts with jurisdiction over civil class actions if the matter in controversy exceeds $5 million, the aggregate number of proposed class members is 100 or more and any class member is a citizen of a state different from any defendant. It also allows for two exceptions to federal jurisdiction where the controversy is uniquely connected to the state in which the action was originally filed. The party invoking either the "local controversy" or "home state" exception bears the burden of proving it by a preponderance of the evidence. *See* 28 U.S.C. § 1332(d)(4)(A)-(B).

A party seeking to use the "home state" exception must establish that at least two-thirds of the class and the "defendants" are citizens of the state in which the action was originally filed. "Primary defendant," however, is not defined in CAFA. Relying on the ordinary meaning of the term, statutory construction and statements by CAFA's legislative sponsors, the Court reasoned that to determine whether a defendant is a "primary defendant," courts should assume liability and determine whether the defendant is a "real target." A defendant is a "real target" if plaintiffs seek to hold the defendant responsible for its own actions and the defendant has significant exposure. Applying this standard, the Third Circuit found that the "home state" exception did not apply in *Vodenichar* because not every "primary defendant" was a citizen of the state in which the action was filed.

The Court then analyzed the "local controversy" exception, which applies when: (1) greater than two-thirds of the class is local; (2) at least one defendant is local; (3) the principal injuries occurred in the state in which the action was filed; and (4) no "other class action" asserting similar allegations was filed against any defendant within three years. In analyzing the exception, the Court found that although CAFA does not define "other class action," Congress' intent was to ensure that defendants did not face similar suits in multiple forums. Applying the "local controversy" exception in light of Congress' intent, the Court in *Vodenichar* concluded that, despite a withdrawn class action having been filed against these defendants within the past three years, the defendants were not facing similar class actions and the "local controversy" exception applied necessitating remand.

Vodenichar provides litigants and lower courts with clear guidance as to how certain undefined terms in CAFA's "home state" and "local controversy" exceptions should be interpreted and should be considered by insurers contemplating removal of a class action filed in their home state's court when the class primarily consists of citizens of that state.

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Contributory Negligence

Maryland's Highest Court Rules It Would Be Contrary To Legislative Mandates For The Maryland Judiciary To Abrogate The Contributory Neglience Doctrine

James K. Coleman v. Soccer Association of Columbia

Writing for the majority in *James K. Coleman v. Soccer Association of Columbia* (No. 9, September Term, 2012), Judge John C. Eldridge explained that, even though the court has the authority to abrogate the contributory negligence doctrine, it declined to change the negligence system in Maryland because it is contrary to legislative policy.

Some members of the legal community are pleased with the court's decision, while others remain dissatisfied. Although the contributory negligence debate has been put to rest for the time being, the direction of Maryland's tort liability system is regularly debated in the legal community, and the initiative to abrogate the contributory negligence doctrine may well resurface. It remains to be seen whether Maryland retains its position on contributory negligence or eventually becomes one of a growing number of states that have adopted some form of comparative fault. For now, contributory negligence remains a viable defense in Maryland.

Background

Both the contributory and comparative negligence doctrines address the apportionment of damages based on the allocation of fault among the parties. The allocation, however, varies significantly depending on which doctrine is applied. Contributory negligence, the doctrine that is currently applied in Maryland and in only three other states (Alabama, North Carolina, Virginia) and the District of Columbia is an affirmative defense rooted in common law that is available to any party in a wrongful death, personal injury or property action. Under the contributory negligence doctrine, an injured party is precluded from recovering any damages from a negligent defendant if the injured party's actions are a contributing factor in causing the injury – even if the injured party is only 1 percent responsible for causing his or her own injuries.

The more modern comparative negligence doctrine is followed in 46 states. There are three types of comparative fault standards:

- In a pure comparative negligence jurisdiction, a plaintiff's fault is compared with the defendant's degree of fault and the plaintiff's recovery is reduced proportionately based on his or her own degree of fault.
- In jurisdictions where the 50 percent bar rule is applied, the plaintiff will recover nothing if he or she is 50 percent or more at fault.
- In 51 percent bar rule jurisdictions, a plaintiff will recover only if he or she is found to be less than 51 percent at fault.

In April 2012, the Court of Appeals granted *certiorari* in *Coleman*, a case that had resurfaced the heated debate over whether to change the negligence system in Maryland by ameliorating or repudiating the contributory negligence doctrine.

In that case, James Coleman was barred from any recovery because he was contributorily negligent in causing his own injuries. In consideration of the potential broader implications of the *Coleman* decision, including its effect on the outcome of litigants' claims and the potential larger-scale economic implications on the region, the Court of Appeals reviewed briefs filed by both parties in the *Coleman* case as well as "friend of the court" briefs from interested groups, such as the American Tort Reform Association, U.S. Chamber of Commerce, Coalition for Litigation Justice Inc., American Insurance Association and American Medical Association, to name a few.

Coleman, along with other proponents of changing the current contributory negligence standard, argued that the doctrine is unjust and antiquated. They argued that barring Coleman from recovering any damages leaves no incentive for the defendant to correct its own negligent conduct and leaves Coleman with no compensation for his medical bills. They further argued that the doctrine undermines the main purposes of the justice system – to deter negligent acts by assigning liability to those who performed those acts.

Those who advocated for the preservation of the contributory negligence standard pointed out that abandoning the doctrine would upset other aspects of the state's tort law system, including the application of joint and several liability, the assumption of the risk doctrine and contribution among tortfeasors. Some would argue that to uproot the tort liability system that has been in place for more than a century brings with it much uncertainty and could threaten Maryland's economic edge. A contributory negligence standard arguably helps Maryland maintain its economic and business competitiveness. Moving away from contributory negligence could increase litigation and its associated costs. From either perspective, it is undeniable that changing the tort liability system is a massive undertaking that requires careful consideration of the implications on Maryland, its citizens, small businesses and the state's overall economic climate.

In practice, the strict result of a contributory negligence defense is often tempered by the actions of juries – the chief complaint among those who oppose contributory negligence. Despite evidence to support a finding of contributory negligence and a jury instruction on contributory negligence, juries are sometimes reluctant to allow the defendant to get off "scot-free" and instead will award the plaintiff some reduced amount of damages to account for the plaintiff's degree of fault. In effect, juries, in cases where they deem it appropriate, have been known to apply what is akin to a comparative negligence standard, despite being in a contributory negligence jurisdiction and irrespective of Maryland law. The injustice complained of by those who seek a change in Maryland's tort system is simply not always a reality when a jury doles out justice. In any event, for now the contributory negligence standard has been preserved. It will be interesting to see whether Maryland's position on contributory negligence remains unchanged or whether it eventually becomes one of the rising number of states that have adopted some form of comparative fault.

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Cyber Risk

The Ever Evolving Cyber Law

There is a wide array of state, federal, and international laws requiring individuals and entities that gather, use and secure "personal" or "protected" information to report, and/or "notice," when this type of information is accessed or acquired without authorization. The original motivator behind these laws is that this type of information, when in the hands of the wrong person, can be used to commit fraud. The goal is to provide affected individuals, and the government or consumer agencies they may turn to for assistance, with notice of the data security incident so that they may take steps to protect themselves.

Whether notice is required hinges on the types of information accessed or acquired. Each of the myriad of laws defines the types of "personal" or "protected" information that trigger notice. Most define this information to be a combination of a resident's first initial and last name, along with Social Security number, driver's license number (or other government-issued identification number), healthcare, or financial information. Some statutes go further, recognizing the risk resulting from unauthorized access to other types of information: birthdate, email address, mother's maiden name, or tax identification number.

Additionally, certain courts (Massachusetts and California) recognize zip codes as protected information, under certain circumstances.

Recent statutory and proposed changes to North Dakota, California, Vermont, and Washington laws affect the types of information protected, when, and to whom, notice is required. These states aren't the first to recognize the need to expand their laws. They won't be the last.

North Dakota's data breach notice law, effective Aug. 1, 2013, now affords protection to a resident's health insurance information.

California lawmakers are considering a bill that protects a resident's username or email address, in combination with a password or security question and answer that would permit access to an online account.

Vermont now requires entities regulated by the Vermont Department of Financial Regulation to provide notice of a breach of the security of personal information of Vermont residents to the department within 14 business days of discovering a breach.

Washington requires insurers to report an event that triggers notice obligations under its data breach notice law and/or HIPAA/HITECH, to Washington's insurance commissioner within two business days.

There are developments on the federal and international front as well. President Obama's recent Executive Order, the final HIPAA Omnibus Rule, pending EU legislation, and the 2011 SEC Guidance all reflect the snow-balling evolution of cyber law.

President Obama's February 2013 Executive Order requires development of a cybersecurity framework, including a set of standards, methodologies, procedures, and processes to address cyber risks. The preliminary draft of this framework is expected in September.

Also in February, the European Union issued its proposed Cybersecurity Directive, which calls for the implementation of national reporting authorities to regulate certain industries, investigate breaches, and issue binding instructions.

Under the final HIPAA Omnibus Rule, which went into effect March 26, 2013, a breach – and notice to affected individuals – is presumed unless the covered entity, by way of a risk assessment, demonstrates there is a "low probability" that protected health information has been compromised.

The above is a far-from exhaustive discussion of the ever-changing nature of data security laws. The takeaway is that if you are not aware of the evolution of these legal duties, you are not prepared. You can be sure that regulators and plaintiffs' attorneys are paying attention.

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New York Court of Appeals Considers Viability of Medical Monitoring Claims

Caronia v. Philip Morris USA

In *Caronia v. Philip Morris USA*, the Second Circuit Court of Appeals considered the unsettled issue of whether cigarette smokers, who were not diagnosed or undergoing treatment for a smoking-related disease, may bring an equitable claim for "medical monitoring" under New York law against Philip Morris, the manufacturer of the cigarettes. The Court kept the possibility of such a claim alive by certifying the question to the New York State Court of Appeals, the state's highest court.

