TICL Journal

Volume 31, No. 1
Spring 2002 Issue

ISSN 1530-390X

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TICL NEWSLETTER *(Cover to Cover)*

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Message from the Section Chair

The Value of Membership

At a recent meeting of the Executive Committee, one of the members challenged the group to respond to the following question: "Why would anyone want to be a member of the TICL Section?" This might seem to be an odd question to address to an audience of people who had dedicated a combined total of over three centuries to the work of the Section. Nevertheless, the question is important in an era when many of our traditional institutions seem to be quickly fading into irrelevance.

I thought my first communication with you as Chair of the Section might be a good time to offer my personal answer to this question and to share with you my vision for the Section in the coming year. But before I do this, let me set the background for the discussion we were having at the time this question was raised. We had just received a report from Dennis Glascott, our Membership Chair. Dennis had reported that the membership of the Section has remained relatively flat, despite the fact that the number of lawyers graduating from law school and practicing law in New York State had continued to increase significantly over recent years. We wanted to understand what we could do to attract new members. I have no doubt that, to a person, every member of our Executive Committee feels strongly, as I do, that the Section has great things to offer and they would like to share these possibilities with as many members of the Association as possible. Moreover, the addition of new and diverse members to the Section and the Executive Committee strengthens the group and adds a vitality and variety of viewpoints which are extremely important to maintaining the strength of the Section.

Perhaps you are thinking at this point, "I'm already a member of the Section; why is this being addressed to me?" For me, the answer is three-fold. First, as you are reading this article, I assume you are a member. As Chair of the Section, I want you to know that I do not take your commitment to membership lightly. I believe we have an obligation to offer Section activities which bring value to you as a person and a professional. So, I think the exercise of reflecting, from time to time, on the meaning of membership in the Section is important.

Second, even those who have been members for a long period of time may be looking for something new from the Section. Perhaps, they would like to become involved with one of the substantive committees, or write an article for the *TICL Journal* or the newsletter, *Cover to Cover*, or participate as a presenter in one of the many CLE programs sponsored either directly by the Section, or jointly with the CLE Committee of the New York State Bar Association.

Third, I believe that each member is an emissary for our Section to those with whom he or she practices, either in a firm or in a larger legal community. I think if the Section is doing a good job, Section members may wish to share the benefits of membership with their colleagues and friends in the profession.

So, what is the answer to the original question? I have been personally involved in the Section for over 20 years. During that time, I have received and read the *TICL Journal* on a regular basis and have contributed to the publication on a number of occasions. I have served on the Executive Committee. I have attended and presented at Section CLEs. I have attended scores of Section meetings at sites throughout New York and the United States. I have met lawyers throughout New York State, many of whom have become good friends. I think I am both a better lawyer and a better person for having had the opportunity to do these things. I could go on at far greater length to explain the numerous ways in which my relationship to the Section has touched me professionally and personally, but I think you get the point. There are lots of opportunities to become involved in ways that should easily fit into the rhythm of your professional and personal life.

My vision as Chair over the coming year is to be a good steward of the Section. In my mind, this means preserving all of the good things the Section has and does—maybe making some of those things a little better than they have been—and finding new and different ways to offer services and activities to the members, which will afford to them the same opportunities to enrich themselves professionally and personally that I have experienced over the last two decades. Let me be more specific.

One development this year about which I am particularly excited is the Web site. The New York State Bar Association has created a new Web site, and the TICL Section has its own home page. This home page will do several things. First, it will dramatically increase the

level and ease of communication between and among Section members. Upcoming programs will be listed on this site, along with information concerning registration. Second, the site will permit the substantive law committees of the Section to create links to articles and other resources pertaining to their particular areas of concentration. Third, it will let Section members access the *TICL Journal* and newsletter electronically. Finally, we hope to use the home page as a means of communication among Section members. These plans are ambitious and they represent a great deal of time and commitment for members of the Section. They also present opportunities for individuals to become involved in the work of the Section. If you are interested, please contact me. My contact information appears at the end of this article.

We will continue to offer state-wide continuing legal education courses, through the good work of Doug Hayden, our CLE Chair. If you have ideas regarding CLEs, Doug is always interested in hearing them. He can be contacted at:

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We will continue with the excellent work of Paul Edelman, Dave Beekman and Ken Bobrow, the editors of the *TICL Journal*. I'm sure you agree with me that this is an extremely high-quality publication which is a valuable resource. Paul can be contacted at:

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We will also continue our tradition of bi-annual meetings of the Section. The next meeting, the Fall Meeting, is scheduled for November 7-10, 2002 at Disney World in Orlando, Florida. The program is being finalized by Program Chair Rob Coughlin. Please note that the meeting will end on Veterans' Day weekend, so as to permit members and their families to extend their stay in Orlando, if they should choose to do so. All of us are very excited about this meeting and we urge every Section member to strongly consider attending.

The activity level of the substantive committees continues to increase. My vision for this year is to increase the level of activity in the committees, so as to offer a vehicle for increased involvement to a wider group of Section members.

I think each person will have a different answer to the question "Why do I want to be a member of the TICL Section?" Ultimately, I think that is the great strength of the group. There are many opportunities to get involved and there are many resources to enrich your practice and your life.

If you are a member, *thank you*. If not, please consider contacting me or Membership Chair, Dennis Glascott, to get involved.

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Dennis R. McCoy

The Changing Jury Environment

By Susan A. Powell

Introduction

The general perspective of American society, and the legal world in particular, is that the actions and general environment in the jury room at the turn of the twentieth century seem to be different than they have been in the past 30 to 40 years. These changes are really an extension of new social and behavioral patterns that have been emerging in American society as a whole for decades. While there is much argument among many parties (i.e., corporate executives, attorneys, legal scholars and academics) as to the nature of these changes—good or bad—our job here is not to remedy the situation, nor to attempt to change social behavior. We seek to understand juror behavior in the context of this dramatically changing social milieu.

In this short article, I am going to briefly summarize these trends in American social patterns over the last 40 years, and examine what these changing patterns might mean for courtroom communication strategies. We will also review these emerging issues as they relate to the September 11 tragedy. We want to see how much these changing patterns influence how we, as trial consultants, must do our jobs to better support the litigation team.

"Using assumptions about jurors of five or ten years ago is like trying to drive a car by looking in the rear-view mirror."

Background

A recent *New York Times* newspaper article, entitled "Tempers Seem to Be Growing Shorter in Many Jury Rooms," states that:

Court officers mention fistfights they broke up, chairs hurled out windows and jurors who screamed so loudly they were heard on other floors . . . jurors have complained about being bullied and humiliated during deliberations. In an extreme case, five black jurors gouged the eye of a holdout white juror and accused him of racism, according to a judge in a 1996 survey on juror conduct, the most recent one conducted. That sort of conduct has led courts around the country to give jurors booklets on how to debate while being courteous and even-tempered. Other courts are focusing on reducing stress . . . these include hints on how to deliberate and making them [the jurors] more physically comfortable. Another source of conflict comes from jurors who increasingly allow their politics or their consciences to enter the deliberations . . . that practice has led to open warfare in a number of jury rooms.[1]

While this article focuses upon many factors —such as small rooms, longer cases, no television, cynicism due to such cases as O.J. Simpson's, and the inability of jurors to negotiate peacefully—is there something more complex behind this behavior? Is this behavior masking more fundamental changes in American society? And what does it mean for the U.S. judicial structure and the jury system, as we now know it?

"Americans are becoming more isolated and less and less socially engaged whether they live in the east, west, north or south; or whether they live in a city, suburb or rural area. These trends are becoming more exaggerated with every passing decade."

Research conducted in the United States within the past 30 to 40 years by numerous sources—academic institutions, private foundations, professional associations—seems to point to a trend that Americans are adopting more and more of an individualistic attitude and there are less agreed-upon communal responsibilities or "standardized" values. As individual differences increase, fewer generalizations about group behavior can be made. Since juries are microcosms of our larger society, it is logical to speculate that fewer generalizations can be made about juror behavior and juror reaction to the multiple conflicting values and scenarios presented in a case.

The consequence of changing American norms is that the traditional juror environment now known to most lawyers is changing dramatically. Using assumptions about jurors of five or ten years ago is like trying to drive a car by looking in the rear-view mirror. These social trends indicate the increasing isolation of the average American. These trends and their consequences exist across every venue in the United States. Americans are becoming more isolated and less and less socially engaged whether they live in the east, west, north or south; or whether they live in a city, suburb or rural area. These trends are becoming more exaggerated with every passing decade.

What are these trends that seem to be affecting our ability to communicate? Robert D. Putnam, in a brilliant synthesis of multiple sources of information in a book called *Bowling Alone, The Collapse and Revival of American Community*,[2] cites the following areas of decline of communal activity or grassroots democracy:

- Decline in formal political activity ("grassroots democracy");
- Decline in civic activity;
- Changing relationships and structure at work;
- Less time with family and friends;
- Less volunteering, less giving; and
- Less trust, honesty, reciprocity.

In short, today the American citizenry is losing the historical, social currency that was such an integral part of our society. These changes have required a substitute for the personal resolution of differences. The increase in the number of lawyers and formal, legal conflict resolution are some of the outcomes of these changes. A stark factor in this change is the loss of trust and reciprocity between individuals. The changes are not recent. They have been occurring over the last third of the twentieth century.

The American jury provides a microscopic perspective on the larger American society. Trial research, in turn, provides a valuable "laboratory" to review and evaluate current American values. Again, we are seeing juror behavior through a rear-view mirror rather than a telescope. Some of the trends are summarized below. Have we kept up with changing norms and societal attitudes in our trial preparation?

Social Trends

Inherently, the judicial system sets up opposing views to be examined. To see how the tools we have must change, it is helpful to review aspects of the social behavior of the American citizen over the last four decades. The record seems to clearly state that we are losing the tools we once thought to be workable.

Robert D. Putnam in *Bowling Alone* states that:

> Our national myths often exaggerate the role of individual heroes and understate the importance of collective effort.[3] A society characterized by generalized reciprocity is more efficient than a distrustful society, for the same reason that money is more efficient than barter. Trustworthiness lubricates social life . . . facilitates cooperation for mutual benefit. Then economic and political dealing embedded in dense networks of social interaction, incentives for opportunism and malfeasance are reduced. Dense social ties facilitate gossip and other valuable ways of cultivating reputation—an essential foundation for trust in a complex society.[4] The dominant theme is simple: For the first two-thirds of the twentieth century a powerful tide bore Americans into ever deeper engagement in the life of their communities, but a few decades ago—silently, without warning—that tide reversed and we were overtaken by a treacherous rip current. Without at first noticing, we have been pulled apart from one another and from our communities over the last third of the century.[5]

"[T]oday the American citizenry is losing the historical, social currency that was such an integral part of our society."

Political Participation

The most common form of communal participation in a democracy is probably that of voting. And, sadly, it has been common knowledge that Americans have been voting in fewer and fewer numbers over the past two centuries, with the most serious declines within the past four decades. The decline of this simple act of communal activity is even more startling when we take into account that more and more persons are eligible to vote (women), that there are fewer and fewer restrictions on voting (on-the-spot registration with a driver's license), and less discrimination against minorities who have increased access to the voting booths (African-Americans).

Parallel to the decline in voting participation is the steep drop in participation by Americans in other civic non-partisan affairs. In the years between 1973 and 1994, the number of Americans who attended even one public meeting in a year declined by 40 percent. Worse yet, the decline would be even steeper if older persons (primarily those over 60) did not stay civically engaged. Steadily, but with relative certainty, younger persons are not replacing their parents and grandparents in participating in political affairs. Indeed, as the older generations are dying out, the statistics clearly indicate that the dropout rate of civic participation in our government will commensurately drop. As time goes on, participation in the everyday deliberations that constitute democracy has declined. In other words, more than a

third of America's civic infrastructure simply disappeared between the mid-1970s and the mid-1990s. This pattern of decline is increasing. Cooperation is falling more rapidly than self-expression, and may well be encouraging the disparity of our social behavior.

> Like battlefield casualties dryly reported from someone else's distant war, these unadorned numbers scarcely convey the decimation of American community life they represent . . . the numbers imply, we now have sixteen million fewer committee members, eight million fewer local organizational leaders, and three million fewer men and women organized to work for better government than we would have had if Americans had stayed as involved in community affairs as they were in the mid 1970s.[6]

Civic Engagement

The definition of civic engagement (as opposed to political engagement) is generally defined by participation in non-political civic associations (Lions Clubs, Boy Scouts, PTAs, etc.) Americans have continued, indeed, to increase their memberships in associations or clubs. However, these newer associations do not require social interaction. Rather, they represent passive, as opposed to active, participation. Statistics that are gathered in this area seem to indicate that any increase in association memberships tends to be in organizations like the AARP, where there is virtually no active involvement, just a willingness to send in a check for certain real or perceived benefits.

On the other hand, membership in associations that demand live participation and engagement, such as charities, youth groups, participative sports groups and unions, has plunged. There has been significantly less face-to-face social activity. Participation in voluntary associations and clubs has been cut in half in the past three decades. Although Americans continue to claim that we belong to more organizations, in fact these organizations themselves are less participative in the community and we are less participative in the organizations. The organizations tend to be based more upon observing activities rather than doing activities. Furthermore, many of these organizations are really lobbying efforts that promote self-interests but require no active participation.

Religious Affiliations

Churches are traditionally incubators for civic activity. Statistics reveal that a regular church attendee is more likely to be engaged in all forms of communal activities, from voter participation to active memberships and jury participation. Traditionally, regular church attendees are more conversational and help promote interaction between people. Consistent with the evolution of our changing social environment, Americans are going to church less and less often than they did four decades ago. Furthermore, the churches themselves are less engaged with the wider community, fostering again a more isolated environment where only people with very similar or identical values interact.

The Work Setting

Fewer and fewer American workers are participating in the workplace in a permanent environment. The shift, particularly dominant in the 1990s, has been increasingly toward more part-time and temporary employees in the workplace. There are also increasing numbers of contract and on-call workers. Nearly one-third of all American workers fall into this temporary work category, whether they wish to or not.

The 1980s and 1990s were particularly dominated by new managerial concepts that resulted in more dramatic "re-engineering" or "downsizing." In an attempt to become more efficient, American corporations continued to be more and more bottom-line focused, and less and less focused on employee retention and satisfaction. There have been several results from this corporate philosophy. One is that workers feel less stable in their work environment and are apt to be less loyal to the organization. This creates a less hospitable atmosphere for positive interactions and interpersonal communications. Furthermore, these trends anger employees when they are eliminated from an organization, but see executive salaries rise. The result of these interactions seems to be increasing employee anger. Recent statistics indicate that one-fourth of all workers are angry on the job.

These feelings about American corporations are revealed in responses to the statement, "Big companies are out for themselves." In 1975-1980, 66.8 percent of Americans polled agreed with that statement; by 1991-1998, 75.8 percent agreed.

These are the same people from which current jury pools are being drawn.

Family and Friends

As summarized above, Americans are less and less likely to communicate with people in more formalized settings such as churches, politics, work and civic associations. However, this trend toward less face-to-face interaction extends even into the American family.

The extent of this decline of interaction within the family, and even among family friends, puts into question the viability of the social fabric that is so important to our everyday interactions. Fewer and fewer families

have dinner together. Fewer people have friends over for dinner. Fewer people are "dining out" and more and more people are grabbing a bite at a fast food restaurant. Americans are participating less and watching more. They watch TV in growing numbers. They attend sports events and the theater and the movies. They go to museums and concerts. However, Americans are "doing" less and less. We play fewer musical instruments, we cook less, we participate in sports less, and we visit with our friends less.

These patterns of diminished social and more individual engagement reduce the ability of the average American to actively and constructively participate in positive social interactions. The vitality of the concept of social currency requires an acceptable level of communication skills. Communication in this context means learning to listen effectively as well as speaking effectively and persuasively. These skills are hard to nurture if one is isolating oneself.

In summary, all of the social characteristics that I have briefly examined above contribute to a much more unstable environment in which today's trial lawyer has to present his or her case.

Post the September 11 Tragedy

As trial consultants, it is our goal at SLR, Inc. to monitor the jury pool locally and nationally. Day to day, each venue varies, some slightly and others widely. These variations are based upon local attitudes and current affairs in that venue, as well as in the country as a whole. A question that has recently arisen is how the terrorist attacks—and the most recent anthrax scares—affected the nation as a whole, and consequently how much these effects will be reflected in jury deliberations and the ultimate outcome of civil and criminal cases.

Short of having a crystal ball, it is our job to examine the current situation as we conduct our present research. We must reflect upon past situations and examine existing theories that may apply to how individuals will react. The most important element to keep in mind while conducting this analysis is that each individual juror is different. His or her experiences are different and consequently his or her reactions are different. Simply applying one theory to all lawsuits and all individuals would be a disservice to our clients.

First, we must take a look at what we know has changed in America since September 11, 2001, and work backwards to individual behavior. We need to examine how each group of individuals may react and how this may affect the world of litigation. Prior to September 11, our nation was led by a president who came into office under a cloud of skepticism. He is a president who didn't win by a majority of the popular vote, and a president with an approval rating of just above 50 percent prior to the attacks. Post-attack, this same president had an approval rating that soared to 90 percent and was maintaining between 87-93 percent (depending upon the poll) one month after the attacks. The nation is also expressing a greater confidence in Congress based upon polls that have risen from 42 percent to 75 percent. Also of great interest is the fact that Americans are now more satisfied with the way things are going in the United States. Sixty-seven percent (up from 43 percent on September 10) of Americans indicate that they are satisfied with the current state of our country. This satisfaction index had been in a steady decline since the election of George W. Bush as President.

"[W]e must take a look at what we know has changed in America since September 11, 2001, and work backwards to individual behavior. We need to examine how each group of individuals may react and how this may affect the world of litigation."

Statistics suggest that families are spending more time at home since the attacks. Sixty percent of Americans indicate that their personal relationships are now stronger. People are also volunteering in greater numbers to help their fellow Americans all across the country (volunteerism has been in a relatively steady decline in the United States since 1960). At the same time, some mental health professionals have predicted that the terrorist attacks may lead our nation into a mental health crisis due to the trauma and fear created by the events. Polls taken directly after the attacks showed that as many as 71 percent of Americans felt depressed, while many others had difficulty concentrating on normal activities and up to one-third indicated that they have had trouble sleeping.

Other mental health professionals, however, disagree and believe that our country is resilient and will not face such a crisis. Polls show that, although people are saddened and feel depressed about the attacks, only 18 percent of individuals indicate that they are very worried that they, or someone they know, will become a victim of a terrorist attack. Another 33 percent indicate that they are at least somewhat worried. Subsequently, a second poll shows that only 12 percent of Americans feel "a lot less safe" than they had before the attacks. The adults most worried are those between the ages of 18 and 29. Polls indicate that older individuals are much less worried. The level of concern for individual safety also appears to have a regional base, as 27 per-

cent of Easterners indicate that they are very worried compared to 21 percent in the South, 15 percent in the West and only 10 percent in the Midwest.

Individuals indicate that they have, for the most part, not changed their lifestyle to reduce their chances of a terrorist attack; however, many do indicate that they are more suspicious of strangers and more aware of suspicious behavior. One indication that suggests Americans have a strong inclination toward punishing those who commit terrorist acts is that 77 percent of Americans say that they are willing to allow the U.S. government to assassinate known terrorists, while 52 percent indicate they would support the assassination of leaders whose countries support or harbor terrorists. However, this sentiment does come from a country where 66 percent of the people (as of May 2001) are in support of the death penalty for convicted murderers. This indicates that Americans were already supportive of strict punishment for criminal behavior.

Prior to September 11, SLR, Inc. was conducting research on punitive damages and issues that may affect the reasoning behind the thinking of those who award high punitive damages. We regularly monitor current social, political and behavioral trends of surrogate jurors. We also track the American public as a whole, primarily by way of national polls.

Many of the trends we were noticing have changed for the moment. The billion-dollar question today is: What does all of this mean (and will things return to the way they were or will they remain as they are today)? An e-mail that has been circulated recently by another trial consulting company has presented a theory that it feels may apply to how juries will react. This theory, known as Terror Management Theory, states that when individuals are faced with the realization of their own mortality, they will become angrier and increasingly more punitive. Although we believe that this reaction may occur, we feel that the situation is much more complex than this theory would suggest.

Interestingly, our research, conducted prior to the attacks, indicates that the amount of total damages, including punitive damages, being awarded by juries appears to be on the rise. Data that we examined on personal injury cases in New York State that resulted in either quadriplegia or paraplegia to the plaintiff indicated that total damages have been increasing in such cases from 1980 to the present. However, we have been unable to identify a similar trend in an area such as breach of contract. On a national basis, there is conflicting evidence of how pronounced this trend toward increasing damage awards truly is.

Some of the trends that have grown out of the terrorist attacks seem to have changed the face of the social route Americans had been taking and may, in fact, result in individuals becoming less critical, at least to non-terrorists and non-murderers. As for murderers and terrorists, the punitive mindset of the American people will probably be quite direct.

Existing research on victimization resulting from a traumatic event (natural and unnatural) shows that individuals do not react the same to similar or identical events. People rely on prior coping mechanisms and their current support systems to deal with trauma. No one situation is the same as another situation; therefore it is reasonable to believe that some individuals may be more inclined to be punitive while others will not. We have noticed in some cases that we have researched, particularly in personal injury cases, that those individuals who have experienced, or know someone who has experienced, a similar injury as that of the plaintiff do not universally punish the defendant.

Since September 11, SLR has been conducting research exercises throughout the country. In accordance with our role as trial consultants, we have been examining the effects that current events have had on individuals—based on our existing database of mock jurors, past and current social and political trends, and the individual qualitative responses obtained from jury research subjects. We are closely examining what psychological and social underpinnings are relevant to jury behavior as it pertains to all aspects of litigation. To date, we have seen no visible differences in juror behavior or verdict preferences. As was pointed out in a recent article in the *New York Times Magazine*:

> We should be wary . . . of ever attaching too much importance to any single event. . . . September 11 was the historical equivalent of a violent and unpredictable storm. But the storm did not alter the fact that summer was slowly fading into fall. In just the same way, the attacks on New York and Washington, however shocking, did not alter the direction of several underlying historical trends. In many respects the world will not be so very different in 2011 from the world, as it would have evolved under the influence of those trends, even had the attacks not happened.[7]

However, we will remain focused on the current state of affairs and keep our clients and colleagues aware of the changing trends and how they might affect their cases.

Implications

Since we have seen no significant or even modest changes in juror behavior to date, we must assume the trends of the past 30 to 40 years remain constant. Even if the events of September 11 and its aftermath eventually lead to some behavior changes, these changes will occur over the long term. A single event does not instantly change societal trends that have been in the making for decades.

The variations in jury behavior will most likely become greater as common social norms dissipate and highly individualistic views prevail. Possibilities for calm, communal dialogue generated from generally accepted social norms will likely continue to diminish. That is to say that the greater deviations around the mean of juror behavior will make the use of generalizations less and less meaningful. This will make a trial lawyer's life inherently more difficult. What role can trial consultants play to help lawyers better manage this changing social environment?

To date, the focus on trial consultants has been on their participation in the jury selection process. An article in the *Dallas Morning News* in June 2001, entitled "Judging Juries," focuses on the wrong issue, almost exclusively jury selection. In declaring that jury selection is an art, not a science, it states: "Many trials are won and lost during jury selection. . . . But it's not because jury consultants are trying to stack the deck. It's because jury consultants and lawyers are successful or unsuccessful in figuring out which jurors are unreceptive to their message and getting rid of them."[8]

This is a good example of focusing on the wrong issue. The important concept here is not "jury selection" but the "message" or story that needs to be conveyed. It is difficult to know what is needed in jury selection if the themes of a case have not been tested with prospective jurors. It is not uncommon for trial lawyers to have little input into jury selection or *voir dire*, particularly in federal court. Therefore, it is much more important for the litigation team to know how to best present its case, weaving a simple and compelling story for the jury. It should be a story that helps put the spotlight on the strengths of the case and diminishes its weaknesses. That is not jury selection. The article itself, if read by potential jurors, would adversely affect their attitude toward the judicial system. Such shallow information circulating among the general public adds further to the adverse trends already being established in American society and an increased cynicism toward the judicial system.

