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Dedication to serving the needs of its clients has been the backbone of Gibson & Behman, P.C. since its founding in 1987. G&B prides itself on providing progressive and economical solutions to the needs of clients in all areas of the firm's practice. We take a macro view of our clients' needs to address root causes of issues and to formulate plans to avoid future problems.

Our proven litigation track record and our ability to analyze trends in the legal community provide confidence to our clients and has allowed us to develop a reputation as zealous advocates. We strive to excel in all areas of our practice with client satisfaction, as always, our paramount goal.

Daniel P. Gibson and  
Scott R. Behman

#### INSIDE THIS ISSUE:

New Jersey	1
New York	1-2
Massachusetts	3-4
Maine	5
Connecticut	6-8
New Hampshire	9
Rhode Island	9

### GIBSON & BEHMAN PREVAILS ON MOTION FOR SUMMARY JUDGMENT IN NEW JERSEY NEGLIGENCE, DRAM SHOP AND SPOILIATION OF EVIDENCE CASE

Attorneys Ron Langman and Roy Woo recently prevailed on a partial summary judgment in a personal injury claim. The case arose out of a physical altercation that took place at an Atlantic City restaurant. The plaintiff alleged that another patron struck her from behind and caused her to fall, sustaining injuries. The plaintiff claimed that the restaurant was responsible for her injuries in that a visibly intoxicated patron was served alcohol resulting in the assault on plaintiff and in that security on premises was inadequate. The plaintiff also alleged spoliation of evidence based on the restaurant's failure to identify the unknown alleged assailant and the failure to draft an incident report. Collins v. Game On Atlantic City, et al. is pending in the Superior Court of New Jersey in Cumberland County.

During discovery, Gibson & Behman established that the alleged assailant was merely getting up from her chair in order to join a line dance in which the plaintiff was participating. The patron accidentally bumped into the plaintiff, causing her to fall. As such, Gibson & Behman showed that the patron's conduct was unintentional, accidental, and sudden and could not have been prevented by the restaurant's employees or security.

The plaintiff also alleged that the patron who caused the fall was served alcohol while intoxicated; however, the plaintiff was unable to proffer any competent evidence that the patron was intoxicated or that the restaurant continued serving her alcohol. Gibson & Behman successfully argued that the sole evidence that the patron was holding a drink during the incident and was not seen after the incident is patently insufficient to establish a Dram Shop cause of action.

Gibson & Behman argued that, under New Jersey law, a defendant is liable for negligent security only if it fails to take appropriate measures to prevent a *foreseeable* injury; however, we established that, in the present case, the injury was accidental and no duty existed on the part of the restaurant to prevent it. Gibson & Behman further argued in regard to the Dram Shop claim that liability exists only when a *visibly* intoxicated person or a minor is served. As the plaintiff was unable to provide any evidence or witnesses of the patron being intoxicated or being served, the Dram Shop claim was not viable. Finally, Gibson & Behman argued that the plaintiff's cause of action for spoliation of evidence was unwarranted in that the defendants did not consider this accidental bumping between two patrons to be an incident that required the formulation of an incident report. Gibson & Behman presented evidence of matters which, according to the defendant's policies, would warrant such a report. As such, we showed that the defendant acted reasonably in not obtaining the patron's information, as the restaurant had no knowledge that litigation was probable.

### GIBSON & BEHMAN MOVES TO WALL STREET

G&B's New York office has relocated to 14 Wall Street. The Suite 5-C 7,000 square feet of office space situated directly in the heart of New York City's Financial District makes way for exciting new growth in the office and direct contact with many of the Country's largest and most prominent financial and insurance institutions.

**GIBSON & BEHMAN SECURED COMPLETE VICTORY IN  
WORKERS COMPENSATION CASE**

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Attorney Chris Cifra of the Burlington, Massachusetts office recently secured a directed verdict in a large building damage liability case brought in Massachusetts state court, assisted by Attorney Chris

The attorneys of the Gibson & Behman New York office were recently successful in a Workers' Compensation matter involving a seasonal worker who allegedly injured his lower back during the course of his employment. Claimant allegedly sustained a work-related injury, however, claimant continued to work the day of the alleged injury and the day after, only seeking treatment two days after the incident. Thereafter, claimant was cleared to return to work within several weeks and resumed his employment with no restrictions. However, shortly thereafter, claimant, being a seasonal employee, was laid off due to his seasonal employment status. Following the lay off, claimant alleged that his cessation from work was due to the injury and the resulting disability, and not merely the result of a seasonal lay off.

Based on Claimant's testimony, as well as the testimony of the employer's representative, who attested to the claimant's seasonal employment and the fact that the lay off was due to the seasonal nature of claimant's employment and not due to any alleged disability, the Law Judge found that claimant's cessation from work was not related to his physical condition, that he failed to search for any type of employment and that medical evidence presented even prior to independent medical examinations revealed either no or at most a partial disability.