The plaintiffs in *Caronia* are residents of New York who brought a putative class action against Philip Morris for negligence, strict liability, and breach of implied warranty, based upon the design, manufacture and sale of its cigarettes. The plaintiffs alleged that although Philip Morris knew at all relevant times that it was feasible to lower the carcinogenic content of its cigarettes, it purposely designed all of its Marlboro cigarettes to deliver an excessive amount of carcinogens when smoked.

Significantly, plaintiffs also asserted an equitable claim to compel Philip Morris to fund medical monitoring of the long-time plaintiff smokers who have not been diagnosed with lung cancer, but were subject to an increased risk due to smoking Marlboro brand cigarettes. Plaintiffs alleged that a recently established medical surveillance technique known as Low Dose CT Scanning of the chest (LDCT) is a safe, efficacious and inexpensive technique, which, for the first time, provides a means to identify and diagnose lung cancers at an early stage, when they are still curable.

The United States District Court, Eastern District of New York, had previously granted summary judgment dismissing the negligence, strict liability, and some of the breach of implied warranty claims as time-barred and the breach of warranty of merchantability claim due to insufficient proof. The District Court also dismissed the medical monitoring claim, holding that the plaintiffs failed to adequately allege that Philip Morris' conduct was the proximate cause of an increased risk of cancer.

The Second Circuit affirmed the dismissal of the negligence and strict liability claims as beyond the statute of limitations. It held that these causes of action accrued when the initial exposure occurred, causing the plaintiffs to have an increased risk of lung cancer, as opposed to the accrual date renewing with each new inhalation. The Second Circuit further affirmed the dismissal of the implied warranty of merchantability claim, holding that defendant had established as a matter of law that the cigarettes were "minimally safe when used in the customary, usual, and reasonably foreseeable manner."

Importantly, however, the Second Circuit vacated the dismissal of the medical monitoring equitable claim. The Court, following an analysis of both federal and state laws, found that most courts have ruled that medical monitoring claims were available for claims asserting tortious exposure to carcinogenic substances, even if the plaintiffs have not been diagnosed. Courts have generally concluded that the New York Court of Appeals would recognize the claim. However, the issue had never been addressed by the New York Court of Appeals and the conclusions held in New York's intermediate appellate courts, the federal district courts in New York, and the highest courts of other states, are in conflict. The Second Circuit determined that the best course would be to have the New York Court of Appeals decide whether New York recognizes an independent claim for medical monitoring. Accordingly, the Second Circuit certified the question of whether New York law recognizes a claim for medical monitoring and, if so, what the elements are, what the statute of limitations is, and when such a claim accrues. Answers to these questions will be addressed by the Court of Appeals, but in the meantime, the reader should be aware of the potential viability of a medical monitoring claim in tortious exposure cases.

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Damages

Court of Appeal Issues Huge New *Howell* Case

Corenbaum v. Lampkin

On April 30, 2013, the California Court of Appeal issued a published decision in *Corenbaum v. Lampkin* (2013) __ Cal.App.4th ___, 2013 Cal.App. Lexis 342 which addressed a couple issues left open by the California Supreme Court's recent opinion in *Howell v. Hamilton Meats* (2011) 52 Cal.4th 541. In this case, the Court of Appeal held that the full amounts billed for the plaintiffs' medical care was not relevant to the amount of damages for past medical services, damages for their future medical care, or noneconomic damages. Slip Opn. at 5. Because the plaintiffs failed to show any other proper basis for admitting this evidence, the admission of this evidence was error requiring reversal.

The Facts

In *Corenbaum*, the plaintiffs were passengers in a taxi which struck by a drunk driver who ran a red light at a speed of approximately 50 to 70 mph in a posted 25 mph zone. The drunk driver fled the scene on foot but was ultimately apprehended, arrested, convicted, and sentenced to three years in state prison.

Prior to trial, the plaintiffs filed MILs to exclude evidence of the payment of plaintiffs' medical bills by a collateral source. Defendants filed MILs to hold a post-verdict hearing on reduction of plaintiff's medical expenses to the amount incurred. At trial, the jury heard evidence of the full amounts billed for the past medical care and heard no evidence of the lesser amounts accepted by the providers as full payment. The jury returned a verdict in excess of $3 million.

After trial, defendants moved to reduce the award pursuant to *Hanif* and *Nishihama* to the full amounts billed for past medical expenses that was actually accepted as full payment.

The Total Amount Billed is Not Admissible for the Purposes of Determining Past Medicals

The Court of Appeal reversed, stating, "evidence of the full amount billed for a plaintiff's medical care is not relevant to the determination of a plaintiff's damages for past medical expenses, and therefore is inadmissible for that purpose if the plaintiff's medical providers, by prior agreement, had contracted to accept a lesser amount as full payment for the services provided." Slip Opn. at 19. The Court also rejected the argument that this evidence was admissible to establish the "reasonable value of the services." Id. at 20.

In so holding, the Court of Appeal reasoned that if a jury were to consider both evidence of the amount accepted by medical providers as full payment and evidence of a potentially greater reasonable value, there would very likely be jury confusion and an improper suggestion of the existence of a collateral source payment. Id at 20-21.

The Total Amount Billed is Not Admissible for the Purposes of Determining Future Medicals

With respect to issues involving *future* medical care, the Court of Appeal held that evidence of the total amount billed was likewise inadmissible. Id. at 23. This conclusion was based on the fact that if the jury should not consider an amount accepted for past payments but a larger amount (the amount billed) for these same past injuries to calculate future payments. Id. at 23.

Moreover, the full amount filled for past services could not serve as a basis for an expert opinion on the reasonable value of future medical services. Id. at 23. Accordingly, any expert should be precluded from so testifying.

The Total Amount Billed Is Not Admissible for the Purposes of Determining Pain and Suffering

Finally, for the same reasons, evidence of the total amount billed is not relevant to the amount of noneconomic damages which are available for pain and suffering. Id.at 27.

BOTTOM LINE

This case represents a major victory for businesses, insurers, municipalities, and other defendants in personal injury matters. If you have any specific questions as to how this new decision could impact one of your cases, please contact me. We are here to help.

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Case Hyperlink: http://www.courts.ca.gov/opinions/documents/B237871.PDF

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Experts

The Burden of Proof

In *Caribbean Steel Company Limited v Price Waterhouse*, the Privy Council has recently reiterated the principle that for a court to find that a professional had breached his duty of skill and care, expert evidence ought to be adduced from persons in the same profession as the defendant as to the standard of care required in the particular case and the defendant's failure to reach that standard.

Background

This case concerned the purchase in the early 1990s by the claimant of a 50.1% share in Caribbean Cable Company Limited which produced construction materials in Jamaica. The claimant's accountants, Price Waterhouse, prepared a valuation in advance of the purchase. This valuation treated a J$13,849,000 surplus in Caribbean Cable's pension fund as an asset and did not mention that Caribbean Cable had already borrowed J$1,400,000 from that pension fund. The claimant alleged that Price Waterhouse were negligent in failing to bring this fact to its attention and that it would have materially affected the purchase.

The claimant was successful at first instance but Price Waterhouse successfully appealed to the Jamaica Court of Appeal. The claimant appealed to the Privy Council.

Decision

The Privy Council dismissed the appeal agreeing with the Jamaica Court of Appeal's finding that the first instance judge had not given due regard to Price Waterhouse' expert evidence.

At first instance, Price Waterhouse' expert had opined that the J$1,400,000 loan from the pension fund was immaterial to the valuation. The Jamaica Court of Appeal and the Privy Council found that the claimant's expert had given no reasoned rebuttal. It was essential that the reasons given by the expert for reaching his opinion were carefully scrutinized; for unless there was a sound reason for rejecting it, the judge could not properly find that professional negligence had been established. *Sansom v Metcalfe Hambleton & Co* was cited by both the Jamaica Court of Appeal and the Privy Council.

Comment

This decision affirms the principle that compelling and coherent expert evidence is necessary for a finding of professional negligence.

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Jurisdiction

Illinois Supreme Court's New Ruling May Impact The Minimum Contacts Requirement In Establishing Specific Personal Jurisdiction

Russell v. SNFA

In *Russell v. SNFA, 2013 IL 113909*, the Illinois Supreme Court upheld the exercise of specific personal jurisdiction under the "catch-all provision" of the Illinois Long-Arm Statute, which provides that a court "may also exercise jurisdiction on any other basis … permitted by the Illinois Constitution and the Constitution of the United States." When a plaintiff seeks to impart personal jurisdiction under subsection (c) of the Illinois Long-Arm Statute, the sole issue to be decided by the court is whether the nonresident defendant's connection or contact with Illinois is sufficient to satisfy federal and Illinois due process. Before the court may subject the defendant to a judgment *in personam*, the court must consider whether the defendant has minimum contacts with Illinois and whether subjecting it to litigation in Illinois is reasonable under traditional notions of fair play and substantial justice.

Background

In *Russell*, the defendant challenged the ability of the court to assert specific personal jurisdiction under applicable provisions of the Illinois Long-Arm Statute (735 ILCS 5/2-209(a), (c) (West 2002)). The court examined subsection (c) of the Long-Arm Statute and the two-part test previously established in *Rollins v. Ellwood,* 141 Ill. 2d 244 (Ill. 1990), which required courts to first determine whether a specific statutory provision of § 2-209 had been satisfied, and then to determine whether the due process requirements of the U.S. and Illinois constitutions had been met. The Illinois Supreme Court agreed with the lower appellate court that had found the two-part test in *Rollins* unnecessary when subsection (c) is invoked, because subsection (c) constitutes an independent basis for exercising personal jurisdiction. The issue before the court in *Russell* was thus simply whether the nonresident defendant's connection or contact with Illinois is sufficient to satisfy federal and Illinois due process.