How does the general public see trial consultants? Do they see them as people who select or stack juries? That seems to be true. How do lawyers see trial consultants? Some lawyers see them as not regulated and therefore question their competence to do the job. Other lawyers consider it almost malpractice not to use consultants in an important trial. Frequently lawyers are confused about how to use trial consultants beyond jury selection. However, those who do use trial consultants tend to be big re-users. We believe that the sophisticated user thinks of a good trial consultant as someone who can help better communicate his or her best and most persuasive story. Furthermore, a good consultant can help prepare witnesses to be more comfortable in the courtroom and to help better support the story he or she is trying to communicate to a judge or jury.

"For trial lawyers, the continued erosion in the ability to generalize about juror behavior will probably make trial consulting, and particularly mock jury research, more important in the future."

For trial lawyers, the continued erosion in the ability to generalize about juror behavior will probably make trial consulting, and particularly mock jury research, more important in the future. Good jury research will become more important in setting trial strategy. However, in turn, the trial consultants who are executing this research must take much greater care. Setting the specifications for the recruiting of the mock jurors is one example of the need for particular care and attention. More attention must be given to seeing that the recruiting matches the specifications of the venue. A closer look at the diversity of the potential juror base is necessary to determine what population is required to produce meaningful results, given the observed range of diversity in the juror population for any particular region.

Trial consulting and mock jury consulting will now require a much higher standard of professional preparation. Gone is the day when a glib, sales-type personality is able to conduct valid mock jury research sessions. It will require knowledge of statistics and the willingness to collect and analyze the profile of every venue in which research is to be done. It will require a better record-keeping system on the behavior of jurors to be sure that the expectations of the research are met. The trial consultant will have to become involved earlier in the process of setting trial strategy, so the legal team has a better idea of what they are likely to face in any particular venue.

As the American population adopts more of an individualistic attitude and has less of a reliance on communal responsibility or standardized values, individual differences will increase. The result will be that fewer generalizations about jurors and group behavior can be made. Fewer and fewer accepted "norms" will be valid as people become more and more inner- or self-directed. Trial consultants can be of particular value because, if properly trained and experienced, they see the world through a different set of lenses than a lawyer. From this different perspective, they can see the juror audience and how to communicate with them effectively.

What do you look for in a good trial consultant? First, you look for someone who has had proven technical training in research methodologies; a Ph.D. or a Master's degree is essential, as these techniques are not emphasized in law school or in a standard baccalaureate program. For instance, a good consultant should know how to develop a good questionnaire, how to select the proper surrogate jurors to participate in a mock trial in that particular venue, and how to properly analyze any data that comes from a mock trial, from a community attitude survey to a change of venue study. For example, you can get a false read on your case and your venue if you do not carefully select the proper cross-section of citizens to participate in a mock jury exercise. Witness preparation and jury selection are then by-products of good case research.

A second criteria for a good consultant is that he or she be familiar with focus groups and be properly trained to effectively run them. This results from good academic training as well as some on-the-job experience with a good trial-consulting firm. Even experience in some other practical research area, like market research, is helpful.

Third, a good consultant is someone who is not afraid to give you strategic advice, rather than just parrot back the information obtained from the research. A good consultant will focus on the strengths and weaknesses of your case, your opponents' strengths and weaknesses; and make recommendations on strategies, themes and a possible storyline. The job of a good consultant is to interpret information obtained from any research, from the perspective of your potential future audience. A consultant who just summarizes what you have all heard or read is of limited value. You should be able to rely on your consultant to tell you what the results of the research mean for your trial strategy.

Fourth, trial consultants should have some acquired knowledge about how our legal system works. This is mandatory. However, it is odd that a jury consultant is expected to be quite knowledgeable about the law—but a lawyer who has turned jury consultant is frequently not questioned about his or her knowledge of social science research techniques. The sword cuts both ways and all parties should be familiar with both the legal processes and the social science research techniques required for good jury research.

Fifth, doing a thorough document and case review is a standard part of the job. Your consultant should be as familiar with the key facts and issues of the case as you are. Today this aspect is a glaring weakness in a lot of jury research. A trial consultant will be of little use to you or your client if he or she cannot run a focus group because they are unfamiliar with the key facts of your case. Furthermore, a trial consultant will be unable to add useful comments about trial strategy if he or she does not know your case well. This mandates that your trial consultant must be an active member of your trial team.

Sixth, regarding pricing, beware of bargains but also beware of price gouging. A certain financial commitment must be made in order that the job can be done properly. Furthermore, as mentioned above, a good consultant must be intimately familiar with your case and this requires extensive document review by the consultant. It may also require many personal meetings with the trial team. This review should be either included in your research costs or negotiated well in advance, because the hourly fees for document review and case meetings with the trial team can add up very fast.

What do you want to avoid when you are looking for a trial consultant? First, avoid consultants who make exaggerated claims about their ability to select a favorable jury. Second, avoid consultants who make misleading claims that jury research is "predictive." While extremely valuable, jury research provides only "indicators" of what strengths and weaknesses your case includes, but can provide you with an excellent backdrop for trial strategy.

In summary, as trial lawyers, you are working in an ever-changing American society. The services of competent, well-trained trial consultants can help you stay on top of these changes.

Conclusion

The Anglo-American legal system has aspects that are important in drawing some conclusions from the material set out here. As Oliver Wendell Holmes points out in his now-famous quote from *The Common Law:*

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and

> political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[9]

"You must avoid falling into the potential trap of thinking that jury research can predict the outcome of your trial or that some super-psychic power will allow the consultant to tell you which jurors to pick and which ones you must reject."

With this backdrop, there are three criteria that deserve consideration. First, our law originates from the appropriate legislative bodies, but is then subjected to constant interpretation by judges and juries over time. Second, we set up an adversarial match between plaintiff and defense from which we expect the information for a fair decision to emerge. Finally, we use juries drawn from the citizenry at large to render the verdict on what is a fair decision. The judges and juries involved in this process are themselves influenced by the social environment of the day. The jurors will only be able to render fair decisions to the extent that they can communicate with one another. This communication skill has declined over the last 30 years and is likely to continue to do so based upon the information summarized in this article.

In this volatile framework, the legal team is expected to chart a strategy that best represents their client's interests. Relying only upon recent historical information on juror attitudes to set trial strategy may be risky. On the other hand, the legal team can gain timely support from the use of high quality trial research. The "high-quality" requirement is very important. You need, as trial lawyers, to have the best review and understanding of the case documents, you need the best design and conduct of the research, and you need the best interpretation and presentation of the results of the research. You must avoid falling into the potential trap of thinking that jury research can predict the outcome of your trial or that some super-psychic power will allow the consultant to tell you which jurors to pick and which ones you must reject. You must focus on testing your themes in the mock jury arena where you get feedback from a juror pool that is similar to what you will encounter in the real trial. This juror pool will be changing in response to the factors outlined above, but you will at least be observing the most current combination of all these trends and obtain an understanding of how they affect your case.

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Endnotes

1. *Tempers Seem to Be Growing Shorter in Many Jury Rooms,* The N.Y. Times, Aug. 3, 2001.
2. Robert Putnam, Bowling Alone, The Collapse and Revival of American Community (Simon and Schuster, 2000).
3. *Id.* at 24.
4. *Id.* at 21.
5. *Id.* at 27.
6. *Id.* at 42.
7. Niall Ferguson, *2011*, The N.Y. Times Magazine, Dec. 2, 2001, at 76.
8. Mark Curriden, *Judging Juries*, Dallas Morning News, June 6, 2001, at 1D.
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Vehicle Transportation Claims Affecting the Business Owner and Insurers

By Robert A. Glick

I. Vicarious Liability

A. Car Rental Companies May Not Seek Indemnification Where Damages Fall Below New York's Minimum Insurance Limits Under Section 350(1) of the Vehicle & Traffic Law (VTL)

1. *ELRAC v. Ward*[1]

Car rental companies cannot avoid liability up to New York State's mandatory minimum insurance $25,000/$50,000 limits. The Court of Appeals unanimously decided that car rental companies may not rest on indemnification clauses to disclaim liability for accidents involving their rental vehicles.

In four cases decided in a single opinion by Chief Judge Judith S. Kaye, the Court of Appeals held that VTL § 370 requires rental firms to provide primary coverage up to the minimum policy limits and to that extent, indemnification clauses in standard rental contracts/agreements are not enforceable. However, the Court held that such a clause is enforceable for amounts in excess of the mandatory minimum limits.

In essence, the Court concluded that the minimum insurance liability coverage is the sole responsibility of the rental car company and not the renter.

The Court of Appeals' decision has wide sweeping impact on the car rental industry, as well as on those insurers providing automobile coverage.

B. Indemnification Agreement Afforded to Car Rental Company That Leased Vehicles to Municipality Not Subject to *ELRAC v. Ward*

1. *JD Rental v. City of New York*

Recently, the court held that the city of New York is obligated to indemnify a car rental company where the city provided the Company with an indemnification and hold harmless agreement. In this case, the city leased the rental car and the police officer driving that car was involved in an accident while in the scope of his employment. The city refused to indemnify the car rental company despite the existence of the indemnification agreement and cited *ELRAC* in support of its denial. The car rental company moved for summary judgment, distinguishing *ELRAC* on the basis that the vehicle involved in the accident should not be considered a rental vehicle, but should be considered a leased vehicle and, therefore, not subject to the *ELRAC* decision. The court granted the car rental company's motion for summary judgment and directed the city to indemnify the car rental company for both no-fault and bodily injury damages.

Specifically, the court held that where the city of New York, pursuant to an agreement, rented a vehicle from a car rental company for a period of one year, that such a rental is to be considered a "Lease" of the vehicle. VTL § 128 defines an owner as "a person, other than a lien holder, having the property in or title to a vehicle or vessel." The term includes a person entitled to the use and possession of a vehicle or vessel subject to a security interest in another person and also includes any lessee or bailee of a motor vehicle or a vessel having the exclusive use of thereof, under a lease or otherwise, for a period greater than 30 days.

The court did not agree with the city's position that this matter was similar to the facts in *ELRAC*, where the court held that a car rental agency could not circumvent its obligation to provide minimum insurance as required by VTL § 370 via an indemnification clause. The court held that an agreement was negotiated by the city for a lease period of longer than 30 days and the city agreed to indemnify for any personal injuries or resultant property damage. Although the city negotiated an exclusionary clause, it failed to exclude no-fault benefits.

II. Threshold Requirement Redefined

A. New York Court of Appeals Rules Unanimously That *Only* a "Total Loss" Is Compensable Under the Permitted-Loss Exception to the No-Fault Serious Injury Threshold Requirement in Personal Injury Automobile Cases

On May 3, 2001, the Court of Appeals decided in *Oberly v. Bangs Ambulance, Inc.*,[2] that a total loss of use is compensable under the "permanent loss of use" exception to the no-fault remedy.

The appeal centered on the no-fault law enacted in 1973 to provide for full and prompt compensation in the case of serious injury. In 1997 the insurance law was amended to define a "serious injury" as one involving a "permanent" physical loss or limitation. In *Oberly*, the Court of Appeals overruled various lower court decisions and held that "to qualify as a serious injury within the meaning of the statute, 'permanent loss of use' *must* be total."[3]

The Court looked to the initial statute, which makes reference to a loss of a body member, and the amended provision that refers to a "permanent consequential limitation of use of a body organ or member" and a "significant limitation of use of a body function or system." The Court stated that, had the legislature "considered partial losses already covered under the 'permanent loss of use,' there would have been no need to enact the new provisions." Specifically, the Court held that "while the Appellate Division properly affirmed the dismissal of plaintiff's claim, it improperly engrafted the term "partial" to the 'loss of use' standard."

The *Oberly* decision dramatically restricts the number of eligible plaintiffs permitted to recover under New York's no-fault law. We are currently reviewing all of our files to determine those matters that are impacted by this decision and those that may be ripe for summary judgment now or in the near future. It is our intention to utilize this decision and, when warranted, maintain proactive defense by aggressively moving to dismiss all frivolous claims.

III. Recent Changes to No-Fault Regulations

The Insurance Department recently promulgated new no-fault proposed regulations. Those regulations were enacted as of September 1, 2001. The regulations dramatically defer from those enacted in 1977.

Significant provisions of the new regulations include the following:

1. Notice and Proof of Claim. Written notice of claim must be provided within 30 days of the accident. Health provider claims must be presented within 45 days of the dates of service. Proof of claim of lost wages must be provided within 90 days.

2. Excuses for Untimeliness. The excuse for late submissions is liberalized as "clear and reasonable justification" and insurers must have a review process for denials of untimely claims. Delays due to third parties, such as an employer, cannot be the basis of denials for untimeliness. A special expedited arbitration has been created to resolve denials on the basis of untimeliness, so that any such issue can be resolved quickly.

3. The insurer is entitled to an examination under oath of the applicant and/or assignee. The department noted in its assessment of the comments that this tool is important in responding to fraudulent claims. Being able to question a suspected fraudulent applicant early in the claim should permit successful investigation earlier in the process and may be a deterrent to recurrent improper claims. Insurers must establish objective standards for when such examinations will be conducted and such standards must be available for review by the department.

4. Interest at two percent per month for claims improperly denied is no longer compounded monthly.

5. In the first amendment to the new regulation, the department has provided that, within six months of the effective date of the regulation, all IMEs and peer review must be conducted by providers authorized by the Insurance Department. The department thus will monitor and oversee the approval of providers who can conduct IMEs and peer reviews. The department will have the authority to suspend or remove a health provider from this panel.

6. The department has reiterated that health providers must be properly licensed by requiring, in the prescribed health provider, verification that the provider set forth licensing information and, for corporate applicants, disclosure of the ownership of the professional corporation.

7. Legal fees will not be awarded if the health provider's claim exceeds the fee schedule. The prior regulation applied such provision retroactively and was challenged in court. The department has responded to this objection by providing that this limitation shall be applicable only for "billings on and after the effective date" of the regulation.

8. Assignments will be effective to health providers but not to providers of other services such as transportation. The department has stated that this provision was necessary because of abuse of claims for transportation expenses.

Of all these changes, those relating to time limits, liberalized excuses and the peer review process are the most significant. The reduced time limits to combat fraud have been accompanied by provisions intended to assist legitimate claimants. It remains to be seen if any challenges will be filed to this regulation.

Endnotes

1. 96 N.Y.2d 855, 729 N.Y.S.2d 670 (2001).
2. 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001).
3. *Id.* at 299 (emphasis added).

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An Insurer's Right of Subrogation in New York

By Thomas R. Newman

Subrogation—in General

Subrogation is an equitable doctrine designed to promote justice in the circumstances of the particular case.[1] Its reach is

> broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made either under compulsion or for the protection of some interest of the party making the payment, and in discharge of an existing liability.[2]

Subrogation "includes so wide a range of subjects that it has been called the 'mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay for it.'"[3]

A right of subrogation may be created conventionally by contract, in which case the subrogee's rights will be defined in an express agreement, or it may arise by operation of law, independently of any agreement, out of the underlying relationship between the parties.[4] One such relationship is that of insurer and insured.[5] The insurance carrier, which has been compelled under its policy to pay a loss, ought in fairness be reimbursed by the party which caused the loss. Therefore, upon payment of the loss, the insurer becomes equitably subrogated to the rights and remedies of its policyholder to proceed against the party primarily liable for the loss.[6]

Regardless of whether a right of subrogation arises by operation of law, by statute or regulation, or by contract, in each case subrogation is wholly dependent on the subrogor's claim against the third party and the subrogee and subrogor "stand in one another's juridical shoes."[7] The subrogee may recover from the responsible third party only to the extent that its subrogor could have recovered from the third party for its default or wrongdoing.[8] The insurer-subrogee "is vested with no greater or different right or remedy than that possessed by its subrogor"[9] and its claim "is subject to whatever defenses the third party might have asserted against its insured."[10]

Typical Subrogation Clauses

a. Transfer Of Rights Of Recovery Against Others To Us

> If the insured has rights to recover all or part any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.[11]

b. Subrogation

> When any payment is made under this policy, the Company shall be subrogated to the Insured's right of recovery in connection with that payment. The Insured shall do whatever is necessary to secure the right of recovery and shall do nothing to waive or prejudice such right.[12]

Subrogation Actions

In New York, where an insurer is the real party in interest because it has paid a loss and obtained from its insured "either a loan or subrogation receipt, trust agreement or similar agreement," the subrogation action may be maintained in the name of the insured, without the need to join the insurer for whose interest the action is brought.[13] In this way the jury does not learn that the claim is insured and, in all but name, the action is prosecuted and paid for by the insurer.

Where the insurer pays only a portion of the insured's claim for a loss caused by the wrongdoing of a third party, the insured remains the real party in interest entitled to prosecute its claim against the wrongdoer in its own name.[14] However, where the insured has been completely reimbursed for its loss by the insurer, the defendant in the subrogation action may move to substitute the insurer as a party plaintiff. CPLR 1004[15] is no bar to the granting of such a motion.[16]

Where an insurer has denied a claim of its insured and is sued by the latter for breach of contract, the insurer may bring a third-party subrogation action impleading the party allegedly responsible for causing the loss even though it has not yet paid the insured's claim.[17] CPLR 1007 permits the defendant to implead any person "who is or may be liable to [him] for all or part of the plaintiff's claim against [him]" and this "is certainly broad enough to encompass contingent claims based on subrogation."[18] "Severances, separate trials and stays can be employed to avoid any possible prejudice."[19]

The Court of Appeals, in *Krause,* recognized two exceptions to the insurer's right to implead the alleged

wrongdoer. First, "as a matter of judicial discretion . . . to reduce court congestion and to assure that the prime object of the collision policy is not frustrated," impleader would not be allowed in automobile collision cases. Such cases "are numerous and involve minor claims, and the very purpose of collision insurance is to permit the insured to collect his damages promptly and use the funds to repair his car."[20]

The second exception is where the parties to the insurance contract have expressly contracted "that the insurer shall have no right to sue the third party until the insurer's liability has been established or the claim paid in part or in full."[21]

A liability insurer that has denied coverage for a suit against its policyholder that has been tendered to it for defense and indemnity may be impleaded into the action against its insured for a determination of the coverage issue. However, if the main action is to be tried before a jury, prejudice to the insurer is presumed and the insurer/third-party defendant will be entitled to a severance.[22]

The severing of negligence actions from insurance coverage actions applies to third-party actions against insurance brokers and agents as well as to insurance companies.[23]

Insurers, as Subrogees, Have Been Allowed to Assert the Contractual and Statutory Indemnity Claims of Their Subrogors

Most insurer subrogation suits are brought against a third party who actually committed a wrongful act that caused the loss paid by the insurer.[24] This explains the language found in many opinions that suggests subrogation is only available to an insurer who is seeking repayment "from a third party whose wrongdoing caused the loss to the insured which the insurer was obligated to cover."[25]

However, an insurer's right of subrogation is not limited to cases where the liability of the third person to the subrogor-insured is founded in *tort*. Rather, any *contract* right that the insured has to be indemnified by another will pass to the insurer upon payment of the loss.[26] Thus, a subrogated claim for contractual indemnity does not require proof of wrongdoing on the part of the indemnitor.

In *Frontier Ins. Co. v. State*,[27] a physician employed as a full-time assistant professor at one of the SUNY medical schools was sued for malpractice by a patient whom she treated as part of her teaching responsibilities. When the state refused to provide her with a defense to which she was entitled under Public Officers Law § 17(2)(a), her private professional liability insurer provided the defense. The insurer, as subrogee, then sued the state for reimbursement. The court held this was a viable cause of action, with the outcome dependent on whether the act for which the state employee was being sued was one performed within the scope of her employment. A trial was held and, after finding the doctor acted within the scope of her state employment, the court entered judgment for the insurer. The Appellate Division affirmed.

Similarly, in *Michigan Mut. Ins. Co. v. American & Foreign Ins. Co.*,[28] the liability insurer of CCC, as subrogee, was allowed to assert a claim against Anthony Concrete based upon a contractual indemnification clause contained in the subcontract between CCC and Anthony Concrete. The Appellate Division noted that the indemnification clause "was not dependent upon proof of fault or injury." Thus, *Michigan Mutual* establishes two important principles:

> (i) insurers, as subrogees, may assert contractual indemnity claims against a third party based on clauses in contracts between their subrogor and the third party indemnitor;
>
> (ii) if the indemnity agreement is broadly worded the insurer may recover from the indemnitor even though the indemnitor was not at fault.

In *Maimonides Medical Center v. Victory Memorial Hospital*,[29] Victory wanted Maimonides to provide pediatric coverage at Victory's premises with physicians employed by Maimonides. Maimonides was willing to do so only if Victory assumed the entire risk of loss from any medical malpractice claim arising out of services at Victory. The parties entered into a contract that contained a one-way indemnity agreement which required Victory to hold harmless Maimonides and its physicians who performed services at Victory from "any and all liabilities, claims . . . losses, law suits, judgments and expenses, . . . arising out of any act or failure to act of any indemnitee hereunder committed in direct or indirect connection with [Maimonides] obligations as set forth in this Agreement." When a loss occurred and the claim was tendered to Victory for defense and indemnity, Victory reneged on its agreement. The liability insurers of Maimonides defended and settled the action, and Maimonides then sued Victory for breach of the indemnity agreement.

Victory argued, *inter alia*, that (i) Maimonides had not sustained any loss, since its liability insurers had defended and settled the malpractice action, and (ii) the insurers may not assert claims in subrogation based solely on their insured's independent contractual rights against a party (Victory) which did not commit the malpractice. The Appellate Division rejected these and other arguments advanced by Victory and directed summary judgment in favor of Maimonides, stating:

> Contrary to defendant's contention, under these circumstances, the doctrine of equitable subrogation allows plaintiff to sue on behalf of its professional insurance carriers to recover from the defendant the money the insurance carriers spent in defending the underlying action which was commenced against the plaintiff's employee physicians.
>
> . . .
>
> The plaintiff satisfied its burden of demonstrating its entitlement to judgment as a matter of law by showing that the defendant agreed to defend and indemnify the plaintiff's employee physicians in the underlying action. . . . In response, the defendant failed to raise a triable issue of fact. [citations omitted].

Waiver of Subrogation

New York courts have held that a waiver of subrogation provision in an agreement negotiated between two sophisticated parties in an arms-length transaction is valid and enforceable "provided the intention of the parties is clearly and unequivocally expressed."[30] The Court of Appeals has noted that, "[p]resumably, in fixing premiums, the insurers considered that they permitted their insured to waive their subrogation rights."[31] However, such provisions "will not be enforced to impose a restriction on the subrogee's rights beyond the plain meaning of the waiver clause."[32] Moreover, "a waiver of subrogation clause cannot be enforced beyond the specific context in which it appears."[33]

Waiver of Subrogation and Indemnification Clauses Have Been Held Not Inconsistent

In *Trump-Equitable Fifth Avenue Co. v. H.R.H. Construction Corp.*,[34] a fire caused extensive damage to a building under construction. Aetna, which had written a builder's all-risk policy, paid the named insureds' property loss. Then, as subrogee and in the name of the owner (Trump-Equitable), Aetna sued the general contractor (H.R.H.) and two subcontractors. Defendants moved for summary judgment based upon a waiver of subrogation clause in the prime contract between Trump-Equitable and H.R.H.

The prime contract consisted of two parts: (i) a typewritten agreement, which contained an indemnification clause from H.R.H to the owner, and (ii) the printed American Institute of Architects "General Conditions for the Contract of Construction" that were incorporated by reference into the typewritten agreement. Both documents were intended to be read so as to be consistent with one another if possible, but if anything in the General Conditions was inconsistent with the typewritten agreement, that agreement controlled.

