

Dedication to serving the needs of its clients has been the backbone of Gibson & Behman, P.C. since its founding in 1987. G&B prides itself on providing progressive and economical solutions to the needs of clients in all areas of the firm's practice. We take a macro view of our clients' needs to address root causes of issues and to formulate plans to avoid future problems.

As a national mid-sized firm with offices throughout the northeast, in Florida and California we are of sufficient size to service all of our clients' needs, but remain small enough to provide personal service and attention to each of our clients no matter the size or scope of the issues presented to the firm.

Our proven litigation track record and our ability to analyze trends in the legal community provide confidence to our clients and has allowed us to develop a reputation as zealous advocates. We strive to excel in all areas of our practice with client satisfaction, as always, our paramount goal.

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About our Newsletter

The Gavel is a publication of Gibson & Behman, P.C. Articles are written by the firm's attorneys and are not intended as a substitute for professional consultation or legal advice on a particular case. If you would like to be on our mailing list to receive future issues of The Gavel, please contact us at 1-800-372-1443.



We are pleased that the demand for our services in Florida has necessitated the opening of a second office to best serve the insurance industry. G&B has expanded its national presence to include our newest location located in Boca Raton.

Daniel P. Gibson
and Scott R. Behman

MASSACHUSETTS BECOMES THE ONLY STATE IN THE NATION TO MANDATE AN AWARD OF TREBLE DAMAGES FOR ALL EMPLOYER WAGE AND HOUR LAW VIOLATIONS

Massachusetts will once again stand alone in enacting monumental legislation. Effective July 13, 2008, Chapter 80 of the Acts of 2008 (formerly, Senate Bill No. 1059) will mandate treble damages for all Massachusetts wage & hour violations. This legislation represents a sentinel shift to the landscape of employment litigation in Massachusetts. Previously, awards of treble damages were at the court's discretion and saved only for cases where employer's violations were egregious. Under the old law, employers could avoid multiple damages by demonstrating good faith attempts at compliance.

That was then, this is now. Now as a matter of course, employers will be subject to treble damages should any violation of wage and hours laws be found. Employers are defenseless. Good faith attempts and unintentional mistakes will no longer provide employers a safe haven from multiple damages.

Given this strict liability standard coupled with the fact the employees are already entitled under existing law to attorneys' fees and costs, plaintiff employees are afforded even greater leverage in filing and settling any potential claim, frivolous or not. Employers bear the onus and must be vigilant in ensuring strict compliance with prescribed laws dealing with minimum wages, hourly and overtime pay, payment of bonuses and commissions, and classifying employees from independent contractors among other legal matters.

This area of the law is complex and obviously changing drastically by each passing day. Employers, small and large, who have concerns and wish to ensure compliance with Massachusetts law should contact Gibson & Behman, P.C. for a consultation.



The General Court Overrules the Supreme Judicial Court: Treble Damages No Longer Discretionary

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Icy Parking Lots: No Relief for New England Plaintiffs

Potential New England plaintiffs were dealt a heavy blow in Worcester County. Superior Court Justice Peter W. Agnes, in Loren Tisdale v. Leominster Donuts, Inc. et al., allowed a defendant proprietor's summary judgment motion after a patron was injured from slipping on an ice patch in the defendant's parking lot. The ice patch had formed from runoff water dripping from an overhead downspout. In granting summary judgment, the Court held that the "open and obvious danger" exception to a property owner's duty of care to visitors applies to falls on natural as well as unnatural snow and ice accumulations. The Court relieved the owner of liability on the basis that the danger was obvious to a reasonable pedestrian, even despite the fact that the accumulation was unnatural. The Court emphasized a regional connotation in reaching its decision by noting that the open and obvious nature of an icy parking lot during the daylight hours of New England winters should be evident to all travelers and calls upon them to take extra care in crossing such areas.

Daniel Friedman named Co-Director of Gibson & Behman's New York City office

Daniel Friedman, a highly-respected litigation attorney with extensive insurance industry litigation experience, has been named Co-Director of the New York City office of Gibson & Behman, a leading national law firm known for providing progressive and economical solutions to its clients since 1987.

