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MESSAGE FROM THE CHAIR

TO THE FRIENDS OF COZEN O'CONNOR:

Although I usually open each issue of the Commercial Litigation Observer by congratulating one of our trial lawyers on yet another victory, I wanted to begin the new year by telling you about a tremendous expansion of our appellate practice. While our appellate practice is extremely well established (indeed, Gaele Barthold has probably argued more than 100 cases before the Pennsylvania Supreme Court), it has now reached new heights.

Justice Sandra Schultz Newman, the first woman to ever be elected to the Pennsylvania Supreme Court – the oldest Court in the Nation, 67 years older than the United States Supreme Court – has joined our firm. Her eleven years as a Supreme Court Justice, and her prior two years on the Commonwealth Court, give her a tremendous insight into how appellate judges think, and how a savvy advocate can best present her case. In addition to her wealth of appellate experience, Justice Newman has spent the past four years as the Supreme Court's liaison to the Philadelphia Court of Common Pleas. Her perspective therefore spans the entire bench, and puts her in a unique position to give strategic advice.

We are justifiably proud of our record of winning at trial. In addition to helping us hold our great verdicts, Justice Newman enhances our ability to take a fresh look at others' work, and suggest new strategies to achieve a better result. As a result, we think that you will find that she makes a "supreme" addition to our firm.

Ann Thornton Field

Sincerely,
Ann Thornton Field
Chair, Commercial Litigation Practice Group

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RECENT DEVELOPMENTS REGARDING ARBITRATION

ARBITRATION CLAUSES DO NOT APPLY TO DISPUTES ARISING OUT OF RELATED CONTRACTS

In *U.S. Small Business Administration v. Chimicles*, 447 F.3d 207 (3d Cir. 2006), the United States Court of Appeals for the Third Circuit held that an arbitration clause contained in one contract does not apply to a dispute arising out of a related contract, even if the second contract explicitly refers to the first.

Chimicles involved a small business investment company that raised money by issuing limited partnership interests. The partnership agreement contained a broad arbitration clause. The subscription agreements, under which the limited partners were obligated to contribute funds in exchange for their interests, did not. After the company became insolvent, the Small Business Administration (acting as a receiver) sued some of the limited partners who had not paid their full subscription amounts. The limited partners moved to dismiss, citing the arbitration clause in the partnership agreement.

The Third Circuit held that the arbitration clause did not apply. In reaching its conclusion, the Third Circuit observed that both the subscription agreement and the partnership agreement were integrated. While the subscription agreement required investors to be bound by the terms of the partnership agreement, the Third Circuit held that the resulting incorporation was not sufficient to make a claim under the subscription agreement arbitrable. In reaching its conclusion, the Third Circuit pointed out that, while the partnership agreement required the arbitration of all disputes between limited partners and the general partner, the partnership itself (through its receiver) had brought the claims under the subscription agreement. Since the partnership had never signed any agreement with an arbitration clause, the Third Circuit refused to compel it to arbitrate.

Tom Wilkinson, a member in Cozen O'Connor's Philadelphia office who chairs the firm's alternative dispute resolution practice group, commented that *Chimicles* shows that, although courts traditionally defer to arbitration, their deference is not blind. While courts often find that disputes are "related to" a contract with an arbitration clause (and are therefore arbitrable), especially if one contract refers to the other, Wilkinson thought the distinguishing factor in *Chimicles* was the fact that the partnership itself was not a party to the contract with the arbitration clause. Had the partnership been a signatory to the partnership agreement, Wilkinson suggested that the *Chimicles* Court might have come out in favor of arbitration. Wilkinson therefore advises his clients to consider all of their contracts carefully, and make sure to include an arbitration clause if they want disputes under that particular contract to be arbitrable.

For more information, or to discuss the effect and impact of U.S. Small Business Administration v. Chimicles, 447 F.3d 207 (3d Cir. 2006), please call Tom Wilkinson at (215) 665-3737.

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RECENT DEVELOPMENTS REGARDING CLASS ACTIONS

ILLINOIS SUPREME COURT REJECTS CLASS CERTIFICATION FOR MASS-TORT CLAIMS

In *Smith v. Illinois Central Railroad Co*., ___ N.E.3d ___, 2006 WL 3491683 (Ill. Nov. 30, 2006), the Supreme Court of Illinois held that class certification was ordinarily inappropriate in mass-tort cases.

Smith involved a train wreck that caused a large chemical spill. Over 1,000 people were evacuated, and numerous businesses were closed because of the toxic fumes. Smith filed a class action, purportedly on behalf of all individuals and businesses that were affected by the spill. The trial court certified the class.