The Facts

In *Russell*, the executor's decedent died in a helicopter crash due to an alleged defect involving seven tail-rotor bearings custom made by the defendant, SNFA, a French corporation. The helicopter was manufactured by Agusta, an Italian corporation, and the crash occurred in Illinois. SNFA argued that it did not have any direct U.S. customers for its custom-made helicopter bearings. However, SNFA did sell approximately $1 million worth of bearings for airplanes and fixed-wing aircraft, different from the model and type found in plaintiff's helicopter, to a company located in Rockford, IL. Furthermore, AAC, the wholly owned subsidiary of Agusta, is located in Pennsylvania and distributes helicopters and component parts internationally and in the United States. In the 10 years leading up to this suit, five Agusta helicopters were sold to customers located in Illinois.

Defendant SNFA claimed that:

- The court cannot establish the requisite "minimum contacts" with Illinois
- The actions of Agusta and AAC are irrelevant for purposes of determining the stream-of-commerce theory
- The relationship with the Rockford, IL, distributor cannot establish minimum contacts because plaintiff's claims did not "arise from" or "relate to" defendant's relationship with the Rockford location, as the parts sold there were not for helicopters, but for other types of aircraft
- Significant weight must be given to the burden on the defendant when assessing the reasonableness of "stretching the long arm of personal jurisdiction over national borders"

The Decision

The court found that the plaintiff met his burden by establishing that SNFA had the requisite minimum contacts with Illinois. The court determined that Agusta and AAC effectively operated as an American distributor for SNFA's tail-rotor bearings in the U.S. market, and rejected SNFA's argument that Agusta's and AAC's actions were irrelevant. SNFA custom manufactured the bearings at issue specifically for Agusta, intending its products to be an inseparable part of the marketing plan of Agusta. Consequently, the sole market for SNFA's bearings would be Agusta or an owner of an Agusta helicopter. The court rejected as too specific SNFA's argument that plaintiff's claims did not "arise from" or "relate to" the activities in the Rockford plant. SNFA is in the business of manufacturing custom-made bearings for the aerospace industry, and SNFA cited no authority that would require the court to differentiate between specific product lines within the industry of custom-made bearings. Finally, the court found that, after giving significant weight to the burden on the defendant of litigating in Illinois, exercising jurisdiction in Illinois was reasonable.

Conclusion

In summary, the Illinois Supreme Court in *Russell* held that the exercise of specific personal jurisdiction in Illinois was proper. The court rejected the traditional two-part test established in *Rollins* and instead determined that the nonresident defendant's connection or contact with Illinois was sufficient to satisfy federal and Illinois due process. The court further found that the plaintiff met his burden of showing that defendant had the requisite minimum contacts in Illinois through the sale of defendant's custom-made bearings by an American distributor. Five helicopters containing the custom-made bearings in question were sold to customers in Illinois, defendant had a business relationship with a company located in Illinois, and while the products sold in that location were not the helicopter bearings in question, the relationship was sufficient to establish minimum contacts. The court also found that it would not be unreasonable to require the defendant to litigate in Illinois.

Future products liability litigation concerning nonresident parties may be impacted by *Russell*, as more defendants could face personal jurisdiction in Illinois courts through application of the Illinois Long-Arm Statute's catch-all provision, even if they are not directly in contact with the plaintiff.

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Case Hyperlink: http://www.state.il.us/court/Opinions/SupremeCourt/2013/113909.pdf

Samantha Birch provided research assistance and was a contributing writer for this alert.

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Preemption

Mutual v. Bartlett Further Shields Generic Drug Manufacturers from Liability

Mutual Pharms. Co. v. Bartlett

In June, 2013, the Supreme Court issued its ruling in the much-anticipated Mutual Pharms. Co. v. Bartlett, No. 12-142 (on appeal from the First Circuit Bartlett v. Mutual Pharms. Co., 678 F.3d 30 (1st Cir. 2012)). As we predicted, the Court reversed the First Circuit's decision and held that "[s]tate-law design defect claims that turn on the adequacy of a drug's warnings are pre-empted by federal law under PLIVA."[1]

BARTLETT'S BACKGROUND

Bartlett's facts are undeniably tragic. The plaintiff, Karen Bartlett, took generic sulindac (manufactured by Mutual) for shoulder pain. She developed Stevens-Johnson syndrome/toxic epidermal necrolysis (SJS/TEN) and suffered permanent injury and disfigurement. By the time of trial, the only remaining claim for the jury to decide was whether sulindac was defectively designed. The jury found in Bartlett's favor and awarded her $21.06 million in compensatory damages.

The First Circuit affirmed, holding that because Mutual "certainly c[ould] choose not to make the drug at all," there was no impossibility preemption. Mutual petitioned for a writ of certiorari, which the Supreme Court granted in December 2012. In addition to the parties' briefs, the Solicitor General filed a brief arguing that all "duty to recall" claims should be rejected. The Supreme Court heard oral argument in March.

Questioning at oral argument focused on two main issues: (1) whether design-defect claims can be independent of failure-to-warn claims; and (2) whether this case represented anything other than a challenge to the FDA's authority to allow drugs to be sold on the market.

The decision today squarely addressed both issues.

Mutual's Duties Under New Hampshire Law Conflict With Its Duties Under Federal Law

Justice Alito authored the opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas (the same five Justices who ruled for preemption in Mensing). In its impossibility preemption analysis, the Court began by "identifying [Mutual's] duties under state law." First, the Court rejected the notion that New Hampshire recognized an "absolute-liability regime," i.e., one that makes drug manufacturers insurers of their products.

Second, the Court analyzed design defect under New Hampshire law, which imposes liability "only where the design of the product created a defective condition unreasonably dangerous to the user."[2] Factors to be considered include: (1) the usefulness of the product to the general public; (2) whether the risk at issue could have been reduced without significant impact to the product's efficacy or manufacturing cost; and (3) "the presence and efficacy of a warning to avoid an unreasonable risk of harm from hidden dangers or foreseeable uses."[3]

The Court concluded that the first two factors would require redesign of a drug, which is impossible in this case for the following two reasons. First, because Mutual's sulindac was a generic drug, it was required to "have the same ingredients, route of administration, dosage form, strength, and labeling as the brand-name drug on which it is based."[4] Second, the Court concluded that the single-molecule drug was incapable of being redesigned.[5]

After eliminating the first two factors from its analysis, the Court was left with a failure-to-warn claim: "Given the impossibility of redesigning sulindac, the only way for Mutual to ameliorate the drug's 'risk-utility' profile—and thus to escape liability—was to strengthen the presence and efficacy of sulindac's warning in such a way that the warning avoided an unreasonable risk of harm from hidden dangers or from foreseeable uses."[6] Essentially, "New Hampshire's design-defect cause of action imposed a duty on Mutual to strengthen sulindac's warnings."[7]

According to the Court, "The duty imposed by federal law is far more readily apparent . . . . [It] prevents generic drug manufacturers from changing their labels." Based on this reasoning, the Court held that the case fit squarely within the bounds of its decision in Mensing and that "federal law prohibited Mutual from taking the remedial action required to avoid liability under New Hampshire law."[9]

Court Rejects "Duty To Withdraw" Argument

The most closely watched aspect of this case was the question whether Bartlett represented a challenge to the FDA's authority to approve a drug—did impossibility preemption apply if a manufacturer could withdraw a drug from the market? The response from the Court was unequivocally negative: "We reject this 'stop-selling' rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be 'all but meaningless.'"[10]

In addition to rejecting the "duty to withdraw" argument, the majority's opinion also spent several pages refuting Justice Sotomayor's passionate dissent. While the majority recognized the "dreadful injuries" giving rise to product liability cases, "sympathy for [the plaintiff] does not relieve us of the responsibility of following the law."[11] The majority also refused to accept that it has "ignored Congress' explicit efforts to preserve state common-law liability." Instead, the Court reiterated its statement from Mensing that "Congress and the FDA retain the authority to change the law and regulations if they so desire"[12] and the Court once again exhorted Congress to provide "'explicit' resolution to the difficult preemption questions that arise in the prescription drug context. That issue has repeatedly vexed the Court—and produced widely divergent views—in recent years."[13]

Justice Breyer's Dissent

Justice Breyer, joined by Justice Kagan, authored a brief dissent, essentially concluding that nothing in the federal regulatory scheme conflicts with a state's requirement that the manufacturer pay damages or exit the market. Part of this conclusion was based on Justice Breyer's refusal to give special weight to the FDA's views, as there had been no hearings or regulations enforcing those views.[14]

During oral argument in March, Justice Breyer had expressed misgivings about allowing a jury to decide whether a potentially lifesaving drug should be withdrawn from the market. Yet in his dissent, Justice Breyer implied that juries should do exactly that—the issue should be left to the trier of fact and decided on a case-by-case basis. Indeed, in this case he "found no convincing reason to believe that removing this particular drug from New Hampshire's market, or requiring damage payments for it there, would be so harmful that it would seriously undercut the purposes of the federal statutory scheme."[15] He further noted that other defendants "remain free" to demonstrate impossibility preemption in their own particular cases.

Justice Sotomayor's Dissent

As in Mensing, Justice Sotomayor's dissent exceeded the majority opinion in length. Joined by Justice Ginsberg, Justice Sotomayor found the majority opinion an "unnecessary" and "unwise" extension of Mensing.

Justice Sotomayor began by taking the majority to task for ignoring the presumption against preemption that laid the groundwork for the Court's opinion in Wyeth v. Levine, 555 U.S. 555 (2009). This presumption should have left Mutual facing "an uphill climb" to show federal preemption of plaintiff's claims, and Justice Sotomayor would have held that Mutual did not meet its burden.

