AHMUTY, DEMERS & MCMANUS NEWSLETTER

"THANK YOU FOR READING AND THANK YOU FOR YOUR BUSINESS"

IN THIS EDITION:

A Note from Founding Partner Philip J. McManus

Welcome to the Winter 2016 edition of the Ahmuty, Demers & McManus Newsletter.

In this edition, William J. Mitchell offers a unique take on the dubious nature of the often used term "and/or" in our practice.

In "Firm Results" we highlight a case where an emergency vehicle was not afforded the protection of Section 1104 New York's VTL; a case where a dietician could not be found responsible for a physician's failure to diagnose in a medical malpractice case; and a case where a superseding event severed the causal connection between the duty of care owed and the plaintiff's injuries in a premises action. We also highlight two jury trials where the plaintiffs' credibility was so damaged upon cross examination that two excellent results were obtained for our clients.

And in news "Of Interest" we welcome two exciting new members of the firm, Dennis P. Wallace who brings with him 40 years of insurance and legal experience; and Steven K. Mantione who brings his 30 plus years experience in prosecuting and defending catastrophic personal injury actions to the firm. We also highlight Lourdes Ventura, recipient of the Culvert News award for her public service and accomplishments; Robert Shaw for his continued good works with the Bronx Advocates for Justice; and ADM's Support of the Speed Mentoring Program at St. John's University School of Law.

Since opening our doors in 1983, relationships have been the bedrock of the firm's culture and success. My hope is that this newsletter provides us with another way to connect and have a productive dialogue on issues currently affecting your business.

To that end, I encourage you to contact us and weigh in on topics we write about or that you would like to get our perspective on. Ask questions, challenge viewpoints, suggest a subject to cover in future editions. Positive or negative, we value your feedback immensely. It helps us better do our job, which is to deliver the highest level of legal service to our valued clients.

Thank you for reading and thank you for your continued support.

PJM

HAVING YOUR CAKE AND/OR EATING IT TOO: The Inherent Ambiguity in the Term "and/or"

By: William J. Mitchell, Esq., Partner, Albertson Office

From the most technical written instruments to informal emails, drafters often use the term "and/or," usually without thinking to much about it. Generally, it is intended to mean "either or both, "either, as applicable," or "both if possible." But under the meaning of the words as written, how can you choose one of two options (thereby rejecting one) but at the same time choose both? Or as one court so aptly put it, what exactly does the "/" mean?

Let's consider the proverbial piece of cake. You can have your cake, or eat your cake. You can't both have it and eat it too. Rather than choose from or clarify the available options, many people quickly short-cut the issue by reverting to "and/or."

The use of this phrase dates back to at least the mid-1800s, and is fairly well-accepted in our vocabulary. Yet, it often doesn't make sense and can be inherently ambiguous, particularly in the courts, where litigants essentially ask judges to decide what "/" means.

Courts have lambasted parties because of poorly drafted instruments and pleadings. Judges nationwide have written that "and/or" is "neither word not phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean." It is a "linguistic abomination" described as "the interloping disjunctive-conjunctive-conjunctive-disjunctive conjunction." It is a "mongrel expression" and an "abominable invention" that "certainly jurors could not be expected to interpret."

Lest it appear that this is lawyer-draft issue only, be assured it is not. People from varied occupations and roles use "and/or," and no one is immune. Even judges.

Insurance Coverage Case Examples

In the world of insurance coverage, when every word and term in an insurance policy has, or will be, scrutinized by the courts, a claimed ambiguity will always create controversy. I once reviewed a coverage file where one adjuster wrote to another: "We hereby tender the defense and/or indemnity of our named insured to you." Did the adjuster want defense and indemnity, or was either of the two acceptable? Incredibly (or perhaps, I thought, sarcastically) the adjuster from the other carrier wrote back: "We hereby accept your tender of defense and/or indemnity." It later became a non-issue in that case, and I presumed an isolated incident.

