

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?

Contact us at 201-848-6000, or email us at lan@jclane.com.

New York Federal Court Clarifies What Pleading Triggers Removal From State Court

The federal court in Manhattan ruled on June 18, 2007, in *Pinson v. Knoll, Inc.*, that the thirty-day time frame for removing a state court action to federal court commences upon receipt of plaintiff's Demand for Damages, rather than the complaint. New York state court practice rules now prohibit the inclusion of a specific dollar-amount demand, or *ad damnum*, in a personal injury complaint. The actual demand comes to defense counsel in response to the defense's request for a Demand for Damages. Only then can defense counsel assert that the amount in controversy exceeds \$75,000, the amount required for entry into federal court.

In *Pinson*, the complaint contained only a generalized description of the damages. The plaintiff's Demand for Damages, for \$3.5 million, was served six months after the complaint. Defendant filed its notice of removal

within thirty days of receipt of the Demand for Damages. Plaintiff moved to remand to state court arguing that the removal should have been filed within thirty days of service of the complaint. The district court disagreed. When the complaint has no *ad damnum*, the removal time is not triggered until receipt of the Demand for Damages. The case was properly removed to federal court. This is a helpful clarification in New York.

New Jersey has had a similar *ad damnum* rule in state courts for years. Most federal judges have permitted removal using service of the complaint as the trigger. We need a clear consensus, however, as to whether a defendant may wait until receipt of a Statement of Damages, as it is called in that State.

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Loading and Unloading Coverage Is Back: New Jersey Supreme Court Reverses *Potenzzone*

When a stranger to an insurance policy happily finds that it is entitled to loading/unloading coverage, is that coverage limited to the \$15,000 statutory minimum or to the full policy limit? The Supreme Court of New Jersey holds that the full limit is available, in *Potenzzone v. Annin Flag Company*, decided June 6, 2007. The high court reversed the decision of the Appellate Division which limited the coverage to \$15,000 (highlighted in our Holiday 2006 issue).

The loading/unloading insured is typically

a shipper, consignee or warehouse which negligently causes injury during loading or unloading of a truck. When sued, it looks to the insurer for the trucker whose truck is being loaded. The insurer points to a standard exclusion that limits loading/unloading coverage to the Named Insured. Since the exclusion violates public policy, it is entirely void, says the Supreme Court. The policy should be read as if it were not there, resulting in full coverage for the loading/unloading insured, who is usually a complete stranger to the policy.

Personal and Personnel

Firm Happenings

Jean A. DiPaolo has joined our firm as an associate. Jean is a graduate of Bryn Mawr College, in Pennsylvania, and Pace University School of Law, in White Plains, New York, where she was named a Ranking Scholar in 2003. Jean is admitted to practice in New York and New Jersey, and joins us with a solid background in defense litigation and trial and appellate practice in insurance defense, transportation, construction and personal injury law. Please welcome Jean to our practice.



Katherine M. Dunn, known to us as Katie, has had much to celebrate recently. Katie worked with our firm all last year as a part-time law clerk while finishing law school at Quinnipiac University School of Law in Connecticut. A graduate of the University of Maryland with a degree in Government and Politics, Katie received her law degree from Quinnipiac in May of this year and immediately commenced her bar exam studies, taking the New Jersey and New York exams in July, and then joining our firm on a full-time basis.

Katie has also had one more celebration, *to-wit*: her nuptials, on Saturday, September 8th. We are all very happy for her and her husband, Stan. Following a Hawaii honeymoon, Katie will be back hard at work.

Legal secretary Kelly Anne Lane chose an unusual summer vacation. She and her boyfriend David McDonald traveled to the Dominican Republic with a mission group, Foundation for Peace, to provide medical help, construction, water purification, Bible school and other assistance to people in this incredibly impoverished part of our world.

Recent Victories

Peter Bobchin obtained complete indemnity, including reimbursement of our legal fees, for our client, an ocean carrier, in a serious personal injury case involving intermodal transportation. The indemnification was based upon the terms of the Equipment Interchange Agreement entered into between the ocean carrier and the local delivery trucker. The case was *Bachman v. Liranzo, et al.*, decided by the Superior Court of New Jersey.

John Lane has just received a favorable decision in a complicated trucking cargo loss case, with the federal court agreeing that missing tariff and bill of lading terms can be supplied by a course of dealing over three years and involving 670 earlier shipments. For more information and a copy of the decision in *Travelers Property Casualty Company v. A.D. Transport Express, Inc.*, visit our website at www.thelanelawfirm.com.

Injury at a Minor League ballgame: “Get over it,” say New Jersey Courts



Attending a minor league baseball game is great fun. Not so, according to Joel Shenman, who was hit in the shoulder with a baseball thrown while two ballplayers were playing catch in the pre-game warm-up. Joel sued the league, both teams and the ballpark owner and was quickly thwarted by the New Jersey courts. Applying tongue-in-cheek logic, the courts held that the traditional immunity ex-

tends to “pre-game warm-ups, post-game celebrations, time-outs, and transitions from inning to inning.” Joel will get over his shoulder pain. Now he must get over his painful loss in *Shenman v. The Atlantic League*. The decision comports with recent legislation too new to apply to Mr. Shenman’s case.

