GOLDBERG SEGALLA LLP
LEGAL UPDATE

Winter 2010

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JOSEPH M. HANNA WINS STATE BAR'S OUTSTANDING YOUNG LAWYER AWARD

At a ceremony on January 28th, Goldberg Segalla partner Joseph M. Hanna was presented with the prestigious New York State Bar Association's Outstanding Young Lawyer Award. The Outstanding Young Lawyer Award recognizes a lawyer who has practiced for less than 10 years and has a distinguished record of commitment to the finest traditions of the Bar through public service and professional activities.

Joe was awarded for his contributions to diversity in the legal profession and his effective leadership in support of many community activities. Mr. Hanna chairs *Success in the City*, a diversity networking event that is being replicated nationwide, and founded and serves as the president of Bunkers in Baghdad, Inc. a non-profit organization dedicated to providing golf equipment for soldiers serving in Iraq, Afghanistan and Wounded Warriors all throughout the United States for recreational and rehabilitative purposes.

Bunkers in Baghdad, Inc. is a non-profit organization that collects and ships new and used golf balls, clubs and other equipment to soldiers serving in combat zones. Bunkers also distributes equipment to injured veterans throughout the United States to aid in their rehabilitation, such as Walter Reed Army Medical Center, Fort Hood, Fort Drum, and Fisher Houses throughout the country. The charity works with school children across the country who help pack the boxes for soldiers with balls, cards and letters they wrote. The "Bunkers Buddies" program is especially rewarding for the soldiers, and for the students themselves. To date, Bunkers has collected 900,000 golf balls and 24,000 clubs, and has shipped more than 460,000 golf balls and 9,000 clubs to Iraq and Afghanistan and 419,000 golf balls and 13,750 clubs around the United States to veterans programs, VA hospitals and military installations. A highlight for Bunkers in Baghdad came when Hanna rang the closing bell at the New York Stock Exchange on June 26, 2009.

Mr. Hanna was also awarded the President's Service Award for his work with Bunkers in Baghdad. The award was created in 2003 by former President George W. Bush as a way to thank and honor Americans who, by their demonstrated commitment and example, inspire others to engage in volunteer service.

Mr. Hanna concentrates his practice in commercial litigation with a focus in construction litigation and sports and entertainment law. He chairs Goldberg Segalla's diversity task force and has written more than 50 articles and chapters in national and state publications. In 2007, Joe was selected from more than 4,000 DRI members as its Young Lawyer of the Year.

Our White Plains Office Moved!

Please note the new address for our White Plains, New York office effective February 1, 2010.

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We look forward to continuing to serve you from our new location. All telephone and fax numbers will remain the same. For additional information please visit our website at www.goldbergsegalla.com.

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ABOUT COVERAGE

New York: Petroleum Spill Covered By CGL Policy

In *Griffith Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, __ A.D.3d __, 2009 N.Y. Slip. Op. 9733 (4th Dept. 2009) (Dec. 30, 2009), the Fourth Department interpreted a "products completed operations hazard" provision in the plaintiffs' commercial general liability insurance policy. The dispute stemmed from a petroleum spill from a spur pipeline in Steuben County, New York. The plaintiff purchased petroleum from a non-party, which transported the petroleum through a pipeline network until it reached the spur pipeline in Steuben County. It was undisputed that the petroleum never reached plaintiff's facility, which was connected to the spur pipeline. As with petroleum deliveries in the past, the purchased petroleum remained stored in the spur pipeline until the non-party seller notified plaintiff to open its valves in its terminal to receive the petroleum. The discharge occurred while the petroleum was still stored in the spur. The notification never occurred; plaintiff had no involvement with the product at issue.

The plaintiff sought a declaration that its insurer was obligated to indemnify it in an underlying action regarding the spill. Its insurance policy contained a "Comprehensive Pollution Exclusion Endorsement Including Products Completed Operations Exception for Specified Business Activities." The policy contained an exception to that exclusionary clause, providing that it did not apply to any property damage "that may arise out of the 'products completed operations hazard' for… [t]he sale, storage and/or transportation of fuels."

In a 3-2 decision, the Fourth Department determined that the petroleum leak fell within the ambit of the PCOH exception, thereby affording coverage. The majority concluded that the exception was unambiguous. Reasoning that the property damage occurred "away from premises" owned by the plaintiff and that the property damage arose from fuel purchased by plaintiff that leaked either while it was transported to the facility or stored in the spur awaiting transportation, the majority determined that the property damage arose out of the plaintiff's product. The dissent, however, reasoned that the exception did not apply because (1) the oil was spilled before it ever came into the plaintiff's possession and it had not been placed in the stream of commerce, and (2) the oil was not plaintiff's "product."

New York: Court Mulls Difference Between Named and Additional Insured

A primary policy listed two named insureds: a company and an individual. A corresponding excess policy was issued; however, it listed only the company as "named insured" and failed to mention the individual. The excess policy defined the term "insured," to include the name insured and any person "included as an additional insured" in the underlying policy.

Following a loss, the individual's estate sought coverage under the excess policy. Coverage was denied on the basis that the individual was not a named insured on the excess policy or an additional insured on the primary policy. In the declaratory judgment action that followed, the trial court held that the terms "additional insured" and "named insured" are not synonymous, and because the individual was not an additional insured, he was not insured under the excess policy.