Yet, when an Alabama widow sued the County after her incarcerated husband died after an attempted suicide, the County sought a declaration that the insurer must defend and/or indemnify the County. The trial court decided in the insured's favor on an insurance coverage matter and declared the insurer had an obligation to defend "and/or" indemnify its insured. The insurer appealed. The Supreme Court affirmed.

Similarly, a New York trial court heard an infant lead paint ingestion case against an insured landlord, and ruled that the insurer had a duty to defend "and/or" indemnify the landlord. The Appellate Division affirmed that holding, declaring that the insurer had to defend and/or indemnify the landlord.

Of critical importance to interpretation of an insurance policy is who is identified as the named insured on that policy. In one instance, a homeowners' insurance policy listed the named insured as the husband, "and/or" his

wife. In many policies or claims, this may have gone unnoticed. But where the husband intentionally burned down the home they both owned, and took his own life while it was in flames, the insurer raised the fraud exclusion, and denied the wife's claims for lost personal property. The issue was whether the innocent spouse was bound by her husband's intentional act, or whether she could recover. Contrary to most states, the court ruled that the innocent spouse could recover because the husband or wife was the insured, in part due to "and/or" in the policy declarations.

In another instance, a policy insured an individual in Wisconsin, "and/or" his company. The insurer raised the "employee exclusion," arguing that the exclusion applies to both insureds for an employee of either, while the individual insured argued that the two insureds should be treated separately, and an employee of one was not necessarily an employee of the other. The court referred to that "verbal monstrosity" of "and/or" as "'Janus-faced,' for it imputes to it more than two faces." The court held that the two insured were to be treated separately, so that the insured was principal or company.

With respect to exclusionary language, a Michigan court considered whether a policy endorsement that added coverage for injury "arising out of sexual abuse and/or misconduct" included coverage for a non-sexual attack. The policy defined "sexual abuse and/or misconduct" to include "sexual and/or physical abuse or misconduct." Did this phrase exclude sexual misconduct or did "misconduct" stand alone so that either was covered? The insured argued that "sexual abuse and/or misconduct" referred to two different coverages. The court disagreed with the insured, finding that the clauses were meant to be read together, in conjunction with each other. Thus, the court interpreted the endorsement as "sexual abuse and misconduct."

Similarly, an exclusion for any injury "while downhill skiing except for recreational skiing and/or cross country skiing away from marked territories and/or against the advice of the local ski school or authoritative body" was not ambiguous. Finding in favor of the insurer, the court ruled that under Indiana law, and/or does not render the exclusion ambiguous, and must be read as "and."

Other Contexts

"I hereby bequeath my estate to my niece, and/or my grandniece" was actually drafted into a will, and would become the subject of litigation some years later. Both niece and grandniece were alive when the will was probated. The New Jersey court struggled with the "illiterate" drafting: "There is no known understanding as to what '/' means."

Fortunately, the attorney who drafted the will was also alive, and swore that her interpretation meant that if both devisees would share equally if still alive, and to the survivor if not. The court decided the venue issue "not by giving force to the accepted definition of each word, but to extract from the document or from other relevant evidence, the probable intention" of the benefactor. After much discussion, the court divided the assets equally between the niece and grandniece, based on the attorney's testimony, which was the only evidence of the decedent's intent.

In another example, the direction of the will was that it was to be interpreted "under the laws or the State of New Jersey and/or the State of New York." The court determined that the intent must be gleaned from the document itself or from extrinsic evidence, and "as such the word 'and' should be disregarded" allow the trustee to choose the law of either state. Thus, this court read and/or to mean "or."

On an action on two promissory notes executed in favor of "A and/or B" and subsequently assigned to a third party, a Colorado court wrote that such "misuse" of the English language has been "severely and properly criticized in times past" but "that does not relieve us of the necessity of working with the term as used by the parties." The court looked to the Uniform Commercial Code, which allows one of the payees to assign the notes. Thus, where "and/or" is used, it means "or."

