

THE LANE LAW LETTER

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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.

Questions or Comments?

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Defense Experts' Attack on Plaintiff's Credibility Opens the Door to Character Evidence for the Plaintiff

Be careful what you wish for. So says the Supreme Court of New Jersey in a terse *per curiam* decision on March 17, 2005 affirming a 2004 decision of the Appellate Division in *Ostrowski v. Cape Transit Corp.*, 371 N.J.Super. 499, 853 A.2d 985. John Ostrowski, a truck driver, suffered a head injury, with permanent cognitive and emotional problems, and can no longer work. The defense doctors claimed that John sustained only a mild concussion and was faking the brain injury claim. The neurologist was prepared to testify that the activities shown on a surveillance video were incompatible with the neuropsychological testing by plaintiff's own doctors. The defendant's neuropsychologist would attack John's character, saying that he is one likely to fake his test results. And the psychiatrist would testify that John had no cognitive loss and a good psychiatric prognosis.

A defense lawyer's dream? Or a nightmare unfolding?

Trial started, and defense counsel *opened*, telling the jury of all these attacks to come.

And that opened the door for a preemptive attack by John's attorney.

In John's case in chief, the trial judge let his attorney present a parade of fact and medical witnesses attesting to John's good character, cutting off the defense experts before they could testify. Normally, this evidence can only be proffered in rebuttal, *after* plaintiff's character has first been attacked by the defense. But here, when that attack starts before trial and in opening statements, the gloves may come off—the plaintiff can show his good character before the defense testimony of bad character is even presented. The jury awarded John and his wife, Dolores, \$3,811,720, and the defendants appealed.

The Appellate Division, and now the Supreme Court, 182 N.J. 585, 868 A.2d 321 (2005), affirmed the trial judge's ruling. Defendants must at times be careful about a vicious attack on plaintiff's character. That attack can backfire badly when the cannons are turned around.

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New York Federal Court Rules Carmack Amendment Applicable to Contract Carrier

In *Travelers a/s/o Quality Carton, Inc. v. North American Van Lines*, 2005 WL 351106 (S.D.N.Y. February 10, 2005) (not yet officially reported), a New York federal judge ruled that the Carmack Amendment—the federal law governing cargo claims—applies equally to contract carriers as to common carriers. Before 1996, the statute expressly applied only to "common carriers." With the Interstate Commerce Commission Termination Act, Congress deleted the work "common" from the phrase.

At least two federal district courts have now determined that congress intended to extend the benefits and burdens of the Carmack Amendment to contract carriers. In this case, North American argued successfully for Carmack applicability, and its exclusivity, thus obtaining dismissal of the state law negligence, contract, bailment and UCC claims. North American then settled with Travelers, and indemnified our client, the broker.



No Auto Insurance? Injured Claimant is Denied Suit For Economic Damages and Pain and Suffering

Enacted in 1997 as part of an auto insurance reform package in New Jersey, N.J.S.A. 39:6A-4.5a denies a “cause of action for recovery of economics or non-economic loss” to the driver of an uninsured vehicle injured in an automobile accident. Now the Supreme Court of New Jersey holds that the provision passes Constitutional muster as a rational approach toward stabilizing or reducing insurance costs, and increasing compliance with compulsory insurance laws, in *Caviglia v. Royal Tours of America*, 178 N.J. 460, 842 A.2d 125 (2004). Therefore, a claimant who is injured while driving an uninsured vehicle, though he may be without fault for an accident, is barred from suing for his damages, both economic and non-economic, such as pain and suffering. In

fact, Mr. Caviglia was not at fault for his accident. Because he had no liability insurance, his claims and his wife’s claim were barred.

The statute actually bars suit to three classes of claimants injured in an accident: (1) Uninsured drivers; (2) Drivers convicted of DWI; and (3) Drivers who act with intent to injure others. Only the first category was directly involved in the *Caviglia* appeal. Also not decided by this case is whether property damage claims are barred, under the definition of “economic damage.”

This is a powerful statute for defendants. In responding to lawsuits, we are careful to investigate all three factors as possible defenses.

The standard for punitive damages in New York is a demanding one, requiring conduct “so reckless or wantonly negligent as to constitute conscious disregard of the rights of others.”



Punitive Damages Denied in New York Trucking Accident

Punitive damages can ruin your whole day. Fortunately, they are hard to come by in New York. In *Marcoux v. Farm Service & Supply, Inc.*, 283 F.Supp.2d 901 (S.D.N.Y. 2003) a case handled by our office, the United States District Court granted a pre-trial motion to dismiss the punitive damage claim. Patricia Marcoux, who was not at fault at all, sustained multiple severe and permanent fractures of the arms, legs, and feet, when a flat-bed trailer traveling in an opposite direction on a rural roadway, “swung out” into her lane, blocking her travel route completely. Ms. Marcoux took evasive action but could not avoid slamming broadside into the trailer, suffering her injuries. She sued for compensatory damages, urging that half of the trailer’s tires were unsafe, the truck driver (from the midwest) was speeding on an unfamiliar curving country road, in rainy conditions, and the driver had a bad driving record. Plaintiff argued that the trucking company was reckless to put the trailer on the road, having just inspected it at their terminal one week before the accident, and putting the entire rig in the hands of a driver with a bad record.

District Judge William C. Conner agreed with us that the conduct of our clients did not rise to the level of wantonness and moral culpability required in New York for the imposition of punitive damages. The standard for punitive damages in New York is a demanding one, requiring conduct “so reckless or wantonly negligent as to constitute conscious disregard of the rights of others” and which demonstrates a “high degree of moral culpability.” Even in combination, the unsafe tires, the driver’s past driving record, and his negligent driving, did not meet the demanding standard.

