RECENT DEVELOPMENTS CONCERNING “DIRECT LOSS” UNDER FIDELITY BONDS

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INTRODUCTION

A substantial majority of published decisions have resolved the long running debate as to the meaning of "direct" as that term modifies "losses" in various fidelity bonds. Those seeking coverage under the bond have argued that a "direct loss" is one which is the proximate cause of the insured's loss. In turn, the term "proximate cause" has been broadly defined as the "but for" variant of proximate cause, that is, one without which the loss would not have occurred.

Under standard proximate cause analysis, a "but for" cause may be but one link in a causal chain between the initial act and the ultimate loss. Under this analysis, if the insured can establish that the type of act covered under the bond (e.g., dishonesty, forgery, etc.) was the initial action or had occurred anywhere in the causal chain, the insured should be entitled to collect if that chain leads to the ultimate loss.

On the other hand, the insurers have sought to clarify that a "direct loss" is that which must immediately follow the action covered. That is, the insurers have argued that a "direct loss" is not a "but for" cause, but is rather, what is termed in proximate cause analysis, the "effective" cause of loss. The perfect example of this analysis is the "paradigm" for fidelity coverage, embezzlement. In an embezzlement, the employee takes money belonging to the insured, thereby immediately enriching the employee and diminishing the assets of the employer. The action by the employee has an immediate and direct cause to the employer and is the effective cause of loss. It is this latter view that has prevailed.

The analysis involving the "but for" causation view of "direct loss" generally arises in the context of third party litigation. In this instance, the insured is sued by some outsider, having no contractual relationship with the insurer, for losses arising out of what might be viewed generically as employee dishonesty. More often than not, this employee dishonesty is directed at the third party outsider and not the insured. However, under the doctrine of *respondeat superior*, the employer is in many cases responsible for the acts of its employee and therefore assumes liability for those improper acts. Eventually, the insured employer may end up on the wrong side of a judgment or, more likely, will settle the case before it ever proceeds to that point. The insured will then turn to the insurer seeking indemnification for the money it has paid out. That is when the debate concerning what constitutes a "direct loss" becomes very relevant.

FIDELITY BOND LANGUAGE REGARDING CAUSATION

Employee dishonesty coverage forms have, at least since the 1980s, contained language requiring that the insurer pay the insured for loss to covered property "resulting directly" from a covered cause of loss.

An example would be the Commercial Crime Coverage Form A - Blanket, Form CR00011090, which states under the initial "coverage" section:

> We will pay for loss of, and loss from damage to, Covered Property **resulting directly** from the Covered Cause of Loss. (Emphasis added).

Policies covering "theft" also contain similar language. For example, one such coverage provides as follows:

> The Company shall be liable for **direct losses** of Money, Securities or Other Property caused by Theft or forgery by any Employee of the Insured acting alone or in collusion with others. (Emphasis added).

Of course, the Financial Institution Bond language is very similar. Under the provisions of the Financial Institution Bond, Standard Form No. 24 (revised to January, 1986), the bond provides coverage for:

> **Loss resulting directly** from dishonest or fraudulent acts committed by an Employee acting alone or in collusion with others. . . . (Emphasis added).

Therefore, by now most every policy dealing with the issue of crime, dishonesty or theft, will contain language requiring that the loss sustained by the insured be as a direct result of the covered event. In fact, many coverages also provide an exclusion for "indirect loss." That is, not only is it a condition to coverage that the insured must prove that its loss was a direct result of a covered event, but as a form of failsafe, the insurer reserves to itself the right to establish that the loss was not a direct result of a covered event and is therefore also excluded under the policy.

An example for this can be found again in the Standard Form 24 Financial Institution Bond which excludes:

> Loss that is an **indirect result** of any act or occurrence covered by this insurance. . . . (Emphasis added).

Therefore, the fact that an indirect loss was not intended to be covered is clear from both the coverage section itself, and the exclusions which limit such coverage.