Special Term denied defendants' motion. It found the indemnification clause of the agreement and the waiver of subrogation clause of the General Conditions inconsistent and held that the indemnification clause controlled under the agreement's priority provisions. The Appellate Division disagreed. It found no inconsistency and reversed and granted summary judgment to the defendants, reasoning as follows:

> The type of insurance which the contractor was required to provide and maintain by agreement—worker's compensation, public liability, comprehensive automobile, etc.—evidence the intent of the parties that the owner would be indemnified and held harmless from liability to third parties. Plaintiff makes no claim that such third-party coverage was not provided by the defendants. In contrast, the General Conditions required the owner to obtain first party coverage for property loss in the event of damage to the building during construction and to waive its right of subrogation in favor of the defendants. Inasmuch as the owner has been fully recompensed for its loss, the indemnification provision is inapplicable and the waiver of subrogation clause governs. . . . [S]uch a waiver of subrogation provision, ". . . in effect simply require[s] one of the parties to the contract to provide insurance for all of the parties."[citations omitted].[35]

Waiver Held Limited to Claims Premised on Tort Liability

In *Viacom International, supra*,[36] a fire occurred at the premises occupied by Viacom in an office building owned by Midtown. Viacom's insurers (Phoenix and American Home) paid Viacom in full for its loss of personal property. However, they refused to pay for the cost of repairing leasehold improvements on the ground that they were the property of the landlord. Viacom claimed that Midtown, under the terms of its lease, was responsible for the cost of restoration and repair of leasehold improvements. Paragraph 9(e) of the printed lease form required each party to

> look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty, and to the extent that such insurance is in force and collectible and to the extent permitted by law [Viacom and Midtown]

> each hereby releases and waives all right of recovery against the other or any one claiming through or under each of them by way of subrogation . . .

Viacom's policies of insurance provided (in accordance with another lease provision) that "[a]ny release from liability entered into by the insured prior to loss hereunder shall not affect this policy or the right of the insured to recover hereunder." This validated the waiver of subrogation clause.

When Midtown refused to pay for the repairs, Viacom sued Midtown for breach of the lease and sued Phoenix and American Home for breach of their policies. The insurers then cross-claimed against Midtown, alleging gross negligence in providing fire-safety equipment, for the amount they had paid for damage to Viacom's personal property and for any amounts which they might be held liable to pay for repairs to the improvements.

Viacom moved for summary judgment against Midtown and the insurers, and Midtown cross-moved for summary judgment dismissing the insurers' cross-claim on the basis of (i) expert affidavits and investigative reports showing it was not negligent, and (ii) the lease's waiver of subrogation clause. The insurers cross-moved for leave to amend their answer to assert a cross-claim in subrogation against Midtown based on breach of the lease.

The lower court construed ¶ 9(e) to require Viacom's insurers to pay first for any fire damage loss and, since insurance covered the entire amount, "there is no need to look to Midtown." Finding the insurers' allegations insufficient to sustain a claim of gross negligence, the court granted Midtown's cross-motion and dismissed those claims. It denied the insurers leave to amend their answers to assert a cross-claim in subrogation against Midtown for breach of contract on the ground that ¶ 9(e) "the lease's waiver of subrogation provisions, disposed of all contractual as well as negligence claims against Midtown."[37] The insurers appealed these rulings.

Thereafter, the insurers sought reargument in the lower court on the ground that the waiver of subrogation clause applied only to a claim based on destruction of the demised premises and did not affect any other claim, including one for damage to Viacom's property. The court agreed and reinstated the insurers' negligence claim. Midtown appealed that order.

The Appellate Division held that "the waiver of subrogation clause at issue does not encompass contract claims."[38] The "waiver is limited to subrogation claims premised on tort liability. In all other respects, the parties' rights and obligations under the lease as to the various contingencies that might arise in such a relationship are clearly spelled out."[39] Viacom's insurers were allowed to assert a cross-claim in subrogation based on Midtown's breach of its *contractual* obligation to repair the damaged leasehold improvements. However, the insurers' cross-claim in subrogation based on Midtown's *negligence* "should not have been reinstated," as it was barred by the waiver of subrogation.[40]

The Appellate Division also rejected Midtown's argument that the indemnity provision in the lease whereby, *inter alia*, Viacom agreed to hold Midtown harmless from all claims or damages arising from or out of the use, possession or control of the demised premises, "irrefutably demonstrate that the parties to the lease intended that the defendant insurers, rather than Midtown, were to be responsible for the cost of the repair and replacement of Viacom's damaged improvements." The indemnity "relates to third-party claims against Midtown arising out of Viacom's possession, use or control of the demised premises, not to claims of the parties, *inter se*.[41]

Several other cases have enforced a waiver of subrogation clause in an insurance policy issued to a tenant, pursuant to a lease provision that required the tenant to obtain insurance that named the landlord as an additional insured and contained a waiver of subrogation against landlord.[42]

The Anti-Subrogation Rule

As a general rule, "the principle of subrogation ought to be liberally applied" to protect its beneficiaries and achieve its objectives.[43] However, there is an important and well-settled exception to this rule known as the "anti-subrogation rule" that prohibits an insurer from suing its own insured on claims arising out of the very risk for which the insurer was paid a premium to provide coverage to the insured.[44] Public policy requires this exception (i) to prevent the insurer from passing the loss to its own insured, and (ii) to guard against the potential for conflict of interest that may affect the insurer's incentive to provide a vigorous defense for its insured.[45] In *Pennsylvania General*, *supra*,[46] Austin Powder had rented a truck from Bison Ford and had agreed to indemnify Bison for liability arising out of Austin's use of the truck. Bison had insured the vehicle with Liberty Mutual Insurance Company (naming Austin as an additional insured) and Austin had a policy providing excess coverage for nonowned business vehicles and a second CGL policy covering contractual liability, both issued by Aetna Insurance Company. The truck—which was being used by Austin to transport dynamite—exploded, causing property damage to third parties. When an action was brought by a third party against Austin and Bison for that property damage, Liberty paid the loss on behalf of its insured, Bison, and sought indemnification (in subrogation) from Austin, an additional insured under the Liberty policy, pursuant to Austin's indemnity agreement with Bison.

The Court of Appeals dismissed Liberty's indemnification claim against Austin holding that it was "an attempt by an insurer to recover from its other insured, Austin Powder, for the very loss for which Austin Powder was supposed to be covered." The Court stated that

> [s]uch an unseemly result would not be consistent with the equitable principles that govern subrogation claims.
>
> The insurer's right of subrogation, long recognized as a matter of equity, has traditionally been applied to claims against third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse. A third party, by definition, is one to whom the insurer owes no duty under the insurance policy through which its loss was incurred. On the other hand, it has often been said that an insurer may not be subrogated to a claim against its own insured, at least when the claim arises from an incident for which the insurer's policy covers that insured. . . . To allow the insurer's subrogation right to extend beyond third parties and to reach its own insured would permit an insurer, in effect, "to pass the incidence of the loss . . . from itself to its own insured and thus avoid the coverage which its insured purchased." [citations omitted].[47]

The Court of Appeals next considered the antisubrogation rule in *North Star, supra,*[48] where it dealt with three consolidated cases—*Valentin, Prince,* and *North Star*—which originated as damages claims for employees' worksite injuries. In each case, the contractor on the construction site purchased insurance against any claims resulting from the contractor's performance, and additionally, pursuant to its contract with the owner of the site, purchased liability insurance for the owner. Both policies, in each case, were purchased from the same insurance carrier.

In each consolidated case, the injured employee sued the owner of the site,[49] and after the owner's insurer settled the lawsuit brought by the injured employee, the insurer, subrogated to the owner's rights, sued the contractor for common-law and contractual indemnification.

In *Valentin* and *Prince*, the Court reaffirmed and applied the antisubrogation rule set forth in *Pennsylvania General*, which involved a *single* insurance policy under which the insurer sought subrogation against an additional insured, finding that the same public policy considerations were applicable in the "immaterially different circumstance[s]" of *Valentin* and *Prince*. The Court held that the *two policies* at issue in *Valentin* and *Prince* were "integrally related and indistinguishable from a single policy in any relevant way," since the two policies in each case were purchased together as coverage against the same risk and paid for by the same party.[50]

In the third case, *North Star v. Continental,* the Court held that the antisubrogation rule did *not* bar indemnification. In *North Star,* the state of New York had contracted with Fresh Meadows to clean and paint 20 bridges. As required by the contract, Fresh Meadows purchased an owners' contractors' protective (OCP) policy naming the state as the only insured. Fresh Meadows also purchased (1) a separate general contractors' liability (GCL) policy from the same insurer, Continental Insurance Company, subject to several exclusions; (2) an excess policy from North Star Reinsurance Corporation; and (3) a workers' compensation policy from U.S. Fire Insurance Company.

Two Fresh Meadows employees injured while painting a railroad overpass sued the state, as owner of the work-site, and the state in turn brought a third-party action for common-law indemnification against Fresh Meadows on the ground that Fresh Meadows' negligence caused the injuries. The employees settled the action for $3 million (funded $750,000 by Continental, $750,000 by North Star, and $1,500,000 by U.S. Fire) pursuant to a stipulation by which the insurers agreed to have their respective liability determined in a declaratory judgment action. In that action, the Appellate Division granted Continental's motion for summary judgment, holding that the exclusions in Continental's GCL policy issued to Fresh Meadows (excluding liability for injuries to employees and indemnification of another for such injuries) rendered it inapplicable to the loss, and that Continental's OCP policy could not be applied to the settlement "because any payments on behalf of the state for vicarious liability would subrogate Continental to the state's claims against Fresh Meadows, the actual wrongdoer." Since Fresh Meadows' liability was covered by the North Star and U.S. Fire policies, Continental's share of the settlement would be passed along to those insurers.

The Court of Appeals agreed with the Appellate Division in *North Star* that "because exclusions in the GCL rendered that policy inapplicable to the loss, the antisubrogation rule does not apply in that case."[51]

In *Jefferson Ins. Co. v. Travelers Indemnity Co., supra,*[52] the Court of Appeals held that the antisubrogation rule bars a claim of indemnity by the excess and primary insurers of the owner of a leased van against the lessee's carrier. The lessee, as a permissive user of the van, was also an additional insured under the owner's policies. "For purposes of the antisubrogation rule, there is simply no reason for treating a 'permissive user' insured differently than a named insured. An insurer covering a permissive user would still be subject to the same potential conflict of interest, and an insurer in explicitly providing for such coverage should not be surprised to pay claims that it covered."[53]

The holding in *North Star*, that where an exclusion renders a policy inapplicable to a loss that policy is not considered in the determination of the applicability of the antisubrogation rule, should also apply where there is a *single* policy issued to *two or more* insureds, the liability of one of which is subject to an exclusion. In such case, the insurer should be allowed to pursue the insured for whom there is no coverage, and to whom it owes no duty to defend, to the extent of its culpability.

Several cases involving excluded or otherwise non-covered claims generally support this view. For example, in *Paul Tishman Co. v. Carney & Del Guidice, Inc.*,[54] a subrogation action by an insurer against an insured subcontractor was sustained where the subcontractor was not an insured because its insurable interest under the subject fire insurance policy was limited to its own property interest in the building under construction and no part of the damages alleged by the insurance company was for destruction of any of the subcontractor's property.[55]

In *S.S.D.W. Co. v. Brisk Waterproofing Co.*,[56] the Court of Appeals held:

> The rationale of *Tishman* [34 N.Y.2d 941, 359 N.Y.S.2d 561] is simply that the contractor is a constructive insured under the owner's property insurance policy *only to the extent* of its insurable interest in the building; it follows, therefore—under the settled rule that the insurer has no right of subrogation against its own insured—that the owner's insurer is barred from subrogation only to the extent of property in which the contractor has an insurable interest: *i.e.*, its tools and the labor and materials which it has furnished. [emphasis in original; citations omitted].

Finally, as frequently happens in construction accident cases, an owner or general contractor, who has its own liability insurance, is also named as an additional insured under a subcontractor's liability policy issued by another carrier. When the owner or GC is sued for bodily injury to, or wrongful death of, an employee of the subcontractor, it will bring a third-party action for contractual and/or common law indemnity against the subcontractor. In such case, the antisubrogation rule would only apply to require the plaintiff to discontinue its action against the subcontractor/named insured insofar as it seeks recovery for an amount within the policy limit, but not for any excess exposure.[57] The insurer of a third-party plaintiff who does not insure a third-party defendant should be permitted to assert its right of subrogation against that third-party defendant. . . . This is so even where . . . there may be a co-insurer . . . who insures both the third-party plaintiff and defendant."[58]

Endnotes

1. *Costello on Behalf of Stark v. Geiser*, 85 N.Y.2d 103, 109, 623 N.Y.S.2d 753, 756 (1995).
2. *Gerseta Corp. v. Equitable Trust Co.*, 241 N.Y. 418, 426 (1926).
3. *Federal Ins. Co. v. Arthur Andersen & Co.*, 75 N.Y.2d 366, 378, 553 N.Y.S.2d 291, 297 (1990); *Gerseta Corp. v. Equitable Trust Co.*, 241 N.Y. 418, 426 (1926).
4. *Federal Ins. Co. v. Arthur Andersen & Co.*, 75 N.Y.2d 366, 372, 553 N.Y.S.2d 291, 293 (1990); *Hartford Acc. & Indem. Co. v. CNA Ins. Cos.*, 99 A.D.2d 310, 312, 472 N.Y.S.2d 342, 344 (1st Dep't 1984).
5. *Ocean Acc. & Guar. Corp. v. Hooker Electro-Chem. Co.*, 240 N.Y. 37, 47 (1925) ("It is so well settled as not to require discussion that an insurer who pays claims against the insured for damages caused by the default or wrongdoing of a third party is entitled to be subrogated to the rights which the insured would have had against such third party for its default or wrongdoing. This right of subrogation is based upon principles of equity and natural justice.").
6. *Hartford Acc. & Indem. Co. v. CNA Ins. Cos.*, 99 A.D.2d 310, 312, 472 N.Y.S.2d 342, 344 (1st Dep't 1984); *Federal Ins. Co. v. Arthur Andersen & Co.*, 75 N.Y.2d 366, 372, 553 N.Y.S.2d 291, 293 (1990).
7. *Costello on Behalf of Stark v. Geiser*, 85 N.Y.2d 103, 109, 623 N.Y.S.2d 753, 756 (1995); *Jefferson Ins. Co. v. Travelers Indemnity Co.*, 92 N.Y.2d 363, 373, 681 N.Y.S.2d 208, 214 (1998) ("an insurer has a right of subrogation, or, in other words, can 'stand in the shoes' of its insured . . .").
8. *Costello on Behalf of Stark v. Geiser*, 85 N.Y.2d 103, 109, 623 N.Y.S.2d 753, 756 (1995); *Federal Ins. Co. v. Arthur Andersen & Co.*, 75 N.Y.2d 366, 372, 553 N.Y.S.2d 291, 293 (1990).
9. *Hartford Acc. & Indem. Co. v. CNA Ins. Cos.*, 99 A.D.2d 310, 472 N.Y.S.2d 342, 344 (1st Dep't 1984); *Medical Malpractice Ins. Assn. v. Medical Liability Mut. Ins. Co.*, 86 A.D.2d 476, 479-480, 450 N.Y.S.2d 191 (1st Dep't 1982).
10. *Federal Ins. Co. v. Arthur Andersen & Co.*, 75 N.Y.2d 366, 372, 553 N.Y.S.2d 291, 293 (1990); *Federal Ins. Co. v. United Port Serv. Co.*, 23 Misc. 2d 142, 199 N.Y.S.2d 552 (Sup. Ct., N.Y. Co. 1960), *aff'd*, 12 A.D.2d 905, 214 N.Y.S.2d 638 (1st Dep't 1961) ("the insurer's claim by subrogation . . . is subject to the same statute of limitations as though the cause of action were sued upon by the insured").
11. ISO *Commercial General Liability Policy* [CG 00 01 01 96], IV Conditions 8.
12. Reliance Insurance Company, *Lawyers' Professional Liability Insurance Policy* [LP 00 R0002 00 0392], X Conditions—Claims C.
13. CPLR 1004.
14. *Skinner v. Klein*, 24 A.D.2d 433, 260 N.Y.S.2d 799, 800 (1st Dep't 1965).
15. CPLR 1004, "When joinder necessary," provides, in pertinent part: "Except where otherwise prescribed by order of the court, an . . . insured person who has executed to his insurer either a loan or subrogation receipt, trust agreement or similar agreement, . . . may sue . . . without joining with him the person for . . . whose interest the action is brought."
16. *Agway Ins. Agencies v. Williamson*, 162 A.D.2d 968, 557 N.Y.S.2d 193 (4th Dep't 1990); *Skinner v. Klein*, 24 A.D.2d 433, 260 N.Y.S.2d 799, 800 (1st Dep't 1965).
17. *Krause v. American Guarantee & Liability Ins. Co.*, 22 N.Y.2d 147, 292 N.Y.S.2d 67 (1968).
18. *Id. at* 153.
19. *Id.*; *Philip Morris Cos. v. Federal Ins. Co.*, 244 A.D.2d 223, 664 N.Y.S.2 45 (1st Dep't 1997) ("Inasmuch as defendants have failed to demonstrate any real prejudice, they should not be permitted to assert their right of subrogation over and against the alleged tort-feasor, prior to payment, entangling the insured in collateral litigation." The third-party actions were dismissed as premature.).

20. *Krause*, 22 N.Y.2d at 156.

21. *Id.*; *Philip Morris Cos. v. Federal Ins. Co.*, 244 A.D.2d 223, 664 N.Y.S.2 45 (1st Dep't 1997) ("The subject insurance policy contained a covenant by the insurers restricting their right to subrogation until after payment on the policy . . .").

22. *Kelly v. Yannotti*, 4 N.Y.2d 603, 608, 176 N.Y.S.2d 637, 642 (1958) ("Must an insurance company, which wishes to disclaim coverage under its policy of insurance, do so only at the price of subjecting itself to very possible *prejudice* (because, if it denies coverage, its insured will bring it into a pending action as a third-party defendant)? We think not—for the same reason that an insurance company is not allowed to be prejudiced in the ordinary action [by mention of the existence of insurance], where the insurance company admits coverage and is, in effect, the *real* defendant.").

23. *Hoffman v. Kew Gardens Hills Associates*, 187 A.D.2d 379, 590 N.Y.S.2d 99, 100 (1st Dep't 1992).

24. *E.g., Fidelity & Deposit Co. v. Queens County Trust Co.*, 226 N.Y. 225, 233 (1919) (fidelity insurer permitted to proceed as equitable subrogee against banks which negligently caused or contributed to the loss).

25. *Jefferson Ins. Co. v. Travelers Indemnity Co.*, 92 N.Y.2d 363, 373, 681 N.Y.S.2d 208, 214 (1998).

26. *Frontier Ins. Co. v. State,* 146 Misc. 2d 237, 550 N.Y.S.2d 243 (Ct. Claims 1989), *aff'd,* 172 A.D.2d 13, 576 N.Y.S.2d 622 (3d Dep't 1991); *Michigan Mut. Ins. Co. v. American & Foreign Ins. Co.,* 251 A.D.2d 141, 674 N.Y.S.2d 313, 314 (1st Dep't 1998); *Maimonides Medical Center v. Victory Memorial Hospital,* 282 A.D.2d 578 , 722 N.Y.S.2d 908 (2d Dep't), *lv. to app. den.*, __ N.Y.2d __ (10/16/01).

27. 146 Misc. 2d 237, 550 N.Y.S.2d 243 (Ct. Claims 1989), *aff'd,* 172 A.D.2d 13, 576 N.Y.S.2d 622 (3d Dep't 1991).

28. 251 A.D.2d 141, 674 N.Y.S.2d 313, 314 (1st Dep't 1998).

29. 282 A.D.2d 578 , 722 N.Y.S.2d 908 (2d Dep't), *lv. to app. den.*, __ N.Y.2d __ , __ N.Y.S.2d __ (October 16, 2001).

30. *Viacom International, Inc. v. Midtown Realty Co.*, 193 A.D.2d 45, 602 N.Y.S.2d 326, 331 (1st Dep't 1993).

31. *Kaf-Kaf, Inc. v. Rodless Decorations, Inc.*, 90 N.Y.2d 654, 661, 665 N.Y.S.2d 47, 50 (1997).

32. *Viacom International, Inc. v. Midtown Realty Co.*, 193 A.D.2d 45, 602 N.Y.S.2d 326, 331 (1st Dep't 1993); *S.S.D.W. v. Brisk Waterproofing Co.*, 76 N.Y.2d 228, 557 N.Y.S.2d 290 (1990).

33. *Kaf-Kaf, Inc. v. Rodless Decorations, Inc.*, 90 N.Y.2d 654, 660, 665 N.Y.S.2d 47, 49-50 (1997).

34. 106 A.D.2d 242, 485 N.Y.S.2d 65, 67-68 (1st Dep't 1985).

35. 485 N.Y.S.2d at 67-68.

36. 193 A.D.2d 45, 602 N.Y.S.2d 326, 331 (1st Dep't 1993).

37. 602 N.Y.S.2d at 329.

38. *Id.* at 330.

39. *Id.* at 331.

40. *Id.* at 331-332.

41. *Id.* at 331.

42. *See, e.g., Extaza of 34th Street v. City Stores Co., Inc.*, 62 N.Y.2d 919, 920-921, 479 N.Y.S.2d 5, 6 (1984) ("State Insurance having waived its right to subrogation against the landlord, to whom tenant by entering into the lease had given a prior written release . . ., has no cause of action in subrogation"); *Atlantic Mutual Ins. Co. v. Soiefer Bros. Realty Corp.*, 281 A.D.2d 441, 721 N.Y.S.2d 554 (2d Dep't 2001) ("The Supreme Court properly determined that the 'waiver of subrogation' clause contained in the insurance policy issued by the plaintiff to [the tenant] . . . precludes recovery by the plaintiff on its subrogation claims against [landlord]").

43. *Jefferson Ins. Co. v. Travelers Indemnity Co.*, 92 N.Y.2d 363, 373, 681 N.Y.S.2d 208, 214 (1998).

44. *Id.*; *Pennsylvania General Ins. Co. v. Austin Powder Co.,* 68 N.Y.2d 465, 471, 510 N.Y.S.2d 67, 70 (1986); *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993).

45. *Jefferson Ins. Co. v. Travelers Indemnity Co.*, 92 N.Y.2d 363, 373, 681 N.Y.S.2d 208, 214 (1998); *Pennsylvania General Ins. Co. v. Austin Powder Co.,* 68 N.Y.2d 465, 471, 510 N.Y.S.2d 67, 70 (1986).

46. 68 N.Y.2d 465.

47. *Id.* at 472.

48. 82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993).

49. Direct claims against an employer-contractor are barred by the exclusive remedy provision of the Workers' Compensation Law.

50. 82 N.Y.2d at 295, 604 N.Y.2d at 516-517.

51. 82 N.Y.2d at 296, 604 N.Y.2d at 517.

52. 92 N.Y.2d 363, 681 N.Y.S.2d 208 (1998).

53. 92 N.Y.2d at 374-375, 681 N.Y.S.2d 214-215.

54. 34 N.Y.2d 941, 359 N.Y.S.2d 561 (1974).

