New York Insurance Association

Legal Roundtable Key Takeaways

The association held a virtual roundtable focused on emerging trends in New York's legal scene on Thursday, March 21. The program featured defense and coverage attorneys from NYIA member firms: Barclay Damon LLP; Debevoise & Plimpton LLP; Hoffman Roth & Matlin, LLP; Hurwitz Fine, PC and Mura Law Group, PLLC. As an additional benefit to members our firms have put together some key points from their presentations. Below are the topics covered in the recent roundtable. Feel free to reach out to our presenters with any questions.

- **Defense Bar Motions: Fraud, Improper Anchoring Tactics and Litigation Funding**
- **Late Notice and Prejudice**
- **Social Inflation: Nuclear Jury Verdicts and Plaintiff Advertising**
- **Child Victims Act Claims: Defense and Coverage Issues**
- **The Expanding Vistas of Baseless New York Litigation Against Insurers, Their Adjusters, and Appraisers and Why It's Wayne Gretzky's Fault**

Defense Bar Motions: Fraud, Improper Anchoring Tactics and Litigation Funding

When handling suspected fraud, thoroughly investigate and then place the fraud at issue in a personal injury lawsuit by filing a motion to amend the answer to assert a counterclaim in fraud. With the recent filing of the RICO case by Roosevelt Road Re Ltd., be sure to flag cases where the plaintiff's treating physician/medical expert is a named defendant in that case. A motion in limine to permit cross-examination of the plaintiff's treating physician/expert witness on the RICO case should then be considered.

Counteract plaintiff's reptilian tactics by not allowing the reptile out of the cage with a preemptive motion in limine to preclude the plaintiff from engaging in improper anchoring tactics during any pre-summation stage of trial.

Where third-party litigation funding has been used to pay for surgeries where causation or medical necessity is at issue, consider a motion in limine to permit cross-examination of the plaintiff and the plaintiff's medical expert and/or treating physician on the use of litigation funding on the basis that it is germane to motive.

For more information, contact Joshua Hoffman of Hoffman Roth & Matlin LLP at jhoffman@hrmnylaw.com.

Late Notice and Prejudice

Third-party late notice disclaimers are tricky. An insurer's rights are not prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim. It is important to identify how your investigation and defense of the claim were

materially impaired or hindered by any delayed notice. Get specific in how your investigation, defense, and potential for early resolution of the claim were impacted, and why that cost the insurer in a irreversible way.

For more information, contact Dan Kohane of Hurwitz Fine, PC at ddk@hurwitfine.com and Ryan Maxwell of Hurwitz Fine, PC rpm@hurwitfine.com.

Social Inflation: Nuclear Jury Verdicts and Plaintiff Advertising

Nuclear verdicts (>$10 million) and thermo-nuclear verdicts (>$100 million) are driving up national averages well into the millions, and now we are seeing billion-dollar verdicts occupying the top-ten lists for the first time. These nuclear verdicts are coming from general liability claims rather than class actions. This is caused primarily by anchoring—the plaintiff's bar plants seeds for high verdicts via jury selection—and a concerted advertising effort as well as appeals to "the lizard brain" during opening and closings at trial.

Billboards advertising huge awards are targeted not only at potential clients but at the potential jurors who issue these verdicts. This tactic, combined with careful questioning in voir dire, can stack a jury with those keen on lashing out on insurance companies to protect individuals. Anchoring is further precipitated by the defense bar sometimes not giving a number at trial, which leaves juries without a counterpoint.

There is a perception that the lack of regulation around litigation funding has also impacted verdicts. As a solution, the defense bar should organize itself differently from the plaintiff's bar, endeavoring to anchor its cases by providing numbers at trial and scrutinizing cases, and use more mock juries. We are living through an age of populism, and the public ultimately pays the price on nuclear verdicts through higher insurance premiums, which has led to more angry and more distrustful jurors.

For more information contact, Eric Dinallo of Debevoise & Plimpton LLP at edinallo@debevoise.com.