OLDER CASES DEALING WITH THE DIRECT LOSS ANALYSIS

There are two significant older cases dealing with the issue of third party liability and a direct loss analysis. The first of those is *Ronnau v. Caravan International Corp.*

In *Ronnau*, the insured was a company by the name of Caravan, which had been sued by a third party for "fraudulent representations" allegedly made by the president of Caravan and other employees, which representations caused the third party a loss. Caravan was financially defunct and offered no resistance to the third party action. A default judgment was given to the third party against Caravan and the third party eventually brought suit against Caravan's fidelity bond insurer.

The lower court held that the fidelity bond issued to Caravan "did not insure Caravan against liability to third parties and . . . that the bond was not a third party beneficiary contract, nor a contract of insurance against liability. . . ."[1] The court further opined that:

> Caravan had not sustained a **direct loss** of money or property by reason of appellant's judgment, and that the judgment was not a loss to Caravan within the coverage of the bond.[2]

In holding in favor of the insured, the court stated:

> A fidelity bond is an indemnity insurance contract whereby one for consideration agrees to indemnify the insured against loss arising from the want of integrity, fidelity or honesty of employees or other persons holding positions of trust. Such a contract is considered to be one on which the insurer is liable only in the event of a loss sustained by the insured. It is **direct** insurance procured by him in favor of himself, as contrasted with bonds running to the benefit of members of the public harmed by the misconduct of the covered individual, which bonds are third-party beneficiary contracts. *Id.* at 122. (Emphasis added).

Another significant early case is that of *KAMI Kountry Broadcasting Company v. United States Fidelity& Guaranty Co.*,[3] which relies heavily on *Ronnau* for its ultimate conclusion. In *KAMI Kountry*, the general manager of KAMI Kountry Broadcasting forged certain signatures on promissory notes to the First National Bank of Cozad, Nebraska. As it turned out, that bank was one of the largest advertisers on KAMI Kountry Broadcasting and threatened to not advertise with KAMI Kountry Broadcasting in the future unless the notes were paid. As a result, KAMI Kountry Broadcasting paid off the notes and then made a claim against its bond. In ruling against the insured, KAMI Kountry Broadcasting, the Nebraska Supreme Court stated:

> The alleged facts disclosed KAMI suffered no **direct loss** as a result of the fraudulent acts of its

> manager. The pleadings indicate this fraud was directed at the bank and that it was the one defrauded by the acts of KAMI's manager. KAMI lost only when it determined to pay the bank.[4]

In concluding its decision, the court stated:

> The original loss suffered by the bank in this case is not, under the facts alleged, converted into a **direct loss** by the insured because it determined to pay the bank on an obligation for which it was not liable.[5]

Though this case does stand for the proposition that a third party loss is not a "direct loss" under the fidelity bond, it might be asserted that the only reason it was not a direct loss was because the court ultimately found that the insured owed no obligation to the third party, but paid the third party because of business considerations. Subsequent cases have made clear that that is not the lynchpin for this decision.[6]

Of interest is the case of *Omaha Bank for Cooperatives v. Aetna Casualty Insurance Company*.[7]

There, the Supreme Court of Nebraska again rendered a decision consistent with that of its earlier ruling in *KAMI Kountry*. This case also involved a bank being sued by one of its borrowers for false representations made by the bank's lending officers in connection with the loan. The only differences between this situation and that involved in *KAMI Kountry*, were the existence of true liability and the breadth of the coverage. It appears that in *KAMI Kountry* the court was dealing with an employee dishonesty policy, whereas in *Omaha Bank*, the court was dealing with a policy insuring the lack of faithful performance. In essentially holding that this was a distinction without a difference for purposes of third party liability, the court stated:

> The bond in question does afford added coverage to the insured, i.e., it covers **direct losses** to the insured not only from dishonest and fraudulent acts of its employees but also **direct losses** for failure to faithfully perform duties, but not involving fraud or dishonesty.[8]