According to Justice Sotomayor, New Hampshire's design-defect law provided "incentives" for Mutual to alter the drug's design or label. In contrast, failure-to-warn law imposed "requirements" that drug manufacturers maintain up-to-date labels. "This difference is a significant one: A mandate leaves no choice for a party that wishes to comply with the law, whereas an incentive may only influence a choice." [16] The majority opinion criticized this aspect of Justice Sotomayor's dissent, stating that "[t]he contours of that argument are difficult to discern."[17] State failure-to-warn claims seem to provide similar "incentive" to maintain a current label and could just as easily be avoided by withdrawing from the market (or remedied by paying damages).

The dissent was very troubled with the lack of compensation to the plaintiff for her injuries: "responsibility for the fact that Karen Bartlett has been deprived of a remedy for her injuries rests with this Court."[18] "As a result [of the majority's decision], the Court has left a seriously injured consumer without any remedy despite Congress' explicit efforts to preserve state common-law liability."[19]

Parallel Claim For Misbranding

Both the majority and the dissent referenced the FDA's misbranding prohibition. The majority explicitly stated that it was not addressing "state design-defect claims that parallel the federal misbranding statute."[20] The dissent recognized that federal law "bars the sale of previously approved drugs if new information comes to light demonstrating that the drug is 'dangerous to health' and thus 'misbranded.'"[21] This was partly the basis on which the dissent rejected the notion that "drug manufacturers have a right to continue to sell a drug free from liability once it has been approved." Additionally, the dissent discredited the FDA's contention that "design-defect claims are pre-empted unless they parallel the FDA's misbranding prohibition," concluding that the FDA's views need not be given weight here.

Impact Of Bartlett Decision

Bartlett reinforces the Supreme Court's opinion in Mensing and provides generic manufacturers with another tool to defend against product liability claims. Bartlett recognizes that many of the common causes of action against pharmaceutical manufacturers are simply failure-to-warn claims disguised as other causes of action. However, the Court left the door slightly ajar to claims alleging parallel violation of the FDA's misbranding prohibition. Though such a cause of action would likely be available in only a sliver of pharmaceutical product liability cases and has little chance of success, we would expect plaintiffs to begin asserting these claims where they think they might have sufficient basis to do so. The FDA may respond to the Court's repeated requests to resolve some of the confusion and controversy surrounding product liability for generic drug manufacturers in the coming months. We think it is less likely that Congress will respond as any measure is unlikely to pass both the Democratic Senate and Republican House of Representatives.

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Case Hyperlink: http://www.supremecourt.gov/opinions/12pdf/12-142_8njq.pdf

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1 Slip op. at 2. See Driving on Both Sides of the Road: Supreme Court Hears Bartlett Oral Argument.
2 Slip op. at 9 (quotation omitted).
3 Id. at 10 (quotation omitted).
4 Id. (citing 21 U.S.C. § 355(j)(2)A)(ii)-(v) and (8)(B); 21 C.F.R. § 320.1(c)).
5 Id. at 11.
6 Id. (qutoation and alterations omitted).
7 Id.
8 Id. at 13.
9 Id.
10 Id. at 15.
11 Id. at 17.
12 131 S.Ct. 2567 at 2582.
13 Slip op. at 19-20.
14 Breyer Dissent at 3.
15 Id. at 4.
16 Sotomayor Dissent at 12.
17 Slip op. at 17-18.
18 Sotomayor Disssent at 2.
19 Id. at 26.
20 Slip op. at 14 n.4.
21 Sotomayor Dissent at 17-18.

This article first appeared in *Chain Drug Review*

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Premises Liability

Colorado Supreme Court Blurs the Lines of Landowner Liability Under the Premises Liability Statue

Larrieu v. Best Buy

Why This Case Is Important

The Colorado Supreme Court has ruled that Colorado's premises liability statute is not, as a matter of law, restricted solely to activities and circumstances that are directly or inherently related to the land. Rather, the premises liability statute may extend to any conditions, activities, and circumstances on the property for which the landowner is liable in its legal capacity as a landowner, thereby requiring a fact-specific, case-by-case inquiry in all premises liability matters.

Overview

Plaintiff Larrieu sued Best Buy Stores, L.P. for injuries he sustained at a Best Buy warehouse where he was picking up a freezer he had purchased. Larrieu and a Best Buy employee had removed the tailgate from a trailer that Larrieu had brought to transport the freezer. As Larrieu walked backwards carrying one end of the tailgate, he tripped over a curb and fell as the Best Buy employee (carrying the other end of the tailgate) continued to move forward towards the curb. The tailgate landed on top of Larrieu, and he suffered a compression fracture of his lumbar spine.

Best Buy removed the matter to Federal Court, where the District Court granted summary judgment in favor of Best Buy, ruling that Larrieu's injuries were not sustained in the course of an "activity inherently related to the land." Larrieu appealed to the Court of Appeals for the Tenth Circuit, who sought certification from the Colorado Supreme Court. The ultimate question decided was as follows:

Does Colorado's premises liability statute, C.R.S. § 13-21-115, apply as a matter of law only to those activities and circumstances that are directly or inherently related to the land?

The Colorado Supreme Court answered the foregoing question in the negative.

Holding

The Colorado Supreme Court refused to adopt Larrieu's efforts to extend the premises liability statute to encompass "any tort that happens to occur on another's property." The Court further rejected Best Buy's efforts to have the Court draw a hard line to define "activities conducted or circumstances existing on [a landowner's] property" to mean only those activities or circumstances that are "directly or inherently related to the land." Choosing a more mid-line approach, the Colorado Supreme Court held as follows:

The premises liability statute applies to conditions, activities, and circumstances on the property that the landowner is liable for in its capacity as a landowner…This analysis necessitates a fact-specific, case-by-case inquiry into whether (a) the plaintiff's alleged injury occurred while on the landowner's real property, and (b) the alleged injury occurred by reason of the property's condition or as a result of activities conducted or circumstances existing on the property.

In other words, the premises liability statute includes activities or conditions that the "landowner" is conducting or creating on the property in its capacity as a "landowner." The Court notes that a "landowner" has been construed broadly to "include individuals or entities who are authorized agents or persons in possession, including those legally conducting an activity on the property or legally creating a condition on the property."

Applying this reasoning to the specific facts of this case, the Court found that Larrieu had in fact alleged that he was injured "by reason of the condition of [Best Buy's] property, or activities conducted or circumstances existing on such property." Because Best Buy, through its employee, was assisting its customer with loading a freezer purchased from the store, Best Buy may be liable in its capacity as a landowner. The Court did note, however, that further factual development was required regarding whether Best Buy had acted unreasonably given Larrieu's status as an "invitee" on the property.

The Tenth Circuit has recently remanded the case to the District Court for further determination in accordance with the Colorado Supreme Court's holding.

Lessons To Be Learned From This Case

The line between when a landowner will or will not be held responsible whenever an injury is not expressly caused by activities that are "directly and inherently related to the land" has been blurred by this decision. Every case will be different, and landowners will need to be cognizant of the potential for premises liability claims to arise from activities and conditions that may only tangentially be related to the land.

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Case Hyperlink: http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2012/12SA213.pdf

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Premises Liability

Florida's Third DCA Limits Scope of Discovery in Premises Liability Cases

Publix Supermarkets, Inc. v. Santos

In cases where a plaintiff is injured due to a slip and fall in a business establishment, the plaintiff may seek discovery related to other slip and falls that occurred on the same premises. Such requests are generally made in an effort to establish that the owner of the premises had actual or constructive knowledge of the dangerous condition that caused the plaintiff's injury. On July 31, the Third District Court of Appeal issued an opinion limiting the scope of these discovery requests.

In *Publix Supermarkets, Inc. v. Santos*, plaintiff brought an action for negligence and negligent mode of operation against Publix. Plaintiff alleged that she slipped and fell in a Publix grocery store as a result of a transitory foreign substance on the floor. Initially, plaintiff sought discovery related to all slip and falls that occurred at that specific store within the three years prior to her accident. After discovering there had been none during that time frame at that particular store, plaintiff sought production of all incident reports regarding slip and falls at any Publix store in the State of Florida, within the three years prior to her accident. The trial court ordered Publix to supplement its initial discovery response with information regarding its stores, statewide, within the past three years.

The Third District Court of Appeal concluded that the trial court allowed the plaintiff to obtain information that was irrelevant with respect to her burden of proof under the applicable statute. In reaching its conclusion, the Court compared the applicable statute, Florida Statute § 768.0755 (2010), to the repealed Florida Statute § 768.0710 (2009). Florida Statute § 768.0755(1) states,

> If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the *business establishment* had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it (emphasis added).

The "business establishment" language in § 768.0755 replaced the "person or entity" language of § 768.0710. The repealed statute focused on the actual or constructive knowledge of the person or entity in control of the business premises. The Court explained that, due to the change in language, an injured person must now prove that the particular "business establishment" where the injury occurred had actual or constructive knowledge of the dangerous condition. Thus, discovery should be restricted to information on the particular establishment. The Court noted, however, that the term "business establishment" is not defined in the statute or in any Florida case.

The Court ascertained the plain and ordinary meaning of the term by turning to an online legal dictionary. It ultimately defined "business establishment" as the actual place of business where the slip and fall occurred, not the total network of stores operated by the entity in possession of the premises where the fall occurred.

Accordingly, the Court held that a discovery request relating to all Publix grocery stores in the state of Florida would result in irrelevant discovery that falls outside of the context of Florida Statute § 768.0755. Plaintiffs must show actual or constructive knowledge of the store at which the slip-and-fall occurred under the current statute.

