CARR MALONEY PC

LEGALLY SPEAKING

Carr Maloney PC is a litigation firm providing comprehensive legal services throughout the mid-Atlantic region. Businesses and individuals use the firm as a single resource to meet all of their legal needs. Recognizing that each client's legal issue comes with its own specific complexities, **we simplify the complex.**

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Kelly Lippincott to Present at the DRI Insurance Coverage and Practice Symposium in NYC

On December 3, 2015 Kelly Lippincott will be presenting at the DRI Insurance Coverage and Practice Symposium in NYC regarding *The Duty to Defend: A Comprehensive Review of Fundamental Concepts, Emerging Issues, and Trends.* Kelly's presentation will drill down on all aspects of the duty to defend, including the use of extrinsic evidence, the scope of defense, pre-tender defense costs, independent counsel, right to recoupment of defense costs, the consequences of an insurer's wrongful failure to defend, and what terminates the duty to defend.

For more information regarding the symposium, please visit the event page on DRI's website, located here.

Joseph Hainline Presents at the DRI Annual Conference

On October 8, 2015 Joe Hainline presented an Ethics CLE at the DRI Annual Conference in Washington, DC. The presentation topic was "Cleaning up the Legal Profession" and focused on the costs and benefits of the emerging trend across jurisdictions to institute mandatory civility rules governing attorney conduct.

Can a Class Action Lawsuit be Maintained Without an Actual Injury?

By: Matthew D. Berkowitz, Esq. and Michele M. Kinney

Often, a lead plaintiff in a class action lawsuit alleges that he was the victim of a statutory violation. However, he suffered no actual harm as the result of the purported violation. Can such an individual be permitted to serve as a class representative, absent an actual injury?

On November 2, 2015, the United States Supreme Court will hear oral arguments in *Spokeo Inc., v. Robins* ("Spokeo") to assess this Question. More specifically, the Court will consider whether Congress may confer Article III (of the Constitution) standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute. Article III provides that to have standing to sue, an individual must have personally suffered a concrete or imminent injury that can be fairly traced to the alleged action of the defendant and that the injury is capable of being redressed by a court decision. In other words, a plaintiff must have suffered an actual injury.

In *Spokeo*, Thomas Robins, in his individual capacity and as a class representative, alleged that Spokeo violated the Fair Credit Reporting Act ("FCRA") by publishing inaccurate information about him and others on Spokeo's website. Robins also alleged that Spokeo failed to provide appropriate notices. Robins did not seek actual damages. Instead, he sought statutory damages under the FCRA. The FCRA allows individuals to recover for statutory damages without proof of an injury.

The District Court for the Central District of California dismissed the case, concluding that Mr. Robins lacked standing under Article III. Robins failed to allege an injury in fact because he did not allege "any actual or imminent harm." The Ninth Circuit reversed the District Court's decision and held that "Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right." Furthermore, the Ninth Circuit held that a "violation of a statutory right is usually a sufficient injury in fact to confer standing" and that a plaintiff can suffer a violation of that statutory right without suffering actual damages.

The Ninth Circuit joined the Fifth and Sixth Circuits, both of which suggested that plaintiffs may maintain lawsuits without an injury in fact, based solely on a statutory violation. On the other hand, the Second, Third, and Fourth Circuits have ruled that Congress cannot create standing by statute alone and the mere deprivation of a statutory right is insufficient to confer standing. Based upon this Circuit split, the Supreme Court granted certiorari.

Should the Supreme Court reverse and hold that statutory violations alone are insufficient to confer standing – i.e., that an actual injury is required, it would be considered a victory to businesses and may be a blow to the plaintiff's class action bar. Because many lead plaintiffs in present class action lawsuits have suffered only alleged statutory violations, plaintiff's counsel may be limited in their ability to locate individuals who have suffered actual injuries as a result of statutory violations. As such, the number of class action suits filed against business for statutory violations under the FCRA and other federal consumer protection statutes may decrease.

On the other hand, if the Supreme Court affirms, classes of consumers may have a greater ability to sue businesses for statutory violations, absent actual harm – especially in the Fourth Circuit and other Circuits that have strictly applied Article III standing. Such a decision may also lead to additional class action suits in the consumer protection arena. It also may open up the door to additional class action lawsuits in other contexts, such as suits under the Americans with Disabilities Act.

