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Hardin Kundla McKeon & Poletto
A Full Service Litigation Law Firm

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HKMP Roster of Certified Civil Trial Attorneys Grows

HKMP is pleased to announce that Associates **James L. Fant** and **Joseph A. DiPisa** were recently designated as Certified Civil Trial Attorney by the Supreme Court of the State of New Jersey. This is a significant accomplishment and HKMP proudly congratulates James and Joe on this achievement. In 1980, the Board on Attorney Certification was established by the Supreme Court of the State of New Jersey for the purpose of assisting consumers of legal services in finding attorneys who have a recognized level of competence in particular fields of law. Attorneys may only be designated by the Supreme Court as "certified" in the designated specialty if they: are able to demonstrate sufficient levels of experience, education, knowledge, and skill in a specific area of law or practice; have passed a rigorous examination; and have been recognized by their peers as having sufficient skills and reputation in the designated specialty. An attorney must also be a member in good standing of the New Jersey Bar for at least five years; taken a specific number of continuing legal education courses in the three years prior to filing an application; demonstrated substantial involvement in preparation of litigated matters; and demonstrates an unblemished reputation by submitting a list of attorneys and judges who will attest to the applicant's character and ability. As of June 2012, fewer than 3% of active attorneys practicing in New Jersey have achieved this designation. James and Joe now join the ranks of a number of other HKMP attorneys who have achieved this status.

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HKMP Obtains Defense Verdict for Homeowner in Slip and Fall on Ice

HKMP Associate **Todd C. Landis** successfully defended a "re-freeze" claim made by a tenant who alleged improper snow/ice removal.

Plaintiff alleged that she slipped on ice which, it was alleged, accumulated on the walkway as a result of snow piles along the edges melting and re-freezing. Plaintiff claimed she sustained a trimalleolar fracture requiring open reduction and international fixation as well as a low back injury requiring surgery.

After 11 days of trial, a Passaic County jury returned a defense verdict. The case largely turned on the credibility of the witnesses. After an aggressive cross-examination of the plaintiff regarding various inconsistent statements, **HKMP's** defense highlighted a photograph taken by the homeowner shortly after the fall which failed to demonstrate any ice condition on the property.



HKMP Secures Directed Verdict in Legal Malpractice Action

HKMP Associate **Patrick McCormick** obtained a directed verdict following a six-day jury trial in a legal malpractice case. Plaintiff alleged that the defendant law firm was negligent in the manner in which it handled underlying estate litigation. Plaintiff was one of seven beneficiaries under her father's will and alleged that certain assets had been wrongfully taken by the executor. She retained the defendant law firm to continue the search for additional assets that she believed had been improperly diverted, and to try the case against the executor. The issues in the underlying case were whether there was credible evidence of additional theft and whether plaintiff was entitled to legal fees in identifying stolen assets. The judge found that there was insufficient evidence of additional stolen assets, but awarded her some attorneys' fees.

Plaintiff filed a malpractice action against her attorneys alleging the defendant law firm was not diligent in identifying additional assets and did not try the case in a sufficiently aggressive manner. Following trial testimony from plaintiff, the defendants, and a forensic accountant who had been retained to trace "hidden" assets, Mr. McCormick moved to dismiss the claims as speculative. The court held a hearing outside the presence of the jury in furtherance of a defense motion to bar testimony from the expert. The court accepted the defendant's argument and determined that, based on the record developed at trial and the opinions to be offered by the expert, the claim was speculative. Accordingly, the court dismissed the plaintiff's case.

The court further ruled that since there was no defense to the counterclaim, the defendants were entitled to all unpaid fees and expenses, which exceeded \$200,000.



HKMP Obtains Dismissal For Assignee For Benefit of Creditors Establishing Immunity Defense and Standard of Care

HKMP Partner **John R. Scott**, in what appears to be a case of first impression, obtained summary judgment dismissing a claim alleging malfeasance and professional negligence against an assignee for the benefit of creditors. Under the statutory scheme (N.J.S.A. 2A:19-1 et seq.), an assignee for the benefit of creditors is to act for the equal benefit of all of the debtor's creditors and, like a trustee, acts solely in a representational capacity. In this instance, the debtors brought a claim alleging that the assignee failed to fulfill his responsibilities and "wasted" assets of the estate.

Analogizing the assignee's work to that of a bankruptcy trustee, **HKMP** successfully argued that "mere negligence" was not sufficient to state a claim and that for an assignee to be liable, there must be a "willful and deliberate" violation of his fiduciary responsibilities. There being no evidence of such a violation, the debtors failed to state a claim. The court agreed, adopted the "willful and deliberate" standard, and the negligence claim was dismissed.