Abandoning the industry-wide distinction between a "named insured" and an "additional insured," the Appellate Division, First Department held that because "additional insured" was not defined, common speech required that "additional insured" meant anyone other than the "named insured" in the excess policy who is insured in the primary policy. Because the individual was insured under the primary policy, he qualified as an "additional insured" under the excess policy.

Acknowledging the distinctions between a named insured and an additional insured in the insurance context, the First Department held that those distinctions "do not require a finding that an ordinary businessperson would be mindful of these distinctions in entering into an ordinary business contract." *Kerrigan v. RM Assocs., Inc.*, __ A.D.3d __, 2009 N.Y. Slip. Op. 09697 (1st Dept. 2009) (Dec. 29, 2009).

New York: Limit Of Liability For Multi-Year Excess Policy Applied Per Occurrence, Not Annually

In *Union Carbide Corp. v. Affiliated FM Ins. Co.,* __ A.D.3d __, 2009 N.Y. Slip. Op. 9290 (1st Dept. 2009) (Dec. 15, 2009), a policyholder maintained a multi-year excess policy that provided limits to each occurrence and "in the aggregate." The policy did not use the word "annual." The policyholder claimed that because the policy was silent regarding whether the limits were applied "annually," and otherwise followed the form of the underlying policy, the policy limits were available on an annual basis.

The First Department rejected the policyholder's argument, holding that the phrase "in the aggregate" unambiguously provided that the policy limits were not applied annually. The policyholder was seeking to add the word "annual" where it did not exist. Further, the court held that because the excess policy followed form "subject to the declarations," which included the aggregate limit, the policy expressly precluded the application of annual limits in the primary policy.

New York: Insurer Ordered To Disclose Underwriting Documents Related To All Pollution Exclusions During Specified Period

The district court for the Southern District of New York ordered Continental Insurance Company to disclose various underwriting documents and produce underwriting witnesses in a dispute over insurance coverage for a cruise ship outbreak of Legionnaires' Disease. *Pentair Water Treatment (OH) Co. v. Continental Ins. Co.*, 2009 U.S. Dist. LEXIS 106424 (S.D.N.Y. 2009) (Nov. 16, 2009). In 1994, passengers on the cruise ship Horizon became ill after an outbreak of Legionnaire's Disease. The outbreak was traced to the whirlpool spa on the vessel and, specifically to its filter, which had been manufactured and distributed by the plaintiff, Pentair, formerly known as Essef Corp. Many of the passengers who fell ill sued the cruise ship line, Celebrity Cruises, which, in turn, cross-claimed against Pentair. Ultimately, Pentair was found 70% liable for the outbreak. A jury awarded the plaintiffs $2.6 million in compensatory damages. They also found Pentair liable for $7 million in punitive damages. In a related action commenced by the cruise ship line for damages including lost profits, judgment was entered against Pentair for $30 million.

Pentair sought payment under an excess umbrella liability policy issued by Continental. Continental, however, denied coverage based on the pollution exclusion, among other grounds. Pentair sued for coverage under the policy. During discovery, Pentair requested that Continental produce documents relating to *any* pollution exclusion clause that Continental used during the relevant time period. Continental refused, arguing that it was only obligated to disclose documents related to the specific language used by Continental in Pentair's policy. The court disagreed, finding that information concerning other pollution exclusions employed by Continental could well shed light on the meaning of the pollution exclusion in Pentair's case. The court also ordered Continental to produce witnesses to testify about Continental's underwriting practices and manuals during the period of 1993-95.

New York: Consequential Damage Claim Does Not Require Showing Of Bad Faith

In *Panasia Estates v. Hudson Ins. Co.*, __ A.D.3d __, 2009 N.Y. Slip. Op. 9284 (1st Dept. 2009) (Dec. 15, 2009), the plaintiff commenced an action against Hudson Insurance Company alleging that it breached the insurance contract by failing to properly investigate the loss and denying coverage. In a historic decision, *Panasia Estates v. Hudson Ins. Co.*, 10 N.Y.3d 200 (2008), the Court of Appeals allowed plaintiff to proceed with asserting a claim for consequential damages, despite a contractual exclusion contained in the insurance policy prohibiting such relief. Following the 2008 decision, attorneys and commentators debated whether a showing of bad faith was required before consequential damages could be awarded.

The plaintiff made a motion to amend its complaint to add a cause of action for breach of contract and sought consequential damages. Hudson moved to dismiss, arguing that the claim for consequential damages needed to be sufficiently pled as "special" damages consistent with the Court of Appeals decision. Despite Hudson's arguments, the trial court granted the motion to amend the complaint. On appeal, the First Department unanimously reversed the decision, but not because specific pleading or bad faith was required. Rather, the First Department noted that the breach of contract cause of action was duplicative of the breach of implied covenant of good faith claim.

The First Department held that the reference to "special" damages in the Court of Appeals decision did not establish a specificity in pleading requirement. More important, the First Department held that a claim for consequential damages can lie absent bad faith, and that the "determinative issue is whether such damages were 'within the contemplation of the parties as the probable result of a breach at the time or prior to contracting.'"

New York: Court Denies Law Firm Excess Coverage for Client Fraud

In *Executive Risk Indem. v. Pepper Hamilton LLP*, 13 N.Y.3d 313 (N.Y. 2009) (Oct. 20, 2009) New York's highest court held that Philadelphia-based Pepper Hamilton LLP is not entitled to excess insurance coverage for litigation arising from its client's securities fraud. The coverage litigation stemmed from fraud perpetrated by Pepper Hamilton's client, a company that serviced the vocational portion of the student loan market. The client repackaged loans acquired from other lenders into certificates, which it sold to investors. Pepper Hamilton prepared memoranda used by the client in connection with the sale of certificates totaling more than $465 million. In March 2002, Pepper Hamilton learned that its client was involved in securities fraud.

