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TO: ALL DELAWARE CLAIMS SUPERVISORS*

FROM: HECKLER & FRABIZZIO

DATE: NOVEMBER 15, 2002

RE: CURRENT DEVELOPMENTS IN WORKERS' COMPENSATION, LIABILITY AND CASUALTY LAW

A. LIABILITY AND CASUALTY LAW:

Waters v. United States, Del. Supr., No. 69, 2001 (December 12, 2001) (Walsh, J.) -- Under Delaware law, PIP insurers may generally pursue subrogation only against the tortfeasor's liability insurer. 21 Del. C. §2118(g). In Waters, the Delaware Supreme Court ruled that where the tortfeasor is uninsured or self insured, subrogation can be pursued against the tortfeasor.

Porter v. Murphy, Del. Super., C.A No 99C-08-258 (October 2, 2001)(Cooch, J.) -- In a matter of first impression, the Superior Court was asked to determine the correct standard of proximate cause in cases of negligence followed by suicide. The court accepted the standard described in *Tate v. Canonica*, 180 Cal. App. 2d 898 (1960). Under this formulation, recovery is permitted "if the negligent wrong caused mental illness which leads to an irresistible impulse to commit suicide." The court also noted that his formulation was similar to that used to determine whether a suicide following a workplace accident was compensable under the Worker's Compensation Act.

Knight v. Statewide Ins. Co., Del. Super., C.A. No. 99C-07-331(Dec. 20, 2001) (Carpenter, J.)--Plaintiff was injured in a motor vehicle accident and was absent from work for 53 days. As a result of plaintiff's employer's sick leave policy, plaintiff suffered no lost wages. When plaintiff returned to work, plaintiff still had 37 sick days remaining. Pursuant to plaintiff's employer's sick leave policy, she was not permitted to "carry over" unused sick leave days from one year to the next. Plaintiff sought PIP benefits to reimburse her for the sick days she had used

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as a result of her injuries. Based upon these facts, the court ruled that such benefits were unavailable.

Fritz v. Yeager, Del Supr., No. 79, 2001 (February 12, 2002)--Plaintiff injured his hand while performing renovations at defendant's property. Plaintiff was using a table saw provided by defendant. The table saw's safety guard had been removed, and both plaintiff and defendant were aware of this fact. Plaintiff's injury would not have occurred had the guard been in place. The cut that plaintiff was performing at the time of the incident could also have been performed using a miter saw. A miter saw with a safety guard was available on defendant's property. Although defendant, as an individual providing chattels to another for the supplier's own business purposes, would normally have a duty to either make the saw safe, discover the unsafe condition, or warn plaintiff of the danger pursuant to Restatement(Second) of Torts §392, plaintiff had actual knowledge of the danger. Therefore, there was no duty to warn, and no liability.

Chrysler v. Merrell & Garaguso, Del. Supr., No. 38, 2001 (April 30, 2002) -- The case involves the Supreme Court's interpretation of the Delaware Statute which prohibits any agreement in a construction contract purporting to indemnify one for its own negligence. 6 Del. C. § 2704. The Statute also contains a savings clause which provides that the Statute will not void or render unenforceable policies of insurance. 6 Del. C. § 2704 (b). The issue presented to the Supreme Court was whether a provision in a construction contract which required a party to purchase insurance protecting the other party from its own negligence, was unenforceable pursuant to the anti-indemnification statute, or whether it was protected by the savings clause contained therein. The Superior Court had decided that the provision to procure insurance, and any insurance procured thereunder, was void and unenforceable as being against the public policy set forth by 6 Del. C. § 2704. The Supreme Court affirmed the Superior Court's ruling to the extent that it relieved the contractor of any direct obligation to indemnify the owner for the owner's sole negligence, but reversed the decision to the extent that it determined the owner's rights which could be asserted pursuant to the contractor's insurance policy.

