The Lane Law Letter

Autumn 2013

Law Offices of John C. Lane
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We are a litigation firm with a practice emphasizing transportation, insurance and construction law in New York and New Jersey.

We hope that you find The Lane Law Letter both enjoyable and useful in keeping you updated on legal developments important to you.

As always, we welcome questions and comments regarding our articles. Contact us by phone at 973-512-3244, or by email at law@jclane.com.

Inside this issue:

NJ Supreme Court Limits Use of Arbitration

Commercial arbitration is a favored means of resolving business and employment disputes. Federal and state arbitration acts promote the use of arbitration, but under strict protocols. Arbitration requires an agreement by the parties to give up their right to go to court to resolve their disputes. A pair of New Jersey Supreme Court decisions illustrates, however, that the courts should limit compulsive arbitration against one who has not signed an agreement and should refuse an arbitration request from a party who by his conduct has waived the right to arbitrate.

The first case is *Hirsch v. Amper Financial Services, LLC*, a high-stakes business dispute involving securities investment, wealth building plans, loss of entire investments, and even an alleged Ponzi scheme. Plaintiffs, husband and wife, were ordered by a lower court to participate in arbitration even though they never signed an arbitration clause. An appellate court ruled that the intertwining of the complicated claims was enough to require them to arbitrate. The Supreme Court disagreed, ruling that an intertwining set of facts, alone, is not sufficient to order the non-signers into arbitration.

The Supreme Court addressed the waiver of the right to arbitrate, in *Cole v. Jersey City Medical Center*. Karen Cole sued the hospital and Liberty Anesthesia Associates, LLC, an independent contractor who employed Cole, claiming she was wrongly dismissed from her job. Her contract with Liberty contained an arbitration clause, but Liberty never invoked the clause until after interrogatories and depositions of 12 persons over a 21-month period. Cole settled with JCMC but continued against Liberty. The Supreme Court held that Cole would be prejudiced by further delay having to change forums at that point, and that Liberty had waived its contractual right to arbitrate.

"To Be Clear..."

An angry New Jersey Supreme Court has ruled unanimously that in the future, no mediation settlement will be enforceable unless it is reduced to writing and signed by the parties before the mediation comes to a close. In *Willingboro Mall v. 240/242 Franklin Ave., L.L.C.*, a contract dispute was settled at mediation, but not reduced to writing. The parties disputed the settlement, all the way to the New Jersey Supreme Court. Intending to resolve the dispute, the mediation instead *became* the dispute. "To be clear," said the exasperated Court, "going forward," a settlement reached at mediation but not reduced to writing will not be enforceable. The Court said it twice, at both ends of their opinion. They meant it. No dissent.

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In The News . . .

In May, *John* attended the Transportation Lawyers Association annual meeting in Napa, California. In June, he attended the Conference of Freight Counsel in Washington, DC.

Peter attended the Alamance Claims Association Golf Tournament in September. This annual outing in Burlington, NC, raises money for local charities, including Loaves & Fishes, a nonprofit emergency food pantry program which provides a week's worth of groceries to people in crisis.

John gathered with his Brother Rats to celebrate VMI Class of '68's 45th reunion in September. That weekend, VMI's football team also celebrated an exciting win over Glenville State.

In November, *John* and *Peter* attended the 2013 TIDA Annual Seminar in Orlando.

Avon Walk for Breast Cancer — NYC — 2013

Did you know, every three minutes someone in the United States is diagnosed with breast cancer? Breast cancer is gender neutral and it affects all races and ethnicities.

This October, paralegal *Sue Cawley* and her daughters Sarah (20) and Danielle (17) participated in the Avon Walk for Breast Cancer held in New York City. Sue was part of Rest Stop 3, ensuring the over 4,200 walkers were nourished and hydrated (36 gallons of Gatorade alone in one day!). The girls walked 39.3 miles in two days - all to raise funds for research to find a cure or prevention, as well as programs that enable all patients to access quality care, support during treatments, awareness for this disease, and much more.

To participate, each walker must raise $1,800. The girls beat that goal and raised $2,450 each! Their team, the Wellness Warriors, raised a total of $61,208 this year - a grand total of $725,032 since 2003! The 4,200 Walkers and 640 Crew Members of New York raised a grand total of $6.7 million this year! "The more of us who walk, the more of us survive." They can't wait to participate again next year - let the training and fundraising begin!

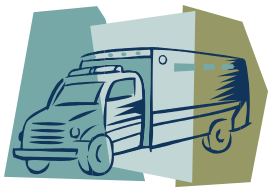
The Duty to Defend — NY Means It!

A failed loan transaction and a legal malpractice lawsuit give the New York Court of Appeals the opportunity to reaffirm the oft-stated rule that the duty to defend is broader than the duty to indemnify under a liability insurance policy. The twist is that in New York, if the insurer improperly refuses to defend its insured, it will not later be able to rely upon otherwise viable policy exclusions to avoid paying a judgment rendered against the insured. That is what happened in *K2 Investment Group, LLC v. American Guarantee & Liability Insurance Co.*, decided June 11, 2013.

K2 Investment and its co-plaintiff made a $2.83 million loan to Goldan, LLC, to be secured by mortgages. One of Goldan's principals, Jeffrey Daniels, is a lawyer. He was actually hired by K2 Investment to prepare and file the mortgages. The loans were not repaid, and plaintiffs discovered that the mortgages were never recorded. They sued Goldan, LLC, on the debt, and Jeffrey Daniels for legal malpractice. Daniels referred the suit to his insurer, American Guarantee, who refused to defend because Daniels was involved as a principal in Goldan. That fact would likely trigger a policy exclusion which would bar coverage, the insurer says. But the lawsuit set forth a cause of action for legal malpractice. Thus, the insurer had a duty under New York law to defend Daniels despite the exclusions. When it did not provide a defense, a default judgment of over $2 million was entered against Daniels.