55. *See also, Hartford Fire Ins. Co. v. Advocate*, 162 A.D.2d 20, 560 N.Y.S.2d 331 (2d Dep't 1990) (insurance company, which paid an innocent partnership the proceeds of a fire insurance policy for damages sustained in a fire intentionally set by a member of the partnership for personal reasons, may seek subrogation from the offending partner who had a separate policy from the same insurer covering the contents of his office), *rev'd on other grounds*, 78 N.Y.2d 1038, 576 N.Y.S.2d 80 (1991) (insurer's claims as subrogee time barred); *Hamilton v. City of New York*, 172 A.D.2d 585, 570 N.Y.S.2d 942, 943 (2d Dep't 1991) (third-party defendants, additional insureds under a policy procured by the third-party plaintiffs, asserted that the third-party action was in essence a subrogation suit brought against it by its own insurers; held that the third-party plaintiffs "met their burden of demonstrating the existence of triable issues of fact by citing the employee exclusion provision of the policy. . . . [i]t cannot be determined, at this juncture, whether the third-party action is one brought by an insurer improperly pursuing subrogation against its own insured"); *Fireman's Fund Ins. Co. v. Krohn*, No. 91 Civ. 3546, 1993 WL 299268 (S.D.N.Y. Aug. 3, 1993) (insurer could bring a claim in subrogation against a contractor who was named as an additional insured on the insurer's policy only to a limited extent).

56. 76 N.Y.2d 228, 234-235, 557 N.Y.S.2d 290, 293 (1990).

57. *Estate of Aprea v. Willets Point Contracting Corp.*, 215 A.D.2d 708, 709, 627 N.Y.S.2d 76, 78 (2d Dep't 1995); *Fitch v. Turner Construction Co.*, 241 A.D.2d 166, 671 N.Y.S.2d 446, 448-449 (1st Dep't 1998).

58. *Fitch v. Turner Construction Co.*, 241 A.D.2d 166, 671 N.Y.S.2d 446, 448-449 (1st Dep't 1998).

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Developments in New York Workers' Compensation Law and the Use of the New York Workers' Compensation Law as a Defense in Liability Related to Employment

By Jared L. Garlipp and Mary M. Russo

Introduction

Under the Workers' Compensation Law (WCL), an injured employee is entitled to receive compensation for lost wages and medical expenses, regardless of fault, in exchange for reduced costs and risks of litigation. Under WCL § 21(1), there is a statutory presumption that injuries arising out of and in the course of employment are compensable. Given the remedial nature of the WCL, courts have construed this statute very broadly.

"The WCL is the sole and exclusive remedy for occupational injuries, occupational diseases, or deaths, with very few exceptions."

Pursuant to WCL § 10(1), employers must maintain workers' compensation coverage for their employees for any accidents, occupational diseases, and deaths arising out of, and in the course of, employment. In New York State, almost all employees are covered by workers' compensation.

The WCL is the sole and exclusive remedy for occupational injuries, occupational diseases, or deaths, with very few exceptions. Under WCL § 11, if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided by the law, an injured employee has the option to bring an action against the uninsured employer in the civil courts for damages or to present a workers' compensation claim before the Workers' Compensation Board (the "Board"). Another exception is where the injury complained of is the product of an intentional and deliberate act of the employer directed at causing harm to a particular employee. In virtually all other instances, the injured worker's sole and exclusive remedy would be under the WCL.

Recent Developments in the WCL

The two most significant changes to the WCL in recent years are the December 9, 1996 amendment to WCL § 32, permitting settlement agreements, and the enactment of WCL § 114-a, effective September 10, 1996, which provides that the Board may disqualify a claimant from receiving wage replacement benefits when the claimant has tried to obtain compensation by making a false statement or falsely representing a material fact.

Prior to the December 9, 1996 amendment, WCL § 32 provided that "no agreement by an employee to waive his right to compensation under this chapter shall be valid." However, the statute now permits the claimant and the employer to agree to settle all issues relating to a claim.

If the agreement is to resolve less than all of the outstanding issues in a case, the agreement may be approved by a workers' compensation law judge. If the agreement will resolve all outstanding issues, it must be approved by a commissioner. Any agreement reached between the parties must be submitted to the Board for approval. Upon receipt of the agreement, the Board may request of the claimant information regarding the payment of related medical expenses by any other party, such as a private health insurer. Any such party would be placed on notice for a WCL § 32 settlement hearing. The date of the hearing is deemed the date of the filing of the agreement.

Any interested party may request that the Board disapprove the agreement within ten days of the WCL § 32 hearing. The Board's decision approving or denying the agreement is published on the 16th day after the hearing. If approved, any award must be paid within ten days or the carrier will incur a 20 percent penalty. Once a settlement is approved by the Board, it has the same binding effect as an award in arbitration. It is conclusive and not subject to review by the Board or the courts pursuant to WCL § 23. The agreement can be amended after approval by agreement of the parties, subject to approval by the Board.

If the Board disapproves a WCL § 32 agreement, the Board's decision is subject to review pursuant to WCL § 23.

Subsequent to October 10, 2000, in certain limited circumstances, a section 32 agreement may be approved without a hearing. In order to be eligible for approval without a hearing, all issues in the case must have been formally resolved through the hearing process, and the claimant must be represented by an attorney. Controverted claims, as well as claims to be disallowed pur-

suant to the terms of the section 32 agreement, claims involving complicated issues, and claims of unrepresented individuals may not be resolved via a section 32 settlement without a hearing.

In order for an agreement to be approved without a hearing, the completed agreement must be submitted to the Board. At that time, the Board will provide the claimant with form EC-32.1, which requires the claimant's signature to be notarized, but does not require the signature of the claimant's attorney. Once this form is received back from the claimant, the Board sends form EC-32.5 to all parties, indicating that the agreement is ready for review by a commissioner and may be approved without a hearing unless any interested party objects within 15 days. The Board retains the right to schedule a hearing should the commissioner, upon review of the agreement, deem a hearing necessary. If no objection is received by the Board, the agreement is approved by a commissioner and the Board files a decision approving the agreement 16 or more days after the filing date of the EC-32.5.

WCL § 114-a provides that if a claimant, or another person with the knowledge of the claimant and acting on the claimant's behalf, knowingly makes a false statement or representation as to a material fact for the purpose of influencing any determination regarding his or her eligibility for workers' compensation benefits, the claimant shall be disqualified from receiving any compensation directly attributable to such false statement or representation. In addition, the claimant shall be subject to a disqualification or an additional penalty up to the foregoing amount directly attributable to the false statement or representation.

In *Phelps v. Phelps*,[1] the court upheld a determination by the Board that the claimant had violated WCL § 114-a by misrepresenting his physical condition in an independent medical examination conducted by the carrier's consultant, and misrepresenting his work status in his testimony before the Board.

The claimant had been videotaped performing significant manual labor for his son's landscaping business for a sustained period of time. Shortly after he was videotaped, the claimant was examined by the carrier's consultant. At this examination, he complained of numbness in his neck and hands, as well as chronic low back pain. He stated that his physical activity was limited to hobbies such as fishing and decorative woodworking. Based upon his statements at the examination, the doctor found the claimant to have a marked partial degree of disability. However, following his review of the videotape, the doctor issued a follow-up report wherein he stated that the claimant's activities as depicted on the videotape diametrically contradicted some of the statements he made at the IME.

Further, at a hearing, the claimant testified that he was not affiliated with his son's landscaping business "at all" and further denied that he worked for that business. Under the circumstances, the court felt there was substantial evidence to support the Board's conclusion that the claimant violated WCL § 114-a and that the penalty imposed by the Board, disqualification from receiving wage replacement benefits after the date of the first false statement, was specifically authorized by the statute.

"As the WCL is intended to be the exclusive remedy of injured workers and their legal representatives as a matter of substantive law, if the facts support a finding that an employer/employee relationship exists between plaintiff and a defendant in a liability action, the defendant may raise workers' compensation as an affirmative defense."

The statute apparently only applies to wage replacement benefits. It does not appear to apply to medical awards or benefits, or death awards, as it refers only to section 15 of the WCL and not sections 13 or 16. A three-member panel of the Board, in *Mark IV Construction*,[2] held that a violation of section 114-a disqualified the claimant from receiving additional indemnity benefits, however, he was still entitled to receive medical benefits.

The Use of New York WCL as a Defense in Liability Related to Employment

As the WCL is intended to be the exclusive remedy of injured workers and their legal representatives as a matter of substantive law, if the facts support a finding that an employer/employee relationship exists between plaintiff and a defendant in a liability action, the defendant may raise workers' compensation as an affirmative defense. The Court of Appeals in *Murray v. City of New York*[3] held that the affirmative defense of workers' compensation may be raised by the defendant at any point prior to the final disposition of an action.

In *Murray*, the plaintiff's decedent was employed as a planner with the Economic Development Administration of the city of New York and was engaged in an authorized business errand for his employer when he was struck by a New York City police car manned by two officers responding to a radio call after it careened from a collision with another vehicle. The plaintiff

brought an action for conscious pain and suffering and wrongful death against the city of New York, as well as the owner of the vehicle.

The city did not allege in its answer the exclusivity of workers' compensation as a remedy, nor did it move to amend the pleadings before trial. After plaintiff had presented her witnesses and after her counsel indicated that plaintiff would rest, aside from reading a hospital record, the city moved for a dismissal based on workers' compensation as a total bar to suit against the city. The trial court reserved decision. The next day, while the city was in the process of presenting its case, the trial court indicated that it had reviewed the workers' compensation question, and had decided to dismiss as to the city, with the right to the plaintiff to reopen. However, all attorneys requested that the case go on to its fulfillment. A verdict was returned in favor of the plaintiff against both defendants, liability being apportioned 25 percent to the city and 75 percent to the owner of the vehicle. The trial justice granted the city's motion to conform the pleadings to the proof, and set aside the verdict as against the city and dismissed the claim against it. At no time did the plaintiff ask to reopen.

The Appellate Division reversed and reinstated the verdict against the city, because, in its view, the trial court had improperly granted the city's motion to conform the pleadings to the proof at a late stage at which the workers' compensation defense was first interposed.

The Court of Appeals reversed, noting that under CPLR 3025, a party may amend his pleading at any time by leave of the court, and that where no prejudice is shown, the amendment may be allowed during or even after a trial. The court found that there was no prejudice here, as the plaintiff had alleged in her Bill of Particulars that the decedent was employed by the city of New York, and had presented evidence that he was on a work errand at the time of his death. The court noted that workers' compensation is an exclusive remedy as a matter of substantive law and, hence—whenever it appears or will appear from a plaintiff's pleading, Bill of Particulars or the facts that the plaintiff was an employee of the defendant—the obligation of alleging and proving non-coverage falls on the plaintiff. The issue may be waived; however, such waiver is accomplished only by a defendant ignoring the issue to the point of final disposition itself.

In *Williams v. Northrup*,[4] the plaintiff, a construction worker who fell into a grease pit, brought a negligence action against the premises owner, the engineers who designed the pit, and the contractor who constructed it. The Fourth Department affirmed the dismissal of the complaint against the owner of the premises, James Northrup, as he was also the president of the plaintiff's employer. In both capacities, Northrup was responsible for safety precautions at the work site controlled by the corporate employer, and therefore, the court observed, the plaintiff's suit against him was barred by the co-employee exclusivity provision of WCL § 29(6).

Similarly, in *Crowder vs. Leichter*,[5] the plaintiff was injured in a fall on a sidewalk and sued the snow removal contractor and the owners of the building adjacent to the sidewalk seeking to recover damages for personal injuries. The building owners were also officers of the corporation that had employed the plaintiff. The Second Department affirmed the grant of summary judgment to the owners of the building. The court noted that the plaintiff was injured during the course of her employment and that her action against the building owners was barred by the WCL.

The courts have also found that an employer's organization into separate legal entities does not preclude a finding that an employee's exclusive remedy is under the WCL. In *Ramnarine v. Memorial Center for Cancer and Allied Diseases*,[6] the claimant was a building service aide employed by Memorial Sloan Kettering Cancer Center, who sustained an injury while on the loading dock at the Memorial Center for Cancer and Allied Diseases. The plaintiff brought a negligence suit against the hospital to recover for his injuries. The employer and the hospital were separate corporations, but were directed by a common management and functioned under a combined budget. Further, the same executive officers ran both corporations, and there as a single human resources department and a common payroll department. A single premium was paid on an insurance policy covering both entities. Accordingly, the court held that the plaintiff's claim against the hospital was barred by the exclusivity provision of the WCL.

Likewise, in *Diaz v. Rosbrock Associates Limited Partnership*,[7] the court held that two properly and separately created, operated and maintained New York limited partnerships which were made up of identical limited and general partners, were one and the same for WCL purposes—so as to preclude an employee of the employer-limited partnership from maintaining a cause of action for work-related personal injuries against the landowner-limited partnership based upon the exclusive remedy provisions of the WCL.

The exclusivity provisions of the WCL also apply in other circumstances. It is well settled that injuries arising from professional services rendered by an employer exclusively to employees at the employer's expense, and on its premises, are injuries occurring in the course of employment, as to which the WCL provides the employee's exclusive remedy against the employer.

In *Feliciano-Delgado v. New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc.*,[8] the plaintiff was a nurse who was employed at a medical facility that provided medical services for members of various hotel and restaurant and industry union locals. As a condition of her employment, the plaintiff was entitled to treatment from the center's physicians free of charge. In 1993, the plaintiff began experiencing pain in her right foot and sought treatment at the health center. She was treated by five individual physicians at the center. The plaintiff alleged that the physicians were negligent in failing to diagnose and timely treat her eventually debilitating condition. The doctors and the health center moved for summary judgment, and the motion court denied this relief. However, the First Department reversed, noting that the fellow employee rule of the WCL provides that workers' compensation shall be the exclusive remedy to an employee who is injured or killed by the negligence or wrong of another in the same employ. The court stated that analysis of whether the provision applies in a given instance must focus on three factors: the services were offered and paid for by the employer; the services were not available to the general public; and the services were only available to the plaintiff as a consequence of her employment. The court further noted that in *Garcia v. Eserson*,[9] the Court of Appeals held that where an employee was treated in an employer's infirmary by a physician paid for by the employer to provide such care, the employee's resulting claim of malpractice against his fellow employee/physician fell within the scope of the WCL's exclusivity provision. Even though the services of these physicians at the health center were available to a segment of the general public, specifically hotel and restaurant industry unions, the court observed that the plaintiff had obtained those services only as a consequence of her employment.

The court also rejected the plaintiff's argument that the WCL exclusivity provision was inapplicable, as she was not performing the work for which she was employed at the time of her injury, so that her injury did not flow as a natural consequence of her duties as an employee. The court held that the work-related element was satisfied by the nexus between the plaintiff's employment and the employer's provision of medical services not available to the public. "There is no requirement that the medical condition upon which a negligent treatment claim is based must be an "injury," or that it must be a direct consequence of the plaintiff's employment duties."

In *McKay v. Ciani*,[10] the plaintiff was a nurse employed at a county-run nursing home, who had undergone substance abuse counseling under the county's employee assistance program, who alleged that her counselor had used his position as therapist to coerce her into a sexual relationship. She brought suit against the county and the counselor for negligence, malpractice and intentional infliction of emotional distress. The Supreme Court granted the county's motion for summary judgment on the basis that the WCL provided the plaintiff's exclusive remedy, and the Third Department affirmed. The court stated that injuries arising from professional services rendered by the employer exclusively to employees at the employer's expense and on its premises are subsumed by the statute, and also precluded are actions for negligent supervision, and—unless the employer deliberately acts to harm the employee—vicarious liability for an employee's intentional tort.

"The question of whether an employer/employee relationship existed between the plaintiff and the defendant is not always an easy one to answer."

In *Chiriboga v. Ebrahimoff*,[11] the First Department held that a third party cannot be held vicariously liable for the negligence of a plaintiff's co-employee. The plaintiff was a parking garage attendant who was seriously injured when a co-worker backed a car into him. The plaintiff brought an action for personal injury against the owner of the vehicle. The motion court denied the defendant's motion for summary judgment, finding that a triable issue of fact existed as to whether the plaintiff's co-worker was negligent and thus, whether the defendant was vicariously liable pursuant to Vehicle & Traffic Law § 388(1), which provides that every vehicle owner is responsible for injuries resulting from the negligent use of the vehicle by one operating it with permission, either express or implied.

The First Department reversed, noting that while it is well-settled that WCL § 29(6) precludes suit against a fellow employee based on his or her negligence, it was not a bar to an action against a third-party owner based upon the owner's affirmative negligence toward the injured employee. However, in this case, the plaintiff had sued the defendant based upon his vicarious liability as the owner of the vehicle operated by his co-worker, and there was no allegation of affirmative negligence by the defendant.

The question of whether an employer/employee relationship existed between the plaintiff and the defendant is not always an easy one to answer.

In *Corp v. State of New York*,[12] the plaintiff was a volunteer security worker who was injured at an athletic event sponsored by a state agency. The plaintiff brought an action against the state, and the state moved for dismissal of the claim based on the fact that the plaintiff's exclusive remedy was provided in the WCL. The Court of Claims granted the motion and dismissed the claim, and the Third Department affirmed. The court explained that whether the plaintiff had a valid claim for damages or whether she was committed to benefits under the WCL was a factual determination for the Board, and the proper procedure involving the Board may not be circumvented by litigants who select the court system as a forum for litigating their dispute. Further, the plaintiff could not elect to waive benefits under the WCL to proceed on a tort cause of action. The policy of the state was that volunteer workers are covered while they donate their services to the state, and the court found that the plaintiff's knowledge, or lack of knowledge, of this policy would not be controlling.

In *Croston v. Montefiore Hospital*,[13] the plaintiff was enrolled as a technologist/trainee in the microbiology lab at the defendant hospital. As part of the program in which she was enrolled, the plaintiff was required to work 7½ hours per day Monday through Friday, and to perform essentially the same tasks as the hospital's certified technologist performed. Although the plaintiff received no financial compensation for her services, the training and experience attained at the hospital was necessary for eventual technologist certification, and so was considered a thing of value, equivalent to wages. Therefore, the plaintiff's action to recover for injuries sustained when she was pricked by a needle and subsequently contracted tuberculosis and acquired immune deficiency syndrome (AIDS), was dismissed, as the plaintiff's exclusive remedy was provided by the WCL.

A so-called "special employee" is considered an employee for the purposes of the exclusive remedy provision of the WCL.

A general employee of one employer may also be a special employee of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits. A special employee is one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer. Whether a person is considered a special employee is generally a fact question; however, a determination of special employment status may, where the undisputed facts compel such a conclusion, be made as a matter of law.[14]

In *Lane v. Fisher Park Lane Co.*,[15] the plaintiff was a temporary agency employee who was assigned to work at the defendant corporation's offices on a full-time basis, where she worked exclusively for two individuals who she considered to be her bosses. The court noted that in determining special employment status, a significant and weighty factor focused on who controls and directs the manner, details and ultimate results of the employee's work. As the plaintiff's work was controlled and directed by the defendant corporation, the plaintiff's special employment status was established as a matter of law, and the court held that the defendant was entitled to summary judgment on the affirmative defense of workers' compensation.

"The courts . . . take a broad view of whether a plaintiff's injury is an accidental injury sustained in the course of employment, for purposes of applying the exclusive remedy provision of the WCL."

In *Lewis v. Summit Office Supply, Inc.*,[16] the court held that a special employee of the plaintiff's direct employer was considered a co-employee, so as to bar recovery in a negligence action. The plaintiff, an employee of Manhattan Transfer, Inc., was injured by a forklift operated by the defendant, Vincent Carbone, an employee of the defendant, Summit Office Supply, Inc. The plaintiff commenced a negligence action against the defendants, who asserted an affirmative defense that the plaintiff's sole remedy was workers' compensation. The Supreme Court granted the defendant's motion for summary judgment, finding that Carbone was a special employee of Manhattan Transfer and, therefore, workers' compensation was the plaintiff's sole remedy. The Second Department affirmed, noting that, given the indicia of control and supervision over the defendant, Vincent Carbone, exercised by Manhattan Transfer, the Supreme Court properly concluded as a matter of law that the defendant, Vincente Carbone, was a special employee of Manhattan Transfer. Since Carbone was, in effect, a co-employee of plaintiff, the plaintiff's sole remedy was workers' compensation.

The courts also take a broad view of whether a plaintiff's injury is an accidental injury sustained in the course of employment, for purposes of applying the exclusive remedy provision of the WCL. This is well-illustrated by the case of *Melo v. Jewish Board of Family and Children Services, Inc*.[17] In that case, the plaintiff was an employee of the Brooklyn Community Residence

which was operated by the defendant. While on duty, the plaintiff was attacked, raped and robbed by an unidentified assailant. The court granted the defendant's motion to dismiss the complaint on the grounds that the plaintiff's exclusive remedy was the WCL. The court noted that, although the plaintiff was a victim of a horrifying experience, she failed to demonstrate that the exclusive remedy of the WCL did not preempt her right to maintain a tort action before the court. Additionally, the court observed that given the remedial nature of the law, the courts have construed it with a view towards giving wide latitude in determining whether a disabling condition is an accident.

In *Mintiks v. Metropolitan Opera Association*,[18] the plaintiff's decedent was a member of an orchestra engaged by the defendant corporation to accompany a ballet. One night, during an intermission, the decedent left the orchestra pit to perform a personal errand. While so engaged, she encountered Craig Crimmins, a stagehand employed by the defendant, in an elevator. Crimmins proceeded to sexually assault the decedent and forced her to accompany him to the roof of the building where he tied her up with a rope. When the decedent attempted to escape, Crimmins kicked her off a ledge, resulting in her death.

The Board affirmed a decision of a workers' compensation law judge awarding death benefits based upon a finding that the decedent was an employee of the defendant, and the accident and death occurred in the course of her employment, and, therefore, pursuant to WCL § 21, was presumed to have arisen out of her employment.

The Appellate Division affirmed the Board's finding that the claimant was an employee of the defendant, as she was on the defendant's payroll and the defendant exercised significant control over the decedent's hours and the manner in which she was to perform. The court also affirmed the determination that the decedent's death occurred in the course of her employment. Although the claimant was on a break between performances and engaged in a personal errand at the time the assault occurred, the court found that her activity was reasonable and did not constitute a deviation from her employment.

However, the court felt that the Board had not adequately considered whether a sufficient causal nexus existed between the decedent's employment and the injury. The court noted that the causal link may be supplied by a work environment which increased the risk of assault, or a work-related motivation for the assault. There was no evidence of a dangerous work environment, so the issue to be considered was whether the Board could properly find that the assault was motivated by some factor related to the claimant's employment. The court did not feel that the facts supported an inference that the motivation for the assault was related to either Crimmins' or the decedent's employment, and was concerned that the Board had failed to consider evidence in the form of the testimony of the police officer who had investigated the case, as well as Crimmins' written confession, that Crimmins had chosen his victim arbitrarily and there were no employment-related issues between the victim and himself.

On remand, the Board Panel found that the presumption that the decedent's death arose out of her employment was not effectively rebuked by Crimmins' statements detailing the events of the evening, in that the evidence was clear that he was extremely intoxicated at the time, making his recollection highly suspect and not credible.[19] Likewise, the testimony of the homicide detective was rejected, as the detective had based his conclusion largely on the statements of Crimmins.

Additionally, the Board Panel found that the decedent's work environment had increased the risk of attack as, by virtue of her employment status, she had access to backstage areas of the employer's premises that were restricted to the general public, and it was in such an area that she encountered Crimmins. The Board Panel also noted that the decedent would not have died but for her employment-related presence in said restricted area during a break in the evening's performance.

Further, the Board Panel observed that Crimmins had admitted to have seen the decedent in the backstage area on a number of occasions prior to the evening of the assault, and that a conversation of unknown context had preceded the assault. Therefore, there was insufficient credible evidence to show that the assault was motivated solely by sexual reasons, and that other factors may have played a role.

Also worthy of note is the case of *Seymour v. Rivera Appliances Corporation*[20] cited by the dissent in *Mintiks*.

In *Seymour*, the decedent had intervened in an argument between two co-employees, resulting in a physical altercation. The next day the two co-employees shot and killed the decedent. The Court of Appeals reversed a decision of the Appellate Division denying compensability under the WCL. The court noted that "so long as there is any nexus, however slender, between the motivation for the assault and the employment," an award may be sustained. The court noted that the decedent would not have become engaged in the quarrel had his employment not exposed him to it, and there was no evidence of prior animosity between the decedent and his co-workers so as to suggest a personal motive for the killing. Further, "[a]rguments among employees

and their escalation into violence, especially during regular breaks, must be anticipated by employers."

