From the Chair

The Changing of the Seasons – and the Guard
by Matt Marrone

As a child, summer always seemed magical and limitless. By the time school let out in mid-June, it felt like the previous nine months had lasted an eternity. Summer would bring trips to visit grandparents in the mountains of central Pennsylvania, vacations to the Jersey shore (long before "Snookie" stole its innocence), and summer romances through later high school and college years. Summer always felt like it would last forever.

But each year there were harbingers of its approaching end. As August drew longer, the buzz of cicadas would grow louder, as if they were commissioned by the school principal to summon the students. School supplies would begin filling store shelves. And every year the fall would bring summer to a screeching halt, cementing autumn in my mind as the most hated of the four seasons.

As an adult, I still enjoy the summer, but I've also developed a deep appreciation for autumn. After sweltering through hot and humid Mid-Atlantic weather in July and August (as I write this, temperatures have been hovering around 100), the crisp and clear weather through September and October is as good as it gets anywhere in the country. The changing colors of autumn leaves are wondrous, particularly since my dad is no longer hounding me every afternoon to rake them. And this fall my wife and I will be celebrating our tenth anniversary.

From a professional standpoint, the time period between Labor Day and Christmas is always the most exciting. This year promises to be even more exciting than others. DRI has planned one of the best Annual Meetings in recent memory, to occur October 26-30, 2011 in Washington, D.C. Please visit www.dri.org and follow the link to the Annual Meeting to learn more about this fantastic program and speakers.

Looking ahead a bit further, on December 15-16 our committee will be presenting its stand-alone Professional Liability Seminar in New York,
NY. The significance of this event for our committee cannot be overstated. It has been nearly 15 years since we last presented a program like this. By now you've received the brochure in the mail. If you've misplaced it, please visit DRI's website and follow the link to seminars to download it, or contact me and I'll e-mail it to you. Dan Meyer and his entire program steering committee have put together an impressive seminar that I guarantee will exceed your expectations. Please register and spread the word to others -- the content, speakers, and networking opportunities will be exceptional. We need your help to make this program a success, and to make it an annual marquee event for our committee.

Our members are the lifeblood of our committee, and of DRI as a whole. Please extend an invitation to join DRI to lawyers and clients you believe would be interested in the works of our committee. If you aren't already familiar with the outstanding DRI benefits (free seminar registration!) available to in-house and claims counsel, please contact our membership chair, Shana O'Grady (sogrady@mrvlaw.com) for details. If you work with professional liability insurers, chances are many of them use attorneys to handle their claims. These claims counsel generally meet DRI's definition of "in-house counsel," and they will appreciate your bringing these benefits to their attention. (If you invite them now to join DRI and explain they can then come to our December program for free, you can close 2011 by attending an excellent seminar with a client in New York at a great time of year!)

If this column seems a bit nostalgic, perhaps it's because my time as committee chair, like summer, will soon be coming to an end. What started two years ago with hope and anticipation will finish with satisfaction that we have achieved many of our goals. On several occasions, in this space and others, I've recounted the successes of our committee over the last few years. I'm confident our committee is on its way to becoming a preeminent authority in the field of professional liability defense, and our strong leadership will continue to steer us in the right direction.

Please support our committee leadership by getting more involved, and perhaps becoming one of those leaders yourself. The opportunities to participate are greater than ever, and growing by the month. Our committee will always find roles for those who want to be more actively involved, and I can personally attest to just how rewarding the involvement can be.

On that note, I hope I get to see many of you at the Annual Meeting or Professional Liability
Seminar so I can tell you in person how much it has been my pleasure to serve this committee as chair. But if I don't see you, please accept this column as a sincere expression of my gratitude. I often like to joke with people that as committee chair I feel like a cross between a circus ringmaster and cheerleader. All joking aside, there's no other circus I'd rather direct, or team I'd rather cheer for. Thank you for giving me this opportunity.

Sincerely,

Matt Marrone, Chair
Lucas and Cavalier, LLC
Philadelphia, PA and Haddon Heights, NJ
mmarrone@lucascavalier.com

The views and opinions expressed by the authors herein are solely those of the authors and are not those of the authors' law firms, employers or clients.

Featured Articles

The Demise of Contributory Negligence in Professional Liability Cases
by Justin L. Assouad and Matthew H. Noce

Introduction

The common law doctrine of contributory negligence enjoyed a relatively short life and appears to be currently dying a slow death in American jurisprudence. In theory, the doctrine seemed to be predicated on sound legal logic. A party should not be able to recover when his own negligence is determined to be a contributing factor to his injuries. However, as an absolute bar, in some instances the defense produced lopsided results which were disfavored by courts. For example, a driver who fails to apply his turn signal prior when making a right turn at an intersection could be barred from recovering from an intoxicated driver who rear-ends him at a high rate of speed resulting in catastrophic injuries. Courts were clearly unsatisfied with such results especially in light of the philosophy that negligence actions are premised on the culpability of the parties. This displeasure with the all-or-nothing system eventually led to the creation of comparative fault systems that are designed to apportion a plaintiff's recovery based on the allocation of fault of the parties. To date,
all but five jurisdictions have adopted some form of comparative fault.

While the overwhelming answer is clear that courts and state legislatures prefer comparative fault systems over the all-or-nothing contributory negligence doctrine, the question remains as to whether comparative fault should apply across the board in all negligence actions. Professional negligence claims and other claims seeking only economic damages have raised questions as to whether comparative fault systems should or even could apply to such claims. The language of the each jurisdiction's comparative fault system will largely influence and dictate whether it may apply in such causes of action. Where the language of a state's comparative fault rule limit its application to bodily injury and property damage claims, defendants have argued the common law doctrine of contributory negligence must apply. However, it is this author's opinion that defendants face an uphill battle in presenting this argument because courts are likely to prefer comparative fault over contributory negligence in such claims for the same policy reasons that led to its almost universal acceptance.