Following this initial successful hearing, Gibson & Behman attorneys requested the deposition of claimant's treating physicians. Out of three treating physicians, only one, an internist, alleged that claimant was totally disabled. This physician's deposition included highly questionable testimony, as he was the only provider who determined that claimant was suffering from a total disability and was therefore unable to return to work solely based on subjective complaints. The other two physicians stated on their numerous C-4's that

claimant was able to return to work; however, one of these treating physicians testified that claimant is totally disabled and cannot return to work, despite return to work letters and the C-4's. More incredibly, when presented with two letters signed by the physician himself and a colleague within the same office, stating that plaintiff was cleared to return to work with no restrictions, claimant's physician denied ever signing or seeing same.

Thereafter, we appeared in front of the Law Judge again for claimant's testimony on the issue of re-attachment to the labor market. At the hearing, claimant testified that he was advised by yet another physician that he was disabled from work, but that he persisted in his job search efforts. However, during cross examination claimant was unable to present any details of his job search efforts, which appeared to have been fabricated. As such, on the issue of whether claimant's cessation of work was related to the accident, the Law Judge determined that it was not. Furthermore, after questioning claimant at length as to his efforts to secure employment, the Law Judge determined that claimant had made no job search efforts since the accident.

Finally, we again appeared before the Workers' Compensation Board for summations regarding the issue of further causally-related disability and attachment to the labor market. As expected, claimant's counsel argued that claimant's treating doctors were all credible and categorized claimant as being, at a minimum, moderately disabled.

Gibson & Behman attorneys argued that claimant's treating physician's testimony as to disability should be given no credit at all and made specific references to the return to work letters, as well as several physician's C-4's which clearly state that claimant is able to work. In that regard, Gibson & Behman attacked the findings of claim-

ant's physician, an internist, who claimed that plaintiff was disabled, based on the physician's questionable qualifications and the fact that his opinion was based merely on claimant's subjective complaints. Additionally, we attacked the credibility of claimant's treating physician on the basis of his alleged lack of knowledge of the return to work letters which were authored by this very physician. Furthermore, we further highlighted that it is simply incredible that this physician did not discuss his joint treatment of claimant with other doctors in his practice.

In that regard, Gibson & Behman also presented the Law Judge with reports from several physicians stating that claimant is able to work and does not suffer from any disability. We then argued that the physician who performed an Independent Medical Examination of claimant was extremely credible and found that claimant had exaggerated in his responses. This physician was the only doctor to perform objective testing on claimant and those tests were negative.

After hearing arguments from both sides, the Law Judge agreed with Gibson & Behman's position and found that the IME doctor's testimony was credible and credited his opinion only. As such, the Law Judge ruled that claimant does not suffer from any further causally-related disability. Having previously found that claimant made no attempts to secure employment, the Law Judge marked the matter no further action.

This is an excellent result obtained by Gibson & Behman attorneys, as claimants face a low burden of proof when making a claim for injuries sustained in the course of their employment, in addition to the fact that this result was obtained in Brooklyn, historically a claimant-friendly jurisdiction.

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**GIBSON & BEHMAN WINS A DIRECTED VERDICT IN BUILDING DAMAGE CASE**

Attorney Chris Cifra of the Burlington, Massachusetts office recently secured a directed verdict in a large building damage liability case brought in Massachusetts state court, assisted by Attorney Chris Driscoll of the Manchester, New Hampshire office.

Attorney Cifra represented a demolition subcontractor who was hired to take down a large building in Boston. There were several buildings closely situated in the neighborhood. A building owner two sites down the street claimed structural damage to his building stemming from the contractor's demolition efforts that created alleged ground vibrations. An overlapping claim was presented against a foundation subcontractor that installed a foundation at the site for the new building after Attorney

Cifra's client had removed the old building.

The claimant business owner recovered \$100K of property insurance proceeds from his insurer, and brought a lawsuit seeking an additional \$800K for alleged damage not covered by his own property insurance. Attorneys Cifra and Driscoll undertook a coordinated defense effort that involved extensive case discovery and involvement of various experts, including structural engineers and commercial building appraisers.

The claimant's insurer brought a \$100K subrogation claim in inter-company arbitration against the insurer for Gibson & Behman's client. The case was thoroughly prepared for arbitration by Attorneys Cifra and Driscoll, who successfully

persuaded a 3 person panel of arbitrators to deny the claim.

The lawsuit seeking the claimed balance of building damage was recently called to trial at Suffolk Superior Court in Boston. Attorneys Cifra and Driscoll moved to block the claimant's experts from testifying at the trial because their opinions, among other things, were disclosed late and were not based upon discernable and reliable methodologies as required under Massachusetts law concerning expert witnesses. The issue was extensively briefed and argued. In a significant defense ruling, the judge agreed and ruled that Plaintiff's experts could not testify at trial. Because the claimant could not prove his damages claim absent required expert testimony, a directed verdict entered in favor of Gibson & Behman's client.