Another significant instance where the WCL acts as a defense in liability actions is the "grave injury" rule embodied in WCL § 11. That statute, as amended on September 10, 1996, provides, in pertinent part, that:

> An employer shall not be liable for contribution or indemnity to any third party based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such an employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Prior to the 1996 amendment, it was the law of New York that, where a defendant was sued for damages arising out of a workplace injury, a claim for contribution or common law indemnification could be brought by the defendant, as third-party plaintiff, against the plaintiff's employer.[21]

The primary purpose of the 1996 amendment was to repeal the decision of the Court of Appeals in *Dole v. Dow Chemical Co.*, which allowed third party actions against employers for indemnification or contribution for injuries sustained by employees in the scope of their employment. The Court of Appeals in *Majewski v. Bradalbin-Perth Central School District*[22] recognized that the statute was amended "to abolish most third party actions so as to enhance the exclusivity of the WCL, thereby reducing insurance premiums and decreasing the cost of doing business in New York."

Further, the risk of "grave injuries" in the statute is exhaustive, not illustrative.[23]

While the provision of WCL § 11 prohibiting impleader is inapplicable if the employer had made a contract, prior to the accident, in which it had agreed to indemnify or contribute to payment for a loss by the employee, General Obligations Law § 5-322.1 prohibits indemnity agreements in which owners or contractors seek to pass along the risks of their own negligent actions to other contractors or subcontractors, even if the accident was caused only in part by the owner's or contractor's negligence. The purpose of General Obligations Law § 5-322.1 is to prevent a prevalent practice in the construction industry of requiring subcontractors to assume liability by contract for the negligence of others. The legislature has concluded that such coercive bidding requirements unnecessarily increase the cost of construction by limiting the number of contractors able to obtain the necessary hold harmless insurance, and unfairly impose subliability and subcontractors for the negligence of others over whom they had no control.[24]

Endnotes

1. 277 A.D.2d 736 (3d Dep't 2000).
2. 100 NYWCLR 1028 (N.Y. Work. Comp. Bd. 1999).
3. 43 N.Y.2d 400 (1977).
4. 270 A.D.2d 806 (4th Dep't 2000).
5. 723 N.Y.S.2d 193 (2d Dep't 2001).
6. 281 A.D.2d 218 (2001).
7. 2001 WL641459 (Sup. Ct., N.Y. Co. 2001).
8. 722 N.Y.S.2d 498 (1st Dep't 2001).
9. 33 N.Y.2d 421.
10. 280 A.D.2d 808 (3d Dep't 2001).
11. 281 A.D.2d 533 (1st Dep't 2001).
12. 257 A.D.2d 742 (3d Dep't 1999).
13. 229 A.D.2d 330 (1st Dep't 1996).
14. *Thompson v. Grummen Airspace Corp.*, 78 N.Y.2d 553 (1991).
15. 276 A.D.2d 136 (1st Dep't 2000).
16. 231 A.D.2d 688 (2d Dep't 1996).
17. 183 Misc. 2d 776 (Sup. Ct., Kings Co. 1999).
18. 153 A.D.2d 133 (3d Dep't 1990), *app. dismissed,* 75 N.Y.2d 1005 (1990).
19. *Metropolitan Opera Association*, 90 N.Y.W.C.L.R. 1113 (N.Y. Work. Comp. Bd. 1990).
20. 28 N.Y.2d 406 (1971).
21. *See Dole v. Dow Chemical Co.*, 30 N.Y.2d 143 (1972).
22. 91 N.Y.2d 577 (1998).
23. *Ibarra v. Equipment Control, Inc.*, 707 N.Y.S.2d 208 (2d Dep't 2000).
24. *See Itri Brick and Concrete Corp. v. Aetna Casualty & Surety Co.*, 89 N.Y.2d 786 (1997).

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The Public Policy of Workers' Compensation Law § 11 Prevails Against Collateral Estoppel Argument

By Edwin L. Smith and Reed M. Podell

In a classic conflict between legislative will and principles of collateral estoppel and due process, one New York court has ruled in favor of legislative policy. That court held that a party in a personal injury lawsuit is bound by the findings of the Workers' Compensation Board (the "Board") even though the requirements of collateral estoppel were not satisfied. The decision's result was dismissal of indemnity and contribution claims, and the effectuation of the legislature's intent to shield employers from most third-party claims in suits arising from workplace injuries. With so many states having workers' compensation laws akin to New York's, the impact of this decision may well be felt far beyond New York's borders.

"In a classic conflict between legislative will and principles of collateral estoppel and due process, one New York court has ruled in favor of legislative policy."

Background

New York's Workers' Compensation Law (WCL), enacted in 1914, was "designed to provide timely payment of disability and medical benefits to injured workers at a reasonable cost to employers."[1] However, the cost to employers dramatically increased beginning in 1972 when the state's highest court held that employers may be subject to common law contribution claims by third parties for their workers' injuries.[2] Thereafter, the impleader of employers for indemnity or contribution became virtually reflexive.

After nearly a quarter century of employers having to both provide workers' compensation benefits and pay personal injury damages resulting from their employees' claims, and with workers' compensation insurance premiums escalating, the state's legislature acted. In 1996, New York joined other states in amending its Workers' Compensation Law to generally prohibit third party contribution claims against an injured worker's employer.[3] The limited exceptions to that prohibition include instances where the worker sustains a statutorily defined "grave injury,"[4] or where the third party is entitled to contractual indemnity.[5] Paramount among the legislature's stated reasons for the amendment was its desire to largely eliminate third-party claims against employers and to seek a reduction of workers' compensation premium costs.[6]

Given the near absolute liability shield afforded to employers by the amended statute, a finding that a party is an injured worker's "employer" takes on singular importance in personal injury litigation. For third parties[7] facing vicarious, absolute liability, the opportunity to disprove a party's status as the "employer" can make the difference between having to pay all or none of a damages award.

A Case of First Impression

In a recent New York personal injury action entitled *Gonzalez v. 17 Murray Street Corp.*,[8] plaintiff alleged he was injured when the ladder upon which he was standing collapsed while he performed certain construction work at the premises owned by defendant 17 Murray Street Corp. ("owner"). This allegation, if proven, would support absolute liability against the owner under New York law.[9] The owner, in turn, asserted common law indemnity and contribution claims against the general contractor, BDB Development Corp. (BDB), who was a direct defendant and the only other party to the suit.

Although plaintiff claimed he was an employee of BDB, this claim was disputed. BDB maintained that plaintiff was actually an independent contractor who was terminated prior to the accident date. Inasmuch as the Workers' Compensation Board has primary jurisdiction to make findings of fact as to whether an employment relationship exists,[10] the Board was charged with resolving the question of whether BDB was the plaintiff's employer upon his application for benefits.

During the time that the Board was conducting hearings on the issues of both BDB's status as employer and whether plaintiff sustained a work related injury, the parties to the litigation made successive joint applications to the court to stay the trial pending the Board's findings. Ultimately, the Board found that BDB was, in fact, the plaintiff's employer and that plaintiff's injuries were work related.

Although the Board's findings are binding in litigation,[11] they do not necessarily bind all parties. The doctrine of collateral estoppel does not preclude a party from litigating an issue decided by the Board unless that party has had a full and fair opportunity to contest the issue in the compensation proceeding, which

includes the right to present evidence and cross-examine witnesses.[12]

However, third parties are not ordinarily permitted to participate in workers' compensation proceedings because those proceedings are limited to those having an enforceable interest in a compensation award.[13] Therefore, courts have held third parties free to litigate issues decided by the Workers' Compensation Board even though a separate judicial determination of the same issue may lead to an inconsistent result.[14] Relying upon this judicial authority, the owner in *Gonzalez*, who had not participated in the workers' compensation proceedings, maintained that the Board's findings were not binding against it in the litigation.

The "Employer's" Motion to Dismiss

After the Board made its findings, BDB moved to dismiss both the plaintiff's direct claims and the owner's common law indemnity and contribution cross-claims based upon WCL § 11. Under the facts and the law, the plaintiff did not oppose dismissal of its direct claims against BDB.

Mindful of the owner's position, BDB argued that the statute unequivocally prohibits common law contribution and indemnity claims against an injured worker's "employer" unless the worker sustains a "grave injury." Therefore, based upon the Workers' Compensation Board's findings, and with no "grave injury" alleged, BDB maintained that all the claims against it must be dismissed.

In further support of its position, BDB argued that the statute's purpose, as explicitly stated by the legislature, would be frustrated unless the owner's indemnity and contribution claims were dismissed. If those claims were allowed to proceed, BDB would be in the position of having to both provide workers' compensation benefits and pay damages in litigation. Avoidance of this very situation was impetus for the statute's amendment.

The Owner's Opposition

The owner, facing statutory liability, needed to preserve its claims against BDB as the only option it had to pass its liability on to another. If the owner could prove that BDB was not plaintiff's employer, it could and would likely recover on its indemnity claim.

The owner's position on the motion was that its cross-claims against BDB could proceed because it did not participate in the workers' compensation proceeding, and so it was not bound by the Board's finding that BDB was the plaintiff's employer. The owner's position was well founded. Under the doctrine of collateral estoppel, the owner would not be bound by the Board's findings because it did not have an opportunity to confront the issue of employment status before the Workers' Compensation Board.[15]

Vexing Questions for the Court

The question for the court to resolve was whether a third party—who is not bound by the Workers' Compensation Board's findings—can litigate common law indemnity and contribution claims against a party that the Board found was the injured worker's "employer" even though employers are statutorily shielded from such claims.

The answer to that question was further complicated by maxims of statutory construction. Under those maxims, the WCL is to be liberally construed,[16] but its construction cannot abrogate the common law by implication.[17] A court must not hold a statute to have changed the common law to any greater degree that the statutory language absolutely requires.[18] To the extent possible, the court must not construe a statute to abolish the common law where both can be effectuated.[19] Consequently, the *Gonzalez* court was constrained to interpret the statute in a way that would give its terms effect while, if possible, doing no harm to the doctrine of collateral estoppel.

The owner's invocation of the doctrine of collateral estoppel also brought due process issues into play. On the connection between collateral estoppel and due process, the United States Supreme Court said:

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.[20]

Therefore, the *Gonzalez* court had the additional burden of having to resolve the matter without violating the owner's due process rights. However, as will be seen, the owner's conduct during the litigation may have undermined its collateral estoppel/due process argument, thereby facilitating the court's decision.

And the Decision Is . . .

At the outset, the court detailed the owner's conduct during the litigation, which appeared to demonstrate its acquiescence to the Workers' Compensation Board to make a finding as to the employer's identity.

Specifically, the court cited to both the owner's failure to make any effort to intervene in the workers' compensation proceedings, and its having joined in the applications to stay the trial pending the Board's findings.

Judicial Estoppel: A Stealth Issue

By discussing the owner's conduct during the litigation, the court seemed to raise the question of whether *judicial estoppel* attached. "Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding."[21]

Although the court did not specifically discuss judicial estoppel, it nevertheless appears that that doctrine was contemplated. In its decision, the court commented that the owner made no effort to participate in the proceedings before the Board, *albeit*, there was no assurance that the owner would have been permitted to participate in those proceedings had such an attempt been made. Consequently, the owner's failure to intervene in the compensation proceedings may not fairly be relied upon to result in estoppel. However, judicial estoppel may have been supported by other conduct.

As noted, the owner joined with the plaintiff and BDB in applying for stays of the trial pending the Workers' Compensation Board's findings. If the owner had no intention of being bound by those findings, then there was no apparent reason for it to have joined in the applications to stay the trial. Arguably, then, the owner's position that it was not bound by the Board's findings may be viewed as contrary to the position it took by joining in the applications for a stay. Still, the owner's change in position, if it was that at all, was subtle and may explain why the court did not explicitly rely upon that doctrine.

Legislative Intent vs. Collateral Estoppel

Instead, the court focused upon the conflict between collateral estoppel and the language and intent of WCL § 11. While there was no controlling authority directly on-point, the court extrapolated from existing appellate authority in concluding that the owner's claims were extinguished by the statute even though the requirements of collateral estoppel were not satisfied.

The court relied in part upon an Appellate Division decision in *Talcove v. Buckeye Pipe Line Co.*[22] In *Talcove,* the defendants were plaintiff's employer and co-worker. Based upon a finding of the Workers' Compensation Board, the *Talcove* court dismissed plaintiff's direct claims against the employer, but refused to dismiss the defendant co-worker's cross-claims for two reasons.

First, neither of the requirements of collateral estoppel had been met (i.e., identity of issue and opportunity to confront the claim). Second, the *Talcove* court said that the 1996 amendment to the Workers' Compensation Law did not require dismissal of the cross-claims against the employer because it was not in effect at the time the action was commenced. From this, the *Gonzalez* court inferred that these common law cross-claims against the employer would be barred by the 1996 amendment *had it been in effect*, even though the co-defendant was not estopped by the Board's decision.

The *Gonzalez* court also relied upon appellate authority for the proposition that the amended workers' compensation statute "extinguished" common law indemnity claims against an injured worker's employer, except in cases of "grave injury."[23] Consequently, no such cause of action could lie. In accord with the legislature's stated intent, the court added that the owner's recovery on its indemnity claim against BDB is impermissible under the statute because, based upon the Board's findings, BDB was already obligated to provide benefits to the plaintiff.

The court acknowledged that preventing the owner from pressing its indemnity claim "may, in essence, be turning the doctrine of collateral estoppel on its head,"[24] but it found that a contrary result would run afoul of the language and intent of the statute. The court then invited the legislature to address the incongruity between the statute and the doctrine of collateral estoppel. This, however, was not the first time such an invitation was extended to the legislature.

A Legislative Solution?

Previously, the New York Court of Appeals suggested that the legislature expand the definition of parties in interest to workers' compensation proceedings, thereby expanding the number of parties to whom collateral estoppel would reach.[25] Third parties invited to participate in compensation proceedings would then be collaterally estopped by the Board's findings, avoiding duplicative proceedings and possible inconsistent results.[26]

Of course, the problem with that resolution is that it would require notice to be given to all possibly interested third parties—however remote—so that they could have an opportunity to be heard in the compensation proceeding. Difficult enough. Now consider how unwieldy compensation proceedings would become as that universe of third parties expands to five, ten, or more, as is possible when the claim arises from injuries sustained during a major construction project.

In addition to the heavy administrative burden placed upon the workers' compensation system by

such a resolution, the judicial system would be unnecessarily burdened when third parties, unforeseen by the compensation system, surface and choose to litigate the question of the employer's identity despite the Board's having already made that finding. The decision of the *Gonzalez* court alleviates these burdens by making the Board's findings conclusive and binding upon third parties against whom collateral estoppel does not apply.

"[T]he question of whether the Gonzalez *court correctly resolved the conflict between the statute and doctrine, and the larger question of whether due process was satisfied, will have to await appellate review if and when this issue arises again."*

Maxims of Statutory Construction: Are Rules Meant to Be Broken?

The *Gonzalez* decision also raises a question as to whether the maxims of statutory construction were violated. After all, a common law doctrine was abrogated to give effect to a statute. However, for the court to have given effect to both the doctrine and statute, it would have to have held that third parties must be given an opportunity to litigate the employer's identity as a threshold issue when the identity is in dispute, irrespective of a finding by the Workers' Compensation Board.

The harm of such a holding would be that the legislature's intent may be frustrated in cases where the Board finds an employment relationship and a contrary finding is made in litigation. Such an outcome would result in an employer providing both compensation benefits and paying damages which, as the *Gonzalez* court noted, is impermissible under the statute. An additional harm of such a holding is that the employer would be forced to incur possibly unnecessary litigation costs until such time as a finding is made as to the employer's identity in the lawsuit. These are evils that the legislature sought to avoid.[27]

Besides, even if the court held that third parties have a right to litigate the employer's status, such a right would largely be illusory because third parties would necessarily rely upon the employee and "employer" to establish whether there is an employment relationship. However, the employee and the "employer" are bound by the Board's decision and are precluded from taking a position in litigation that conflicts with the Board's findings.[28]

Consequently, the application of collateral estoppel will effectively deny a third party the evidence it needs to support its position. In the end, it is likely that the only evidence a third party would present in litigation will be wholly consistent with the Board's findings due to the constraints of collateral estoppel upon the employee and "employer." The result, then, will most assuredly be a ratification of the Board's findings, thereby barring the third party's claims pursuant to the Workers' Compensation Law. It is therefore fair to say that the *Gonzalez* court's decision not only avoids frustration of the legislature's intent, but also spares judicial resources by avoiding a third party's impotent effort to press a claim against the "employer."

Discerning and applying the will of the legislature is the court's role in interpreting a statute, which requires an examination of the statute's context and legislative history.[29] It has therefore been said that "however helpful the maxims [of statutory construction] when discriminately used, they should not be abused as talismanic."[30] In this case, there is little doubt that the *Gonzalez* court interpreted the statute in harmony with the legislature's intent, despite its apparent departure from the maxims of statutory construction.

Post Script

Although the owner appealed the court's dismissal of its contribution and indemnity claims, the appeal was withdrawn following an "eve of trial" settlement. Consequently, the question of whether the *Gonzalez* court correctly resolved the conflict between the statute and doctrine, and the larger question of whether due process was satisfied, will have to await appellate review if and when this issue arises again.

Endnotes

1. 1996 N.Y. Laws Ch. 635, § 1 (A. 11331).
2. *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).
3. 41 Am. Jur. 2d *Indemnity* § 38 (1995); 82 Am. Jur. 2d WCL § 446 (1992); N.Y. Work. Comp. § 11. Despite many state courts' approval of statutory barring of third party claims against employers, one court has found this provision of a workers' compensation statute unconstitutional as violative of due process. *Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974).
4. Under the statute, a "grave injury" means one or more of the following: death; permanent and total loss of use or amputation of an arm, leg, hand or foot; loss of multiple fingers; loss of multiple toes; paraplegia or quadriplegia; total and permanent blindness; total and permanent deafness; loss of nose; loss of ear; permanent and severe facial disfigurement; loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.
5. WCL § 11.

6. 1996 N.Y. Laws Ch. 635, Legis. Memo; 1996 N.Y. Laws Ch. 635, § 1 (A. 11331).
7. As used in this article, "third parties" refer to those who were not parties in interest to a workers' compensation proceeding and who seek to assert indemnity or contribution claims against another for the damages claimed by plaintiff.
8. *Gonzalez v. 17 Murray St. Corp.*, 189 Misc. 2d 158, 2001 N.Y. Slip Op. 21390, 730 N.Y.S.2d 412 (Sup. Ct., N.Y. Co. 2001).
9. N.Y. Labor Law § 240(1).
10. *O'Rourke v. Long*, 41 N.Y.2d 219, 221, 391 N.Y.S.2d 553, 556, 359 N.E.2d 1347, 1350 (1976).
11. *O'Rourke v. Long*, 41 N.Y.2d at 221; *Gerini v. Pacific Employers Ins. Co.*, 27 Cal. App. 2d 52, 80 P.2d 499 (1938); *Hazel v. Alaska Plywood Corp.*, 16 Alaska 642 (1957); *Chesser v. Louisville Country Club*, 339 S.W.2d 194 (Kentucky 1960).
12. *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15, 505 N.Y.S.2d 831, 496 N.E.2d 851 (1986); Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 Fordham L. Rev. 63 (1986).
13. *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15; *O'Rourke v. Long*, 41 N.Y.2d 219; *Fraser v. Brunswick Hospital Med. Ctr.*, 150 A.D.2d 754, 542 N.Y.S.2d 204 (2d Dep't 1989); *Pigott v. Field*, 13 A.D.2d 350, 215 N.Y.S.2d 925 (1st Dep't 1961); WCL § 25(3)(a), (b).
14. *Id.*
15. *O'Rourke v. Long*, 41 N.Y.2d 219; *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 487 (1984).
16. Statutes, Book 1, § 302.
17. Statutes, Book 1, § 301(b).
18. Statutes, Book 1, §§ 153, 301(a), (b).
19. Statutes, Book 1, § 301(b), Comment.
20. *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443 (1971).
21. *Maas v. Cornell University*, 253 A.D.2d 1, 5, 683 N.Y.S.2d 634, 636 (3d Dep't), *aff'd*, 94 N.Y.2d 87, 699 N.Y.S.2d 716, 721 N.E.2d 966 (1999).
22. 247 A.D.2d 464, 668 N.Y.S.2d 666 (2d Dep't 1998).
23. *Bartek v. Murphy*, 266 A.D.2d 865, 697 N.Y.S.2d 801 (4th Dep't 1999), *leave to appeal den.*, 95 N.Y.2d 756, 712 N.Y.S.2d 447, 734 N.E.2d 759 (2000).
24. *Gonzalez v. 17 Murray St. Corp.*, 730 N.Y.S.2d at 414.
25. *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d at 22; WCL § 25(3)(a), (b).
26. *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d at 23.
27. *O'Rourke v. Long*, 41 N.Y.2d at 221; 1996 N.Y. Laws Ch. 635, Legis. Memo; 1996 N.Y. Laws Ch. 635, § 1 (A. 11331).
28. *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d at 21; *Mohn v. Smith*, 271 A.D.2d 662, 706 N.Y.S.2d 727 (2d Dep't 2000); *Monteverde v. Delta Int'l Machinery Corp.*, 215 A.D.2d 240, 626 N.Y.S.2d 187 (1st Dep't 1995).
29. *Mowczan v. Bacon*, 92 N.Y.2d 281, 680 N.Y.S.2d 431, 703 N.E.2d 242 (1998).
30. *Becker v. Huss Co., Inc.*, 43 N.Y.2d 527, 540, 402 N.Y.S.2d 980, 984, 373 N.E.2d 1205, 1209 (1978).

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"Foreseeability" in Premises Security Lawsuits

By Alan Kaminsky and Nicole Mauskopf

One of the most confusing components in a premises liability lawsuit is that of foreseeability. To maintain a viable negligent security action against a landlord, a plaintiff must establish that: the defendant owed a duty to protect the injured crime victim; the defendant breached that duty; and the breach of the duty was a proximate cause of the criminal act and the victim's injuries. In order for duty to be proven, it must be established that a landlord had an opportunity to foresee the likelihood of crime on its property. Thus, the issue of foreseeability is of critical importance to both plaintiff and defense counsel.

A review of prominent premises security decisions sheds insight as to how a case can be defended and what criteria the courts rely on in deciding whether or not foreseeability has been established in a particular situation. A landlord is not held to a duty to provide protective measures unless there is foreseeable risk of harm resulting from activities of third persons on the premises.[1] Foreseeability in this context has generally been equated with the degree to which a landlord has been apprised of the incidence of criminality within the particular premises. In *Nallan*, the plaintiff was shot in the back by an unknown assailant while he signed in at the desk located in the building's lobby. Notably, the lobby attendant was away from his post at the time. Overturning the Appellate Division, the court decided that plaintiff did sustain a *prima facie* case of negligence and the complaint should be reinstated. Ultimately, *Nallan* recognized the duty of landlords to take steps to minimize foreseeable danger from criminal acts.

Jacqueline S. v. City of New York,[2] a case defended at trial by one of the authors, involved a 14-year-old plaintiff who was abducted in the lobby of her apartment building, one of several in a housing complex, where she was raped in the utility room. There was evidence of numerous crimes and intruders in the building complex prior to the rape. However, there was no particular instance of crime occurring in plaintiff's building. The court held that, "there is no requirement in *Nallan* or *Miller* [as in *Miller v. State*, 62 NY2d 506 (1984)] that the past experience relied on to establish foreseeability be of criminal activity at the exact location where plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected." The court further stated that whether or not the crime was foreseeable depended on the, "location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question."