The argument that contributory negligence, instead of comparative fault, should apply to economic loss claims creates a slippery slope of which defendants need to be cognizant. Plaintiffs typically respond that neither defense is applicable to such claims. Each argument is an all-or-nothing approach in that defendants are asking for a complete bar while plaintiffs seek to collect their full damages without any reduction based on their own negligence. Courts are thus faced with the decision that spans the entire spectrum. To date, three courts have specifically confronted this issue and reached very different conclusions which are discussed below.

The first part of this article will offer a description of the relatively short history of the contributory negligence doctrine. The second part will briefly discuss the five jurisdictions that have refused to adopt a comparative fault system. It is this author's opinion that those jurisdictions would continue to allow contributory negligence to serve as a complete bar in all negligence actions, including those for pure economic damages. The next section will discuss the 15 jurisdictions whose laws seems to clearly dictate a preference to extend their comparative fault rules to economic loss claims. The final section will discuss the remaining 31 jurisdiction who have adopted comparative fault laws that contain language that seems to exclude claims for pure economic loss. It is in these jurisdictions that the contributory negligence doctrine may still be available to the negligent defendant. That section outlines for the practitioner the legal
arguments that have been raised in favor of both comparative fault and contributory negligence under those circumstances and provides a detailed analysis of the conflicting outcomes that have been reached by courts on the issue.

**History of Contributory Negligence**

The origin of the judicially created common law doctrine of contributory negligence dates back to the early part of the nineteenth century. Not so coincidentally, this defense arose around the same time period as the Industrial Revolution. Many legal scholars believe the creation of this common law defense was designed to protect the emerging industries in their infant stages from sympathetic juries and to keep the liabilities of those industries within manageable bounds. See 78 A.L.R.3d 339 (1977) at *25.

The contributory negligence doctrine was accepted by virtually every jurisdiction within a few short decades. *Id.* In its original form, the defense served as a complete bar to recovery for the plaintiff who was found to be even the slightest bit negligent. Courts initially applied the doctrine across the board in all negligence causes of action. However, upset with the harsh results, courts quickly began to carve out exceptions to the general rule marking the beginning of the doctrine's decline. Some of the initial exceptions recognized by the courts across the country were the last clear chance doctrine and rule that contributory negligence does not bar recovery for willful and wanton misconduct. However, the applications of these exceptions were limited, so courts continued to search for ways to protect the slightly negligent plaintiff.

The steady decline of the contributory negligence doctrine gained significant momentum in 1858 when the Illinois Supreme Court abrogated the doctrine and replaced it with a primitive form of comparative fault. *See* Galenta & C.U.R. Co. v. Jacobs, 20 Ill. 478 (Ill. 1858). While the Illinois court-created comparative fault system would eventually be repudiated before the turn of the century, the damage to the contributory negligence defense was done and its eventual demise became inevitable. Other state courts began to take similar efforts to substitute in their own systems of comparative fault in place of contributory negligence. *See* Wichita & W.R. Co. v. Davis, 16 P. 78 (Kan. 1887); Smith v. American Oil Co., 49 S.E.2d 90 (Ga. 1948). However, the truly fatal blow came in 1910 when the Mississippi legislature enacted a statute which provided for the apportionment of damages between negligent defendants and contributorily negligent plaintiffs in general negligence actions. 78
A.L.R.3d 339 at *25. The downward spiral continued throughout the twentieth century to the point that all but five (5) jurisdictions today have substituted contributory negligence with some form of comparative fault.

**Contributory Negligence Remains Law of the State in Five Jurisdictions**

As mentioned above, the following five (5) jurisdictions still recognize the contributory negligence defense as a complete bar to a plaintiffs' claim:

- Alabama, see *Alabama Power Co. v. Schotz*, 215 So.2d 447;
- District of Columbia, see *Wingfield v. People's Drug Store*, 379 A.2d 685 (D.C. 1994);
- Maryland, *Bd. Of County Commissioners of Garrett County v. Bell Atlantic*, 695 A.2d 171 (Md. 1997);
- North Carolina, see N.C.G.S.A. §99B-4(3); and

Each of these jurisdictions have heard arguments for comparative fault system and rejected it in favor of the contributory negligence defense. As such, this author assumes that a court would continue to recognize the contributory negligence defense as a complete bar to all negligence actions, including those claims for pure economic loss.

**States' Comparative Fault Systems That Seem to Extend to Economic Loss Claims**

Several states have adopted comparative fault systems which by their express language appear to extend to claims for pure economic losses. It is very unlikely that a valid argument could be made in these jurisdictions that the contributory negligence has any place in any negligence actions in these states. These states include:

- Arizona, see A.R.S. §12-2505 (pure comparative fault statutes applies to "all cases");
- Florida, see F.S.A. §768.81(2) (pure comparative fault statute specifically mentions its application to negligence cases and that both economic and non-economic damages should be reduced based on plaintiff's percentage of fault);
- Indiana, see I.C. §34-51-2-6 (modified 51% comparative fault rule applies to all actions based on fault);
- Kansas, see K.S.A. §60-258a(a) (modified 50% comparative fault rule specifically mentions that it applies to
claims for economic loss);
• Kentucky, see K.R.S. §411.182 (pure comparative fault statute applies in "all tort actions");
• Minnesota, see M.S.A. §604.01(1) (modified 51% comparative fault rule specifically mentions that it applies to claims for economic loss);
• New Mexico, see Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981) (abrogated contributory negligence doctrine replacing it with pure comparative fault system in all negligence claims);
• Ohio, see Ohio Rev. Code Ann. §2311.53 (modified 51% comparative fault rule applies in all cases where a person's damages resulted from "tortuous conduct");
• South Carolina, see Nelson v. Concrete Supply, 399 S.E.2d 783 (S.C. 1991) (modified 51% comparative fault rule applies in all causes of action);
• Tennessee, see McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992) (modified 50% comparative fault rule applies in all negligence cases);
• Texas see Tex. Civ. Prac. & Rem. Code Ann. §§33.001 and 33.002 (modified 51% comparative fault rule applies to any cause of action in tort); and
• West Virginia Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979) (modified 50% comparative fault rule applies to all tort actions).