Conclusion

Whether "and/or" actually means "and" or "or" is fairly evenly split in these decisions. Given that uncertainty, you may well be better off avoiding "and/or."

Firm Results – Recent Trial Verdicts and Summary Judgment Wins Obtained By ADM Attorneys

Lourdes Ventura and **Frank Cecere**, recently obtained an Order summarily dismissing the plaintiff's Complaint against a worldwide shipping company and the driver of one of its delivery vehicles. The plaintiff was a passenger in an ambulance that was transporting the non-party patient to a hospital that collided with a motor vehicle owned and operated by the shipping company.

In support of its motion, the shipping company offered deposition testimony of both drivers along with a video recording taken from inside the ambulance. The shipping company contended that it was proceeding through the intersection with a green light when the co-defendant ambulance, which did not have its lights nor sirens activated, ran a red light and collided with the shipping company's vehicle. The shipping company contended that it did not violate any provisions of the VTL and that the ambulance was not afforded the protection of VTL 1104 because the lights and sirens were not activated. The ambulance countered that because the operator of the shipping company vehicle looked left before entering the intersection, a question of fact existed as to whether he exercised reasonable care to avoid the collision. The Court was not moved by this speculative and conclusory argument and dismissed the plaintiff's Complaint as against the shipping company.

John McPhilliamy successfully moved for summary judgment in a medical malpractice action brought by a plaintiff after a failed laparoscopic sleeve gastrectomy, a common weight loss surgery. Following the surgery, the plaintiff developed severe nausea and was unable to hold solid food or fluids down. Although such complaints are common following weight reduction surgery, the plaintiff's symptoms continued for several weeks resulting in a hospital admission where IV fluids were administered. Even after the placement of a stent by co-defendant doctor, plaintiff continued to experience nausea and vomiting.

The plaintiff developed other symptoms including dizziness and confusion. She did not respond to hydration and B12 supplements and she became more disoriented and confused with worsening dizziness and an inability to concentrate. The plaintiff was ultimately diagnosed with Wernicke's Encephalopathy.

John represented a defendant, a registered dietician who interacted with the plaintiff on five occasions during her hospital stay. She assessed the plaintiff's nutritional needs and made recommendations in this area. She was not allowed to prescribe nor could she make entries on the plaintiff's chart. Rather, she would make notes of her assessments and recommendations and called the plaintiff's treating physician to communicate her opinions.

Expert affidavits submitted in support of the application established that the dietician did not depart from acceptable standards of care and that her opinions were given within a reasonable degree of nutritional and dietetic certainty. Further, it was found that there was no causal link between anything the dietician did or did not do and the injuries suffered by the plaintiff. The Court inferred that the responsibility lay with the plaintiff's physician who failed to note that his patient had a severe vitamin deficiency. In dismissing the case against the dietician, the Court found that the plaintiff and the co-defendant failed to demonstrate that the dietician should be held accountable for what the doctors were obligated to do.

This is particularly a case when recommendations regarding vitamins and thiamine supplements were disregarded by the physician in charge. The Court further notes that the doctors failed to diagnose the plaintiff with Wernicke's Encephalopathy and therefore there was no reason to hold the dietician responsible. Plaintiff's counsel has rejected the latest settlement offer of $9,000,000.00.

Firm Results - Continued

Lourdes Ventura and Patrick Cooney successfully moved for summary judgment for an ADM client where the plaintiff fell through a plywood cover leading to the basement of the client's premises.

A small garden was located in front of the building with one side being adjacent to the building itself. The remaining three sides were completely surrounded by a 42 inch high guardrail. The enclosed garden area had been excavated and utilized for the purposes of deliveries but was covered when deliveries were not being made. The plaintiff, a male model, used the front of the building for a photo shoot. No one, including the plaintiff, photographer or the modeling agency, notified the building owner that a photo shoot would take place in front of the premises. The photographer asked the plaintiff to enter the enclosed garden for a photo and upon doing so, the plaintiff fell through the plywood cover.