Friedman joins Gibson & Behman after having served the last 17 years as in-house general litigation counsel at the Madison Avenue-based American European Group. American European Group is the parent company of a group of insurance companies that includes Rutgers Casualty Insurance

Company. While there, Attorney Friedman provided defense litigation to the insurance industry with significant, successful jury trial experience in New York and New Jersey. Friedman earned his Juris Doctor from New York Law School and was Associate Editor of the Law Review. His legal work prior to American European Group included serving as an Associate Attorney for the New York law firms of Rubin Gross Harris Fischl & Roth, and Flower & Plotka. From December 1989 to May 1991 he was Associate Attorney for Blodnick Abramowitz Newman & Bass P.C., Lake Success, NY.

"Daniel is highly-respected and extremely capable. His track record, and his reputation for excellence, both speak for themselves. We are fortunate to have him as part of our family."

-Daniel Gibson, Esq.

Gibson & Behman's NYC Office Proves by Clear and Convincing Evidence that Nabbi Ghemar is the Long Lost Son of Peter Tosh in Kinship Hearing

Peter Tosh, born Winston Hubert McIntosh (October 9, 1944 – September 11, 1987) was the guitarist in the original [Wailing Wailers](#), a reggae musician, and a trailblazer for the Rastafarian movement.

After an illustrious career with the Wailers and as a solo musician, he was murdered at his home. Though robbery was officially said to be the motivation behind Tosh's death, many believe that there were ulterior motives to the killing. After Winston McIntosh's death, the Public Administrator of the County of New York was appointed the Administrator of the Estate for Winston McIntosh a/k/a Peter Tosh. In a decision dated July 28, 1995, the State of New York Surrogate's Court, County of New York determined that Winston McIntosh was survived by ten children as his distributees, the whereabouts of one, who was incorrectly named as Gamel McIntosh, could not be located.

After this decision, one of Winston McIntosh's daughters, Niambe McIntosh, located an

individual named Nabii Ghemar, who was then living in Belgium, and identified him as the child of the decedent whose whereabouts were previously unknown and incorrectly named as Gamel McIntosh.

Mr. Ghemar retained the services of Gibson & Behman P.C. to represent his interests with a goal of having the Court deem him to be Gamel McIntosh and thus entitle him to the proceeds from the Estate that had previously been deposited with the Commissioner of Finance of the City of New York.

On April 12, 2007, Ron Langman, Esq. of Gibson and Behman's New York Office appeared on behalf of Mr. Ghemar for a kinship hearing before the New York County Surrogate's Court. At the hearing Mr. Langman called Nabbi Ghemar, Grazia Merlo-Ghemar (Nabbi's mother), Pauline Morris (Winston McIntosh's first cousin), Melody Cunningham (mother of Winston McIntosh's other children) and Niambe McIntosh (Winston McIntosh's daughter) as witnesses, in an effort to prove to

the Court that Nabbi Ghemar was in fact, the lost son of Winston McIntosh.

In order to convince the Court, Mr. Langman was required to prove by clear and convincing evidence that Winston McIntosh openly and notoriously acknowledged Nabii Ghemar as his child pursuant to EPTL § 4-12.2 (a)(2) (c) and further that Mr. Ghemar was the child previously incorrectly identified as Gamel McIntosh.

After the testimony of the witnesses, the Court rendered a decision on January 22, 2008. In its decision, the Court determined that Nabii Ghemar was a distributee of the decedent and was the person incorrectly named in the court records as Gamel McIntosh. As a result, Mr. Ghemar's share of the Estate, which was reflected in the accounting of the Public Administrator for the period of July 15, 2000 to May 19, 2006, is to be paid to him.