The language of the statutes and court opinions referenced above clearly indicate a preference of comparative fault beyond general negligence claims. In fact, Ohio’s Supreme Court reached such a conclusion in Cincinnati Riverfront Coliseum, Inc. v. McNulty, Co., 504 N.E.2d 415 (Ohio 1986), in which it held comparative negligence is the law of Ohio in all negligence cases, including professional negligence cases, where appropriate. It is this author’s opinion that similar results will be reached in the other eleven jurisdictions if and when the issue arises.

Other states’ comparative fault systems, however, are not as clear but appear broad enough for courts to apply them to such claims. For instance, Louisiana's pure comparative fault statute states that it applies to all cases "where a person suffers injury, death or loss...” L.S.A C.C. Art. 2323 (emphasis added). Since the legislature failed to define the term "loss,” it is likely that court would interpret that statute to include claims for pure economic loss. Similarly, Maine's comparative fault statute states that it is to be applied to all cases in which a person suffers "death or damages..." 14 M.R.S.A. §156. Maine's legislature similarly failed to define the term "damages," so again it is
likely courts will extend that statute to cover claims for pure economic damages. The language of Georgia's comparative fault statute is even broader in that it provides:

If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

O.C.G.A. §51-11-7. Georgia courts have interpreted this statute as creating a modified comparative fault system (50% rule). See Weston v. Dun Transport, 695 S.E.2d 279 (Ga. App. 2010). Arguably, one could interpret that language as encompassing all negligent causes of action, including those for pure economic loss.

While the issue remains unanswered in many of these jurisdictions, the same public policy considerations considered by the courts or legislatures in favor of the creation of their comparative fault systems will likely dictate the application of such systems to economic loss claims whenever possible. As such, the contributory negligence doctrine certainly seems to be dead within these jurisdictions.

**Person, Property and Death Statutes**

The remaining 31 jurisdictions' comparative fault systems state that their application is limited to claims for wrongful death, personal injuries and property damage. Such language and limitation is similar to that found in the Uniform Comparative Fault Act of 1977 (hereinafter "UCFA").

The language of the UCFA provides that it applies to actions "based on fault seeking to recover damages for *injury* or *death* to *person* or *harm* to *property*..." The UCFA thus suggests that the abrogation of contributory negligence extends only so far as the reach of comparative fault, which according to its express language is only those cases involving claims for death, personal injuries or damage to property. This is made evident in the comment section in which the drafters specifically state that its application "is confined to physical harm to person or property." The drafters expound on this point in the same comment as follows:
[The UCFA] does not include matters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation resulting from defamation. But failure to include these harms specifically in the UCFA is not intended to preclude application of the general principle to them if a court determines that the common law of the state would make the application.

As such, the drafters believed the decision on whether to apply comparative fault or contributory negligence to claims alleging only economic damages should be left for the courts to decide.

The first court to address this issue was the Massachusetts’ Supreme Court in Clark v. Rowe, 701 N.E.2d 624 (Mass. 1998), which involved a legal malpractice claim. It should be noted that it does not appear that the defendant in that case argued that the contributory negligence doctrine should apply as a complete bar to plaintiff's claim. Instead, the argument on appeal focused on whether Massachusetts' modified comparative fault rule may apply as an affirmative defense to such claim. Similar to the UCFA, Massachusetts' comparative fault act concerns recovery of damages for negligence "resulting in death or injury to person or property." G.L. c. 231, §85. Initially, the Court acknowledged that the damages sought by plaintiff clearly fell outside the scope of the act in that "property" did not include pure economic loss. However, the Court's analysis did not end there. Citing the UCFA drafter's comments discussed above, the Court considered whether the public policy considerations underlying the act supported a common law rule of comparative fault in such cases. Relying upon rulings from other jurisdictions permitting comparative fault as a defense to legal malpractice cases, as well as its own jurisdiction's recognition of the defense in medical malpractice cases, the Court held the act should be extended to such claims.
The next court to address the issue was the Pennsylvania Superior Court in *Gorski v. Smith*, 812 A.2d 683 (Pa. 2002), which also involved a legal malpractice claim. After determining that an attorney may submit a client's negligence as an affirmative defense in such action, the Pennsylvania Superior Court was faced with the issue of what effect the client's negligence would have on a plaintiff's ultimate recovery. In this case, though, the defendant did argue that contributory negligence should serve as a complete bar to such claim. Thus, the remaining issue for the court was whether to apply Pennsylvania's common law doctrine of contributory negligence, its modified comparative fault system or neither of these defenses to a claim for only economic damages.

Pennsylvania's modified comparative fault act, similar to the UCFA and Massachusetts', states that it applies to negligence claims "resulting in death or injury to person or property." 42 Pa.C.S.A. §7102. There the defendant argued that because a legal malpractice claim did not involve bodily injury or damage to property, it fell outside the scope of the act and thus the common law doctrine of contributory negligence should apply. Reluctantly, the court agreed with the defendant's strict interpretation of the act and held that the common law contributory negligence doctrine applied as a complete bar in such claims. However, in doing so, the Pennsylvania court recognized in a footnote how the *Clark* court had previously avoided this result by adopting a common law rule that comparative fault should apply to actions involving pure economic losses. The court further stated that such a rule would better serve the public policy considerations which led to the enactment of such systems. Although, recognizing that it was bound by precedent, the *Gorski* court went on to state that it hoped the Pennsylvania Supreme Court would similarly adopt such a common law rule in cases involving pure economic damages. No such decision, however, has ever been reached by that court to date.