After discussing three cases cited by the insured in support of its position, the Nebraska Supreme Court stated:

> None of these cases held that the surety was liable, under this type of bond, to third parties because of unfaithful performance of duty by the insured's employees. None involved covered

> losses sustained by the insured because of its tort liability to third parties.
>
> . . . .
>
> We hold that coverage provision A of the Banker's Bond, indemnifying against dishonest, fraudulent acts or failure to perform faithfully, does not insure the bank against the consequences of its own torts.[9]

Problems respecting the necessity of "direct losses" started to arise when insureds began arguing that a "direct loss" simply means the "proximate cause of loss" and that a proximate cause of loss simply means a "but for" causation analysis. Under this rationale, if the employee's act, or the covered event, was a "substantial contributing factor" to the harm suffered, then that act could be considered a proximate cause of the loss. Typical of these cases are the Third Circuit's decision in *Jefferson Bank v. Progressive Casualty Insurance Company*,[10] and the Fifth Circuit's decision in *First National Bank of Louisville v. Lustig*.[11]

In the *Jefferson Bank* case the court paid lip service to the idea of direct loss, but ultimately decided the case under a proximate cause standard. Jefferson Bank had agreed to take make a loan to an individual, Shapiro, using Shapiro's real property as collateral. Shapiro brought a notary with him to the closing, Stevenson, to witness his signature on the mortgage. Stevenson was also held out to be an agent for the title insurance company that issued the title commitment relied upon by Jefferson Bank. During the closing, Stevenson acknowledged the mortgage and notarized it with a notary's seal and stamp.[12] Subsequently, Shapiro defaulted on the loan, and it was discovered that Stevenson was not an agent for the title insurance company, nor was she a notary, and the title commitment relied upon by Jefferson Bank was a counterfeit. Furthermore, Stevenson had agreed to record the mortgage, but had not done so. Realizing that it had no means of collecting on the debt owed to it by Shapiro, Jefferson Bank made a claim on its Banker's Blanket Bond issued by defendant Progressive Casualty Insurance Company.[13]

The court examined whether Jefferson Bank could recover under Insuring Agreement E of the Banker's Blanket Bond by demonstrating that it had incurred "loss resulting directly from" its extension of credit in good faith reliance on the mortgage that bore the forged signature of the notary. The court stated that in order to decide whether the fraudulent notary's signature caused Jefferson Bank's loss so as to find coverage under the Banker's Blanket Bond, it would first have to determine the correct definition of "loss resulting directly from" under Insuring Agreement E. The court first stated that the district court had applied a strict interpretation of the phrase, concluding that the loss must be "directly caused" by the forgery. The court thought that such a standard meant proving that the forgery was both the proximate cause of the loss and had some additional closeness in space and time between the loss and the cause of the loss.[14] The court disagreed with such a definition and stated:

> An analysis of Insuring Agreement E in light of Pennsylvania law persuades us, however, that conventional proximate cause is indeed the correct standard and that requiring "immediacy" is inappropriate.[15]

The court based its conclusion that "resulting directly from" suggested nothing more than proximate causation on two factors. First, the court examined other insurance cases where the policy contained the language "direct cause of a loss," and such was interpreted to mean the "proximate cause of a loss." By analogy, the court interpreted "resulting directly from" to be "proximately caused by" under Insuring Agreement E. Second, the court discussed the idea that "direct cause" or "immediate cause" was a very nebulous concept, and one that did not enjoy "favor under Pennsylvania law." It further explained that Pennsylvania had adopted a "substantiality" standard, rather than an "immediacy" standard for proximate causation.[16] On this basis, the court concluded:

> Given the difficulty and confusion that results from applying a "nearest cause" or "immediate cause" standard, we do not believe that the parties intended to contract for it. Instead, we believe that in this contract "resulting directly from" means "proximately caused by."[17]

This analysis is flawed. The court was requested to interpret a term on the insurance contract. As such, principles of contract law and contract construction should have directed the analysis. Instead, the court addressed tort principles in Pennsylvania to assist it in reaching its conclusion that a proximate causation standard was appropriate for addressing the meaning of the contractual term direct loss. Proximate causation is a tort concept, and is not one which was adopted in the insurance contract to define the scope of coverage being purchased. In *Jefferson Bank* the Court effectively ignored the words chosen in the contract and substituted different words, as a result of which it reached an incorrect result. Recent case law, however, has done much to clarify what is intended to be covered with respect to the third party law suits.