NEW YORK

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Insurance UIM Coverage: Arbitration Findings entitled to Collateral Estoppel

The doctrine of issue preclusion provides that when an issue has been "actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or different claim." [Demoulas Supermarkets, Inc. v. Ryan](#), 70 Mass.App.Ct. 259, 265-66 (2007). The Middlesex Superior Court recently employed this doctrine in holding that findings in an arbitration proceeding on a claim for uninsured motorist coverage, that the insured had forfeited coverage by making materially false statements concerning the claim, are entitled to collateral estoppel (issue preclusion) in a civil action by the insurer to recover the costs of defending the fraudulently presented claim.

In [Fri Florence Fon v. Amica Mutual Insurance](#), No.

20060607, Ms. Fon was injured in an automobile accident and as a result suffered injuries. She filed a claim with her insurer, Amica, for uninsured motorist benefits. Amica ultimately decided her account of the accident was fraudulent and denied coverage. Ms. Fon thereafter filed suit to compel Amica to arbitrate her uninsured motorist benefits claim. At arbitration, the arbitrator concluded that Ms. Fon had indeed presented false statements concerning the accident and that such statements constituted a breach of the cooperation clause. As a result, the arbitrator held that Ms. Fon was not entitled to recover from Amica because her claim was fraudulent.

Upon the conclusion of arbitration, Amica motioned for and was granted summary judgment as to the underlying claim Ms. Fon had brought against it. In holding, the Middlesex Superior Court

provided that when arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope of judicial proceedings, the arbitration award should have the same effect on issues necessarily determined as a judgment has.

Although applied to fraudulent statements made in the course of applying for uninsured motorist benefits, this decision has far reaching effects. It draws into question the willingness and necessity for insurers to arbitrate pending claims, as there now remains great potential for having arbitration decisions being afforded preclusive effect. More thorough discovery and analysis will need to be devoted to evaluating a claim as to ensure that proper judicial review is had.

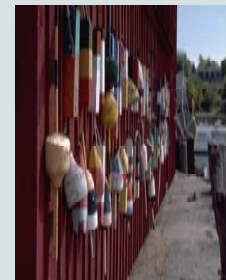
Continued Success: Defense Verdict for G&B

Senior Trial Attorneys H. Charles Hambelton and Deborah A. Katz of the Gibson & Behman's Burlington office recently secured a defense verdict in continuance of G&B's long standing expertise in defending premises liability actions.

The matter involved a 45-year-old female plaintiff patron lawfully on the defendant supermarket's premises. The plaintiff contended that while she was in the florist section of the

store picking out flowers, a hanging plant fell from a display and struck the plaintiff in the head. As a result of the incident, the plaintiff contended that she suffered a herniated cervical disc and was unable to return to her job as a bartender since she had difficulty moving her dominant left hand. Plaintiff made claim to \$400,000 for future lost wages and \$50,000 in medical expenses.

The plaintiff brought suit



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G & B NEW HAMPSHIRE DEFEAT THE "PRIVILEGED" PLOW

In New Hampshire, there is a longstanding policy supported by statute that favors the snowplow in any motor vehicle collision when displaying its emergency lights. State law RSA 265:6-a, II specifically requires that all drivers yield the roadway to highway maintenance vehicles displaying emergency lights. Public policy also favors emergency relief vehicles, especially the esteemed and essential snowplow, when involved in mishaps with the traveling public.

In a recent exception to the prevailing tide, Gibson & Behman successfully sued the Town of Peterborough in a subrogation action in

which the town's snowplow had activated its emergency lights during street sanding in the height of winter and collided with a local motorist. The snowplow had stopped at its stop sign, looked both ways then proceeded to cross the road but collided with the motorist who had no traffic signal. The Town argued that the motorist was at fault for failing to observe and yield the right of way to the snowplow that was entering the intersection in plain view. However, the trial judge agreed with Gibson & Behman and held that the 'emergency vehicle rule' only makes sense when the driver is acting prudently and in situations appropriate for yielding to occur. In this

instance, because the local motorist was driving reasonably through the intersection, it was not required to yield to the snowplow that failed to exercise reasonable observation regarding other oncoming traffic.