Punitive damage claims are always trouble. Even in New York and New Jersey, where the bar for punitive damages is very high, those claims must be challenged, and dismissed, long before jury selection, so that the jury does not hear about a defendant’s purported moral depravity. They might not award punitive damages as such, but their judgment of the remainder of the case will certainly be skewed. The motion to dismiss a punitive damage claim should be made well before the trial.

New York Adheres to “No Prejudice” Rule for Liability Claims, Relaxes Rule for SUM Claims

For more than thirty years New York has held to the harsh rule that an insurer may disclaim liability coverage for failure of an insured to give prompt notice of an occurrence, or the commencement of a suit against the insured, on the ground that the breach of the notice obligation in the policy vitiates coverage. Just as commentators were predicting a change to this rule, the Court of Appeals issued its decision in *Argo Corp. v. Greater New York Mut. Ins. Co.*, 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005), in which the state’s highest court reaffirmed the rule of *Security Mut. Ins. Co. of New York v. Acker-Fitzsimmons Corp.*, 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972). Under that rule, there must be strict compliance with notice requirements in an insurance policy, both as to the occurrence and any resulting lawsuit. The prompt notice helps guard against fraud and gives the insurer the opportunity to investigate claims while evidence is fresh, and allows the insurer to make early evaluations and control claims, aiding in settlement. The other side of the rule is that the failure to give the prompt notice will vitiate coverage, with no showing of prejudice required of the insurer. Notice to an insurer a mere few months after an occurrence, and after only thirteen days in one case, would allow the insurer to disclaim.

Commentators had expected a change in the law, based upon a decision of the Court of Appeals in 2002, in *Matter of Brandon v. Na-*

tionwide Mut. Ins. Co., 97 N.Y.2d 491, 743 N.Y.S.2d 53, involving a supplementary underinsured motorist (SUM) insurance claim. There, the Court held that the no-prejudice rule would not be applied, in large part because the insurer had prompt notice of the occurrence, but simply did not have notice of the insured’s later lawsuit against the underinsured tortfeasor. In a footnote, the Court noted that New York is in a “dwindling minority” of states holding to the no-prejudice rule in liability policy claims, with Tennessee and Colorado having recently ended their adherence to the rule. The Court limited the *Brandon* decision to SUM claims, because the issue of continuing the no-prejudice rule in liability claims was “not before us.” That suggestive comment led to a lower appellate court decision, *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 787 N.Y.S.2d 22 (1st Dept. 2004), in which the plurality urged that the no-prejudice rule should be abandoned, and remanded a coverage action to the trial court to determine whether the insurer had in fact been prejudiced. A change in the law was anticipated, with some enthusiasm.

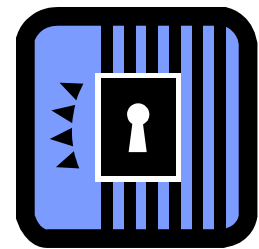
Only a few months later, the Court of Appeals in *Argo Corp.* and a companion case, *Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, delivered a clear message: except in SUM cases, where the insurer must establish that it was prejudiced, there will be no change. New York will remain in the “dwindling minority” holding to the no-prejudice rule in liability policy claims. The law in New York thus remains settled and most clear.

New York is in a dwindling minority of states holding to the no-prejudice rule in liability policy claims.

Some Common Sense Is Nice: No Lawsuit for the Criminally Stupid

New Jersey Federal District Judge Stanley Chesler gets our vote for uncommon common sense and good judgment, in granting summary judgment to Arm & Hammer, the baking soda people, dismissing a suit by a prison inmate. In *Ward v. Arm & Hammer*, 341 F. Supp.2d 499 (D.N.J. 2004), Mr. Ward thought he should be compensated for his own criminal stupidity. Ward had used the defendant’s baking soda to manufacture crack cocaine. He sued Arm & Hammer on the theory that they owed a duty to warn him of the dangerous consequences of the criminal misuse of baking

soda, including the fact that the criminal misuse was illegal, and would land him in a federal correctional facility for 200 months! Judge Chesler ruled that the manufacturer had no duty to warn the inmate (who now has nothing better to do than to bring frivolous lawsuits) about something he already knew—that the ingestion of crack cocaine is harmful and unlawful—and that manufacturers generally have no duty to warn of the potential consequences of criminal misuse of their products. What a breath of fresh air!



It's Just Horse-Sense

With unbridled determination the New York Appellate Division, First Department, applied equitable jurisdiction to divide insurance proceeds between the owner and the lessee of – of all things – a recently demised horse. The horse was leased for two years, the rent being \$15,000 per year, with an option to purchase upon notice to the owner. Neither party had an obligation to insure the steed, but the lessee did so, insuring the horse's value of \$55,000. The poor animal died in a fire 111 days before the end of the lease and before the lessee gave notice of intention to buy. A dispute arose between the owner and the lessee over the entitlement to the insurance proceeds, and the insurer commenced a state-court interpleader action, depositing the proceeds into court and obtaining a discharge of its obligations.

The owner and lessee fought in court over the proceeds. The Appellate Division ruled that

the lessee was not presumed to be entitled to the proceeds just because it bought the policy. In fact, the court awarded the lessee only 111 days worth of annual rent, and the premium paid, for a total of \$6,685. The rest went to the owner, who paid nothing for the insurance (although the lessee was repaid the premium amount) but lost his horse.

This sounds like a case from the 1920s. Actually, it was decided on November 26, 2002, in *Agricultural Ins. Co. v. Matthews*, 749 N.Y.S.2d 533 (1st Dept. 2002). And the court's reasoning is not unique to horses – it could apply just as well in a truck or trailer lease if the contract does not spell out the rights and obligations of the parties in regard to insurance.