Lourdes and Patrick argued that but for the plaintiff's own reckless action, the occurrence was not foreseeable. The law is clearly established that even if a defendant owes some duty of care to a plaintiff, under certain circumstances there may be a "superseding" event that may prevent the finding of liability. Such a superseding event severs the causal connection between the duty of care owed and the plaintiff's injuries. The Court opined that the question of legal cause may be properly decided as a matter of law in cases that generally involve independent intervening acts which operate upon, but do not flow from the original negligence. Further, for the plaintiff's conduct to constitute a superseding cause, the plaintiff's negligence, in addition to being unforeseeable, must rise to such a level of culpability as to replace a defendants negligence as a legal cause of the accident. The Court found that the plaintiff's conduct of scaling the 42" high barrier to enter a protected area constituted a superseding event barring recovery.

Carmine Carolei of our Hopewell Junction office recently tried a case in Supreme Court, Westchester County before a justice who repeatedly pressured Carmine (and his principal) to settle the case.

The case revolved around a two vehicle accident wherein Carmine's client made a left hand turn into an intersection. In its charge to the jury, the Court marshaled the facts charging the jury that if a plaintiff proved the defendant was making a left hand turn and another car was in the intersection or another car was close to the left turn, then such action by the defendant was hazardous, and therefore negligent. The jury only had to consider if plaintiff was comparatively negligent and whether the defendants' negligence was a substantial factor in causing the accident.

The plaintiff underwent an arthroscopic shoulder repair and a percutaneous discectomy. She lost $34,000 in wages, missing a year from work. The initial settlement demand was $300,000 and the first and only offer made by the defendant after jury selection was $60,000. On the first day of trial, the plaintiff dropped the settlement demand to $175,000 and after trial started, the demand decreased to $125,000. The Court made two additional attempts to settle the case at $100,000 and $97,000. The $60,000 offer was never increased. During summations, Carmine attacked the plaintiff's credibility wherein her trial testimony did not corroborate her written statement made on her MV-104. At trial, the plaintiff claimed there were no passengers in her car, but at the time she prepared the MV-104, she indicated that her grandson was in the car, thus creating speculation that she may have been rushing to get him to school.

Upon deliberation, the jury made three written requests, asking for the MV-104, a read-back of the testimony as to whether the plaintiff's grandson was in the car and last, the jury wanted to know if the fact that one car hit another was all they could consider on negligence or could they speculate that the other car ran the stop sign. These questions caused plaintiff and her counsel some concern. They ultimately accepted the $60,000 offered at the beginning of the trial.

Firm Results – Continued

Patrick Cooney recently tried a case in Supreme Court, Queens County on behalf of a transportation client with a large SIR. The plaintiff claimed she sustained a herniated disc at L4-L5 requiring a decompressive lumbar laminectomy and partial discectomy. The action arose from a motor vehicle accident occurring on the BQE in Queens, New York. Plaintiff claimed that the defendants tractor trailer moved from the left lane to the center lane, where she was traveling, striking the left rear quarter panel of her vehicle. The defendant operator, testified that he observed the plaintiff's vehicle in his right hand mirror. He testified further that he also observed the plaintiff's vehicle swerving within the middle lane and she approached the tractor trailer, he observed her holding a cell phone in her left hand.

At her deposition, the plaintiff admitted to using her cell phone but denied using it when the accident happened. She also testified at trial that she always used an earpiece thus if she was on the cell phone, she would not have been holding it. This testimony opened the door to the admission of a guilty plea to operating a vehicle while using a cell phone. Ironically the citation was issued five days after the accident in question. The plaintiff's credibility also took another hit when she testified at trial that she observed the tractor trailer had crossed the broken line and entered her lane of travel. Her testimony was impeached with her deposition testimony wherein she testified she never observed any traffic lanes on the BQE.

The plaintiff's settlement demand was $650,000. The CEO of the transportation company never authorized a settlement offer. The jury returned unanimous defense verdict finding the plaintiff had no credibility. Post trial motions to set aside the verdict were denied.