In order to prove that a criminal attack by a third party is foreseeable, a plaintiff must prove that there is a likelihood of third persons posing a safety risk to those on the premises.[3] In *Todorovich, et al. v. Columbia University*,[4] the First Department held, "the foreseeability of criminal predation upon the premises [must be] legally contingent upon actual notice to the landlord of prior incidents in which ambient crime had infiltrated the building." In *Todorovich*, the plaintiffs were attacked by an armed assailant in the vestibule of their building. The plaintiffs attempted to argue that because they lived in a neighborhood notorious for crime, the building should have been on notice. However, the court felt that a landlord does not have to protect from neighborhood crime, rather only those crimes known to occur or likely to occur in its building. The defendant's building had a near-perfect security record and the plaintiffs' harm was not due to any flaw in the security system. The court therefore awarded summary judgment to the defendant.

In yet another case where the court awarded summary judgment to the defendants was *Evans v. 141 Condominium Corp*.[5] In that case, which took place in 1992, the building employed a 23-hour doorman who happened to be on his dinner break when the plaintiff was robbed. As proof of prior criminal acts in the building, plaintiff proffered that there was a murder in 1990 and a robbery in 1991. Also, there were two employees shot at an all-night deli on the same block. The court held those other incidents "too unrelated to her situation to support a claim that the instant assault was a foreseeable consequence of defendants' leaving the lobby unattended." It should be noted that this case is distinguishable from *Nallan*, *supra*, where the court found that because there were several crimes in the building, coupled with the failure of the lobby attendant to be at his post, a jury could find negligence attributable to the defendant since the plaintiff would be relying on the security guard for protection. In *Evans*, the plaintiff knew that the doorman took dinner and only worked 23 hours.

Another unforeseeable circumstance arose in *Novikova v. Greenbriar Owners Corp*.[6] In that case, plaintiff-decedent was shot in the vestibule of the building upon returning to a tenant's apartment as a guest. The plaintiff offered proof that there were approximately 21

incidents that happened in the "immediate vicinity" and thus the defendant was on notice. The Second Department held that even though in *Jacqueline S.*, *supra*, the Court of Appeals found that the past criminal conduct need not be at the exact location where plaintiff was or the same type of harm that plaintiff suffered, it "does not mean that the criminal activity relied upon by the plaintiffs to support their claim of foreseeability need not be relevant to predicting the crime in question." In fact, "to establish foreseeability, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location." In this case, only 3 of the 21 cited incidents occurred at the building, or in front of it, and none of those crimes were similar to the one suffered by plaintiff. Therefore, the court granted summary judgment to the defendant.

In *Soto v. 2101 Realty Co. et al.*,[7] the Second Department again found that adequate notice did not exist and there was no triable issue of fact. Plaintiff was assaulted while working in the lobby of the defendants' building. He asserted that the assailants gained access to the building through the sometimes-inoperable front door. However, the only evidence of prior criminal conduct in the building was statements made by the plaintiff to the managing agency that drugs were being sold in the building, that there were loiterers in the basement and that some tenants had been robbed on the sidewalk. The court found that these instances were not enough to put the defendants on notice of prior criminal activity and the need to employ minimal security measures.

Even if there have been some crimes on the premises, summary judgment can still be granted if the plaintiff is a victim of a different crime. This was the case in *Scheir v. Lauenborg*,[8] where the plaintiff was assaulted in a parking lot. The Second Department decided that plaintiff's evidence of prior criminal incidents on the premises, "failed to raise an issue of fact as those incidents were not similar to the assault on the plaintiff." It is interesting to note that the court in *Scheir* did not cite the holding of *Jacqueline S.* Yet, in *Wayburn v. Madison Land Limited Partnership*,[9] the First Department denied summary judgment and followed *Jacqueline S. supra*, holding that foreseeability can exist even if the past crimes in the building were not the exact type to which the plaintiff endured. It was only a matter of the building having notice that there was a likelihood that criminal activity might occur. In *Wayburn*, both plaintiffs were assaulted and battered and one was also raped in an office building. The only history of past crimes came from an office manager of one of the tenants of the building. She stated that there were some criminal and threatening incidents that had occurred, two attempts to pry open door locks were made, there had been thefts and strangers in the elevators who frightened people.

A recent case regarding foreseeability is *Mason v. U.E.S.S. Leasing Corp*.[10] In that case, the Court of Appeals affirmed the First Department's decision not to grant summary judgment. In this case, the assailant was a known troublemaker to the building. Therefore, a question of fact existed as to whether the defendant negligently permitted the assailant to enter the premises after being put on notice of his criminal history in the building.

Hence, unless a plaintiff is able to establish that a landowner should have foreseen criminal activity upon his premises, courts may be inclined to render decisions granting a defendant's motion for summary judgment.

Endnotes

1. *Nallan v. Helmsleye Spear, Inc.*, 50 N.Y.2d 507 (1984).
2. 81 N.Y.2d 288 (1993).
3. *See Provenzano v. Roslyn Gardens Tenants Corp.*, 190 A.D.2d 718 (2d Dep't 1993) (Plaintiff was raped and sodomized in the laundry room by a house guest of an employee of the sales agent for the premises. The court awarded summary judgment because plaintiff failed to offer any proof of criminal activity in the building that would have put the landlord on notice to take adequate measures to provide safety.).
4. 245 A.D.2d 45 (1st Dep't 1997).
5. 258 A.D.2d 293 (1st Dep't 1999).
6. 258 A.D. 2d 149 (2d Dep't 1999).
7. 266 A.D. 2d 529 (2d Dep't 1999).
8. 722 N.Y.S.2d 63.
9. 724 N.Y.S.2d 34.
10. 2001 N.Y. LEXIS. 1865.

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Regulation 68 and Proposed Legislation Changing New York's No-Fault Laws

By Gary A. Cusano

No-Fault Fraud and Abuse

New York is now the second most expensive state for automobile insurance and many believe it is well on its way to pass New Jersey and become the most expensive state in the country. Fraud and abuse of the no-fault system is seen as a major cause of the problem. Unscrupulous medical providers and Mob-backed "medical mills" are costing New York drivers $1 billion a year in excess insurance premiums. State and insurance sponsored task forces have been studying the problem as the issue has come into the public spotlight. It is a popular topic in the press.

As a result, both the state Assembly and Senate have proposed legislation and regulations to address the problem. At the same time, the state Insurance Department has promulgated Regulation 68 to address these issues as well.

Regulation 68

Regulation 68 was instituted by the Insurance Department in September 2000 as a tool to fight insurance fraud. In essence, like the proposed legislation summarized below, it reduces from 90 days to 30 days the time injured motorists have to file claims, and from 180 to 45 days the time physicians have to submit claims for medical treatment to insurance carriers.

It is believed that shorter time periods for reporting claims and treatment will reduce fraud and abuse by preventing health care providers from holding bills for up to six months until most of the treatment is already rendered. This avoids scrutiny of the medical need for the treatment and/or testing.

When Regulation 68 was first introduced, it was struck down on procedural grounds for failing to observe administrative procedures in its failure to seek other options and opinions to accomplish its goal. The regulations were reintroduced and a recent challenge was dismissed by Justice William A. Wetzel.[1] The court held that Superintendent Gregory V. Serio was well within his authority to reintroduce the regulation and did not act irrationally or unreasonably. Justice Wetzel commented on the overwhelming statistics concerning insurance fraud in New York and the fact that most businesses bill on a monthly basis and health care providers could do so as well.

The Insurance Department has suggested that now is the time for the legislature to take steps to repair the "no fault" system. Proposed bills to do just that are outlined below.

Assembly Bill A.8654 D

On June 6, 2001, the New York State Assembly passed a bill that, if made into law, would effect the most significant changes in the no-fault law in the state since 1977. While this bill does not possess the breadth of changes proposed by the Senate bill, it will have a significant impact on claims arising from automobile accidents.

The bill's provisions include:

1. A requirement that health care providers to auto accident victims notify the no-fault carrier within 30 days of initial treatment and provide proof of claim within 60 days. Pre-set standards for reasonable excuses for lateness are established.
2. Proof of suspected fraud will extend the insurer's time to disclaim beyond the 30-day time limit.
3. Requirement for arbitration for all no-fault disputes.
4. No-fault arbitration findings WILL NOT constitute collateral estoppel, either affirmatively or defensively, of the issues arbitrated. (Previously, if a suit against a third party was pending, the no-fault medical issues would never be arbitrated for fear of a binding adverse finding against the claimant.)
5. Monetary award for reporting fraudulent claims.
6. IMEs of no-fault claimants would be conducted by doctors certified and monitored by the state Insurance Department.
7. Discount in no-fault premiums for consumers if they use their own HMO or a carrier-sponsored HMO for treatment.
8. Requirement for local DA's office to appoint a special prosecutor for insurance fraud.
9. Increase criminal penalties for insurance fraud.
10. Provides a "more appropriate method" to calculate insurer excess compliance.

11. Moratorium on rate increases until January 1, 2003.

12. Superintendent review of insurer use of surcharges.

13. Requirement for insurers to file underwriting criteria with superintendent.

This bill was never passed after its introduction last year, but it has now been reintroduced with this year's new session and the Rules Committee will likely vote on it in the next few months.

Senate Bill S.5367

This Senate bill was introduced on May 23, 2001, and as of the date of this writing has not been passed. It contains many provisions similar to those in the Assembly bill, such as the regulation of excess profits from motor vehicle insurance rates, the establishment of a preferred provider organization for health care, and increased criminal and civil (license revocation) penalties. It goes much further, however.

The bill provides for a reduction in comprehensive insurance premiums by offering consumers the option of using insurance company-specified motor vehicle repair shops. It also provides insurers with the ability to inspect vehicles and obtain new part invoices in the course of a repair. It proposes an increase in the no-fault death benefit from $2,000 to $10,000. It creates minimum optional deductibles and co-payments for first-party benefits.

Perhaps the most significant of all the changes, however, is the amendment of the definition of "serious injury" under section 5102 of the Insurance Law and the denial of a right of recovery against a covered person in an automobile accident by an injured person under certain circumstances.

The bill proposes two significant changes to the "serious injury threshold" that an injured plaintiff must meet to maintain an action against a third party arising from an automobile accident. It removes from the statute the "significant limitation of use of a body function or system" definition of "serious injury." This limits the recovery to injuries that are BOTH significant AND permanent. This section also changes the subjective category of non-permanent injury as one that prevents an injured party from performing substantially all of his or her usual activities for 90 out of the first 180 days after the accident. Under this bill, the time period would be increased to 120 out of the first 180 days after the accident. A study done by the College of Insurance found that these two categories, which are difficult to verify by objective analysis, account for 57 percent of all bodily injury claims. It was felt that the attempts to "pierce the threshold" under these categories resulted in unnecessary diagnostic testing and excessive health care treatment.

Section 5104 of the Insurance Law is amended by adding two new subsections. The first denies a right of recovery by a person injured in an auto accident against a covered person if, at the time of the accident, the injured person was:

- the owner or operator of a vehicle known to be uninsured;
- committing a felony or fleeing arrest;
- operating or occupying a vehicle known to be stolen;
- operating a vehicle while intoxicated or impaired by alcohol or illegal drugs.

The second section creates a presumption of knowledge by a vehicle owner of his or her failure to have the vehicle properly insured, seven days after the insurer or its agent mails the notification. Therefore, seven days after the notice is mailed, that vehicle owner cannot sue a third party for injuries as a result of an auto collision.

This bill "died" on the state Senate floor last year but, like its sister bill in the Assembly, it was reintroduced in January 2002. It has not yet been scheduled for a vote.

Conclusion

Both of these bills are important first steps in modifying a system that has been the subject of significant fraud and abuse. The Senate bill has the broader scope since it addresses both first- and third-party claims abuse. However, the Assembly bill seems more complete in dealing with the first-party claims. The recent ruling upholding Regulation 68 will likely be addressed in the Appellate Division.

Endnote

1. *Medical Society of the State of New York v. Serio*, 116519/01, N.Y.L.J., Feb. 22, 2002, p. 17 (Sup. Ct., N.Y. Co.).

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Employment Practices Liability Insurance

By Stephen J. Paris and Eric A. Portuguese

I. Overview

Beginning in the early 1990s, in response to the rapid increase in employment-related lawsuits, and the lack of coverage for most employment-related claims under standard commercial general liability (CGL) policies, many insurers began issuing a new form of coverage, the Employment Practices Liability Insurance (EPLI) policy. Because employers have faced increased exposure to employment-related claims, the demand for this new product has grown steadily. Since this coverage is still relatively new, the policies are far from uniform, and there are very few reported cases interpreting the EPLI policies. Therefore, care is required in selecting the appropriate carrier since there are significant differences.

This type of policy is not a broad, comprehensive policy, like the CGL policy, but is instead a type of "named peril" policy covering certain defined "wrongful acts" or "wrongful employment acts." The Insurance Services Office (ISO) has developed an Employment Practices Liability Coverage Form (EP 00010498), in which the policy refers to a covered "injury," which in turn defines the covered employment-related offenses. Typically, the EPLI policy is written on a claims-made basis, and defense costs almost always are included within policy limits (i.e., defense costs reduce available limits).

Most policies give the insurer the unfettered right to select defense counsel. In some cases, the insured can negotiate for the right to select counsel. In others, defense counsel can be pre-agreed.

Care should be taken to ascertain whether the policy merely requires the claim to be first made during the policy period, or if the claim has to be both made *and* reported during the policy period. Most states have enforced the "claims-made" or "claims-made and reported" policy requirement as conditions precedent to coverage, without a showing of prejudice. Also, most EPLI policies provide that an administrative agency's notification of charges against the insured constitutes a "claim" under the policy.[1] In addition, like any claims-made policy, the EPLI policy may have a clause dealing with inter-related claims. For example, a particular employee's claim for retaliation was related to the same employee's earlier sexual harassment claim so that both claims would be deemed a single claim for the purposes of reporting to the carrier.[2]

One should also be aware of the policy's retroactive date, if any, which would preclude coverage for wrongful employment practices committed before the retroactive date regardless of the fact that the claim was first made during the policy period. However, most stand-alone EPLI policies currently being issued do provide full-prior acts coverage, but care must be taken to be sure this is the case.

"Care should be taken to ascertain whether the policy merely requires the claim to be first made during the policy period, or if the claim has to be both made and *reported during the policy period."*

Some EPLI policies give the insurer total control over settlements, and the insurer need not even confer with the insured concerning settlement decisions. This is not good from an insured's perspective, given the sensitive nature of EPL-type claims. Other EPLI policies require the insured's consent to a settlement. However, be aware of what is sometimes referred to in the vernacular as the "hammer clause." These "consent to settlement" provisions stipulate that if an insured fails to consent to a settlement recommended by the insurer, the insured becomes responsible for any additional amounts in a higher ultimate judgment or settlement plus all defense costs incurred after the refusal to settle. However, these provisions at least give the insured some control over settlements and are preferable to those policies which give the insurer total control over settlements.

EPLI policies often contain a deductible or a self-insured retention (SIR). A few provide for co-payment, which requires the insured to pay a portion of any loss, usually five to ten percent over and above the deductible or SIR. In this article, we will discuss the coverage and exclusions in the typical EPLI policies, as well as the more limited employment-related coverages found in other policies, such as Director's and Officer's (D&O) and CGL policies.

II. Typical Coverages Under EPLI Policies

The key exposures covered under most EPLI policies are: sexual harassment, discrimination, and wrongful termination. Sexual harassment is typically defined as "unwelcome sexual advances, requests for sexual favors, or other visual or physical conduct of a sexual

nature when such conduct: (1) is linked with a decision affecting an individual's employment; (2) interferes with an individual's job performance; or (3) creates an intimidating, hostile or offensive work environment for an individual (see ISO EPLI form). Thus, this definition includes both "quid pro quo" and "hostile environment" cases.

Discrimination coverage would typically include a violation of a person's civil rights with respect to race, color, national origin, religion, gender, marital status, age, sexual orientation, pregnancy, or physical or mental condition (disability). The ISO EPLI definition also includes "or any other protected class or characteristic established by any federal, state or local statutes, rules or regulations."

Wrongful termination generally is defined as termination of an employment relationship which is against the law or in breach of an implied agreement. Some EPLI forms, like ISO, cover termination of employment only based on discrimination. This leaves open the question of whether a termination of employment based on violation of public policy is covered under the particular EPLI policy.

Some EPLI policies have much broader coverages to include claims for: wrongful failure to employ, wrongful failure to promote, negligent evaluation or discipline, wrongful deprivation of a career opportunity, failure to grant tenure, negligent supervision, employment-related defamation, employment-related infliction of emotional distress, invasion of privacy or employment-related misrepresentations. An insured should carefully analyze the definitions of covered "offenses." In addition, some insurers offer third party (i.e., non-employee-related) discrimination coverage by endorsement.

Under stand-alone EPLI policies, the insured organization is a "named insured." Be careful under employment-practice coverage endorsements added to D&O policies, because the "insured" may be limited to only the individual directors and officers. Some EPLI policies include only employees who hold "managerial or supervisory positions." Others define "insured" to include all employees acting within the scope of their employment with the named insured. It is possible, for example, that any employee could be accused of discrimination or sexual harassment regardless of managerial status. In addition, because many employers obtain workers from employee leasing firms, be careful to determine if the policy also includes "leased workers," i.e., persons leased to the named insured organization by a labor leasing firm. In appropriate circumstances, volunteers may be included in the definition, by endorsement. The broadest coverage of all in this regard would be for "independent contractors" who commit or are alleged to have committed discrimination, harassment, or other wrongful employment acts. Most EPLI policies exclude coverage for "independent contractors," but the few that do provide such coverage require that their work be "supervised and controlled" by the insured entity.

Virtually all of the EPLI policies (except for a few that provide defense-only coverage) cover settlements and judgments which include back pay and front pay, compensatory damages and statutory attorney's fees, as well as defense costs. Most of the policies specifically exclude civil and criminal fines. The policies are split on the issue of coverage for punitive damages. The issue of punitive damage could be problematic if the applicable state bars coverage for punitive damages as a matter of pubic policy. This is an important issue since punitive damages are awarded in most employment-related cases. This being the case, an insured would be well-advised to seek a policy which expressly covers punitive damage accompanied by an appropriate designation of venue provision. Also not included are coverage for loss of insurance plan benefits (e.g., health insurance coverage) owed to an employee, ADA compliance, or non-pecuniary costs arising from the internal costs necessary to reinstate a former employee or employing an applicant.

III. Typical EPLI Exclusions

It is important to note that the exclusions found in EPLI forms vary in number and scope among the various insurers. Many EPLI insurers exclude "criminal, fraudulent or malicious acts." The ISO policy also excludes acts or omissions "arising out of that insured's knowing acquiescence or failure to act, or instruction, direction or approval given to another concerning such acts or omissions." Some policies specifically exclude "innocent insureds" from the exclusions related to "intentional acts." Also, most EPLI policies exclude liability arising out of "bodily injury" on the basis that such is compensable under workers' compensation laws. Query, in a state such as New York (where pure emotional distress constitutes "bodily injury"), does this exclude mental anguish? Some policies exclude "emotional distress, mental anguish, or humiliation" from the definition of the excluded "bodily injury" claims.

Typically, the EPLI policy will also exclude "contractual liability," workers' compensation, social security, unemployment, retirement or disability benefits, obligations under the Americans with Disabilities Act (ADA), injury to employees involved in strikes or lockouts, termination of employment because of corporate reorganization or downsizing (although this is available), NLRB decisions, and Employee Retirement Income Security Act (ERISA) matters. Many policies

exclude coverage for the failure to comply with the Workers' Adjustment Retraining Notification (WARN) Act, governing the notice to be given to employees in connection with plant closing. The downsizing or reorganization exclusion many vary as to the percentage (5-20 percent) of employees terminated at any given location, which triggers the exclusion. Some policies, including ISO, exclude coverage for "retaliatory actions"—an insured's retaliatory employment action because an employee has filed a claim or has given testimony against the insured. Others include retaliation as a covered "wrongful-employment act." Even the broader definition of "retaliation" coverage does not apply to claims brought under any federal, state or local whistle-blower law.

Another exclusion bars coverage for "circumstances or events" which the insured was aware of prior to the policy's inception date. Also, most EPLI insurers require potential insureds to disclose in their policy applications all known incidents or circumstances that might lead to claims being made under the policy. Some insurers only require disclosure of incidents which are the subject of written notices of such incidents to management. In any event, disclosure of such events would likely trigger the "prior knowledge" exclusion as well as a later exclusion pertaining to those specific circumstances. The failure to disclose known incidents that later become claims could result in the insurer seeking rescission of the policy for material misrepresentations. EPLI applications tend to be lengthy and detailed, and should be filled out completely and carefully.

IV. Interplay with CGL and D&O Coverage

Under a standard CGL policy, most sexual harassment, discrimination and wrongful discharge claims would not be covered since there would be no "occurrence" under the policy.[3] However, there may be coverage for allegations of disparate impact discrimination.[4] The *American Management Association* case relied upon a circular letter from the New York State Insurance Department, dated May 31, 1994, which concluded that "liability coverage for acts of discrimination, when based solely on either disparate impact (as opposed to disparate treatment) or vicarious liability, would not be against public policy."

In New York, "bodily injury" is deemed to include pure emotional distress or mental anguish.[5] A CGL policy, however, would not cover liability for back pay or front pay, or for any lost income or benefits.

The CGL policy has an "employee exclusion" barring coverage for "bodily injury" arising out of employment by the insured. The exclusion may not apply to post-termination hours, or off-hours (or off-premises) sexual harassment where the employee-claimant was not in the scope of employment.

Many CGL policies, including the ISO form, also include an "employment-related practices exclusion," the mirror image of the EPLI policy. The employment-related practices exclusion generally bars coverage for employment-related practices such as harassment, defamation or discrimination.[6]

Most D&O policies only cover claims for "wrongful acts" by the individual officers and directors; they do not usually cover claims against the corporation as a whole, apart from the corporation's indemnity liability to the officers and directors. Furthermore, there is generally no D&O coverage for directors and officers acting outside of their official capacity. This should restrict coverage for sexual harassment which serves no legitimate business purpose. Also, the D&O policy often contains an insured-versus-insured exclusion barring coverage for a suit by one insured against another. This will affect only claims made between officers and directors since D&O policies have a specific employment-related practices exclusion similar to the CGL exclusion. In contrast, some D&O insurers now offer an Employment Practices Liability (EPL) endorsement, extending coverage for wrongful discharge, sexual harassment, discrimination and other specified employment-related claims. The EPL endorsement may or may not cover the corporation itself. Absent entity coverage for the corporation itself as an insured, the underlying liability may not attach to the individual officer or director. It is possible, however, that the individuals could be sued when they have direct involvement in employment decisions. Also, D&O policies frequently exclude coverage for "bodily injury" claims. Since the coverages under the CGL and D&O policies may provide only limited, if any, coverage for employment-related claims, most companies would be advised to purchase stand-alone EPLI policies. The companies could adjust the policy's deductibles and co-payment provisions to achieve cost savings.

Another reason why a stand-alone EPLI policy is preferable is the fact that an entity's D&O coverage, or a law firm's Management Liability and Professional Liability policies, are extremely important protections. It would not, in our judgment, be prudent to jeopardize the aggregate limits of liability of those other policies by subjecting them to an EPL claim, which might be totally out of the control of the directors and officers of a corporation or the management of a law firm. It is preferable to maintain a separate tower of coverage for these specialized EPL claims. Finally, in this regard, placing EPLI on a stand-alone—rather than as an add-on to a D&O, Management Liability or Professional Liability—policy has the decided advantage of bringing to bear a dedicated, experienced team of specialists to handle claims.

There are other enhancements and advantages an insured, and a law firm, should consider when deciding upon EPL insurance. For example, some insurers are offering extensive risk management services to accompany their policies, often at no additional cost. These vary, but often include a Web site with Web-enabled training and testing (a built-in defense), full-time experts at the ready, multiple hot lines, etc.