In July 2002, for purposes of procuring insurance coverage, Pepper Hamilton's general counsel circulated a memorandum inquiring whether any attorney was aware of any facts or circumstances that might be the basis of a legal malpractice claim. The Pepper Hamilton attorney handling the fraudulent client's file informed general counsel of litigation pending against the client and stated that he was uncertain whether Pepper Hamilton would be joined in that litigation. Pepper Hamilton failed to disclose that information on its insurance applications.

Pepper Hamilton was ultimately sued for professional malpractice in connection with the securities fraud. Upon being notified of the lawsuit, Pepper Hamilton's excess insurers denied coverage. Specifically, the excess insurers argued that the prior knowledge exclusion contained in Pepper Hamilton's primary policy and expressly incorporated into the excess policies barred coverage. The Court of Appeals agreed, relying on proof that Pepper Hamilton was aware of its client's securities fraud months before its excess policies incepted. The court stated that the attorney's belief that he and Pepper Hamilton could be subject to a lawsuit, although subjective, was also reasonable. As a result, the court ruled that two of the excess insurers, Executive Risk Indemnity Inc. and Twin City Fire Insurance Co., are not obligated to indemnity Pepper Hamilton.

New York: Multiple Claims From Same Product Defect Constitute Multiple Occurrences

Bausch & Lomb brought an action against defendant Lexington Insurance Company seeking a declaration that Lexington was obligated to provide insurance coverage to Bausch & Lomb for alleged injuries arising out of the use of Bausch & Lomb contact lens solutions. *Bausch & Lomb, Inc. v. Lexington Ins. Co.*, 2009 U.S. Dist. LEXIS 120304 (W.D.N.Y 2009) (Dec. 28, 2009). Bausch & Lomb alleged that it purchased umbrella liability insurance policies from Lexington for yearly periods from January 1, 2004 through January 1, 2007, and that during that time, thousands of claims were made against the company for alleged injuries arising from consumers' use of certain ReNu brand contact lens solutions. Bausch & Lomb contended that Lexington denied coverage for all but a portion of the claims.

According to Bausch & Lomb, Lexington denied coverage because it determined that each alleged injury arose from a separate "occurrence" under the terms of the policy, and as a result, did not meet the specified limits of liability to trigger coverage. Bausch and Lomb contended that Lexington improperly characterized the injuries as arising from multiple "occurrences," and in doing so, ignored portions of the policies that specifically provided for grouping of claims.

Lexington maintained that its policies should be construed so as to provide that each alleged injury sustained by users of contact lens solutions be treated as a separate occurrence. According to Lexington, pursuant to such an interpretation, it would only be obligated to provide insurance coverage once certain liability thresholds (as stated in the policies) have been met in each individual case. Lexington further contended that because those thresholds had not been reached, and were not likely to be reached, it was not obligated to provide a defense for every claim, and was not obligated to insure liability losses that do not reach the policy thresholds.

The court found that the claims arose from separate "occurrences" under the terms of the Lexington policies, and as a result, Lexington was not obligated to insure Bausch & Lomb for losses arising from those claims, or defense costs arising from those claims, absent a showing that Bausch & Lomb met the liability limits set forth in the policies. Relying upon the unambiguous definition of "occurrence," the court reasoned that it is the exposure by consumers to the product that constitutes the "accident."

ABOUT DEFENSE

New York: Absent Prejudice, Improperly-Obtained Discovery Insuppressible

The Fourth Department in *Radder v. CSX Trans., Inc.*, 2009 N.Y. Slip Op. 9847 (4th Dept. 2009) (Dec. 30, 2009) addressed discovery-related ethical issues. The plaintiff retained the law firm of Kantor & Godwin, PLLC (K & G) to represent him in a FELA action. While the plaintiff's action was pending, a second CSX employee, William Pauley, was injured at work. Mr. Pauley also retained K & G to represent him in a personal injury action against CSX. Shortly before the plaintiff's action went to trial and without notice to or consent from CSX, K & G interviewed Pauley concerning the plaintiff's case. During the course of that interview, Pauley disclosed to K & G, as he previously had disclosed to the attorneys for CSX, that on the day of the plaintiff's accident he had forged an inspection report related to the piece of equipment that had caused the plaintiff's injuries. Before Pauley was called as a witness at trial, CSX moved to preclude his testimony, contending that K & G had violated the attorney Disciplinary Rules then in effect by interviewing Pauley.

The Fourth Department rejected CSX's argument that K & G had violated former DR 7-104 (a) and former DR 5-105 (b) through (d) by interviewing Pauley and, therefore, suppression of his testimony at the plaintiff's trial was unwarranted. The court reasoned that there was no constitutional, statutory, or case law authority mandating the suppression of Pauley's otherwise valid testimony and, thus, it looked to the CPLR § 3103 (c) (which permits the suppression of "any disclosure under [article 31 that] has been improperly or irregularly obtained so that a substantial right of a party is prejudiced") to determine if suppression was warranted on that basis.