While the successful written ruling will not likely significantly alter NH law, it is a welcomed relief from the prevailing tendency of courts to turn a blind eye to careful local motorists who nonetheless find themselves aggrieved – and not relieved – to encounter a snowplow on the roadway. For further questions, please contact Kevin O'Neill in our NH office.

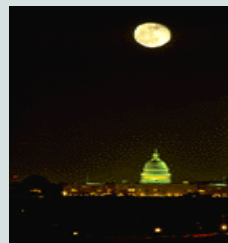
NEW HAMPSHIRE HAS NEW MEDIATION RULES

New Hampshire has launched a new Rule 170 alternative dispute resolution program starting in 2007. The new rule seeks to streamline the mandatory ADR program and to now include formal state certified and trained civil mediators that may conduct mediations more flexibly. In the past, the mediation program was voluntary and typically limited to two hours at the courthouse. Despite the best intentions of the volunteer mediators, the mediation of complex or hotly disputed claims often were ineffective.

The new ADR program will rely upon mediators who are certified after undergoing specialized training – 8 hours for existing volunteer mediators and 20 hours for new mediators. The location and time frame has also been expanded to include any mutually agreeable location and amount of time. The new rule also provides that the mediator should be selected by mutual assent early in the case at the case structuring conference. If not, the court will select from the volunteer mediator list. There will remain an administrative fee for volunteer mediators and varying compensation for

paid mediators. It is anticipated that the new program will result in better more effective mediators that may be chosen by the litigants based upon their individual merits and not simply appointed by the court. Gibson & Behman will remain actively engaged with ADR and watchful for mediators who are particularly effective in obtaining reasonable results in complicated disputes.

For further questions, please contact our New Hampshire office at (603) 624-5548.



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Connecticut Supreme Court Eases Plaintiffs' Burden in Self-Service Premise Liability Cases

The Connecticut Supreme Court recently upheld the application of the "mode of operation" rule in the context of a premises liability claim involving a self-service salad bar. This rule, previously adopted by sister state courts, including Massachusetts, relieves a premises liability plaintiff, under certain circumstances, from proving that a defendant business had either actual or constructive notice of the condition that caused the plaintiff's injury. Rather, in this limited subset of premises liability cases, the plaintiff's burden is altered such that he or she must show that (1) "the business' chosen mode of operation creates a foreseeable risk that the condition regularly will occur" and, (2) "the business fails to take reasonable measures to discover and remove it."

The plaintiff in this particular matter brought a lawsuit against Stop and Shop, Incorporated, after she slipped and fell on piece of lettuce on the floor immediately surrounding a self-service salad bar. The trial court, following a bench trial, entered a defense verdict, finding that the plaintiff failed to meet her burden of proof in establishing that the defendant had either actual or constructive knowledge of the piece of lettuce that had fallen to the floor of the store and allegedly caused the plaintiff's fall. The plaintiff appealed, arguing that the trial court should have considered her claim pursuant to the mode of operation rule, thereby relieving her of the burden of proving either actual or constructive notice.

The plaintiff relied, in large part, on the physical structure of the salad bar and the adopted store policies in regard to the salad bar to demonstrate that the defendant store was aware of the potential risks associated with its self-service salad bar and that, at the time of the plaintiff's slip and fall, the defendant store was non-compliant with its own policies intended to protect against such incidents. The Court noted that "[t]he salad bar had no railings and was framed by a four inch ledge that was too narrow to accommodate trays or containers. As a result, patrons customarily would hold their

containers aloft, over the floor area, while serving themselves from the salad bar." The floor below the salad bar was made of tile or linoleum, with only narrow runners, leaving the tile surface exposed. The store manager conceded that the salad bar, as a result of these conditions, was "an area where people used to let . . . salads fall. It was precarious." Because of these "precarious" conditions, the store adopted specific policies, requiring the stationing of salad bar attendants, the use of sweeping logs to document preventative maintenance and cleaning of the salad bar, and the use of special accident report forms.