**ARBITRATOR FINDS TAVERN NOT LIABLE TO SERIOUSLY INJURED MOTORIST**

Attorneys Scott Behman and Dan Shanahan of Gibson & Behman's Burlington office recently obtained a favorable arbitration decision in a liquor liability case against a tavern that allegedly served alcohol to a patron later involved in a serious motor vehicle accident with another vehicle. The plaintiff suffered catastrophic injuries, including fractured vertebra resulting in permanent paraplegia.

On May 24, 2002, the plaintiff was operating his motor vehicle on the Lowell Connector when his vehicle was hit from behind by a vehicle operated by the alleged patron. The impact caused the plaintiff's vehicle to leave the roadway, causing serious and life-threatening injuries. A police officer at the scene observed the patron was intoxicated and administered field sobriety tests which the patron failed. The patron initially admitted to police officers that he consumed alcohol at another establishment, but did not mention the defendant tavern. The patron was later treated at a local hospital for his injuries and a blood sample was obtained, yielding a blood alcohol level of 0.17%. Approximately four and one-half years after the accident, the patron pleaded guilty to operating under the influence, and for the first time admitted to consuming alcohol at two establishments, being served last at the defendant tavern.

The patron testified to consuming a total of seven mixed drinks that evening, four being served at the defendant tavern. The defense argued that the patron's testimony contradicted evidence that he was, in fact, served at the defendant's tavern. The defense called into question inconsistencies with the patron's description of where he parked his car, the gender of the bartender, the description of the defendant tavern, and register receipts which failed to corroborate the patron's description of the rounds of drinks served to the patron's group that evening. The defense also attacked the credibility of the patron's account of his objective signs of intoxication while at the defendant tavern.

### GLOUCESTER TAVERN NOT LIABLE TO PEDESTRIAN STRUCK BY DRUNK DRIVER

Attorney Dan Shanahan of Gibson & Behman's Burlington office recently obtained a defense verdict in a liquor liability case against a Gloucester tavern insured by Hospitality Mutual Insurance Company. The plaintiff was a pedestrian struck by a drunk driver minutes after leaving the defendant tavern.

On August 13, 2004, the alleged intoxicated patron arrived at the defendant tavern after working as a landscaper. He arrived at the tavern between 3:30 p.m. and 3:45 p.m. There was evidence offered that the patron was served and consumed three to four beers during a time period between forty minutes to over one hour. Within minutes after leaving the tavern, the patron was involved in a motor vehicle accident, striking the plaintiff who was talking to a friend while standing outside the driver's side window of a parked car. The plaintiff was thrown a distance of forty-two feet, eventually landing on the asphalt road surface. The patron initially drove away, but later returned to the scene to find rescue personnel and police officers. The patron recognized the plaintiff as a family friend and became visibly upset and shaken at the scene. A police officer detected the

odor of alcohol, and the patron voluntarily submitted to field sobriety tests. The patron failed several of the tests and was placed under arrest. The patron later pleaded guilty to operating under the influence of alcohol.

As a result of the accident, the plaintiff sustained a fractured collarbone, knee injury, closed head injury, and other internal injuries. The plaintiff was admitted to a local hospital for five days and continued follow up care for her orthopedic injuries. The fractured collarbone failed to properly heal, requiring surgery to remove the distal end of the bone. The plaintiff eventually underwent a total knee replacement. The plaintiff's medical bills exceeded \$150,000.00. The plaintiff also alleged she was unable to work since the accident as a result of her injuries.

The defense argued that there was no evidence the patron was showing any visible or obvious signs of intoxication while at the tavern. The defense argued that based on the most credible evidence, the service of three beers, not four beers, in approximately one hour, was not excessive or a sufficient amount to place the bartender on notice she was serving alcohol to an in-

toxicated patron. The defense argued that the cause of the accident was the patron's inattentiveness trying to answer his cell phone while driving, causing his vehicle to veer into the plaintiff. The defense was successful in excluding evidence of a breathalyzer, and limiting the admissibility of the patron's OUI conviction and observations made by police officers at the scene.

The defense also disputed the extent and severity of the plaintiff's injuries. The defense offered the testimony from its expert, an orthopedic surgeon, who testified the only orthopedic injuries related to the accident were the fractured collarbone and a tibial plateau fracture in the knee, which resolved within one year after the accident. The expert also testified that a slip and fall event in a bath tub less than a year after the accident caused unrelated damage within the knee, later requiring the total knee replacement.

After four days of trial in Lawrence Superior Court, an Essex County jury found that the defendant tavern was not negligent. The plaintiff's initial demand was \$750,000, which was reduced to \$75,000 before trial. No offer was ever made.