CASES CLARIFYING THE SCOPE OF COVERAGE IN THIRD PARTY LITIGATION LOSSES

Two cases decided in 1998 have gone a long way in clarifying exactly what is covered with respect to an insured's liability to third parties under typical fidelity coverage. In the Fifth Circuit case of *Lynch Properties Inc. v. Potomac Ins. Co.*,[18] Potomac Insurance issued a master insurance policy including employee dishonesty coverage to Lynch Properties, a property management firm. Lynch Properties was owned by Harry Lynch, who also took care of his mother's personal business. Lynch's secretary, the bookkeeper for both Lynch Properties and Mrs. Lynch, embezzled approximately $19,000 from Mrs. Lynch's personal bank account. When Lynch Properties found that the money was missing from the mother's account, it made a claim under its employee dishonesty coverage. While there was no doubt that the secretary was an employee of Lynch Properties, Potomac denied coverage based upon the "interest covered" provision which limited property loss to property (a) "that you own or hold" or (b) "for which you are legally liable," with the "you" being the named insured, Lynch Properties.[19] The court agreed with the insurer and found that there was no coverage "because Lynch Properties neither owned, held, nor was legally liable for the funds."[20]

The court analyzed both prongs of the "interest covered" provision and found that Lynch Properties did not "hold" the funds that the secretary had misappropriated since, under Texas law, Lynch Properties did not hold the account monies in bailment. The court stated that the mother had never "delivered" her personal bank accounts to Lynch Properties because they remained in her name alone. The court also found that while Lynch Properties may have been in physical position of the checks on the mother's account, the loss of **checks** cannot be equated with the loss of **funds** from the mother's personal bank account. The court then found that Lynch Properties was not "legally liable" to the mother for the funds. Lynch Properties had argued that since they had assumed the task of handling the mother's account, the mother could sue Lynch Properties for defalcations and Lynch Properties would be "legally liable" to the mother. In dealing with this argument, the court stated:

> Acceptance of Lynch Properties' argument would mean that Potomac's policy would cover any loss where an employee takes a customer's property in the course of their employment responsibilities, regardless of whether the employer had any interest in the property itself. Furthermore, it would transform this policy, which insures property loss for which Lynch Properties is legally liable, into a policy insuring any vicarious liability arising from any employee's dishonesty.[21]

The court here recognized that the "legally liable" language in the policy does not mean any after-the-fact legal liability, for which the employer may have some vicarious responsibility due to the improvident acts of its employee. For the insured to be "legally liable" for the property, its legal liability must attach before the acts complained of had occurred or independent of such acts. Recognizing the critical distinction between fidelity coverage and liability policies, the court said:

> Employee dishonesty policies insure against the risk of property lost through employee dishonesty. [Citation omitted.] Liability policies, by contrast, require an insurer to discharge an obligation of the insured to a third party for some act of the insured or its employee. [Citation omitted.] Although employee dishonesty policies may cover the loss of third party property in the possession of the insured, these policies do not serve as liability insurance to

> protect employers against tortious acts committed against third parties by their employees.[22]

Lynch Properties stands for the proposition that third party actions brought against an insured based upon actions of the insured's employee toward a third party, are not covered, absent some pre-existing legal liability for the property in question.