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New Case Holds Sophisticated Parties May Contractually Waive the Delayed Discovery Rule Applicable to Actions for Latent Construction Defects in California

Brisbane Lodging, L.P. v. Webcor Builders, Inc.

In *Brisbane Lodging, L.P. v. Webcor Builders, Inc*., 216 Cal.App.4th 1249 (2013), a California appeals court upheld a contract clause waiving the delayed discovery rule applicable to actions for latent construction defects. Although an issue of first impression in California, the decision follows unanimous case law on the same issue from other states, including Kentucky, Maryland, Massachusetts, New York, and Pennsylvania.

An owner, Brisbane Lodging, entered into a contract with a prime contractor, Webcor Builders, for the design and construction of a hotel. The parties were represented by counsel, participated in “extensive” contract negotiations, and revised early contract drafts. The final contract between the parties contained the 1997 American Institute of Architects Standard Form Agreement between Owner and Contractor, the AIA Document A201 General Conditions, and other attachments. Article 13.7.1.1 of the AIA A201 General Conditions established the limitations period to assert any claim for acts or omissions occurring before substantial completion of the project as follows:

“As to acts or failures to act occurring prior to [substantial completion], any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of [substantial completion]."
The date of substantial completion of the project was July 31, 2000. In early 2005, Brisbane discovered a broken sewer line. Webcor made repairs, but the sewer line continued to fail. In May 2008, Brisbane sued Webcor for latent construction defects, asserting causes of action for breach of contract, breach of warranty, and negligence. Webcor moved for summary judgment on the grounds that the suit was time-barred. Specifically, under Article 13.7.1.1, the three-year statute of limitations for tort claims expired on July 31, 2003 (three years after substantial completion), and the four-year statute of limitations for contract claims expired on July 31, 2004 (four years after substantial completion). Brisbane argued that its suit was timely based on the delayed discovery rule, which provides that claims for latent construction defects do not accrue until the defects are or reasonably should have been discovered. The trial court found that Article 13.7.1.1 was valid and enforceable and granted summary judgment in favor of Webcor.

The court of appeals affirmed, holding that Article 13.7.1.1 was enforceable as part of a contract freely entered into by sophisticated parties for the purpose of tying the applicable limitations period to a date certain. The court focused on the parties’ equal bargaining position, lack of special relationship, and experience in such transactions. The court also noted that courts in other states have examined Article 13.7.1.1 under similar circumstances and unanimously found it to be valid and enforceable.

The court rejected Brisbane’s argument that enforcing Article 13.7.1.1 is against public policy. The court commented that the public policy underlying the delayed discovery rule is directed to situations in which one party has an unfair advantage over the other party, and found there was no such unfair advantage in this case. The court also noted California’s established policy in favor of permitting private parties to contract. Where parties are on an equal footing and engage in considerable give and take over a contract’s terms, the parties should be free to allocate risk as they see fit. The court distinguished *Moreno v. Sanchez*, 106 Cal.App.4th 1415 (2003), cited by Brisbane, on the grounds that *Moreno* involved a special relationship between parties in an unequal bargaining position, namely individual homeowners relying on the specialized skill and knowledge of the home inspector with whom they contracted. Further, the contract in *Moreno* not only waived the delayed discovery rule, but also shortened the applicable statute of limitations to the disadvantage of the homeowners.

The take-away from this case for clients and friends is a reminder and emphasis on the importance of contract negotiations and drafting.

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Florida Supreme Court Modifies State *Forum Non Conveniens* Doctrine as to the Level of Deference Owed to an Out-of-State Plaintiff's Choice of Forum

Cortez v. Palace Resorts, Inc.

On June 20, 2013, the Florida Supreme Court issued its decision in *Cortez v. Palace Resorts, Inc.*, Case No. SC11-1908, addressing Florida's *forum non conveniens* doctrine (a version of the federal standard). The case involved a "negligent vacation packaging" lawsuit by a California plaintiff against several Florida-based entities involved with the management and promotion of a Mexican resort and Mexican timeshares. The trial court and intermediate appellate court dismissed the lawsuit in favor of its reinstatement in an appropriate Mexican court because the lawsuit arose from an assault occurring at the Mexican resort and, unlike a Florida plaintiff, the out-of-state California plaintiff's choice of a Florida forum was not owed great deference.

The Florida Supreme Court reversed. In the process, it made at least two significant clarifications of Florida's *forum non conveniens* doctrine. First, all U.S. plaintiffs – not just Florida residents – are owed substantial deference in their forum choice when they sue in a Florida court, and to overcome that presumption, the defendant will have to show "evidence of unusually extreme circumstances" sufficient to "thoroughly convince[] [the Florida court] that material injustice" will take place if the case is litigated in Florida. Second, in all *forum non conveniens* inquiries, the court must consider not just private interest factors affecting the relative convenience of the parties, but also the public interest factors regarding the competing forums' interests in the action.

The decision is noteworthy in another regard. The Florida Supreme Court allowed the lawsuit to proceed against parent and affiliate entities based in Florida that handled logistical and promotional activities for the Mexican resort despite the fact that those entities did not appear to directly own and operate the subject Mexican resort where the plaintiff suffered the alleged assault. The plaintiff had voluntarily dismissed the Mexican entities, which therefore were not involved in the case by the time it reached the appellate courts. For such Florida and U.S.-based entities that handle booking and other logistics for international resorts there is a well-established mechanism to potentially avoid the result that occurred in this case – a mandatory, international forum-selection clause selecting a rationally related forum preferred by the resort (*e.g.*, the jurisdiction in which the resort is located or the jurisdiction in which the resort company has its principal place of business). Such clauses have been enforced in similar circumstances when included in initial guest booking materials, provided to the guest before check-in through mail or e-mail, and then included in the guest's check-in materials upon arrival. *See, e.g.*, *Krenkel v. Kerzner Int'l Hotels, Ltd.*, 579 F.3d 1279 (11th Cir. 2009) (affirming enforcement of such a clause against U.S. guests who sued a Bahamas resort with logistics and support operations in Florida – clause selected an appropriate Bahamian court to resolve "any claims" against the U.S. and Bahamian resort-related entities "resulting from any events occurring in the Bahamas"). Florida has adopted the federal *Bremen* standard, which favors the enforcement of such clauses. *See Manrique v. Fabri*, 493 So. 2d 437, 440 (Fla. 1986).

To ensure the best possibility of enforcement of such clauses in the resort context, the clause should be communicated to the guest(s) at every stage of the reservation and booking process - i.e., not just upon check-in. Based on case law, this type of forum-selection clause should be communicated on the booking website, in pre-stay mail and e-mail communications with the guest, and then once again at physical check-in. Consistent with the same case law, the clause must also be reasonably communicated to the guest and must bear a reasonable relationship to the location of the resort.

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Ninth Circuit Overturns Precedent, Finds Miller Act's One-Year Statute of Limitations Is a Claim-Processing Rule, Not a Jurisdictional Requirement

United States ex rel. Air Control Technologies, Inc. v. Pre Con Industries, Inc.,

First In United States ex rel. *Air Control Technologies, Inc. v. Pre Con Industries, Inc.*, --- F.3d ---, 2013 WL 3242673 (9th Cir., June 28, 2013), the Ninth Circuit Court of Appeals held that the one-year statute of limitations under the Miller Act is not a jurisdictional requirement, overruling its prior decision in *United States ex rel. Celanese Coatings v. Gullard*, 504 F.2d 466 (9th Cir. 1974).

The prime contractor on a construction project for the U.S. Veterans Administration, Pre Con Industries, entered into a subcontract with Air Control Technologies. In December 2008, after beginning work on the project, Air Control encountered job site conditions that made the work more expensive than it originally anticipated. In November 2009, Pre Con terminated Air Control when Air Control demanded reimbursement for its unanticipated costs. In March 2011, Air Control sued Pre Con for breach of contract and Pre Con's Miller Act surety under its Miller Act payment bond.

The defendants moved to dismiss the complaint for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The defendants argued that Air Control's suit was barred by the one-year statute of limitations under the Miller Act, which the Ninth Circuit previously held to be a jurisdictional requirement in *Celanese Coatings*. As is proper with a factual attack in a motion to dismiss on jurisdictional grounds, the defendants submitted materials outside the pleadings to establish that Air Control's complaint was untimely. The district court granted the motion, finding that, based on the materials outside the pleadings presented by the defendants, Air Control could not demonstrate that it performed labor or supplied materials to the project within one year of filing its complaint.

On appeal, the Ninth Circuit reconsidered the issue of whether the Miller Act's one-year statute of limitations is a jurisdictional requirement or, alternatively, a claim-processing rule. If the statute of limitations is deemed to be a jurisdictional requirement, then Rule 12(b)(1) applies and a district court may properly consider materials outside the pleadings. If the statute of limitations is deemed to be a claim-processing rule – i.e., a non-jurisdictional rule "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times" – then Rule 12(b)(1) does not apply and a district court may not properly consider materials outside the pleadings. Instead, the Rule 12(b)(6) failure to state a claim analysis applies and a district court may only consider the well-pleaded allegations of the complaint in question, not any extrinsic materials.

A three-judge panel of the Ninth Circuit overruled *Celanese Coating*s as irreconcilable with intervening higher authority; namely, recent U.S. Supreme Court decisions adopting a bright line rule for determining whether a particular statute of limitations creates a jurisdictional or a non-jurisdictional requirement. *See, e.g., Henderson ex rel. Henderson v. Shinseki*, --- U.S. ---, 131 S. Ct. 1197, 1202 (2011). Specifically, Congress must clearly state that a given statute of limitations is jurisdictional; otherwise it should be treated as non-jurisdictional claim-processing rule.