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### SWEEPING CHANGES TO MASSACHUSETTS PERSONAL INFORMATION LAW

The Massachusetts Department of Consumer Affairs and Business Regulation has issued final regulations implementing the Commonwealth's security breach law, Massachusetts General Laws c. 93H (the Regulations). The Regulations, codified at 201 CMR 17.00: Standards for the Protection of Personal Information of Residents of the Commonwealth, were generally effective on May 1, 2009, while various safeguards are effective January 1, 2010, and establish rigorous standards for safeguarding personal information.

These regulations are being promulgated in the wake of a series of alarming data breaches, placing hundreds of thousands of Massachusetts consumers at risk of identity theft. Once fully integrated, these regulations will place Massachusetts among the leading states with respect to safeguarding personal information.

### EXECUTIVE DIRECTIVE CURTAILS PREEMPTION

Recently President Obama issued a Directive to the Heads of all Executive Branch Departments and Agencies stating it is the policy of his Administration that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Preemption of state common law will no longer be presumed or asserted by regulatory agencies absent "explicit preemption by Congress or an otherwise sufficient basis under applicable legal principles."

While not immediately obvious, these changes will likely have a profound impact on both litigation and subrogation in the years to come. Specifically, this executive directive should herald great changes in the ability to recover against product manufacturers, including those in fire losses, which is a primary aspect of Gibson & Behman's practice in the State of Maine.

On a number of occasions our firm has handled fire losses, relative to floor staining products, extension cords, toast-

ers, dishwashers and other faulty products. Almost all state law claims against product manufacturers under theories akin to "negligent failure to warn," which is the most common theory of liability in such instances, eventually sustain defeat at the hands of federal preemption. The federal preemption, in turn, is premised upon the existence of a federal statute governing the labeling and warning requirements of specific products, such as those mentioned above.

For example, when one sues a floor staining manufacturer in state court for a fire loss, such suits are defeated because the doctrine of federal preemption prohibits a state from requiring any action above, beyond, or in conflict with the Federal Hazardous Substances Act (FHSA): Labeling and Banning Requirements for Chemicals and Other Hazardous Substances (15 U.S.C. § 1261 and 16 C.F.R. Part 1500). Many states have attempted to enact more stringent labeling requirements on products covered by the FHSA only to be overturned at the appeals level on the grounds of federal pre-

emption. In this respect, prior to May 20, 2009 product manufacturers were, essentially, "bullet-proof" at the state court level.

It appears that President Obama's executive directive will serve to unlock the door to state law claims against product manufacturers who were previously insulated by the doctrine of federal preemption. This is a potentially profound development. We have begun a review of files that we recommended be closed on the grounds that state law claims were unrecoverable due to federal preemption. At this time we have not found any such claims that are ripe to be reopened. However, in the State of Maine the negligence statute of limitations is six (6) years. Thus, there is a potentially large pool of previously unrecoverable claims that may be positively effected by President Obama's actions and which are still within the statute of limitations. If you believe this important development has affected your rights do not hesitate to contact Gibson & Behman for our assistance in reviewing your potential claim.

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### "BODILY INJURY" DEFINITION CLARIFIED IN UNINSURED MOTORIST COVERAGE

Recently the Law Court in the State of Maine clarified the definition of "bodily injury" with regard to uninsured motorist coverage in *Ryder v. USAA General Indemnity Co.*, 2007 ME 146, 938 A.2d 4. In this wrongful death case, the Law Court held that the term "bodily injury," as used in an underinsured motorist insurance policy, applied to a bystander claim for emotional distress from witnessing a loved one's death as long as the plaintiff could establish that the emotional distress was a diagnosable sickness or disease. The policy defined "bodily injury" as "bodily harm, sickness, disease or death." The Law Court found that the term was ambiguous and construed the term in favor of coverage.

The Law Court concluded that there could be coverage for bystander recovery under the policy language but departed from its previous jurisprudence on recovery for emotional distress by concluding that the plaintiffs could collect only if they could show that the mental distress was both severe and constituted a diagnosable sickness or disease.

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**“If the Structure Crumbles: Protecting  
Claimants and Respondents in Structured Settlements”**

A tentative settlement figure of \$600,000.00 has been agreed upon by the parties in a workers' compensation matter in the state of Connecticut. The claimant just celebrated her fiftieth birthday and is looking for a secure stream of income for the remainder of her life to cover recurring medical costs. An obvious solution is to enter into a structured settlement.

In our current, uncertain economic climate, with government bailouts for insurance companies and banks, the claimant may wonder: Will my structured, compensation settlement annuities be protected? Workers' compensation insurers may question: If the annuity insurer becomes insolvent, what liability does our company have?

