

THE LANE LAW LETTER

Law Offices of John C. Lane
The Grace Building, 191 Godwin Avenue, Wyckoff, New Jersey 07481

New York Court of Appeals Expands Tort of Conversion to Include Electronic Data

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.

In *Thyroff v. Nationwide Mut. Ins. Co.*, decided March 22, 2007, the New York Court of Appeals entertained a “certified question” from the U.S. Court of Appeals for the Second Circuit. The question was stated succinctly: “is a claim for the conversion of electronic data cognizable under New York law?” The New York high court concluded that it is.

Louis Thyroff was an exclusive insurance agent for Nationwide. In his work he used company hardware and software to maintain customer information, as well as personal e-mails, correspondence and other data pertaining to his customers. In September 2000, his agency contract was terminated, and he was denied all access to the computer system and the data. Thyroff sued Nationwide in federal court for conversion of his electronic data. The district court, exercising diversity of citizenship jurisdiction, was bound by the venerable *Erie v. Tompkins* doctrine to follow New York law. That court held that New York law does not recognize the tort of conversion when the property converted is not “tangible.”

Mr. Thyroff appealed to the Second Circuit, which recognized this as a novel issue in New York. It thus used the “certified question” procedure under New York law to refer

the question to the New York high court.

The New York Court of Appeals relished the opportunity, quoting Professor Prosser that “The hand of history lies heavy upon the tort of conversion.” The court described that long history, from the days that the thief, when caught “was straightaway put to death” and the goods recovered, through the old English civil procedure (an action in *trespass de bonis asportatis*), and on to the modern jurisprudence. Conversion had always been directed toward interference or misappropriation of “goods” that were tangible, personal property, not “intangible property.” The court referred to cases applying the “merger doctrine,” whereby, for example, conversion of stock certificates may be treated as conversion of the shares represented by the certificates. But could the definition be expanded to information stored digitally in a computer program?

The New York high court answered, “Yes,” expanding the tort of conversion to include electronic records. Here, the customer contacts and other data have value to Mr. Thyroff whether they are on paper or stored in digital form. Thus, the electronic records are subject to a claim of conversion in New York.

The Firefighters’ Rule is Really Dead in New Jersey!

In our Summer 2006 edition we reported that the Fireman’s Rule — a common-law rule that prohibits policemen and firemen from suing for injuries sustained responding to an emergency — had seemingly been eliminated by a 1994 statute. The statute had suffered through a dozen years of judicial interpretation. Now the Supreme Court of New Jersey has ruled definitively in *Ruiz v.*

Mero, 189 N.J. 525 (March 13, 2007).

The opinion is eighteen pages long but the holding is concise: “The plain and extremely broad language of the statute appears to have abolished” the firefighters’ rule. A first responder may sue for injuries “sustained while confronting an emergency on the owner’s premises.”

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Personal and Personnel

Continuing Education

John Lane attended the recent biennial Transportation Megaconference sponsored by the American Bar Association, in New Orleans. This educational program was especially well-planned and provided valuable topic segments, ranging from an in-depth presentation on closed-head injuries to a lively discussion on the early settlement of catastrophic casualty claims, and many topics in between. John also had the opportunity to visit with friends from places far and wide.

Fostering Education

Peter Bobchin recently had the opportunity to chaperone his daughter's school trip to Historic Williamsburg and Jamestown. The trip was part of the Samsel Upper Elementary School, TAG (Talented and Gifted) program.

Springtime Education

Some important Murphy's Laws to remember as the weather gets warmer...
 Your best golf shots always occur when you are playing alone.
 The worst golf shots always occur when you are playing with someone you are trying to impress.
 The fish are always biting...yesterday!
 as seen on <http://www.murphys-laws.com>

Punitive Damages in the Workplace, As Elsewhere, Must Fit the Offense

Punitive damages should not go beyond the amount required to specifically deter the defendant.

In *Tarr v. Bob Ciasulli's Mack Auto Mall*, decided by a New Jersey appellate court in February 2007, the court held that a punitive damage award may not be enhanced "for general deterrence purposes." This case involves a "pervasive and extensive" sexual harassment endured by plaintiff, as found by a jury. In an earlier appeal (following the first trial), the Supreme Court of New Jersey held that in discrimination cases, the victim may recover all natural consequences of the wrongful conduct, including emotional distress and mental anguish, even without other injury or damage. On retrial, plaintiff was awarded \$25,000 in compensatory damages, \$85,000 in punitive damages, and attorneys' fees of \$165,229.39. The appellate court deemed that to be too much punishment.

The gist of the issue is that the jury was instructed that its award was "to punish the defendant and to deter the defendant and others from similar wrongful conduct." [Emphasis supplied]. It is the deterrence of others' language that gave concern to the appellate court. While any punitive or "exemplary" damage award may generally deter others from similar wrongdoing, there is a difference between that natural conse-

quence and permitting the jury to increase the award "beyond the amount required to specifically deter the defendant." The latter is improper.

The appellate court also held that it was plain error for the trial judge to allow plaintiff's attorney to argue in summation that the punitive damage award will give the jurors an "opportunity to send a message." In passing New Jersey's Punitive Damage Act in 1995, the Legislature intended a more restrictive standard in regard to awarding of punitive damages. This award was vacated, and the case was sent back to the trial court for what will be the third trial of the punitive damage portion of the case.