The latest court to address this issue was *Children's Wish Foundation International, Inc. v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648 (Mo. banc 2011). In that case, the Missouri Supreme Court was faced with the issue of whether the common law contributory negligence doctrine should have been submitted as an affirmative defense in a professional negligence action for economic loss against an accounting firm. On appeal, the plaintiff took a conservative approach by arguing that Missouri's pure comparative fault system, and not contributory negligence, should apply to professional negligence cases involving economic damages. The lower appellate court affirmed the
trial court's decision; however, Missouri's Supreme Court reversed the decision and held that public policy necessitated the application of Missouri's pure comparative fault system. The detailed analyses contained in both courts' opinions provide practitioners with an outline of the legal arguments available for both arguments and is worth exploring in further detail.

Initially this author would point out two propositions upon which both courts agreed. First, Missouri followed the contributory negligence rule at common law, including in cases for economic loss, prior to its adoption of a pure comparative fault system. Second, both cited the UCFA drafter's comments noted above in their opinions and noted that the UCFA, upon which Missouri's pure comparative fault system is based, does not extend to matters involving pure economic loss because such claims were beyond the scope of the act. See Gustafson v. Benda, 661 S.W.2d 11 (Mo. banc 1983) (Missouri Supreme Court supplanted the doctrine of contributory negligence with a comprehensive system of pure comparative fault in accordance with the UCFA).

The Western District began its analysis by interpreting the UCFA drafter's comments as making the following recommendations regarding its application:

(i) the abrogation of contributory negligence in favor of comparative fault in all matters involving damages for injury or death to a person or harm to property; (ii) the application of comparative fault to all matters involving such damages even where contributory negligence was not previously recognized as an affirmative defense; and (iii) not applying comparative fault, and thus an unchanged state of law in 'economic loss' negligence cases, subject to the court's right to apply comparative fault principles if permitted by the common law of the state.

Children's Wish v. McCann, 2010 WL 1656454,
*12 (Mo. App. W.D. 2010) (emphasis in original). However, the court went on to acknowledge that the drafter's recommendations had not been adopted wholesale by Missouri courts. In fact, the court noted that Missouri's Supreme Court had previously refused to follow the second recommendation when it rejected the application of the comparative fault to products liability cases because contributory negligence was never a defense in such cases at common law. Citing Lippard v. Houdaille Ind., Inc., 715 S.W.2d 491, 492-493 (Mo. banc 1986). As such, the court noted that the following questions remained unanswered: (i) did comparative fault abrogate contributory negligence in all negligence cases or does contributory negligence remain a defense in claims for economic loss and (ii) will Missouri courts extend the availability of comparative fault as a defense to economic loss negligence cases.

Up to that point, the Western District stated that the emerging trend in Missouri seemed to indicate that courts were unwilling to extend the comparative fault system to economic loss negligence cases based on the limiting language of the UCFA. However, since no definitive answer had been reached on the topic, the Western District decided to address whether it believed the UCFA's recommendations are sound and grounded in logical legal principles.

The court first examined the nature of economic loss negligence cases and noted that such claims arise out of relationships that are contractual or quasi-contractual in nature. The court acknowledged that through contract negotiations parties can bargain and allocate risks and duties among themselves which it believed conflicted with the sweeping concept of "fault" that subsumes the comparative fault system. The court's concern was that by permitting comparative fault in economic loss negligence actions given the broad sweep of 'fault' could result in a jury weighing fault without regard to the manner in which the parties' negotiations or discussions have allocated risks and duties among them, and without regard to differing standards of care, inconsistent with the historical relationship between economic loss cases and underlying principals of contract law."

Another dilemma that concerned the court in professional negligence cases was the different standards of care which applied to parties in such cases. In such actions, the professional-client relationship dictates that the professional as a member of a learned and skilled profession has a duty to exercise the ordinary and reasonable technical skill that is usually exercised by one in his profession; whereas, the client's duty is defined by a lower standard of an
ordinary careful person. Trying to apply comparative fault to such relationships creates an obvious problem in that its application is based on a proportional reduction of damages by "any…fault chargeable to the claimant." The court further noted that comparative fault presumes a client has a commensurate duty to use reasonable care to avoid harm to one's self. However, the court believed that this presumption ignores the fact that the professional owes a higher duty to the client and that a client has often sought the assistance of the professional to do what client cannot do or to remediate a predicament of the client's creation.

Conversely, the Western District was also concerned that comparative fault would blur the primary focus of professional negligence claims which the court stated to be the scope of the duties undertaken by the professional pursuant to a higher standard of care. By applying the broad sweep of "fault" as set forth by the UCFA, the court was concerned that the focus on the specific duties undertaken by the professional would be lost resulting in situations where the professional may only receive a reduction in the damages where he should have prevailed because the duties undertaken never included responsibility for preventing the economic loss suffered by the client.

For these reasons, the Western District refused to extend Missouri's comparative fault system to economic loss negligence cases and affirmed the trial court's decision that the common law contributory negligence doctrine was applicable in such claims.

However, as mentioned above, contributory negligence's victory was short lived as the Missouri Supreme Court reversed the trial court's decision, and similar to Massachusetts' Supreme Court, created a common law rule that Missouri's comparative fault system applies to pure economic loss claims. In doing so, the Court rejected the Western District's interpretations of the UCFA's drafter's comments regarding the application of comparative fault to economic loss claims. The Court instead felt the drafters' comments were likely guided by the fact that many states already had in place economic loss doctrines which restrict the availability of tort damages in cases alleging only economic loss. The Court believed the drafters were conscious of these laws and did not want to exceed the intended scope of the UCFA by recommending that states enlarge the scope of damages recoverable in tort actions to include claims for pure economic loss.

Another compelling reason the Court believed supports such a rule was to promote uniformity and consistency in cases involving fault-driven
claims. Such claims are defined by a breach of a legal duty, and not the nature of the injury that results. As such, the Court did not believe the type of injury should dictate the defense available in fault-based claims.

