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MEMORANDUM

To: Delaware Claims Association
From: Sean A. Dolan, Esquire
Date: April 7, 2009
Re: Case Law Update

**SUPERIOR COURT ALLOWS
AMENDED COMPLAINT AFTER
EXPIRATION OF STATUTE OF
LIMITATIONS**

Dobson v. McKinley, Del. Super., C.A. No
07C-06-088 (March 31, 2009)

This case arises out of a motor vehicle accident on April 8, 2006. The plaintiff was killed when his car was struck during a high speed police car chase. Officers from the town of Newport were pursuing defendant McKinley when McKinley ran a light and collided with the plaintiff's vehicle. Originally the plaintiff sued only McKinley, but McKinley filed a third party claim against the police officers and the Town of Newport, on the theory that the police were negligent in the way they carried out the chase.

During the course of the litigation, and after the two year anniversary of the accident, the plaintiff sought leave to amend his Complaint to assert a claim against the third party defendants directly. The third party

defendant objected, on the grounds that the statute of limitation had expired.

The Court determined that, since the third party defendant was aware of the possible claims since the time of the accident, the Court would allow the amendment under Superior Court Rule 15. Furthermore, even though the plaintiff never made a formal claim in writing to the Town of Newport, the Town had an obligation to notify the plaintiff of the statute of limitations under 18 Del. C. Section 3914. Thus the statute of limitations defense, according to the Court, would fail in any event.

SUPERIOR COURT ALLOWS PRODUCT LIABILITY ACTION IN DELAWARE RESULTING FROM ACCIDENT IN MEXICO

Pena, et al. v. Cooper Tire and Rubber Company, Inc., et al., Del. Super., C.A. No. 07C-06-059 (March 31, 2009)

The plaintiff was killed on September 1, 2006, in a motor vehicle accident in Mexico. He was operating a Ford vehicle which was equipped with tires manufactured by defendant Cooper. He alleged that tread separation caused the vehicle to roll over, resulting in the plaintiff's death. Plaintiff filed suit in Delaware, alleging product liability. The defendants moved to dismiss on the grounds of *forum non conveniens*. They argued that Delaware is an improper venue because of the expense and difficulty of litigating the case here. Rather, the defendants argued that Mexico would be the appropriate jurisdiction to hear the case.

The Superior Court discussed the factors that determine the level of hardship. They are: 1) the relative ease of access to proof; 2) the availability of compulsory process for witnesses; 3) the possibility of viewing the premises (accident scene); 4) which state's law will apply to the case; 5) whether there is a similar action in another

jurisdiction; and 6) other practical matters that will effect the relative ease or difficulty of hearing the case.

The Court noted that the plaintiff must have an alternative forum available to him at the time the lawsuit is instigated. Here, there was some question as to whether Mexican courts would allow the action to proceed against these defendants. After reviewing this and the other factors, the Court denied the Motion to Dismiss. Even though the defendants offered to submit themselves to the jurisdiction of the Mexican courts, that factor is immaterial.

**SUPERIOR COURT DENIES PRE-
JUDGMENT INTEREST IN UIM CLAIM**

**Rapposelli v. State Farm, Del. Super., C.A.
No. 07C-03-027 (April 1, 2009)**

This was a claim for underinsured motorist benefits stemming from a car accident on January 2, 2004. The plaintiff accepted the tortfeasor's minimum limits and then pursued UIM coverage with State Farm. After a jury verdict in favor of the plaintiff, the plaintiff sought costs and pre-judgment interest. During the trial, the Judge determined that the jury should be told the amount of State Farm's coverage (\$100,000.00) as well as the amount received from the tortfeasor (\$15,000.00). The jury assessed total damages of \$85,000.00, resulting in a \$70,000.00 award against State Farm. The plaintiff sought pre-judgment interest back to the date of the accident, on the grounds that this case was essentially a tort claim. The Court, however, disagreed, concluding that the action against State Farm for underinsured motorist benefits is essentially a contract matter. The fact that tortuous activity is the subject matter of the contract does not determine the nature of the obligation to enforce the contract. As such, the Court denied the claim for interest.

**SUPERIOR COURT UPHOLDS ASSAULT
AND BATTERY EXCLUSION IN
INSURANCE POLICY**

**Regis Insurance Company v. Lobby
House, Inc., et al.**, Del. Super., C.A. No.
08C-01-048 (March 30, 2009)

This was a declaratory judgment action that arose out of a fight in a bar on February 5, 2006. The plaintiff in the underlying matter alleged that a fight broke out between other patrons, and that the plaintiff was injured as he was attempting to leave. He sued the other individuals as well as the bar. The bar carried liability insurance, and the policy contained an assault and battery exclusion endorsement. This declaratory judgment action sought to establish that the insurance company did not owe a duty to defend or indemnify the bar in connection with the litigation.

The plaintiff attempted to assert broad claims going beyond assault and battery, but the Court nevertheless noted that, at its core, this case was simply about a bar fight. As such, the exclusion, which was clear and unambiguous, was enforceable. Therefore, the insurance company's Motion for Summary Judgment was granted.

**UNITED STATES SUPREME COURT
DISCUSSES FEDERAL PREEMPTION
IN PRODUCTS LIABILITY CASE**

Wyeth v. Levine, U.S. Supreme Court, No.
06-1249 (March 4, 2009)

This case deals with federal preemption of state law claims for damages. The plaintiff received I.V. injections of the medication Phenergan. She alleged that, as a result of the injection method, she developed gangrene and her arm was ultimately amputated. She alleged in a state law claim against the defendant that the drug's manufacturer provided an inadequate warning concerning this injection method. The defendant argued that, since the FDA approved the warning label, federal preemption would be a bar to the plaintiff's claim.

The Supreme Court disagreed, and determined that the FDA's approval of the warning label represented a minimum requirement and did not prevent the manufacturer from providing additional warnings as necessary in light of new information.