Another case decided in 1998 and related to this issue was *Aetna Casualty and Surety Company vs. Kidder, Peabody & Company, Inc.*[23] In that case, New York's Appellate Division framed the issue as follows:

> The issue before us is whether the securities brokerage firm of Kidder, Peabody & Company is covered under the fidelity bonds for third-party claims arising out of the misconduct of its employees in divulging confidential information relating to corporate takeovers and mergers of Kidder's clients, which resulted in massive insider trading and losses to third parties.[24]

The third parties were plaintiffs in class actions and were public shareholders of companies which were subject to Kidder's insider trading. The shareholders alleged that they would not have sold at the prices at which they sold their securities if they had the same inside information as defendants. Kidder ultimately settled the actions for approximately $27 million. It then sought coverage under its fidelity bond.

Summary judgment was issued in favor of the insurer dismissing Kidder's claims under its fidelity bonds on the basis that: (1) the bonds were not liability policies and did not cover losses sustained by non-insured third parties; (2) the bonds provide coverage only for "direct losses" or "direct compensatory damages," not consequential or incidental losses; (3) the bonds cover only acts undertaken by an employee with the "manifest intent" to cause the insured a loss; and (4) the bonds provide coverage only where the losses have been "solely and directly" caused by the employee's misconduct. This latter language was added and is not typical of most fidelity policies, but is generally used by certain Underwriters at Lloyd's.

In upholding the trial court's decision, the appellate court stated that:

> By their clear terms, the fidelity bonds require that the unfaithful employee must intend to cause the employer a loss directly and solely relating to the faithless act, classically described as embezzlement or other types of theft from the employer [citation omitted] or even retaliation against the employer that benefits a third party in collusion with the employee. . . .[25]

The court found that fidelity bonds are not triggered from the "indirect and consequential injuries" an employer sustains as a result of legal settlements with third parties who are the actual targets of the employee's acts.[26] The appellate court then engaged in an historical analysis of fidelity bonds and their derivation. In concluding that analysis, the court stated:

> Nothing in the history of these particular bonds, which comports with an historical understanding of what fidelity coverage is, indicates that the employee infidelity being covered as a risk could reach the employee's dishonesty toward third parties, absent an intent to cause a loss to the employer.[27]

These cases were closely followed by the Ninth Circuit case of *The Vons Companies v. Federal Insurance Company*.[28] In *Vons*, an alleged employee of Vons, Gene Shirley, was claimed to have been engaged in a fraudulent scheme that eventually resulted in loss to third party victims of that scheme. These alleged victims sued Vons and others. Vons eventually settled the litigation for $10 million, the limit of its fidelity insurance policy.

In fact, Shirley was not employed by Vons, but rather by a brokerage company, which brokered transactions in grocery and non-grocery products for various grocery stores (including Vons), covering shortages here and disposing of surpluses there. In upholding summary judgment in favor of the insurer, the Ninth Circuit held that California law recognized that fidelity policies cover "direct losses" of specified covered property and are not third-party liability policies. In so holding, the court followed the opinion of the Fifth Circuit in *Lynch Properties*, and found that the mere fact that an employer might be vicariously liable for the criminal acts of one its employees was not sufficient to implicate coverage under the policy at issue. In reaching a similar conclusion, the Ninth Circuit in *Vons* focused upon the need to read the insuring clause in the context of the "Ownership" provision of the policy. The Ninth Circuit, in discussing and agreeing with the lower court decision, concluded that "under its policy, Federal provided Vons with coverage for 'direct losses' that were 'caused by' employee theft or forgery. . . . [The court held] that 'direct' means 'direct' and that in the absence of a third party claims clause, the Vons policy did not provide indemnity for vicarious liability for tortious acts of its employee."[29]

This opinion is particularly significant because the court recognized that the "legal liability" referred to in the Ownership provision of the policy must relate to legal liability which pre-exists or exists separate and apart from the alleged tortious activity of the employee.