The Court also rejected the defendant's argument that the contractual relationship of the parties warrants the application of contributory negligence to such claims because the parties are able to allocate the risk of loss in the contract. The Court noted that the same argument could be made to the application of contributory negligence, and that only in a very one-sided contract would the parties agree the client is barred from all recovery due to the slightest degree of negligence by the client. Additionally, the Court noted that such claims are not premised on the contract, but rather, arise from a professional duty recognized by law. As such, the court believed comparative fault should apply to a professional negligence case for the same reasons it applies in a negligence action involving a personal injury.

**Conclusion**

The number of jurisdictions that allow for contributory negligence as a complete bar to liability in professional liability cases has dwindled over recent years. In those states where the doctrine still appears in play, defense counsel should carefully examine the policy arguments that have been made in other jurisdictions as summarized above. By putting forth the strongest policy arguments in favor of the doctrine, defense counsel should place their client in the best position to preserve this very important defense.

Justin L. Assouad and Matthew H. Noce
HeplerBroom LLC
St. Louis, Missouri
Justin.Assouad@heplerbroom.com
Matthew.Noce@heplerbroom.com

**Does Comparative Fault Eclipse Job-Site Accident Indemnity?**
*by Thomas J. Grau and Nathan A. Leach*

When accidents with injury occur on a job-site and a lawsuit is filed, the contractual allocations for job-site safety become paramount. Faced with such litigation, it is also not uncommon that a design professional (and
his or her attorney and insurer) evaluate whether or not there is the potential to receive defense and indemnity from other project participants with specific job-site safety responsibilities.

As discussed in detail below, the general conditions in most of the commonly used standard form contracts in the construction industry make it clear that design professionals are not responsible for job-site safety and that the general contractor and its subcontractors are *solely* responsible for job-site safety. Despite these seemingly clear contractual responsibilities for safety, after a construction site accident, the claimant will often utilize the "shotgun" approach and file a lawsuit that names every construction participant as a defendant other than the injured worker's employer (due to the exclusivity provision contained in most workers' compensation acts that prohibits an injured worker from suing his/her employer). As such, often the party most directly responsible for the injured worker and job-site safety is statutorily prohibited from being named directly as a defendant and is usually only added to the action as a third-party defendant.

When a design professional is named as a defendant in a claim for personal injury and appears to have no, or extremely minimal, exposure to liability based on its lack of responsibility for safety, the design professional is still faced with incurring substantial costs in defending the claim. As a result, the design professional should consider enforcing its contractual right to defense and indemnity and tender its defense to the contractor and/or subcontractor. In this regard, the unmodified general conditions contained in the most widely utilized and interpreted standard form agreement (the American Institute of Architects ("AIA") A201 General Conditions for the Contract for Construction ("AIA General Conditions")) includes a clause which provides the owner, the architect, and the architect's consultants, with rights to defense and indemnity.

This article briefly examines the job-site safety provisions found in the AIA A201 General Conditions, discerns how the AIA indemnity clause has been interpreted by the majority of jurisdictions, and explores issues under comparative fault statutes that impact the attractiveness of pursuing a third-party claim for indemnity.

*Common Contractual Job-Site Safety Provisions.*

Under the 2007 edition of the A201 General
Conditions, the contractor is solely responsible for safety. Among other provisions, the contractor’s general obligations for construction supervision and procedures, including those relating to safety, are set forth in Article 3.3.1, which provides that “the Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures.” Furthermore, the specific contractual obligations for job-site safety are designated in Article 10.1 of the A201 General Conditions, which provides that “the Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.”

Under Article 3.3.2 of the A201 General Conditions the contractor is also solely responsible for the acts and/or omissions of its subcontractors. As to safety violations in particular, Article 5.3 provides that “the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor’s Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. . . .” In contrast, the architect “shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work . . . (AIA Document B101 - 2007 Standard Form of Agreement Between Owner and Architect, Article 3.6.1.2). Similar contractual protections are afforded to the Architect's consultants as well.

Based on the foregoing (and assuming that the design professional did not gratuitously assume a duty for safety via its conduct on the job-site and that its design was not responsible for the injury), the design professional appears to have no responsibility for job-site safety as safety responsibilities are exclusively allocated to the contractor and/or its subcontractors. However, the design professional is still faced with
incurring substantial defense costs (including those associated with filing a dispositive motion on the grounds that no duty exists to support the plaintiff's negligence claim). As such, it is likely prudent for the design professional to consider tendering its defense to those seemingly contractually responsible for the subject accident and injuries.

**Common Contractual Indemnity Rights Available to Design Professionals.**

Generally speaking, contractual indemnity provisions fall into one of two categories. The first type requires the indemnitor (often the general contractor) to indemnify the indemnitee (often the design professional and owner) for the indemnitee's own negligence. Although largely enforceable, due to the harsh consequences of such an obligation, the majority of jurisdictions will strictly construe such a clause and only enforce it where it is entered into knowingly and stated in clear and unequivocal terms. See *Hagerman Constr. v. Long Electric Co.*, 741 N.E.2d 390, 392 (Ind. Ct. App. 2000).

The second and more common type of indemnity clause only requires the indemnitor to indemnify the indemnitee for the indemnitor's own negligence. This type of indemnity clause (which usually contains language requiring the indemnitor to indemnify the indemnitee "to the extent" of its negligence) usually tracks the comparative fault laws enacted in most jurisdictions. See *MT Builders, LLC v. Fishers Roofing, Inc.*, 197 P.3d 758, 765 (Az. Ct. App. 2008) (noting that the majority of courts interpret the "to the extent" language as "creating a comparative fault or negligence arrangement" where the indemnitor's liability is limited "to the extent" that it is at fault) (citations omitted). As such, the indemnity clause found in Article 3.18 of the 2007 A201 General Conditions likely falls into the latter category, only requiring the contractor to indemnify the architect for the contractor's negligence.