By way of history, in 1982, Congress passed The Periodic Payment Settlement Act of 1982 (P.L. No. 97-473), which promoted the use of structured settlement agreements in physical injury cases by means of amendments to the tax codes. Section 104(a)(2) of the Internal Revenue Code was amended to permit the amount of money used to purchase an annuity or government obligation to fund payments of a settlement agreement for personal injury suits to be excluded from the recipients' gross income. As part of the Act, Section 130 was adopted as part of the Internal Revenue Code to create a method in which an injured party could receive the stream of payments from a "qualified assignment" process. Subsequently, the Taxpayer Relief Act of 1997 broadened the Act to include workers' compensation payments for claims filed after August 5, 1997, making them eligible for qualified assignment, the same as physical injury or physical sickness tort claim payments under IRC § 104(a)(2). The obvious tax advantage resultant from the revisions to the Internal Revenue Code is that a qualified income stream earned through a lump sum settlement will remain exempt from taxation, while income generated by investments outside the act will be taxable.

The workers' compensation insurer may transfer the cost of future damage payments to a third party by means of a "qualified assignment" to a financially secure and experienced institution. Section 130 of the Internal Revenue Code prescribes certain requirements for recognition as a qualified assignment and eligibility for favorable tax treatment. These requirements mandate that (1) the assignee assumes the liability from a party to the suit or agreement or the worker's compensation claim; (2) the payments are fixed and determinable as to the amount and time of payment; (3) the payments cannot be accelerated, deferred, increased or decreased, or otherwise changed by the recipient; (4) the obligations of the assignee are no greater than the obligation of the assignor; (5) the periodic payments are excludable from the recipient's gross income under Section 104(a)(2); (6) the injury must be a physical sickness or injury; and (7) a qualified funding asset (an annuity or U.S. Government obligation) must be used to fund the structured payments.

C.G.S. § 31-320 suggests all payments under Workers' Compensation are non-assignable, even after the award or full and final stipulation. C.G.S. § 31-340 also discusses the insurer's responsibilities to the employee, namely that the insurer is directly liable to the employee or her dependent for compensation benefits. Interpretation of the language of Section 130 of the Internal Revenue Code, however, appears to dictate that assignment of fiscal liability by the workers' compensation carrier to a third party, including language in the stipulation that relieves the carrier of its liability, is appropriate as long as the subject annuity meets the definition of a qualified assignment under the Internal Revenue Code. If that interpretation is accurate, and assuming an annuity was not a part of the stipulation, the obligation of the insurer posed by the Connecticut statutes §§ 31-340 and 31-320 are alleviated by virtue of the workers' compensation insurer and claimant entering into a binding, contractual agreement with consideration to waive the insurer's ongoing obligations. Parties are cautioned, however, that this is not settled law, and the question remains as to whether the insurance carrier for compensation benefits remains responsible after the assignment of benefits to the third party annuity company even with a contractual waiver by both parties of the rights under C.G.S. §§ 31-320 and 31-340. Moreover, C.G.S. §§ 31-320 and 31-340 arguably could be preempted by the requirements of the Internal Revenue Code. As one can imagine, the implications of contractual waiver of rights in this particular instance may lead to contractual waiver of rights in numerous other instances.

Assuming that respondents are allowed to relinquish their liability to a third party, what protection is given to the claimant? The first protection is the type of funding asset mandated by Section

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130 of the Internal Revenue Code, which includes *any annuity contract issued by a company licensed to do business as an insurance company under the laws of any state, or any obligation of the United States government*. In most cases, annuity contracts through insurance companies are the preferred type of funding asset given their higher rates of return. Insurance companies are subject to regulations that require certain assets be set aside in order to ensure certain obligations are met. Overall rating or creditworthiness of the insurance company that issues the annuity is based on its ability to pay claims and can differ greatly between companies. Traditionally, the workers' compensation insurer chooses the annuity provider to fund the structured settlement.

In selecting an annuity, one should be chosen from a highly-rated company, which ratings can be obtained from numerous sources, including, but not limited to, Moody's, Standard's & Poor's and A.M. Best. The best case scenario, even for represented claimants, would be to consult with their financial advisor as to which annuity best serves their financial goals. As we know, however, claimants are, at times, *pro se* and do not have a financial advisor or the wherewithal to obtain financial advice. This presents several challenges and questions for commissioners in approving these types of stipulations. Beyond the selection of the annuity insurer, further protection from annuity default is provided by individual state guaranty associations. Pursuant to C.G.S. § 38a-863, the Connecticut Life and Health Insurance Guaranty Association ("CLHIGA"), was created in the wake of the Connecticut Life and Health Insurance Guaranty Act, namely C.G.S. §§ 38a-858 to 38a-875, inclusive. CLHIGA is made up of all insurers licensed to sell direct insurance in the state, including structured settlement annuities. Member insurers are charged monetary assessments to carry out the powers and duties of the association, which include monies to maintain the guaranty fund in event of insurer insolvency.