Analyzing the evidence through the lens of CPLR § 3103, the Fourth Department held that the trial court did not abuse its discretion or act improvidently by denying the request to suppress Pauley's testimony. The Fourth Department determined that K & G did not violate former DR 7-104 (a) and former DR 5-105 (b) through (d). More important, however, the court reasoned that, even assuming that there was evidence that was "improperly or irregularly obtained," no substantial right of CSX was prejudiced. It noted that the evidence of Pauley's forgery was previously known to the attorneys for CSX, it was not privileged and it could have been exposed in the normal course of discovery.

New York: School Bus Driver Must Ensure Student Reaches Position Of Safety

In *Smith v. Sherwood*, __ A.D.3d __, 2009 N.Y. Slip Op. 9901 (4th Dept. 2009) (Dec. 30, 2009), the plaintiff commenced an action individually and on behalf of his minor 12-year-old son, seeking damages for injuries sustained when his son was struck by a vehicle after alighting from a bus operated by a regional transportation authority ("RTA"). At the time of the accident, the plaintiff's son was a student at a private school and was transported to and from school on an RTA bus pursuant to a contract with the local school district. The RTA bus was not a typical yellow school bus and was not equipped with the safety features required for school buses pursuant to New York's Vehicle and Traffic Law § 375(20). On the day of the accident, as the defendant bus driver drove past the usual stop for plaintiff's son, the plaintiff's son was dropped off on the opposite side of the street. Upon exiting the bus, plaintiff's son attempted to cross the street while walking in front of the bus. While doing so he was struck by a passing vehicle.

The trial court granted the RTA's and the bus driver's motion for summary judgment dismissing the common law negligence cause of action asserted by the plaintiff. In a 3-2 decision, Fourth Department found that the Supreme Court erred in granting summary judgment on the common law negligence cause of action because the RTA bus driver had a continuing duty to exercise reasonable care to ensure that discharged students reach a position of safety before moving the bus, and that this duty extended to students crossing to the opposite side of the street after being discharged from the bus, where the bus driver had knowledge that they needed to do so. The two-judge dissent would have affirmed the trial court's grant of summary judgment dismissing the plaintiff's common law negligence claim on the ground that the duty of a bus driver operating a city bus that is neither painted yellow nor equipped with flashing lights and a stop sign, terminates when a passenger has alighted safely to the curb.

New York: Absent Special Relationship, Teacher's Action Dismissed

In *Dinardo v. City of New York*, __ N.Y.3d __, 2009 N.Y. Slip. Op. 8853 (N.Y. 2009) (Dec. 1, 2009), New York's highest court ruled that a teacher who had sustained personal injuries after breaking up a fight between two students had no cause of action for negligence because there was no "special relationship" between her and the Board of Education. For months prior to the incident, the special education teacher repeatedly expressed her concerns about one of the students and safety in the classroom. Her supervisor told her that the administration was working on having the student removed. In her action against the Board of Education, plaintiff alleged that since the student was not removed in a timely fashion, the fight between the student occurred, which resulted in her injury.

The case went to trial. At the close of plaintiff's proof, the Board of Education moved for judgment as a matter of law, which was denied. The jury ruled in plaintiff's favor and awarded damages. The Board of Education then moved to set aside the verdict, which was denied. The Board then appealed and the First Department affirmed, with two justices dissenting. On appeal to New York's Court of Appeals, the Board argued that the conduct alleged to have constituted a promise to act on the teacher's behalf was a discretionary governmental action, which cannot provide a basis for liability. The Court of Appeals agreed and held that the vague assurances the teacher had received were not definite enough to establish justifiable reliance. Accordingly, no special relationship existed, and plaintiff had no cause of action for negligence.

New York: Railroad Immune From Liability For Assault By Homeless Men

A recent Second Department decision, *Doe v. City of New York,* __ A.D.3d __, 2009 N.Y. Slip. Op. 8580 (2nd Dept. 2009) (Nov. 17, 2009) addresses a governmental entity's potential liability when it acts in both a propriety capacity (e.g. landlord) and a governmental capacity. In *Doe*, the plaintiff was assaulted and raped by a group of homeless men on a ramp near the Shea Stadium station of the Long Island Railroad ("LIRR"). The plaintiff sued the LIRR alleging that it was negligent in failing to maintain its premises in a reasonably safe condition.

The LIRR was aware that homeless men were residing on its property. The LIRR decided to deal with the problem by developing a social outreach program to convince the homeless persons to voluntarily leave the property and chose not to forcibly remove the people.

In affirming the order of the trial court, the Second Department held that the LIRR's policy decision to deal with the homeless problem by developing a social outreach program was a proprietary governmental function and as such was not subject to liability. Once the LIRR acted on the problem, its decision on how to deal with the problem was not subject to scrutiny by traditional tort principles because in that circumstance its decision was deemed a governmental function. Courts have held that "it is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred."

New York: Court Allows Disclosure Of Cellphone And Laptop Records

In *Detraglia v. Grant, Jr.*, __ A.D.3d __, 2009 N.Y. Slip. Op. 9120 (3rd Dept. 2009) (Dec. 10, 2009), the Third Department held that the defendant's cellphone and laptop computer records were discoverable. The defendant was driving a vehicle owned by his employer when he collided with a vehicle driven by a co-defendant. During discovery, the plaintiff demanded production of billing records for all three of the defendant's cellular telephones and the Verizon Wireless Aircard for the defendant's company-issued laptop, which were all in the defendant's vehicle at the time of the accident. The plaintiff also sought to depose the defendant's employer's IT representative. Upon the defendant's refusal to comply with these demands, the plaintiff moved to compel disclosure. The lower court partially granted the motion by requiring defendants to produce the records for the three cellular telephones and the wireless aircard for the date of the accident. The court also ordered production of the employer's representative for a deposition.