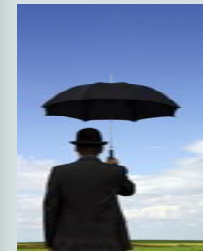
Despite these policies and preventative measures in place by virtue of store policy, the plaintiff testified that, at the time of her fall, there were no salad bar attendants present. Further, the plaintiff argued, the fact finder was permitted to infer from the defendant's failure to produce documentation of cleaning of the area in accordance with its own guidelines, that the area surrounding the salad bar had not been maintained in accordance with store policy. Thus, the Supreme Court of Connecticut held that "[u]nder the circumstances . . . a fact finder reasonably could have concluded that the plaintiff had slipped and fallen due to the defendant's failure to take adequate precautions in connection with its operation of the salad bar."

As a policy matter, the Court supported its holding with three observations of the modern self-service practice employed by retailers. First, the Court found that retailers should bear the economic risk resulting from cost-cutting measures, including the employment of self-service operations. Citing *Meek v. Walmart Stores, Incorporated*, a prior Connecticut Court of Appeals decision, the Court noted that "[t]he measures taken by large, self-service retail merchandising establishments to protect their invitees must be commensurate with the risks inherent in that method of store operation . . ." Second, the Court found that the traditional prima facie case for premises liability claims is incom-

patible with self-service operations. Rather, "[s]elf-service businesses . . . are aware that some customers will be injured due to the conduct of other customers because such injuries are a likely, and therefore foreseeable, consequence of the self-service method of operation." Third, the Court found that "the requirement of actual or constructive notice places a difficult – and frequently insuperable – burden on injured customers to establish when the unsafe condition arose." Frequently, the physical condition of the injured party following the incident at issue will prevent him or her from performing any immediate investigation of the scene and the cause of the accident. Finally, the Court reasoned, the application of the mode of operation rule is most likely to promote the use of reasonable care in maintaining self-service operations.

As a practical matter, and contrary to the outcry against the implementation of the mode of operation rule, this analytical paradigm is not tantamount to strict liability for defendants employing a self-service operation. Rather, it is a reminder to business owners that they must take reasonable measures to ensure the safety of their patrons and, further, they must ensure actual implementation of policies intended to protect the safety of their patrons.

In order to avoid the fate of the defendant in *Kelly v. Stop and Shop, Incorporated*, business owners employing self-service operations must not only adopt sufficient procedures and practices to ensure the safety of their customers, but they must actually employ and document these measures. Thus, Kelly stands as a cautionary tale in which the defendant store adopted arguably sufficient measures to protect the safety of customers, but failed to implement these measures in a manner that was consistent in practice and further failed to document their efforts in a manner designed to rebut the presumption of liability that arises under the mode of operation rule.



CONNECTICUT

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**Connecticut
falls in line
with Sister
States in
adopting the
Mode of
Operation
Rule**

Connecticut Workers' COMPENSATION UPDATE

Recent Supreme Court Ruling Places Greater Importance on Filing Form 43 Contest of Claim

The recent Connecticut Supreme Court decision *David Harpaz v. Laidlaw Transit, Inc.*, released on March 18, 2008, has upset the long standing premise in Connecticut Workers' Compensation law that respondents may continue to contest the extent of a claimant's disability absent filing a form 43. The decision leaves respondents and claimants alike speculating as to the extent to which one is precluded from contesting the scope of a claimant's injuries if a form 43 was not filed within the time prescribed by C.G.S. §31-294c. The practical questions raised by the decision are not answered by the Supreme Court, such that additional guidance will not be available for some time absent legislative involvement.

By way of background, C.G.S. §31-294c prescribes the notice requirements applicable to a claimant in asserting his claim, as well as the mechanism by which respondents may contest a claim. Under, C.G.S. § 31-294c (b), if an employer neither timely pays benefits nor timely contests liability, the claim is presumed compensable and the employer is barred from contesting the employee's right to receive compensation. A respondent can avoid the presumption of compensability under C.G.S. § 31-294c (b) by either filing a timely notice of contest (form 43) or by commencing timely payment of compensation. In Connecticut, however, there is a long standing distinction between the right to contest liability for an injury and the right to contest the extent of disability attributed to such an injury. Despite not filing a form 43, employers could still contest the extent of a claimant's disability for issues such as the necessity of medical treatment and assigned permanency as related to the claimed injury.