In this regard, Article 3.18 provides in pertinent part:

3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants.......from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work......attributable to bodily injury, but only to the extent caused by the negligent acts or omissions of
the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder……

It has been noted that the current version of Article 3.18 of the A201 General Conditions (which was first modified in 1997) has made "it fairly clear that the extent of indemnity provided under this provision is, more or less, coextensive with that of comparative fault." See Bruner & O'Conner on Construction Law, §5.87 (2011). However, a conundrum may be created when comparative fault principles are intermixed with the commonly accepted interpretation of Article 3.18. That is, if Article 3.18 only requires the contractor to indemnify the design professional for the contractor's negligence, then, potentially, there is no indemnity at all. Under comparative fault, the design professional can never be held liable for the negligence of the contractor, and for all practical purposes, the Article 3.18 indemnity provision may be eclipsed by comparative fault.

The Interplay of Contractual Indemnity Rights in Comparative Fault Jurisdictions.

If the above is true, what benefit does Article 3.18 provide the design professional in comparative fault jurisdictions when the architect will never be held directly responsible for the negligence of the contractor when fault is allocated by the jury? Is the design professional still allowed to recover its costs and expenses in defending the underlying action asserted by the injured worker? If so, is it limited to the fault assigned to the contractor and/or subcontractors?

Surprisingly, not many cases have interpreted the current Article 3.18 contained in the A201 General Conditions to answer these questions specifically in the context of a design professional seeking indemnity from the contractor. Perhaps the case that provides practitioners with the most guidance is Dillard v. Shaughnessy, Fickel and Scott Architects, Inc., 884 S.W.2d 722 (Mo. App. 1994). In Dillard, a classic construction site accident scenario played out when an employee of a Subcontractor was injured and the Subcontractor received OSHA citations. Id. After the accident, the injured worker filed suit against the Owner, General Contractor, Architect, and Engineer (but not his employer). Id. at 723. The contract documents contained an indemnity clause that mimicked the current unmodified Article 3.18 contained in the A201. Id. Accordingly, the Architect and Engineer tendered their defense and requested indemnity
from the General Contractor, which was denied on the grounds that the Plaintiff had asserted independent allegations of negligence against the Architect and Engineer. *Id.* Forced to defend themselves, the Architect and Engineer eventually filed a motion for summary judgment against the Plaintiff’s claims on the grounds that they did now owe a duty for safety to support the negligence claim, which was granted by the court. *Id.* at 723. The Architect and Engineer then pursued recovery of their defense costs against the General Contractor. *Id.*

The Missouri Court of Appeals (applying Kansas law) found that the indemnification clause unambiguously required the General Contractor to indemnify the Architect and Engineer for the contractor’s negligence regardless of any liability on the part of the Architect and/or Engineer. The case was then remanded and the trial court was instructed to “determine whether the negligent acts or omissions of the subcontractors and/or General Contractor were the whole cause of the injuries to [the Plaintiff] and hence the reason he filed suit against the Architects and Engineers, or if not the whole cause, the court must decide what portion of fault is to be ascribed to the subcontractors and/or the General Contractor.” *Id.* at 725. Furthermore, the court noted that “if the General Contractor’s or the subcontractor’s negligence is determined to have been the "whole cause" of the accident, General Contractor will reimburse Architects and Engineers for all their reasonable legal expenses including attorney fees incurred defending this matter." On the other hand, “if a percentage of fault is ascribed to General Contractor and/or the subcontractor, General Contractor will reimburse that same percentage of the expenses and legal fees to Architects and Engineers.” *Id.*

Based on the analysis in *Dillard* (and other cases that have interpreted similar indemnity language in the AIA A401 standard subcontract agreement), even though a design professional will never be assigned fault by a jury in relation to the contractor’s negligence in a comparative fault jurisdiction, the design professional may still pursue recovery of its defense costs and expenses and be indemnified to the extent of fault assigned to the contractor and/or subcontractor. In a serious bodily injury case that may be substantial. For example, if a jury finds that the contractor and/or its subcontractors were 80% responsible for the subject injury and the design professional was only 20% responsible, the design professional may recover 80% of its attorneys’ fees and expenses. In the event that zero fault is assigned to the design professional, it should receive all of its reasonable costs and attorneys’ fees in defending the Plaintiff’s claim. Note, however, that although the *Dillard* decision did not address whether the injured
worker's negligence would be assigned to its employer on a respondeat superior theory when fault is allocated, at least one case has held that it would not. See Martin & Pitz Assoc. v. Hudson Constr. Srvs., Inc., 602 N.W.2d 805 (Iowa 1995).

Based on the above, in situations like those that played out in the Dillard case, prior to aggressively pursuing a third-party claim for indemnity counsel for the design professional should consider the strength of its underlying defenses to the Plaintiff's allegations of negligence and the likelihood that the majority of the fault will be assigned to the potential indemnitor (the contactor and/or subcontractor(s)). Counsel for the design professional (and its insurer) should also consider how much effort to put into the indemnity claim in that the fees and expenses associated with pursuing the indemnity claim (as opposed to the fees and expenses associated with defending the personal injury claim) are often not recoverable. In this regard, the majority view appears to be that unless the subject indemnity clause provides otherwise, the recoverable attorneys' fees and costs are limited to those incurred in defending the underlying action and do not extend to those incurred in establishing the right to indemnity. See Oldenburg Group, Inc. v. Frontier-Kemper Constructors, Inc., 597 F.Supp 2d 842 (E.D. Wis. 2009).

Counsel for the design professional may also want to consider how the use of experts and fact witness(es) in the underlying action may later impact its indemnity claim. For example, if a design professional's expert opines that the design professional was in no manner negligent and the design professional subsequently settles the underlying suit, the indemnitor will frequently claim that the settlement amount was unreasonable based on the design professional's minimal exposure to liability. As such, in order to protect its right to indemnity, the indemnitee should tender its defense and demand indemnity at the earliest possible opportunity, thereby providing the indemnitor an opportunity to direct the defense (if desired) and diminishing any future argument that certain expenses, fees and/or settlement amounts were unreasonable.