On appeal, the Third Department noted that there was evidence in the records that the defendant may have been distracted by technological devices immediately prior to the accident. Given the conflicting evidence, the Third Department held that the records were subject to disclosure. The Third Department also held that the employer's IT employee could be subject to a deposition regarding information contained on the cellphones and laptop.

New York: Vicariously-Liable Party Benefits from Timeliness of Alleged Tortfeasor's Motion

In *Salisbury v. Christian*, 2009 N.Y. Slip Op. 9752 (4th Dept. 2009) (Dec. 30, 2009), the plaintiffs, a driver and passenger of a motorcycle, were injured when they were rear-ended by the defendant's vehicle. The defendant Anthony Christian leased the motor-vehicle, which Jonelle Christian was driving at the time of the accident. Defendant Central National Bank leased the vehicle to Mr. Christian. A jury found in favor of the plaintiffs. Notably, at the close of evidence, the trial court granted a directed verdict to the plaintiff passenger against all three defendants regarding the accident's alleged causation to Ms. Christian's alleged injuries.

The appeal concerned the trial court's grant of the directed verdict. The Christians timely moved to set aside the verdict based on conflicting evidence regarding causation and credibility issues as to the plaintiff passenger's testimony. Central National Bank also moved to set aside the jury on the same grounds, but did so after the 15-day time limitation set forth in CPLR 4405. The trial court denied the Christian's motion and "dismissed" Central National Bank's motion for untimeliness and because it was incorrectly denominated as a cross motion.

The Fourth Department held that the trial court erred by denying the Christian's motion to set aside the jury verdict and directed a new trial on causation and damages regarding the plaintiff passenger. The Fourth Department also agreed with Central National Bank that it should be afforded the same relief as the Christians because it was vicariously liable as the lessor of the motor-vehicle. The court held that the liability between Central National Bank (the lessor) and the Christians was inseparable.

New Jersey: Action Continues Absent Affidavit Of Merit

In *Highland Lakes Country Club & Cmty Ass'n v. Nicastro*, __ A.2d __, 2009 N.J. LEXIS 1291 (N.J. Sup. Ct. 2009) (Dec. 8, 2009), the Supreme Court of New Jersey concluded that the usually fatal error of failing to comply with the New Jersey Affidavit of Merit Statute (N.J.S.A. §§ 2A:53A-26 to 29) does not warrant dismissal of the parties' complaint when the filing of the affidavit is contrary to the statute's intent. The case centered on a boundary dispute between the plaintiff Highland Lakes and defendant private-property owner Nicastro. The Nicastros hired a surveyor to mark out the land boundaries before they purchased and renovated their property. The action was commenced after renovations had begun, when the plaintiffs asserted that the Nicastros were developing the plaintiff's land and not their own. The Nicastros instituted a third-party action against the surveyors they hired, maintaining not that the survey was wrong, but that if they were found liable that their liability was secondary and vicarious to the surveyors because they relied on the surveyors' work. Thus, the Nicastros asserted in their third-party suit that they were entitled to indemnification, contribution, and compensatory damages.

The surveyors served an answer to the third-party complaint. The Nicastros failed to file the Affidavit of Merit as mandated by the New Jersey Affidavit of Merit Statute. After the deadline passed but before complying with discovery, the surveyors moved to dismiss the Nicastros' complaint alleging that the complaint failed to state a valid cause of action because the Nicastros failed to file the Affidavit of Merit. The trial court denied the surveyors' motion and the denial was affirmed by the Appellate Division and Supreme Court. The court noted the general goals and requirements of the Statute were to weed out frivolous lawsuits early in the litigation while, at the same time, ensuring that plaintiffs with meritorious claims will have their day in court. The court held that the overall purpose of the statute would not be served by requiring the affidavit in this case.

Pennsylvania: State Entitled To Recover Medicaid Expenses From Tortfeasor

In *E.D.B. v. Clair*, __ A.3d __, 2009 Pa. LEXIS 2790 (Pa. 2009) (Dec. 29, 2009), the Supreme Court of Pennsylvania ruled that the Pennsylvania Department of Public Welfare ("DPW") could obtain reimbursement from a tortfeasor concerning Medicaid expenditures made on behalf of a disabled minor even though the parents' claim for those expenses was barred by the statute of limitations. The plaintiff suffered from severe physical and mental disabilities. Through her parents, she filed a malpractice action asking for past and future medical expenses in addition to damages concerning future earning capacity. All parties eventually negotiated a settlement, which included the creation of a special needs trust for the plaintiff. The settlement was reached more than eighteen years after the plaintiff's birth.

The plaintiff's parents notified the DPW of the suit in accordance with § 1409(b)(5) of the Fraud and Abuse Act. DPW responded by issuing a statement of claim and asserting a lien on any award or settlement resolving the litigation for the amount that DPW had provided for the plaintiff's care. An order was entered by the trial court that indicated the trustee of the special needs trust was required to fully reimburse DPW for its lien.