Child Victims Act Claims: Defense and Coverage Issues

Laws enacted in 2019 amended the statute of limitations for certain abuse claims, and revived certain claims (commonly called the Child Victims Act). The Civil Practice Law and Rules now provides that a victim of abuse under the age of 18 may bring a claim until age 55; and if the victim was over 18 at the time of abuse, they may bring claim within twenty years.

Time-barred claims: if the victim was under 18 at time of abuse, but the statute of limitations expired, and the claim was revived, it could be brought within a 2-year window from August 2019 to August 2021.

The 2022 Adult Survivors Act revived time barred claims for victims over 18 at the time of abuse, allowing them to brought within a one year window from November 2022 to November 2023. Typical claims include assault & battery and negligence claims against the perpetrator

(although most alleged perpetrators don't have assets or applicable insurance) and negligence against employer/organization/school – negligent hiring, supervision, retention.

To establish a cause of action based on negligent hiring, negligent retention, or negligent supervision, the claimant must show that employer knew or should have known of the employee's propensity for the conduct which caused the injury (i.e. actual or constructive knowledge of propensities). See, e.g., *Nellenback v. Madison County*, 2024 N.Y. App. Div. LEXIS 97 (3rd Dep't, January 11, 2024)

For schools the same standard applies. Did school have actual or constructive knowledge of employee's propensities? Schools also have a duty to protect students because of in-loco parentis status: "The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians." The standard for determining whether a school has breached its duty is to compare the school's supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information.

A school "has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision." See, e.g., *J. B. v. Monroe-Woodbury Cent. Sch. Dist.*, 2024 N.Y. App. Div. LEXIS 855 (2nd Dep't February 14, 2024)

Coverage frequently turns on whether a policy can be identified, given the timeframes involved. The insured has the burden of proof to establish the existence of an insurance policy; the insurer has the burden of proof to show any exclusions—which can include limits; an insurance policy may be proven by secondary evidence—such as premium records, policy numbers, claim documents, excess policy references, etc. See, e.g., *Emons Industries, Inc. v. Liberty Mut. Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982); *Gold Fields Am. Corp. v. Aetna Cas. & Sur. Co.*, 173 Misc. 2d 901 (Sup. Ct., New York Co., 1997); *Burt Rigid Box v. Travelers Prop. Cas. Corp.*, 302 F.3d 83 (2nd Cir. 2002)

Pending legislation would create a Child Victims Act Fund of $200 Million for public school districts and voluntary foster care agencies to apply for reimbursement for judgments or settlements paid in a Child Victim Act lawsuit that are not covered by insurance—to be funded from the State's general fund.

For more information contact, Joseph Wilson of Barclay Damon LLP at jwilson@barclaydamon.com.

The Expanding Vistas of Baseless New York Litigation Against Insurers, Their Adjusters, and Appraisers and Why It's Wayne Gretzky's Fault

For what likely are several reasons, first-party and third-party litigation against insurers has increased over the last few years in both the variety of insurer-related defendants being sued and the variety of theories of liability being asserted against those defendants. Where once insurers faced fairly generic and standard causes of action alleging breach of contract and seeking

declaratory relief, policyholder and personal injury plaintiffs' counsel have more recently attempted to plow new legal ground in New York.

If confronted with one of these novel actions or proceedings, insurers and the insurer-related defendants—independent adjusters, appraisers, etc.—should consider consulting with experienced coverage litigation counsel to evaluate the viability of the particular (and possibly peculiar) claims being asserted against them and then, in order, (1) demand the voluntarily discontinuance of any such claims and then, if plaintiff's or petitioner's counsel declines to discontinue, (2) file a pre-answer motion to dismiss the unviable claims. Front-loading defense costs may, in the end, save defense and indemnity expense on the back end. Vigorously defending against and succeeding in having such novel claims dismissed on motion could also deter or dissuade the same or different counsel from re-plowing the same, barren field.

For more information, contact Roy Mura of Mura Law Group, PLLC at roy.mura@muralaw.com.