Choice of Law Really Does Matter

It sounds like a riddle. A private plane flying from Vermont to New York crashes in Connecticut, killing the pilot and passenger. Which state's wrongful death statute governs the measure of damages? In *Rehl v. Lear Romec*, a New York federal court had to decipher how a Connecticut state court would decide whose law—Connecticut's or New York's—would apply. Your lawyer will tell you that it makes a big difference. In *Rehl*, New York's more conservative law won out. The facts are dizzying.

Connecticut's wrongful death statute provides a recovery for a decedent's family members for non-economic loss – their emotional pain and grief. New York law limits recovery to economic loss. If an adult child dies leaving no economic dependents, the recovery for grieving parents is rather limited under the New York law, and far more generous in Connecticut.

Matthew Rehl was a private pilot flying himself and a friend from Vermont to New York, Rehl's home state, when an engine fire in the Piper Saratoga, caused by a defective fuel pump, resulted in a fatal crash near Waterbury, Connecticut. Rehl's parents filed a lawsuit in federal court in Connecticut against various defendants who manufactured or refurbished components or who serviced the plane. The suit was transferred to the Eastern District of New York. That court had to decide whether New York's restrictive wrongful death law or Connecticut's broader law would apply. To do so, the New York federal court was required to apply Connecticut's conflict-of-law rules be-

cause the case was originally filed in Connecticut. Connecticut is now following the "most significant relationship" test.

Piper Aircraft, a Delaware company located in Florida, built the plane. Lycoming Engines, part of a Rhode Island business incorporated in Delaware, made the engine. Neither was included in the federal suit. The defective fuel pump was originally made by Lear Romec, a division of Hydro-Aire, a California corporation based there. Lear Romec is based in Ohio. The plane was owned by M.K. Two, of Farmingdale, New York, the plane's home base. Master Aviation, a Delaware corporation located in Connecticut, maintained the plane. At Master's suggestion, M.K. Two hired Teledyne Mattituck, a New York-based Delaware corporation, to overhaul the engine. This included installing an overhauled fuel pump manufactured in 1978 by Lear Romec and overhauled by Kelly Aerospace Power Systems, in Alabama. Teledyne completed the overhaul and shipped the engine to Master Aviation in Connecticut, who then installed it in the plane two months before the crash. Rehl's parents are New Yorkers.

Applying Connecticut's guidelines, the New York federal court decided in favor of New York law (and the defendants) because New York has the most significant contacts and its public policy interests are most at stake. In *Rehl*, the choice-of-law outcome really did make a difference.

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New Jersey Considers Expansion of Wrongful Death Damages

It will do so if the trial lawyers and the State Bar Association have their way. The Assembly, the lower house of the Legislature, is considering a bill that would permit non-economic damages sustained by surviving family members, such as grief and pain and suffering at the loss of a loved one, to be recoverable in a wrongful death claim. Presently, the New Jersey Wrongful Death Act permits only economic damages for the loss of a loved one, similar to New York's law. The supporters argue, correctly, that the loss of a young child or an eld-

erly relative often brings little compensation, because they generally are not providing financial support to the survivors.

The bill also has the support of AARP and Mothers Against Drunk Driving. It is opposed by insurance, medical and business groups in New Jersey. There was discussion of having a \$250,000 cap to such damages, something that may yet occur. The bill is now moving toward a vote before the full Assembly. We will watch it closely and report further.





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New Jersey Supreme Court Rules that an Auto Passenger May Owe a Duty to Assist a Motorcyclist Hit by the Car

Hard facts make bad law. They also give the New Jersey high court the opportunity to find tort duties not previously known. The Court carefully exhorts that it is formulating “no rule of general application” but limits its decision to the facts of this case. Nevertheless, the Court holds that by not summoning help for the motorcyclist - later hit and killed by another motorist as he lay on the road - “a reasonable jury could find defendants breached a duty which proximately caused the victim’s death.” *Podias v. Mairs*, decided June 26, 2007.

Mr. Podias was struck while riding his motorcycle in the early morning hours on the Garden State Parkway, by a car driven by Michael Mairs. In his car were defendants Swanson and Newell. The Court says the trio had been drinking, and indeed Mairs had a blood alcohol content above the legal limit. After the accident the three fled the scene without summoning any help for Mr. Podias despite the fact that they had cell phones and indeed used them for numerous other calls. In the dark night on the Parkway, another motorist accidentally struck Mr. Podias, resulting in his death.

In the ensuing wrongful death suit against Mairs, Swanson, Newell and others, the lower courts held that the passengers in the Mairs car owed no duty to Mr. Podias. The Supreme Court reversed the dismissal of the complaints against Swanson and Newell and remanded the case for trial.

The Court looked to decisions from California and Minnesota to support the expansion of duty: Where the defendant owes no duty to render assistance, “he is at least required to take reasonable care that he does not prevent others from giving it.” Even where the original danger was created by innocent conduct, “there may be a duty to make a reasonable effort to give assistance and avoid further harm” to the helpless victim.

Where this case will go remains to be seen. This is a court which embraces in its opinion the expansion of duties, involving “evolving notions of duty, which are no longer tethered to rigid formulations or static historical classifications.”