Other cases have recently followed the lead of the *Lynch Properties*, *Kidder*, Peabody, and *Vons* line of cases. In *Finkel vs. The St. Paul Fire and Marine Insurance Company*,[30] the court held that fidelity bonds did not insure against legal liability of the insured to third parties, but only covered direct losses from employee dishonesty. The court stated:

> Simply put, the [employee dishonesty coverage] is not a liability policy, but an indemnity policy.[31]

At least four other courts in the past three years have reached similar conclusions.[32]

In *Auto Lenders Acceptance Corp. v. Gentilini Ford*,[33] employee of defendant Gentilini, Randy Carpenter, perpetrated a fraudulent credit scheme in the course of his employment with Gentilini Ford by submitting fraudulent applications to Auto Lenders Acceptance Corp. to induce it to finance car purchases to high risk customers. After several of these customers defaulted on their loans, Auto Lenders discovered the fraud and brought suit against Gentilini for participating in the fraud. Gentilini then brought an action against its insurers under the "employee dishonesty extension" to its commercial coverage insurance policy seeking a defense to Auto Lenders' suit and indemnification.[34]

The "employee dishonesty extension" provided that Gentilini could extend its coverage to "apply to direct loss of or damage to Business Personal Property and "money" and "securities" resulting form dishonest acts committed by any of your employees."[35] The trial court found that the insurer had a duty to defend Gentilini on the basis of possible coverage. The trial court held that Carpenter's acts could cause a direct loss to Gentilini. Therefore, the appellate court faced head on the question of whether the acts of Carpenter directed at Auto Lenders resulted in a "direct loss" to Gentilini. The appellate court explained that the trial judge who originally decided the issue in favor of Gentilini improperly looked to the "so-called Appleman's Rule" dealing with proximate causation of loss under fire insurance policies in determining that a "direct loss" was present.[36] It further explained that the trial judge saw an unbroken chain of events under the reasoning of "Appleman's Rule," in that Carpenter's fraud against Auto Lenders precipitated the suit against Gentilini, which in turn resulted in a loss to Gentilini.[37]

However, the appellate court expressly disagreed with such an analysis, and decided that a "direct loss," as required by the fidelity coverage, was not present. It noted that the policy language involved limits the coverage to direct loss from an act of dishonesty by an employee with the "manifest intent to cause loss or damage" to the insured. The court thought it very clear that Carpenter's acts were intended to defraud Auto Lenders, and not Gentilini the insured.[38] The court agreed with several decisions discussed herein. (*Lynch Properties*, and *Vons*) as well as several other similar holdings in denying coverage. *Auto Lenders Acceptance Corp. v. Gentilini Ford*,[39] also citing *F.D.I.C. v. Nat'l Union Fire Ins. Co.*,[40] *East 74th Corp. v. Hartford Acc. & Indem. Co.*,[41] and *Cent. Nat'l Ins. Co., of Omaha v. Ins. Co. of N. America*.[42]

The court concluded that the language of the insurance policy did not provide for the proximate cause analysis implicit in Appleman's Rule. Rather, the policy provided for coverage to employers for losses sustained as a direct result of the illegal acts of employees, without any intervening event. The court further explained that the employee's actions needed to be directed against its employer in order to find coverage under the policy's employee dishonesty provision requiring "direct loss."[43] As such, it declined to adopt the tort concept of proximate cause in the interpretation of such a contract between an insured and its insurer. The appellate court therefore refused to find coverage for Gentilini under "the employee dishonesty extension" to its commercial coverage insurance policy for the acts of Carpenter directed against a third party creating liability for Gentilini and directed that judgment be entered in favor of Gentilini's insurers.[44]

CONCLUSION

The clear trend among courts is to recognize that a fidelity bond is an "indemnity" policy, not a "liability" policy, and that such policies generally do not provide coverage for third party losses. Where an insured's loss is based upon its liability for the tortious acts of its employee directed at a third party, coverage is not afforded under the terms of standard commercial crime policies, theft policies or financial institution bonds.

1. *Id.* at 120.

2. *Id.* at 121. (Emphasis added).

3. 190 Neb. 330, 208 N.W.2d 254 (Nebraska 1973).