The Illinois Supreme Court took a direct appeal of the class certification and reversed the trial court. After noting that the Illinois rules on class certification were patterned after the Federal Rules, and that class actions have been disfavored in mass-tort cases, the Illinois Supreme Court found that the proposed class was not sufficiently cohesive. Specifically, the Illinois Supreme Court observed that people who actually came in contact with the chemicals would have different damages (and different issues of proof) than those who simply had to evacuate. The Illinois Supreme Court also said that businesses would have different issues of proof than individuals. Finally, the Illinois Supreme Court noted that different defenses could be applicable to different claims. As a result, the Illinois Supreme Court held that, even though the liability phase of all of the claims would be the same, the differences in the causation and damages phases of the claims prevented common issues from predominating, and precluded class certification.

Tia Ghattas, a member in Cozen O'Connor's Chicago office who has defended numerous class actions, said that the *Smith* Court recognized that judicial expedience in resolving cases *en mass* could not trump the need to decide each case on its merits. The *Smith* Court therefore refused to "railroad" the defendant into a class action, in which extraordinary settlement pressure could be exerted. Instead, the *Smith* Court allowed the defendant to exercise its rights, and defend each individual case on the merits. Ghattas noted that the difficulties in proving every case, and the time and expense necessary to do so, is often why plaintiffs' lawyers try and roll everything into one large class action. Ghattas therefore advises her clients to consider whether the expense of defending cases individually will lead to an overall better result.

For more information, or to discuss the effect and impact of Smith v. Illinois Central Railroad Co., ___ N.E.3d ___, 2006 WL 3491683 (Ill. Nov. 30, 2006), please call Tia Ghattas at (312) 382-3116.

RECENT DEVELOPMENTS REGARDING EMPLOYEES' RIGHTS TO MEDICAL CARE

FAILURE TO NOTIFY AN EMPLOYEE OF HER OPTIONS FOR "IN NETWORK" MEDICAL TREATMENT OBLIGATES AN EMPLOYER TO PAY FOR ANY TREATMENT SELECTED BY THE EMPLOYEE

In *Knight v. United Parcel Service*, (Ca. WCAB Oct. 10, 2006), the California Workers' Compensation Appeals Board (sitting *en banc*) held that an employer's failure to notify an injured employee that the employee could (and should) obtain treatment through a certain network of doctors obligated the employer to pay for whatever treatment the employee obtained.

Knight involved a UPS driver who was injured on the job. As a result, he sought treatment from a UPS clinic. The employee was not satisfied with his treatment, however, and wanted a second opinion. He therefore consulted his own doctor. His doctor was not a member of UPS' (or its workers' compensation insurer's) network of doctors. Despite repeated requests from the employee's doctor and lawyer, he was unable to get a list of all of the "in network" doctors. Similarly, the employee was never sent to an "in network" doctor, and was never told that he had to stay "in network."

The *Knight* Court held that UPS' failure to inform its employee of his rights, and its failure to send him a list of "in network" doctors, prevented UPS from insisting that the employee stay "in network." The Court concluded that this failure to inform the employee of his rights amounted to either neglect, or a refusal to provide treatment. As a result, the *Knight* Court required UPS to pay the (higher) cost of the "out of network" treatment its employee received.

Huey Cotton, a member in Cozen O'Connor's Los Angeles office who often represents employers in the California Courts, noted that UPS never informed its employee of his right to get a second (or a third) opinion. As a result, Cotton said the *Knight* Court probably thought that UPS (and its insurer) were shirking their duties, and hoping that the employee would not fully exercise his rights. Such a "penny wise" attitude can, according to Cotton, often turn out to be "pound foolish," especially in the California State Courts, since those courts are very protective of workers' rights. Cotton therefore advises his clients to go the extra mile to be fair to employees. While it may cost more in the short run, Cotton believes that the long term savings, as well as the increased morale and productivity, usually justify the investment.

For more information, or to discuss the effect and impact of Knight v. United Parcel Service, (Ca. WCAB Oct. 10, 2006), please call Huey Cotton at (213) 892-7907.

RECENT DEVELOPMENTS REGARDING IMPUTATION

A BANKRUPTCY TRUSTEE CANNOT BRING CLAIMS BASED ON A SUBSIDIARY'S ALLEGED FRAUD

In *Nisselson v. Lernout*, 469 F.3d 143 (1st Cir. 2006), the United States Court of Appeals for the First Circuit held that a bankruptcy trustee could not bring claims based on the fraud alleged to have occurred when the bankrupt company acquired another company, since the acquirer would have been involved in any wrongdoing.

Nisselson involved a company (L&H) that acquired a competitor (Dictaphone) through an exchange of stock. Prior to the merger, Dictaphone conducted due diligence on L&H. This due diligence did not, however, discover that L&H had materially overstated its revenue. The merger was consummated by having a newly formed subsidiary of L&H acquire all of Dictaphone's stock. The overstatement of revenue was discovered two months after the merger took place. L&H and its subsidiary which had acquired Dictaphone filed for bankruptcy shortly thereafter.