Maureen Casey successfully defended a Nassau County School District in a trip and fall case involving a school monitor exiting the school at dismissal time for bus duty. The monitor claims to have tripped over a raised sidewalk flag. She testified that the raised portion of the sidewalk was an inch and a half. The school District argued that the plaintiff's view of the sidewalk was not obstructed as she was walking, that she was not in a hurry, and that it was a sunny, clear day. Further, the incident occurred in the middle of the afternoon during daylight hours at about 2:15 p.m. In granting summary judgment to the School District, the Court concluded that the alleged defect was physically insignificant and neither the surrounding circumstances or characteristics of the defect itself increased the risk posed by the defect.

Of Interest

We are proud to announce that **Dennis P. Wallace** joined ADM as a Partner in the firm's NYC office earlier this year upon his retirement from AIG. Dennis focuses his efforts on the firm's long-standing commitment to provide superior and cost-effective legal services to its valued clients.

Dennis spent 27 years at AIG, most recently as Senior Managing Director of the Claims Initiative Group. In that role, Dennis worked closely with AIG's Actuarial, Claims and Legal departments to improve case-specific results, enhance reserving practices, and develop broad-reaching claim strategies and programs.

Dennis joined AIG in 1989 and held a series of claims, legal and management positions, including establishment of AIG's Legal Operations Center to oversee enterprise-wide external legal spend; VP - Excess Casualty claims; VP - Primary Casualty and Auto claims; VP - Claims Resources and Solutions, consisting of Issue Management, Claims Technical Training and Claims Service and Marketing; VP - extra-contractual and staff counsel malpractice claims; and Northeast Regional Claims Litigation Manager.

In addition, Dennis has served on various insurance industry-related panels, including U.S. Chamber Institute for Legal Reform's Steering Committee to Curb Global Forum Shopping; U.S. Department of Justice's Civil Justice Statistics Initiative; National Center for State Courts, and RAND Corporation's Institute for Civil Justice (ICJ), where he currently is a member of the Board of Overseers.

Before AIG, Dennis was a litigation defense and coverage attorney at a New York City-based law firm and before that, VP - Claims at Marsh & McLennan. Dennis received his undergraduate degree from St. John's University in Queens, New York, and his law degree from St. John's University School of Law. Dennis has almost 40 years of insurance claims and legal experience and is licensed to practice law in NYS.

The firm is also proud to announce the addition of **Steven K. Mantione** as a partner in our Albertson office. Steve joins ADM after specializing in the prosecution and defense of catastrophic personal injury actions for over thirty (30) years; the last sixteen years in his own private practice.

Steve has established a successful practice in a wide variety of general liability cases including motor vehicle litigation; Labor Law/construction accidents; nursing home litigation; municipality/school district litigation; professional liability litigation; products liability; premises liability; insurance law; ambulance and volunteer fire services; sports related litigation; pastoral and church litigation; defamation; sexual abuse and civil rights litigation.

Steve has been involved in the successful defense of many "high-profile" cases; including actions for wrongful death; limb dismemberment; paraplegia and work place assault.

Steve is "counsel of choice" for several domestic and international insurance companies; third-party administrators and for various Religious Organizations/Insurance Boards.

Steve has received the highest possible rating, in both legal ability and ethical standards, for more than fifteen consecutive years from Martindale-Hubbell ("AV Preeminent"); and has been rated on several occasions as one of Long Island's top lawyers by the Long Island Pulse.

Of Interest – Continued

Leading the Way

A Latina Legal Trailblazer Receives the *Culvert News* 2016 Community Leadership Award for Women of the Year

Dr. Edward R. Culvert, publisher of the on-line *Culvert News* identified **Lourdes Ventura** as a New York Civil Rights Lawyer and Latino Legal Trailblazer. In presenting Lourdes with this award, Dr. Culvert recognized her for her outstanding public service and professional accomplishments and added: "I am confident [she] will continue to make significant contributions to the people of the State of New York." Lourdes was also recognized for her service as President of the Queens County Women's Bar Association for her service as a former Queens County prosecutor.