HKMP also successfully argued that, like bankruptcy law affords a trustee qualified immunity when he is not acting pursuant to a court order and absolute immunity when acting pursuant to a court order, the assignee was entitled to immunity because the action taken in disposing of certain assets of the estate was taken pursuant to the Deed of Assignment which **HKMP** argued was the equivalent of a judicial order. The court found that the assignee was immune from the claims that he had committed malfeasance in performing his assignee duties and dismissed the claims asserted against the assignee with prejudice.



HKMP No Cause On Herniated Disc Claim

HKMP Associate **Ross Carpenter** recently obtained a defense verdict in a motor vehicle accident personal injury action venued in Hudson County Superior Court. The jury found in favor of HKMP's client, finding that his auto accident with plaintiff did not cause plaintiff to suffer a permanent injury. Because plaintiff's auto insurance policy was subject to the limitation on lawsuit option, the court entered a judgment for the defense.

The accident occurred on February 17, 2013. Plaintiff alleged that defendant struck his vehicle in the rear while plaintiff was stopped at a red light in Bayonne. Plaintiff claimed that the accident caused him to suffer a new permanent injury in his neck and an aggravation of a preexisting asymptomatic injury in his back. At trial the defense conceded liability; however, offered testimony that the impact was minimal. **HKMP** disputed plaintiff's contention that he suffered any permanent injury in the accident. At **HKMP's** request, a defense expert reviewed MRIs of plaintiff's lower back, performing a comparative analysis of the images taken both before and after the accident, and Mr. Carpenter elicited testimony that established there was no change in plaintiff's lumbar discs. The defense physician admitted that the post-accident MRI of plaintiff's neck revealed a small bulge, but that the bulge was degenerative, meaning it was caused by age-related wear and tear and not traumatic in nature.

Plaintiff testified that following the accident, he was confined to administrative work as the owner of a moving company and could no longer lift heavy objects. However, Carpenter introduced a photo to the jury from plaintiff's Facebook depicting plaintiff carrying three storage containers stacked on top of one another while in his company's uniform.

After less than an hour of deliberation, the jury returned a 5-1 verdict in favor of the defense.



HKMP Obtains Defense Ruling in PIP Arbitration Seeking Recovery of Lifetime Income Continuation Benefits

HKMP Associate **Todd C. Landis** obtained a defense ruling in a PIP arbitration where the claimant sought income continuation benefits. The claimant, who had a policy of No-Fault insurance which provided for lifetime income continuation benefits of \$700.00 per week, brought the specific claim seeking \$143,399.00 for approximately 200 weeks of lost income.

HKMP successfully argued that the claimant could not demonstrate that his inability to hold employment was due solely to the bodily injuries sustained in the underlying accident. **HKMP** established that the claimant's medical experts failed to apportion the totality of his disability and ability to earn income to the subject accident. After conclusion of the hearing and closing argument, a Dispute Resolution Professional denied plaintiff's claim.

Todd Landis oversees the firm's department handling defense of PIP claims and also handles the defense of civil suits in various areas of tort litigation.



Charity Care Benefits Barred

In Plaintiff v. ABC Hospital, plaintiff alleged significant uro-gynecological injuries arising out of the performance of a cesarean section. The court granted the defendant's *in limine* motion to bar the admissibility of \$779,000 in medical bills. Plaintiff asserted that \$779,000 in bills incurred at ABC Hospital, which were paid by Charity Care, were admissible in evidence under the Collateral Source Rule, N.J.S.A. 2A:15-97. **HKMP** Partner **Patrick J. Clare** argued that the medical bills were not admissible under the Collateral Source Rule and supporting case law because the plaintiff was not obligated to reimburse ABC Hospital for the \$779,000 in medical bills. Support for the defense position that the plaintiff had not "incurred" any medical bills was found in N.J.A.C. 10:52-11:14 which expressly states that: "persons determined to be eligible for charity care shall not receive a bill for services or be subject to collection procedures". Also, in Dias v. A.J. Seabra's Supermarket, 310 N.J. Super 99, 101 (App. Div. 1998), the Appellate Division ruled that the only medical bills that were admissible were for the amount actually paid by the health insurer plus any outstanding, unpaid amount. The trial court was persuaded to grant the Hospital's *in limine* motion, finding Dias was persuasive because plaintiff was not required to reimburse ABC Hospital for the \$779,000 in bills nor did a health insurer pay some or all of the medical bills.

This ruling prevented the plaintiff from "boarding" \$779,000 in medical bills which, more than likely, would have influenced the jury's assessment of the seriousness of the injuries allegedly incurred by the plaintiff and, had the medical bills not been barred, constituted a significant component in any potential jury award. The case ultimately settled, in part due to the favorable ruling obtained by the Hospital on the *in limine* motion.