Baby Product Manufacturers Bump into Negligence

By: Melissa E. Hoppmeyer, Esq. Reprinted with Permission from DRI's *The Voice*

Product safety is a robust area of law that receives much scrutiny and debate among the public, consumer agencies and manufacturers. This scrutiny multiplies whenever the product relates to children's safety. Recently, the hot topic in the children's product industry is the use of crib bumpers. Negligence and wrongful death suits concerning the safety of crib bumpers are rising. In fact in 2011, plaintiffs in California filed a class action against one of the larger crib bumper manufacturers alleging negligence among other consumer protection allegations. Ultimately, the California Court dismissed the class action on jurisdictional grounds.

Despite the increase in litigation, crib bumpers continue to be a big ticket item for manufacturers and distributors of baby products. In the U.S. alone, more than 200,000 crib bumpers are sold every year. Crib bumpers are bought for both their aesthetic value and as a safety measure used to prevent bumps, bruises and an infant's limbs from becoming trapped between crib slats. Critics of the product, including child-safety organizations such as American Academy of Pediatrics, Consumer Product Safety Commission (CPSC), and First Candle, warn that crib bumpers increase an infant's suffocation risk.

The debate pits consumer agencies against manufacturers, both adamantly advocating their positon concerning the product's safety. Both sides of the debate commission research studies that review the product's safety, which produce widely disparate findings. CPSC's study links approximately 690 infant deaths, between 1992 and 2010, to the use of pillows and cushions in cribs. Alternatively, a 2011 research study commissioned by the Juvenile Product Manufacturers Association (JPMA) refutes research linking dozens of infants' deaths to crib bumpers and argues that no evidence exists to suggest that crib bumpers are unsafe. While consumer agencies and manufacturers both agree that blankets and pillows do not belong in cribs, bumpers remain the last in-crib item where ample disagreement still exists.

Following the consumer agencies' lead several states, including Maryland and Illinois, considered legislation banning crib bumper sales with Maryland enacting the ban in 2013. Legislators are considering similar legislation in New York, California and Pennsylvania. Illinois' state legislature continues to debate a state-wide ban; however, a city-wide ban currently exists in Chicago.

Conflicting research coupled with the continued nation-wide sales creates an area of law ripe for litigation. Further, the legislatures' increasing attention poses the possibility of a rise in litigation, with the bans on crib bumper sales playing a large role in the law's

development. Two potential ways a ban could affect litigation is through the use of negligence per se and assumption of the risk in crib bumper litigation.

First, a statute banning crib bumpers sales presents a savvy plaintiff's attorney with an opportunity to plead negligence per se. To prove negligence per se, the plaintiff must prove that (1) defendant violated a statute; (2) the statute in question is a safety statute; (3) the defendant's acts caused the type of harm that the statute was intended to prevent and (4) the plaintiff was a member of the class that the statute protected. Enacted to protect infants from possible death or injury, even a quick analysis of the crib bumper bans demonstrates a feasible argument for the statute's use. The statutes prohibit the sale of crib bumpers and provide penalties for the statute's violation. The statute's singular purpose is infant safety. Presented correctly, a plaintiff's attorney could persuade a court to allow the claim.

This presents an issue for litigators defending such a suit. Unlike ordinary negligence, a plaintiff alleging negligence per se need not prove the reasonable person standard, rather the actor's conduct is automatically considered negligent, and the suit's focus becomes causation. Not requiring the Plaintiff to establish a breach ensures a factual, rather than legal dispute, making summary judgment unlikely. Every case will become a battle of the experts, each side presenting its research and testifying for and against causation. Removing the ability to present a strong case for summary judgment gives plaintiffs an opportunity to use the inevitable raw emotion associated with these types of cases to persuade juries or force settlement.

Second, a statutory ban and greater public knowledge presents the opportunity to raise an assumption of the risk defense. Pleading such an affirmative defense allows litigators to determine through discovery, if the plaintiff knew the alleged potential dangers and bought or continued to use the bumper knowing the risks. Although difficult, presenting testimony that a parent knew the alleged dangers and still chose to purchase and use the bumper, could relieve manufacturers and distributors of liability. In states still practicing under a contributory negligence theory, assumption of the risk presents a complete bar to recovery. In comparative fault states, assumption of the risk can mitigate damages and act as a powerful settlement tool.

The conflicting research and increased nation-wide discussion concerning the safety risks posed by crib bumpers ensures this area of law's continued development. It is important that firms representing children's product clients keep abreast of any changes to the law both nationally and in their respective jurisdictions.

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