Similarly, when a design professional is pursuing a claim for indemnity and the subject indemnity clause provides that the contractor is to indemnify the design professional for both the design professional's negligence and the contractor's negligence, counsel should consider the impact of an expert's testimony that the design professional met the standard of care. Not only can the expert's opinion be used as evidence that any settlement with the
The indemnitor was unreasonable, but also to bolster an argument that there is no basis for claiming indemnity for the design professional's own negligence. That is, logic dictates that a design professional who met the standard of care cannot at the same time be negligent so as to trigger the indemnity obligation.

In summary, a design professional and its insurer should consider the foregoing law and issues so as to develop cogent strategy in pursuing a third-party claim for indemnity against the contractor under standard indemnity provisions in a comparative fault jurisdiction. Under comparative fault, pitfalls exist for such indemnity claims both in jurisdictions that interpret the indemnity clause so as to provide indemnity for only the contractor's negligence and in jurisdictions where indemnity is found to extend to the design professional's negligence as well. In either instance, precaution is advisable.

Thomas Grau and Nathan Leach
Drewry Simmons Vornehm, LLP
Carmel and Indianapolis, Indiana
tgrau@dsvlaw.com
nleach@dsvlaw.com

The Janus Decision
by H. Steven Vogel and Louis Castoria, with contributing assistance from William J. Kelly (White Plains)

Overview

The U.S. Supreme Court recently ruled in the Janus Capital Group case that the legal entity or person actually making an allegedly fraudulent statement in a public securities offering, and only that person, can be held liable under Securities and Exchange Commission (SEC) Rule 10b-5, in a private securities fraud action. In declaring that only those entities that have "the ultimate authority" over a statement may be held liable in private action, the Supreme Court has created a bright line test to determine who can (and cannot) be held liable for allegedly fraudulent statements under the federal securities laws.

Many believe that the Janus decision provides clear guidance to those in the securities industry and their attorneys, auditors and advisers as to how to avoid a private cause of action under SEC Rule 10b-5. Arguably, the Janus decision
articulates a roadmap to avoid the multitude of potential fraud liability for those involved in the securities industry.

Critics assert that the Court's 5–4 split decision in *Janus* narrowly interprets the intent of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 while others argue that the decision sets a standard that future courts, arbitrators and regulators may apply liberally to circumscribe liability for misrepresentations to those who actually speak the words to the public.

The *Janus* decision may prove to be beneficial to professionals who provide services to their clients in the securities industry. The Court did not address the issue of whether professional advisers should be shielded from liability based on theories other than Rule 10b-5.

**Facts of the Janus Case**

The *Janus Capital Group Inc. v. First Derivative Traders*, 564 U.S,___ (decided June 13, 2011), originated in the U.S. Court of Appeals for the Fourth Circuit where the plaintiff alleged that misleading statements were made in the Janus Mutual Fund prospectuses. The case raised important questions about the ability of plaintiffs to bring fraud lawsuits under federal securities law against service providers for statements made by their clients.

The plaintiff, First Derivative Traders (FDT), sought to hold Janus Capital Group (JCG), a publicly traded financial services company and creator of Janus Investment Fund, and its wholly owned subsidiary, Janus Capital Management LLC (JCM), which was hired to act as investment adviser and fund administrator, liable for the alleged misstatement in the Janus Investment Fund Prospectuses. The Janus funds offer securities to the public via offering documents and are governed by an independent board of trustees. FDT invested in the stock of JCG, but not in the Janus Funds. All of Janus Investment Fund's officers were also officers of JCM; however the legal distinctions between the two companies were properly maintained and noted by the High Court.

The principal allegation in the underlying case is that the price of JCG's stock was artificially inflated as a result of misleading statements in the Janus Funds prospectuses. Specifically, the statements being challenged relate to the policies for discouraging and deterring "market timing." FDT claimed that these statements were misleading because JCM permitted discretionary frequent trading by a small number of investors.

The lower (district court) dismissed the complaint on the grounds that JCG did not make the
statements in the Janus Funds prospectuses, and regardless of whether the statements were made, JCM cannot be liable to JCG shareholders who did not invest in the Janus Funds. The Fourth Circuit reversed and recognized that the critical issue was whether FDT had adequately pled reliance on the alleged statements — an essential element of a private class action under the SEC's Rule 10b-5.

The U.S. Supreme Court granted certiorari on June 28, 2010, and heard oral argument on December 7, 2010.

Questions Presented to the Supreme Court

JCG and JCM raised two key issues, among others, in their petition for writ of certiorari, wherein they argue that the Fourth Circuit's decision created or magnified conflicts among the circuits.


In Stoneridge, the U.S. Supreme Court curtailed the investing public's right to bring a federal securities fraud action against secondary actors under both primary and other theories of liability. The Court held that there is no implied private right of action against secondary actors under the federal securities laws even where the secondary actors engage (allegedly) in fraudulent conduct. Secondary actors in this case were those defendants that were not directly involved in the dissemination of the information relied on by the plaintiffs. The Court focused on the requirement that the allegedly injured investors directly relied on the alleged fraud and also highlighted the decision by Congress in its 1995 legislation specifically limiting the authority to bring an action for aiding and abetting securities fraud to the SEC. The Fourth Circuit also split with several circuits that have rejected liability against service providers for participating in other companies’ misstatements.

Second, in finding that a service provider can be held liable for a statement in another company's prospectus "even if the statement on its face is not directly attributed" to the service provider, the Fourth Circuit exacerbated an existing circuit conflict over whether a statement must be directly attributed to a nonspeaking defendant
The questions presented by the petition for certiorari were (1) whether the Fourth Circuit erred in concluding...that a service provider can be held primarily liable in a private securities-fraud action for "helping" or "participating in" another company's misstatements and (2) whether the Fourth Circuit erred in concluding...that a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.