The penalty in New York is a harsh one: An insurer, "having chosen to breach its duty to defend, cannot rely on policy exclusions to escape its duty to indemnify." American Guarantee was ordered to pay its $2 million policy limit, because it did not defend Daniels.

Rescue Squad Indemnity — an Update and More to Come



As our readers may recall, we have been following the case of *Murray v. Plainfield Rescue Squad*, a wrongful death suit filed by Odis Murray's parents, against the emergency squad that responded to, and attempted life-saving treatment upon, Mr. Murray after he was shot by his brother. The New Jersey Trial and Appellate Courts agreed with the Rescue Squad's argument that it was entitled to immunity under N.J.S.A. 26:2K-29. The New Jersey Supreme Court disagreed, however, holding that the statute provided immunity to individual members of a rescue squad, but *did not* provide immunity to the rescue squad as an entity. The case was remanded. Shorty after our last edition went to print, a Union County jury handed up a defense verdict. We still await the NJ Legislature's vote on a bill that would extend immunity to volunteer and hybrid fire departments, ambulance, rescue or emergency squads, and civil defense units. Stay tuned!

George Oyala Beats the PLIGA!

George Oyala is a truck driver who was seriously injured in a motor vehicle accident while working. His employer's Worker's Compensation insurer paid $159,000 in medical expenses. The other driver, who caused the accident, had only $15,000 in coverage, which was paid. George had Underinsured Motorist's Coverage with Consumer First Insurance Company. He made a UIM claim for $85,000 ($100,000 limit minus the $15,000 tort recovery) against Consumer First. Before any payment was made on the UIM claim, Consumer First became insolvent. That led George to the New Jersey Property-Liability Guaranty Association, the State's guaranty fund. What happened there is the story of *Oyala v. Liu*, decided by an Appellate Court on July 15, 2013.

The Guaranty Association has a $300,000 maximum liability per claim, according to its founding statutes, which also require that the fund receive a credit for the $159,000 Worker's Compensation payments. But, is that credit measured against the amount of George's claim for $85,000, which would wipe out his UIM claim, or against the $300,000 maximum liability of the Association? The Appellate Court applied the credit for the Worker's Compensation payments against the $300,000 maximum limit, leaving plenty of coverage to pay George's $85,000 UIM claim.

NY High Court Reaffirms High Hurdle for Punitive Damages

Punitive damages are rare under New York law. They are reserved for conduct showing such a high degree of immorality and wanton dishonesty as to imply a criminal indifference to civil obligations. The Court of Appeals recently reaffirmed this rule in *Marinaccio v. Town of Clarence*, in which defendant Kiefer Enterprises planned to develop land abutting the property of plaintiff Paul Marinaccio. The development included a plan to divert water through a storm sewer and a ditch, ultimately to a mitigation pond. The Town approved the development but belatedly realized that the ditch was on Marinaccio's property. Mr. Marinaccio sued the Town and Kiefer for damages resulting from the construction of the water diversion over his property, alleging trespass to land and nuisance. He sought both compensatory and punitive damages. A jury awarded $1.3 million in compensatory damages against the Town, and $328,000 in compensatory damages and $250,000 in punitive damages against Kiefer. The parties settled the compensatory damage claim and Kiefer appealed as to the punitive damage award. The Court of Appeals reversed that award: Punitive damages are awarded to punish and deter behavior involving moral turpitude. Here, [Kiefer's] behavior does not rise to that level.

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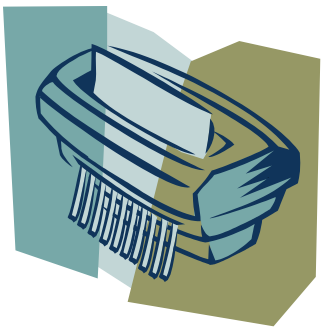
A Spoliation Claim is Defeated

A New Jersey federal court rejected a spoliation claim in *Khaldei v. Kaspiev* (District of N.J., Aug. 7, 2013), a case involving ownership of certain photographs. The district court reviewed several decisions of the Second Circuit Court of Appeals and the Southern District of New York to define spoliation and the hierarchy of spoliation sanctions. In the end, the court determined that a case for spoliation had not been proved. The case demonstrates that spoliation claims can be defeated.

Spoliation is the destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. A party seeking spoliation sanctions must establish the elements of a spoliation claim:

(1) that the party having control over the evidence has an obligation to preserve it at the time it was destroyed;
(2) that the evidence was destroyed with a culpable state of mind (which can be negligence); and
(3) that the destroyed evidence was relevant to the party's claim or defense.

Sanctions for spoliation must be measured to deter spoliation, place the risk of an erroneous judgment on the party who wrongfully created it, and restore the wronged party to the same position he would have been in absent the wrongful destruction of the evidence. The choices include – from least to most harsh – further discovery, cost-shifting, fines, special jury instructions, evidence preclusion, and entry of default judgment or dismissal. In this case, following federal precedent, the district court found that no spoliation was established. The "missing" photographs were apparently not lost; the defendant was not on notice that he should preserve them; and defendant's actions in placing the photographs in storage was not done with a culpable – not even negligent – state of mind. The motion for spoliation sanctions was denied.



More on this crucial topic in our next issue!