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**COZEN O'CONNOR ATTORNEYS OBTAIN SIGNIFICANT APPELLATE VICTORIES**

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**FAILURE OF PLAINTIFF TO SUPPORT HER CLAIM OF NEGLIGENT DESIGN WITH EXPERT TESTIMONY AS TO DESIGN STANDARDS AND FORESEEABILITY IS FATAL TO CLAIM**

Stephen A. Cozen, with the assistance of Elizabeth Chambers Bailey, recently obtained victory in the United States Court of Appeals for the First Circuit on behalf of a Bank in a negligent design case. *Vazquez-Filippetti v. Banco Popular de Puerto Rico*, Nos. 05-2372, 06-1432 (1st Cir. Sept. 27, 2007). The plaintiff had suffered severe physical injuries when she was struck by a car while using the ATM machine located next to the drive through lanes at the Bank. The plaintiff brought an action against the driver of the car and his insurer as well as the Bank, alleging tort claims under Article 1802 of the Puerto Rico Code. The plaintiff did not present any expert evidence as to the design of the ATM vis-à-vis the drive-through bank lanes, although expert testimony presented by the Bank established that the design was in accordance with all relevant codes and requirements. At the close of all evidence, the Bank moved for judgment as a matter of law under Rule 50 on the grounds that the plaintiff had not shown that the design of the ATM was negligent or that the injury was foreseeable. The trial court denied the motion, and characterized the issue as a premises liability claim rather than negligent design. The jury returned a verdict for nearly \$6 million finding the Bank 75% liable for the injuries and the driver of the car 25% liable.

On September 27, 2007, the First Circuit rendered its Opinion, finding that the case was, in fact, a negligent design case, and that, under Puerto Rico law, “expert testimony is necessary to define the standard of care whenever the design of the relevant product is beyond the experience or knowledge of an average lay person.” The Court further found that expert testimony as to the foreseeability of the conduct of a third-party was also necessary because the case involved third-party conduct. Thus, because the plaintiff had failed to present any expert testimony on these issues in support of her claim and the Bank’s expert was uncontroverted, the Court reversed the entry of judgment against the Bank.

## NOTICE OF CANCELLATION TO LOSS PAYEE NOT REQUIRED WHEN POLICY IS CANCELLED BY THE INSURED

Stephen A. Cozen, with the assistance of Elizabeth Chambers Bailey and Richard M. Mackowsky, recently obtained victory in the Third Circuit Court of Appeals on behalf of a property insurance carrier. In *Gallatin Fuels, Inc. v. Westchester Fire Insurance Company*, Nos. 06-3133 and 06-3141 (E.D. Pa. Aug. 9, 2007), the plaintiff sought coverage as a loss payee under a policy of insurance issued to a mining company. The policy covered certain underground mining equipment which the plaintiff had leased to the mining company. The carrier denied the claim on grounds the policy had been cancelled by the insured (through its insurance premium lender) prior to the loss. Thus, at the time of the loss, there was no policy in effect.

The plaintiff filed suit, alleging that the carrier failed to give proper notice of the cancellation to the loss payee. Following a nearly three week trial, the jury returned a verdict in favor of the plaintiff and awarded \$1.325 million in compensatory damages.

On August 9, 2007, the Third Circuit rendered its Opinion, reversing the jury verdict with respect to breach of contract and vacating compensatory damages. Specifically, the court found that the policy only required the insurer to notify the loss payee when the insurer cancels the policy. The policy did not require notice of cancellation be provided to the loss payee when the policy is cancelled by the insured. Since the insured, and not the insurer, cancelled the policy covering the mine equipment, the insurer was not required to provide the loss payee with notice of cancellation. Since cancellation was proper, there was no policy in effect at the time of the loss and therefore, the loss payee was not entitled to coverage.

## THE COZEN O'CONNOR APPELLATE PRACTICE GROUP

Our experienced appellate lawyers represent clients in federal and state appellate courts throughout the country. They are front-line advocates who use their special skills to ensure that trial records are properly developed and protected, and that the best factual and legal arguments are available later for any appeal. Because of their substantial and varied experiences in representing clients in the trial and appellate courts, our appellate attorneys can provide valuable assistance at all stages of the litigation process, including trial assistance, pre-verdict assistance, post-verdict work, and appellate representation. Cozen O'Connor appellate attorneys are particularly versatile and have successfully handled all types of appellate matters.

The appellate attorneys who are available to assist clients have collectively handled or worked on a vast number of appellate cases, appeared before a wide variety of state and federal appellate courts (ranging from the U.S. Supreme Court to the U.S. Court of Appeals for the Armed Forces, as well as each circuit of the Courts of Appeal), served a wide variety of appellate judicial clerkships, authored Law Review articles and served on Law Review editorial boards, and served on various court-related committees. The practice group is chaired by Hon. Sandra Schultz Newman, a former Pennsylvania Supreme Court Justice.

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