CETRULO & CAPONE LLP

INSURANCE INDICATOR

VOLUME III, No. 11 November 2009

MA – NO "FOWL" PLAY; PLAINTIFF'S CASE AGAINST TURKEY PAN MAKER MAY PROCEED

Plaintiff was busy in his kitchen cooking a holiday turkey for his family in an E-Z Foil Brand Large Pack N' Roast Roaster with no handles. Once the 18 pound turkey was done, the plaintiff took it out of the oven to put it on a platter. The pan collapsed and the hot juices spilled over the plaintiff, causing severe second and third-degree burns. Plaintiff filed suit and asserted claims for negligence and breach of warranty against both Pactiv, the pan's manufacturer, and Star Market, the store where he bought the pan. Both defendants moved for summary judgment.

The judge considered the evidence in the case. The label on the pan indicated that it was both "sturdy" and "reusable" and that it could support up to a 20 pound turkey. In small print it also cautioned that the bottom of the pan should always be supported. Pactiv also manufactured another type of pan with handles specifically designed to minimize the danger of spillage imposed by the pan's collapsing. This evidence, combined with the question of whether the warning was adequate, made the case inappropriate for summary judgment. "It is within a jury's function to evaluate the location and size of writing on the label and decide whether the defendant failed to adequately warn the consumer that this pan would collapse with just turkey juices in it." Casey v. Pactiv Corp., 2004 WL 1429967 (Mass. Super. 2004).

MA – PLAINTIFFS MAY NOW ASSERT MEDICAL MONITORING CLAIMS

In October, the Massachusetts Supreme Judicial Court decided the case of Donovan v. Philip Morris USA, Inc., 2009 WL 3321445 (Mass. 2009). In Donovan, the plaintiffs were lifelong smokers who had not yet developed lung cancer, but who claimed that cigarette smoking had caused and will continue to cause damage and injury to the tissue and cellular structure of their lungs. For that reason, the plaintiffs claimed that they were entitled to "reasonable expenses incurred for medical care and nursing in the treatment and cure of the injury."

The SJC agreed and held that, "the expense of medical monitoring is [] a form of future medical expense and should be treated as such." In order to be entitled to medical monitoring, plaintiffs must be able to prove certain factors, the most important of which is that exposure to the toxic substance caused, "subcellular changes that substantially increased the risk of serious disease, illness, or injury for which an effective medical test for reliable early detection exists." The Donovan case effectively creates a new cause of action in Massachusetts for medical monitoring.

Cetrulo & Capone LLP, an AV rated law firm, has lawyers admitted to practice across New England and in New York. We defend insureds and represent their insurers in areas of general liability, construction, toxic torts, environmental, employment, product liability, personal injury, professional liability, insurance coverage in state and federal trials and appeals, arbitration, mediation and ADR. The best solutions require the best representation.

BOSTON OFFICE

Two Seaport Lane
Boston, MA 02210
617.217.5500
617.217.5200 Fax

NEW YORK OFFICE

111 Broadway
New York, NY 10006
212.635.2230
212.635.2239 Fax

PROVIDENCE OFFICE

321 South Main Street
Providence, RI 02903
401.274.7850
401.274.9670 Fax

CONNECTICUT OFFICE

195 Church Street
New Haven, CT 06150
203.909.6498
203.909.6499 Fax

Cetrulo & Capone LLP

congratulates

James E. Carroll

on his selection as a Fellow of The Litigation Counsel of America, a trial lawyer honorary society whose membership is limited to less than one half of one percent of all American lawyers.

RI – LEAD PAINT PLAINTIFFS NOT ENTITLED TO MEDICAL MONITORING

In 1999, two year-old Alexander Murillo was diagnosed with lead poisoning after being exposed to lead paint that was present in the house that his family was renting in Pawtucket. The Rhode Island Department of Health performed an inspection and confirmed the existence of lead paint. Thereafter, Murillo's mother filed suit on his behalf and asserted claims for negligence, negligent misrepresentation and omissions, and punitive damages against the owner. She also claimed she was entitled to the costs of her son's future medical monitoring.

The defendant filed a motion in limine and sought to prevent the plaintiff's expert doctor from testifying regarding the necessity of medical monitoring. The doctor was going to testify that, due to Murillo's lead exposure, he was in a higher risk category for kidney disease, hypertension, and cardiovascular disease. Both parties cited to the recent Massachusetts decision of Donovan v. Philip Morris.

Judge Gibney ultimately ruled that, because Murillo did not exhibit any physical manifestations of the conditions for which he was allegedly at a higher risk for developing, the likelihood of him contracting a future medical condition was only speculative. It was "far from certain that Murillo [would] require future medical care due to his lead exposure." Furthermore, Rhode Island law does not allow for "medical monitoring for a possible, yet unmanifested, future harm." Judge Gibney also noted that Donovan was an instructive case and that it supported the Court's decision. "Unlike the Donovan plaintiffs, whose lung tissues exhibited changes that warned of potential cancers, Murillo's kidneys, heart, and nerves do not present any physiological changes indicative of future harm." Miranda v. DaCruz, (Providence Superior Court) (October 26, 2009).

CT – DECLARATIONS PAGE INSUFFICIENT TO PROVE EXISTENCE OF INSURANCE

An employee sued her employer for false imprisonment, intentional infliction of emotional distress, negligence, and other claims after a masked gunman entered the employer's home office and bound, gagged, and blindfolded the employee while threatening her and her family's life. She then filed an application for prejudgment attachment of her employer's property. At the attachment hearing the employer produced the declarations page of his umbrella insurance policy, which showed he had $1.3 million worth of coverage. The employee's application was therefore denied and she appealed.

On appeal, the Court noted that the plaintiff had shown probable cause that she would recover for emotional distress. More importantly, the defendant had not sufficiently proved that he had adequate insurance to cover a judgment against him. First, the actual insurance policy was never entered into evidence. Second, the insurer had issued a reservation of rights letter with respect to all counts of the plaintiff's complaint. Therefore, the lower court's decision not to issue a prejudgment attachment was unsupported by evidence and clearly erroneous. The Court noted that, "a realistic possibility exists that there may not be insurance coverage… especially in light of the reservation of rights."

Because the defendant had not met his burden of proof to show that he possessed insurance to cover a potential judgment against him, the Court reversed the lower court's decision and issued a prejudgment attachment for $250,000. Socci v. Pasiak, 978 A.2d 96 (Conn. App. Ct. 2009).

For further information, please Contact
James E. Carroll, Esq.
617.217.5203
Or
Bert J. Capone, Esq.
617.217.5201

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.