Ironically, the appellate court found no fault with the amount of the attorneys' fees (twice the punitive damage award) except for \$23,000 for the earlier appearance in the Supreme Court of New Jersey. Plaintiff's attorneys failed to make timely application in the Supreme Court for the award of those fees, and thus the part of the verdict for attorneys' fees was reduced by that figure. All-in-all, the defendant seems to have enjoyed a Pyrrhic victory.

“Illicit Transportation” Is More Than Just Carrying Illegal Cargo

This case illustrates the importance of complying with all requirements of federal law to obtain operating authority before sending your truck out on the road in interstate transportation: you may lose your insurance coverage because the truck is being used in an “illicit trade or transportation.” That is what happened to P.K. Carrier Corp. in *Federal Ins. Co. v. P.K. Carrier Corp. v. Certain Underwriters at Lloyd’s, London*, decided by the U.S. District Court for the Southern District of New York, on February 13, 2007.

P.K. Carrier applied for interstate motor carrier authority from the Federal Motor Carrier Safety Administration (FMCSA), at the same time obtaining an insurance policy from Lloyd’s covering physical damage for a Freightliner tractor for up to \$45,000. On May 12, 2001, P.K. Carrier received a letter from FMCSA advising that their application had been received and accepted but explic-

itly stating that the letter does not constitute authority to operate. Four additional requirements had to be met, within 20 days, in order to obtain a certificate of authority and to commence operations. Just two days later, P.K. dispatched a truck from New Jersey to New Mexico. The truck overturned in Arkansas two days into the trip, causing extensive damage. Lloyd’s issued a disclaimer letter invoking the exclusion for “illicit trade or transportation.” P.K. Carrier sued Lloyd’s, arguing that the word “illicit” was intended to apply in a different context, such as carrying contraband cargo.

The district court sided with Lloyd’s, applying a dictionary definition of “illicit” as “illegal or improper”: “Even under a strict and narrow interpretation, the operation of a vehicle without proper authorization constitutes illicit transportation.” P.K. Carrier’s impatience cost them the insurance coverage.

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An Admiralty Case About a Train Robbery in Denver

A manufacturing company in Colorado ordered some airplane flight simulator parts from a company in Rotterdam. After the parts arrived at a Denver train depot, the buyer picked them up but never paid for them. Lawyers would call that a “conversion,” a type of theft. The seller in Rotterdam sued the ocean carriers, in New York federal court, for the negligent release of the expensive goods at the train yard in Denver, to the absconding buyer. To decide the case, *Rexroth Hydrauline B.V. v. Ocean World Lines*, the federal district court applied federal maritime law to limit the loss to \$500 for each of the 27 packages. Why apply maritime law to a railroad theft? The answer is in the details.

Rexroth hired Ocean World Lines (OWL) to arrange the entire shipment to Englewood, Colorado. OWL issued a through ocean bill of lading which incorporated the Carriage of Goods By Sea Act (COGSA) and its statutory limitation of liability of \$500 per package of goods. The OWL bill of lading had a clause extending these protections to any others it might hire to perform the transportation. That included the actual ocean carrier, which

carried the shipment to Houston and then arranged railroad shipment to Denver.

Rexroth discovered it had never been paid for the goods and issued instructions to OWL to put a hold on them in Denver. OWL agreed, as did the ocean carrier and its affiliates handling the inland arrangements. They admittedly muffed their assignment, however, letting the buyer pick up the goods and never pay for them. When Rexroth sued the carriers for the full value of the converted goods, the federal court applied maritime law, rather than the Carmack Amendment applicable to railroads, because the railroad had not breached any agreement and was not involved in the case. The only transportation agreements involved were ocean bills of lading which incorporated COGSA’s \$500 package limitation. That limitation protected the defendants.

And so it was that a federal court decided an admiralty case about a “train robbery” in Denver, on a shipment from Rotterdam to Colorado, via the Port of Houston. Why was the case brought in New York? We don’t know.





*The Grace Building
191 Godwin Avenue
Wyckoff, NJ 07481
Phone: 201-848-6000
Fax: 201-848-6808
Email: lan@jclane.com*

*Visit us on the Web at
www.thelanelawfirm.com*

Ferry Ticket Restriction Cannot Be Enforced

Lorraine Ramsey fell while on a ferry, the M/V Cape Henlopen, riding from Cape May, New Jersey, to Lewes, Delaware. She brought suit against the Delaware River and Bay Authority, the ferry operator, in New Jersey state court, well within that state's two-year statute of limitations. Her complaint was thrown overboard because the reverse side of her passenger ticket required that suit be brought within *one* year, and only in a Delaware court. The Appellate Division reversed, on December 14, 2006, agreeing with Lorraine's clever lawyer that the restrictions on the ticket were unenforceable. The decision is published in *Ramsey v. Delaware River and Bay Authority*.

Undaunted by the lower court defeat, Ms. Ramsey's lawyer appealed on the ground that the restrictions on the ticket should have been approved by the 15 commissioners of the Authority. The Authority argued that the ticket provisions were part of the

ministerial act of entering into a routine contract, not requiring full board authority. The Appellate Division sided with Lorraine and her husband. The court noted that a shortened limitation period in a passenger ticket is permitted under the federal maritime law, as is a venue requirement. Here, however, these ticket provisions "in one swoop" affected many thousands of ferry passengers each year. They are "so significant" that they required action by the commissioners. Without that, the restrictions are *ultra vires* and unenforceable.

Seems silly to us. Keeping heads in good working order is important, too, but we doubt the ship fitter waits for authority from the commissioners before making his appointed rounds. We'll watch for an appeal to the Supreme Court of New Jersey on this one.