L&H's trustee brought claims against the officers, directors, accountants and advisors involved in the merger. The defendants moved to dismiss, claiming that the claims were barred by the *in pari delicto* defense. The trial court agreed.

The First Circuit affirmed. In analyzing the trustee's claims, the First Circuit noted that both L&H and its subsidiary which acquired Dictaphone were the entities that engaged in fraud. To the extent the trustee could bring claims arising out of the merger, the trustee "inherited" those claims from the L&H subsidiary that acquired Dictaphone. While the acquiring subsidiary was, in the end, injured by the fraud,

it was also the engine of fraud. The First Circuit held that this was precisely the type of situation in which the *in pari delicto* defense barred recovery. In contrast, the First Circuit noted that the "old" Dictaphone (and its shareholders) who were damaged by the fraud had valid claims since they received (worthless) stock in L&H in exchange for their stock in "old" Dictaphone. The trustee did not, however, have standing to bring claims on behalf of the selling shareholders. On the contrary, the trustee could only bring claims on behalf of the acquirer.

Bruce Lederman, a member in Cozen O'Connor's Midtown, New York office who handles complex commercial matters, said that the *Nisselson* Court carefully analyzed the source of the trustee's claims, and traced them back to the acquiring corporation. Lederman commented that it was significant that, after determining that the claims could be traced back to the acquiring corporation, the *Nisselson* Court explicitly decided that the trustee could not claim to be an "innocent successor" to the acquiring corporation. Lederman therefore concluded that, at the end of the day, the *Nisselson* Court was unwilling to allow the trustee to (in effect) re-structure the transaction after it closed. Lederman also observed that *Nisselson* demonstrates the need for due diligence, and careful analysis before entering into any transaction.

For more information, or to discuss the effect and impact of Nisselson v. Lernout, 469 F.3d 143 (1st Cir. 2006), please call Bruce Lederman at (212) 453-3819.

RECENT DEVELOPMENTS REGARDING PRIVILEGE

TWO COURTS RESTRICT PRIVILEGE TO ITS TRADITIONAL ROOTS

In *In Re Student Finance Corporation*, 2006 WL 3484387 (E.D. Pa. Nov. 29, 2006), and *Davis v. Kraft Foods North America*, 2006 WL 3486461 (E.D. Pa. Dec. 1, 2006), the United States District Court for the Eastern District of Pennsylvania held that, while non-parties to a lawsuit could invoke work-product protection, parties could not claim a self-critical analysis privilege.

Student Finance involved a bankruptcy trustee's suit against numerous defendants who allegedly caused the company's bankruptcy. The trustee settled with one of the defendants, which was the largest creditor of the estate. Another defendant then subpoenaed the materials the settling creditor had accumulated during its investigation into the (now settled) lawsuit. When the settling creditor claimed that the investigation materials were protected work-product, the defendant issuing the subpoena argued that only a party could claim work-product protection. In analyzing the question, the *Student Finance* Court found that, while the Federal Rules only extended work-product protection to parties, caselaw sometimes permitted non-parties to claim work-product protection. Since the work-product was prepared for use in a virtually identical lawsuit, the *Student Finance* Court reasoned that it would be unfair to require the materials to be produced.

Davis involved Kraft's attempts to withhold documents in a discrimination case based on the "self-critical analysis" privilege. Kraft claimed that the documents in question, such as compensation analyses and surveys on race relations, were only prepared

because Kraft was trying to meet its obligations under the anti-discrimination laws. After considering the issues, the *Davis* Court held that, since there is no traditional "self-critical analysis privilege," it would not create one. Instead, it adhered to the traditional position that privileges should be construed narrowly. The *Davis* Court then went on to hold that, even if it would have recognized a "self-critical analysis privilege," that privilege would not apply to factual data such as compensation rates or survey results.

Sarah Davies, a member in Cozen O'Connor's Philadelphia office, said that the *Student Finance* and *Davis* Courts appeared to confine privileges to their traditional role of allowing a party to prepare its case without having the other party look over its shoulder. The Courts also adhered to the general rule that documents created in the ordinary course of business must be produced, even if those documents may be harmful. The touchstone, according to Davies, is whether the documents would be prepared even if they were not shielded from production. While most businesses routinely engage in "self-critical analysis" (if for no other reason than to analyze their strengths, weaknesses, opportunities and tactics), they would not commit litigation strategy to paper if that strategy would have to be turned over to the other side. Davies therefore advises her clients to be careful to separate legal analysis from routine business analysis, so as not to inadvertently produce information which could otherwise be protected.