Here, because the Miller Act does not clearly state that the one-year statute of limitations is jurisdictional, the Ninth Circuit held that it should be treated as a claim-processing rule. The appeals court vacated the district court's order granting the defendants' motion to dismiss and remanded the case for further proceedings because under a Rule 12(b)(6) failure to state a claim analysis, Air Control did not allege in its complaint that it had not furnished labor or materials within one year of filing suit. Put differently, when looking only at the well-pleaded allegations of Air Control's complaint and not any extrinsic materials, it was not clear whether the complaint was time-barred.

In practice, this change may make it tougher and more expensive for sureties and contractors to defeat untimely Miller Act claims at the pleadings stage, possibly forcing defendants to incur expenses of initial disclosures and discovery prior to bringing a summary judgment motion.

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Case Hyperlink: http://cdn.ca9.uscourts.gov/datastore/opinions/2013/06/28/11-56230.pdf

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Multiple 998 Offers To Compromise: California Supreme Court Holds A Second 998 Offer Does Not Extinguish An Earlier Lapsed Offer For Purposes Of When The Cost-Shifting Benefits Vest

Martinez V. Brownco Const. Co. Inc.

HOLDING

This case sets the precedent that when a plaintiff has made two unaccepted and unrevoked statutory 998 offers to compromise, and the defendant fails to obtain a judgment more favorable than either offer, the trial court retains discretion to order payment of costs incurred from the earliest date of the 998 offers.

FACTS

Plaintiff Raymond Martinez was injured in an electrical explosion at work. He and his wife sued Brownco Construction Company, Inc. for negligence and loss of consortium.

On August 30, 2007, Mr. Martinez served Brownco with a statutory offer to compromise pursuant to section 998 in the amount of $4,750,000.00. Mrs. Martinez also served a statutory offer to compromise pursuant to section 998 for $250,000.00. Brownco neither accepted nor rejected the offers, and they were withdrawn since the statutory 30-day period had passed.

On February 8, 2010, Mr. Martinez served Brownco with a second statutory offer to compromise for $1,500,000.00. Mrs. Martinez also served a second statutory offer to compromise for $100,000.00. Brownco again took no action on either of these offers, and they were withdrawn by operation of law when the trial began on February 18, 2010.

Following trial, the jury rendered a verdict in favor of Mr. and Mrs. Martinez. Judgment was entered awarding Mr. Martinez $1,646,674.00 for his negligence claim and Mrs. Martinez $250,000.00 for her loss of consortium claim. As such, Brownco did not receive a more favorable judgment under section 998 because the damages award to Mrs. Martinez was more than her second 998 offer and equal to her first 998 offer. Plaintiffs then sought $561,257.14 in itemized costs including $188,536.86 in expert fees incurred between the time the first and second 998 offers were made and $64,555.45 in expert fees incurred after the second 998 offer. Taking the position that her second 998 offer nullified her first, Brownco argued that Mrs. Martinez was not entitled to recovery of the $188,536.86 in expert fees incurred after her first 998 offer but before her second offer.

The California Supreme Court agreed with the Court of Appeal that denying litigants the benefit of earlier offers would actually discourage settlement. The Court noted that if a party knows that making a subsequent offer to compromise will extinguish the benefits potentially gained from the first offer, then that party will not be incentivized to attempt settlement at a later point in the case. In order to promote the goals of section 998 which is to encourage settlements, the Court ruled that a second offer to compromise does not impact a party's entitlement to costs incurred after a first offer is made.

WHY IS THIS CASE IMPORTANT?

This case offers important strategic lessons for those who litigate in California state courts. Section 998 offers to compromise differ from its federal counterpart in that it allows "any party," not just the defendant, to invoke the rule. It is a tool either litigant can utilize as leverage to settle cases since the other party can run the risk of paying post-offer costs or foregoing recovery of their costs.

The traditional rule, applying the principles of contract law, is that a subsequent 998 settlement offer effectively revokes the first. Prior to Martinez, attorneys may have reasonably believed that costs and fees could only shift from the date of the last 998 offer. That belief made it easier for clients to reject such second offers. Additionally, it stopped many attorneys from making a second offer. After Martinez, attorneys should expect to start seeing more second 998 offers and will need to advise their clients of the significant risks of rejecting these offers.

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Lone Pine Orders Are Still Useful In Fracking Litigation

Plaintiffs have brought a number of gas and oil fracking-related groundwater contamination cases across the nation, and it is a safe assumption that more will follow, given the press and regulatory attention focused on this sector. The suits contend that hydraulic fracking operations caused methane and the chemicals used in drilling operations to move into the groundwater and contaminate water supply wells. A point of contention in these cases is whether plaintiffs can demonstrate a causal link between groundwater contamination and horizontal fracking operations.

Several recent scientific studies have concluded that no causal connection exists between shale gas development and groundwater contamination, although a recent report has claimed such an association.[1] The U.S. Environmental Protection Agency is engaged in a study "to better understand any potential impacts of hydraulic fracturing on drinking water and groundwater."[2] The study, if it is ever completed, will certainly impact ongoing fracking litigation if it reaches any definitive conclusions.

The EPA was to complete the study by 2014, but the agency recently extended the deadline for public input on the study until Nov. 15 of this year, and recent reports have placed the actual publication date closer to 2016.[3]

Because there is no definitive scientific proof linking fracking with groundwater contamination (or at least because of the great uncertainty over the question), defendants have met with some success using this uncertainty to their advantage at a variety of early inflection points. For example, the more rigorous pleading standard in Iqbal has provided defendants a tool to convince some courts to dismiss cases before discovery.

In Tucker v. Southwestern Energy Company, the U.S. District Court for the Eastern District of Arkansas ordered plaintiffs to replead their case, noting that the complaint's "[g]eneral statements about the many dangerous substances used in fracking, and conclusory statements about the migration of these substances" were not sufficient to survive a motion to dismiss.[4] To continue, the plaintiffs would need to provide "particular facts about particular fracking operations by particular fracking companies using particular substances" that allegedly caused the plaintiffs' harm.

Lone Pine case management orders are another useful tool that can be used to force plaintiffs to establish their claims early in litigation. For the uninitiated, Lone Pine orders are a case management tool that are sought often in complex mass tort actions by the defendant and that were first used in an eponymous New Jersey state court case in 1986.[5]

The order places the onus on plaintiffs to meet a prima facie showing of liability, often requiring the production of expert reports on causation, medical evidence and environmental studies prior to full discovery. Lone Pine orders can take many shapes,
depending upon the particulars of the case being addressed. In federal litigation, the orders have been approved as a legitimate tool for the management of litigation under the discretion provided to trial courts by Fed. R. Civ. P. 16.6

A recent Colorado appellate decision, however, has rejected the use of a Lone Pine case management tool in a state court fracking case. In Strudley v. Antero Resources Corp., four plaintiffs brought tort claims against drill operators seeking damages for personal injury. At the request of defendants, the trial court entered a typical Lone Pine order, requiring plaintiffs to submit a list of the alleged contaminants that caused damage; reports on the actual contamination; the names of the medical providers who treated plaintiffs; and a detailed expert opinion on causation.

The trial court later dismissed plaintiffs' claims because they could not meet all of these requirements.[7] The decision had been held out by other defendants seeking other Lone Pine orders in fracking cases as a case management model.

On July 3, 2013, the Colorado Court of Appeals, Division I overturned the ruling, finding that the trial court abused its discretion in denying plaintiffs their right under Colorado law to discovery on their central claims and striking down the use of the Lone Pine order. The appeals court found that the "circumstances surrounding the case were not shown to be so extraordinary as to require departure from the existing rules of civil procedure."[8]

This conclusion, however, was driven by the court's determination that the Colorado counterpart to Fed. R. Civ. P. 16 "contains no language granting trial courts the broad discretion contemplated in the rule's federal counterpart." Therefore, the Strudley opinion must be viewed as particular to the Colorado rules and not directly applicable to federal courts or state courts in other jurisdictions considering the entry of Lone Pine orders.

But the Strudley court also relied in part on the fact that certain federal district courts had recently rejected the use of Lone Pine orders despite the more discretionary federal rules. Last year, Magistrate Judge Carlson in the U.S. District Court for the Middle District of Pennsylvania rejected the use of Lone Pine orders in two fracking groundwater cases, as did a judge in the U.S. District Court for the Southern District of West Virginia.[9]

The trial courts rejected the procedure because they found that the traditional discovery and case management techniques were sufficient, given the complexity of the allegations and the number of parties (one, two or four plaintiffs against one defendant) at issue. The Middle District of Pennsylvania decisions also expressed a view that Lone Pine orders should only be used after some discovery has occurred.

So, are Lone Pine orders still a useful tool in fracking litigation? The answer is, of course, yes. But a defendant's success at obtaining an order is tied to the circumstances of its particular case, the judge's desire to force plaintiffs to establish some foundation for their claim before discovery commences and defense counsel's ability to convince the court of the complexity of the matter.

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.

During the second phase of discovery, the defendants obtained an order that required the plaintiffs to produce expert opinions identifying every hazardous substance to which they were exposed, the location of exposure and an explanation of causation. The defendants requested the order because the plaintiffs had not identified specific contaminants or a theory of contamination in response to initial discovery requests.

On June 27, 2013, the court denied the defendants' motion to strike the plaintiffs' expert reports, holding that the plaintiffs had complied with the Lone Pine order: "Though Plaintiffs' expert reports, especially the Rubin Report, are far from models of clarity, they meet the essential requirements imposed by the Lone Pine Order. As to their admissibility, the Court will leave that issue for another day."[11]

Although the court did not take the ultimate step of dismissing plaintiffs' claims, the Lone Pine order still achieved a key litigation purpose: The plaintiffs were forced to pick a theory and live with it, providing defendants with a target for later discovery and expert attacks. The tone of Judge Siragusa's opinion indicates a deep skepticism of the plaintiffs' expert case that may eventually result in successful Daubert motions.