Brian Keech, an employee of Merrell & Garaguso (a contractor performing work at the Chrysler plant in Newark, Delaware), was injured when a Chrysler employee, while operating a forklift, caused a fence to fall on him. Mr. Keech brought suit against Chrysler for the negligence of its employee. Chrysler brought a third-party action against Merrell & Garaguso claiming that Merrell & Garaguso, pursuant to its contract with Chrysler, was required to indemnify and defend Chrysler from all claims arising under the contract. The action further stated that Merrell & Garaguso was required to provide insurance for any such action pursuant to the terms of the contract. Pursuant to 6 Del. C. § 2704, the Superior Court determined that the indemnification provision set forth in the contract was void and unenforceable to the extent it sought indemnification for Chrysler's own negligence. The Superior Court then found that the provision requiring Chrysler to purchase insurance for Merrell & Garaguso, to the extent that it required purchasing insurance for Chrysler's own negligence, was also void and unenforceable, even to the extent that Merrell & Garaguso had purchased the appropriate insurance. The Superior Court found that Chrysler should not be able to do indirectly what it could not do directly.

The Supreme Court, after briefing and two oral arguments, affirmed that Merrell & Garaguso could not be held liable to Chrysler directly for any damages sustained as a result of Chrysler's own negligence, even if it breached the provision of the contract to procure insurance. However, it reversed the Superior Court's decision to the extent that the Superior Court attempted to delineate the rights which Chrysler may have against Merrell & Garaguso's insurer,

if Chrysler was added to its policy as an additional insured. The Court found that the savings provision in the Statute, 6 Del. C. § 2704 (b) "has meaning only if it can not be used as a shield by insurers to decline coverage for insurance once purchased and duly issued to any insured, however identified or designated." The Court reasoned that "if in fact an insurer issues an endorsement to cover the actions of a third-party in charge of a premium for that coverage, it should not be permitted to create an illusion that insurance exists."

As a result of the Supreme Court's decision, Chrysler will be able to pursue its declaratory judgment action against Penn National Mutual Insurance Company, the insurance carrier for Merrell & Garaguso.

The implications of the decision may affect both the adjusting of claims, and underwriting of policies. With respect to the adjusting of claims, once an entity is added as an additional insured, that entity will be protected, even for claims of their own negligence, by the indemnification and defense provisions of the policy, unless otherwise indicated. One defense to coverage may be, based upon the dicta of the Court, that an additional premium was not charged in adding the entity as an additional insured, and the risk was not assumed by the carrier. The more important step may be in the underwriting phase. An insurance carrier needs to be extremely attentive to the adding of additional insureds to the policy, since the coverage provided by the policy may be wide ranging. A clause in the additional insured endorsement which excludes from coverage any liability of the additional insured due to the additional insured's own negligence might be warranted, and would likely be held valid by the Court.

The reasoning applied by the Court in the case may also be applied beyond the construction contract setting. For example, indemnification provisions in Delaware, in general, are not interpreted to include indemnification for the parties' own negligence, unless the language is clear and unequivocal. However, most contracts also include a "duty to procure insurance" provision. Therefore, these insurance provisions, to the extent that the insurance is purchased, will still cover the other party for their own negligence, even if the indemnification provision does not allow the same. In any event, in any liability case involving a contract among several defendants, the pool of applicable insurance coverage may be extended, and the ability to tender a defense to another party should closely be examined.

B. WORKERS' COMPENSATION LAW:

Brooks v. Lowe's Home Centers, Inc., DeFax Case No. D60233 (IAB 12/3/01)—The Board denied employers termination petition because the medical expert for the employer emphasized restrictions that were so onerous that Claimant would not be able to find a job in the labor market within such restrictions. The Board held that employer's vocational rehabilitation specialist identified 11 sedentary positions that were not within their medical expert's restrictions; furthermore, the medical expert never reviewed those positions as being within his restrictions.

Barkley v. Johnson Controls, Inc., DeFax Case No. D60291 (IAB 1/18/02)—Claimant suffered a work-related injury to his back in 1985. Since that time he went back to work full time for the same employer. In 2000, Claimant slipped and fell on ice in a non-work related accident and filed a Petition for additional compensation due. Delaware law allows compensation for a recurrence of an injury if the impairment has returned "without the intervention of a new independent accident". The Board denied additional compensation by using a two-prong test to determine whether Claimant suffered a recurrence--first, whether the second injury was an intervening cause, and second, whether there was a change in Claimant's

condition as a result of the second injury. Here, the Board ruled that the fall (second injury) was an intervening event because there was no evidence that the original work-injury caused this fall. Therefore, the Board found this was simply a new injury and not a recurrence of disability for which the employer should be liable.

Leonard v. Playtex Products, Inc., DeFAX Case No. D60385 (IAB 3/13/ 02)—Claimant alleged a work-related injury to her cervical spine. The Board ruled that because claimant's testimony was consistent with her family doctor's records, which indicated that he saw her one week after the accident, and because there was no evidence of any other cause of claimant's injuries besides the work injury, claimant could receive benefits.