Because the statute of limitations had expired on the plaintiff's parents' claim for reimbursement for medical expenses when the plaintiff filed suit against the defendants, the Superior Court found that the parties' settlement could not have included payment for the medical expenses that the plaintiff incurred while she was a minor. Consequently, the Superior Court held that DPW could not satisfy its lien from the settlement funds. Subsequently, DPW filed a petition for allowance of appeal to the Supreme Court, which was granted.

The Supreme Court found that the Fraud and Abuse Act indicates the plaintiff had a cause of action to recover such amounts from her tortfeasors. Furthermore, the Supreme Court concluded that the General Assembly intended to provide DPW with the right to recover the reasonable value of Medicaid benefits paid to the plaintiff as a beneficiary via a lien asserted on the parties' settlement. The Supreme Court noted that the Fraud and Abuse Act specifically authorizes DPW to recover the value of benefits provided to a beneficiary from a liable third party. Therefore, the Supreme Court reversed the Superior Court's decision and held that DPW could satisfy its lien for Medicaid benefits paid to the plaintiff during her childhood from the parties' settlement.

ABOUT E-DISCOVERY

Ending Litigation Holds

When should a litigation hold end? When litigation relating to the trigger event is no longer anticipated or resulting litigation has ended? Of course, the answer isn't that easy.

Ending a litigation hold (sometimes known as releasing, lifting, or removing the litigation hold) is a valuable and necessary last step in the litigation hold lifecycle. It is an essential part of a defensible litigation hold business process. Guideline 11 to the Sedona Conference's Commentary on Legal Holds (2007) states: "The legal hold process should include provisions for release of the hold upon the termination of the matter at issue." There are important benefits associated with bringing a litigation hold to an effective and timely end. Releasing the hold allows the corporation to return to its normal record retention practices relating to the held electronically-stored information ("ESI") and other documents. Expired ESI and other documents not subject to any other existing preservation duty can be destroyed pursuant to the corporation's retention schedule. Moreover, the litigation hold can then come off the compliance radar. Periodic reminders, modification, tracking and monitoring can stop. Storage costs can stop. Closing down a large hosted data set can reap significant savings.

Many corporations have a pool of ESI that is perpetually trapped by litigation hold after litigation hold. Cascading or overlapping litigation holds happen when all or a portion of ESI held in one matter is also relevant to a subsequent litigation hold. Timely release of litigation holds can help corporations escape from this litigation hold purgatory. Although untested by a reported case, the timely release of a litigation hold is an essential part of a corporation's retention policy. It demonstrates that the corporation returns to its routine practice after its legal duty to preserve has been discharged. If litigation is not threatened or anticipated, there is no duty to keep the released ESI.

In *Adams v. Dell*, 621 F. Supp. 2d 1173 (D. Utah 2009), plaintiff argued that a large pool of ESI should have been preserved in response to a completely unrelated lawsuit and therefore should have existed and subjected to a litigation hold in *Adams*. Defendant AUSUTek argued that there was no duty to preserve prior to a 2005 attorney letter threatening a lawsuit. The court countered with the existence of industry-wide litigation against computer manufacturers such as Sony and Toshiba. According to the court, defendant ASUSTeK and other manufacturers were "sensitized" to the issues between 1999 and 2000, specifically citing to a multi-billion dollar settlement paid by Toshiba in 1999. As a result, the court held AUSTeK should have been preserving evidence back in 1999.

What if AUSUTek implements a litigation hold in 1999 in response to the industry-wide litigation? It rides out the storm thankful that it was not dragged into litigation. AUSUTek releases its litigation hold between 1999 and 2004, a period of five years with no lawsuit, and destroys expired ESI pursuant to standard policy. Fast forward to the 2005 threat to sue letter. The corporation issues a new litigation hold. This time, however, most of the ESI is long gone. Arguably, its actions were reasonable. Its routine destruction took place when there was no reason to anticipate litigation and no duty to preserve. Under this scenario the corporation should be safe. Destruction took place years prior to the new trigger event.

Releasing holds is an important and necessary last step in a defensible litigation hold business process.

John Jablonski is a partner with Goldberg & Segalla.. He is the co-author of *7 Steps for Legal Holds of ESI and Other Documents*, published by ARMA International (2009).

NEW ADDITIONS

Buffalo

Troy S. Flascher

Troy S. Flascher is an associate in the firm's Buffalo, New York office. He graduated *cum laude* from Thomas M. Cooley Law School where he served as an editor of the school's law review. Mr. Flascher concentrates his practice in the areas of product liability, premises liability, medical malpractice, contractual liability, FDCPA compliance issues and litigation, and errors and omissions by insurance agents and brokers.

Hartford

Mark R. Cramer

Mark R. Cramer joins the Hartford, Connecticut office as Special Counsel. Mr. Cramer has extensive experience in the defense of professional insurance and real estate agents and brokers, professional accountants, common carrier liability, premises liability and security, motor vehicle liability and liquor liability. Mr. Cramer has served as lead trial counsel for a variety of litigation matters involving serious personal injury and death, and significant personal and commercial property loss claims in courts throughout the State of Connecticut, in both jury and non-jury matters, and in class action and multi-party matters. He also has arbitration and mediation experience, and has represented clients before various state administrative agencies, including the Department of Consumer Protection, the Department of Insurance, and the Commission on Human Rights and Opportunities.

Mr. Cramer is a member of the Hartford County, Connecticut State and American Bar Associations. He is a graduate of Wesleyan University and he obtained his law degree from the Western New England College School of Law.