Either in federal court or in state courts other than Colorado (unless the Colorado Supreme Court addresses the Strudley issue), Lone Pine orders remain a viable case management tool. Fracking defendants facing claims from a few litigants in a single litigation may face an uphill battle as courts have shown skepticism when dealing with only a few plaintiffs rather than a mass tort.

In requesting the order, defendants must convince the court of the complexities inherent in the plaintiffs' claims (for instance, causation, multiple chemicals or groundwater anomalies) that are not dispelled because only a single plaintiff or family is bringing the claims. Because issuing a Lone Pine order is left to the trial court's discretion, the challenge lies in convincing the judge that the Lone Pine order is necessary to protect the defendants' interests while not unfairly prejudicing plaintiffs.

As an alternative, defendants can choose to wait until early written discovery is complete, using the Lone Pine procedure instead to resolve deficiencies identified in plaintiffs' responses. In this manner, the Lone Pine order serves as an information-forcing device to confine plaintiffs to a particular story.

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*[1] The U.S. Department of Energy recently found that no connection exists. See http://www.law360.com/articles/458671/doe-study-says-no-groundwater-pollution-at-pa-fracking-site. The National Ground Water Association examined over 1,700 wells in one Marcellus Shale county in Pennsylvania, finding that, on a regional scale, "methane concentrations are best correlated to topographic and hydrogeologic features, rather than shale-gas extraction." National Ground Water Association, 51 Groundwater 333, 347 (May -June 2013). See also T.M. Kresse, N.R. Warner, P.D. Hays, A. Down, A. Vengosh, and R.B. Jackson, Shallow Groundwater Quality and Geochemistry in the Fayetteville Shale Gas-Production Area, North Central Arkansas, U.S. Geological Survey Scientific Investigations Report 2012-5273, *31 (2012) (finding no connection). But see Robert B. Jackson, et.al., Increased Stray Gas Abundance in a Subset of Drinking Water Wells Near Marcellus Shale Gas Extraction, Proceedings of the National Academy of Science (June 24, 2013), available http://www.pnas.org/content/early/2013/06/19/1221635110.full.pdf+html?sid=46f41612-d993-414f-a81f-7049ac9e905d (claiming a connection).*
[2] United States Environmental Protection Agency, EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources, http://www2.epa.gov/hfstudy (last updated May 22, 2013).
[3] "EPA Schedule for Final Fracking Study: Slips to 2016 from Original 2014 Target," Env't Rep. (BNA) No. 122, at A-14 (June 24, 2013).
[4] Tucker v. Sw. Energy Co., 2012 U.S. Dist. (E.D. Ark, Feb. 17, 2012).
[5] Lore v. Lone Pine, No. L-33606-85 (N.J. Super. Ct. Nov. 18, 1986).
[6] Acuna v. Brown & Root Inc., 200 F.3d 335 (5th Cir. 2000).
[7] No. 2011-CV-2218 (Col. Dist. Ct. Denver City May 9, 2012).
[8] 2013 COA 106, No. 12CA1251, available at http://www.cobar.org/opinions/opinion.cfm?opinionid=9023&courtid=1 [9] See, e.g., Roth v. Cabot Oil & Gas Corp., No. 12-2004 (M.D. Pa. Oct. 15, 2012); Kamuck v. Shell Energy Holdings GP, LLC, No.4:11-1425 (M.D. Pa. Sept. 5, 2012); Hagy v. Equitable Production Co., No. 2-1372 (S.D. W.Va. June 29, 2012).
[10] Baker, et. al. v. Anshutz Exploration Corp., No. 11-06119 (W.D. NY) (Doc. 83, filed Sept. 25, 2012)
[11] Baker, et. al. v. Anshutz Exploration Corp., No. 11-06119 (W.D. NY) (Doc. 112, filed June 27, 2013)

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Third Party Litigation Financing

Third Party Funding - Funders and Funded Parties Obligations

On 20th May 2013, Mr David Donaldson QC, sitting as Deputy Judge of the High Court, gave Judgment in a case between Harcus Sinclair (a Firm) v (i) Buttonwood Legal Capital Limited ("BLC"), (ii) Rylatt Chubb (a Firm), (iii) Alternative Real Estate Fund Limited and (iv) Roskill Advisors (Cayman) Limited. The case focussed upon whether BLC, a company specialising in third party litigation funding, had been previously entitled to terminate its funding of a commercial court action being brought by the Third and Fourth Defendants (collectively "AREF"), and what should therefore happen to certain monies held in escrow by Harcus Sinclair on behalf of BLC.

Privacy restrictions imposed on the publicity of the Judgment have now been lifted.

It can now be reported that BLC was held by Mr Donaldson to be entitled to terminate its funding arrangements, that it had validly done so, and that the escrow monies were therefore ordered to be repaid immediately to BLC.

This is the first reported case to consider termination of third party litigation funding agreements since the arrival of the new Jackson regime, which came into force on the 1st April 2013. This Judgment not only confirms that courts will enforce the terms of commercial third party funding agreements between the relevant parties, but also underscores the fact that a funded party and their solicitors should be fully cogniscent not only of their respective rights but also of their obligations under the funding agreement, to understand and observe a funder's right of continuing review and the advisability of claimants working to keep a funder appraised of a case's developments.

The Case

This case concerned monies held in an escrow account by the Claimant firm as part of a litigation funding agreement (the "Agreement") under which monies were loaned by BLC to AREF, Cayman companies, to pursue a claim against First Rand Bank in the Commercial Court. That litigation concerned a claim by AREF against First Rand Bank for their alleged withdrawal as a "cornerstone investor" in one of AREF's investment projects.

The key question for the court was whether the Agreement had been validly terminated in January 2013 pursuant to a clause in the Agreement permitting unilateral termination where *"in the reasonable opinion of the Lender the prospects of success are less than 60%"*.

Further issues arose, if BLC were entitled to terminate the Agreement, as to BLC's liability, if any, as funder, to pay fee requests made of it both before and after the termination, and also whether provision of a sum by way of security for costs in the First Rand proceedings was still a liability of BLC.

A condition of funding under the Agreement was that the prospects of success of the underlying funded case continued to exceed 60%. Initially at the outset of funding in 2011 a short counsel's opinion was submitted, described as a 'preliminary view' so as to 'enable potential backers to decide whether to put up sufficient funds'. More formal advice was anticipated to be provided to the funders as the case progressed.

In 2012, BLC repeatedly requested provision of an updated counsel's merits advice in respect of the underlying proceedings. BLC did not receive what they had repeatedly requested and eventually, in November 2012, gave notice to AREF's solicitors that they would seek their own independent counsel's review of the prospects of success of the funded case.

In the period November 2012 to January 2013, the counsel instructed by BLC received a number of papers and requests for further information that were relayed to AREF's solicitors. Not all of these requests were responded to by AREF's solicitors. A draft and then a final opinion were issued by BLC's independent counsel which stated that, on the available evidence, the prospects of success were less than the minimum threshold allowed for in the Agreement. BLC considered the ongoing funding issue in light of this advice and ultimately decided to terminate the Agreement. That decision was communicated to AREF's solicitors immediately afterwards on 8th January 2013.

It was argued by AREF that the opinion arrived at by BLC was not 'reasonable' as they had not had sight of all relevant materials. The judge held that whilst there may have been further information that could have been made available by AREF to BLC, and in spite of BLC's requests for any and all materials to be made available to their counsel, this information was not disclosed in a timely manner, or at all. On that basis, Mr Donaldson held that the opinion arrived at by BLC's counsel, and BLC's termination based upon that opinion, was reasonable.

A claim that BLC was estopped from terminating the agreement was also dismissed.

As it was established that the agreement had been terminated, it was also held that the two release requests for solicitor's fees and disbursements which were filed after the date of termination were not due or payable by BLC.

On the issue of any payment to be made in respect of an order for security of costs to be given in the underling proceedings, it was held that the appropriate form of request required under the contract had not been made prior to termination. As an exercise of judicial discretion, specific performance of any obligation to pay would not be ordered as, pursuant to the termination, AREF had obligations under the Agreement to repay to BLC all monies previously loaned to them.

Accordingly it was held that all relevant monies in the Harcus Sinclair escrow account be returned to BLC in accordance with the terms of the relevant Undertaking.

Comment

There are a number of changes imposed under the Jackson Costs Reforms which put litigation funders at the forefront of options for a litigant in pursuing a claim in court. Alongside the introduction of Damages Based Agreements new and innovative ways of funding litigation are being introduced to the market to enable parties to pursue large commercial claims where they may otherwise have been unable to do so.

This case demonstrates the fact that funding agreements are very much a commercial agreement between a borrower and lender. Litigants and their solicitors must ensure that they recognise and observe their obligations towards their funders, and that information provision terms need to be observed.

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Labor Law §240

Labor Law §240(1) has traditionally been viewed as applying to two broad categories of cases. The first are situations where a worker falls from a height and the second are scenarios where an object falls from a height causing injury to a worker positioned below. The second category, commonly known as "falling object" cases, continues to engender considerable litigation. In this issue, we discuss six cases from the Appellate Division, New York's intermediate appellate court, which addresses the issue of whether the item which injured the worker was a "falling object" within the meaning of Labor Law §240(1).