If a member insurer is found to be insolvent, the Act allows for protection, currently up to \$500,000.00, per insolvent insurer pursuant to C.G.S. § 38a-860(g), to holders of individual annuities with the insolvent insurer via the Connecticut Insurance Guaranty Association ("CIGA."). For example, if an individual owned four \$200,000.00 annuities with the same insolvent insurance company, the individual would have total guaranty association coverage of only \$500,000.00. The remainder of the funds left unprotected by the Act would need to be submitted as a creditor claim in the receivership of the insolvent insurer. Ideally, CIGA would step into the shoes of the insolvent insurer and provide identical benefits under those insolvent insurance policies, including workers' compensation policies and annuity insurance. More specifically, once the Insurance Department determines that the insurer is insolvent, the CIGA funds are supposed to be triggered and make up for any shortfall from the date of insolvency. CIGA should provide these funds to the claimant at least until a new insurer buys the annuity from the insolvent insurer. The general recommendation to avoid becoming a creditor in receivership beyond any proceeds unprotected by CIGA, is for the claimant to vary her annuities by diversifying the total value of the settlement share into several annuities funded by different insurers, all below the \$500,000.00 threshold of available coverage.

The CIGA may deny payment of benefits and as we have seen most recently with compensation claims, delay payment of benefits for a significant period of time. This situation can cause issues for the claimant, including from which forum the claimant would seek assistance if annuity payments were denied. While the settlement proceeds originated from a workers' compensation settlement, if the annuity insurer becomes insolvent and/or CIGA denies payment of those benefits, then the question remains as to which agency should hear this matter. Should it come under the jurisdiction of the insurance commission pursuant to C.G.S. § 38a-990, or should the workers' compensation commission retain jurisdiction for any issue arising until the proceeds are paid in full by the annuity carrier? Workers' compensation commissioners may be reluctant to fully release the obligations of the workers' compensation insurer due to the concern with jurisdiction upon insolvency and possible declination of benefits. By not fully releasing the workers' compensation insurer, the claim remains under the jurisdiction with the workers' compensation commission. This, however, begs the question whether requiring the workers' compensation insurer to act as a guarantor of an annuity is even permitted based on the requirements of a qualified assignment pursuant to the Internal Revenue Code as indicated above.

Presently, under C.G.S. § 38a-860(c), the Association covers only Connecticut residents, and residency is generally determined on the date the applicable insurer is declared insolvent. Thus, if the insured moves out of state, there is no guaranty that coverage up to \$500,000.00 will be afforded. Many considerations and concerns should be factored into whether a claimant and respondent will enter into a structured settlement, including tax implications and Social Security requirements. To the degree that these types of agreements provide long term streams of income and are attractive for insurance companies and claimants alike, this option should remain open for all parties.

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**EMPLOYER HAS NO STANDING TO CHALLENGE EMPLOYEE'S SETTLEMENT AGREEMENT**

The Supreme Court of Connecticut recently held that a plaintiff-employer who intervenes in an employee's civil claim for negligence related to a compensable work injury against a third-party tortfeasor under Connecticut General Statutes § 31-293(a) has no standing to challenge the terms of a settlement arising from that claim.

In *Sorraco v. Williams Scotsman, Inc.*, the plaintiff brought a claim of negligence against the defendant for injuries which he sustained in the course of his employment with Manafort Brothers, Inc. ("Manafort"). Manafort became obliged and paid the plaintiff's workers' compensation benefits as a result of the injuries. The plaintiff brought his negligence claim against the actual tortfeasor pursuant to Connecticut General Statutes 31-293(a). Manafort intervened in this case pursuant to Section 31-293(a) seeking to recover the benefits it had paid to the plaintiff in the amount of \$542,411.69. During the course of pleadings, the plaintiff and the defendant reached a settlement agreement totaling \$750,000.00 in which that amount was to be split equally between the plaintiff and the intervening plaintiff-employer. Thus, Manafort would not be fully compensated to the extent of its lien. Manafort requested a hearing by the court to determine whether the equal division of settlement proceeds was reasonable.

The Supreme Court held that Manafort had no standing to challenge the terms of the settlement. The court explained that an intervening plaintiff-employer's right to obtain reimbursement in such a situation is derived in its entirety from Section 31-293(a). Because Section 31-293(a) specifically protects plaintiff-employers from potential unfair settlements by not binding the employers to such settlements, the court held that employers are not prejudiced by such settlements. Employers may refuse to assent to a settlement in such cases and seek reimbursement through their own claims. Because the employers are not bound by the settlement and may seek reimbursement on their own, they have no standing to challenge the settlements.

The important consideration of this holding is that intervening employers who are not happy with the allocation of funds in a settlement agreement such as in this case, should simply not agree to settle the case. Instead, the intervening employer should pursue its own cause of action with the hopes of recouping a greater amount of money. The defendant will still be on the hook for any additional funds awarded and may think twice about the agreement reached with the plaintiff in as much as that carrier may wind up exposing its insured to personal liability if the policy limits have been exhausted. Furthermore, insurers who have large compensation liens should seriously consider filing their own recoupment claims simultaneous to those filed by the injured employee. It is important that employers and insurers protect their option of pursuing their own claim. As seen in this case, if an employer or insurer relies solely on the diligence of the injured employee in pursuing a third-party negligence claim, it risks an unfavorable outcome. Because of this, employers and insurers should file and prepare their own case for trial simultaneous to that of the injured employee (assuming the size of the lien justifies it) in the event the injured employee accepts an unfavorable settlement.