Insofar as their own coverage is concerned, law firms should be aware that some insurers will permit a firm to defend itself at the administrative stage, if it so desires. With respect to the firm's clients, some carriers are very flexible in the pre-approval of defense counsel. This is of value to the firm as an insured, and in its capacity in counseling its clients upon the selection of an EPL insurer.

V. Conclusion

The foregoing is intended to provide a primer in the field of EPLI. Obviously, care must be taken and a more in-depth understanding employed when it comes to the selection of a policy form, an insurer, and an interpretation of coverage as it may apply to any given set of circumstances. Hopefully, this article will provide a useful beginning.

Endnotes

1. *See Specialty Food Systems, Inc. v. Reliance Insurance Co. of Ill.*, 45 F. Supp. 2d 541 (E.D. La.), *aff'd*, 200 F.3d 816 (5th Cir. 1999).
2. *See Pantropic Power Products, Inc. v. Fireman's Fund Insurance Company*, 141 F. Supp. 2d 1366 (S.D. Fla. 2001).
3. *See, e.g., Green Chimney School for Little Folk v. National Union Fire Insurance Co., of Pittsburgh, Pa.* 244 A.D.2d 387, 664 N.Y.S.2d 320 (2d Dep't 1997) (no coverage for sexual harassment); *Mary & Alice Ford Nursing Home Co., Inc. v. Fireman's Insurance Co. of Newark, N.J.*, 86 A.D.2d 736, 446 N.Y.S.2d 599 (3d Dep't), *aff'd*, 57 N.Y.2d 656, 454 N.Y.S.2d 74 (1982) (no coverage for discrimination based on disability).
4. *See, e.g., American Management Ass'n. v. Atlantic Mut. Insurance Co.*, 168 Misc. 2d 971, 641 N.Y.S.2d 802 (N.Y. Co., Sup. Ct. 1996), *aff'd*, 234 A.D.2d 112, 651 N.Y.S.2d 301 (1st Dep't 1996) (age discrimination).
5. *See Lavanant v. General Accident Insurance Co. of America*, 79 N.Y.2d 623, 584 N.Y.S.2d 744 (1992).
6. *See Collins Building Services, Inc. v. United Capitol Insurance Co.*, 1999 WL 259519 (S.D.N.Y. 1999) (sexual assault or harassment); *Berman v. General Accident Insurance Co. of America*, 176 Misc. 2d 13, 671 N.Y.S.2d 619 (Sup. Ct., N.Y. Co. 1998) (defamation); *Frank and Freedus v. Allstate Ins. Co.* 45 Cal. App. 4th 461 (1996); *Agricultural Insurance Co. v. Focus Homes*, 212 F.3d 407 (8th Cir. 2000).

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Book Review

A Complete Guide To Premises Security Litigation, Second Edition
(American Bar Association, 2001)
By Alan Kaminsky

Reviewed by Paul S. Edelman

Alan Kaminsky, who has been a prolific legal writer and oft times a contributor of his legal research to this *Journal*, has written a second edition of his book on premises security. This is a book that covers every aspect of the subject and records cases from all the jurisdictions of the country. For New York lawyers, there is a concise primer on what the New York courts require for a plaintiff to get past a summary judgment motion.

"[A Complete Guide To Premises Security Litigation, Second Edition,] *covers every aspect of the subject and records cases from all the jurisdictions of the country.*"

A list of topics discussed provides the reader with some idea of the breadth of the book's coverage.

Statistical Information and Elements of a Premises Security Claim

This section deals with a discussion of the fact that plaintiffs' verdicts can be very high, that settlements are also high in a proper case and that defense costs through trial can exceed $50,000.

The areas covered for these types of claims are not only residential buildings, but dormitories, shopping malls, day care centers and other areas that one might not consider the usual locations for these types of assault cases. Three elements must be proven: a duty, the relationship of the parties and foreseeability. Proximate cause is the high hurdle, since these are claims where the actual assailant is not a party. Most important is how the assailant achieved entry to the premises. Was it a security lapse or the lack of reasonable security features?

Other chapters involve investigation, defense strategies, use of experts and dealing with psychological and emotional injuries. One psychologically interesting chapter deals with these cases through the eyes of a jury; another, "Lessons Learned From Trials." One interesting chapter deals with suggestions for claims personnel.

Part II is a case study based on an amalgam of cases Mr. Kaminsky has tried. Part III has case law and discussions involving the law in each of the 50 states. The legal requirement varies from the very liberal, favoring the plaintiff, to the very conservative, where, in effect, a plaintiff must show such similarities in prior events that recovery is very rare, if at all. For our readers, the discussion of New York law brings the reader up to date. Cases since publication of the book testify that the essence of handling these cases is dealt with in the very readable and interesting treatment of the issues. The long list of people who helped, indicate the extensive research that went into the publication.

Editors' Note

In the Fall 2001 issue of the *Journal*, the article on Civil Rights was attributed to Paul J. Suozzi, of Buffalo, the Chairman of the Municipal Law Committee of this Section. Although this article and several others were written under the aegis of the Municipal Law Committee, the article, "Civil Rights, False Arrest and Excessive Use of Force," was actually written by Vincent R. Fontana, of Garden City, New York.

We regret the error very much.

Book Review

Successful Partnering Between Inside and Outside Counsel
(West Group and the American Corporate Counsel Association)
Robert L. Haig, Editor-in-Chief

Reviewed by John M. Nonna

Counsel representing corporate clients, whether within a corporate law department or in private practice, face complex relationship issues ranging from ethical and professional responsibility issues to budgeting issues to planning and strategy issues in transactional and litigation engagements. Today counsel are faced with detailed guidelines regarding how one is to represent the client, how one is to bill the client and how one is to perform legal research for the client. In-house counsel have the difficult task of administering these guidelines and outside counsel have the more difficult task of complying with them. At the center are an outside lawyer and an in-house lawyer who must learn to work together as a team and appreciate their respective roles and constraints.

"As a reference work, [Successful Partnering Between Inside and Outside Counsel] *should be on the bookshelf of every lawyer with responsibility for corporate clients."*

Capitalizing on his success in creating comprehensive resources for commercial litigators in the New York State and federal courts, Robert Haig has brought together a blue ribbon panel of general counsel of major corporations and eminent private practitioners to create a reference work for in-house and outside counsel who must deal with the many facets of corporate legal representation. This four-volume, 6,032-page treatise, entitled *Successful Partnering Between Inside and Outside Counsel*, was published in a joint venture between West Group and the American Corporate Counsel Association. One may not read this encyclopedic opus as one would read a novel or non-fiction work. Rather, it should be regarded as a reference work to which counsel can turn for insight and guidance on a myriad of facets of the corporate client relationship. As a reference work, it should be on the bookshelf of every lawyer with responsibility for corporate clients.

This work covers a whole panoply of topics concerning the corporate attorney-client relationship. One is the formation of the attorney-client relationship. Chapters 2 through 9 of *Successful Partnering* address how a corporation should decide whether to retain outside counsel (as opposed to using its own in-house legal resources), how to go about selecting counsel, how to be selected as counsel to a corporate entity and the ever-popular topic of fee arrangements. There is also a very useful chapter on engagement letters and dealing with corporate policies and regulations regarding the performance of legal services such as billing and dealing with the media. These chapters also contain sample forms for engagements letters, fee arrangements, requests for proposals and responses.

A second broad subject area deals with the relationship between the corporate entity, corporate counsel and outside counsel. There is an especially useful chapter on communications methods and skills which contains an informative survey of the views of corporate clients on methods of communication (video conferencing, phone, e-mail, in person meetings) and styles of communication. Another useful chapter in this subject area is one on decision tree analysis.

Complementing the chapter on fee arrangements are two others concerning "Billing and Expenses" and "Disbursements." The chapter on billing contains the Uniform Task Billing Management Code Sets which are also provided on disk. Many corporate clients, particularly insurance companies, now require that firms representing them on any matter generate bills that comport with these codes.

The chapters entitled "The Relationship Between the Legal Department and The Corporation" and "Law Department Management" provide valuable commentary on the organization, management and functioning of the in-house legal department. There are also chapters on the organization and structure of various-sized law departments.

Other subject areas comprehensively treated are professionalism, ethics and licensure. Of particular interest to insurance practitioners is a chapter entitled "Representing a Client with Insurance." This chapter discusses the relationship between counsel, the insured and insurer. It is a succinct yet thorough treatment of this complex area.

Finally, there are a number of chapters that deal with specialized issues such as deciding whether local or specialized outside counsel are needed, the use of coordinating counsel and hiring counsel for legal work in foreign countries. The final chapter of Volume 1 of the treatise is valuable for practitioners representing European corporate entities in U.S. litigation. It addresses the specific relational, substantive and procedural legal issues that arise in the context of such representation.

"[I]t is difficult to do justice to this monumental reference work in a short book review. I have tried to provide a flavor of just how comprehensive and ambitious a project this work is."

Successful Partnering is more than a comprehensive treatment of the formation, fostering and nurturing of the corporate attorney-client relationship. It goes on to address particular issues that corporate counsel confront in a variety of substantive legal areas. Volumes 3 and 4 of this comprehensive work deal with corporate governance, internal investigations and various transactional areas such as information technology, mergers and acquisitions, commercial finance, bankruptcy, joint ventures, employee benefits, advertising issues, patents and trade secrets, copyright, environmental law, real estate and mass torts. There are also a number of chapters on various litigation topics—pleading, discovery, experts, trial preparation, settlement, and appeals. The list is exhaustive. The work ends with a series of case studies of how major corporations in the United States manage complex litigation and transactional issues.

As a reviewer, it is difficult to do justice to this monumental reference work in a short book review. I have tried to provide a flavor of just how comprehensive and ambitious a project this work is. Just assembling the authors and coordinating their topics was itself a challenge to the editor-in-chief who has obviously learned how to master the task of putting together a work of this scope and depth.

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Recent Court Decisions Which May Impact Your Practice

By Kevin Lane and Adam Ferrandino

Insurance Coverage

Agency: No agency relationship existed between bank and insurance broker for courier based upon bank's requirement that courier company bidders maintain six different types of insurance. *Chase Manhattan Bank v. Each Individual Underwriter Bound to Lloyd's Policy No.* 790/004A89005, 731 N.Y.S.2d 150 (1st Dep't 2001).

Arbitration Venue: Court could not *sua sponte* transfer venue of proceeding to stay arbitration, even if arbitration was brought in wrong county. This must be done upon motion or consent. *Phoenix Insurance Co. v. Casteneda*, 731 N.Y.S.2d 224 (2d Dep't 2001).

Binders: Insurance binder is an interim policy of insured in effect only until an assessment of risk is completed by the carrier and policy issued or coverage refused. *Gatti v. Alliance Group of Western New York*, 731 N.Y.S.2d 327 (Sup. Ct., Monroe Co. 2001).

Binders: Insurance Law § 3426(b), requiring specific procedures for canceling a policy (no cancellation is effective until 20 days after written notice mailed to insured and insured's agent or broker), applies to binders. *Gatti v. Alliance Group of Western New York*, 731 N.Y.S.2d 327 (Sup. Ct., Monroe Co. 2001).

Disclaimer: Grounds for disclaimer must be clearly, specifically stated or cannot later be raised as affirmative defense. To wit, insurer disclaimed on ground that no notice was provided regarding the damage to a concrete slab. Later raised defense of no notice of a later collapse, caused by the damaged slab. Court held that insurer had waived defense of collapse, even though it was caused by slab, because not specifically raised previously. *Benjamin Shapiro Realty Co. v. Agricultural Insurance Co.*, 731 N.Y.S.2d 453 (1st Dep't 2001).

Garage Policy: No liability exclusion (exclusion which excludes coverage under garage policy if other valid automobile insurance exists) is not against public policy. *State Farm Mutual Automobile Insurance Co. v. John Deere Insurance Co.*, 733 N.Y.S.2d 198 (2d Dep't 2001).

Statute of Limitations: Plaintiff's claim for disability benefits accrued when the plaintiff received denial of reconsideration of initial termination of benefits, not initial termination of benefits. *Block v. Teachers Insurance & Annuity Ass'n of America*, 731 N.Y.S.2d 138 (1st Dep't 2001).

Labor Law

Applicability of 12 N.Y.C.R.R. § 23-9.7(e) Expert Testimony: Plaintiff was injured while being transported to the work site in the bed of a pick-up truck. The truck drove over railroad tracks that had a sharp drop resulting in an injury to plaintiff's back. Although there was conflicting expert testimony concerning the applicability of the regulation, the jury returned a verdict finding a violation of Labor Law § 241(6). The verdict was set aside by trial court. The Appellate Division reversed, finding that it was an abuse of discretion for the court to do so. The conflicting testimony of expert witnesses raised an issue which was solely to be determined by the jury. *Clause v. E.I. DuPont, et al.*, 284 A.D.2d 966, 726 N.Y.S.2d 317 (4th Dep't 2001).

Applicability of Regulation: Plaintiff was a member of a crew laying a sewer pipe and was cleaning it prior to it being placed in a trench. He was injured when he was struck by the boom of a backhoe that was used to excavate the trench. Sections 23-9.5 and 23-9.4(h) of 12 N.Y.C.R.R. did not apply. Section 23-9.4(h) relates to "unauthorized" persons being adjacent to a power shovel which was in operation. Plaintiff clearly was part of the crew and thus was not unauthorized. Section 23-9.5(c) provides that "no person other than the . . . excavating crew" is to be within the range of a different bucket which is being used for digging. *Mingle v. Barone Development Corp.*, 283 A.D.2d 1028, 723 N.Y.S.2d 803 (4th Dep't 2001).

Covered Activity: Plaintiff reported to work on the roof of a building under construction. As plaintiff walked toward his foreman to get instructions, he stepped onto a piece of yellow insulation where a roof panel had been removed. Plaintiff fell 21 feet to the floor below. Blood-alcohol tests taken in the emergency room indicated that plaintiff's blood level was 0.27 mg/dl (a B.A.C. of approximately 27 percent). The issue of plaintiff's intoxication as the sole cause of the accident did not defeat plaintiff's summary judgment motion under Labor Law § 240(1) in light of the fact that no safety devices were in place to prevent the plaintiff from falling through the roof. *Sergeant v. Murphy Family Trust*, 284 A.D.2d 991, 726 N.Y.S.2d 537 (4th Dep't 2001).

Covered Person: Plaintiff and his wife were walking on a sidewalk adjacent to a building that was under construction. The sidewalk was barricaded. As a result,

they crossed the street. In doing so, plaintiff's wife was struck by a motorcycle and died. Since neither plaintiff was employed by any of the defendants or permitted to work on the site, they were *not* covered under Labor Law § 200 nor § 241(6). *Fonzi v. Beishline Jr.*, 705 N.Y.S.2d 470 (4th Dep't 2000).

Covered Worker: Plaintiff was injured when he slipped and fell on snow and ice at construction site. At the time of accident, plaintiff was walking across an open lot as part of his duties of taking water readings at the buildings located near the construction site. Plaintiff deemed not to be engaged in "construction project" and thus not within class of persons entitled to protection under Labor Law § 241(6). *Morra v. White*, 714 N.Y.S.2d 510 (2d Dep't 2000).

Definition of Contractor: A party who has the authority to enforce safety standards and choose responsible subcontractors is a "contractor" under Labor Law § 240. Moreover, where an entity had right to exercise control over the work, irrespective of whether it actually exercised that right, contractor status applies. *Williams v. Dover Home Improvement, Inc.*, 714 N.Y.S.2d 318 (2d Dep't 2000).

Elevation-Related Risk: Plaintiff was injured when he fell approximately 8 feet after stepping on a sheet of particle board. The board had been placed over the cement-walled foundation of the front porch. The court determined that the porch was part of the structure. Thus the particle board was a "platform" or functional equivalent of a scaffold. In a strongly worded dissent, Justice Lawton indicated that this case was indistinguishable from a number of prior cases decided by the court including *Riley v. Stickl Construction Co.*, 662 N.Y.S.2d 660 (4th Dep't 1997), and *Tomlins v. Siltone Building Co.*, 699 N.Y.S.2d 854 (4th Dep't 1999).

Elevation Risk: Plaintiff was working in a trench putting together pipes and pipe fittings. Part of the trench wall collapsed and pipe fitting which had been laid on top of the trench slid down into it. Plaintiff attempted to prevent it from hitting his co-worker (his father) by putting his hand up. As a result, the pipe fitting hit his hand and jammed his hand between the pipe and the side of the trench. Supreme Court properly dismissed Labor Law § 240(1) cause of action since there was no "elevation related" hazard associated with the injury-producing events. The court further found, relying upon the Fourth Department's decision in *Staples v. Town of Amherst*, 540 N.Y.S.2d 926, that cave-in of the trench did not implicate Labor Law § 240. *O'Connell v. Consolidated Edison Co.*, 714 N.Y.S.2d 328 (2d Dep't 2000).

Exception for One and Two Family Dwelling: Plaintiff's employer was hired to install a roof on new home of defendants. The owner of the house was at the site from time to time and also independently hired certain subcontractors to perform work at the site. The court determined that this was insufficient to establish direction, control and supervision over the work of the plaintiff. *Schultz v. Iwachiw*, 284 A.D.2d 980, 725 N.Y.S.2d 511 (4th Dep't 2001).

Exemption for Owners of One and Two Family Dwellings: There is no direction or control if the owner of the property informs worker that work should be performed. Rather, direction and control only occurs if owner specifies how that work should be performed. Pleadings raised issue of fact of whether the owner of the premises informed plaintiff, who was injured when he tripped in the foyer of the house and fell through a stairwell to the basement, how to perform certain work in the premises. *Gambee v. Dunford*, 705 N.Y.S.2d 755 (4th Dep't 2000).

Exemption for One and Two Family Dwelling: Contractor was hired to build a cabin to be used by property owners as a hunting lodge. He was injured during the course of construction. The cabin was to have a basement, a small office and two bedrooms. Evidence indicated that defendants planned to use it for sleeping and eating when they went hunting and there was no commercial use anticipated of the cabin. Since it was clear that the cabin was intended to be for the private use of its owners who would dwell (although temporarily) in it, one and two family dwelling exception applied. Thus, claims under Labor Law §§ 240(1) and 241(6) dismissed. *Heerema v. Kenul*, __ A.D.2d __, 733 N.Y.S.2d 101 (2d Dep't 2001).

Fall From Elevated Work Site: Plaintiff was working on second floor of building in the area known as the "boiler platform." This area was made of metal grading and occupied half of that portion of the building. Plaintiff's employer was hired by owner to remove four electrical precipitators which extended through the platform. When they were removed, there were holes remaining (15 foot by 20 foot) which were surrounded by guardrails. However, the last precipitator that was removed was not guarded. Plaintiff was assisting in the removal of a valve from the wall and was approximately five feet away from the unguarded hole. When the valve was cut off the wall, it struck plaintiff causing him to stumble backwards and fall through the hole 20-25 feet to the ground. Liability under Labor Law § 240 established as a matter of law. *Skinner v. Oneida-Herkimer Solid Waste Management Authority*, 275 A.D.2d 890, 713 N.Y.S.2d 794 (4th Dep't 2000).

Fall From Ground Level: Plaintiff was injured when he slipped or tripped on electric wires and fell into a wastewater treatment tank. Cause of action under Labor Law § 240(1) does not lie as a matter of law. A worker who falls into opening from ground level while traversing a work site is not covered. *Johnson v. City of Corning*, 702 N.Y.S.2d 489 (4th Dep't 2000).

Fall From Ladder Insufficient to Impose Liability: Plaintiff was injured when he fell from a ladder while working on a home improvement project. Plaintiff testified at his EBT that the ladder shifted to his right as he fell. However, a co-worker indicated that the ladder did not lean but remained straight. At the hospital, the plaintiff could not recall how the accident occurred. The mere fall from a ladder by itself is not sufficient to impose liability under Labor Law § 240 in the absence of showing that the ladder was defective. Thus, issue of fact existed as to whether or not the ladder provided adequate protection as required by Labor Law § 240. *Williams v. Dover Home Improvement, Inc.*, 714 N.Y.S.2d 318 (2d Dep't 2000).

Gravity-Related Event: Plaintiff was injured during the course of the construction of the Lyonsdale Power Plant. At the time of his injury, the plaintiff was on the top of a 12 foot high condenser tank attempting to locate a vacuum leak. While he was doing so, a seal on the tank gave way causing it to implode and thus drawing the plaintiff partially inside the tank. Plaintiff attempted to establish, through expert testimony, that the implosion was caused by a difference in the air pressure and that the force of gravity caused this air pressure differentiation. The court determined that the injury-producing event was not the type of "special hazard" encompassed by Labor Law § 240(1) and dismissed that portion of the complaint in this regard. *Luckern v. Lyonsdale Energy Limited Partnership, Inc.*, 281 A.D.2d 884, 722 N.Y.S.2d 632 (4th Dep't 2001).

Hazards Within Statutes: Plaintiff was injured while he was on top of a scaffold. The scaffold could be "moved" through a motorized system. He was injured when he struck his face and head on overhead duct work while the scaffolding was being moved from one location to another within the work site. The Court determined that this was not the type of risk within the ambit of Labor Law § 240(1). *Rohrback v. Legion Associates Joint Venture*, 283 A.D.2d 994, 724 N.Y.S.2d 392 (4th Dep't 2001).

Improper Hoisting: Plaintiff was injured at a work site while he and his co-worker were constructing a scaffold. The scaffold consisted of two ladders placed against the building with a "pick" suspended from "jacks" which were located on the ladders. As a co-worker began to climb one of the ladders, he was holding one end of the pick while plaintiff (who was on the ground) supported the other portion of it. The pick is described as being 24' by 22" and weighing about 200 pounds. When the co-worker was approximately 12 feet up the ladder, he lost his grip, the pick fell and struck the plaintiff on the shoulder. The plaintiff was injured as a result of being struck by an object that was being improperly "hoisted" and thus fell within the protection of Labor Law § 240(1). *Micoli v. City of Lockport*, 281 A.D.2d 881, 721 N.Y.S.2d 891 (4th Dep't 2001).

Issue of Fact of Whether Labor Law § 240 Was Violated: Plaintiff claims that he was injured when a personal hoist in which he was riding "free fell" several floors stopping abruptly and crashing into springs at the bottom of a shaft. Plaintiff asserted that this action violently propelled him against the hoist walls causing injuries to his knee and back. Despite the fact that two independent reports of the accident were consistent with each other, the court determined that a fact question existed. The first report was generated solely from information provided by plaintiff. This report (to his employer) was utilized then to create a report to the general contractor. There is no indication from the other twenty workers on the hoist of any incident nor did anybody else report this accident. *Falsitta v. Metropolitan Life Insurance Co.*, 719 N.Y.S.2d 373 (3d Dep't 2001).

Labor Law § 240(1): Building Engineer Not "Employed": Plaintiff was employed as a chief engineer by the managing agent of an apartment building. General contractor at site was to perform renovation work. The contractor requested that the engineer close a water valve in the ceiling so that the contractor could proceed with plumbing work which was part of project. While closing the valve, plaintiff fell off a ladder. Claim under Labor Law § 240(1) dismissed since plaintiff was not "employed" within the meaning of that section to perform any work in relation to the renovation. Even though the task of closing the valve may be regarded as an incident of the renovation work, plaintiff did not fall within the ambit of that statute. Rather, he was performing the task as part of his regular duties. *Petermann v. Ampal Realty Corp.*, 733 N.Y.S.2d 9 (1st Dep't 2001).