Anti-Subrogation Provision Does Not Bar Post-Loss Assignment

In Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co., 227 N.J. 322 (Feb. 1, 2017), the New Jersey Supreme Court held that once an insured loss has occurred, an anti-assignment clause in an occurrence-based policy does not afford an insurer with a basis to decline coverage based upon the insured's assignment of the right to invoke policy coverage for that loss, even though the claim had not been reduced to a monetary judgment.

Following a series of corporate transactions, Givaudan Fragrances, Corp. ("Fragrances") was created and assumed certain liability for environmental contamination from a former manufacturer owned and operated by Givaudan Corporation (the policyholder). Fragrances initially alleged that it was a successor to Givaudan Corporation, but discovery proved that not to be so. Fragrances then obtained an assignment of the right to pursue coverage for, among others, the environmental liability from Givaudan Flavors Corporation ("Flavors"), the successor to Givaudan Corporation. Fragrances also alleged that it was an affiliate of Flavors and that under certain policies it qualified as an insured under the definition of "insured" which included "affiliates." The Insurers argued that any assignment to Fragrances was invalid because the insurers did not consent to the assignment and that Fragrances did not qualify as an insured because it was not.

The Court characterized the majority rule in the United States as being that clauses prohibiting the assignment of an occurrence policy without insurer consent are void when applied to a post-loss assignment because such an assignment does not materially increase the risk to the insurer. The Court re-affirmed its earlier decision in Flint Frozen Foods, Inc. v. Firemen's Fund Ins. Co., 8 N.J. 606 (1952) and the Appellate Division decision in Elat, Inc. v. Aetna Cas. & Surety Co., 280 N.J. super. 62 (App. Div. 1995), holding that an anti-assignment clause is not a bar to a post-loss assignment of a claim.

The Court reasoned that anti-assignment provisions apply only to assignments before a loss and do not prevent an assignment post-loss. The rationale behind this principle is that post-loss assignments do not increase the insurer's risk. In this instance, because the policies at issue are occurrence policies and the assignment took place after the occurrence had taken place and after the expiration of the policies, the assignment was deemed valid.



Federal Contractor Need Only Show "Colorable Defense" On Remand

The Third Circuit US Court Of Appeals construing the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), ruled in the case of Papp v. Fore-Kast Sales, that a federal defense contractor need not prove their case on a plaintiff's motion to remand.

In Papp, Boeing removed an asbestos matter from state court into federal court pursuant to the federal contractor defense; then on the plaintiffs' remand motion the United States District Court for the District of New Jersey ruled that Boeing failed to meet a "special burden" and failed to demonstrate that a federal officer affirmatively prohibited warnings regarding asbestos dangers. The Third Circuit reversed the District Court.

The Third Circuit found that the allegations against Boeing involved conduct which occurred when it was "acting under" the direction of a federal officer or agency. Factually, Boeing claimed that it manufactured equipment following government specifications and pursuant to meetings with the military. Boeing also claimed that they had no special knowledge concerning the dangers of asbestos at the time. The Third Circuit ruled that a federal contractor simply needs to show that its defense is a "colorable federal defense" and that the contractor does not need to prove its case on the remand motion.

HKMP Partner, **Nicea D'Annunzio** heads HKMP's asbestos unit and has been designated as national counsel for several corporations involved in asbestos litigation.



Summary Judgment Granted in Furnace Fire Case

HKMP's **Janet Poletto** and **Bob Blanton** obtained summary judgment for a fuel delivery and service company in a subrogation case arising from a furnace fire. HKMP's client had provided services and fuel on a will call basis to

plaintiff's insured. The home furnace had caught fire causing damage throughout the house several weeks after HKMP's client provided a diagnostic check in response to a no heat call. HKMP's client disputed liability as well as damages.

Plaintiff served a summary of the opinion of its origin and cause expert that the furnace was the point of origin. Plaintiff also served an initial liability report and a rebuttal liability report from a furnace expert. HKMP moved for summary judgment arguing the rebuttal report was untimely and that all plaintiff's expert reports were net opinions.

The court granted summary judgment after oral argument. The court found the origin and cause report to be a net opinion in failing to establish the cause of the furnace fire. It barred the rebuttal liability report as untimely as well as substantively insufficient. It held both the rebuttal and the initial furnace report failed to articulate a custom, practice, or other standard such as a code or regulation supporting the expert's opinions and barred the expert. Finding that plaintiff could not prove a furnace fire case without such expert testimony, the court dismissed the entire case.



For over thirty years, Hardin, Kundla, McKeon & Poletto has provided an integrated association of professionals committed to attaining clients' goals through quality service, pragmatic guidance and thoughtful planning. The proficiency, expertise and experience of its attorneys creates achievable goals and practical results for its clients through communication and teamwork.

The articles in this newsletter are for informational purposes only and do not constitute legal advice.

For more information about any topic discussed in this newsletter, please contact Hardin, Kundla, McKeon & Poletto at 973-912-5222 or info@hkmpp.com.