**Tackling the Complex Evolution of Music Licensing**

For many years, music licensed to film and television went unnoticed. "Miami Vice" was the first television show to move away from a composed soundtrack and to license pre-recorded music on a regular basis, and the popularity and freshness of the show shifted the entire landscape of film and television music. Artists began licensing to many more productions, and the music licensing business took off. License fees for uses of songs in TV, Film, and advertisements now range anywhere from \$500 to \$5,000,000+. Musicians' careers can be revitalized and new musicians can obtain superstar status just because of a single use of their song on screen.

Less than 15 years ago, the rights obtained were as simple as 5 years, United States only, "Free and Basic Television" and maybe an option for "Home Video." The ever-expanding world of television syndication, media options, distribution methods, marketing plans and new technology has shifted the landscape once more. Today, a request from a producer can look like a complicated Excel spreadsheet with use terms ranging from United States to Worldwide (some have gone so far to expand this to The Universe), one month to perpetuity or life of the copyright, and media uses for soundtracks, internet streaming, non-permanent or permanent downloads, ringtones, in-context trailers and out of context trailers, just to name a few. Music licensing has become an arena of new concepts and ideas both creatively and legally. It is clear, if you want to succeed, you must embrace the demand to adapt quickly or failure is almost certain.

Gibson & Behman currently employs staff with extensive experience in licensing music and music publishing administration for film and television, from such shows as "Sopranos", "Sex and the City", and "South Park", to films such as "Dogtown and Z-Boys" and "O Brother, Where Art Thou?" As a result, Gibson & Behman is currently handling music licensing for a major Massachusetts corporation's advertising.

### **GIBSON & BEHMAN WINS A NEW HAMPSHIRE WORKER'S COMPENSATION CASE UNDER "COMING AND GOING RULE"**

Attorney Chris Driscoll of Gibson & Behman's New Hampshire office recently prevailed in a hotly-contested claim in an administrative hearing before the NH Department of Labor. The case involved an unsettled legal issue concerning the compensability of employee injuries while commuting to work or returning home from work.

Under the "coming and going rule" workers who work in fixed locations (e.g., business offices) are generally not eligible for worker's compensation benefits for injuries suffered in car accidents while commuting to or from work. However, there is a recognized exception to the rule for workers who do work in the field that requires regular travel during work hours. It is unsettled law in New Hampshire, even in cases involving traveling field workers, whether they are covered for car accident injuries suffered when the employee is en route from their home to their first business location.

In Attorney Driscoll's case, the employee was a visiting nurse who provided medical services to senior citizens in their homes. The nurse had a group of clients assigned to her by her employer and occasionally traveled between clients' homes during the day, and occasionally ran errands for clients and drove them to medical appointments. The employee was injured in a car accident while traveling from her home in Southern New Hampshire to the home of a client in Northern Massachusetts, a distance of about 12 miles.

Attorney Driscoll worked closely with the insurer claims representative and the insured employer to fully investigate the case. Significantly, it was discovered that the employee had written a series of e-mails to her employer that materially undermined her claim presentation. For example, the employee admitted that she had played golf while vacationing out of state within weeks of the accident. Additionally, the employee told the employer of significant, disabling and unrelated health issues the employee was dealing with as well as her mother. In context, it was argued that the employee's absence from work was attributable to these unrelated health issues, as opposed to a bona fide employment-related disability stemming from the car accident.

The specific claim scenario presented has not been ruled on by the New Hampshire State Supreme Court; however, it had been in other states, some of which ruled the injury compensable and others of which ruled it non-compensable. In addition to introducing copies of e-mails as evidence at hearing, Attorney Driscoll attached copies of court decisions from other states supporting the denial of compensation. The employer appeared at the hearing to testify as well.

After a lengthy hearing was held, the hearing officer agreed with Attorney Driscoll's arguments and issued a ruling denying the claim.

### **Rhode Island Supreme Court Affirms Ruling of MMI Where Employee Refuses Additional Surgery**

A recent Rhode Island Workers' Compensation case arises out of a work-related accident in which an Employee suffered a compensable injury to his back. Employee underwent a surgical procedure on his back followed by physical therapy, which proved to be unsuccessful. Although recommended, Employee refused to undergo the second recommended surgery.

Employer petitioned the Rhode Island Workers' Compensation Court for a review of Employee's status, asking the Court to find that Employee was at maximum medical improvement (MMI). A finding of MMI would allow Employer to reduce Employee's weekly compensation by 30%. The judge entered an order finding Employee at maximum medical improvement and Employee's benefits were reduced by 30%.