For more information, or to discuss the effect and impact of In Re Student Finance Corporation, 2006 WL 3484387 (E.D. Pa. Nov. 29, 2006), and Davis v. Kraft Foods North America, 2006 WL 3486461 (E.D. Pa. Dec. 1, 2006), please call Sarah Davies at (215) 665-2768.

RECENT DEVELOPMENTS REGARDING PRODUCTS LIABILITY

A PLAINTIFF MUST SPECIFICALLY IDENTIFY BOTH THE PRODUCT AND THE ALLEGED DEFECT IN ORDER TO PREVAIL

In *Martin v. E-Z Mart Stores, Inc*., 464 F.3d 827 (8th Cir. 2006), the United States Court of Appeals for the Eighth Circuit held that a product liability plaintiff had to identify both the specific product, and the alleged defect, in order to prevail.

Martin involved a smoker whose shirt caught fire after he put a cigarette lighter back in his pocket. The plaintiff testified that he had two lighters in his pocket, and he could not remember which one he had used right before the fire. The plaintiff also acknowledged that both lighters had warnings saying he should have made sure the lighter was out before putting it away. While plaintiff's expert testified that foreign matter in the lighter most likely prevented the flame from going all the way out, the expert was unable to say whether this was the result of a manufacturing or a design defect.

Based on this evidence, the trial court dismissed the case, holding that a plaintiff could not prevail if he could only show that there was a 50/50 chance that a particular lighter caused the fire. The Eighth Circuit affirmed, holding that a preponderance of the evidence, by definition, required more than a 50/50 chance. The Eighth Circuit went on to hold that a plaintiff who could not point to a specific defect was trying to present conjecture to the jury. Since conjecture is an insufficient basis for a verdict, the Eighth Circuit agreed that the plaintiff's claim should be dismissed.

Lawrence Cohen, a member in Cozen O'Connor's Downtown New York office who has tried numerous products liability cases, noted that *Martin* illustrated the limits of strict liability. Since the plaintiff was unable to identify a specific defect, he could not prove that the lighter was in its original condition at the time of the fire. Similarly, since plaintiff admitted he had been warned to make sure the lighter was out before he put it back in his pocket, he could not prove that he had not caused the fire. Cohen concluded that *Martin* therefore showed that a diligent defense could prevail, even in the face of certain damages.

For more information, or to discuss the effect and impact of Martin v. E-Z Mart Stores, Inc., 464 F.3d 827 (8th Cir. 2006), please call Lawrence Cohen at (212) 908-1246.

RECENT DEVELOPMENTS REGARDING SPOLIATION

ARKANSAS SUPREME COURT REJECTS SPOLIATION CLAIMS AGAINST THIRD PARTIES

In Downen v. Redd, ___ S.W.3d ___, 2006 WL 3095470 (Ark. Nov. 21, 2006), the Supreme Court of Arkansas held that Arkansas would not recognize a cause of action for spoliation against third parties.

Downen involved a worker who was killed when he was pinned between two asphalt rollers on a construction site. When the worker's lawyers asked to inspect the machine, the company's lawyers said they could not do so until they were properly appointed as lawyers for the estate. Before plaintiff's lawyers could be properly appointed, the employer sold the machine. Plaintiff then sued the company's lawyers, claiming that they were responsible for the spoliation of evidence.

The Arkansas Supreme Court affirmed the trial court's dismissal of the third-party spoliation claim. The Arkansas Supreme Court began by noting that Arkansas did not recognize first-party claims for the spoliation of evidence. Instead of recognizing a separate claim for spoliation, the Arkansas courts addressed first-party spoliation by imposing sanctions where it was appropriate to do so. After recognizing that some sanctions, such as giving an "adverse inference" instruction, dismissing claims, or entering judgment, were not available against third-parties, the Arkansas Supreme Court noted that some sanctions were still available. For example, the Arkansas Supreme Court pointed out that litigants could seek orders directing third-parties to preserve evidence. Finally, the Arkansas Supreme Court noted that, in extreme cases, a third-party could be subject to criminal charges for spoliation of evidence.

Paul Reichs, a member in Cozen O'Connor's Charlotte office who defends complex product liability cases, observed that the Arkansas Supreme Court was clearly worried about the speculative nature of third-party spoliation claims. While a party in a particular case might strongly believe that the outcome would have been different if certain evidence had been preserved, proving that the outcome would have changed, especially if the evidence is no longer available to be examined, would be very difficult. As a result, Reichs suggested it would be difficult to prevent prejudice or sympathy for an unsuccessful litigant from infecting the trial. Since one of the goals of the legal system is finality, Reichs commented that the Arkansas Supreme Court was wise to close the door on the potential for additional collateral litigation.

For more information, or to discuss the effect and impact of Downen v. Redd, ___ S.W.3d ___, 2006 WL 3095470 (Ark. Nov. 21, 2006), please call Paul Reichs at (704) 348-3425.

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