LEGAL NEWS IN BRIEF

News in a Flash for Subrogation and Insurance Professionals

VOLUME 12, ISSUE 6

Jan Meyer , Esq. *◇

Richard A. Hazzard , Esq. *◇
Noah Gradofsky , Esq. *◇
Stacy P. Maza , Esq. *◇
Richard L. Elem , Esq. *◇
Elissa Breanne Wolf , Esq. *◇
Solomon Rubin , Esq. *◇
Benjamin O. Stewart, Esq. *◇

Of Counsel:
Joshua Annenberg , Esq. *◇
Michael J. Feigin , Esq. *◇®
Lianne Forman , Esq. *

Admitted to Practice In:
*** New Jersey ◇ New York**
® US Patent & Trademark Office

Law Offices of JAN MEYER and Associates, PC

Main Office:
1029 Teaneck Road
Second Floor
Teaneck, New Jersey 07666
(201) 862-9500
Fax: (201) 862-9400
office@janmeyerlaw.com
www.janmeyerlaw.com

Maintains a New York Office:
424 Madison Avenue,
16th Floor
New York, New York 10017

LEGAL NEWS IN BRIEF IS PREPARED AND PUBLISHED BY
LAW OFFICES OF JAN MEYER AND ASSOCIATES, P.C.

LOJM'S LATEST VICTORY: PIP CARRIER AND ITS INSURER ARE SEPARATE "PERSONS" FOR SPLIT-LIMIT POLICIES

GEICO v. Castro
New Jersey Superior Court, Law Division
Docket No. BER-L-252-13
(May 3, 2013)

N.J.S.A. 39:6A-9.1(b) states that where a PIP carrier is entitled to recover PIP from an insured tortfeasor, such recovery "shall be subject to any claim against the insured tortfeasor's insurer by the injured party and shall be paid only…up to the limits of the insured tortfeasor's motor vehicle or other liability insurance policy." Many have understood this statute to indicate that where a tortfeasor has a split-limit policy and the maximum available to an individual is paid to the injured party for the bodily injury claim, the PIP carrier would not be entitled to recovery.

In a recent motion, our office noted that NJ precedent is clear that the PIP recovery right is not a subrogated right, but a direct right of recovery held by the insurer. As such, where a policy has a limit for injuries to any one person, the PIP losses should not be considered part of an injury to "one person" but an injury to a second person.

The tortfeasor's carrier argued that their policy was exhausted by paying a $15,000 bodily injury claim to GEICO's insured, the only injured party in the accident. Judge Steele disagreed in her ruling, writing that "the court finds that Geico is a separate person within the meaning of the subject policy and has brought forth a separate and distinct claim from its insured….The court finds that the subject policy permits GEICO, a separately injured person, to recoup the PIP benefits it paid to its insured….GEICO's potential recovery has not been exhausted, as the policy provides for an aggregate recovery of damages in the amount of $30,000.00."

The decision, which is not binding on other courts, but should be considered highly persuasive in PIP recovery arbitration, is on appeal to the New Jersey Appellate Division. ■

DRAM SHOP ACT: "VISIBLY INTOXICATED"

Halvorsen v. Villamil
New Jersey Appellate Division
409 N.J. Super 568
(March 6, 2013)

The Appellate Division held that the Dram Shop Act (N.J.S.A. 2A:22A-1 to -7) does not require eyewitness testimony to prove that the establishment served its patron while said patron was "visibly intoxicated." A licensed alcoholic beverage server, pursuant to the Act, is deemed negligent when serving alcohol to a person in "a state of intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication." In this case, there were sufficient factors which would allow a jury to reasonably deduce such visible intoxication notwithstanding Plaintiff's failure to produce an eyewitness: the patron's odor of alcohol on his breath; his subjective lack of pain despite

serious injuries requiring hospitalization; his high blood alcohol level; his severe impact on a slowing vehicle so as to flip it on its side; and the expert report's timing of the drinking with the patron's attendance at the establishment. ■

PIP ARBITRATION OPTION

Boyd v. Plymouth Rock Assurance
New Jersey Appellate Division
Docket No. A-1379-12T1
(May 28, 2013)

Plaintiff filed suit against High Point Preferred Insurance Company for alleged improper reduction of his PIP benefits. High Point sought to move the matter to arbitration, invoking the policy clause providing that "either party may submit the matter to dispute resolution," mirroring the language of the Automobile Insurance Cost Reduction Act (AICRA; N.J.S.A. 39:6A-5.1). The Appellate Division reversed the trial judge's denial of High Point's motion. AICRA's language reflected legislative intent to extend the right to demand arbitration to insurers in addition to insured parties. Accordingly, "may" in the policy language (and in AICRA) is understandable to denote that either party has an absolute right to require that a PIP disputed be removed to arbitration. ■

NET OPINION

Great Northern Ins. Co. v. AM Appliance Group
New Jersey Appellate Division
Docket No. A-6122-10T3
(May 28, 2013)

Plaintiff appealed summary judgment ruled in Defendants' favor in the within subrogation action for damage to Plaintiffs' insureds' house, the damage having originated from a fire in the dryer on the premises. Defendants were the builder of the house, seller of the dryer, the electrical contractor and the company that serviced the dryer. The Appellate Division upheld the trial court's dismissal of Plaintiff's action and its finding of Plaintiff's expert opinion to be a net opinion, one that is not sufficiently supported by factual evidence. Although the builder failed to place the dryer in its proper place as designed, there was no evidence that such misplacement caused the fire. The expert's claim that an excessive buildup of lint caused the fire was merely speculative in the absence of any evidence of such a buildup at the time of the fire, or eight months earlier, when the dryer was last serviced. Plaintiff also submitted no evidence contradicting the seller's claim that they originally delivered the dryer without installing same. ■

NOTICE OF CLAIM

The New York Supreme Court, Appellate Division, Second Department issued two recent decisions regarding potentially defective notices of claim. In **Williams v. County of Westchester**, 103 A.D.3d 796 (Feb. 20, 2013), the Court upheld judgment in favor of the County due to Plaintiff's failure to include the lack of a guardrail, improper "protection" around a tree or the failure to maintain a clear zone on the side of the roadway. These omissions inconvenienced the County from investigating the related issues so as to properly defend the matter. "A party may not add a new theory of liability which was not included in the notice of claim."

By contrast, in **Vallejo-Bayas v. New York City Transit Authority**, 103 A.D.3d. 881 (Feb. 27, 2013), the Court did not deem Plaintiff's misstatement of the time of the underlying incident in his notice of claim to be fatal to his action against the defendant, inasmuch as the error was made in good faith and Defendant was not prejudiced thereby. Plaintiff had also provided in the notice of claim the exact date, location and nature of the alleged incident, and although he was unable to identify the bus with greater particularity, the information he provided in the notice of claim, as well as his testimony in a *General Municipal Law §50-h* hearing was sufficient to enable Defendant to conduct a meaningful investigation into the claim. ■

GARNISHMENT OF ASSETS

Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce
New York Court of Appeals
2013 WL 1798585
(April 30, 2013)

The Court of Appeals upheld denial of Plaintiff's application for a turnover order. Plaintiff had sought enforcement of its judgments for unpaid taxes against Defendants, who had since relocated to the Cayman Islands. Having domesticated said judgments in New York, Plaintiff applied for a turnover order against a Canadian bank with a New York branch, under the theory that Defendants maintained accounts in the bank's 92%-owned subsidiary in the Caymans. The Court held that NY CPLR 5225(b) requires actual, not constructive, possession or custody by the banking entity of the assets sought, the decisive word "control" being clearly omitted from the statutory language. ■