On appeal, Employee contended that, because he was a candidate for further surgery, he had not reached maximum medical improvement. The Rhode Island Supreme Court disagreed with Employee's argument by concluding that Employee's refusal to undergo surgery that had a reasonable likelihood of improving his condition was an insufficient reason for forestalling an MMI determination. *Providence College v. Gemma*, W.C.C. No. 95-01493 (App. Div. 8/19/96); *Robin Rug v. Manteiga*, W.C.C. No. 93-04363 (App. Div. 8/16/94). The Supreme Court determined that the phrase maximum medical improvement is not a determination that Employee's condition will never improve or decline nor does it preclude the possibility of future medical interventions. The Court found that the MMI designation merely identifies the point at which Employee's physical or mental impairment has stabilized and further treatment is not reasonably expected to materially improve his condition. R.I.G.L. 28-29-2(8). The Supreme Court concluded that the mere possibility that surgery might improve Employee's condition did not preclude a finding that he reached MMI when his refusal to undergo the treatment recommended ensured that his condition had, in all likelihood, become stable. In addition, the Rhode Island Supreme Court concluded that the underlying order did not violate Employee's due process, as the order was not effective until five months after it was entered and retroactive relief was available.

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### Arbitration - A Viable Alternative to Litigation?

Over the last several decades litigating parties have made arbitration the preferred means for resolving disputes. Historically, several elements in various combinations have been the primary points of attraction that cause litigating parties to prefer arbitration over litigation in courts. These characteristics include the procedural flexibility, autonomy from courts, greater speed of conflict resolution, lower costs, parties' choice of arbitrators and arbitral forum, neutrality, informality, and confidentiality. However, each characteristic naturally has drawbacks that compromise its propounded benefit.

As arbitration becomes more prevalent in today's legal system it increasingly appears that the traditionally recognized advantages of arbitration cannot unequivocally guarantee attraction of the litigating parties to arbitration. Among these traditional characteristics are cost, speed, arbitrator expertise and privacy. While arbitration has the potential to provide for greater speed than litigation, this potential is hardly always a certainty due to party autonomy, a myriad of dilatory tactics and potential problems in obtaining evidence, which may be prohibitive to a speedy resolution. Moreover, the ability to obtain a summary judgment and other pre-trial judgments in a courtroom setting often makes litigation a much faster resolution method. Costs, which may be lower in arbitration, may also as easily become excessive due to a fee to arbitrators, administrative costs, and the cost of travel to the place of arbitration.

The pivotal role of arbitrators to the process and result of arbitration is undisputed. However, the changing in the norms of arbitration has raised questions as to the role of the arbitrator such as the extent to which an arbitrator's personal sense of justice may influence the outcome, as well as the issue of constraints placed upon arbitrators' neutrality by arbitral institutions, rules and conventions.

Confidentiality and privacy have long been held to be the main attraction and the primary distinguishing characteristic of international arbitration. While confidentiality is certainly important in instances where highly sensitive financial and technological information is involved, it is important to realize that confidentiality often gives way to considerations of policies advocating openness and transparency. In fact, courts are increasingly recognizing that no blanket requirement of confidentiality can or should bind parties in arbitration and that such requirement is not implied or clearly mandated by any law or principle. Contrary to what an inexperienced party may be led to believe, arbitration cannot make information that is otherwise public domain confidential. Moreover, often awards have to be made known to authorities such as securities regulators, receivers, creditors and liquidators.

From a functional standpoint, blanket confidentiality prevents the standardization of the arbitration processes, dissemination of details of rulings and proceedings and establishment of a body of principles, which in turn leads to repetitive dispute resolution and inability to apply prior experience to resolution of difficult disputes. Subsequently, this hindrance jeopardizes such useful elements as low costs and speedy resolution, not to mention the need for a body of precedent and principles in light of the fast growth of the use of arbitration. Moreover, the need for transparency and setting of precedent along with the overriding policy considerations arguably make complete confidentiality an illusion. Critics of confidentiality in arbitration argue that given potentially undesirable implications both for individual parties and for arbitration process as a whole, a confidentiality obligation may not be the socio-economic good it is often presumed to be.

In addition, often arbitrating parties fail to distinguish between confidentiality at the proceedings stage and at the enforcement stage. Indeed, parties are free to demand privacy and confidentiality as long as the proceedings – which can be potentially damaging to businesses and reputations – and institutional rules allow them to do so. However, as the enforcement of the awards happens in courts, confidentiality is compromised to a certain extent. It is true that courts rarely, if ever, engage in substantive review of disputes and focus primarily on the compliance of the proceedings with the rules. Nevertheless, once the award is taken to the enforcement stage (while not doing so significantly lowers the value of arbitration), the precedent with some reasoning and disclosure of facts is invariably created regardless of the parties' initial agreement as to the confidentiality of the proceedings.

*HAPPY HOLIDAYS FROM ALL OF US AT  
GIBSON & BEHMAN*

*We wish each of you and your families a wonderful holiday season  
and a very happy, safe New Year*