In the *Harpaz* case, the claimant was employed by the respondent as a bus driver and was injured in a motor vehicle accident November 2, 2001, while in the course of employment. He filed his Form 30C on October 31, 2002, asserting a claim for a back injury as a result of the accident. The respondents filed an untimely Form 43 contesting compensability on May 15, 2003. A Motion to Preclude was filed by the claimant and on January

8, 2004, the presiding Commissioner found the respondents were precluded from challenging compensability due to the late disclaimer.

Ultimately, the claimant's treating physician opined that the claimant's need for surgery was related to the November 7, 2001, motor vehicle accident. The respondents filed Form 43's on March 15, 2003, and February 3, 2004, contesting the extent of the claimant's disability and his need for surgery. They had an orthopedic surgeon perform an independent medical examination of the claimant, who concluded that the 2001 accident was not a factor in the claimant's need for surgery in 2004. The Commissioner found the respondent's IME physician more credible than the claimant's treater with regard to the causal connection, or lack thereof, for the claimant's need for surgery. The Commissioner agreed with the respondent's IME that the claimant's need for surgery was not causally related to the underlying claim at the formal hearing level. The Commissioner's opinion was affirmed at the Compensation Review Board. The Connecticut Supreme Court, however, reversed the Board's decision and the case was remanded as the Court concluded that the basis for the Commissioner's opinion was improper in light of C.G.S. §31-294c.

The basis of the Supreme Court's decision was an extensive review of C.G.S. §31-294c. The Court concluded that respondents were not permitted under the statute to contest the extent of a claimant's disability if they did not contest the claim or begin compensation within 28 days. The Connecticut Supreme Court determined that in accordance with §31-294c (b), the respondent could not contest the need for surgery because no contest of claim was filed within 28 days. The Court clarified that the claimants need only prove a prima facie case.

The ruling in the *Harpaz* case negates Connecticut's longstanding distinction between contesting liability versus challenging the extent of disability of a claim. The long standing principle in Connecticut has been that the respondents' ability to an independent medical examination of an injured em-

ployee is part of their right to a fair hearing. *Bailey vs. State*, 65 Conn. App. 592, 603 (2001). The *Harpaz* decision raises questions regarding what, if anything, respondents are permitted to do to contest a claim when a timely form 43 has not been filed. Clearly, respondents' use of an independent medical examiner to contest the need for surgery would not be permitted under the *Harpaz* case. The decision begs the question of what else might fall under "extent of disability?" May respondents contest an assigned permanency? In light of the *Harpaz* case, the answer is seemingly no.

How do respondents protect themselves against the ruling in *Harpaz*? Certainly, filing of forms 43, contesting claims regardless of whether the underlying claim is going to be accepted is one method. This would include filing forms 43 on claims for which benefits have been paid out within the first 28 days, thereby allowing the respondent to contest the claim for up to one year under C.G.S. §31-294c (b). In applicable cases, suggested language on forms 43 would include, "respondents contest the extent of the disability claimed."

The scope and true ramifications of the *Harpaz* decision are not yet known. Although the Commissioners are obligated to follow the Supreme Court's decision, it is uncertain the degree of deference they will give to the case and whether they will tailor exceptions to the rule in order to level the playing field. This will certainly differ greatly among Commissioners and also between cases, based upon their specific facts.



The ruling in *David Harpaz v. Laidlaw Transit, Inc.*, negates Connecticut's longstanding distinction between contesting liability versus challenging the extent of disability of a claim.



BAD FAITH LAW IN RHODE ISLAND HARSH ON INSURERS

Rhode Island has very strict laws when it comes to an insurance company's duty to settle a case within the policy limit and protect its insured.