Ruling by the Court

By way of background, section 10(b) of the Securities Exchange Act of 1934 makes it "unlawful for any person, directly or indirectly...[to] use or employ...any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may proscribe...." Pursuant to this section, the SEC promulgated Rule 10b-5, which makes it unlawful, among other things, for "any person, directly or indirectly...[to] make any untrue statement of a material fact" in connection with the purchase or sale of securities. This is the basis for almost all securities fraud claims and it has long been held that this section of the Act provides for a private cause of action against principal wrongdoers. The Janus Court's opinion focuses on the issue of who should be considered the "maker" of the allegedly untrue statement.

At first blush, "who is the maker of a statement" may seem like an easy question to answer, but the complexities of modern securities offerings complicate the analysis. For example, if a law firm drafts a prospectus that contains a misleading statement, and the prospectus is ultimately issued by the company, is the law firm a "maker" of an untrue statement? By further example, is an auditor whose statements are incorporated into an annual report considered the "maker" of at least a portion of the annual report? The lower courts have been inconsistent in answering this question.

The Janus Court held that "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." The Court went on to explain that "without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." In creating this bright line rule, the Supreme Court examined the definition of "make" and analogized it to a speaker and speechwriter. Ultimately, it is the speaker who receives credit...
for, and is held responsible for, the speech, not the speechwriter.

The decision specifically rejects the plaintiffs' and others' proposed rationales for a more inclusive definition, including the government's position that one who "creates" a statement should be held liable for the content of that statement. The Supreme Court also rejected the argument that the "well-recognized and uniquely close relationship between a mutual fund and its investment adviser" should suggest that "an investment adviser should generally be understood to be the 'maker' of statements by its client mutual fund." In rejecting this argument, the Court noted that the fund and adviser maintained distinct corporate independence. While not directly addressing "primary" versus "secondary" liability in the opinion, the Supreme Court stated that any further expansion of liability under Rule 10b-5 should be left to Congress and not the courts.

The dissent was written by Justice Breyer (with Justices Ginsburg, Sotomayor and Kagan joining) and argued that the majority's definition of "make" is misguided because it is not common usage and is not supported by prior lower court and Supreme Court decisions. Although the dissent offers criticism and proposes its own interpretation, it is not precedent.

Lessons from Janus

Narrowly read, the Janus decision limits the targets of private securities fraud claims based on section 10(b) and Rule 10b-5 to those who actually "make" the alleged representations, and refrains from expanding the potential pool of defendants in such cases via judicial decree rather than an act of Congress. The decision is by no means a "free pass" for potential fraudulent conduct by those involved in the drafting of securities prospectuses.

The Janus decision, like Stoneridge and its progeny, limits the potential exposure against a private right of action under Rule 10b-5 for those in the securities field and professionals involved with promulgating securities prospectuses. The professionals that may be affected by the Janus decision include attorneys, accountants, bankers, financial advisers and consultants.

It appears that Janus provides protection for attorneys and other professionals who participate in drafting prospectus materials from direct liability to securities purchasers in fraud claims based on those offering materials. In particular, corporate lawyers should appreciate the consequence of this decision. More often than not, it is the issuer's outside corporate lawyers who draft the prospectus, annual report
and some other corporate disclosures. Prior to the Janus decision, it was unsettled whether the lawyers could be liable for misstatements contained in these documents. The Court's decision forecloses this potential liability, at least under Rule 10b-5. Notwithstanding this, outside lawyers may not escape liability under state law theories.

On the other hand, auditors of an issuer do not appear to be protected from Rule 10b-5 liability for statements made in their own audit reports, knowing that those reports may be quoted by the audited company in its public securities filings.

Critics of the decision, including plaintiffs' lawyers, investor advocates and members of the SEC argue that the Janus decision makes it tougher to hold those allegedly responsible for fraudulent statements liable. For example, amici curiae briefs filed by the New York Common Retirement Fund and the North American Securities Administrators Association, Inc. as well as the United States (through the Department of Justice and the SEC) reveal fears that a strict interpretation, as ultimately rendered by the Supreme Court, would harm investors by creating an impenetrable shield for those involved in using or trading securities.

As with any decision by the Court, it will take years for the full impact of the ruling to be realized. For now, a large number of potential securities fraud defendants may rest a little easier, knowing that so long as they do not have the "ultimate authority" to actually "make" a statement, they are shielded from at least one form of exposure and sometimes crippling expensive litigation.

H. Steven Vogel and Louis Castoria
Wilson Elser Moskowitz Edelman & Dicker LLP
Miami, Florida and San Francisco, California
hsteven.vogel@wilsonelser.com
louis.castoria@wilsonelser.com

News & Announcements

Seminar Information

In an effort to provide more consistent and timely material to our seminars attendees, DRI is changing the way we distribute course materials in advance of a seminar. From this point forward, an email link will be provided to registered attendees two weeks prior to the event. This link will allow registrants to download and review the course materials in advance of the event – a CD-Rom will not be
mailed. When an registrants arrive onsite for a seminar, they will receive an updated CD-Rom with course, any late paper submissions and onsite materials. This change, while small, ensures that we are delivering the resources to grow your practice in the most efficient way possible.

Special Offer

DRI Today

Have you visited DRI's new online portal, DRI Today yet? DRI Today is your one-stop resource to news, market updates, legal commentary and more all designed specifically with the defense attorney in mind. Browse the DRI Blog for interesting discussions or catch up on past articles from For The Defense. DRI Today provides a convenient resource to find information on any practice area topics with just the click of your mouse. Be sure to make DRI Today your homepage to keep up with the fast changing world of legal news. Don't forget to like DRI on Facebook and follow DRI on Twitter!