LaManna v. Daimler-Chrysler Corp., DeFAX Case No. D60264 (IAB 11/26/01)—Claimant was entitled to additional compensation for reasonable chiropractic treatment which was related to the work-related injury.

Muziol v. Daimler-Chrysler Corp., DeFax Case No. D60801 (Del. Super. 4/30/02)—The Court affirmed the Board ruling which awarded Claimant total disability for mental injury caused by harassment at the workplace. Claimant suffered anxiety and stress after being harassed by co-employees who wanted him to participate in an at-work drug ring. The Court affirmed in that the employer should have been aware of the stress and that the co-employees where the cause of his psychiatric disability.

Demello v. Howard Johnson's, DeFax No. D60417 (IAB 3/20/02)—Additional Compensation of 10.2 weeks was awarded to Claimant for disfigurement caused by work-related RSD of her right arm. The RSD caused discoloration of the skin on her hand and arm.

Serpe v. Coventry Health Care, DeFax No. D60437 (IAB 5/20/02)—Employers petition to terminate benefits was denied by the Board because Claimant still experienced cognitive problems and forgetfulness after a work-related head injury.

Arrigo v. Top City Inc., DeFax Case No. D60875 (IAB 5/31/02)—Claimant's credibility came into play when the Board denied his petition for compensation. Claimant produced evidence concerning the events of the date of accident which did not coincide with the testimony of his co-workers--there were inconsistencies in the weight of the box Claimant allegedly lifted; the witnesses also overheard Claimant complaining of a sore back before the accident occurred, and that he attempted to purchase Percocet tablets from a co-worker. The Board ruled that Claimant failed to meet his burden of proof based on these inconsistencies and also because the objective findings by the medical experts were normal.

O'Grady v. Comp USA, IAB No. 1188154 (8/30/01)—The "going and coming" rule for not being in the course or scope of employment includes a 30 minute lunch break that occurs on the sidewalk next door to the employer's premises. Injuries occurring off the premises while an employee is going to or coming from work, or at lunch time, is not compensable.

Trotter v. State of Delaware, DeFax Case No. D60825 (IAB 4/16/02)—Claimant suffered injuries, working as a volunteer firefighter, when he was assaulted by co-worker in the firehouse. The "personal dispute exception" did not prevent Claimant from receiving benefits. This exception has two elements: a willful act and personal reasons. The Board ruled that the assault was not a result of a personal dispute but, rather, a result of a work-related dispute.

Young v. Food Lion, Inc., 2002 WL 499890 (Del. Super. 2000) -- Superior Court upheld the Board's denial of permanent impairment to the knee/lower extremity. Although the claimant experienced pain, there was no evidence that she experienced a functional loss of use of her knee--no swelling, no atrophy, no gate derangement, no loss of range of motion.

Brooks v. J.C. Penny Company, Inc., 2000 WL 519911 (Del. Supr. 2002) -- The Superior Court upheld the Industrial Accident Board's finding against the carrier which exceeded the amount of compensation due under the original Order for failure to comply with an unappealed Order of the Board and pay benefits on a timely basis.

Medford v. State of Delaware, DeFax No. D60929 (Del. Supr., September 10, 2002) -- The Superior Court upheld the Board's Decision to deny a claimant's benefits for an injury where the claimant delayed accepting medication and counseling for the alleged condition and where the claimant withheld information about serious personal stressful situations that he had experienced. The claimant was a Sergeant with the Department of Corrections.

Ritchie v. Cook's Plastering, IAB Hearing No.: 1189394 (3/27/02) -- The Board dismissed the claimant's Petition for benefits arising out of a physical altercation with his supervisor because the claimant's act was reckless, deliberate and indifferent to danger pursuant to 19 Del. C. §2353(b).

McClafferty v. Acme Markets, Inc., IAB Hearing No.: 115978 -- Vocal chords are worth a total of 175 weeks for total loss of use.

Juster v. State of Delaware, IAB Hearing No.: 828117 (4/12/02) -- The Court denied the Petition of a 66-year-old claimant with 9th grade education with low back injury for recurrence of total disability finding that such disability was due to indulgent/volitional behavior such as tobacco use and obesity, as opposed to a progression of the work accident/low back injury.

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