Labor Law § 240(1): Height Differential: Plaintiff was hired to install insulation panels on outside of building. Panels weighed between 50 to 80 pounds and were installed in a track located on a wall four feet above the ground. A rope was tied around the panel and the panel lifted from the bottom by plaintiff and two co-workers while a third co-worker, either standing on the roof or in a scissor jack lift, used the rope to pull the panel to the level above the track in order for the workers then to set it. Plaintiff was injured when co-worker let go of the rope causing the panel to fall striking plaintiff and knocking him to the ground. The trial court properly denied defendant's Motion for Directed Verdict under Labor Law § 240(1). There was proof before the trial jury that the panel, which was approximately five to eight feet off the ground, was enough to establish evidence of a height differential to bring the incident within the ambit of Labor Law § 240(1). Curiously, the court notes that testimony which indicates that the base of the panel was four to five feet off the

ground would support the contention of no height differential. Apparently, at least in the Fourth Department, if the product being "lifted" (hoisted) was over the head of the plaintiff, Labor Law § 240(1) would be implicated. *Powell v. Sodus Cold Storage Co.*, 289 A.D.2d 1000, 735 N.Y.S.2d 309 (4th Dep't 2001).

Lack of Proximate Causation: Plaintiff was injured when he and two co-workers were unloading a heavy "gang" box full of tools and equipment from the back of a pick-up truck. They did so by sliding it onto a ramp and guiding it down the ramp. As it was being guided onto the ramp, it became unstable and started moving toward plaintiff who was unable to hold it. Plaintiff stepped aside twisting his back. Defense summary judgment motion properly granted as to Labor Law § 241(6) claims. Regulation contained at 12 N.Y.C.R.R. § 23-2.1(a) although specific enough to support a cause of action was *not* breached in this incident nor were the provisions of 12 N.Y.C.R.R. § 23-6.1 regarding material hoisting. The court determined that those regulations were not applicable because they were not using "hoisting equipment" to move the gang box from the truck. *Flihan v. Cornell University*, 280 A.D.2d 994, 720 N.Y.S.2d 695 (4th Dep't 2001).

Liability of Construction Manager: In the absence of proof that the construction manager was delegated the authority to supervise and control plaintiff's work activity or the work activity giving rise to plaintiff's injury, it is not liable under Labor Law § 240(1) as an agent of the owner. *Phillips v. Wilmorite, Inc.*, 281 A.D.2d 945, 723 N.Y.S.2d 590 (4th Dep't 2001).

Liability of Construction Manager: Construction manager who has the authority to supervise, direct or control the injury producing work may be liable as the owner's agent pursuant to Labor Law § 240. Specifically, where construction manager hired the entity who erected and maintained a man hoist which allegedly failed and directly employed the hoist operators who had requisite authority to supervise, direct and control so as to be potentially liable. *Falsitta v. Metropolitan Life Insurance Co.*, 719 N.Y.S.2d 373 (3d Dep't 2001).

Owner: A contract vendee who contracts to have the work performed by others and has an interest in the property is an owner pursuant to Labor Law § 240. *DiVincenzo v. Plaza Farms Development, Inc.*, 703 N.Y.S.2d 647 (4th Dep't 2000).

Protected Activity: Plaintiff was standing on a step ladder wiring a light fixture when he sustained an electric shock. He lacerated his left arm and there was a significant dispute of how the laceration occurred. The court determined that if the injury resulted from the electric shock, Labor Law § 240(1) did not apply. See *Finnigan v. Rochester Institute of Technology*, 277 A.D.2d 892, 716 N.Y.S.2d 214 (4th Dep't 2000).

Protected Activity: Plaintiff was a demolition worker employed at a demolition project. At the end of his work day, plaintiff alighted from a demolition vehicle which was equipped with a "track system" on each side. There was no step to assist the operator to enter or exit from the cab of the vehicle. Plaintiff was injured when he stepped down from the cab and placed his foot on the vehicle's track which was slippery due to the accumulation of grease. He fell approximately three feet to the ground. The court determined that this was *not* the type of risk which falls within Labor Law § 240. *Bond v. York Hunter Construction, Inc.*, 95 N.Y.S.2d 883 (2000).

Protected Activity: Plaintiff was injured while climbing a ladder at the Durez Division of Hooker Chemicals. He was employed by Davis Refrigeration and assigned to work at the Durez plant. In the course of investigating a loose or broken piece of machinery in the air conditioning system, plaintiff was injured when he lost footing while climbing a ladder. The court determined that where a person is investigating a malfunction in the air conditioning system, efforts in the furtherance of that investigation are protected activities and not "maintenance" work. The court determined that there are issues of fact in this regard and thus denied both defendant's and plaintiff's motions for summary judgment. *Short v. Durez Division-Hooker Chemicals*, 280 A.D.2d 972, 721 N.Y.S.2d 218 (4th Dep't 2001).

Unprotected Activity: Plaintiff was injured when he fell three to five feet from an unguarded, unrailed tier of pre-cast concrete. He used these tiers to descend from an office in an upper level of the building under construction to his work site which is at floor level. Summary judgment should have been afforded to defendants since the activity that plaintiff was involved in did not constitute the type of "extraordinary elevation risk" that Labor Law § 240 is meant to protect against. *McKenna v. Huber, Hunt & Nichols, Inc.*, 284 A.D.2d 901, 725 N.Y.S.2d 919 (4th Dep't 2001).

Protected Activities—Gravity-Related Activities: Two cranes were positioned on the opposite sides of a river bed to simultaneously lower a 36-ton concrete beam onto the abutments. Rubber bearing plates were placed on the abutments to act as cushioning for the beams. As a beam was being lowered (hovering about five or six inches above the bearing plates), the plaintiff noticed that the plate was crooked. The plaintiff reached with his left hand to straighten the plate but as his fingertips reached it, the beam was lowered trapping his left hand. Upon his outcry, the beam was immediately lifted. The court determined that this was not the type of special hazard within the protection of Labor Law § 240. The beam was at all times lowered in a controlled manner and it never became unhooked from the beam and was always under the control of crane operators.

Since plaintiff's injuries were not caused by malfunction, failure or lack of a protective device but by his own conduct of reaching under the beam to adjust the bearing cushion, claim dismissed under Labor Law § 240. *Jaeger v. Costanzi Crane, Inc.*, 720 N.Y.S.2d 235 (3d Dep't 2001).

Recalcitrant Worker: In order to establish the recalcitrant worker defense, defendant must show that plaintiff deliberately refused to use available safety devices which were provided. Instructions to plaintiff to avoid an unsafe practice insufficient to establish defense. Moreover, the presence of safety devices elsewhere on the job site not sufficient. *Akins v. Central New York Regional Market Authority*, 275 A.D.2d 911, __ N.Y.S.2d __ (4th Dep't 2000).

Recalcitrant Worker: Plaintiff sought damages after her husband was killed when he fell through an opening in an elevated metal floor. Defense contended that an issue of fact existed regarding the applicability of the recalcitrant worker defense. The proof submitted, however, failed to indicate that the decedent was furnished with a safety device that was "immediately and visibly" available to him or that the decedent purposely or deliberately refused to heed a specific order to use the safety device. *Huthmacher v. Dunlop Tire Corp., et al.*, 284 A.D.2d 1014, 726 N.Y.S.2d 888 (4th Dep't 2001).

Roofs: Since plaintiff's fall on the dormer roof occurred at the same level as his work site, and in the absence of proof that any of his injuries were attributable to the elevation differential between his work site and the lower level of the flat roof, there was no basis for imposing liability under Labor Law § 240(1). *Grant v. Reconstruction Home, Inc.*, 699 N.Y.S.2d 193 (3d Dep't 1999).

Supervision, Direction and Control: Accident occurred because plaintiff asserted that there was a dangerous condition on the premises. Thus, lack of supervision and control was irrelevant. The court determined that since defendants failed to establish that they did not exercise any supervision or control over the general condition of the premises or that they needed or created or had constructive notice of the dangerous condition, that this cause of action survived the motion for summary judgment. *Perry v. City of Syracuse Industrial Development Agency*, 283 A.D.2d 1017, 726 N.Y.S.2d 311 (4th Dep't 2001).

"Trip" Hazards: Regulation contained at 12 N.Y.C.R.R. § 23-1.7 did not apply where worker slipped and/or tripped as the result of electrical wires being strewn across job site. In order for regulation to apply, there must be ice, snow, water, grease or other foreign substance which caused the slip. *Johnson v. City of Corning*, 702 N.Y.S.2d 489 (4th Dep't 2000).

Utility Poles: Plaintiff was attempting to remove the limb of a tree in preparation of the placement of new utility poles along the road. As the new poles were erected, a crew under the employ of Alltell, Inc., transferred the telephone lines from the old utility pole to the new one. The plaintiff was clearing the trees so that the new utility poles could be erected. Plaintiff was injured after the limb of a tree he was attempting to remove fell on his left hand. Alltell's motion seeking dismissal of Labor Law § 240 claim denied and liability assessed against Alltell since, although it did not own the utility poles, it owned the lines attached to those poles and thus was a "owner" within the meaning of Labor Law § 240. *Widrig v. Alltell New York, Inc.*, 281 A.D.2d 967, 722 N.Y.S.2d 662 (4th Dep't 2001).

Work Within the Ambit of Section: Plaintiff was injured when the aluminum ladder he was on came in contact with a 23,000 volt power line. At the time of the accident, plaintiff was performing touch-up painting on a billboard owned by his employer located on property owned by another entity. The work does not constitute "construction, excavation or demolition work." Complaint dismissed. *Casey v. Niagara Mohawk Power Corp., et al.*, 703 N.Y.S.2d 618 (4th Dep't 2000).

Work Not Within Statute: Plaintiff was injured while assisting two other employees in removing an air compression unit from top of building. The plan was to lower the compressor from the roof by a rope. In lifting the compressor off the roof to attach the rope, plaintiff lost his grip resulting in his little finger being severed. Defendant's motion for summary judgment should have been granted in that activity at issue did not fall within Labor Law § 240. Although plaintiff's activity might have constituted a "structural repair," at the time he was injured, he was not involved in an elevation-related action nor was he involved in hoisting the air conditioning unit. *Tavarez v. Sea-Cargoes, Inc.*, 718 N.Y.S.2d 28 (1st Dep't 2000).

Work Activities Not Covered: Plaintiff was operating a track loader at a construction project. He was injured when he stepped from the cab of the loader that he was operating onto the tracks in order to latch the door. He slipped and fell approximately four-and-a-half feet to the ground sustaining lower back and leg injuries. Labor Law § 240(1) claim properly dismissed. Plaintiff's fall from the tracks of the construction vehicle was not an "elevation-related risk" that fell within the purview of Labor Law § 240(1). *Lessard v. Niagara Mohawk Power Corp.*, 277 A.D.2d 941, 715 N.Y.S.2d 816 (4th Dep't 2000).

Worker's Conduct Being Proximate Cause: Plaintiff was injured when the scaffolding on which he was standing began to shake rapidly causing him to lose his balance and fall to the ground. This shaking was caused by a co-worker who was attempting to adjust a pin and brace of the scaffold. The co-worker's action did not constitute an unforeseeable independent intervening act. Thus, liability under Labor Law § 240 was properly imposed against owner. *DeSousa v. Dayton T. Brown, Inc.*, 721 N.Y.S.2d 69 (2d Dep't 2001).

Litigation

Damages: Award of $415,000 for past pain and suffering was proper. The amount of damages awarded for personal injury is a question for the jury, and it may be set aside when it "deviates materially from what would be reasonable compensation." Given the injuries sustained by plaintiff, including the aggravation of a back injury, scarring to his back, and severe facial scarring, the amount of damages awarded in this case was appropriate. *Doyle v. Nusser*, 733 N.Y.S.2d 85 (2d Dep't 2001).

Damages: In personal injury action, plaintiff failed to demonstrate that she had suffered a "serious injury" within the meaning of Insurance Law § 5102(d). Plaintiff submitted (1) self-serving affidavits describing her inability to perform certain household chores; and (2) affidavit of examining chiropractor which did not indicate the objective tests utilized to quantify the restrictions allegedly sustained in her cervical and lumbar spines and additionally relied on unsworn medical reports of other doctors. This was not sufficient to establish that she had in fact sustained a "serious injury" pursuant to Insurance Law § 5102(d) in order to recover. *Delgado v. Hakim*, 732 N.Y.S.2d 233 (2d Dep't 2001).

Discovery of No-Fault Records: Defendant in an action arising from an automobile accident is entitled to obtain the entire contents of plaintiff's no-fault file. All materials in that file are relevant and material to the issues involved in the underlying lawsuit. *Scott v. Saint Albord*, 734 N.Y.S.2d 623 (2d Dep't 2001).

Discovery: Lower court's grant of motion to compel plaintiff's production of certain documents to defendant was improper. Plaintiff had by letter expressly conditioned defendant's document review on plaintiff's reservation of the attorney/client privilege. Defendant impliedly acquiesced to this condition through silence regarding the issue in a later correspondence, and furthermore commented on the existence of an agreement on the matter in another correspondence stating that defendant "expected plaintiff to review the document for privilege." Because plaintiff had performed and there was no meeting of the minds pertaining to a modification of the original agreement, defendant's motion should have been denied. *Accenture LLP v. Computer Sciences Corp.*, 733 N.Y.S.2d 42 (1st Dep't 2001).

Dismissal: Case which was presumptively abandoned was restored to trial calendar. Pursuant to CPLR 3404, a case which has been stricken or marked off the trial calendar and not restored within one year, is deemed abandoned and dismissed. However, this creates merely a rebuttable presumption of abandonment. As the intent of CPLR 3404 is to dispose of dead cases, in restoring an action to the trial calendar, the court will look to the "totality of the circumstances" and not to technicalities. In this case, plaintiff was able to demonstrate that: (1) the action had merit; (2) a reasonable excuse existed for the delay; (3) there was no resulting prejudice to the adverse party; and (4) there was no intent to abandon the action. *Leonardelli v. Presbyterian Hospital in the City of New York*, 733 N.Y.S.2d 391 (1st Dep't 2001).

Dismissal: In an action brought challenging the setting of insurance premiums for Workers' Compensation coverage, the Supreme Court erred in denying plaintiffs' motion for a voluntary discontinuance. The decision to grant such a discontinuance is in the court's discretion and a party cannot be compelled to litigate absent a showing of special circumstances. Since this action was still in the pleadings stages and no special circumstances were demonstrated, the discontinuance should have been granted. *Burnham Service Corp., et al. v. Nat'l Council on Compensation Insurance, Inc., et al.*, 732 N.Y.S.2d 223 (1st Dep't 2001).

Jury Trial: In an action against a reinsurer by an insurance company for recovery under several retrocession agreements (agreements through which a reinsurer cedes all or part of its reinsurance policies to a different reinsurer), the plaintiff had requested a jury trial on all issues in the Note of Issue. Therefore, it was an error for plaintiffs to request a referee to report on the issue of the damages for violation of one of the retrocession agreements. The demand for a jury trial on all issues cannot be withdrawn without consent of defendant unless it will result in "no undue prejudice" to the defendant. *Muhl v. Vesta Fire Insurance Corp.*, 733 N.Y.S.2d 163 (1st Dep't 2001).

Restoration of Action to Trial Calendar: In a negligence action, plaintiff's motion to restore the action, which had been marked off the trial calendar more than two years earlier, was improperly denied. Plaintiff sufficiently demonstrated: (1) that the action had merit; (2) a reasonable excuse for the delay in seeking to restore; (3) a lack of intent to abandon; (4) and lack of prejudice to the defendant. Therefore the restoral motion should have been granted. *Palermo v. Lord & Taylor, Inc. et al.*, 730 N.Y.S.2d 508 (1st Dep't 2001).

Summary Judgment: Defendant's motion for summary judgment was denied in personal injury action in which plaintiff was injured as a result of a trip and fall on the sidewalk in front of a building. There were material issues of fact in existence regarding whether the indentation in which the plaintiff allegedly caught the heel of her shoe was "trivial as a matter of law" and whether it was "open and obvious." *Santulli v. City of New York*, 731 N.Y.S.2d 173 (1st Dep't 2001).

Summary Judgment: In personal injury action for injuries sustained as a result of trip and fall on loose and broken concrete on sidewalk adjacent to area in which defendant construction company was performing work, defendant's motion for summary judgment was properly denied. There existed triable issues of fact, including when construction began on the premises, whether the construction vehicles actually contributed to or caused the alleged hazard, and whether the construction vehicles had access to the sidewalk where plaintiff was injured. *Green v. City of New York*, 731 N.Y.S.2d 434 (1st Dep't 2001).

Motor Vehicles

Causation: The plaintiffs are not required to exclude every possible cause of the accident other than the defendants' negligence, but the other possible causes must be rendered "sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence, not speculation." *Cain v. Amaro*, 731 N.Y.S.2d 766 (2d Dep't 2001).

Emergency Doctrine: Doctrine was not applicable as defendant was in the process of completing a left turn when the collision occurred and he did not cross over into plaintiff's lane of travel. *Cassidy v. Mulroney*, 730 N.Y.S.2d 546 (2d Dep't 2001).

Rear-End Collision, Summary Judgment: Defendant operator of a moving vehicle who saw the plaintiff's vehicle stopped at a red light and applied his brakes, but nevertheless skidded into plaintiff's vehicle due to the wet condition of the roadway was unable to rebut the inference of negligence. *Garcia v. Hazel*, 731 N.Y.S.2d 211 (2d Dep't 2001).

Rear-End Collision, Summary Judgment: Third-party defendant established that defendant could not see any vehicle prior to the accident because he was totally blinded by the condition of his windshield and no other evidence offered raised a question of fact. *Sega v. Ryder*, 731 N.Y.S.2d 282 (3d Dep't 2001).

Scope of Employment, Summary Judgment: The issue whether an employee was acting in the scope of employment at the time of the accident is heavily dependent on factual considerations and thus the issue is ordinarily one for the trier of fact. *Virtuoso v. Pepsi-Cola Co.*, 730 N.Y.S.2d 601 (4th Dep't 2001).

Serious Injury Threshold, Summary Judgment: Plaintiff's chiropractor who examined plaintiff five years post-accident and indicated certain quantified range of limitation of motion failed to defeat defendant's motion. *Lentini v. Melina*, 731 N.Y.S.2d 233 (2d Dep't 2001).

Premises Liability

Causation: The failure of a plaintiff to identify what caused her to slip and fall entitles the owner of the store to summary judgment dismissing the claim. *Moody v. F.W. Woolworth Co.*, 732 N.Y.S.2d 645 (2d Dep't 2001).

Comparative Negligence: In a slip and fall action where a plaintiff truck driver testified to: (1) having knowledge that diesel fuel was slippery; (2) seeing the puddle of diesel fuel when filling his truck; (3) realizing that the puddle of diesel fuel was close to him; and (4) intentionally stepping into the puddle of diesel fuel, a jury's apportionment of only 5 percent comparative negligence on the part of the truck driver is not a fair interpretation of the evidence. *Stoyanovskiy v. Amerada Hess Corp.*, 286 A.D.2d 727, 730 N.Y.S.2d 172 (2d Dep't 2001).

Expert Affidavit: An expert affidavit asserting, without objective evidence in support, that the design of an adjacent building diverted water toward a parking lot where plaintiff fell is speculative, remote and lacking adequate foundation to defeat a summary judgment motion by the owner of the adjacent building. *Orr v. Spring*, 732 N.Y.S.2d 697 (3d Dep't 2001).

Property Owner: A property owner responsible for the placement of an expansion joint in the sidewalk in front of the property may be held liable to a pedestrian that was able to have the heel of her shoe caught on the expansion joint and the expansion joint was shown to be out of the sight of the approaching pedestrian. *Coakley v. City of New York*, 730 N.Y.S.2d 72 (1st Dep't 2001).

Vicious Propensity, Dogs: In an action based upon personal injuries sustained by a dog bite or attack, the determination of a vicious propensity of the dog is not limited to a previous bite or attack, but includes the propensity to act in a manner, whether playful or not, that may endanger the safety of another. *Marquart v. Milewski*, 732 N.Y.S.2d 801 (4th Dep't 2001).

Kevin Lane and Adam Ferrandino are with the law firm of Sliwa and Lane, serving the counties of Allegheny, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Livingston, Monroe, Niagara, Orleans, Wyoming and Yates and all of New York State with Coverage Practice.

Editor's Note: Cases to Look For

By Paul S. Edelman

Argument was set in February in the New York Court of Appeals on the very important issue of the vicarious liability of HMOs for medical malpractice.

In *Wisholek v. Douglas*,[1] two lower courts held an HMO responsible for a physician employed by it who was guilty of malpractice. This was so held, even though insurers are not exposed to direct claims of malpractice pursuant to Public Health Law § 4410. The law does not state explicitly whether an HMO is liable under a respondeat superior theory for these vicarious liability claims. A law that specifically allows a suit against an HMO has failed to pass the legislature due to the insurance lobby.

Labor Law Cases

Section 240 of the Labor Law had two cases to be argued in February, which involved the strict liability provisions applicable to workmen injured by elevation-related risks. *Bauer v. The Female Academy of the Sacred Heart*,[2] concerns a window washer who was injured. Suit was brought also under section 202, which applies specifically to cleaning windows. The Third Department dismissed the section 240 claim and, after a trial, held that section 202, which had begun as another strict liability statute, was changed in 1970. A majority held[3] that section 202 in 1970 became actionable only if there was a violation of the Industrial Board's regulations regarding window cleaners, i.e., some evidence of negligence. A second jury held that the accident was due solely to the plaintiff's own fault.

Roberts v. General Electric[4] concerns a plaintiff who, while on a ladder, was hit by asbestos being removed from above. He fell off the ladder. A jury award was upheld by the Third Department. At issue is whether the falling asbestos was by design or by the failure of safety equipment and by accident.

Endnotes

1. 2002 N.Y. LEXIS 546 (Mar. 21, 2002).
2. 2002 N.Y. LEXIS 548 (Mar. 26, 2002).
3. 275 A.D.2d 809, 712 N.Y.S.2d 706 (2001).
4. 2002 N.Y. LEXIS 494 (Mar. 19, 2002).

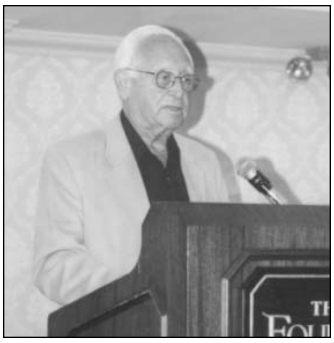
Editors' Note

The Torts, Insurance and Compensation Law Section wishes to thank the following for their financial support and sponsorship at the annual reception and dinner held 23 January 2002 at the aircraft carrier, *Intrepid*, on the Hudson River. This was an evening that evoked both the tragedy that befell New York and the spirit of this great city to rise again better than before. They are:

- Daniel J. Hannon & Associates;
- McMahon, Martine & Gallagher, attorneys in New York City; and
- Petrone & Petrone, in Syracuse.

We also gratefully acknowledge the financial support of the following sponsors at our very successful meeting at the Equinox, Manchester Village, Vermont, from 20 to 23 September 2001:

- FTI/S.E.A.;
- Ringler Associates (Structured Settlements), New York City;
- Support Claim Services, Inc., Independent Medical Examinations and other support services, Melville, New York; and
- David J. Zaumeyer & Associates, Inc., Forensic Accountants and Economists for Litigation Consulting.



Speaker Hon. Milton Mollen.

Scenes from the TICL Section

FALL MEETING

September 20-23, 2001
The Equinox, Manchester Village, VT

Business Theatre Works presentation for the program on Sexual Harassment in the Workplace.

Dancing the night away—Section Chair Saul Wilensky with Sandy, and future Section Chair Dennis McCoy with Beth.

Program Co-Chairs Robert A. Glick and Mitchell S. Cohen, with Section Chair Saul Wilensky.

Tennis Tournament—Thomas Keleher (1st), Marcella Beekman (2nd), Nancy Keleher (3rd) and Paul Edelman (4th).

Hon. Anthony J. Mercorella and wife, Maria.

Hon. Douglas J. Hayden and his wife, Una, with future Section member Shannon Hayden.

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