Syracuse

Molly M. Ryan

Molly M. Ryan is an associate in the firm's Syracuse, New York office. She previously practiced in the District of Columbia and California, where she handled state and federal cases at the trial court and appellate levels. Ms. Ryan focused on the defense of law enforcement officers and public entities in excessive force and other civil rights cases, as well as on products liability, premises liability, and business litigation.

She graduated from the Santa Clara University School of Law and Colgate University, where she played on the women's soccer team.

ABOUT OUR PEOPLE

Sharon Angelino, Carrie Appler

The Fourth Department recently affirmed summary judgment for an insurer represented by Sharon Angelino and Carrie Appler in a late-notice case. The policyholder argued that his late notice should be excused because he did not believe he was liable for groundwater contamination on his property. The Fourth Department found that the policyholder's excuse was not reasonable. In so ruling, the Fourth Department noted that the issue is not whether the policyholder believes he will ultimately be found liable for the injury, but rather whether he believes that a claim will be asserted against him.

Sharon Angelino, Toni Frain

Sharon Angelino and Toni Frain successfully obtained summary judgment for the insurer in a declaratory judgment action entitled "Seminole Arms Owners Corp. v. Harleysville Worchester Insurance Company" on the basis of late notice of occurrence. There, the underlying plaintiff sustained her accident on November 19, 2005, the incident was reported to the insured immediately, but the insured did not report the incident to its insurer until June 20, 2006. The case was venued in the New York State Supreme Court, Kings County.

Sharon Angelino, Michael Glascott, Colleen Murphy

Sharon Angelino, Michael Glascott and Colleen Murphy were featured presenters of three recent Professional Insurance Agents Lunch and Learn webinars. They spoke on the topics of insurance trends and litigation in New York, priority of coverage in construction context, and certificates of insurance, respectively.

Richard Braden, Bruce Hoover, Daniel Moar

After the City of Buffalo ordered a business to indefinitely shut down due to perceived fire code violations, Rick Braden, Bruce Hoover, and Daniel Moar successfully obtained a court order allowing the business to continue operating until the legal issues relating to the fire code are resolved. The City of Buffalo placed the business in financial jeopardy by shutting it down with no notice and threatening to arrest its owner if he attempted to re-open the business. The owner immediately consulted with the attorneys at Goldberg Segalla who began working to challenge the City's action. Within one day of the business being closed, Rick, Bruce and Dan obtained a temporary restraining order prohibiting the City from forcing the business to close or arresting its owner.

Albert D'Aquino

Albert D'Aquino was appointed president of the Professional Liability Defense Federation for the 2009-2010 term. The Professional Liability Defense Federation, unveiled in September 2009, is an organization devoted to the defense of claims against attorneys, health care professionals, accountants and architects and is committed to providing state-of-the-art insights to members and the broader defense community of claims management and law developments important to this field. If you would like more information about the PLDF, visit www.pldf.org or email Albert J. D'Aquino at ajdaquino@goldbergsegalla.com.

Christopher Floreale

Christopher Floreale was successful in obtaining a defense verdict in a case involving a motor-vehicle accident. Jury deliberations took only 90 minutes.

Christopher Floreale, Anthony Tantillo

Christopher Floreale and Anthony Tantillo obtained a no-cause verdict in Niagara County after a two-week-plus trial in a case where it was alleged that a 2-year-old (now 13) fell due to the defendant's negligence and sustained a traumatic brain injury. Plaintiffs asked for $3.2 million, but the jury, after deliberating for 45 minutes, found that the defendant was not negligent.

The trial judge allowed the plaintiffs to put on their entire case without precluding any of their witnesses, and because he precluded the defendant's IME doctor from testifying, the verdict is essentially insulated from being reversed on appeal.

Daniel Gerber, Brian Biggie

Daniel Gerber and Brian Biggie successfully defended an action by a Rochester attorney seeking damages for an alleged breach of contract. The plaintiff sought readmission into a group life insurance program after his policy was terminated for failure to maintain group membership. In response, they argued that group membership was a condition precedent to participation in the group plan. Thus, absent membership, the policy was properly terminated. The court agreed, and after oral argument the court dismissed the complaint in its entirety.

Dennis Glascott

Dennis Glascott was recently selected to be a fellow in the Litigation Counsel of America (LCA). The Litigation Counsel of America is a trial lawyer honorary society composed of less than one-half of one percent of American lawyers. Fellowship in the LCA is highly selective and by invitation only. Fellows are selected based upon effectiveness and accomplishment in litigation, both at the trial and appellate levels, and superior ethical reputation.

Neil Goldberg, Liza Callahan

Neil Goldberg and Liza Callahan recently obtained summary judgment dismissing a products liability action for lack of jurisdiction. The defendant holding company owned the stock of an independent subsidiary that manufactured the crane plaintiff alleged was defective. Plaintiff sued only the holding company and not the subsidiary. The court agreed there was no jurisdiction over the holding company, as it did not conduct business in New York, was separate and distinct from the subsidiary, and did not manufacture the crane.

Neil Goldberg, Cheryl Possenti, Joseph Welter

Neil Goldberg, Cheryl Possenti and Joseph Welter recently published an article “Are You Prepared? The CPSC’s Searchable Consumer Product Incident Database” in the Fall/Winter 2009 issue of *USLAW* magazine.

William Greagan

William Greagan co-authored an article in the January 2010 issue of DRI’s *For the Defense* entitled “Essential Assessment: Lead Paint Injuries- Causation and Discovery.”