The first is a decision from the Appellate Division, Third Department which denied recovery to a worker who was severely injured when the bucket of a backhoe descended precipitously and crushed him. The next is a case from the Appellate Division, Second Department which reversed judgment in favor of defendant because the trial judge failed to instruct the jury on the "falling object" aspect of Labor Law §240(1). The court held that it is not necessary for the object to strike the worker for liability to attach. The third and fourth are cases from the Appellate Division, Second Department which come to differing conclusions in situations where the workers were injured while purposefully detaching materials positioned above them. The last two cases are from the First and Second Departments of the Appellate Division, where those two courts discuss situations where the workers were struck by objects which fell from a height through inadvertence.

BACKHOE OPERATOR DROPS BUCKET ON PLAINTIFF - NO 240(1) LIABILITY BECAUSE GRAVITY DID NOT CONTRIBUTE TO ACCIDENT

Mohamed v. City of Watervliet

In *Mohamed v. City of Watervliet*, 106 A.D.3d 1244, 965 N.Y.S.2d 637 (3rd Dep't 2013), the plaintiff and his co-workers were engaged in the reconstruction of a street. At the time of the incident, the plaintiff was in a 9 ½ foot trench working approximately 3 ½ feet underneath the bucket of a backhoe which was operated by a co-worker. The operator of the backhoe accidentally bumped or jostled the backhoe's joystick, which caused the bucket to drop onto the plaintiff and crush him. The injuries included fractures to his skull, neck, shoulder, ribs, pelvis, leg and ankle, as well as punctured lungs which caused blood to flow out his ears. Consequently, the plaintiff commenced this action alleging among other things, a violation of Labor Law §240(1). The trial court dismissed that claim on defendant's motion for summary judgment.

In affirming, the Appellate Division, Third Department rejected the plaintiff's argument that the bucket of the backhoe was a "falling object" within the meaning of Labor Law §240(1). In so doing, the court stated that liability under Labor Law §240(1) "does not extend to harm caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist unless the injury itself was caused by *the application of the force of gravity to an object or person*." (court's emphasis). The court concluded that "the evidence submitted would establish that the backhoe bucket crushed plaintiff not because of gravity, but because of its mechanical operation by an allegedly negligent co-worker. Under these circumstances, [the trial court] properly dismissed plaintiff's section 240(1) claim because there was no falling object - the harm did not flow directly from the application of the force of gravity to an object."

"FALLING OBJECT" NEED NOT STRIKE PLAINTIFF DIRECTLY TO IMPOSE LIABILITY

Saber v. 69th Tenants Corp.

A falling object does not necessarily have to strike the plaintiff in order to bring the case within the purview of Labor Law §240(1), a point which is illustrated by *Saber v. 69th Tenants Corp.*, 107 A.D.3d 873, 968 N.Y.S.2d 103 (2nd Dep't 2013).

In *Saber*, the accident occurred while plaintiff was removing a mirror from the ceiling of a shower stall. At the time, the plaintiff was standing on a six-foot A-frame ladder outside of the shower stall, while his assistant was standing beneath the mirror inside the stall. The mirror suddenly came loose and the plaintiff tried to keep the glass from falling on his co-worker. The mirror then came into contact with the walls of the shower stall and shattered, causing the plaintiff to lose his balance and fall from the ladder, which was wobbling at the time.

The case proceeded to trial under Labor Law §240(1), and the jury was charged only on whether the ladder provided the plaintiff with proper protection. The jury was not charged as to potential liability under the "falling object" aspect of the statute. The jury found that the defendant violated Labor Law §240(1), but the violation was not the proximate cause of the plaintiff's injuries.

The Appellate Division, Second Department reversed and ordered a new trial under the "falling object" theory. The court stated that "the trial court erred in falling to charge the jury in connection with Labor Law §240(1) as it applies to falling objects, such as the mirror in this case. Liability may be imposed where an object or material that fell, causing injury, was a load that required securing for the purposes of the undertaking at the time it fell. Moreover, whether the statute applies in a falling object case does not depend upon whether the object has hit the worker but whether the harm flows directly from the application of the force of gravity to the object. Here, the plaintiff contended that the accident occurred not only due to the wobbly ladder, but also because the mirror was not properly secured during the removal process, thus causing it to fall."

The court added that liability could attach irrespective of whether the mirror was being purposefully removed. "While the object that fell was to be removed as part of the project, the location in which that item was situated and the lack of any device to protect the worker directly below it from a clear risk of injury raise a factual issue as to whether the object required securing for the purposes of the undertaking. The trial court erred in failing to amend the charge to the jury so as to incorporate the contention that the mirror required securing."

FALL OF OBJECT DURING DEMOLITION OPERATIONS MAY - OR MAY NOT - IMPLICATE THE STATUTE

Maldonado v. AMMM Props. Co.

Ross v. DD 11th Ave., LLC

As is evident from the foregoing discussion of *Saber v. 69th Tenants Corp.,* Labor Law §240(1) litigation under the "falling object" theory may involve items which are in the process of being intentionally detached and removed from a height. *Saber* and the following two cases illustrate that the results in such cases are not always consistant.

In *Maldonado v. AMMM Props. Co.,* 107 A.D.3d 954, 968 N.Y.S.2d 163 (2nd Dep't 2013), the plaintiff was injured while demolishing an interior partition wall in a commercial building. The bottom part of the wall consisted of sheetrock. A single glass pane, approximately five feet wide and six feet high, had been installed in the wall about four feet above the floor on top of the sheet rock. The plaintiff was holding the glass pane while his co-worker attempted to dislodge it from its metal frame by the use of pliers. During this process, the glass cracked and fell, causing the plaintiff to sustain injuries. The defendant moved for summary judgment dismissing the plaintiff's cause of action under Labor Law §240(1). The trial court denied the motion.

The Appellate division, Second Department reversed and dismissed that claim. The court stated that "[n]ot every object that falls on a worker gives rise to the extraordinary protections of Labor Law §240(1). To recover, a plaintiff must show that, at the time the object fell, it was being hoisted or secured, or "required securing for the purposes of the undertaking. The plaintiff also must show that the object fell *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute. Here, the glass pane that caused the plaintiff's injuries was slated for demolition at the time of the accident, and the defendants established . . . that the glass pane was not an object that required securing for the purposes of the undertaking, that is, the demolition." (court's emphasis)

A contrary result ensued in *Ross v. DD 11th Ave, LLC*, ____A.D.3d ____, ____ N.Y.S.2d ____, 2013 N.Y. Slip Op. 05686 (2nd Dep't 2013). There, the accident occurred while the plaintiff was stripping wooden forms that had served as frames for concrete which had been poured to create concrete columns of a building under construction. The accident occurred after the plaintiff had plied a piece of wooden form from a concrete column and placed it on the floor. The plaintiff was injured when a separate piece of the form situated above the piece that he had just removed fell from the columns, striking him in the face. The trial court denied the defendants' motion for summary judgment dismissing the claim under Labor Law §240(1).

The Appellate Division, Second Department affirmed. The court held that "[t]he plaintiff's deposition testimony . . . presents a triable issue of fact as to whether the piece of form fell on the plaintiff "because of the absence or inadequacy of a safety device of the kind enumerated in the statute. Contrary to the defendants' contention, the securing of pieces of form to the column would not have been contrary to the objectives of the work plan, as the plaintiff testified that the forms were cut into sections and that he was removing a different section than the one that fell on him."

"FALLING OBJECTS" - AN OBJECT MUST REQUIRE "HOISTING OR SECURING" TO IMPLICATE THE STATUTE

Moncayo v. Curtis Partition Corp.

Mercado v. Caithness Long Is. LLC

In *Moncayo v. Curtis Partition Corp.,* 106 A.D.3d 963, 965 N.Y.S.2d 593 (2nd Dep't 2013), the Appellate Division held that, in order to establish liability under the "falling object" theory, a plaintiff must show that the item was in the process of being hoisted or secured, or that it required securing for the purposes of the task at hand. There, the plaintiff, a worker on a construction site, was struck by a piece of sheetrock which had fallen from the third floor of a building. The sheetrock slipped from the hand of another worker, McNerny, after he cut it to facilitate the installation of a grill for the air conditioning system. After it slipped from McNerny's hand, it bounced off of a windowsill and through an empty window frame, before it struck the plaintiff who was standing on the ground. The trial court dismissed the plaintiff's claim under Labor Law §240(1).

The Appellate Division, Second Department affirmed. The court stated that "in a 'falling object' case under Labor Law §240(1), a plaintiff must show that, at the time the object fell, it was being hoisted or secured or required securing for the purposes of the undertaking. The plaintiff also must show that the object fell *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute. The statute does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected." (court's emphasis). The court concluded that this case did not meet the foregoing criteria: "McNerny testified that the sheetrock debris was placed in piles and then bagged. It was not discarded in pieces through the window openings. Because those small pieces of sheetrock were not in the process of being hoisted or secured and did not require hoisting or securing, the special protection of Labor Law §240(1) was not implicated."

Note the difference in the result that ensued in *Mercado v. Caithness Long Is. LLC*, 104 A.D.3d 576, 961 N.Y.S.2d, 424 (1st Dep't 2013). In *Mercado*, the plaintiff was struck in the head by a pipe that fell from a height of approximately 85 to 120 feet. The pipe had fallen through a gap in a toeboard installed along a grated walkway near the top of a generator at a power plant under construction. The trial court granted the plaintiff's motion for summary judgment on liability pursuant to Labor Law §240(1).

In affirming, the Appellate Division, First Department stated the following: "It is undisputed that there was no netting to prevent objects from falling on workers and contrary to defendants' contention, plaintiff is not required to show exactly how the pipe fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries. Nor is plaintiff required to show that the pipe was being hoisted or secured when it fell, since that is not a precondition to liability pursuant to Labor Law §240(1)."

The lesson of these cases therefore, is that one must analyze "falling object" cases not by trying to determine whether they were actually being "hoisted or secured" when they fell, but, under a reasonable view of the circumstances, they should have been properly hoisted or secured.

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