Bronx Advocates for Justice Carry on with Good Deeds

Bronx Advocates for Justice sponsored a Judge's Night at the Hard Rock Café, Yankee Stadium.

Pictured (above) is **Robert Shaw**, co-president of Bronx Advocates for Justice (extreme left) with Judge George Silver (center left) at the annual judge's night at the Hard Rock Café.

Bronx Advocates for Justice work with community activists and the progressive legal community for social justice and the needs of the community's less fortunate. The BAJ advocates against discrimination based on sex, national origin, disability and sexual orientation.

Mentoring the Future of the Profession

On Tuesday, February 9, 2016, ADM proudly sponsored the Queens County Women's Bar Association Annual Speed Mentoring Event at St. John's University School of Law. First initiated in part, three years ago by **Lourdes Ventura** of our Albertson office and current president of the QCWBA, this program became an overnight success. It is now a main stay on the QCWBA's calendar. The events connect law students and recent law graduates with practicing attorneys who offer career advice and insight in five-minute burst. The firm looks forward to participating again next year.

st. john's UNIVERSITY
SCHOOL OF LAW

Ahmuty, Demers & McManus

Albertson
200 I. U. Willets Road
Albertson, New York 11507
Phone: (516) 294-5433
Fax: (516) 294-5387

New Jersey
65 Madison Avenue, Suite 400
Morristown, New Jersey 07960
Phone: (973) 984-7300
Fax: (973) 993-1989

Hopewell Junction
1531 Route 82
Hopewell Junction, New York 12533
Phone: (845) 223-3470
Fax: (845) 223-3287

Capital Region - Albany
634 Plank Road, Suite 203
Clifton Park, New York 12065
Phone: (518) 387-3604
Fax: (518) 387-3623

New York
199 Water Street
New York, New York 10038
Phone: (212) 513-7788
Fax: (212) 513-7843

Bohemia
640 Johnson Avenue, Suite 103
Bohemia, New York 11716
Phone: (631) 244-0219
Fax: (631) 244-0250

White Plains
55 Church Street
White Plains, New York 10601
Phone: (914) 584-9934

West Palm Beach
2161 Palm Beach Lakes Blvd., Suite 301
West Palm Beach, Florida 33409
Phone: (561) 557-4200
Fax: (561) 557-4062

Ahmuty, Demers & McManus traces its origins to 1946. The Firm as it now exists was formed in 1983 and quickly evolved to its present size of more than ninety attorneys serving the legal needs of clients throughout New York and New Jersey. As experienced litigators with decades of proven results, our attorneys demonstrate daily the tenacity, creativity, energy and commitment required to defend the wide spectrum of complex legal issues that confront our clients.

Perhaps the best indication of the Firm's abilities and dedication to service is manifested by the fact that we have continued to represent many of the same clients over the years, despite management changes within those companies and corporations. As the Firm and its clientele continue to grow proportionately, the Firm remains committed to the core value of taking a personalized approach to the needs of our clients.

Clients of the Firm recognize the commitment of all Ahmuty, Demers & McManus attorneys to handle legal matters efficiently and expeditiously, while at the same time providing the highest quality legal representation at a reasonable cost. The Firm works closely with its clients, utilizing a team approach in the defense of legal matters. The Firm prides itself on understanding the needs and philosophy of our clients and is highly experienced in resolving cases through trial, early resolution, ADR or motion practice. Since no single approach is best suited for all clients or cases, this versatility is a benchmark of the Firm. The legal staff includes some of the finest trial and appellate lawyers in New York, thereby allowing Ahmuty, Demers & McManus to handle any case regardless of complexity.

With over ninety attorneys, Ahmuty, Demers & McManus is uniquely qualified to provide superior and cost effective legal services to all of our clients. Perhaps the best indication of the Firm's abilities and reputation is demonstrated through the long term relationships the Firm maintains, even when many of our clients have