Joseph Hanna, Matthew Bruno

Joseph Hanna and Matthew Bruno published an article entitled “The Rich Keep Getting Richer and the Poor, Poorer… in the Bowl Championship Series” in the Fall/Winter 2009 issue of NYSBA *Entertainment, Arts and Sports Law Journal.*

Matthew Lerner

Matthew Lerner recently received an affirmance at the Appellate Division, Third Department concerning a policyholder’s dispute over first-party No-Fault benefits. The court adopted Matt’s argument on appeal that the plaintiffs failed to demonstrate that they sustained damages from an alleged breach of contract. Matt demonstrated on appeal that the defendant insurance company had paid the injured plaintiff lost wages for three years and there were no outstanding claims for reimbursement concerning medical treatment. Notably, after the Third Department’s affirmance, the plaintiffs attempted to recommence the action. The trial court granted Matt’s pre-answer motion to dismiss based on res judicata.

Matt also received a reversal at the Appellate Division, Fourth Department concerning a jury trial awarding approximately $3 million in damage to the plaintiff. Matt represented the vicariously liable motor vehicle owner. The driver of that motor vehicle rear-ended a motorcycle on which the plaintiff was a passenger. She alleged a closed-head injury, and the trial court granted her a directed verdict as to the causation issue. The Fourth Department agreed with Matt that conflicting medical opinions and credibility issues as to the plaintiff’s testimony should have precluded a directed verdict determination. The court also agreed that the vicariously liable defendant, even though the underlying motion was untimely, should be afforded the same relief as the actively negligent defendant.

Matt wrote an amicus curiae brief on behalf of the Products Liability Advisory Council concerning an appeal to the Appellate Division, Fourth Department in *Pokorney v. Foster Wheeler, Inc.* The issue concerned whether one manufacturer has a duty to warn about another manufacturer’s product when the first manufacturer produces a sound product that is compatible for use with the other manufacturer’s allegedly defective product. PLAC is a national non-profit organization that represents American and international product manufacturers.

Matthew Lerner, William O'Connell

Matthew Lerner and William O'Connell received a reversal at the Appellate Division, Third Department concerning a Labor Law § 240(1) dispute concerning two homeowners. The Third Department adopted Bill's and Matt's argument that the homeowners did not direct or control the work that the injured plaintiff was performing when the accident occurred. The court agreed that the homeowners' general involvement with the project did not rise to the level of direction or control to deprive them of the homeowner's exemption to Labor Law § 240(1). The court also dismissed the plaintiff's Labor Law § 200 and common-law negligence claim against the homeowners because they did not control the manner in which the plaintiff performed his work, nor did they have actual or constructive notice of a dangerous condition with the retaining wall that caused the plaintiff's injuries.

Matthew Lerner, Latha Raghavan

Matthew Lerner and Latha Raghavan received an affirmance at the Appellate Division, Third Department concerning a "serious injury" threshold summary judgment motion stemming from a low-speed automobile accident The Third Department agreed with Latha and Matt that the plaintiff failed to raise a triable issue of fact to differentiate her alleged injuries from her pre-existing injuries. The plaintiff's expert witness failed to address the defendant's expert witness, who provided evidence that the plaintiff's current injuries were not caused by the low-speed motor-vehicle accident.

Brian McElhenny

Brian McElhenny published an article in the November 2009 edition of the *Suffolk Lawyer* entitled "Court of Appeals Rejects Estoppel Claim Against Municipality."

Bryan Richmond, Brian Biggie

Bryan Richmond and Brian Biggie successfully defended an insurer that issued a homeowner's policy against a Workers' Compensation action. Following arguments at an evidentiary hearing, the court held that there was no coverage under the policy and dismissed the action against the insurer.

Michael Shalhoub

Michael Shalhoub was selected by his peers for inclusion in the 2010 edition of The Best Lawyers in America in the specialties of Commercial Litigation, Medical Malpractice Law and Product Liability Litigation. For over a quarter of a century, Best Lawyers has been regarded by both the profession and the public as the definitive guide to legal excellence in the United States.

Goldberg Segalla LLP Named Go-To Law Firm For Litigation

Corporate Counsel magazine named Goldberg Segalla LLP a 2010 Go-To Law Firm in litigation for the nation's Top Fortune 500 companies. *Corporate Counsel* selects Go-To Law Firms by surveying general counsel at Fortune 500 companies and asking them which law firms they turn to for legal advice in various practice areas.

Promotions

Goldberg Segalla LLP is pleased to announce the promotions of three attorneys to partner and three attorneys to Special Counsel. The promotions were effective as of January 1, 2010.

Kevin Burns, Jeffrey L. Kingsley and Colleen M. Murphy were elected as partners of the firm. Kevin is resident in our White Plains, New York office and Jeff and Colleen are resident in our Buffalo, New York office.

Kevin Burns

Jeffrey L. Kingsley

Colleen M. Murphy

Jeffrey A. Carlino, Matthew J. McDermott and Jeffrey J. Signor were named Special Counsel of the firm. Jeff Carlino and Jeff Signor are resident in our Buffalo, New York office and Matt is resident in our White Plains, New York office.

Jeffrey A. Carlino

Matthew J. McDermott

Jeffrey J. Signor

For more information about these attorneys, we invite our clients and friends to visit our website at www.goldbergsegalla.com.

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