The Rhode Island Supreme Court in *Asermely v. Allstate* promulgated a new rule of law regarding the allegations of bad faith against insurance companies. The *Asermely* case arises out of motor vehicle accident. The Plaintiff made a demand within the \$50,000.00 policy limits and the insurer rejected the offer. At trial, the jury awarded the Plaintiff, including interest, \$86,333.57. The insurer cut a check in the amount of \$50,000.00 as full and final resolution to the case. The Plaintiff in turn filed a bad faith action against the insurer seeking the full amount of the jury award.

The Rhode Island Supreme Court ruled that an insurance company has a fiduciary obligation to act in the best interests of its insured in order to protect the insured from excess liability and to refrain from acts that demonstrate greater concern for the insurer's monetary interest than the financial risk attendant to the insured's situation.

The Court ruled that it is not sufficient that the insurance company act in good faith. An insurance company's fiduciary obligations include a duty to consider seriously a plaintiff's reasonable offer to settle within the policy limits. Accordingly, if it has been afforded reasonable notice and if a plaintiff has made a reasonable written offer to a defendant's insurer to settle within the policy limits, the insurer is obligated to seriously consider such an offer. If the insurer declines to settle the case

within the policy limits, it does so at its peril in the event that a trial results in a judgment that exceeds the policy limits, including interest. If such a judgment is sustained on appeal or is un-appealed, the insurer is liable for the amount that exceeds the policy limits, unless it can show that the insured was unwilling to accept the offer of settlement. The insurer's duty is a fiduciary obligation to act in the best interests of the insured. Even if the insurer believes in good faith that it has a legitimate defense against the third party, it must assume the risk of miscalculation if the ultimate judgment should exceed the policy limits.

This decision of the Rhode Island Supreme Court sets forth a harsh standard on insurers to resolve the case within its policy limits and protect its insureds.



Rhode Island Supreme Court Requires Insurance Companies Exercise More than Just Good Faith

\$2.4 Billion Ocean State Verdict May Be Sunk On Appeal

Three major paint companies may face one of the largest renovation bills ever recorded. The Rhode Island Supreme Court will soon be ruling on the appeal of a 2006 jury verdict that could force Sherman Williams Co., Millennium Holdings (Glidden Paints), and NL Industries to pay \$2.4 Billion to renovate homes potentially contaminated by lead paint sold by these companies in the first half of the 20th Century.

The 2006 jury decided the companies created a public nuisance by selling the lead-pigment paints, causing lead poisoning in children that continues today. If the Court upholds the verdict, virtually every dwelling constructed in Rhode Island before 1978 (over 240,000 homes) stands to be inspected for lead-based paint

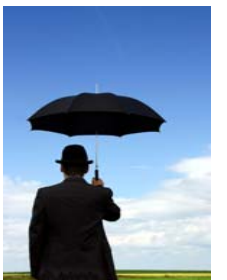
and potentially renovated at the companies' expense.

The Court heard four hours of argument on May 14th from 13 lawyers on the companies' appeals. Attorneys for the State analogized the harm caused by the sale of this paint to air pollution, saying that the effects of the paint are so diffuse and widespread that "there is no point in looking at the effects on every house...." The State further argued that Defendants had control of the paints when they were sold, and that is when the nuisance was created.

Attorneys for the Defendants argued the products were lawfully sold at the time and no Rhode Island Supreme Court case has ever held a lawfully sold product a public nuisance.

The foreseeable ripple effect of the Ocean States' Supreme Court ruling stands likely to have a significant impact on as many as 15 other states that have identified incidents of elevated blood lead levels in their state's children, most notably in Ohio, where the share of children with elevated lead blood levels was at 2.3% in 2007. Upholding this verdict could lead to a bevy of lead paint-based claims nationwide.

Currently, Rhode Island law requires landlords to correct such lead paint problems at their own expense. If the 2006 verdict is upheld, landlords not in compliance stand to get a free renovation at the companies' expense. The Rhode Island Supreme Court has estimated it will render a decision in July – and this job estimate will be completed on time.



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