4. *Id.* at 254. (Emphasis added).

5. *Id.* at 257. (Emphasis added).

6. See, e.g., *The Vons Companies v. Federal Insurance Company,* 57 F.Supp.2d 933, aff'd. at 212 F.3d 489 (9th Cir. 2000); and *Lynch Properties Inc. v. Potomac Ins. Co.*, 962 F.Supp. 956 (N.D. Tex. 1996), aff'd. 140 F.3d 622 (5th Cir. 1998).

7. 301 N.W.2d 564 (Nebraska 1981).

8. *Id.* at 790-91. (Emphasis added).

9. *Id.* at 791.

10. 965 F.2d 1274 (3rd Cir. 1992).

11. 975 F.2d. 1165 (5th Cir. 1992).

12. *Id.* at 1275.

13. *Id.* at 1276.

14. *Id.* at 1280.

15. *Id.* at 1281.

16. *Id.* at 1281.

17. *Id.* at 1282.

18. 962 F.Supp. 956 (N.D. Tex. 1996), aff'd. 140 F.3d 622 (5th Cir. 1998).

19. *Id.* at 626.

20. *Id.*

21. *Id.*

22. *Id.* at 629.

23. 246 A.D. 2d 202, 676 N.Y.S. 2d 559 (New York App. Div. 1998).

24. *Id.* at 204-05.

25. *Id.* at 209.

26. *Id.*

27. *Id.* at 212.

28. 57 F.Supp.2d 933, aff'd. at 212 F.3d 489 (9th Cir. 2000).

29. *Id*. at 492-493.

30. 2002 U.S. Dist. Lexis 11581 (D. Conn. June 6, 2002).

31. See, 2002 US Dist. Lexis 11581 (June 6, 2002).

32. See, also, *Patrick v. St. Paul Fire and Marine Insurance Co.*, 2001 WL 828251 (Vermont, Feb. 15, 2001); *United General Title Ins. Co. v. American Int'l. Group*, 51 Fed. Appx. 224, 2002 U.S. App. Lexis 23993 (November 14, 2002); *Fireman's Fund Insurance Co. v. Special Olympics International*, 2003 WL 1023045 (Mass., Jan. 24, 2003); and *Auto Lenders Acceptance Corp. v. Gentilini Ford*, 358 N.J.Super. 28, 816 A2d 1068 (App.Div. 2003).

33. 358 N.J.Super. 28, 816 A2d 1068 (App.Div. 2003).

34. *Auto Lenders Acceptance Corp. v. Gentilini Ford*, 358 N.J.Super. at 31.

35. *Id.* at 32.

36. The Appleman's Rule according to the court provides that:

> Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produced the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is not necessarily the last act in a chain of events which is, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into motion that chain of events producing the loss. An incidental peril outside the policy, contributing to the risk insured against, will not defeat recovery. . . . . In other words, it has been held that recovery may be allowed where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk.

Auto Lenders Acceptance Corp. v. Gentilini Ford, 358 N.J.Super. at 33, citing to *Franklin Packaging Co., v. California Union Ins. Co.*, 171 N.J. Super. 188, 191 (App. Div. 1979), citing to 5 Appleman, Insurance Law and practice § 3083 at 309-311 (1970). It should further be noted that the trial judge's reliance on Section 3083 of Appleman's treatise in the *Auto Lenders* was further misguided since Section 3083 of Appleman's treatise deals with proximate causation of loss under fire insurance contracts which are in most instances statutorily prescribed.

37. *Id.* at 33.

38. *Id.* at 34-35.

39. 358 N.J.Super. at 35-36.

40. 205 F.3d 66 (2nd Cir. 2000).

41. 51 N.Y.2d 585, 416 N.E.2d 584, 435 N.Y.S.2d 584 (1980).

42. 522 N.W.2d 39, 42 (Iowa 1994).

43. *Id.* at 36.

44. *Id.* at 38.